

Criminal Law

Workbook



Published by

BPP Professional Education
BPP House, Aldine Place
142-144 Uxbridge Road
London, W12 8AA
www bpp com

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior written permission of BPP Professional Education Ltd.

The contents of this course material are intended as a guide and not professional advice. Although every effort has been made to ensure that the contents of this course material are correct at the time of going to press, BPP Professional Education Group makes no warranty that the information in this course material is accurate or complete and accept no liability for any loss or damage suffered by any person acting or refraining from acting as a result of the material in this course material.

© BPP Professional Education Ltd

2023

A note about copyright

What does the little © mean and why does it matter? Your market-leading BPP books, course materials and e-learning materials do not write and update themselves. People write them on their own behalf or as employees of an organisation that invests in this activity. Copyright law protects their livelihoods. It does so by creating rights over the use of the content. Breach of copyright is a form of theft – as well as being a criminal offence in some jurisdictions, it is potentially a serious breach of professional ethics. With current technology, things might seem a bit hazy but, basically, without the express permission of BPP Professional Education:

- Conversion of our digital materials into different file formats, uploading them to social media or e-mailing or otherwise forwarding them to a third party is a breach of copyright.
- Printing our digital materials in order to share them with or forward them to a third party or use them in any way other than in connection with your BPP studies is a breach of copyright.

Contents

Introduction

Introduction to Criminal Law	iv
------------------------------	----

1 Introduction	1
2 Core principles	7
3 Homicide	35
4 Non-fatal offences	63
5 Property offences	75
6 Defences	123
7 Inchoate offences	145
8 Parties to a crime	151

Introduction to Criminal Law

To be criminally liable for an offence, there are three core principles the prosecution must prove beyond reasonable doubt; that the defendant committed a guilty action, while having the relevant guilty mind and that there is no valid defence which can be successfully relied upon.

Within this workbook you will study how these three core principles of criminal liability relate to a variety of offences such as homicide offences, offence against the person and offences against property. You will also consider whether defences, such as self-defence, effect a defendant's criminal liability. The workbook concludes by considering more complex forms of criminal liability such as attempts to commit a crime along with the various parties there can be to a crime, the principal offenders and secondary parties.



Introduction

1 The criminal justice system

1.1 What is the difference between criminal law and the criminal justice system?

Criminal law is vast and has an impact on just about every aspect of our daily lives. Failure to purchase a television licence or comply with health and safety rules are as much a breach of our criminal law as importing class A drugs or stealing a wallet. The only significant difference is the likely penalties each defendant would face on conviction.

Once it has been alleged that a crime has been committed, the defendant will be processed through our criminal justice system. The needs of society to be protected against prohibited behaviour must be carefully balanced against the requirement not to infringe the basic human rights of the defendant. Following an allegation that there has been a breach of the law, the defendant will be considered innocent until proven guilty, entitled to a fair trial, and the burden of proving the case lies with the prosecution.

However, there is a distinction between the criminal justice process and criminal law.

Substantive criminal law is concerned with learning to identify criminal offences and how to apply the law to the facts.

The criminal justice process involves litigation, evidence and sentencing from the initial allegation right up to trial and possible conviction. It commences when a person is alleged to have committed a prohibited act. This will generally result in the defendant being arrested, taken to a police station and detained. Following a police interview, should the evidence allow, the defendant will be charged and appear before a magistrates' court. In the alternative, the magistrates' court issues a written charge and requisition to secure the defendant's attendance at court.

They are asked to enter a plea:

- (a) If they plead guilty, the court moves to sentence.
- (b) If they plead not guilty, there is a trial and the court comes to a verdict.
 - (i) If the verdict is guilty, the defendant must be sentenced.
 - (ii) If they are not guilty, the defendant is acquitted of the charge and is free to go.

A person who is sentenced following either a guilty plea or verdict may appeal.

Much of this process is procedural and will be studied later in your training on litigation or practice modules.

1.2 What types of offences are there?

There are lots of different ways to categorise criminal offences such as fatal and non-fatal offences against the person along with property offences. However, there are three classifications of offences which impacts where trial and sentencing take place: summary, indictable-only and either way offences.

Summary offences are the least serious crimes. These include offences such as assault and criminal damage (subject to the value of damage caused). They can only be tried in the

Magistrates' Court, and the punishment that can be imposed is subject to the maximum that the Magistrates have the power to impose, currently six months' imprisonment or up to 12 months' imprisonment (for sentences running consecutively on two or more offences triable either way) and a £5,000 fine.

Indictable-only offences are the most serious crimes and can only be tried by a judge and jury in the Crown Court. The maximum penalty is that imposed by the statute creating or regulating the offence. Examples include murder, manslaughter, causing grievous bodily harm with intent and robbery.

Offences which are 'either way' can be tried either in the Magistrates' Court or the Crown Court (also known as 'indictable' offences, in other words capable of being tried on indictment). The decision as to which court should try the offence is initially made by the Magistrates, in whose court all criminal cases commence. If the Magistrates decide that, on the facts of the allegation, their powers of sentence are sufficient to deal with the matter, they will offer summary trial, although the defendant has the right to choose trial by jury. However, if the Magistrates conclude that the facts indicate an offence that would attract a penalty in excess of their powers, they will decline jurisdiction. In this case the defendant loses the right to choose, and the case will go to the Crown Court. Examples of either way offences are assault occasioning actual bodily harm and theft.

The classification of offences is only relevant to adults. With youths, the potential sentence determines where their trial is held. Classification of offences will be something that will be more relevant to you later in your legal studies, on criminal litigation or practice modules.

1.3 Where do the Police and Crown Prosecution Service come in?

If the harm caused is of a serious nature, we have decided that action should be taken by society rather than by the victim of that harm. While it might be reasonable to ask a person to sue to obtain money owed on a contract, it would not be reasonable to ask a victim of grievous bodily harm to fund and bring a prosecution against the perpetrator. A system of self-prosecution would not have the efficiency that can be achieved by allowing the state to use the collective resources of society to prosecute such cases, through the Crown Prosecution Service. The state machinery, such as the police, is equipped for investigating such matters and for collecting evidence.

2 Criminal law

2.1 What is a crime?

From the earliest of times, society has regulated certain behaviour carried out by its subjects. This regulation takes the form of offences/crimes created to check and protect society as a whole, as well as individual interests and certain property rights. It is not easy to define a crime but, as a starting point, we could say that a crime represents society's interpretation of the difference between right and wrong. It is for this reason that a crime can be thought of as a 'public wrong'.

2.2 What are the purposes of sentencing?

We may consider the Sentencing Act in order to get a sense of what criminal law is aiming to do.



Example

Section 57(2) Sentencing Act 2020 which sets out the purposes of sentencing adults.

- (2) The court must have regard to the following purposes of sentencing—
- the punishment of offenders,
 - the reduction of crime (including its reduction by deterrence),
 - the reform and rehabilitation of offenders,
 - the protection of the public, and

- (e) the making of reparation by offenders to persons affected by their offences.
-

2.3 What are the similarities and differences between criminal law and morality?

Not all unacceptable behaviour will be criminalised. It is not the job of the criminal justice system to enforce all public morals. Certainly, general morality can inform the legislature on what behaviour to outlaw: for example, it is not morally acceptable to act in such a way that results in the ‘infliction of grievous bodily harm’ on another, and there is a corresponding criminal offence that reflects this. If such behaviour is carried out, the defendant will be subject to criminal sanctions, if the defendant had no good reason for doing so, such as performing a life-saving operation. Nevertheless, there are situations where what some might consider immoral behaviour will not be reflected by a corresponding criminal offence. One example of this is extra marital sex. Some people might view this as immoral, but embarking on an extra marital affair is not a crime. In addition, there is some behaviour that will only become unacceptable in certain circumstances, or if the person goes beyond certain limits, for example, buying alcohol under the age of 18, or excessive consumption of alcohol in a public place.

2.4 How does criminal law evolve?

Some of the law you will study is based on principles and rules that are hundreds of years old. Some decisions reflect this and will no doubt feel positively archaic to you both in nature and form, but this only adds to this truly fascinating area of law. A fine example of this is the law relating to non-fatal offences against the person, the relevant statute is the Offences Against the Person Act 1861!

However, criminal law is constantly evolving. This occurs in a number of ways: the courts continue to provide guidance on how they interpret the current laws through case law; attitudes in our society change, which can result in a corresponding change in the law; and the government continually updates the law through amendments, repeals of existing laws, as well as the creation of new offences. To give you some examples of the evolving nature of criminal law, marital rape was recognised as a crime for the first time in 1991 by the courts and homosexuality was finally decriminalised in 1967 by an Act of Parliament.

Criminal law also exists in and reflects wider societal context which often falls far short of the swift justice we expect the system to provide. The Macpherson report which came out of the inquiry into the murder of the black teenager Stephen Lawrence labelled London Metropolitan Police as institutionally racist in 1999 and yet in 2020 a House of Commons Library briefing into police powers of stop and search suggested that Black, Minority and Ethnic people (the terminology used in their briefing) were four times more likely to be searched by the police than white people in 2019/20. Research by the Equality and Human Rights Commission in 2011 suggested that counter-terrorism law and policy in the wake of 9/11 had been perceived by Muslims in Britain as targeting them ‘on the basis of their religion, rather than any form of immediate threat or suspicion’. A third and final example is that despite over 30 years of the families and survivors campaigning for justice and criminal accountability for the deaths of the 96 football fans that died at the Hillsborough disaster in 1989, no one has been held criminally accountable. The acquittal in 2019 of the match commander for gross-negligence manslaughter is a recent example of a prosecution that failed to secure a conviction in the case.

3 Criminal liability

3.1 How do you establish criminal liability?



Figure 1.1: IDEA structure

You establish criminal liability through legal analysis. From your study of substantive criminal law you will learn to **identify** behaviour which could give rise to criminal liability, the relevant offence(s), and the rules which govern such offences. For example, for the lawyer, it is never enough to simply call someone a thief. It must be proved, beyond reasonable doubt, that, in accordance with **s 1(1) Theft Act 1968**, the defendant dishonestly appropriated property belonging to another with an intention to permanently deprive the other of it.

You must know how crimes are **defined**, in terms of what guilty action or omission the defendant needs to have committed and what guilty mind the defendant is required to have. You need to be able to **explain** what is required by case law or statute for each element of the offence in order to determine this. You must then be able to **apply** this knowledge to your given facts so that you may assess and advise your particular client on the strengths and weaknesses of the allegation(s). You must also be able to determine the availability of any particular defence which could be used to justify or excuse what would otherwise be criminal behaviour. An example would be a defendant who hits someone, but does so in self-defence. You might need more information in order to provide more definitive advice.

It is not the lawyer's job, whether acting for the prosecution or the defence, to simply endorse an allegation made against the defendant. The job of the lawyer requires that we are able to analyse and test the accusation against the requisite law.

3.2 Summary

- Identify:
 - The defendant
 - The defendant's act or omission
 - The offence
- Define the law: The *actus reus* (guilty act/omission) and *mens rea* (guilty mind) of the offence.
- Explain the law with the help of statute and/or case law.
- Apply the law to the facts of the case.

Make such **conclusions** that you are able to and indicate any **additional information** you might need to provide more definitive advice on criminal liability.

3.3 What is the difference between civil and criminal law

It is very important that you remember that criminal and civil law are two distinct areas. This is not always easy, partially because there is a significant overlap between the two. The same action can be both a civil wrong (often a tort) and a criminal offence. If Fred punches Jim, Fred can be prosecuted for the offence of battery, and can also be sued for the tort of trespass to the person. Despite this, it is possible to set out some principal differences.

Crime is seen as a public wrong (in the example above, the public interest lies in the prevention of such actions), whereas a civil wrong is a private matter to be resolved between the parties. This is reflected in the parties to any proceedings following an incident. Any member of the public could prosecute Fred for the offence of battery (although in practice this will be conducted by the state in the form of the Crown Prosecution Service). However, only Jim, as the person who has suffered the trespass, could sue Fred in tort.

The commission and successful conviction for a crime will result in punishment, such as a fine payable to the state, imprisonment, or sometimes both. By contrast the defendant in an action for tort or breach of contract will be liable to pay damages to the injured party or be required to comply with the terms of an injunction.

3.4 To what standard do crimes need to be proved?

It is for the prosecution to prove every element of the crime ‘beyond reasonable doubt’ (*Woolmington v DPP [1935] AC 462*). This is true even in relation to most defences such as self-defence. Here, the only requirement placed on the defendant would be to raise the possibility that self-defence applies; thereafter it is up to the prosecution to prove that the defence does not apply.

In those rare situations where the defendant has the burden of proof, such as the defence of diminished responsibility in murder, the standard of proof which the defence must meet is lower-on the balance of probabilities.

The standard direction given to juries on the standard of proof does not in fact refer to the phrase ‘beyond reasonable doubt’. Juries are asked:

How does the prosecution succeed in proving the defendant’s guilt? The answer is – by making you sure of it. Nothing less than that will do. If after considering all the evidence you are sure that the defendant is guilty, you must return a verdict of ‘Guilty’. If you are not sure, your verdict must be ‘Not Guilty’.

(Judicial Studies Board Guidelines)

2

Core principles

1 Overview

1.1 Key elements of criminal liability

'As a matter of analysis we can think of a crime as being made up of three ingredients; *actus reus*, *mens rea* and (a negative element) the absence of a valid defence.'

D.J. Lanham [1976] Crim LR 276

These latin phrases are taken from Edward Coke's institutes, who stated that 'an act does not make a person guilty unless (their) mind is also guilty.' *Actus Reus* broadly translates as a guilty act, however this can be misleading. A defendant can be found to have committed the *actus reus* of an offence despite the fact that he took no action at all; he can be guilty of a crime by his omission or failure to act. The defendant's conduct must be accompanied by a state of mind required for that crime. Note that there are some crimes which do not require any particular state of mind and are regulatory in nature. These are known as strict liability offences and are beyond the scope of this workbook. If a defendant is found to have committed the *actus reus* of a crime, with the required *mens rea*, he still may be able to avoid liability should there be some justification or excuse for his behaviour.

This chapter will begin by looking at types of *actus reus* and consider how crimes can be classified. It will then move on to omissions, by considering the general rule and exceptions to this rule. It will then consider terminology which can be found in the *mens rea*, as well as *mens rea* principles. It will then provide an overview of defences and finish by looking more closely at the offence of murder.

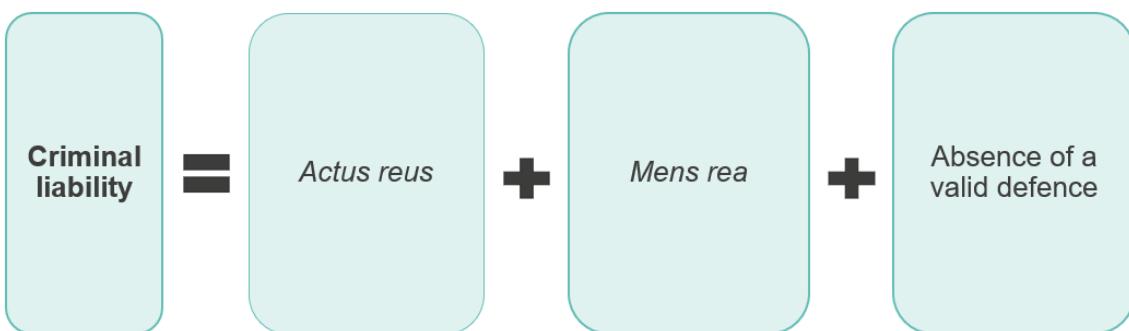


Figure 2.1: Key elements of criminal liability

2 Actus reus

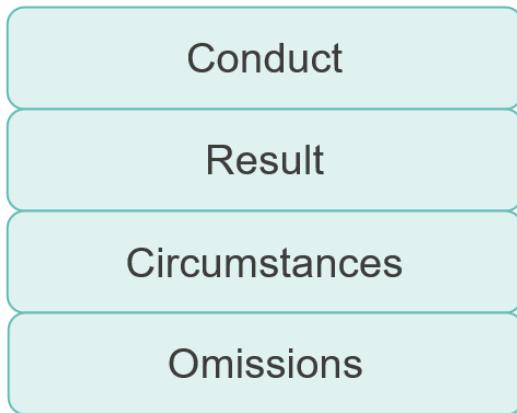


Figure 2.2: Types of actus reus

Actus reus usually refers to the actions of the defendant that are prohibited by law. However, as you will see, the *actus reus* can be much wider than just doing something. This is an essential element of the offence. To assist in determining the relevant rules, offences can be categorised in a number of different ways. You will see that most crimes can fit into more than one category.

We will look at four types of *actus reus*:

- Conduct;
- Result;
- Offences with surrounding circumstances; and
- Omissions.

2.1 Conduct offences

In some cases, offences will only require certain acts to have been committed by the defendant to satisfy the *actus reus*.

For example, the conduct required for fraud by false representation under **s 2 Fraud Act 2006** is that the defendant makes a false representation. It is not necessary that the victim is deceived by the representation.

2.2 Result offences

The *actus reus* of result crimes requires more than just the defendant's action. Here, the action must lead to a specified consequence. In such cases, it must be proved that the action actually caused the result.

One example of a result offence is murder, where the actions of the defendant must cause the death of the victim. Other examples include manslaughter, grievous bodily harm (GBH) and actual bodily harm (ABH).

2.3 Surrounding circumstances

The *actus reus* can also include the need for some particular surrounding circumstance.

Under **s 1(1) Theft Act 1968**, the *actus reus* of theft is defined as the appropriation of property 'belonging to another'. The surrounding circumstance the prosecution must prove is that the property belonged to someone other than the thief.

2.4 Omissions

A defendant can be held to have committed the *actus reus* of an offence despite taking no action at all. Although the general rule that there is no liability for failure to act, the criminal law will, in certain circumstances, impose a legal obligation to act which if breached could result in criminal liability.

An on-duty lifeguard could be liable for gross negligence manslaughter if a swimmer drowned due to a failure to take any action to help.

2.5 How to identify the *actus reus*

Consider the following offences:

Section 1(1) Theft Act 1968 provides:

'A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.'

Section 1(1) 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.'

Can you break these offences down into their component parts? What is the *actus reus* of these offences? What is the *mens rea*?

2.6 Summary

- In this section you have learnt the definition of *actus reus* and you have practiced identifying the *actus reus* from offences.
- The *actus reus* of an offence can be the prohibited:
 - Conduct;
 - Result;
 - Circumstances; and/or
 - Omissions of the defendant.

3 Actus reus: Causation

3.1 Result crimes

Result crimes require that the defendant's conduct cause a particular result. Result crimes include murder, manslaughter, criminal damage, and assault occasioning actual bodily harm. Causation is part of the *actus reus* of these types of offences.

There are two aspects to causation, both of which must be proved by the prosecution:

- **Factual causation:** The jury must be satisfied that the acts or omissions of the accused were in fact the cause of the relevant consequence.
- **Legal causation:** It must be established that the acts or omissions of the accused were a legal cause of that consequence.

In deciding the issue of causation, the jury must apply legal principles.

While the general rules on causation are relevant to all result crimes, we will study this law within the offences of murder and involuntary manslaughter here.

The *actus reus* of murder is the 'unlawful killing of a human being under the King's Peace'.

The word 'killing' suggests that murder is a result crime which requires the prosecution to show that the defendant's acts or omissions caused the death of the victim.

To do this, the tests of factual and legal causation must be satisfied. We will consider those tests in greater detail now.

3.2 Factual causation: The 'but for' test

Factually, it must be proved that 'but for' the acts or omissions of the accused, the relevant consequence would not have occurred in the way that it did (**R v White [1910] 2 KB 124**).

In other words, if you eliminate the act of the defendant would the prohibited harm have occurred anyway?



Key case: *R v White* [1910] 2 KB 124

Facts: W put poison in a drink intending to kill his mother. She was subsequently found dead. It was not clear on the evidence whether she had drunk any of the liquid from the glass. Medical evidence showed that she had died from heart failure, not from poisoning.

Held: W was therefore acquitted of murder, there being no causal link between the consequence and his act. However, he was guilty of attempted murder.



Key case: *R v Dyson* [1908] 2 KB 454

Facts: This was at a time before antibiotics and when meningitis was not curable. The victim, a child, had meningitis. Dyson threw her down the stairs and she died. It was argued that the child was going to die in any event, and the actions of the defendant had not caused death.

Held: Any action which accelerates death is a cause.

3.3 Legal causation

The law will step in to prevent a person from being responsible for all acts that arise from their actions. For example, if X asks Y to a party and on the way to the party Y is stabbed by Z, it is clear that, but for X's invitation, Y would not have been on the way to the party, which led Y to being stabbed by Z. However, X should not be held responsible for the stabbing, and will not be the legal cause of the attack.

The law will check the culpability of the defendant before imposing liability and it will require that the defendant is the 'operating and substantial' cause of the prohibited consequence (*R v Pagett* (1983) 76 Cr App R 279).

When determining the legal cause, the law may have regard to some of the following factors. When completing your analysis of given facts you should only deal with the law which is relevant to the facts of your case. The key legal causation principles are:

- The defendant's act must be the 'substantial' cause of the prohibited harm (*R v Hughes*).
- The consequence must be caused by the defendant's culpable act (*R v Dalloway*).
- The defendant's act need not be the only cause of the prohibited consequence (*R v Benge*).



Key case: *R v Hughes* [2013] UKSC 56

The defendant's act must be the 'substantial' cause of the prohibited harm. Lord Hughes and Lord Toulson said:

Where there are multiple legally effective causes, whether of a road traffic accident or of any other event, it suffices if the act or omission under consideration is a significant (or substantial) cause, in the sense that it is not de minimis or minimal. It need not be the only or the principal cause. It must, however, be a cause which is more than de minimis, more than minimal.



Key case: *R v Dalloway* [1847] 2 Cox CC

Facts: The defendant was driving a horse and cart without holding the reins. A child ran in front of the cart, he was struck by one of the wheels and killed. It appeared on the evidence that, even if the defendant had been holding the reins, he could not have stopped the cart in time.

Held: If Dalloway had not been driving the cart, the child would not have been killed, and in that sense he 'caused' the death. However the court held it was necessary to go further and show that the death was due to the culpable element in his act – the negligence in not using the reins. Accordingly, D's conduct was not to blame for the killing and he was acquitted of manslaughter.



Key case: *R v Benge [1865] 4 F & F 504*

Facts: Benge was the foreman of some railway tracklayers. He thought that the next train was not due for several hours and so ordered the track to be taken up. He sent a man with a red flag down the track to stop any trains. However, this signalman did not go the correct distance and the driver of the train was not keeping a good look out. The train crashed and several people were killed and D was tried for manslaughter.

Held: If the defendant's negligence mainly or substantially caused the accident, it was irrelevant that it might have been avoided if other persons had not been negligent. A defendant can still be liable even when other causes were present.

3.4 Legal causation: Intervening acts

A **novus actus interveniens** is a subsequent event or act of either the victim or a third party which renders the defendant's part in the consequence very small, breaking the chain of causation and meaning that the defendant is not criminally liable.

The courts have been required to consider the question of whether the chain of causation has been broken in a number of different contexts such as:

- Medical negligence
- Acts of a third party
- Acts of the victim
- Thin skull rule
- Natural events

The cases that follow provide guidance on what will be required before the law will be willing to accept that the accused is not the legal cause.

3.4.1 Medical negligence

Key case: *R v Smith (1959) 2 QB 35*

Facts: Smith stabbed the victim during a fight at their barracks and pierced his lung. Another soldier tried to carry him to the medical station but dropped him twice on the way. On his arrival it was not realised how seriously ill the victim was and he received treatment that was not only inappropriate but positively harmful and he died a couple of hours later.

Held: Smith was convicted of murder, because it was held that his actions remained a substantial and operating cause. The medical negligence, while a cause, was not a sufficient cause to sever the chain of causation.

Lord Parker LCJ:

It seems to the court that, if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said 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 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 follow from the wound.

Key case: *R v Cheshire [1991] 3 All ER 670*

Facts: Cheshire shot the victim twice. Following extensive surgery the victim developed respiratory problems and required a tracheotomy tube to be inserted into his windpipe. Scar tissue formed over the tracheotomy hole and the victim found it difficult to breath. The medical staff dismissed this as anxiety. Eventually his windpipe became completely blocked and he died. At the time of his death, the victim's original wounds had healed.

Held: The Court of Appeal held that poor medical treatment did not break the chain of causation.

Beldam LJ:

Even though negligence in the treatment of the victim was the immediate cause of his death, the jury should not regard it as excluding the responsibility of the defendant unless the negligent treatment was so independent of his acts, and in itself so potent in causing death, that they regard the contribution made by his acts as insignificant.

Overall, the courts are reluctant to allow medical malpractice to break the chain of causation.

3.4.2 Acts of third parties



Key case: *R v Pagett [1983] 76 Cr App R 279*

Facts: Using his pregnant girlfriend as a shield, Pagett shot at the police, who were attempting to arrest him for various serious offences. The police returned fire and killed the girl. The judge, directing the jurors on causation, stated that they had to be sure that the appellant had fired first at the officers and that that act caused the officers to fire back, with the result that the girl was killed. The jury also had to be satisfied that, in doing so, the police acted reasonably, either by way of self-defence or in the performance of their duties as police officers. The judge said that if they were not sure of those facts then they should acquit because the chain of causation, linking Pagett's unlawful acts to the girl's death, would be broken. The jury convicted Pagett, who appealed against his conviction.

Held: The Court of Appeal rejected the appeal and held that there may only be a break in the chain of causation if the actions of the third party were 'free, deliberate and informed. This was not held to be the case here.' Goff LJ was of the opinion that the police officers' actions were neither free nor deliberate. Instead, he considered it to be a reasonable act performed for the purpose of self-preservation.

3.4.3 Acts of the victim

There are three types of acts of the victim that we will consider:

- 'Fright and flight' cases
- Refusing medical treatment
- Suicide

'Fright and flight'

In what circumstances, if any, could the victim break the causal link between the defendant's acts and the prohibited result?

The issue arises in the context of the victim's reaction to the defendant's act. When under attack or the threat of attack from the defendant, it is plausible to consider that the victim may attempt to escape from the attack or threat. However, it has been necessary for the law to consider when such escape attempts can amount to a *novus actus interveniens*.

The issue falls around the question as to whether the escape was foreseeable by the reasonable person. If it is not, then the defendant is entitled to an acquittal and is no longer deemed to be the legal cause of the prohibited result.



Key case: *R v Roberts [1972] 56 Cr App R 95 (CA)*

Facts: The victim was a passenger in Roberts' car. She was terrified by Roberts' unwanted sexual advances and jumped out of the moving car, suffering injuries in the process.

Held: Roberts was convicted of assault occasioning actual bodily harm. The Court of Appeal considered that the accused had caused her injuries and said that the victim's reaction would only break the causation if it were an act that was 'so daft' that no reasonable person could have foreseen it. In the Court of Appeal judgment, Stephenson LJ stated that, to determine whether the passenger's actions broke the chain of causation, the jury should be directed to ask the following question:

Was it the natural result of what the alleged assailant said and did, in the sense that it was something that could reasonably have been foreseen as the consequence of what he was saying or doing? As it was put in one of the old cases, it had got to be shown to be his act, and if of course the victim does something so "daft" [...] or so unexpected [...] that no reasonable man could be expected to foresee it, then it is only in a very remote and unreal sense a consequence of his assault, it is really occasioned by a voluntary act on the part of the victim which could not reasonably be foreseen and which breaks the chain of causation between the assault and the harm or injury.



Key case: *R v Williams & Davis* [1992] 1 WLR 380

Facts: The appellants gave a lift to a hitchhiker and tried to rob the hitchhiker at knifepoint. The victim jumped from the moving car and died of head injuries.

Held: The appellants were convicted of manslaughter.

On appeal, Stuart Smith LJ held that the jury should have been directed to consider the following issues:

There must be some proportionality between the gravity of the threat and the action of the deceased in seeking to escape from it [...] [T]he deceased's conduct [...] [must] be something that a reasonable and responsible man in the assailant's shoes would have foreseen [...] [T]he nature of the threat is of importance in considering both the foreseeability of harm to the victim from the threat and the question whether the deceased's conduct was proportionate to the threat, that is to say that it was within the ambit of reasonableness and not so daft as to make it his own voluntary act which amounted to a novus actus interveniens and consequently broke the chain of causation. It should of course be borne in mind that a victim may in the agony of the moment do the wrong thing [...]

The jury should consider two questions: first, whether it was reasonably foreseeable that some harm, albeit not serious harm, was likely to result from the threat itself; and, secondly, whether the deceased's reaction in jumping from the moving car was within the range of responses which might be expected from a victim placed in the situation which he was. The jury should bear in mind any particular characteristic of the victim and the fact that in the agony of the moment he may act without thought and deliberation [...]

In our judgment the failure of the judge to give any direction on causation was a misdirection and the conviction on this count must be quashed.

From the case of **Roberts**, in determining whether the victim's action was a foreseeable mode of escape, the jury would essentially have the same knowledge as the defendant had at the time D committed the act. As the court in **Williams and Davies** approved the case of **Roberts** it is generally believed that the characteristics Stuart Smith LJ was referring to were those characteristics which would be visible to a reasonable man present at the time of the defendant's act.

Refusal of medical treatment

The courts have also considered what the position would be where the victim refuses medical treatment, which results in their death.

We will consider three cases:

- *R v Blaue*
- *R v Holland*
- *R v Dear*

Key case: *R v Blaue* [1975] 1WLR 1411

Facts: Blaue stabbed a woman several times and pierced her lung. The victim refused to have a blood transfusion, as it was contrary to her religious beliefs. She was advised that without a

transfusion she would die. She refused to have the transfusion and subsequently died. The defendant was convicted of manslaughter. He appealed against his conviction, arguing that the victim's refusal to have a blood transfusion amounted to a *novus actus interveniens*.

Held: This argument was rejected. Defendants must take their victims as they find them and that meant the whole person, in both mind and body.



Key case: *R v Holland [1841] 2 Mood & R 351*

Facts: The deceased was attacked by Holland and suffered a number of wounds, which included a severely cut finger. The surgeon advised that he should have the finger amputated in order to prevent the wound from becoming infected. The deceased ignored the surgeon's advice. Several weeks later he contracted tetanus from the wound and died. The defendant argued that the cause of death was not the wound, but the refusal to accept treatment.

Held: The court held that this was no defence. It did not matter whether the wound was instantly mortal or whether it became the cause of death because the deceased refused the recommended treatment.



Key case: *R v Dear [1996] Crim LR 595 (CA)*

Facts: The appellant's 12-year-old daughter told him that the victim had sexually assaulted her. The appellant repeatedly slashed the victim with a Stanley knife. Subsequent to receiving medical treatment, the victim's wounds opened up and two days later the victim died. D claimed that the chain of causation had been broken because V had died by suicide, either by reopening his wounds or, the wounds having reopened naturally, by failing to take steps to staunch the consequent blood flow. Dear was convicted of murder.

Held: The Court of Appeal rejected his appeal. Rose LJ held:

The correct approach in the criminal law is to ask [...] were the injuries by the defendant an operating and significant cause of death? That question, in our judgment, is necessarily answered, not by philosophical analysis, but by common sense according to all the circumstances of the particular case.

In the present case the cause of the deceased's death was bleeding from the artery which the defendant had severed. Whether or not the resumption or continuation of that bleeding was deliberately caused by the deceased, the jury were entitled to find that the defendant's conduct made an operative and significant contribution to the death.

Suicide

The victim's suicide may not break the chain of causation if:

- V nonetheless dies from the original wound (*R v Dear*); or
- The act was reasonably foreseeable eg where the defendant causes a brilliant pianist to lose her fingers, or a keen sportsman to be paralysed (applying the rule in *R v Roberts* and *R v Williams and Davies*); or
- The D's unlawful act was a significant and operating cause of death and at the time of the attack it was reasonably foreseeable that the victim would die by suicide as a result of V's injuries (*R v Wallace*).

The victim's suicide may break the chain of causation if:

- The injuries inflicted by the defendant have healed, but the victim goes on to die by suicide (distinguishing *R v Dear*); or
- It was a voluntary and informed decision of the victim to act (*R v Kennedy*). In this case, Kennedy supplied a dose of heroin in a syringe, which he handed to the victim, who injected himself, and almost immediately suffered an adverse reaction. The victim later died of the consequences of intoxication by opiates and alcohol. The House of Lords decided that a

person who supplies a drug to another has not caused that drug to be administered when the other injects it.

3.4.4 The 'thin skull' rule

The 'thin skull' rule provides that a person who inflicts harm on another cannot escape liability if the victim, owing to some pre-existing infirmity or peculiarity, suffers greater harm than would have been expected as a result of what the accused has done.

Put simply, the defendant must take the victim as they find them.



Key case: *R v Hayward* [1908] 21 Cox 692

Facts: Hayward, who was in a rage, threatened his wife and chased her into the road. She collapsed and died. She was suffering from an abnormal thyroid condition, such that any combination of physical exertion and fear might lead to death.

Held: It was held that Hayward had caused her death because he had to take her condition as he found it.

See also *R v Blaue* (acts of the victim, refusal of medical treatment).

3.4.5 Natural events

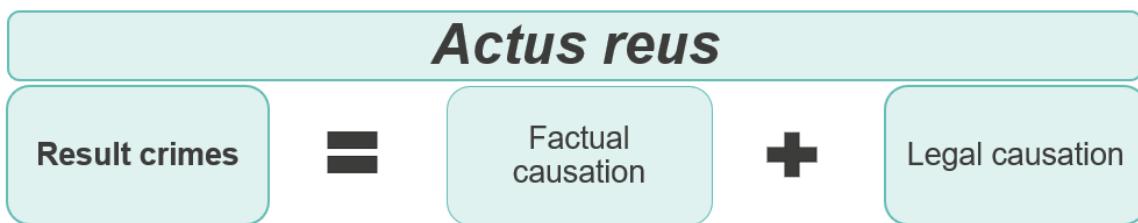
Natural events will only break the chain of causation if they are 'extraordinary' and not reasonably foreseeable.

For example, if D knocks V unconscious and leaves V on the beach then V is drowned by the incoming tide, D has legally caused V's death. The natural event of the tide coming in is reasonably foreseeable.

3.4.6 Which test should I use?

When dealing with a situation that is similar to facts of previously decided cases, reference should be made to the relevant case for direction on what is required for the new intervening act to break the chain of causation. Usually this will be straightforward. However, in the event of new situations arising, the Court of Appeal in *R v Girdler* [2009] EWCA 2666 has directed use of common sense when deciding which test to use.

3.5 Summary



- **Result crimes** require that the conduct of the defendant cause a particular result.
- There are two aspects to causation, both of which must be proved by the prosecution:
 - Factual causation: It must be proved that 'but for' the acts or omissions of the accused, the relevant consequence would not have occurred in the way that it did (*R v White*).
 - Legal causation: The defendant must be the 'operating and substantial' cause of the prohibited consequence (*R v Pagett*).

4 Omissions

This section considers when a defendant can be criminally liable for an omission or a failure to act.

4.1 The general rule

The general rule is that a defendant cannot be criminally liable for a failure to act, as there is no general duty to act to prevent harm – **R v Smith (William)** [1826] 2 C&P 449: ‘Omission, without a duty, will not create an indictable offence’.

This section will examine the circumstances in which a defendant may commit the *actus reus* of an offence and be convicted because they have **omitted** or failed to act when under a duty to do so.

In order to secure a conviction based upon a failure to act, the prosecution must prove that:

- (a) The crime is one which is capable of being committed by an omission. Some offences can only be committed by an act, eg unlawful act manslaughter (**R v Lowe**);
- (b) The accused was under a legal duty to act;
- (c) The accused breached that duty;
- (d) The breach caused the *actus reus* of the offence to occur; and
- (e) Should the offence so require, that the accused had the required *mens rea*.

This element will concentrate on the second of these requirements, so that you will be able to establish whether a legal duty to act exists. Common situations when the defendant will be under a legal duty to act are by: statute, special relationship, voluntary assumption, contract, the defendant creating a dangerous situation or public office. These principles of law can then be applied to offences such as gross negligence manslaughter.

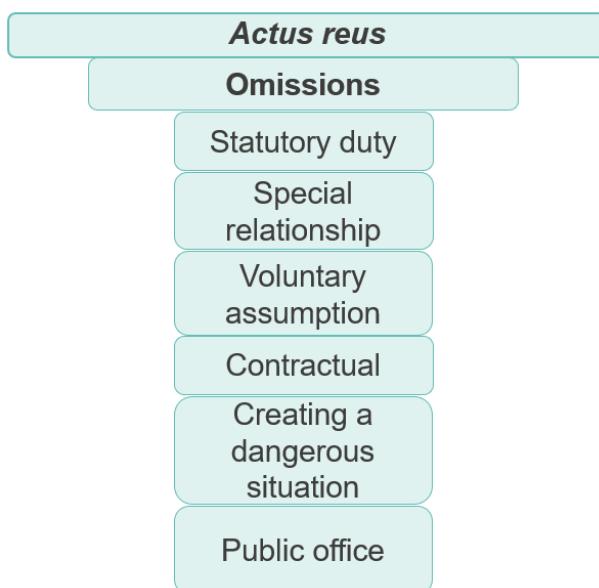


Figure 2.3: Situations where a duty to act may arise

4.2 Statutory duty

Under statutes, innumerable offences can be committed by an omission.

Many examples can be found in the less serious/summary only offences. Such an example can be found in **s 6(4) Road Traffic Act 1988**, where it is an offence to fail to provide a specimen of breath.

4.3 Special relationship

Examples of special relationships are:

- Doctors and patients
- Parents and their children
- Spouses



Key case: *R v Hood* [2004] 1 Cr App R (S) 431

Held: D was held to be liable for the manslaughter of his wife who died as a result of broken bones suffered three weeks earlier after a fall. D had failed to summon medical assistance to help her. The basis of his liability, it seems, stemmed from his relationship with her, based on marriage.



Key case: *R v Gibbons and Proctor* [1918] 13 Cr App R 134

Facts: Gibbons lived with his girlfriend, Proctor, together with his child, Nelly, and Proctor's children from a previous relationship. Gibbons gave Proctor money for food for the family. Proctor deliberately starved Nelly to death.

Held: The Court of Appeal noted that Gibbons was living in the same house as Nelly. It said he must have been aware of the condition of his daughter, who was little more than a skeleton when she died. If he did not see her, then that is evidence from which the jury could have decided he did not care what was happening to her and had the mens rea for murder. Gibbons was convicted of his daughter's murder based on breach of his duty as a father not to neglect her.



Key case: *Re A (Children (Conjoined Twins))* [2000] 4 All ER 961 (CA)

Both children were certain to die in the absence of a surgical procedure to separate them. The operation would save one twin, but the parents would not give their consent. The judge observed that the parents had a legal duty to the twin who could be saved. By denying that twin the chance to live, they might be guilty of killing her under the principle in **Gibbons and Proctor**.

4.4

Voluntary assumption of a duty of care

A person is not generally under a duty to care for another in distress. However, if a person voluntarily assumes a duty towards another, the law will hold that person liable if they fail to carry out that duty.

The basis on which the courts have held a voluntary assumption of a duty of care to exist is often factually specific as can be seen by the cases that follow.



Key case: *R v Nicholls* [1874] 13 Cox CC 75

If a person chooses to undertake the care of a person who is helpless either from infancy, mental illness or other infirmity, he is bound to execute that responsibility and if he by gross negligence allows him to die he is guilty of manslaughter.

(Per Brett J)



Key case: *R v Gibbons and Proctor* [1918] 13 Cr App R 134

(see also special relationship, parents)

Held: Edith Proctor was also convicted of Nelly's murder, on the basis that Proctor was living in the same household, in the role of Gibbons' de facto wife. She was looking after 'the family' while Gibbons went out to work, and received money for housekeeping and food from Gibbons.



Key case: *R v Instan* [1893] 1 QB 450

Instan lived with her aunt, who was 73 years old. Her aunt gave Instan money to provide both of them with food. The aunt developed gangrene in her leg and became bedridden. Instan used the money to buy food for herself but did not give any to her aunt, nor did she summon medical assistance. The aunt died and Instan was convicted of her manslaughter due to voluntary assumption of a duty of care.



Key case: *R v Stone and Dobinson* [1977] QB 354

Facts: Stone lived with his mistress Dobinson. They were both of low intelligence and described as ‘inadequate’. They both accepted into their home Stone’s elderly, weak and anorexic sister, Fanny. They tried to make her eat but gave up. Eventually Fanny was confined to her bed and Stone and Dobinson failed to get medical assistance. As a result Fanny died.

Held: Stone and Dobinson were convicted of her manslaughter, and their convictions were upheld, on the basis that, although neither was under a duty imposed by law to care for an ailing relative, they had voluntarily assumed this duty upon themselves.



Key case: *R v Ruffell* [1977] QB 354

Facts: The victim was at R’s house. They were taking drugs. V became unconscious and R tried to revive him. He telephoned V’s mother the next day. R said that V was ill and sitting on R’s doorstep. V’s mother told R to take V inside and keep him warm. R agreed, but did not, returning to bed. Later V was found by a passer-by, taken to hospital and he died. The trial judge directed the jury that a duty of care could be assumed: V was a friend, V was in R’s house, R had attempted to revive him. The jury was told if they decided R had assumed this duty, they were entitled to decide whether by putting V outside R had breached that duty. The jury decided in the affirmative and R was convicted.

Held: The Court of Appeal followed the approach taken in **Stone and Dobinson** and upheld the conviction.

4.5 A breach of a contractual duty

The duty can be owed by the defendant either to the party with whom the defendant is contracted or to a third party.



Key case: *R v Pittwood* [1902] 19 TLR 37

Facts: Pittwood was employed as a level-crossing gatekeeper. He failed to close the gate when a train was coming and a man was killed by the train.

Held: Pittwood’s failure to close the gate could amount to the actus reus of manslaughter by omission, because he was under a contractual duty to do so when a train was approaching.

4.6 Defendant creates a dangerous situation

If a person accidentally started a fire in a house, the person has a duty to take reasonable steps to counteract the dangerous situation created. The steps need only be reasonable, so a person would not be expected to risk their own life to save the lives of others, but they would be expected to take reasonable steps, such as summoning help, warning any occupants of the house that it is on fire, and so on.



Key case: *R v Miller* [1983] 2 AC 161 (per Lord Diplock)

Facts: Miller, a squatter, fell asleep in a bed whilst holding a lighted cigarette. He awoke to find the mattress smouldering. He realised it was his cigarette that had caused the fire, but all he did was to move to another room and go to sleep again. The house was damaged by fire.

Held: Miller was convicted of arson (**Criminal Damage Act 1971**, s 1(1) and s 1(3)).

The House of Lords held that if someone inadvertently sets in motion a chain of events that causes the risk of damage, and that person becomes aware of what is happening and he can prevent further damage, his inaction or omission to do so can become an actus reus of criminal damage. Lord Diplock said:

I see no rational ground for excluding from conduct capable of giving rise to criminal liability, conduct which consists of failing to take measures that lie within one’s power to counteract a

danger that one has oneself created, if at the time of such conduct one's state of mind is such as constitutes a necessary ingredient of the offence.



Key case: *R v Evans [2009] 1 WLR 1999*

Facts: Gemma Evans, a 24-year-old woman, purchased heroin and supplied her 16-year-old sister, Carly. Carly self-injected in a house in which she resided with Evans and her mother (Andrea Townsend). After injecting the drug, she developed and complained of symptoms consistent with an overdose. Gemma Evans and Andrea Townsend were also heroin addicts, they knew the signs of an overdose and were fully aware of the dangers involved. They appreciated that Carly's condition was very serious and indicative of an overdose. Evans said that she had seen that Carly's lips had turned blue, that she was 'in a mess', and was incapable of responding to attempts to speak to her. Evans and Townsend decided not to seek medical assistance because they feared that they themselves and possibly Carly would get into trouble. Instead, they put Carly in bed with the hope that she would make a miraculous recovery. Although the women slept in the same room and checked on Carly occasionally, Carly died during the night. The medical evidence demonstrated that the cause of death was heroin poisoning. Evans and her mother were charged with gross negligence manslaughter.

Evans appealed against her conviction for gross negligence manslaughter. It was argued by the defence team that the case should have been withdrawn from the jury because the Crown failed to establish that Evans owed the victim a duty of care.

Held: The mother was convicted on the basis of her 'familial duty or responsibility' which marked her relationship with the deceased' and which required her to take responsible steps to summon assistance for her young daughter once she realised she was critically ill and in need of urgent medical attention. Since Evans was an older half-sister, the court decided that she did not come within the purview of the familial duty doctrine. An adult sibling is not regarded as the constructive guardian of younger siblings.

However, the Court of Appeal held that Evans had a duty of care because she had created a dangerous situation and failed to do anything to remedy it. This overlooks the fact that Evans's sister created the dangerous situation by making the independent choice to self-inject. In effect, Evans was convicted on the grounds that she had helped her sister to create a dangerous situation for herself by supplying her with deadly drugs, she was aware that her sister's act of self-injection had put her in peril and she failed to summon help when she was in a position to do so.

4.7 Public office holders



Key case: *R v Dutham [1979] QB 722*

Facts: D was a police constable, on duty and in uniform, who in the early hours of the morning saw a man who had been evicted from a club being kicked so badly that he later died. D did not attempt to stop the disturbance and when the incident ceased, he drove off.

Held: He was guilty of wilfully neglecting to perform his duty.

4.8 Omissions and causation

- The relationship between omissions and causation in this context means that if the defendant had acted, D could have made a causal difference.
- The defendant cannot cause by omission.
- The defendant can fail to uncause when D has a duty to uncause, but this is different to causing.

For example, if V self-injects dangerous drugs into their own arm and suffers an overdose, the cause of V's death is their own act of self-injection. The drugs are causing V to die. But if the

supplier of the drug is present when V overdoses, the supplier will have a duty to try to uncause what V has caused.

4.9 Summary

- The general rule is that a defendant cannot be criminally liable for a failure to act (**R v Smith (William)**). We examined the circumstances in which a defendant may commit the *actus reus* of an offence and be convicted because they have **omitted** or failed to act when under a duty to do so. A legal duty to act may arise from a:
 - Statutory duty;
 - Special relationship;
 - Voluntary assumption of a duty if care;
 - Contractual duty;
 - Creating a dangerous situation; and
 - Public office.

5 Mens rea overview

‘**Mens rea**’ means ‘guilty mind’. Most offences require that the defendant not only commits the act, but also in some way has a ‘guilty mind’. However, this phrase can be quite misleading, as it does not necessarily mean that the defendant is morally guilty, merely that in law the defendant has the required mental element for the crime.

The term ‘**mens rea**’ covers a number of mental states that may need to be proved in relation to the *actus reus* of a crime. It is possible for a particular *actus reus* to have more than one type of *mens rea* required in order to complete the offence. Burglary is an example of this.

The state of mind that the prosecution must prove to secure a conviction will vary from crime to crime.

You will need to familiarise yourself with the various types of *mens rea* and learn which type is required to accompany the *actus reus* for each crime.

What follows is a brief summary of some of the differing types of *mens rea*.

5.1 Intention

Some offences require that the defendant must have **intended** a specified result.

The obvious example of this is murder, where the defendant must intend to kill the victim or intend to cause the victim serious harm: **R v Vickers [1957] 2 QB 664**.

There are two types of intention:

- Direct intention: The aim or purpose of the defendant’s act (**R v Moloney**); and
- Indirect/oblique intention: Used in rare cases where the defendant does something manifestly dangerous and someone dies or is seriously injured but that was not the primary aim of the defendant.

5.2 Recklessness

Recklessness occurs when somebody takes an unjustifiable risk, aware of the danger that the prohibited harm may occur upon taking that risk.

More often, the defendant can be convicted, either if D intended the result, or if D was reckless as to whether the result should occur. This is a position, for example, with the offence of criminal damage.

Some offences use other words when defining the *mens rea* needed such as the word ‘maliciously’. This has been held to allow for the *actus reus* to be committed intentionally or in the alternative, recklessly such as **s 20 Offences Against the Person Act 1861**.

5.3 Knowledge and belief

Under **s 22 Theft Act 1968**, a person is guilty of handling stolen goods if, ‘knowing or believing them to be stolen’, that person receives the goods.

These words have been held to allow for the defendant who is absolutely certain as to the existence of a particular circumstance, or is at least possibly aware that the particular circumstance exists.

5.4 Dishonesty

In common with most offences under the Theft Act 1968, the defendant must also be found to have been dishonest when handling the goods. This word is not actually defined in the Act.

However, the Supreme Court considered this requirement in the case of *Ivey v Genting Casinos [2017] UKSC 67*, and a workable test was set out.

5.5 Negligence

Negligence is when the defendant’s actions fall below the standard of a reasonable person.

Although negligence is of great importance in civil law, it does not feature prominently in the criminal law. There are a number of statutory offences in which negligence is the basis of liability, and perhaps the best known of these is careless driving. Some criminal law offences have negligence as an element of mens rea, gross negligence manslaughter for example. Here, the negligence must be gross.

Key case: *R v Bateman [1925] 19 Cr App R 8 (CCA)*

In this case, the distinction between gross negligence and civil negligence was described:

[...] in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment.

Key case: *R v Sheppard [1981] AC 394 (HL)*

There is some opinion that negligence should not feature at all, as it requires judging a person against the state of mind of a non-existent, hypothetical person rather than their own state of mind, which is surely what mens rea requires. Lord Diplock in said:

The concept of the reasonable man as providing the standard by which the liability of real persons for their conduct is to be determined is a concept of civil law, particularly in relation to the tort of negligence; the obtrusion into criminal law of conformity with the notional conduct of the reasonable man as relevant to criminal liability, though not unknown, is exceptional, and should not be lightly extended.

5.6 Summary

- ‘**Mens rea**’ means ‘guilty mind’.
- This section contained an overview of some common types of mens rea:
 - Intention: Direct (the defendant’s aim) and indirect (death or serious injury was a virtual certainty and the defendant knew this, even if it was not the primary motive);
 - Recklessness: The defendant saw a risk of harm, went ahead anyway and the risk was an unjustified one to take;
 - Knowledge and belief;
 - Dishonesty; and
 - Negligence.

- It is important to remember that any discussion concerning whether a defendant has a particular form of *mens rea* must, in practice, be linked to a specific act or consequence as required for the offence in question (ie the *actus reus*). It is never acceptable to simply state *mens rea* in the abstract. For example, to be convicted of committing criminal damage, the defendant must either intend to destroy/damage property belong to another, or be reckless as to the destruction/damage of the property belonging to another.

6 Intention

There are two types of intention in criminal law:

- Direct intent; and
- Oblique intent (also known as indirect intent).

We will also consider the role of motive in criminal law.

6.1 Direct intention

Direct intent is where the consequence is what the defendant aims to happen. It is the purpose or objective of D's act. If the consequence is D's purpose, D intends it even if D's chances of success are slim. This is a wholly subjective test, from the defendant's point of view.

For example, if the defendant, wanting to kill, shoots at the victim half a mile away knowing that they could easily miss, D still intends to kill because that is what D is trying to achieve. The result has formed at least part of the reason for D acting.



Key case: *R v Moloney* [1985] 1 All ER 1025 (HL)

Lord Bridge made it clear that it was the jury's task to decide on the matter of intention. He stated that the word should be given its ordinary meaning and that judges should generally avoid defining the term intention, beyond explaining that it differs from 'desire' and 'motive'.

The golden rule should be that, when directing a jury on the mental element necessary in a crime of specific intent, the judge should avoid any elaboration or paraphrase of what it meant by intent, and leave it to the jury's good sense to decide whether the accused acted with necessary intent, unless the judge is convinced that, on the facts and having regard to the way the case has been presented to the jury in evidence and argument, some further elaboration is strictly necessary to avoid misunderstanding.

It should also be noted that their Lordships made it clear within that this approach of determining the defendant's direct intent was not restricted to murder cases and was to be of general application.

-
- Direct intention is the most common type of intention and the one you should consider first.
 - Case law has recognised that a defendant may 'intend' a result because it is the purpose of D's act.
 - Whenever considering whether the defendant intended to commit the *actus reus*, a trial judge should simply direct the jury to convict the defendant if they are satisfied that it was the defendant's aim or purpose to commit the *actus reus*.

In a murder trial, for example, the jury must simply consider whether the defendant intended (was it D's aim/purpose) to kill or cause serious harm when D committed the *actus reus*. Judges should refrain from giving juries any further elaboration as to what this means. In reality, this happens in the vast majority of cases. This is particularly true in cases where there has been a direct attack upon the victim, and evidence is available to show that the defendant wanted the actual consequence to happen.

6.2 Oblique intention

Very occasionally cases arise where there is a need to elaborate upon the meaning of intention because:

- The jury has specifically requested further guidance on the issue, in which case further direction should be given to them.
- The trial judge is of the opinion that the facts themselves, or the presentation of evidence in court, has meant that the jury would benefit from further guidance.

It has been suggested by Lord Bridge in **Moloney** that such cases would be ‘rare’. However, he did not make any attempt to clarify what sort of cases would fall into this ‘rare’ category.

By way of example, it has since been suggested that it may sometimes be necessary to give a jury an elaborated direction on the meaning of intention in those relatively rare cases where the defendant does an act which is manifestly dangerous, and as a result someone dies, but where the primary desire or motive may not have been to harm that person.

It is murder trials that have provided the forum for discussion of this issue in the past, although there is no reason why this could not become an issue in any offence where intention is the only form of mens rea available. In reality, the number of cases where extended guidance is given to a jury is extremely small.

Oblique intent is where the consequence is not the defendant’s purpose but rather a side effect that D accepts as an inevitable or certain accompaniment to D’s direct intention. The consequence here does not have to be ‘desired’. Indeed, the defendant may even regret that this incidental consequence will occur.

Key case: **R v Woollin [1999] AC 82**

The test for oblique intent was adopted by the House of Lords. The current model direction to be given to the jury was said to be as follows:

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 the death or serious bodily harm was a virtual certainty (barring some unforeseen event) as a result of the defendant’s action and that the defendant appreciated that such was the case. The decision is one for the jury to be reached upon consideration of all the evidence.

(Per Lord Steyn)

There is some debate about whether oblique intention is a definition of intention or merely evidence of intention.

Case law suggests that oblique intention is evidence of intention:

- In **R v Moloney**, Lord Bridge stated that such a state of mind could only be evidence of intention.
- In **R v Woollin**, the jury are still to be instructed that they are not entitled to find the necessary intention unless they find foresight of virtual certainty, not that they must find the necessary intention in such a case.

Key case: **R v Matthews and Alleyne [2003] EWCA Crim 192**

In this case, the trial judge had directed the jury to find that intention to kill was proved if they were satisfied that the defendant had appreciated that there was a virtual certainty of death. The Court of Appeal did not consider that Lord Steyn had changed the law, and said the foresight of virtual certainty was still only evidence of intention:

[...] the law has not yet reached a definition of intent in murder in terms of appreciation of a virtual certainty.

(Per Rix LJ)

The proposition that foresight of virtual certainty could be evidence of intention without also being intention has been much criticised by academics. See Professor John Smith [1998] Crim LR 891:

[...] some of us hoped that a perceptive jury would ask some unlucky judge what was the state of mind they were required to find proved which was not purpose but was something more than foresight of virtual certainty? – a question to which there appears to be no answer.

Professor John Smith, Crim LR 1998 at 891



Exercise: Challenge yourself

The Draft Criminal Code also includes oblique intention in its definition of intention:

(1) [...] a person acts

(a) "intentionally" with respect to a result when –

(i) it is his purpose to cause it, or

(ii) although it is not his purpose to cause it, he knows that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result.

If a defendant's purpose in acting is not to produce the *actus reus* of the crime with which D has been charged and intention is the only type of mens rea available, D may still be found to have an intention to commit that *actus reus* if D has oblique intent.

Much of the law in this area has concentrated on what is required for the jury to find indirect intent but **R v Woollin** contains the current model direct to be given to the jury.

Oblique intent is only to be used in **rare** circumstances when the facts require it and when intention is the **only** form of mens rea for the offence eg murder, causing GBH with intent contrary to **s 18 Offences Against the Person Act 1861**.

This means that if the rules of the offence allows mens rea in the form of intention **or** recklessness then you must not refer to oblique intent. For example, if a defendant is charged with criminal damage and D does not directly intend to destroy/damage property, then you must consider whether D was reckless.

6.3 Motive and intention

What the law is very clear about is that intention should not be confused with motive or desire.

While the defendant may have a motive (for instance, a reason to kill), that does not mean when D commits the *actus reus* D can automatically be taken to have the intention to kill.

However, while a motive is not the same as intention, an individual can be taken to intend both their ends and the means through which they will achieve them.



Key case: **R v Moloney [1985] 1 All ER 1025 (HL)**

The judgment of Lord Bridge gave the following example. Suppose D puts a bomb in a cargo aeroplane which he has insured and the bomb is timed to go off mid-flight. It is D's aim/direct intention to claim for the aircraft on his insurance. This is his motive in placing the bomb in the aeroplane. However, the destruction of the aeroplane is the means to achieving his aim, so destroying the aeroplane is also his direct intention. The death of the pilot is an inevitable side effect of what he has done, but was not necessary for him to achieve his aim, so this is his oblique intention.



Key case: **Chandler v DPP [1964] AC 763 (HL)**

Facts: The appellants had wished to demonstrate their opposition to nuclear weapons. They had planned a non-violent action to immobilise an aircraft at an RAF station for a period of six hours. They were convicted of conspiracy to commit a breach of **s 1 Official Secrets Act 1911**, namely to enter a prohibited place for 'a purpose prejudicial to the safety or interests of the state'.

Held: On appeal against conviction, Radcliffe LJ agreed with the trial judge's direction to the jury that the appellants had made their entry for two separate purposes:

[...] an immediate purpose of obstructing the airfield, and a further or long-term purpose of inducing or compelling the government to abandon nuclear weapons in the true interests of the state.

Where the jury were satisfied that the appellant's immediate purpose was proven, they were right to find the appellants guilty, regardless of whether they thought the long-term purpose in itself beneficial. Their motive behind the immediate action was irrelevant, they still intended the method of achieving it.



Key case: *R v Hill* (1985) 81 Cr App R 206 (CA)

Motive can be used as evidence of intention.

Robert Goff LJ stated in the context of poisoning offences under **s24 Offences Against the Person Act 1861**.

We have no doubt that, in considering whether in any particular case the accused acted "with intent to injure", it is necessary to have regard not merely to his intent with regard to the effect which the noxious thing will have upon the person to whom it is administered, but to his whole object in acting as he has done. The accused may, in one case, administer the noxious thing with the intent that it would itself injure the person in question; but in another case he may have an ulterior motive, as for example when he administers a sleeping pill to a woman with an intent to rape her when she is comatose. In either case he will, in our judgment, have an intent to injure the person in question, within the words in the section.

6.4 Summary

- There are two types of intention in criminal law: direct intent and oblique intent.
- When advising juries as to the meaning of intention, many judges have been keen to state that, in a majority of cases, no guidance as to its meaning should be given and rather it should be left to the common sense of the jury. Presumably, the reason behind this is that 'intention' is an ordinary word in everyday usage.
- Direct intent is where the consequence is what the defendant, subjectively, aims to happen (*R v Moloney*).
- Juries are not entitled to find oblique intent unless they feel sure:
 - Death or serious injury was a virtual certainty as a result of the defendant's action (objective element); and
 - The defendant appreciated that (subjective element) (*R v Woollin*).
- Oblique intent is not intention but evidence of it (*R v Matthews & Alleyne*).
- Motive is not the same as intention (*DPP v Chandler*) but can be used as evidence of intention (*R v Hill*).

7 Recklessness

We are now moving on to consider those offences that can be carried out with reckless mens rea. Many of the offences you will study on this course allow for this type of mens rea, and it is often the alternative option to intention.

Take, for example, the offence of criminal damage. Where the defendant does not intend to destroy or damage property belonging to another, D can still be liable where D recklessly destroys or damages property belonging to another (**s 1(1) Criminal Damage Act 1971**).

Recklessness is when a person does not intend to cause a harmful result but sees a risk of harm and goes ahead anyway. In order to be criminally liable for reckless behaviour, the risk taking

must be unjustifiable. If risk taking is justifiable, there is social utility or value to the activity, against the likelihood and the amount of harm that might happen.

It is impossible to say in general terms that recklessness requires any particular degree of probability of the occurrence of the harm in question. If the conduct has no social utility—for example, a game of ‘Russian roulette’ or an armed robbery—the slightest possibility of any harm should be enough. If the act has a high degree of social utility—for example, the performance of a surgical operation—then only a very high degree of probability of grave harm that outweighs the social utility will suffice to condemn it as reckless.

Ormerod and Laird, Smith, Hogan and, Ormerod’s, Criminal Law (15th edn OUP) 104

7.1 The current definition



Key case: *R v G and another [2003] UKHL 50*

The current definition of recklessness comes from this case and was given in the context of criminal damage. Lord Bingham, with whom the other judges agreed, approved the following definition of recklessness laid down in **Clause 18 of the Law Commission’s Draft Criminal Code (1989)**:

A person acts recklessly within the meaning of section 1 of the Criminal Damage Act 1971 with respect to –

- (i) a circumstance when he is aware of a risk that it exists or will exist;
- (ii) a result when he is aware of a risk that it will occur;

and it is, in the circumstances known to him, unreasonable to take the risk.

The Court of Appeal in **A-G’s Reference (No 3 of 2003) [2004]** 2 Crim App R 367 held that the test in **R v G** should be of general application.

The second part of the test of recklessness states:

in the circumstances known to him, it was unreasonable to take the risk.

Although the risk must have been objectively unreasonable, it is clear that the risk under consideration is the risk seen by the defendant.

In deciding whether the risk is a reasonable one to take, the jury will consider the social utility of what the defendant is doing. If there is no social utility at all, then the jury will probably decide that even a tiny risk is unjustified.

In **R v G** the Lords emphasised that the jury should not take into consideration circumstances not known to the accused at the time D committed the offence.

For example, if the accused throws a lighted cigarette into an empty wastepaper bin which, unknown to D, contains a small quantity of flammable fluid put there by someone else, the jury must ignore the presence of this flammable fluid when answering the second question.

7.2 Summary

- Recklessness is a form of *mens rea* or guilty mind.
- Examples of offences that have recklessness as a form of *mens rea* are: assault and basic criminal damage.
- According to **R v G**, a defendant is reckless when:
 - D foresaw a risk of harm and went ahead anyway; and
 - In the circumstances known to the defendant, it was unreasonable to take the risk.

8 Additional principles

This section considers some additional principles of criminal liability such as the rules on coincidence, transferred malice and mistake.

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



Coincidence of *actus reus* and *mens rea*: As a general rule, the defendant must have the relevant *mens rea* for the offence at the precise moment when D commits the *actus reus*. This is known as the requirement for coincidence of *actus reus* and *mens rea*.

The courts have developed some flexible interpretations to get round the requirement for coincidence of *actus reus* and *mens rea*:

- The continuing act theory; and
- The one transaction principle.

8.2 The continuing act theory



Key case: *Fagan v Metropolitan Police Commissioner* [1969] 1QB 439

Facts: Fagan accidentally drove onto a policeman's foot. The policeman asked him to move off his foot, but Fagan put the handbrake on and refused to do so. He was charged with assaulting a police officer in the execution of his duty. At the time of driving onto the foot, which was the *actus reus* of the crime, he did not have the *mens rea*.

Held: However, the Divisional Court held that the assault involved a battery and this battery continued after the car came to rest. The *actus reus* was a continuing act, and it was enough that Fagan had the *mens rea* at some time during its continuance.

A defendant can be guilty of an offence using the continuing act theory if they form the *mens rea* for the offence at some point during the *actus reus* continuing.

In the **Fagan** case, the defendant formed the *mens rea* when he realised that his vehicle was on the police officer's foot and did not move it. At the moment he formed the *mens rea*, the *actus reus* was still continuing.

8.3 The one transaction principle

Sometimes the court will categorise the actions of the accused as a series of acts, making up **one transaction**. In certain circumstances it is enough for the defendant to have the *mens rea* at some time during that transaction.



Key case: *Thabo Meli* [1954] 1 All ER 373 PC

Facts: The appellants hit V over the head with intent to kill him. Thinking that they had killed him, they rolled his body over the cliff to make his death appear accidental. It was later discovered that V died from exposure at the foot of the cliff.

Held: The appellants had the *mens rea* for murder when they hit V, but not when they did the act that caused his death, as they thought he was already dead at this point. The Privy Council said that because the appellants' acts were performed in pursuance of an antecedent plan to kill the victim, the series of acts could not be divided up. They formed one transaction and it was enough that the *mens rea* existed at some point during that transaction.

8.4 Extension of the one transaction principle: Causation

This principle has been extended to cases where there was no prior planning.

In **Le Brun** it was recognised that sometimes the problem of coincidence of *actus reus* and *mens rea* may be avoided by viewing the act done with the *mens rea* (the first act) as causing

subsequent acts. D's act of knocking his wife unconscious caused him to drag her home and drop her on the pavement.



Key case: *R v Le Brun* [1992] QB 61

D assaulted his wife, hitting her on the jaw and knocking her unconscious. He then attempted to drag her home, and in doing so he accidentally dropped her and she fractured her skull on the pavement. She died from the fracture to the skull. D was convicted of manslaughter and the conviction was upheld. The court said that the unlawful act and the act causing death were all part of the 'same transaction'. Lord Lane stated that it did not matter that there was no preconceived plan and that the defendant knew that his wife was still alive. He said that the transaction continued as long as the defendant was trying to cover up the crime he believed he had committed.

8.5 Where it isn't clear which of D's acts was the *actus reus*



Key case: *AG's Ref [No 4 of 1980]* [1981] 1 WLR 705

D pushed V down some stairs. He then pulled V back up the stairs by using rope tied around her neck. He also cut her throat. It was unclear whether she had died from strangulation or the stabbing. The court said that it was unnecessary to prove which act caused the death:

[...] if an accused kills another by one or other of two or more different acts each of which, if it caused the death, is a sufficient act to establish manslaughter, is it necessary in order to found a conviction to prove which act caused the death? The answer to that question is no, it is not necessary to found a conviction to prove which act caused the death.

In such cases, the defendant must have the mens rea for the relevant crime when D does each of the acts which could constitute the *actus reus*.

8.6 Transferred malice



Transferred malice: Transferred 'malice' is when D's mens rea is transferred from the intended harm to the actual harm.

It does not make a difference to criminal liability that D, for example, intends to kill X, but misses and kills Y instead. The doctrine of transferred malice operates to allow the mens rea against X to be transferred and joined with the *actus reus* that causes the prohibited harm to Y. D's intended harm against X can be transferred to the unintended victim, Y, and D will still be guilty of the crime of murder.



Key case: *R v Latimer* [1886] LR 17 QBD 359

Facts: L aimed a blow at C with a belt, striking C slightly. The belt then recoiled, hitting V in the face and wounding her severely.

Held: L's appeal against his conviction under **s 20 Offences Against the Person Act 1861** was dismissed. The court held that his intention to injure C could be transferred to V.



Key case: *R v Mitchell* [1983] QB 741

Transferred malice was applied to manslaughter. The defendant assaulted A, aged 72, causing him to fall on to B, aged 89, ultimately causing her death.

8.7 Limits of transferred malice



Key case: *R v Pembliton* [1874] LR 2 CCR 119

Facts: The accused threw a stone at a crowd of people. He missed them but broke a glass window behind them. It was found that he intended to hit the people but not the window. Had he injured someone, he could have been convicted under **s 20 Offences Against the Person Act 1861**.

Held: The court quashed his conviction for criminal damage since that was an offence with a different *mens rea*. To be liable for criminal damage, the accused must have intended to damage property or been reckless to the same. An intention to injure a person was insufficient. Therefore, transferred malice will not assist where the defendant has the *mens rea* for one crime and the *actus reus* for another. The defendant must have the *mens rea* for the crime charged. It is not possible to mix and match the *mens rea* of different crimes.

8.8 Mistake

Where the defendant makes a mistake, the effect this will have on criminal liability depends upon the type of mistake. We will consider:

- Ignorance of the law; and
- Mistakes that negate the *mens rea*.

8.8.1 Ignorance of the law

If the defendant does not know they are breaking the law, this mistake will not help avoid liability. Hence, the saying ‘ignorance of the law is no excuse’. This is the case even if the defendant’s ignorance is quite reasonable, and even if it were impossible for D to know of the prohibition in question.



Key case: *R v Bailey* [1800] Russ & Ry 1

D was convicted of an offence created by a statute when he was on the high seas. He committed it before the end of his voyage when he could not possibly have known of the statute.

8.8.2 Mistakes that negate the *mens rea*

A defendant might make a mistake as to some element of the *actus reus*, which will prevent D from having the *mens rea*. This could be a mistake of fact, for example if the defendant takes the wrong umbrella away from a restaurant, mistakenly believing it is their umbrella, there will be no liability for theft because D will not be dishonest. The mistake could be one of civil law, as seen in *R v Smith*.

If the *mens rea* required for the relevant element of the *actus reus* is intention or recklessness, there is no need for the mistake to be reasonable. If the *mens rea* requirement is negligence, then the mistake must be reasonable.



Key case: *R v Smith* [1974] QB 354

Facts: Smith was the tenant of a flat. He installed a stereo system and, with the consent of the landlady, added some roof and wall panels to hide the wiring. These, being affixed to the building, became the property of the landlady. Not knowing about this law, and believing them to be his own property, Smith damaged the panels when he removed his stereo system.

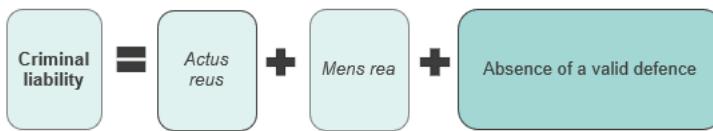
Held: The Court of Appeal quashed his conviction because he did not intentionally or recklessly damage property belonging to another as required by the **Criminal Damage Act 1971**.

8.9 Summary

This section considered the following additional principles of criminal liability.

- **Coincidence of actus reus and mens rea:** This is required for criminal liability. The relevant guilty act and guilty mind for the offence must occur at the same time. The courts have interpreted this concept widely using:
 - **The continuing act theory:** As long as the mens rea takes place at some point during the actus reus continuing to take place this will be enough (*Fagan v MPC*);
 - **The one transaction principle:** It will be sufficient that the defendant has the mens rea for the offence at some point during a series of acts (*Thabo Meli*).
- **Transferred malice:** The mens rea for the intended harm can be transferred to the actual harm that occurs (*Latimer*), as long as the mens rea for the offences is the same (*Pemberton*).
- **Mistake:** While ignorance of the law will not prevent criminal liability (*Bailey*), the defendant may make a mistake which can mean that the mens rea of the offence is not fulfilled and will escape criminal liability as a result (*R v Smith*).

9 Defences overview



For a defendant to be criminally liable, they must have the actus reus and mens rea of the relevant offence and the absence of a valid defence- a justification or excuse for D's behaviour. If a valid and complete defence exists, D will not be criminally liable. General defences are available to almost any crime, such as self-defence and intoxication. Some defences only operate in relation to specific crimes, such as the special defences of loss of control and diminished responsibility which are available in relation to murder only. If the defendant killed with diminished responsibility, D will not be acquitted but convicted of the lesser charge of voluntary manslaughter, rather than murder. These partial defences are covered in other elements. There are lots of other defences, general and specific, in addition to those covered in this element such as insanity/ automatism, duress, infancy and necessity.

9.1 Intoxication

The defendant may avoid criminal liability if intoxicated with drugs or alcohol. A defendant is more likely to be successful with an intoxication defence if involuntarily intoxicated rather than voluntarily intoxicated. With involuntary intoxication (such as being drugged without consent), the court will ask whether the defendant form the mens rea even though intoxicated (*Kingston [1995] 2 AC 355*). With voluntary intoxication (such as getting drunk on alcohol), the rules are a little more complex. Essentially, with less serious crimes of basic intent (where recklessness is a form of mens rea available), the defendant will be deemed reckless if they would have foresaw the risk of harm if sober (*Coley, McGhee and Harris [2013] EWCA Crim 233*). Other elements cover these rules in more detail.

9.2 Consent

There are a variety of rules on consent. In the context of non-fatal offences against the person, the availability of consent will depend on the seriousness of the offence.

- If the offence is an assault or battery, consent is available if the victim consented or D honestly believed that V was consenting (*AG Reference (No 6 of 1980)[1981] QB 715*).
- If D intended to cause the offence of actual bodily harm or above, consent is not available (*R v Brown[1994] AC 212*) unless some of the public interest exceptions apply: medical treatment, sport, horseplay, tattooing/personal adornment and sexual gratification/accidental infliction of harm.

9.3 Self-defence

Self-defence can be used in protection of yourself, another or property.

If successful, the defendant will be acquitted.

It is a defence that is found in both common law and a statute, under **s 76 Criminal Justice and Immigration Act 2008 (as amended)**.

The defendant is entitled to rely on the defence if:

- The defendant honestly believed that the use of force was necessary; and
- The level of force the defendant used in response was objectively reasonable in the circumstances as the defendant believed them to be.

9.4 Mistake

While ignorance of the criminal law will not prevent criminal liability, the defendant may make a mistake of fact or civil law which can mean that the *mens rea* of the offence is not fulfilled and will escape criminal liability as a result. This could be a mistake of fact. If Ryan takes the wrong umbrella away from a restaurant, mistakenly believing it is his, he will not be liable for theft because he will not be dishonest.

9.5 Summary

This section considered some general defences in overview which can allow a defendant to avoid criminal liability:

- With involuntary intoxication, the court will ask whether the defendant form the *mens rea* even though intoxicated (**Kingston**). With voluntary intoxication and less serious crimes of basic intent, the defendant will be deemed reckless if they would have foresaw the risk of harm if sober (**Coley, McGhee and Harris**).
- If the offence is an assault or battery, consent is available if the victim consented or D honestly believed that V was consenting, **AG Reference (No 6 of 1980)**. If D intended to cause the offence of actual bodily harm or above, consent is not available (**R v Brown**) unless some of the public interest exceptions apply: medical treatment, sport, horseplay, tattooing/personal adornment and sexual gratification/accidental infliction of harm.
- A defendant is entitled to rely on self-defence if protecting themselves, another or property. The defendant must honestly believe that the use of force is necessary and the level of force the defendant uses in response is objectively reasonable in the circumstances as the defendant believes them to be.
- While ignorance of the criminal law will not prevent criminal liability, the defendant may make a mistake of fact or civil law which can mean that the *mens rea* of the offence is not fulfilled and will escape criminal liability as a result.

10 Murder



Murder: Murder is a common law offence and is defined as 'unlawful homicide with malice aforethought'.

Under English law there is no offence of homicide as such. It is a generic term and can be broadly defined as causing the death of another human being. Murder is the most serious form of homicide, and what distinguishes murder from other forms of homicide is that the defendant must act with a specific intent. Homicide also covers other offences including involuntary manslaughter for example.

Murder carries a mandatory life sentence pursuant to the **Murder (Abolition of Death Penalty) Act 1965**. The judge has no discretion in sentencing other than to recommend a minimum term before a prisoner can be released on licence.



Unlawful homicide: The *actus reus* elements of the offence are the words 'unlawful homicide'.

Unlawful homicide was defined by Sir Edward Coke (3 Inst 47) as '[...] unlawfully killing a reasonable person who is in being and under the King's peace [...]'.

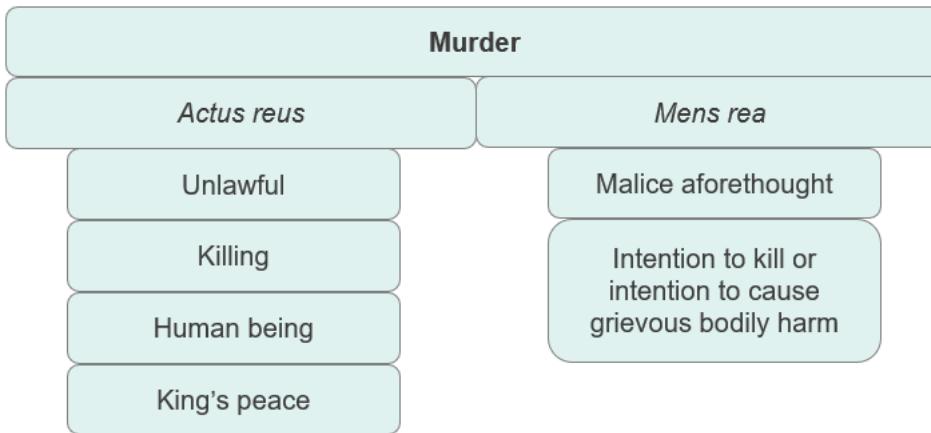


Figure 2.4: Elements of a murder offence

10.1 Unlawful

The killing must be unlawful. It will be lawful to kill another if it falls into one of the following categories:

- Killing enemy soldiers in battle;
- Advancement of justice: An example of this is the lawful application of the death penalty. Although we no longer have the death penalty in this country there are occasions when person could be tried in this country for a killing which occurred in a country which does have the death penalty;
- Self-defence: Killing will be lawful where the force used was reasonable and necessary to prevent crime or protect self, others or property.

10.2 Killing

Murder is a result crime which requires the prosecution to show that the defendant caused the death of the victim. To do this, the tests of factual and legal causation must be satisfied. Other elements cover causation in detail. In brief these tests are:

- Factual cause: ‘But for’ the acts or omissions of the defendant, the relevant consequence would not have occurred in the way that it did (*R v White*[1910] 2 KB 124).
- Legal cause: The defendant’s act must be the ‘substantial’ cause of the prohibited harm. Substantial does not mean it has to be the only or principal cause but it needs to be more than minimal (*R v Hughes*[2013] UKSC 56).

10.3 Human being

A reasonable person in being

The victim of a homicide must be a person, a human being.

It is not possible to murder a corpse.

Since 1979, following a conference of the Medical Royal Colleges and Faculties, it has been possible to determine the point of death with complete certainty (see the Criminal Law Review Commission 14th Report). At the moment which the brain dies, the person will be held to have died. It is the unanimous belief of the medical profession that without the brain the body simply cannot survive.

A person is ‘in being’ when born alive and capable of independent life. The court found it necessary to determine when a person becomes ‘in being’ in these cases.



Key case: *R v Poulton* [1832] 5 C & P

Littledale J made it clear that the child must be fully expelled from the mother’s body and born alive:

[...] the being born must mean that the whole body is brought into the world; and it is not sufficient that the child expires in the progress of the birth. Whether the child was born alive or not depends mainly upon the evidence of the medical men.



Key case: *R v Reeves [1839] 9 C & P 25*

This case indicated that it was not necessary for the umbilical cord between mother and child to have been cut.



Key case: *AG-Ref (No 3 of 1994) [1998] AC 245*

A pregnant woman was stabbed in the abdomen, her child was born prematurely and died. The child was not a live person when stabbed and therefore this could not be murder.

10.4 Under the King's Peace



Key case: *R v Adebolajo [2014] EWCA Crim 2779*

Facts: Two men killed Fusilier Lee Rigby on a Woolwich street because he was in the British army. They stated that they were fighting a war so were not under the Queen's Peace.

Held: Lord Thomas CJ, said:

The law is now clear. An offender can generally be tried for murder wherever committed if he is a British subject, or, if not a British subject, the murder was committed within England and Wales. The reference to "the Queen's/[King's] peace", as originally dealt with in the cases to which we have referred, went essentially to jurisdiction.

10.5 Mens rea



Malice aforethought: The mens rea for murder is 'malice aforethought' which means:

- Intention to kill (express malice); or
- Intention to cause grievous bodily harm (implied malice). Grievous bodily harm means 'serious harm' (*Saunders [1985] Crim LR 230*).

The defendant does not need to have any malice, nor does the act need to be premeditated.

Mercy killing is no defence in English law (*Inglis [2011] 1 WLR 1110*).

The defendant can have malice aforethought even if they kill a person in the spur of the moment.



Key case: *R v Vickers [1957] 2 QB 664*

Facts: In *Vickers*, the defendant broke into a shop intending to steal from it. He was disturbed by the elderly lady who lived above the shop. Vickers struck her and kicked her in the face, as a result of which she died. Vickers was convicted of murder. He appealed against his conviction on the grounds that the **Homicide Act 1957** had removed an intention to cause grievous bodily harm as a head of mens rea for murder. The defence argued that, if Vickers intended to cause her grievous bodily harm, he was committing an offence under **s 18 Offences Against the Person Act 1861**, ie another offence and therefore, under the **s 1(1) Homicide Act 1957**, the offence of murder had to be disregarded.

Held: This argument was rejected by the Court of Appeal, which confirmed the mens rea of murder as intention to kill or intention to cause grievous bodily harm.

10.6 Key principles of intention

The key principles of intention apply.

- Generally the meaning of intention should be left to the common sense of the jury. However, direct intent is where the consequence is what the defendant, subjectively, aims to happen (*R v Moloney*[1985] 1 All ER 10252q)
- Where D's aim or purpose in acting is something other than death or grievous bodily harm, juries are not entitled to find oblique intent unless they feel sure:
 - Death or serious injury was a virtual certainty as a result of the defendant's action (objective element); and
 - The defendant appreciated that (subjective element) (*R v Woollin*[1999] AC 82).
- Judges have said that the need for a *Woollin* direction will rarely arise. Oblique intent is not intention but evidence of it (*R v Matthews & Alleyne*[2003] EWCA Crim 192).
- Motive is not the same as intention (*DPP v Chandler*[1964] AC 763) but can be used as evidence of intention (*R v Hill*(1985) 81 Cr App R 206).

10.7 Summary

Murder is a common law offence defined as the unlawful killing of a reasonable person who is in being under the King's peace with malice aforethought. This element considered what the prosecution must prove for the *actus reus* of murder:

- Unlawful: The killing was not done in self-defence for example;
- Killing: The defendant caused the victim's death in fact (*White*) and in law (*Hughes*);
- Human being: The victim was alive and capable of independent life before their death (*Poulton*);
- King's peace: The murder was committed within the legal jurisdiction of the courts of England and Wales (*Adebolajo*).

This section also considered the mens rea for murder which is 'malice aforethought':

- Intention to kill (express malice); or
- Intention to cause grievous bodily harm (implied malice) (*Vickers*). Grievous bodily harm means 'serious harm' (*Saunders*).



3

Homicide

1 Homicide overview

Homicide is an umbrella term used to describe a set of offences where the defendant has killed a victim. Homicide includes murder, voluntary manslaughter and involuntary manslaughter.



Murder: The unlawful killing of a human being under the Kings' Peace, with malice aforethought.

If a defendant is found guilty of murder, they are given a mandatory life sentence.

A defendant will not be criminally liable for murder if any of the elements of the *actus reus* or *mens rea* are missing. So, if the defendant lawfully killed an enemy soldier in battle, there would be no criminal liability for murder. Alternatively, it may be that the defendant is not the factual cause of the death of the victim, if the victim died from a heart attack unrelated to the poison that the defendant gave the victim.

Equally a defendant will not be criminally liable for murder if the defendant did not act with intention to kill or intention to cause grievous bodily harm, meaning serious harm. If the defendant merely intended to unlawfully touch the victim, with a slap for example and death resulted, this would not be enough to make the defendant criminally liable for murder. Alternatively, it could be that due to intoxication the defendant did not form the *mens rea* of murder, so will not be criminally liable.

In addition, a defendant will not be criminally liable for murder if they have a valid defence like self-defence. A defendant will be acquitted if they have committed the *actus reus* and *mens rea* of murder but have a valid defence.

A defendant will be criminally liable for voluntary manslaughter if the defendant:

- Committed the *actus reus* of murder: The defendant unlawfully killed another human being under the Queen's peace; and
- Committed the *mens rea* of murder: The defendant committed the *actus reus* with malice aforethought, meaning intention to kill or intention to cause grievous bodily harm; and
- Can rely on one of the special defences to murder: Loss of control or diminished responsibility.



Voluntary manslaughter: This is where the defendant has satisfied the *actus reus* and *mens rea* of murder, but murder conviction is reduced to voluntary manslaughter by way of diminished responsibility or loss of control.

Involuntary manslaughter: This is where the defendant has killed the victim, but lacks the *mens rea* of murder.

If the defendant has killed with loss of control or diminished responsibility, the defendant will be criminally liable for voluntary manslaughter rather than murder, so these are partial rather than complete defences, in that the defendant is not acquitted. The defendant is not given a mandatory life sentence but the judge has discretion in sentencing. It is worth noting that once

the defence of loss of control is raised it is up to the prosecution to prove beyond reasonable doubt that the partial defence does not apply. In contrast, with diminished responsibility the defence must prove on the balance of probabilities that the partial defence applies – one of the few instances in criminal law where the burden of proof rests with the defence.

In summary, when doing a legal analysis of a client-based problem, you can ask yourself these questions to establish whether the defendant is criminally liable for murder or voluntary manslaughter:

- Has the defendant unlawfully killed another human under the Queen's peace with intention to kill or intention to cause grievous bodily harm?
 - If not, the defendant is not liable for murder.
 - If so, consider the next question.
- Can the defendant rely on a complete defence such as self-defence? We consider complete defences first, as the defendant will be acquitted if successful.
 - If so, the defendant is not liable for murder.
 - If not, consider the next question.
- Can the defendant rely on the partial defence of loss of control or diminished responsibility?
 - If not, the defendant is liable for murder.
 - If so, the defendant is liable for voluntary manslaughter.

You have already looked at the offence of murder the previous chapter. It will be useful to review your notes on this, before continuing with this chapter. This chapter will first look at voluntary manslaughter and will consider the two special defences to murder. It will also look at the effect of intoxication on both of these defences. It will finish by looking at involuntary manslaughter.

2 Voluntary manslaughter: Diminished Responsibility

2.1 Diminished responsibility introduction

Diminished responsibility is one of the two special defences to murder. ‘Special defence’ means diminished responsibility can only be used as a defence to murder, no other offences.

Diminished responsibility is a partial defence, meaning if it is successful, the defendant is not acquitted but convicted of a lesser offence, known as voluntary manslaughter (**s2(3) Homicide Act 1957 (HA)**). This means that the judge will have discretion in sentencing and the defendant will avoid the mandatory life sentence handed down to those convicted of murder (**Murder (Abolition of Death Penalty) Act 1965**).

The burden falls upon the defence to prove on the balance of probabilities that the defendant was acting under diminished responsibility (**s 2(2) HA**).

Diminished responsibility is not available as a defence to a charge of attempted murder (**R v Campbell [1997] Crim LR 495**).

Section 2(1) HA 1957 (as amended by s 52 CJA 2009)

Section 2(1) Homicide Act 1957 (as amended by the s52 CJA 2009) provides:

(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.

(1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct.

2.2 An 'abnormality of mental functioning'

Firstly, under **s 2(1)**, there must be an 'abnormality of mental functioning'.

The **Coroners and Justice Act 2009 (CJA)** made modest reforms to the language of diminished responsibility, for example requiring an abnormality of mental functioning rather than an abnormality of mind.



Key case: *R v Byrne [1960] 2 QB 396*

In the absence of any statutory definition, guidance on the meaning of abnormality of mental functioning is taken from this case. A defendant would be suffering from an abnormality of the mind if they had a 'state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal'.

2.3 Arising from a recognised medical condition

Secondly, under **s 2(1)(a)**, the abnormality must arise from a recognised medical condition.

This clause has hugely simplified the defence but it is not completely straightforward.

A defendant might be suffering from an undiagnosed recognised medical condition at the time of the killing which will be sufficient to satisfy this element.

It is not enough to be suffering from an abnormality of mental functioning and have a recognised medical condition. The abnormality must be caused by the recognised medical condition and not by something else, such as hatred, jealousy or bad temper.

Alcohol Dependency Syndrome (ADS) is a recognised medical condition.



Key case: *R v Dowds [2011] EWCA Crim 281*

Facts: The defendant, a binge drinker, stabbed his partner after a night of heavy drinking. He tried to run the defence of diminished responsibility on the basis that he was suffering from a recognised medical condition, namely 'Acute Voluntary Intoxication'. Dowds was not arguing that he was an alcoholic and there was no evidence to suggest it. The trial judge concluded that this could not give rise to the defence and did not put it to the jury. Dowds argued that the changes made to the defence by s52 CJA meant that it was possible to raise the defence of diminished responsibility based on voluntary intoxication because such intoxication is recognised as a medical condition in both the World Health Organization's International and Statistical Classification of Diseases (ICD) and the American Medical Associations Diagnostic and Statistical Manual (DSM).

Held: The Court of Appeal noted that both the ICD and DSM recognised a number of medical conditions that would give rise to significant problems if raised as issues in legal cases, including 'unhappiness', 'irritability and anger', and 'intermittent explosive disorder'. However, they also noted that the DSM itself, in its introduction, warned against a rigid application of the categories of medical condition to legal issues. It also briefly reviewed the long history of legal principles that showed, with exceptions, that the law generally does not allow voluntary intoxication to afford any defence to criminal liability. They said that the changes brought about by the CJA to the defence were recommended by the Law Commission, who nevertheless observed that generally the law as it formerly read worked well and no major changes were required. They therefore concluded that there was nothing to suggest that Parliament, by bringing into force the changes

in the CJA, intended to reverse the longstanding rule that voluntary intoxication cannot give rise to a defence.

2.4 Substantial impairment of D's ability

Thirdly, under **s 2(1)(b)**, the abnormality of mental functioning must have substantially impaired the defendant's ability to do one of the things stated within **s 2(1A)**.

These three things are: to understand the nature of D's conduct, to form a rational judgment and to exercise self-control.



Key case: *R v Golds [2016] UKSC 61*

The meaning of the word 'substantial' has been considered by the Supreme Court. It held that 'substantial' should have its ordinary meaning and therefore there is generally no need to direct the jury on the meaning. However, if the court felt it was necessary to provide further guidance then the judge should explain that 'substantial' means something greater than 'more than merely trivial'.

2.4.1 To understand the nature of D's conduct

Law Commission, Report No 304 provided the following example.

A boy aged 10 who has been left to play very violent video games for hours on end for much of his life, loses his temper and kills another child when the child attempts to take a game from him. When interviewed, he shows no real understanding that, when a person is killed they cannot simply be later revived, as happens in the games he has been continually playing.

2.4.2 To form a rational judgment

Law Commission, Report No 304 provided the following examples.

A woman suffering from post-traumatic stress disorder, following violent abuse suffered at her husband's hands, comes to believe that only burning her husband to death will rid the world of his sins.

A mentally sub-normal boy believes that he must follow his older brother's instructions, even when they involve taking part in a killing. He says: 'I wouldn't dream of disobeying my brother and he would never tell me to do something if it was really wrong'.

A depressed man who has been caring for many years for a terminally ill spouse kills her, at her request. He found it progressively more difficult to stop her repeated requests dominating his thoughts.

2.4.3 To exercise self-control

Law Commission, Report No 304 provided the following example.

A man says that sometimes the devil takes control of him and implants in him a desire to kill, a desire that must be acted on before the devil will go away.

The question of whether the defendant's ability is substantially impaired is one of fact and is for the jury to decide, however, guidance can be taken from the above examples. The above definitions tend to allow the jury a wide discretion and much will depend on the extent to which the jury feel the defendant is morally culpable.

2.4.4 Provides an explanation

Finally, under **s 2(1)(c)**, the abnormality of mental functioning must provide an explanation for the defendant's acts and omissions in doing or being a party to the killing.

The defendant's act will provide an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct (**s 2(1B)**).

Therefore, a causal link between the abnormality of mental functioning arising from a recognised medical condition and the killing must be established. It is clear from the wording of this section that it need not be the only cause. The defence can still operate, even if the jury consider that

alcohol may have played a part (*Dietschmann* [2003] 1 AC 1209). Another section will cover this in more detail.

2.4.5 Medical experts



Key case: *R v Brennan* [2014] EWCA Crim 2387

Facts: In this case Brennan had been convicted of murder despite a psychiatrist's evidence that all the elements of the test had been satisfied. Her evidence had not been contradicted.

Held: Davies LJ, in overturning the conviction, held that a judge should withdraw the murder charge from the jury when either the expert medical evidence is uncontested or when there is no other evidence which is capable of rebutting the medical evidence. It was held to be legitimate and helpful for expert psychiatrists to give evidence.

All four of the elements of the defence are concerned with psychiatric matters.

2.5 Summary

- Once the D has fulfilled the *actus reus* and *mens rea* of murder, D's conviction can be reduced to voluntary manslaughter (**s 2(3)**), if D proves, on the balance of probabilities, that they were acting under diminished responsibility (**s 2(2)**). Medical evidence will be helpful for all elements of the defence (*R v Brennan*).
- Diminished responsibility has four elements:
 - **D must have an abnormality of mental functioning (s 2(1))**, meaning 'state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal' (*R v Byrne*).
 - The abnormality of mental functioning must:
 - **Arise from a recognised medical condition (s 2(1)(a))** which can be diagnosed or not at the time of the killing. D must not be acting out of hatred, jealousy or bad temper.
 - **Have substantially impaired** (something greater than 'more than merely trivial', *R v Golds*) the defendant's ability (**s 2(1)(b)**) to understand the nature of D's conduct, form a rational judgment and/or exercise self-control (**s 2(1A)**).
 - **Provide an explanation for D's conduct (s 2(1)(c))**, even if it is not the only cause (**s 2(1B)** and *R v Dietschmann*).
- Diminished responsibility is not available for attempted murder (*R v Campbell*).

3 Voluntary manslaughter: Loss of control

The Law Commission published a report in 2006 proposing a wholesale restructuring of the law of homicide. The government's response was the **Coroners and Justice Act 2009 (CJA)**. This made significant changes to the special defences to murder. The defence of provocation was abolished and was replaced with 'loss of control'.

3.1 Loss of control introduction

Loss of control is a partial defence to murder.

The burden of proof rests with the prosecution once the issue is raised (**s 54(5) CJA**).

The prosecution need to prove that only one of the components is absent for the defence to fail, this is clear from the statute and was confirmed in the first case on the new defence (*R v Clinton, Parker and Evans* [2012] EWCA Crim 2).

It will be a matter for the judge to decide whether the defence can be put before the jury (**s 54(6)**). The power of the judge to remove the issue of loss of control from the jury may prove to be a significant change from the old law of provocation (*R v Jewell* [2014] EWCA Crim 414).

If this defence is successful, the conviction is reduced from murder to voluntary manslaughter, which means that the defendant will avoid the mandatory life sentence (**s 54(7)**).

As some aspects of the defence are yet to be defined and tested by the courts, you will be expected to rely on your statutory interpretation and analysis skills.

3.1.1 The three key requirements of the loss of control defence

Section 54(1) Coroners and Justice Act 2009 provides:

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,
- (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.

3.2 There must be a loss of self-control

Firstly, under s 54(1)(a), the defendant's act or omission in killing, must have resulted from a loss of self-control.



Key case: *R v Clinton, Parker and Evans [2012] EWCA Crim 2*

The Court of Appeal made it clear that this defence had replaced the old law on provocation and that application of this defence should be made with reference to the Coroners and Justice Act 2009. The judges were of the opinion that the old common law is now largely irrelevant. It seems that the use of old case law is now very limited. It can be referred to, but any use must be justified.

The element of loss of self-control can be assessed by looking at its literal meaning. As under the old law, whether the defendant actually lost control is a question for the jury, taking into account all of the evidence.



Key case: *R v Richens [1993] 4 All ER 877*

Loss of self-control was a necessary part of the old law and reference can be made to the legal principle from this case, which stated that, although there need not be a complete loss of control so that defendants do not know what they are doing, defendants must be unable to restrain themselves. A mere loss of temper would not be enough.

The loss of control need not be sudden (s 54(2)).

The defence will be lost should it be established that the defendant was acting out of a 'considered desire for revenge' (s 54(4)). The judges in *R v Clinton* directed that this should be considered within this aspect of the defence.



Key case: *R v Ahulwalia [1992] 4 All ER 889*

A case on the old law, where it was noted that the jury in deciding whether there was a loss of self-control should consider the length of any delay between the provocation and the killing and it was noted that the longer the delay, the less likely it was that the defendant had lost self-control. This observation would apply to the loss of control defence.

3.3 Qualifying trigger

Secondly, under s 54(1)(b), there must be a qualifying trigger.

The 'qualifying trigger' that must be identified as the cause of the loss of control is defined in s55.

Lord Judge in *R v Clinton*, made it clear that it would be more difficult to raise the loss of control defence than the old defence:

In section 55(3) it is not enough that the defendant is fearful of violence. He must fear serious violence. In subsection (4)(a) the circumstances must not merely be grave, but extremely so. In subsection (4)(b) it is not enough that the defendant has been caused by the circumstances to feel a sense of grievance. It must arise from a justifiable sense not merely that he has been wronged, but that he has been seriously wronged. By contrast with the former law of provocation, these provisions, as Mr Michael Birnbaum QC, on behalf of Clinton submitted, have raised the bar.

Section 55 CJA 2009 provides:

- (1) This section applies for the purposes of section 54.
- (2) A loss of self-control had a qualifying trigger if subsection (3), (4) or (5) applies.
- (3) This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person.
- (4) This subsection applies if 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.
- (5) This subsection applies if D's loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4).
- (6) 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 [...]

3.3.1 Fear trigger - fear of serious violence

The first trigger (**s 55(3)**) ‘attributes’ the loss of self-control to the defendant’s fear of serious violence. There is no specific direction on the way in which the defendant should fear serious violence; this would suggest that this defence will have a broader application than it previously did. In **Dawes, Hatter and Bowyer** [2013] EWCA Crim 322, the Court of Appeal directed that, despite the fact that there may be factual overlaps, loss of control and self-defence are two distinct defences. The court highlighted some important differences: for example, self-defence requires only that the defendant fears violence, whereas the **s 55(3)** requires the defendant to fear **serious** violence.

It seems that in part, this ‘trigger’ is designed to cover a situation where a jury might conclude that the defendant was justified in using defensive force, but that the level of force used was unreasonable, thus preventing the defence of self-defence from operating.

A good example of this may be found within the **Tony Martin** case.

D cannot rely on the fear trigger if D incited it as an excuse to use violence (**s 55(6)(a)**). This will be covered in more detail in another element.

Key case: R v Martin (Anthony) [2002] Crim LR 136

Mr Martin, having suffered a number of burglaries at his isolated farmhouse in Norfolk, decided to take matters into his own hands. He had placed various security measures/booby traps around his property and then shot at two suspected burglars, who had entered his farmhouse during the night, with his pump-action shot gun. One of the victims (16-year-old Fred Barras) died. Mr Martin pleaded self-defence at his trial, but was unsuccessful due to the excessive force used. However, a

defence may now be available under loss of control using a fear of serious violence as a qualifying trigger.

3.3.2 Anger trigger

The second qualifying trigger, informally referred to as the anger trigger, is a more nebulous concept and has three parts to it:

- Things said and/or done;
- That constitute circumstances of an extremely grave nature; and
- That caused D to have a justifiable sense of being seriously wronged.

None of these elements are defined in the **CJA 2009**. Although we have clear direction that both the ss 55(4)(a) and (b) require objective evaluation, confirmed in **Clinton** and **Dawes**.

3.3.3 Things said or done (or both)

Limitations

D cannot rely on the anger trigger if:

- D incited it as an excuse to use violence (**s 55(6)(b)**); or
- The thing said/done constituted sexual infidelity (**s 55(6)(c)**).

This will be covered in more detail in another section.

Things said or done (or both)

This was a requirement under the old law, and confirms that there must be something actually said or done. Therefore, circumstances on their own will not be enough.



Key case: **R v Acott [1996] Crim LR 664**

Lord Steyn made it clear, by way of example, that if a person was driving in slow-moving traffic caused by snow and lost self-control, they would not be able to rely on this defence.

3.3.4 Circumstances of an extremely grave nature

The phrase, ‘constitutes circumstances of an extremely grave nature’ is not defined in the **CJA**.

What we do know is that the presence of this phrase must be determined objectively, and these circumstances should not be established easily. See Lord Judge in **R v Clinton**.

Jonathan Herring says he believes:

[...] the circumstances facing the D must have been unusual, and not part of the normal trials and disappointments of life. The circumstances could not be events which ordinary people would regard as trivial. So being jostled in a supermarket, having someone queue jump in front of you, or being sworn at would not amount, in themselves, to grave circumstances.

3.3.5 Caused D to have a justifiable sense of being seriously wronged

Reference has been made to the explanatory notes for some guidance on the meaning of the phrase, ‘caused D to have a justifiable sense of being seriously wronged’. Although the phrase is not defined, the notes do emphasise that the issue of whether this sense of being seriously wronged is justifiable is an objective question. This has since been confirmed in **R v Clinton**.

Further direction can be taken from Dennis Baker and Lucy Zhao (2012) 76 Journal of Criminal Law 254 at pp. 263-269.

Baker and Zhao suggest:

[...] Similarly, the word “justifiable” in s 55(4)(b) of the Coroners and Justice Act 2009 means that the defendant’s sense of being seriously wronged must be one that accords with contemporary society’s norms and values. In other words, it must be shown that a normal person in contemporary Britain would have felt seriously wronged in the same situation.

This is judged according to the normative standards of a normal person communally situated in Britain.

An honour killer may have in fact lost control upon learning of his 20-year-old daughter's love affair with a man of a different race or religious faith. Additionally, he may have in fact felt seriously wronged by his daughter's conduct, but this will not qualify as an 'objective' trigger for his loss of control. The fact he 'personally' felt wronged and 'subjectively' viewed the circumstances as being of an extremely grave character is irrelevant as far as the new defence is concerned. A normal person communally situated in contemporary Britain would not consider discovering his adult daughter dating someone of a different race or religious faith as constituting extremely grave circumstances. A normal relationship between a consenting adult couple does not constitute extremely grave circumstances, and a normal parent in contemporary Britain would not be unjustifiably wronged in an objective sense by having to deal with his or her adult daughter's decision to choose her own partner.

Compare this with the situation where a parent arrives at a kindergarten to pick up her child and finds a paedophile teacher molesting her child. Clearly, the latter would constitute objective provocation when measured against contemporary standards in Britain. A normal parent communally situated in contemporary society would have a justifiable sense of being seriously wronged by such conduct.

It is important to note that there is no need for the parent actually to catch the paedophile teacher in the act; it would be enough if it were '**said**' to him or her that there is a teacher in the building who has just been caught molesting your toddler. For example, if the mother uses her smartphone to inform her husband, who is waiting outside the kindergarten, that she has just found a paedophile teacher molesting their child, the husband could raise the defence if what has been '**said**' to him (ie 'I found the teacher molesting our child') causes him to lose control and run into the kindergarten and kill the paedophile teacher. The husband is provoked by the paedophile's act, even though he did not witness it. Second-hand word of such an act would have the same objective provocative effect as witnessing it.

3.4 A normal person test

Finally, under, s 54(1)(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.

Section 54(3) provides:

In subsection (1)(c) the reference to "the circumstances of D" is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.

There are two steps. The jury will have to assess:

- The gravity of the qualifying trigger to a person in the defendant's circumstances; then
- Whether as a result of that trigger a normal person might have done what the defendant did or something similar.

Key case: **DPP v Camplin [1978] AC 705 (The gravity of the qualifying trigger)**

In assessing the magnitude of the qualifying trigger it is worth noting what Lord Diplock said in this case:

To taunt a person because of his race, his physical infirmities or some shameful incident in his past may well be considered by the jury to be more offensive to the person addressed, however equable his temperament, if the facts on which the taunt is founded are true than it would be if they were not.

The test for determining the proportionality of D's reaction remains a wholly-objective one.

The normal person will have ordinary powers of tolerance and self-restraint.
The jury will not be allowed to take into account any characteristics or circumstances that would affect normal tolerance and the ability to exercise restraint.

Characteristics or circumstances likely to be excluded in assessing the normal person's capacity for tolerance and self-restraint:

- Bad temper
- Intoxication
- Extreme sensitivity
- Post-traumatic stress disorder (*R v Rejmankski*)
- Personality disorder (*R v Rejmankski*)

There are three categories to consider:

- Category one: Circumstances and characteristics will be taken into account under s 54(1)(c);
- Category two: Circumstances and characteristics which will be excluded by s 54(3); and
- Category three: Which consists of circumstances or characteristics which will be considered in assessing the magnitude of the qualifying trigger, but ignored in assessing how much tolerance and self-restraint the normal man would have. See the *R v Rejmankski* case below.

In *R v Clinton* Lord Judge pointed out that as the statute requires the jury to take into account all the circumstances, they could find themselves in a situation where they are expected to ignore sexual infidelity when considering the qualifying trigger but could take it into account here. If there is evidence that the jury feel is relevant to the overall evaluation, the courts have confirmed that the jury can take sexual infidelity into consideration, regardless of whether it goes towards the gravity of the taunt, provided it does not **only** go towards the capacity to exercise self-restraint.



Key case: *R v Rejmanski* [2017] EWCA Crim 2061

Hallet LJ explained how the third category would be dealt with.

If a mental disorder has a relevance to the defendant's conduct other than a bearing on his general capacity for tolerance or self-restraint, it is not excluded by subs. (3), and the jury will be entitled to take it into account as one of the defendant's circumstances under s54(1)(c). However, it is necessary to identify with some care how the mental disorder is said to be relevant as one of the defendant's circumstances. It must not be relied upon to undermine the principle that the conduct of the defendant is to be judged against "normal" standards, rather than the abnormal standard of an individual defendant [...] The disorder would be a relevant circumstance of the defendant, but would not be relevant to the question of the degree of tolerance and self-restraint which would be exercised by the hypothetical person referred to in s54(1)(c).



Key case: *R v Wilcocks* [2016] EWCA Crim 2043

A case where the victim had taunted the defendant about his failed suicide attempts, the Court of Appeal approved the trial judge, Holroyde J's direction:

If and insofar as you conclude a personality disorder reduced his general capacity for tolerance and self-restraint, that would not be a relevant circumstance when you are considering the defence of loss of control. But it is important to emphasise that this exclusion only relates to any feature of a personality disorder which reduced his general capacity for tolerance and self-restraint. Let me give you an illustration. If you thought that CW suffered from a personality disorder which made him unusually likely to become angry and aggressive at the slightest provocation, that would of course be relevant to diminished responsibility but it could not assist him in relation to loss of control. But if you thought that a personality disorder had caused him to attempt suicide, then you would be entitled to take into account as one of his circumstances the effect on him of being taunted that he should have killed himself.

3.5 Summary

Once the D has fulfilled the *actus reus* and *mens rea* of murder, D's conviction can be reduced to voluntary manslaughter (**s 54(7)**), if the prosecution fail to disprove, beyond reasonable doubt, that the defendant was acting under a loss of control (**s 54(5)**).

Loss of control has three aspects to it:

- D lost self-control. This does not have to be complete but D must be unable to exercise self-restraint (**R v Richens**).
- D acted as a result of a qualifying trigger:
 - Fear trigger: Defendant fears serious violence; and/or
 - Anger trigger:
 - Things said and/or done;
 - That constitute circumstances of an extremely grave nature; and
 - That causes D a justifiable sense of being seriously wronged.
 - A normal person might have done the same or a similar thing. The jury will have to assess:
 - The gravity of the qualifying trigger to a person in the defendant's circumstances; then
 - Whether as a result of that trigger a normal person might have done what the defendant did or something similar.

4 Voluntary manslaughter: Loss of control - limitations

Aside from the fact that loss of control can only be used as a special defence to murder, there are some clear limitations on the use of the qualifying triggers. The defence of loss of control cannot be used:

- (a) In an act of 'considered desire for revenge';
- (b) As an excuse to use violence;
- (c) If the thing said/done constituted sexual infidelity;
- (d) If the defendant is charged with attempted murder.

We will consider each of these limitations in greater detail.

4.1 Limitation 1: Considered desire for revenge

This defence cannot be used if it stems from an act of revenge (**s 54(4)**).

This would cover cases where there is clear evidence of planning.

The word 'considered' is important here, as it implies the defendant has had time to think about the qualifying trigger. It is clear that if the defendant is acting out of planned revenge, D will not have lost self-control. The judges in **R v Clinton** recognised this when they made it clear that **s 54(4)** must be considered within the first requirement, a loss of self-control.

4.2 Limitation 2: An excuse to use violence

The defendant cannot create the qualifying trigger as an excuse to use violence.

Further narrowing the defence, is indicated by **s 55(6)**:

- (6) 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.

Sections 55(6)(a) and (b) were considered by the Court of Appeal in **R v Clinton**. Lord Judge suggested that someone who is out to incite violence may well not 'fear' violence, but actively welcome it, and equally such a person would not feel a sense of being seriously wronged. This suggests that in such circumstances, the defence will always be difficult to run. However, Lord

Judge goes on to point out that **ss 55(6)(a) and (b)** only apply where the defendant's actions were done with a view to providing an excuse for violence; it is not enough that the defendant 'started it' to invoke **s 55(6)**. D must have had the intent from the outset to provoke the reaction that then led to the killing. It is therefore only in rare cases that these subsections will apply.

4.3 Limitation 3: The thing said/done constituted sexual infidelity

The defence cannot be relied on if the thing said/done constituted sexual infidelity.

This subsection was brought in to prevent defendants from using sexual infidelity as an excuse for killing.

Section 55(6) states:

In determining whether a loss of self-control had a qualifying trigger—

[...]

(c) the fact that a thing done or said constituted sexual infidelity is to be disregarded.

Much of the **R v Clinton** judgment deals with the prohibition contained within (**s 55(6)(c)**). It includes a useful analysis of how complicated it is to determine whether the thing said or done actually constitutes sexual infidelity. It is not as straightforward as it first sounds. The Court of Appeal questions whether the exception under **s 55(6)(c)** should apply in the following scenarios:

- If sexual infidelity is in the background, but is not the true trigger or the sole trigger for the loss of control.
- Where there has not in fact been any sexual infidelity because V, or someone else, has lied or made it up to taunt D.
- If the sexual infidelity has not taken place yet, eg V is about to leave D for someone else, but has not yet been sexually intimate with them.



Key case: **R v Clinton, Parker and Evans [2012] EWCA Crim 2**

Lord Judge quoted from Hansard and chose to interpret the intention of those proposing the clause in the bill as being to exclude the defence only when sexual infidelity is the sole qualifying trigger. He said that if there are other things said or done or if there is also a fear of serious violence, then sexual infidelity should be considered. Lord Judge went on to say:

However, to seek to compartmentalise sexual infidelity and exclude it when it is integral to the facts as a whole is not only much more difficult, but is unrealistic and carries with it the potential for injustice. In the examples we have given earlier in this judgment, we do not see how any sensible evaluation of the gravity of the circumstances or their impact on the defendant could be made if the jury, having, in accordance with the legislation, heard the evidence, were then to be directed to excise from their evaluation of the qualifying trigger the matters said to constitute sexual infidelity, and to put them into distinct compartments to be disregarded.

In our judgment, where sexual infidelity is integral to and forms an essential part of the context in which to make a just evaluation whether a qualifying trigger properly falls within the ambit of subsections 55(3) and 55(4), the prohibition in section 55(6)(c) does not operate to exclude it.

It is likely that in most cases where sexual infidelity has caused the defendant to lose their self-control, there will be other factors which could make up a qualifying trigger such as the threat that the defendant will lose the children, as was the case in **R v Clinton**, or that they will lose their home. It will then be possible to include sexual infidelity within the argument that a qualifying trigger exists, to ensure that the jury has the 'whole story'.

4.4 Limitation 4: Attempted murder

The CJA is silent on this point. However, provocation was not available as a defence to a charge of attempted murder (*R v Campbell* [1997] Crim LR 495).

Smith, Hogan and Ormerod's Criminal Law states that loss of control 'is not a defence to a charge of attempted murder or any other charge other than murder'.

4.5 Summary

This section considered the limitations on the use of the special defence of loss of control which is available only in relation to murder.

The defence of loss of control cannot be used:

- In an act of 'considered desire for revenge' (s 54(4)).
- As an excuse to use violence (ss 55(6)(a) and (b)). It is not enough that the defendant 'started it'.
- If the thing said/done constituted sexual infidelity (s 55(6)(c)). However, it is likely that in most cases where sexual infidelity has caused the defendant to lose their self-control, there will be other factors which could make up a qualifying trigger. It will then be possible to include sexual infidelity within the argument that a qualifying trigger exists, to ensure that the jury has the 'whole story'.
- For attempted murder, see *R v Campbell* and Smith, Hogan and Ormerod's Criminal Law.

5 Murder, voluntary manslaughter and intoxication

You will come across intoxication in two different forms in this element:

- As a way to negate the mens rea of murder; or
- As an influencing factor on the special defences of loss of control and diminished responsibility.

If D is intoxicated loss of control and/or diminished responsibility can still be potentially argued as partial defences to murder, reducing the conviction to voluntary manslaughter if successful.

Intoxication can mean with drugs or alcohol.

Negating the mens rea

A defendant can use evidence of their intoxication to show that they did not form the necessary mens rea for murder - that the defendant did not form the mens rea of intention to kill or cause grievous bodily harm to the victim.

Remember, the prosecution need to prove, beyond reasonable doubt, that the defendant has committed the *actus reus* and the mens rea of murder. If, due to intoxication, the defendant did not form the mens rea of murder, then the defendant will be entitled to an acquittal.

5.1 Intoxication and loss of control

Key case: *R v Asmelash* [2013] EWCA Crim 157

The interaction between intoxication and the defence of loss of control was explained in this case of where Lord Judge stated:

It does not mean that the defendant who has been drinking is deprived of any possible loss of control defence: it simply means, as the judge explained, that the loss of control defence must be approached without reference to the defendant's voluntary intoxication. If a sober individual in the defendant's circumstances, with normal levels of tolerance and self-restraint might have behaved in the same way as the defendant confronted by the relevant qualifying trigger, he would not be deprived of the loss of control defence just because he was not sober. And different considerations would arise if, a defendant with a severe problem with alcohol or drugs was mercilessly taunted about the condition, to the extent that it constituted a

qualifying trigger, the alcohol or drug problem would then form part of the circumstances for consideration.



Key case: *R v Morhall [1996] AC 90*

This is a case under the old law on provocation. The defendant was addicted to glue and had been taunted about his glue-sniffing habit and how it made him a hopeless character, incapable of employment. The fact that he was addicted to glue was relevant in assessing the gravity of the provocation, but the jury had to consider whether a reasonable man, who was not high on glue, would have done what he did. So, the law is unchanged and directs us as follows:

- (a) Defendant is not precluded from using the defence just because he is drunk;
 - (b) His intoxication will be ignored in accordance with the **CJA 2009, s 54(3)** (as a circumstance whose only relevance to D's conduct is that it bears on D's general capacity for tolerance or self-restraint), if it has no connection to the things said or done which make up the qualifying trigger; and
 - (c) If there is a connection between the things said or done which make up the qualifying trigger eg when the defendant is taunted about his intoxication, then the jury can take that intoxication into account in assessing the gravity of the qualifying trigger.
-

5.2 Intoxication and diminished responsibility

The impact of intoxication on the defence of diminished responsibility is an issue with which the courts have long struggled.

What follows is an outline on how the courts have dealt with this, which, it is believed, remains the position for this defence despite the modification of the **HA 1957, s 2**.

The courts have taken two approaches, depending on whether the intoxication is:

- Independent of the abnormality- the defendant has an abnormality of mental functioning **and** is voluntarily intoxicated; or
- As a result of alcohol dependency syndrome (ADS).

5.2.1 Intoxication independent of the abnormality

A defendant might, at the time of the killing suffer from both an abnormality of mental functioning and from the effect of alcohol taken before the killing. The leading authority on this situation before the amendments was **R v Dietrichmann [2003] 1 AC 1209**, where the House of Lords suggested that it would be an impossible task for the jury simply to ignore the effect of the alcohol and decide whether the defendant, sober, would still have killed as a result of the abnormality. Instead, the jury must first consider the effect of the matters other than the alcohol and determine whether they amounted to such abnormality of mental functioning as might have substantially impaired the defendant's ability to do one of the things in the **2(1A) HA**. From that case, the jury should consider:

If the defendant was intoxicated at the time of the killing, the jury should then ask themselves: has the defendant satisfied you that, despite the drink,

- (1) he was suffering from mental abnormality; and
- (2) his mental abnormality substantially impaired his mental responsibility for his fatal acts?

Note that, in these circumstances, the jury may still find that the defence operates, even if they consider that the alcohol may have played a part in the defendant's inability to do one of the factors in the **HA 1957, s 2(1A)**.



Key case: *R v Kay [2017] EWCA Crim 647*

The Court of Appeal in considering the amended defence of diminished responsibility said that it was bound by the case of *R v Dietschmann*, so it is clear that this case remains the authority to be applied.



Key case: *R v Dowds [2012] 1 WLR 2576 at 2590*

Hughes LJ (as he then was) said:

It is enough to say that it is quite clear that the reformulation of the statutory conditions for diminished responsibility was not intended to reverse the well-established rule that voluntary acute intoxication is not capable of being relied upon to found diminished responsibility. That remains the law. The presence of a “recognised medical condition” is a necessary, but not always a sufficient, condition to raise the issue of diminished responsibility.

5.2.2 Alcohol dependency syndrome

We will consider a series of cases which make up the courts approach to D's seeking to rely on diminished responsibility with alcohol dependency syndrome (ADS).



Key case: *R v Wood [2008] EWCA Crim 1305*

The Court of Appeal acknowledged that it was somewhat artificial to draw a distinction where that defendant has ADS between purely involuntary drinking and drinking where the defendant has some ability to stop. Instead, the jury must decide whether the ADS was a significant factor in leading the defendant to consume the alcohol, even if there was an element of voluntary choice either to start drinking or not to stop at some point. If they decide that it was a significant factor, they can conclude that the defendant's responsibility was impaired as a result of the abnormality of mental functioning.



Key case: *R v Stewart [2009] EWCA Crim 593*

Further guidance was given in this case, where the Court of Appeal gave guidance as to how a judge should direct the jury in cases involving ADS. First, they pointed out that the jury must be satisfied that there was an abnormality of mind (which would now be an abnormality of mental functioning). Evidence of ADS may well assist the jury here. However, it would, depending on the evidence, be open to them to conclude that, notwithstanding the existence of the condition, at the time of the killing, the defendant was not suffering from an abnormality of mental functioning.

Second, if the jury are satisfied that the defendant was suffering from an abnormality, they then need to be satisfied that this arises from a recognised medical condition. If there is clear evidence of ADS, then this requirement is likely to be satisfied. Any attempt to rely on voluntary and temporary drunkenness, even when based on habitual heavy binge drinking, will not be sufficient.

Third, under the old law, the Court of Appeal directed that the jury must consider whether the ADS substantially impaired the defendant's mental responsibility. The Court of Appeal suggested a number of factors that may assist the jury in deciding this:

- (a) The extent and seriousness of the defendant's dependency;
- (b) The extent to which his ability to control his drinking was reduced;
- (c) Whether he was capable of abstinence and if so;
- (d) For how long; and
- (e) Whether he was choosing for some particular reason (such as a birthday) to decide to get drunk or to drink more than usual.

Without seeking to be prescriptive about considerations relevant to an individual case, the defendant's pattern of drinking in the days leading to the day of the killing, and on the day of the killing itself, and notwithstanding his consumption of alcohol, his ability, if any, to make

apparently sensible and rational decisions about ordinary day to day matters at the relevant time, may all bear on the jury's decision whether diminished responsibility is established in the context of this individual defendant's alcohol dependency syndrome.



Key case: *R v Kay [2017] EWCA Crim 647*

The approach was approved for the amended law by the Court of Appeal in this case. Hallett LJ:

[W]e see no reason to depart from the approach in *R v Stewart*. Coupled with the provisions of section 2(1) of the Homicide Act 1957(as substituted), it provides a clear and sensible approach for directing the jury. The approach is neither binary nor simplistic but is flexible enough to encompass a wide variety of factual circumstances in a manner that is fair to all.

It is suggested that the same considerations will be made when determining whether the defendant is able to do one of the things (**s 2(1A) HA**).

5.3 Summary

These pages summarise where in your analysis you will need to consider intoxication.

Murder

- *Actus reus*
 - Unlawful
 - Killing
 - Human being
 - Queen's peace
- *Mens rea*: Even though intoxicated, did D form the *mens rea* of intention to kill or intention to cause grievous bodily harm? A drunken intent is still intent (**Kingston**).

Loss of control

- Did D lose self-control?
- Did D act due to the fear or anger qualifying trigger? D's drug or alcohol addiction can be taken into account in assessing the magnitude of the qualifying anger trigger if D was taunted about the addiction.
- Normal person test- an intoxicated person is not precluded from using the defence. If D is addicted to drugs or alcohol this will be a characteristic given to the normal person but the normal person will still have normal levels of tolerance and self-restraint and be sober (**Asmelaš**).

Voluntary intoxication is not, on its own, capable of being relied upon to found the defence of diminished responsibility (**Dowds**). If the defendant has an abnormality of mental functioning (AMF) and is voluntarily intoxicated (**Dietschmann**).

- D must have an AMF.
- AMF must arise from a recognised medical condition.
- AMF must have substantially impaired the defendant's ability to do one of the things in **s2(1A)**.
- AMF must provide an explanation for D's conduct, even if it is not the only cause - alcohol can be another reason.

If the defendant's AMF **arises from** the alcohol dependency syndrome (ADS).

- D must have an AMF: At the time of the killing due to ADS. Factors to be taken into account include the extent and severity of the ADS.
- AMF must arise from a recognised medical condition: The alcohol dependency syndrome.
- AMF must have substantially impaired the defendant's ability to do one of the things in **s 2(1A)**.
- AMF must provide an explanation for D's conduct, even if it is not the only cause (**s 2(1B)**).

6 Unlawful act manslaughter

6.1 Introduction

Involuntary manslaughter includes all varieties of unlawful homicide other than murder. It is distinguished from murder by the lack of 'malice aforethought'. In *Andrews v DPP [1937] AC 576*, Lord Atkin at 581, alluded to the difficulties of defining an offence (or offences) which cover a wide range of circumstances:

Of all crimes manslaughter appears to afford most difficulties of definition, for it concerns homicide in so many and so varying conditions [...] the law [...] recognises murder on one hand based mainly, though not exclusively, on an intention to kill, and manslaughter on the other hand, based mainly, though not exclusively, on the absence of intent to kill, but with the presence of an element of 'unlawfulness' which is the elusive factor.

We will begin by considering one of two main forms of involuntary manslaughter: unlawful act (or constructive) manslaughter.

Here, the accused lacks the mens rea for murder but kills someone in the course of committing an unlawful (criminal) act.

Key case: *DPP v Newbury and Jones [1977] AC 500*

The modern definition of unlawful act manslaughter arises from this case. The defendants had pushed a concrete paving slab onto an oncoming train, killing the guard.

The court stated that to be guilty of the offence the prosecution must prove that:

- The defendants intentionally (voluntarily) did an act;
- The act was unlawful;
- The unlawful act was dangerous; and
- The unlawful act caused the death of the victim.

6.2 The defendant's act was intentional

The accused must intentionally, ie voluntarily, have carried out an act, which results in the death of a person. This refers to intention with regard to the doing of the act, not to the consequences which flow from it.

6.3 The defendant's act was unlawful

There are three aspects to the defendant's act being unlawful. It must be:

- A criminal act;
- An intrinsically unlawful act; and
- An act rather than an omission.

6.3.1 The unlawful act must be a criminal act

Key case: *R v Franklin (1883) 15 Cox CC 163*

Initially, it was accepted that the unlawful act could be civil or criminal. However, since this decision it has been settled law that the unlawful act must be criminal.

The mere fact of a civil wrong committed by one person against another ought not to be used as an incident which is a necessary step in a criminal case.

Key case: *R v Lamb [1967] 2 QB 981*

The criminal act must be independent of the fact that it has caused death. Both the *actus reus* and *mens rea* of the criminal act must be proven.

The defendant pointed a revolver at the victim as a practical joke. Both parties believed that there was no risk of the revolver firing a bullet. Unfortunately, a bullet was fired and the victim was killed. Lamb was convicted of manslaughter.

The Court of Appeal allowed the appeal against conviction on the basis that there had not been an unlawful act. The defendant had no intention of committing an assault (at that time, intention was the only mens rea for assault) and therefore all elements of the offence had not been proven.



Key case: *R v Scarlett [1993] 4 All ER 629*

The defendant was the landlord of a pub. He believed the deceased was about to hit him and therefore the defendant physically removed him from the premises. The deceased fell down some steps and suffered a head injury from which he died. The Court of Appeal held that if the defendant was using reasonable force in acting in self-defence or to prevent a crime, there would be no unlawful assault and accordingly the defendant's conviction for unlawful act manslaughter was quashed.

The unlawful act need not be serious and can simply be a common assault. Typically, the unlawful act will be an offence against the person, but it can also be any offence eg theft or criminal damage.

6.3.2 The act must be intrinsically unlawful

The unlawful act cannot be based on a lawful act, which becomes unlawful only because of the negligent or reckless manner in which it is performed eg driving.



Key case: *Andrews v Director of Public Prosecutions [1937] AC 576*

The principle that the act must be intrinsically unlawful came from this case. Lord Atkin stated:

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. If it were otherwise a man who killed another while driving without due care and attention would ex necessitate commit manslaughter.

6.3.3 There must be an act rather than an omission

A person cannot be guilty of unlawful act manslaughter by an omission. A failure to do something while under a duty to do it would correctly be charged as gross negligence manslaughter.



Key case: *R v Lowe [1973] QB 702*

The Court of Appeal quashed the defendant's manslaughter conviction, which had resulted from his criminal omission to look after his nine-week-old daughter. Phillimore LJ stated:

If I strike a child in a manner likely to cause harm it is right that if the child dies I may be charged with manslaughter. If, however, I omit to do something with the result that it suffers injury to its health which results in its death, we think that a charge of manslaughter should not be an inevitable consequence, even if the omission is deliberate.

6.4 The act must be dangerous



Key case: *R v Church [1966] 1 QB 59*

Edmund Davies J stated that:

[...] the unlawful act must be such as 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.

Whether the act is dangerous is an objective test and depends not on the accused's appreciation of the likely harm, but on what the sober and reasonable person would appreciate. This was affirmed in **DPP v Newbury**.

6.4.1 Type of harm



Key case: R v Dawson (1985) 81 Cr App R 150

The Court of Appeal said that the type of harm likely to result from the unlawful act must be physical and not emotional harm. However, Watkins LJ said:

[...] there seems to us to be no sensible reason why shock produced by fright should not come within the definition of harm in the context [...]. Shock can produce devastating and lasting effects, for instance upon the nervous system. That is surely harm.



Key case: R v JM & SM (2012) EWCA Crim 2293

The Court of Appeal said that the type of harm a reasonable person would have foreseen does not have to be that actually caused.

6.4.2 Circumstances to be taken into account

The dangerousness of the act is judged from the viewpoint of a sober and reasonable person. The reasonable person will have knowledge of the circumstances that they would have had if they had been in the accused's shoes at the time of the offence.



Key case: R v Dawson (1985) 81 Cr App R 150

The defendant and accomplices, wearing masks and armed with an imitation gun and a pickaxe handle, robbed a petrol station. The cashier suffered from a heart condition and died shortly after the robbery. The trial judge had directed the jury that the reasonable person would know of the victim's bad heart. This was held to be a misdirection and their appeals were allowed on the basis that a sober and reasonable person present at the scene of the crime would have known the robbery could cause fear but could not have known of the heart condition:

This test can only be undertaken upon the basis of the knowledge gained by a sober and reasonable man as though he were present at the scene of and watched the unlawful act being performed [...]. In other words, he has the same knowledge as the man attempting to rob and no more.

The Court of Appeal overturned the conviction because the jury had been misdirected. It is possible that a properly directed jury could have found what the defendants did to be dangerous.

The defendant could become liable if they became aware of a fact during the commission of the offence which would make the act dangerous.



Key case: R v Watson [1989] 2 All ER 865

Facts: In **Watson**, the defendants broke into the house of an elderly and frail man. The elderly man confronted the defendants and died of a heart attack shortly after the burglary. The defendants appealed against their conviction for manslaughter on the basis that when they entered the house they did not know that the elderly man was present and consequently the reasonable person would not know this. As a result, their act of burglary was not dangerous.

Reference was made by Lord Lane CJ to the explanation of how a burglary could cause death to someone with heart disease:

Dr West, who was called on behalf of the prosecution, had performed the autopsy. He was sure that the burglary was the cause of death. He described for the benefit of the jury how

excitement causes the production of adrenalin making the heart beat faster. The heart therefore needs more blood and oxygen, but is unable to obtain it if there is a chronic heart disease, as there was here, with the result that the arteries leading to the heart are substantially narrowed. The heart then begins to beat irregularly, it eventually stops beating and thus death ensues.

Held: The Court of Appeal stated that a reasonable person in the defendant's shoes would have realised the act was dangerous once they became aware of the particular circumstances. It did not matter that the defendants did not know this information (frail, elderly man) when they first entered the house. The unlawful act comprised the whole of the belligerent intrusion during which time they were gathering knowledge and information about the victim.

Hence, following this rationale in **Watson**, the action of burglary became dangerous once they realised the elderly man was in the house. A reasonable person would consider that there was the risk of some harm being caused to an elderly and frail man.



Key case: R v Ball [1989] Crim LR 730

The defendant kept a mixture of live and blank cartridges for his gun in his overall pockets. He picked up his gun and a handful of cartridges and went out of his house to confront the victim. He fired at the victim and killed him. Ball claimed that he had mistakenly thought he had put a blank cartridge in the gun. The court held that the reasonable person would have been aware of the difference in weight and would not have made that mistake. Therefore the act was dangerous.

In **R v Ball** the reasonable person was given knowledge they would have gained from being in the defendant's shoes a while before the unlawful act. The reasonable person will therefore have any special knowledge which the defendant has. This has now been confirmed by the Court of Appeal in **R v Farnon [2015] EWCA Crim 351** at pp 12 and 22.

6.4.3 Summary

We could summarise the legal principles from the cases on the act being dangerous as follows:

- The sober and reasonable person knows everything they would have known if they had been in the defendant's shoes at the time of the offence.
- The sober and reasonable person has any special knowledge that the defendant has or ought to have known.
- Being reasonable, they do not make any unreasonable mistakes made by the defendant.

6.5 The unlawful act caused the death of the victim

Normal rules of causation apply (Chapter 1). The act must have both factually and legally caused the death of the victim. The issue of causation is the last stage in the four-part test for unlawful act manslaughter.

6.6 Causing death by supplying drugs

The courts have faced particular difficulties in applying the rules relating to unlawful act manslaughter to deaths arising from the supply, by the defendant to the victim, of controlled drugs, such as heroin, cocaine, etc. In order to understand the rules relating to this issue, it is helpful to distinguish between two situations, where D:

- (a) Directly administers the drug to V, for example by taking a syringe and injecting V with it; and
- (b) Merely supplies V with the drugs, or assists V, such as by mixing a particular 'cocktail' of drugs, or filling the syringe before passing it on to V, who then takes the drugs themselves.

Previously, the courts, through some ingenious mental gymnastics, successfully managed to bring cases falling under (b) into the ambit of unlawful act manslaughter. The confusion in law that these efforts caused has been resolved to a large extent by the case of **R v Kennedy [2007] 3 WLR 612**, discussed on the pages which follow.

6.6.1 Administration of the drug by the defendant



Key case: *R v Cato* [1976] 1 WLR 110

The deceased asked Cato to inject him with heroin. Cato obliged and the victim died as a result. Cato was convicted of manslaughter. He appealed on the basis that there had been no unlawful act as the victim had consented. The Court of Appeal upheld Cato's conviction for unlawful act manslaughter, holding that, by injecting the deceased with heroin, Cato had acted unlawfully by administering a noxious thing contrary to **s 23 Offences Against the Person Act 1861 (OAPA)**, and the deceased's death was caused by this unlawful act. Consent by the victim was no defence to this.

R v Kennedy confirmed the decision of *R v Cato* on this point.

6.6.2 Supply of drugs and assisting the deceased to take the drugs

This concerns situations where the deceased voluntarily consumes the drug, in awareness of what they are taking. Where the deceased is deceived, or is otherwise unaware of what they are taking, the supplier of the drug may still be guilty of an offence under **s 23 OAPA**. This offence could form the basis of a conviction for unlawful act manslaughter.

Where the deceased is aware of what they are taking, could the supplier of drugs still be convicted? Does it make a difference if the supplier of drugs does more than simply supplying, such as by mixing a particular 'cocktail' of drugs, or filling the syringe before passing it on to V? The issues fell to be determined by the House of Lords in *R v Kennedy* [2007] 3 WLR 612.

The offence of unlawfully by administering a noxious thing contrary to **s 23 OAPA** is beyond the scope of this Workbook.



Key case: *R v Kennedy* [2007] 3 WLR 612

Kennedy supplied a dose of heroin in a syringe, which he handed to the victim, who injected himself, and almost immediately suffered an adverse reaction. The victim later died of the consequences of intoxication by opiates and alcohol. Kennedy was convicted of unlawful act manslaughter and his conviction was upheld by the Court of Appeal on two separate occasions.

The question certified by the Court of Appeal for the consideration of the House following Kennedy's second appeal was as follows:

When is it appropriate to find someone guilty of manslaughter where that person has been involved in the supply of a class A controlled drug, which is then freely and voluntarily self-administered by the person to whom it was supplied, and the administration of the drug then causes his death?

The answer given by the House of Lords was emphatic:

'In the case of a fully-informed and responsible adult, never.' (Per Lord Bingham.)

Lord Bingham amplified this comment in the context of the issue of causation:

The criminal law generally assumes the existence of free will. The law recognises certain exceptions, in the case of the young, those who for any reason are not fully responsible for their actions, and the vulnerable, and it acknowledges situations of duress and necessity, as also of deception and mistake. But, generally speaking, informed adults of sound mind are treated as autonomous beings able to make their own decisions how they will act, and none of the exceptions is relied on as possibly applicable in this case. Thus D is not to be treated as causing V to act in a certain way if V makes a voluntary and informed decision to act in that way rather than another.

In this case the heroin is described as "freely and voluntarily self-administered" by the deceased. This, on the facts, is an inevitable finding. The appellant supplied the heroin and prepared the syringe. But the deceased had a choice whether to inject himself or not. He chose to do so, knowing what he was doing. It was his act.

6.7 Summary

This section considered one type of involuntary manslaughter, unlawful act manslaughter.

In **DPP v Newbury** and Jones the court stated that to be guilty of the offence the prosecution must prove that:

- **The defendant intentionally (voluntarily) did an act** which results in the death of a person (D does not need intention regarding the consequences which flow from the act).
- **The act was unlawful** It must be:
 - A criminal act rather than a civil one (**R v Franklin**), the *actus reus* and *mens rea* of the offence must be proven (**R v Lamb**) and there must be no valid defence (**R v Scarlett**).
 - An intrinsically unlawful act: It cannot be a lawful act which becomes unlawful only because of the negligent or reckless manner in which it is performed eg driving (**Andrews v DPP**).
 - An act rather than an omission (**R v Lowe**).
- **The unlawful act was dangerous:** An objective test which asks if all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm, albeit not serious harm (**R v Church**).

Physical, not emotional harm but includes shock that produces physical effects (**Dawson**).

- The sober and reasonable person knows everything they would have known if they had been in the defendant's shoes at the time of the offence (**Dawson, Watson**).
 - The sober and reasonable person has any special knowledge that the defendant has or ought to have known (**Ball**).
 - Being reasonable, they do not make any unreasonable mistakes made by the defendant (**Ball**).
- **The unlawful act caused the death of the victim:** The act must have both factually and legally caused the death of the victim. If D:
 - Directly administers a drug to V, D causes V's death as consent by the V is no defence (**Cato**).
 - Merely supplies V with the drugs, or assists V, D does not cause V's death, so long as V is a fully informed and responsible adult who freely and voluntarily self-administers (**Kennedy**).

7 Gross negligence manslaughter

Involuntary manslaughter includes all varieties of unlawful homicide other than murder. It is distinguished from murder by the lack of 'malice aforethought'. This element will consider one of two main forms of involuntary manslaughter: gross negligence manslaughter. Unlawful act manslaughter is covered in a separate element. Unlike unlawful act manslaughter, there is no requirement that the defendant was involved in a criminal act. The basis of a gross negligence manslaughter charge will be that the defendant has breached a duty of care owed to V. This can be done through a positive act or by an omission which must be considered so bad that it necessitates a criminal charge.



Key case: **R v Bateman (1925) 19 Cr App R 8**

The classic definition of negligence in relation to manslaughter was given in this case:

[...] in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.



Key case: *Andrews v DPP* [1937] AC 576

Defining the precise nature of negligence has proved problematic for the courts. In this case the House of Lords summarised the degree of negligence as being close to reckless, but not completely the same, Lord Atkin stated:

Probably of all the epithets that can be applied “reckless” most nearly covers the case [...] but it is probably not all-embracing, for “reckless” suggests an indifference to risk, whereas the accused may have appreciated the risk and intended to avoid it and yet shown in the means adopted to avoid the risk such a high degree of negligence as would justify a conviction.



Key case: *R v Adomako* [1995] 1 AC 171

The leading case on gross negligence manslaughter is this House of Lords decision. In **Adomako**, the defendant was a locum anaesthetist during an operation to correct a detached retina. He failed to notice that a tube had become dislodged during the course of the operation, and this resulted in the patient being deprived of oxygen. The patient suffered a cardiac arrest and died. The defendant was convicted of manslaughter. Adomako appealed to the House of Lords on the basis that the correct test for this form of manslaughter should be recklessness not negligence.

The Lords dismissed his appeal and expressed the view that **Andrews v DPP** had not been overruled by the House, and that, therefore, gross negligence and not recklessness was the correct test for this form of manslaughter. Lord MacKay said (p 296):

In my opinion the law as stated in these two authorities [**Bateman and Andrews**] is satisfactory as providing a proper basis for describing the crime of involuntary manslaughter [...]. On this basis in my opinion the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who died. If such breach of duty is established the next question is whether that breach of duty caused the death of the victim.

7.1 Requirements of gross negligence manslaughter

The basic requirements for gross negligence manslaughter as laid down in **Adomako** are as follows:

- (a) The existence of a duty of care;
- (b) Breach of that duty;
- (c) That the breach causes death;
- (d) That there was a risk of death; and
- (e) That the breach of duty was so bad as to amount to ‘gross negligence’.

7.2 Duty of care

Duty of care is essentially given the same meaning it has in the law of tort, and a defendant will owe such a duty towards anyone where harm caused by their acts was foreseeable.

In certain situations, this can be easy to establish as it is now settled in the law of tort that everyone has a general duty to take care to avoid injury **by a positive act** to their neighbour.

You also know that liability can arise for **an omission** in circumstances where the defendant is under a specific duty to act. This duty can arise by statute or by contract. It can also arise as a result of a special relationship between the defendant and the victim, as a result of the defendant's voluntary assumption of a duty of care, or as a result of the defendant creating a dangerous situation.

Review the previous chapter for the legal principles on omissions.

Even if the defendant's act does not fall neatly in to either category set out above, there may still be liability. The judge will decide whether there is sufficient evidence to go before the jury based on the specific facts of each case.



Key case: *R v Singh* [1999] Crim LR 582

The deceased tenant had died from carbon monoxide poisoning as a result of a faulty gas fire. The defendant was the maintenance man for the lodging house where the deceased had been staying and he was in charge of the lodging house while his father, the owner, was away in India. The trial judge summed up the duty of care owed in the case:

In [the defendant's] case there existed a close relationship between him and his father's tenants [...] Mr Gurpal Singh was [...] the "maintenance man" he was also one of the two people to whom tenants could bring any complaints or inquiries that they had with the prospect of there being dealt with [...]. Therefore Mr Gurpal Singh had assumed a duty of care towards his father's tenants.

The Court of Appeal approved 'as a model of its kind' the judge's direction and the appeal against conviction was dismissed.



Key case: *R v Ruffell* [2003] 2 Cr App R (S) 53

In this case R had supplied drugs to the victim who had clearly suffered a severe adverse reaction to the drugs. R did various things, such as putting the V in a cold bath, to try to revive him. The next day R rang the V's mother and said he was going to work, and she would find her son outside R's house. The mother asked R to bring V in and cover him with a blanket. R agreed, but left V outside. It was very cold weather and V died from a combination of hypothermia and the drugs.

The Court of Appeal, in reviewing the sentence, found that the defendant had breached a duty of care towards the victim even though it is not clear from the judgment on what basis the duty arose. It could have been that R had voluntarily assumed a duty of care, or it could have been that R had created a dangerous situation as in *R v Miller*.

The courts have made it clear that the defendant could still have a duty of care within criminal cases, even though such liability would be avoided in tort.



Key case: *R v Wacker* [2003] 4 All ER 295

The appellant, a lorry driver, was convicted of killing by gross negligence after 58 illegal immigrants were suffocated while being transported in his lorry. The defendant argued that the law of negligence did not recognise a duty of care arising between parties to a criminal enterprise.

The Court of Appeal upheld his conviction stating that it was inappropriate to apply the tortious principle of *ex turpi causa non oritur actio* in a criminal action.

7.3 Breach of duty of care

The House of Lords in *Adomako* held that the ordinary principles of negligence apply in deciding whether the defendant had breached their duty of care. The question is one of whether the defendant's acts fell below the standard expected of a reasonable person.

The reasonable person will be attributed with any special skill used by the defendant. In *Adomako* the question was whether the defendant's actions had fallen below the standard of a reasonable anaesthetist.

7.4 The breach caused the death of the victim

The normal causation principles apply.

7.5 There was a risk of death

In *Adomako*, Lord Mackay referred to the risk of death, but then quoted the test in *Bateman*, which refers to a disregard to the 'life and safety of others'.

However, in **Singh** it was held that there must ‘be an obvious and serious risk not merely of injury or even serious injury, but of death’.

Key case: **R v Misra and Srivastava [2005] 1 Cr App R 21**

That there must be an obvious and serious risk not merely of injury or even serious injury, but of death was confirmed by the Court of Appeal in this case. Lord Judge stated:

In our judgment, where the issue of risk is engaged, **Adomako** demonstrates, and it is now clearly established, that it relates to the risk of death, and is not sufficiently satisfied by the risk of bodily injury or injury to health.

At this point he does not appear to require an obvious and serious risk. However, later in his judgment he refers to the quote from **R v Singh**, above, with approval.

Key case: **R v Rose [2017] EWCA Crim 1168**

The Court of Appeal overturned the conviction of an optometrist due to this element of the offence not being fulfilled.

Rose had performed a routine sight test on a seven-year-old boy, but failed to use an ophthalmoscope to view his optic nerves. Rose had a duty to do this internal examination which would have revealed he was suffering from hydrocephalus. At her trial it was found that a competent optometrist would have carried out such an examination and having done so would have seen that the optic nerve was swollen and immediately referred the boy for medical treatment which would have saved his life. In the event, the boy’s condition was not detected in time and he died.

The Court of Appeal held that test for the fourth element of gross negligence manslaughter was whether a reasonable and competent optometrist would have seen an obvious and serious risk at the time of the breach of duty. It was not whether a reasonable and competent optometrist would have seen an obvious and serious risk if she had not breached her duty. This criteria had not been fulfilled in Rose’s case. A mere possibility that an assessment might reveal something life-threatening was not the same as an obvious risk of death: an obvious risk was a present risk which was clear and unambiguous not one which might become apparent on further investigation.

7.6 The breach was sufficiently serious to constitute gross negligence

Judges have struggled with how to direct juries to differentiate between negligence causing death justifying a successful civil action for compensation, and negligence, which is sufficiently serious to justify a conviction for manslaughter. In **Adomako**, the House of Lords acknowledged that the infinite variety of circumstances in which the issue may arise precludes any more precise definition of the distinction and therefore left the issue to the jury with relatively little guidance.

On the pages that follow a variety of cases are considered to give you a flavour of the factually specific decisions that have been made on what constitutes gross negligence.

Key case: **R v Litchfield [1998] Crim LR 508**

The difficulty of explaining the distinction to a jury between civil negligence and criminal gross negligence is illustrated in this case.

The captain of a schooner was convicted of manslaughter by gross negligence when three of his crew members died after he sailed perilously close to the Cornish coast, knowing that he would have to rely on his engines and knowing that they may break down as a result of him using contaminated fuel.

According to the trial judge ‘with his vast experience of sailing, he must have appreciated the obvious and serious risk of death to his crew in navigating his ship in the way he did’.

The Court of Appeal upheld his conviction based on the trial judge’s direction that the question for the jury was whether the captain’s conduct was:

[...] so bad, so obviously wrong, that it can be properly condemned as criminal, not in some technical sense of the word, like somebody might be regarded as criminal if they did not have a light on the back of their bicycle, but in the ordinary language of men and women of the world.

In this case, the fact that the defendant had recognised the risk made it easier for the jury to find he had been grossly negligent.



Key case: *R v Adomako* [1995] 1 AC 171

Adomako was an anaesthetist attending an operation. The defendant did not appreciate that there had been a disconnection of the oxygen tube. After 4 mins an alarm sounded. Despite resuscitation attempts, the patient died 9 minutes after the disconnection. At no stage between the alarm and the death was the connection checked. This was despite the fact that the patient started to turn blue after the oxygen tube had been disconnected. The prosecution called witnesses who stated that: 'the standard of care that the patient received was abysmal'. Checking the oxygen tube would have been absolutely basic procedure.

Lord Mackay gave the question as follows:

This is necessarily a question of degree and an attempt to specify that degree more closely is I think likely to achieve only a spurious precision. The essence of the matter which is supremely a jury question is 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 is perhaps unusual in that it involved a single, terrible mistake leading to liability (though Lord MacKay emphasises that A missed several opportunities to spot what was wrong).



Key case: *R v Bateman* (1925) 19 Cr App R 8

In order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment. The Court of Appeal held that proof of gross negligence did not require proof of any particular state of mind, and did not require evidence as to the accused's state of mind.



Key case: *A-G's Ref(No 2 of 1999)* [2000] QB 796

The Court of Appeal held that proof of gross negligence did not require proof of any particular state of mind, and did not require evidence as to the accused's state of mind.



Key case: *R v Misra and Srivastava* [2005] 1 Cr App R 21

The victim developed an infection following a routine operation. The two defendants were between them the doctors responsible for V's post operative care over a period of 48 hours from the time of his operation until the time of death (S on night shift, M on days). Despite numerous signs of significant post-operative problems (raised temperature, low blood pressure, high pulse) they took little action. They did not check blood tests that had been ordered, ignored advice from senior nurses and other doctors, recorded the patient as being fine and basically did nothing to treat the patient. Such a catalogue of errors could not realistically be anything other than grossly negligent.



Key case: *R v Singh [1999] Crim LR 582*

S was the son of the owner of a building split into bedsits. S acted as rent collector, maintenance man and main link between the tenants and his father. At the time of the death, he was in charge as his father was in India. Several tenants told him of problems with their gas fires, including the smell of gas and symptoms suggestive of carbon monoxide poisoning over a period of four months. S acknowledged he was aware of the dangers of carbon monoxide poisoning. One of the tenants died of carbon monoxide poisoning. S, his father and the fitter who inspected the fires the previous year were all convicted of manslaughter. Given the number of complaints, his direct involvement and his knowledge, S's conviction was upheld.



Key case: *R v Prentice [1993] 4 All ER 935 CA, R v Sullman [1994] KB 302*

Their appeal was heard with **Adomako** in the Court of Appeal. Both were junior doctors. P was required to administer a routine lumbar injection to a 16-year-old cancer sufferer. He had not done this before and was concerned about whether he should. He consulted the registrar, who arranged for S (who had only done the procedure once) to supervise. S took the wrong drug from a box of drugs provided and handed it to P who injected. Because it was the wrong drug, the patient died from a reaction to it. In the circumstances, the mistakes by the defendants were in part brought about by the failures of others, including the failure of more senior doctors to prepare and advise them or supervise them properly, inadequacies in the way the drugs were stored (different drugs with similar labels in the same box). Therefore the mistakes of the defendants were not 'grossly negligent' – contrast with **Singh** where there were also multiple people responsible but all were experienced and individually able to address the problems.

7.6.1 What constitutes gross negligence?

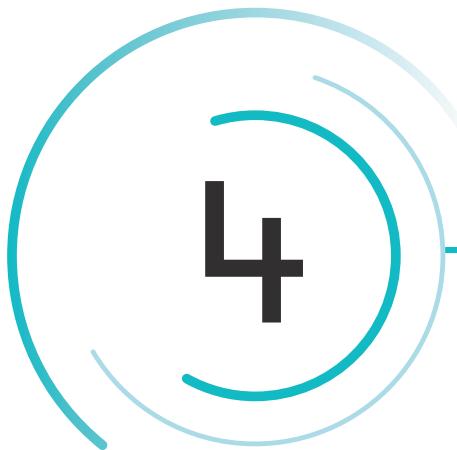
It is not possible to draw firm conclusions from these cases, given that the issue of what constitutes gross negligence is fact sensitive. However, here are some themes which can be used to guide your application of the law to the facts of any scenario you are given:

-
- Where the defendant is responsible for a series of acts/omissions rather than a single event, this may make it easier for the jury to find gross negligence (**Misra, Litchfield**).
- A single devastating act can be grossly negligent (**Adomako**).
- Where the defendant's mistakes are themselves in part or in whole brought about by mistakes of others, this may be a reason for not convicting (**Prentice and Sullman**).
- There can be gross negligence by the defendant, even if others are also responsible for the circumstances leading up to the death, for example where, despite the involvement of others, the defendant has a clear personal responsibility and the ability to discharge it (**Singh**).
- If the defendant has knowledge/experience that should alert them to the danger, this may be a helpful fact for the jury to take into account: contrast **Singh** and **Litchfield** with **Prentice and Sullman**.
- There is no requirement for any mental state, **Adomako**. However the defendant's state of mind is not irrelevant eg it was a key point in **Litchfield** that **Litchfield** would have seen the serious risk of death.
- If someone has seen a high risk of death or has a 'couldn't care less' attitude to a high risk of death, it seems clear that they are highly likely to be convicted.
- The defendant's state of mind may also work in their favour: if the defendant genuinely did not believe there was a risk, this is a factor that the court can take into account.

7.7 Summary

This element considered one type of involuntary manslaughter, gross negligence manslaughter. The basic requirements for gross negligence manslaughter as laid down in **Adomako** are as follows:

- The **existence of a duty of care**: Everyone has a general duty to take care to avoid injury by a positive act to their neighbour. Liability can arise for an omission in circumstances where the defendant is under a specific duty to act.
- **Breach of that duty**: The question is one of whether the defendant's acts fell below the standard expected of a reasonable person. The reasonable person will be attributed with any special skill used by the defendant.
- **The breach causes death**: Factual and legal causation principles apply.
- **There was a risk of death**: There must 'be an obvious and serious risk not merely of injury or even serious injury, but of death' (**Singh**).
- **The breach of duty was so bad as to amount to 'gross negligence'**: 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**). Factually specific but some themes can be drawn from the case law in this area.



Non-fatal offences

1 Non-fatal offences overview

1.1 Introduction

This is a hierarchy of non-fatal offences against the person:

- Wounding or grievous bodily harm with intent (**s 18 Offences Against the Person Act 1861 (OAPA)**), the most serious offence but committed less frequently;
- Wounding or grievous bodily harm (**s 20 OAPA**)
- Assault occasioning actual bodily harm (**s 47 OAPA**);
- Battery; and
- Assault, the least serious offence but along with battery committed most frequently.

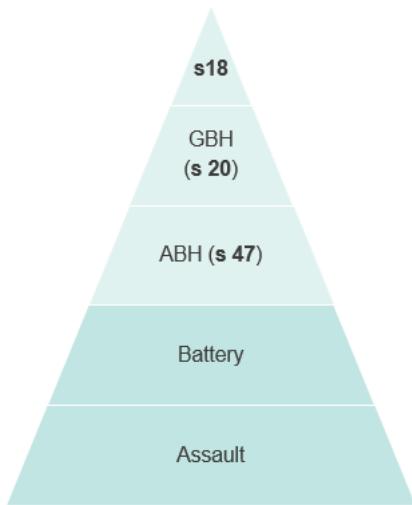


Figure 4.1: Hierarchy of non-fatal offences

2 Assault

This is an offence in which the victim anticipates the defendant will use violence against them.

It is the least serious non-fatal offence as no touching occurs.

Assault is defined in the ‘common law’ (precedents found in case law).



Assault: Assault is where the defendant intentionally or recklessly causes another person to apprehend immediate and unlawful personal violence (**Fagan v Metropolitan Police Commissioner [1969] 1 QB 439**). The House of Lords confirmed this definition of the offence in the case of **R v Ireland; Burstow [1998] AC 147**.

2.1 Actus reus

'Causing the victim to apprehend immediate and unlawful personal violence'

- **Apprehension**

- Apprehension means to make the victim expect or anticipate but not necessarily fear immediate and unlawful personal violence (contrast *R v Lamb* and *R v Logdon*).
- Words alone and silence is enough (*R v Ireland*).
- Words can however negate an assault (*Tuberville v Savage*).

- **Immediate**

- Does not mean instantaneous but some time not excluding the immediate future (*R v Constanza*) or imminent (*R v Ireland*).

- **Unlawful**

- Not done in self-defence or with the victim's consent.

- **Personal violence**

- All the victim has to anticipate is an unwanted touch.

2.2 Apprehension

The defendant must do something to make the victim apprehend (ie anticipate or believe) they will suffer immediate and unlawful personal violence.

There is no need for the defendant to have actually applied force or make physical contact for the offence to be committed.

Some words or physical movement from the defendant, causing the victim to think that they are about to be struck (eg raising a fist towards the victim), would be sufficient.



Key case: *R v Lamb* [1967] 2 QB 981 (CA)

Facts: Two teenage boys were playing with a revolver. This had two bullets in it, neither of which was opposite the barrel. Believing that this meant the gun was safe, the defendant pointed it at his friend and pulled the trigger. His friend was shot dead.

Held: No assault had taken place, since the victim at whom the gun was pointed did not fear the possible infliction of violence because he did not believe the gun, with which they were playing, would fire. Note there was also no assault because the defendant did not have the necessary mens rea. The defendant must cause the victim to believe D can and will carry out the threat of force.



Key case: *Logdon v DPP* [1976] Crim LR 121

Facts: The defendant showed the victim a pistol in a drawer, saying that it was loaded and declaring that he would hold her hostage. The defendant alone knew that the gun was a replica and unloaded, but his actions and words caused the victim to believe otherwise.

Held: The defendant was found to have committed an assault against the victim.

If the victim is caused to apprehend such a threat, it is irrelevant that the defendant does not in fact have the means to carry out that threat.



2.2.1 Apprehension - can the threat to use force be of any nature/form?

- Physical gestures can form the basis for an assault.
- Words or silence alone can constitute an assault in some circumstances.



Key case: *R v Wilson* [1955] 1 All ER 744

Lord Goddard stated that the words 'get out the knives' would, on their own, be sufficient to constitute an assault.



Key case: *R v Ireland; Burstow [1998] AC 147*

Technically, on this issue, the comments made by their Lordships were obiter since the defendants in these two cases had repeatedly made silent telephone calls to their victims. No words had been spoken. Lord Hope of Craighead believed that silence conveyed a message to the victim and as such was capable of forming the basis of an assault. Indirectly, this confirms that words spoken may amount to an assault since they too convey a message and one that is arguably more direct than silence.

2.2.2 Apprehension - words can negate an assault



Key case: *Tuberville v Savage (1669) 1 Mod Rep 3*

The defendant placed his hand on his sword and said: 'If it were not assize-time, I would not take such language from you'. The action of putting his hand on the sword was threatening but was found to be negated by his words, which clearly implied that no physical action would be taken because the judges were in the vicinity.

Ultimately all depends on whether the victim apprehended immediate unlawful personal violence.

If X comes across Y in a dark alleyway and Y says: 'If you were not such a tiny squirt, I would punch your face in', X may well apprehend immediate unlawful personal violence and Y would have committed the *actus reus* of assault.

2.3 Immediate

The victim must believe that immediate violence will be inflicted upon them. Apprehension that the force might be applied sometime in the future would be insufficient. However, the courts have developed a rather generous interpretation of 'immediacy'. The courts have not interpreted 'immediate' to mean instantaneous. In the *Constanza* [1997] 2 Cr App R 492 case, immediate was held to mean apprehension of personal violence at some time not excluding the immediate future. The victim in this case thought that personal violence could happen at any time as D had been following her, calling her and sending over 800 letters to her home.



Key case: *R v Ireland, R v Burstow [1998] AC 147*

Lord Steyn equated immediate with imminent:

After all, there is no reason why a telephone caller who says to a woman in a menacing way 'I will be at your door in a minute or two' may not be guilty of an assault if he causes his victim to apprehend immediate personal violence. Take now the case of the silent caller. He intends by his silence to cause fear and he is so understood. The victim is assailed by uncertainty about his intentions. Fear may dominate her emotions, and it may be the fear that the caller's arrival at her door may be imminent. She may fear the possibility of immediate personal violence.



Key case: *Smith v Chief Superintendent, Woking Police Station (1983) 76 Cr App R 234*

Facts: Smith entered the garden of a house at night and looked through the window of a ground floor bedroom at the victim who was in a nightdress. He pressed his face against the glass for several seconds. The victim recognised Smith and was terrified. He appealed on the ground that there was no evidence that he had the mens rea for assault.

Held: The appeal was dismissed. Lord Justice Kerr stated that this was a situation where although the victim did not know what the defendant was going to do next, she feared some immediate violence which was what the D in this case intended.

2.4 Unlawful

Occasionally, the application of force upon another person will be considered lawful. There are a number of reasons why it would not be unlawful, such as if the defendant threatens reasonable force in self-defence or the victim consents to the threat.

You will consider defences in the 'General defences' chapter.

2.5 Personal violence

The Court of Appeal, in the case of *Ireland*, suggested that 'violence' could include a threat of psychological as well as physical damage. This view was expressly rejected by Lord Hope in the House of Lords. It would appear that, where the apprehension is of immediate psychological harm, charges under other statutes, such as the Protection from Harassment Act 1997, may be more suitable. It is, therefore, clear that, for an assault, the victim must apprehend **physical** violence.

It should be noted that, where the assault results in psychological harm which is more than trivial, the defendant will be liable for the more serious offence under **s 47 OAPA**.

2.6 Mens rea

The defendant intends or is reckless as to causing the victim to apprehend immediate unlawful personal violence (*R v Venna*).

- Assault is a basic intent crime, meaning it can be committed intentionally or recklessly.
- A defendant intends an assault if it was D's aim or purpose (*R v Moloney*).
- A defendant is reckless as to an assault if they:
 - See a risk that their actions will cause the victim to apprehend immediate and unlawful personal violence; and
 - In the circumstances known to D, it was unreasonable to take that risk (*R v G*).

The case of *R v Savage; Parmenter [1992] 1 AC 714 (HL)* confirmed the view that subjective recklessness (as now set out in *R v G*) must be established for any assault charge based upon recklessness.

3 Battery

A battery is where the defendant touches the victim in an unwanted fashion.

Battery is defined in common law.



Battery: A battery is the actual intended use of unlawful force to another person without consent (*Fagan v MPC*). The House of Lords confirmed this definition in the case of *Ireland* and further confirmed that it includes the reckless application of force.

3.1 Actus reus

Application of unlawful force on another. The pages that follow will explain the below in more detail:

- **Application:** Battery can be inflicted:
 - Directly (*Collins v Wilcock*).
 - Indirectly (*R v Martin, DPP v K*).
 - By an omission (*Santana Bermudez*).
- **Unlawful**
 - Means that the battery isn't done in self-defence or with V's consent for example.
 - Consent can be express or implied consent to inevitable everyday contact (*Collins v Wilcock*).
- **Force**

- Means the merest of touch (**Collins v Wilcock**) and doesn't have to be rude, hostile or aggressive (**Faulkner v Talbot**).
- Touching someone's clothes is enough (**R v Thomas**).
- Where the battery results in harm which is more than trivial, the defendant will be liable for the more serious offence under **s 47**.

3.2 Force



Key case: **Collins v Wilcock [1984] 3 All ER 374**

Goff LJ stated:

The fundamental principle, plain and incontestable, is that every person's body is inviolate [...]. Any touching of another person, however slight may amount to a battery.



Key case: **R v Thomas (1985) 81 Cr App R 331**

[...] there could be no dispute that if you touch a person's clothes while he's wearing them that is equivalent to touching them.

(Per Ackner LJ)



Key case: **Faulkner v Talbot [1981] 3 All ER 468**

A battery is an intentional touching of another person without the consent of that person and without lawful excuse. It need not necessarily be hostile, or rude, or aggressive as some of the cases seem to indicate (Lord Lane CJ).

The application of force need not be aggressive.



Key case: **DPP v Santana-Bermudez [2003] EWHC 2908 (QBD)**

Facts: The respondent was convicted of assault occasioning actual bodily harm (based on a battery). A police officer asked the respondent if he had any needles or 'sharps' on him. The respondent replied 'No'. The officer then searched the respondent's jacket pockets, where her finger was pierced by a hypodermic needle.

Held: Although the respondent had not done an act which had directly caused the injury, the Divisional Court held that he had created a danger (by exposing the officer to a risk), which he had failed to avert. Battery was constituted by an omission. An omission can constitute force.

3.3 The application of force

Most batteries are inflicted directly eg by the defendant hitting the victim with or without a weapon.

Throwing a missile at the victim is also considered to be a direct application of force.

However, a battery can be indirect.



Key case: **R v Martin (1881) 8 QBD 54**

Facts: The defendant closed the exit doors of a theatre. As the people were about to leave, he turned off the lights and panic ensued.

Held: This was an indirect battery. The court also gave the example of D digging a pit which V then falls into as being an indirect battery.



Key case: DPP v K [1990] 1 WLR 1067

Facts: K was 15. He splashed some acid on to his hand during a chemistry lesson and he asked for permission to go and wash his hand because it was sore. He took with him a boiling tube of concentrated acid. He poured some of the acid onto a piece of paper, but hearing footsteps outside, he panicked and poured the rest of the acid into the upturned nozzle of a hot air hand/face drier. The footsteps receded and he re-joined the chemistry lesson intending to return later to deal with the acid in the drier. Another pupil used the drier and the acid was ejected on to his face, causing scarring.

Held: Although he was acquitted because of a lack of mens rea, the Court of Appeal stated that this had satisfied the actus reus of battery.

3.4 Unlawful

We must consider the circumstances when such contact may be justified. This can be for a number of reasons, but a common claim is that the victim consented to the application of force. Consent can therefore make the application of force lawful, and thus prevent a battery from being committed.



Key case: Collins v Wilcock [1984]

A police officer grabbed a woman's arm to prevent her from walking away without the power to do so. Lord Justice Robert Goff explained that a certain amount of physical contact must be accepted to move around in society, such as jostling in the supermarket, underground and busy street. However, the police officer's action went beyond implied consent.

3.5 Mens rea

The defendant must have an intention be reckless as to applying unlawful force on another person (*R v Venna*).



Key case: R v Venna [1976] QB 421 (CA)

James LJ stated:

In our view the element of mens rea in the offence of battery is satisfied by proof that the defendant intentionally or recklessly applied force to the person of another [...]. We see no reason in logic or law why a person who recklessly applies physical force to the person of another should be outside the criminal law [...].

4 Section 47 - Assault occasioning actual bodily harm

4.1 Definition

Section 47 OAPA 1861 provides:

Whosoever shall be convicted on indictment of any assault occasioning actual bodily harm shall be liable [...] to be imprisoned for any term not exceeding five years.

4.2 Actus Reus

Assault occasioning actual bodily harm

Key Term Content

- Assault: Meaning an assault or battery
- Occasioning: Normal principles of causation apply

- Actual bodily harm

4.3 An 'assault'

There must be an 'assault'. This has been interpreted to mean that there must be either an assault or battery (*DPP v Little [1992] QB 645 (DC)* and *R v Ireland; Burstow [1998] AC 147*). Both the actus reus and the mens rea of either an assault or battery must be established.

4.4 Occasioning

The assault or battery must 'occasion actual bodily harm'. In other words, the assault or battery must result in actual bodily harm being caused to the victim. The normal principles of causation apply. Have a look at Chapter 1 to remind yourself of these.

This offence can also be committed through an omission (*DPP v Santana-Bermudez [2003] EWHC 2908 (QBD)*).

Key case: *DPP v Santana-Bermudez [2003] EWHC 2908 (QBD)*

Facts: The respondent was convicted of assault occasioning actual bodily harm. A police officer asked the respondent if he had any needles or 'sharps' on him. The respondent replied 'No'. The officer then searched the respondent's jacket pockets, where her finger was pierced by a hypodermic needle.

Held: Assault occasioning actual bodily harm can be committed by an omission. Although the respondent had not done an act which had directly caused the injury, the Divisional Court applied *R v Roberts* and *R v Miller* and held that he had created a danger (by exposing the officer to a risk), which he had failed to avert. Thus, the conviction was upheld.

Where someone (by act or word or a combination of the two) creates a danger and thereby exposes another to a reasonably foreseeable risk of injury which materialises, there is an evidential basis for the actus reus of an assault occasioning actual bodily harm. It remains necessary for the prosecution to prove an intention to assault or the appropriate recklessness.

In the present case, if [...] the respondent, by giving PC Hill a dishonest assurance about the contents of his pockets, thereby exposed her to a reasonably foreseeable risk of an injury which materialised, it was erroneous of the [Crown] court to conclude that there was no evidential basis for the actus reus of an assault occasioning actual bodily harm.

(Per Kay J)

4.5 Actual bodily harm

Key case: *R v Donovan [1934] 2 KB 498*

The definition of actual bodily harm was said to include 'any hurt or injury calculated to interfere with the health or comfort' of the victim.

It was said that the hurt need not be serious or permanent but must be more than transient and trifling.

Key case: *R v Chan-Fook [1994] 1 WLR 689*

The Court of Appeal overturned this conviction as the trial judge directing the jury had omitted the words 'hurt or injury' and said it would be actual bodily harm if the victim's health or comfort was interfered with.

Hobhouse LJ said:

the word "harm" is a synonym for injury. The word "actual" indicates that the injury (although there is no need for it to be permanent) should not be so trivial as to be wholly insignificant.



Key case: *T v DPP [2003] Crim LR 622*

A momentary loss of consciousness was held to be capable of amounting to actual bodily harm as it involved an injurious impairment of the victim's sensory functions.

The court emphasised that in **Donovan** the harm which had been excluded was that which was transient and trifling, not transient or trifling.

Subsequent consideration of what can amount to 'actual bodily harm' has been given in the case of **DPP v Smith** and it seems that the type of harm which can be included has extended yet further.



Key case: *DPP v Smith [2006] EWHC 94 (Admin)*

Facts: Here the defendant, Mr Smith, cut off his estranged girlfriend's ponytail and some further hair from the top of her head. It was argued on behalf of Mr Smith that this act did not amount to 'actual bodily harm', in accordance with the legal definition provided in **Miller**, and as there was no evidence to suggest that this act had caused the victim psychiatric or psychological harm, there was no case to answer.

Held: Despite the fact that the defendant's actions left no mark on the body or break of the skin, and that essentially he had cut 'dead tissue', it was still part of the body, which by cutting had amounted to an assault. As Sir Igor Judge stated:

Even if, medically and scientifically speaking, the hair above the surface of the scalp is no more than dead tissue, it remains part of the body and is attached to it. While it is so attached [...] it falls within the meaning of "bodily" in the phrase "actual bodily harm". It is concerned with the body of the individual victim.



Key case: *R v Chan-Fook [1994] 1 WLR 689*

Actual bodily harm was held to include psychiatric injury, although Hobhouse LJ emphasised:

[...] it does not include mere emotions such as fear or distress or panic nor does it include, as such, states of mind that are not themselves evidence of some identifiable clinical condition.

This was confirmed by the House of Lords in **R v Ireland; Burstow**.

4.6 Mens rea

- No mens rea is required for the actual bodily harm;
- All that is required is the mens rea for the assault or the battery.



Key case: *R v Savage, R v Parmenter [1992] 1 AC 699*

Lord Ackner stated:

Can a verdict of assault occasioning actual bodily harm be returned upon proof of an assault together with proof that actual bodily harm was occasioned by the assault, or must the prosecution also prove that the defendant intended to cause some actual bodily harm or was reckless as to whether such harm would be caused? 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. The prosecution are not obliged to prove that the defendant intended to cause some actual bodily harm or was reckless as to whether such harm would be caused.

5 Section 20 - Malicious wounding or inflicting grievous bodily harm

5.1 Definition

Section 20 OAPA 1861 provides:

Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of an offence [...]

The defendant must either wound or inflict grievous bodily harm.

5.2 Actus Reus

Note that s 20 creates two offences:

- Malicious wounding; and
- Maliciously inflicting grievous bodily harm.

5.3 Wound



Key case: C (a minor) v Eisenhower [1984] QB 331

It was held that the rupture of blood vessels internally is not sufficient to constitute a wound. There must be a break in the continuity of both layers of the skin. Both the dermis and epidermis must be broken.

It is important to realise that if there is proof of a wounding, the actual injury need not be severe; any breaking of the skin will suffice.

As 'maliciously' is an adverb, the word 'wound' as in the section is a verb. Wound (a verb) means to cause a wound (a noun).

Normally the wounding will be such that causation will not be an issue. Occasionally, however, it may be, for example where:

- D chases the victim, causing them to fall and cut their head; or
- D throws a knife and V tries to intercept it.

5.4 Infliction of grievous bodily harm

This word has proved difficult to determine in the past due to questions as to what was necessary to amount to an 'infliction', ie was an assault a pre-requisite?

Essentially infliction now bears the same meaning as 'cause' and the normal rules of causation should apply.



Key case: R v Wilson [1984] AC 242

It was decided that there could be an infliction of grievous bodily harm contrary to s 20 without an assault being committed.



Key case: R v Burstow

Where the accused made nuisance telephone calls, but never actually attacked the victim. The House of Lords upheld the conviction for inflicting grievous bodily harm (psychological injury). The House of Lords held that 'inflict' did not require an assault to be committed first.



Key case: *Ireland*

Psychiatric injury may amount to GBH if sufficiently serious, but its cause and effect will need to be proved by expert evidence.



Key case: *DPP v Smith*

The House of Lords held that the words 'grievous bodily harm' simply mean 'really serious harm'. In **Saunders** [1985] Crim LR 230, it was decided that it would not be a misdirection to leave out the word 'really'; the words 'serious harm' would suffice.



Key case: *R v Bollom (2004) 2 Cr App R 6*

The Court of Appeal held that, in deciding whether or not the injuries sustained were 'grievous', the jury should consider the effect of the injuries on the victim, taking into account the victim's age and health. The jury can also look at the totality of the injuries. This case concerned a baby with multiple cuts and bruises which on their own would not have been enough, but taken together, could amount to serious harm.

5.5 Mens rea

D must intend or be reckless as to the causing of harm. The issue is the extent of the harm that must be intended or foreseen.

D must intend or be reckless as to the causing of **some** harm.



Key case: *R v Savage; Parmenter*

The House of Lords reaffirmed the interpretation of maliciously as laid down in **R v Mowatt [1968] 1 QB 421**:

It is quite unnecessary that the accused should have foreseen that his unlawful act might cause physical harm of the gravity described in the section, i.e. a wound or serious physical injury. It is enough that he [foresaw] [...] that some physical harm to some person, albeit of a minor character, might result.

(Per Lord Diplock)

6 Section 18 - Wounding or causing grievous bodily harm with intent

Section 18 OAPA 1861 provides:

Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause grievous bodily harm to any person, with intent [...] to do some grievous bodily harm to any person [...] shall be guilty of an offence [...]

6.1 Actus reus

The defendant must either wound or inflict grievous bodily harm. This is the same actus reus as that of a s 20 offence.

Again, note that **s 18** creates two offences:

- Malicious wounding with intent to cause GBH; and
- Maliciously inflicting grievous bodily harm with intent to cause GBH.

Wound

This bears the same meaning as under **s 20** so there must be a break in the continuity of both layers of the skin. Both the dermis and epidermis must be broken. Any breaking of the skin will suffice (**C (a minor) v Eisenhower**).

Causing

Traditionally, it was accepted that the word ‘cause’ was wider than that of ‘inflict’ used under **s 20**. However, since the case of **Wilson**, there appears to be little significance in the use of different words under **ss 20** and **18** and the normal rules of causation apply.

Grievous bodily harm

This bears the same meaning as under **s 20** so serious harm (**Saunders**).

6.2 Mens rea

The mens rea element is the key distinguishing feature between **ss 18** and **20**.

Under **s 20** it is enough to intend or foresee (ie be reckless as to) some harm, however slight.

Intention to cause grievous bodily harm

For **s 18** the defendant must actually intend to cause harm which amounts in law to grievous bodily harm (serious harm). Recklessness is not enough. Note, where the actus reus is a wound, the mens rea is still intention to cause GBH. Intention to wound is not enough.

Intention can be direct (aim, purpose, **R v Moloney**) or oblique (**R v Woollin**). Juries are not entitled to find **s 18** by oblique intent unless they feel sure:

7 Examples of injuries

Assault

- Serious injury was a virtual certainty as a result of the defendant’s action (objective element); and
- The defendant appreciated that (subjective element).
- Threats of violence only
- Victim anticipates violence but there is no actual touching
- Some words or physical movement from D (eg raising a fist towards the victim) would be sufficient
- Silence in some circumstances

Battery

- Mere touch
- An unwanted kiss
- A slap

Section 47 - assault occasioning actual bodily harm

- Temporary loss of sensory function (eg sight or hearing)
- Temporary loss of consciousness
- Extensive bruising
- Cutting someone’s hair without their consent
- Minor fractures
- Psychiatric injury that is more than trivial- beyond mere fear, distress or panic

Section 20 - wounding or inflicting grievous bodily harm

Section 18 - wounding or causing GBH with intent

- GBH
 - Permanent loss of sensory function
 - Permanent disability

- Broken bones
- Fractured skull
- Substantial blood loss
- Wound - breaking both layers of skin, the dermis and epidermis

8 Summary

Common law	<i>Actus reus</i>	<i>Mens rea</i>
Assault	Causing the victim to apprehend immediate and unlawful personal violence	Intention or recklessness as to causing the victim to apprehend immediate and unlawful personal violence
Battery	Applying unlawful force to another	Intention or recklessness as to applying unlawful force to another

OAPA 1861	<i>Actus reus</i>	<i>Mens rea</i>
Section 47	<ul style="list-style-type: none"> • Assault - meaning an assault or battery. • Occasioning - normal principles of causation apply. • Actual bodily harm. 	Mens rea for the assault or the battery. Intent or recklessness as to: <ul style="list-style-type: none"> • Causing the victim to apprehend immediate and unlawful personal violence; or • Applying unlawful force upon another.
Section 20	<ul style="list-style-type: none"> • Wound; or • Infliction of grievous bodily harm. 	D must intend or be reckless as to the causing of some harm.
Section 18	<ul style="list-style-type: none"> • Wound; or • Infliction of grievous bodily harm. 	D must intend to cause grievous bodily harm.



5

Property offences

1 Basic criminal damage

1.1 The basic offence



Basic criminal damage: Section 1(1) Criminal Damage Act 1971 (CDA), provides:

A person who without lawful excuse damages or destroys 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 offence of basic criminal damage offence may be broken down into five parts:

- Destroy or damage
- Property
- Belonging to another
- Without lawful excuse (this will be covered in a separate section)
- Intention or recklessness as to the damage or destruction of property belonging to another

1.2 Actus reus

1.2.1 Destroy or damage

The CDA does not provide a definition of the terms 'damage' or 'destroy'.

The term 'destroy' means that following D's actions, the property ceases to exist. However, much of the case law has concerned itself with the definition of damage.

Whether property is damaged is a question of fact and degree as will be seen in the cases which follow.



Key case: *Samuels v Stubbs [1972] 4 SASR 200*

The court considered that it was difficult to lay down a general rule as to what constitutes damage. It held that it must be guided by the circumstances of each case, the nature of the article, and the mode by which it was affected. The court stated:

[T]he word [...] is sufficiently wide in its meaning to embrace injury, mischief or harm done to property, and that in order to constitute damage it is unnecessary to establish such definite or actual damage as renders the property useless or prevents it from serving its normal function [...]



Key case: *Hardman v Chief Constable of Avon [1986] Crim LR 330*

The defendants had painted silhouettes on a pavement in whitewash as part of a demonstration against Hiroshima. The Local Authority had employed a 'graffiti squad' to clean the pavements, despite the fact that the pictures would eventually have been washed away by the rain.

The court held this to be damage as damage need not be permanent. It was relevant that time, effort and money had been spent in restoring the pavement to its original state.



Key case: Roe v Kingerlee [1986] Crim LR 735

Mud was spread on the walls of a police cell. This cost £7 to remove and was held to be damage.



Key case: A (a juvenile) v R [1978] Crim LR 689

The court held that spitting on a policeman's raincoat was not criminal damage. It was argued that the spittle could be wiped away with a cloth to return the raincoat to its original state without a mark or stain.



Key case: Morphitis v Salmon [1990] Crim LR 48

The court stated:

[Criminal damage includes] not only permanent or temporary physical harm but also permanent or temporary impairment of value or usefulness.



Key case: Fiak [2005] EWCA Crim 2381

A case where F stuffed his blanket down the toilet in his prison cell and then repeatedly flushed the toilet. This flooded the cell. Although the floor was waterproof and the blanket was washable, this constituted damage as both were temporarily unusable.

1.2.2 Property

Section 10(1) CDA 1971

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.

In *R v Whitley (1991) 93 Cr App R 25*, the court held that information does not fall within the definition of 'property' contained in (s 10(1)).

1.2.3 Belonging to another

Section 10(2)

Property shall be treated for the purposes of this Act as belonging 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.

It can be seen that property can belong to more than one person. Where D owns property it can still belong to another, such as a co-owner. If the property is mortgaged it will also belong to the bank or mortgage company by virtue of **s 10(2)(c)**.

1.3 Mens rea

The mens rea for basic criminal damage is the intention or recklessness as to the destruction or damage of property belonging to another.

Intention is to be given its ordinary meaning (**R v Moloney [1985] 1 AC 905**) and therefore requires consideration of whether, at the time D carried out the actus reus, it was D's aim or purpose to destroy or damage the property belonging to another.



Key case: **R v G [2003] UKHL 50**

The House of Lords, stated that to convict a person of reckless criminal damage the prosecution must prove that:

- (a) At the time of committing the actus reus, the accused was **subjectively** aware of a risk; and
- (b) In the circumstances known to the accused, it was **objectively** unreasonable for the accused to take that risk.

It has been confirmed that the mens rea extends to the whole of the actus reus. The Court of Appeal held that it is insufficient that D does an act that damages property intentionally. What must also be proved is that D knew, or was reckless as to whether, the property belonged to another.



Key case: **R v Smith [1974] 1 ALL ER 632**

Facts: Smith, who lived in rented accommodation with his brother, had installed electrical wiring to connect a stereo system. He had also, with his brother's help and the landlord's permission, put down floorboards, wall panels and roofing material. After two years, Smith decided to vacate the flat and asked permission for his brother to remain: the landlord declined. After this, Smith smashed the wall panels, floorboards and roofing material, doing so he said to gain access to the wiring that he had fitted, in order to remove it. He was found guilty.

Held: The Court of Appeal allowed the appeal and quashed his conviction (per James LJ).

Construing the language of s 1(1) we have no doubt that the actus reus is "destroying or damaging any property belonging to another". It is not possible to exclude the words "belonging in another" which describe the "property". Applying the ordinary principles of mens rea, the intention and recklessness and the absence of lawful excuse required to constitute the offence have reference to property belonging to another. It follows that in our judgment no offence is committed under this section if a person destroys or causes damage to property belonging to another if he does so in the honest though mistaken belief that the property is his own, and provided that the belief is honestly held it is irrelevant to consider whether or not it is a justifiable belief.

Therefore, while ignorance of the criminal law is no defence, this case is an example of how ignorance of the civil law can prevent liability.

1.4 Basic arson

Arson is criminal damage by fire, however slight. Basic arson is charged under **s 1(1)** and **s 1(3)**. Below you can see the additions to the actus reus and mens rea:

Actus reus:

- Destroy or damage **by fire**
- Property
- Belonging to another

- Without lawful excuse

Mens rea:

- Intention or recklessness as to the destruction or damage of property belonging to another by fire.



Basic arson: Section 1(3) CDA 1971 provides:

Any offence committed under this section by destroying or damaging property by fire shall be charged as arson.

1.5 Summary

This section considered the offence of basic criminal damage under **s 1(1)** (and **s 1(3)** if the charge is basic arson):

Actus reus:

- Destroy or damage (by fire)
- Property (**s 10(1)**)
- Belonging to another (**s 10(2)**)
- Without lawful excuse (**covered in another section**)

Mens rea:

- Intention or recklessness as to the destruction or damage of property belonging to another (by fire).

Whether property is damaged is a question of fact and degree:

- Guided by the circumstances of each case, the nature of the article, and the mode by which it was affected. It is unnecessary to render the property useless (*Samuels v Stubbs*).
- It need not be permanent. It is relevant that time, effort and money is spent in restoring the property (*Hardman v Chief Constable of Avon*).
- It includes not only permanent or temporary physical harm but also permanent or temporary impairment of value or usefulness (*Morphitis v Salmon*).

2 Criminal damage - lawful excuse

2.1 Introduction

A defendant will not commit criminal damage if they have a lawful excuse. A lawful excuse can be:

- Any general defence: Where relevant, can apply to any offence of criminal damage/arson under (**s 5(5)**); or
- Section 5(2)** lawful excuse defences: Where relevant, can apply to basic criminal damage or basic arson (but not the aggravated form of these offences which are covered in the next section).

Section 5(2) lawful excuse defences

There are two lawful excuse defences in **s 5(2)**:

- Section 5(2)(a):** Operates where the defendant believes that the owner would have consented to the damage; and
- Section 5(2)(b):** Operates where the defendant acts to protect their or another's property.

2.2 Section 5(2)(a) - D believes the owner would have consented

This defence is dealt with in **ss 5(2)** and **(3)**:

- Section 5(2)(a)** operates where the defendant believes that the owner would have consented to the damage; and
- Section 5(3)** says that the defendant's belief need not be reasonable. It is only necessary for it to be honestly held.

Let's consider the actual wording of this lawful excuse defence.

5 "Without lawful excuse"

(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 or damage and its circumstances; or

(3) For the purposes of this section it is immaterial whether a belief is justified or not if it is honestly held.

2.2.1 Mistaken belief due to voluntary intoxication?



Key case: *Jaggard v Dickinson* [1980] Crim LR 717 (QBD)

Facts: Dickinson broke a window in the drunken belief that the house was that of a friend with whom she was staying.

Held: The court confirmed that the test was subjective. Applying s 5(3), the court held that Dickinson was entitled to the defence under the s 5(2)(a), irrespective of whether the belief was reasonable, even, as here, where it resulted from the defendant's intoxication.

2.2.2 Can a defendant's motive be taken into account?

Provided the defendant honestly believes that the owner of the property has or would have consented to the damage to property, the defendant's **motive** for causing the damage is irrelevant to s 5(2)(a), even where the motive is to perpetrate a fraud. Criminal damage is not an offence of dishonesty.



Key case: *R v Denton* [1982] 1 All ER 65

Facts: The owner of a factory in financial difficulties had apparently said to D: 'There is nothing like a good fire for improving the financial circumstances of a business'. D took this as an instruction to set fire to the factory, which he did.

Held: His conviction for arson was quashed, the Court of Appeal holding that he was entitled to the s 5(2)(a) defence.

2.2.3 Are there any limits on this defence?



Key case: *Blake v DPP* [1993] Crime LR 586

Facts: The defendant attempted to rely on s 5(2)(a) defence using a novel argument. During a demonstration protesting about the use of military force by the allies in Iraq and Kuwait, Blake, a vicar, used a marker pen to write a Biblical quotation on a concrete pillar at the Houses of Parliament.

He appealed against his conviction for criminal damage, claiming, *inter alia*, that he was carrying out the instructions of God. He argued that he had lawful excuse under s 5(2)(a) in that he believed God to be the one entitled to consent to the damage. He also argued that s 5(2)(b) applied as he had damaged the property to protect the property of others (the court's ruling on this issue, will be discussed later).

Held: The QBD dismissed his appeal, holding that a belief, however powerful, genuine and honestly held, that God had given consent was not a lawful excuse under the domestic law of England.

2.3 Section 5(2)(b) - D acts to protect property

Section 5(2)(b) operates where the defendant acts to protect their or another's property.

The section relates only to the protection of property, as opposed to the protection of people.



Key case: *R v Baker & Wilkins [1997] Crim LR 497*

Facts: A mother could not raise the **s 5(2)(b)** defence to a charge of criminal damage to a door that she had kicked open in order to rescue her child from a perceived threat by her estranged husband.

Held: The court held that the child did not constitute 'property' for the purposes of **s 5(2)(b)**. If it had been a pet dog or cat, then the case might have been different, as these are property. For example, letting a person's pet parrot out of its cage could be criminal damage or theft of the bird.

5 "Without lawful excuse"

(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) [...]

(b) if he destroyed or damaged or threatened to destroy or damage the property in question or, in the case of a charge of an offence under section 3 above, intended to use or cause or permit the use of something to destroy or damage it, 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-

(a) that the property, right or interest was in immediate need of protection; and

(b) that the means of protection adopted or prosed to be adopted were or would be reasonable having regard to all the circumstances.

(3) For the purposes of this section it is immaterial whether a belief is justified or not if it is honestly held.

2.3.1 D acts to protect property

There are four requirements for the **s 5(2)(b)** defence aspects of which we will consider in greater depth:

- (a) **R v Baker & Wilkins:** The defendant must act to protect property.
- (b) **Section 5(2)(b)(i):** The defendant must believe that the property was in immediate need of protection (subjective test, see **s 5(3)**).
- (c) **Section 5(2)(b)(ii):** The defendant must believe that the means of protection adopted are reasonable (subjective test, see **s 5(3)**).
- (d) **R v Hunt:** The damage caused by the defendant must be (objectively) capable of protecting the property.



Key case: *Johnson v DPP [1994] Crim LR 673*

Facts: Johnson, a squatter in a council house, damaged a door while attempting to fit locks in the house. Johnson was charged with criminal damage and raised **s 5(2)(b)** defence on the grounds that there had been a high number of thefts in the area, and that he had therefore acted to protect his property.

Held: The Queen's Bench Division upheld his conviction on the grounds that he did not believe his property was in **immediate** need of protection.

2.3.2 Objectively capable of protecting the property



Key case: *R v Hunt [1977] Crim LR 740*

Facts: In order to demonstrate the inadequacy of the fire alarm in a block of flats, Mr Hunt started a fire in a bedroom in a deserted part of the block. He pressed the fire alarm, which did not work. He then called the fire brigade.

Held: The Court of Appeal, rejecting the defence under **s 5(2)(b)**, introduced an **objective** element into the defence in addition to those specifically mentioned in the Act. The court held that it was not sufficient that the accused intended to prevent further damage to property (as statutory language suggests) but also required that the act be objectively **capable** of protecting the property from damage.

Arguably, the introduction of this objective test, is inconsistent with the language used in **s 5(2)(b)** which indicates a subjective test, see **s 5(3)**. The fourth aspect of the **s 5(2)(b)** lawful excuse defence is that the damage caused by the accused must be objectively capable of protecting the property.



Key case: *Blake v DPP*

The defendant put forward the additional argument that he was entitled to rely on **s 5(2)(b)** because he had acted to protect property in the Gulf States.

Applying the objective test from **Hunt**, the court held that his actions were not capable of having this effect.



Key case: *R v Hill and Hall (1998) 89 Cr App R 74*

Facts: The accused, a nuclear protestor, was arrested outside a nuclear submarine base. She was in possession of a hacksaw blade, which she intended to use to cut through the wire fence. She was charged under **s 3 CDA** (possessing anything with intent to destroy or damage property) and unsuccessfully raised the defence under **s 5(2)(b)** that she was acting in order to persuade the Americans to leave the base, to reduce the threat of a nuclear strike, and thus protect her property.

Held: The objective test in **Hunt** was confirmed in this case. The court held that cutting the wire was far too remote from the eventual aim of protecting property to satisfy the test.

2.4 Other lawful excuses

Section 5(5) preserves the availability of the general defences to criminal offences such as self-defence, and duress

Section 5(5) states:

This section shall not be construed as casting doubt on any defence recognised by law as a defence to criminal charges.

2.5 Summary

A defendant will not commit criminal damage if they have a lawful excuse:

- Any general defence: Such as self-defence, where relevant, can apply to any offence of criminal damage/arson under **s 5(5)**; or

- **Section 5(2)** lawful excuse defences: Where relevant, can apply to basic criminal damage or basic arson but not the aggravated form of these offences which are covered in a separate element:
 - **Section 5(2)(a):** operates where the defendant honestly believes that the owner would have consented to the damage (**s 5(3)**), even if mistaken due to voluntary intoxication (**Jaggard v Dickinson**). Note: D's motive is irrelevant even if it is to perpetrate a fraud (**R v Denton**); and
 - **Section 5(2)(b):** has four requirements to it:
 - **R v Baker & Wilkins** - D must act to protect property.
 - **s 5(2)(b)(i)** - D must honestly believe that the property was in immediate need of protection (subjective test, **s 5(3)**). See **Johnson v DPP** on immediacy.
 - **s 5(2)(b)(ii)** - D must honestly believe that the means of protection adopted are reasonable (subjective test, see **s 5(3)**).
 - **R v Hunt** - The damage caused by D must be objectively capable of protecting the property (see further **Blake v DPP** and **R v Hill & Hall**).

3 Aggravated criminal damage



Aggravated criminal damage: Section 1(2) Criminal Damage Act ('CDA') 1971 provides:

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 whether any property would be destroyed or damaged; and
 - (b) intending by the destruction or damage to endanger life of another or being reckless as to whether the life of another would be thereby endangered;
- shall be guilty of an offence.

3.1 Actus reus

The offence of aggravated criminal damage falls under **s 1(2)** (or **s 1(2)** and **s 1(3)** if the charge is aggravated arson).

- Destroy or damage (by fire)
- Property (**s 10(1)**)
- Belonging to another **s 10(2)** or himself.

While the actus reus of aggravated criminal damage/arson requires damage or destruction to property:

- A defendant can commit aggravated criminal damage to D's own property.
- The lawful excuse defences in the **s 5(2)** do not apply. However, a defendant might nevertheless have a lawful excuse if any of the general defences to criminal offences apply (**s 5(5)**).
- As a matter of actus reus, it is irrelevant whether the life of another was actually endangered. See the case of **R v Sangha** discussed later on in this section.

3.2 Mens rea

The mens rea of aggravated criminal damage (or aggravated arson) is:

- **Section 1(2)(a):** Intention or recklessness as to the destruction or damage of property (by fire); and
- **Section 1(2)(b):** Intention or recklessness as to the endangerment of life by the damage or destruction (by fire).



Key case: *R v Sangha* [1988] 2 All ER 385

Facts: Mr Sangha set fire to some furniture in a flat. There was no danger to the occupants since they were not present at the time. There was no danger to the occupants of adjacent flats because of the special construction of the building.

Held: The Court of Appeal upheld the defendant's conviction on the basis, *inter alia*, that the issue was whether the accused intended or was reckless as to whether life might have been endangered, not whether life was actually endangered.



Key case: *R v Dudley* [1989] Crim LR 57 (CA)

Facts: Dudley had a grievance against the 'J' family. He consumed drink and drugs and threw a firebomb at their house. The fire was extinguished by the J family and only trivial damage was caused. D's counsel claimed that it must be proved that he intended to endanger life or had been reckless as to whether life was endangered by the actual damage caused and that as the damage caused was not great, he could not have been reckless as to endangering life.

Held: The Court of Appeal disagreed. The words 'destruction or damage' in s 1(2)(b) referred back to the destruction or damage intended or as to which there was recklessness, not to the destruction or damage actually caused.

3.2.1 Danger to life must arise from the damaged property



Key case: *R v Steer* [1988] 1 AC 111 (HL)

Facts: The defendant had fired three shots through a window.

Held: This did not constitute the offence under the CDA 1971, s 1(2) because any risk to life intended or foreseen had been by the bullets fired and not by the damaged property. It was held that there had to be a causal link between the damage to property and the danger to life.

If the damage is caused by fire, the risk to life will always be from the damaged property. Lord Bridge of Harwich pointed out in *R v Steer*:

It is not the match and the inflammable materials, the flaming firebrand or any other inflammatory agent which the arsonist uses to start the fire which causes danger to life, it is the ensuing conflagration which occurs as the property which has been set on fire is damaged or destroyed. When [whether] the victim in the bedroom is overcome by the smoke or incinerated by the flames as the building burns, it would be absurd to say that this does not result from the damage to the building.



Key case: *R v Webster* [1995] 2 All ER 168

Facts: The defendants had pushed a coping stone from a bridge onto a train, which had hit a carriage showering the passengers with debris from the roof. The conviction had been based on a direction that intent to endanger life by the stone falling on a passenger would suffice.

Held: The court substituted a conviction based on recklessness (per Taylor CJ):

If the defendant's intention is that the stone itself should crash through the roof of a train or motor vehicle and thereby directly injure a passenger, or if he was reckless only as to that outcome, the section would not bite. If, however, the defendant intended or was reckless that the stone would smash the roof of the train or vehicle so that metal or wood struts from the roof would or obviously might descend upon a passenger, endangering life, he would surely be guilty. This may seem to many a dismal distinction.

3.3 Summary

This section considered aggravated criminal damage under **s 1(2)** (and aggravated arson under **s 1(2)** and **s 1(3)** if done by fire):

Actus reus:

- Destroy or damage (by fire)
- Property (**s 10(1)**) which can belong to the defendant or another

Mens rea:

- **Section 1(2)(a):** Intention or recklessness as to the destruction or damage of property (by fire).
- **Section 1(2)(b):** Intention or recklessness as to the endangerment of life by the damage or destruction (by fire):
 - No life need actually be endangered (**R v Sangha**).
 - The damage intended or the damage D was reckless to is the issue, as opposed to the amount of actual damage caused (**R v Dudley**).
 - Danger to life must arise from the damaged property, not the means of damaging it. If the damage is caused by fire, the risk to life will always be from the damaged property (**R v Steer**).

4 Theft



Theft: The definition of the offence of theft is found in **s 1(1) Theft Act 1968 (TA)**, which provides:

A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it [...]

The prosecution must prove all five elements in order to secure a conviction for theft:

- **Actus reus:**
 - Appropriation (**s 3 TA**)
 - Property (**s 4 TA**)
 - Belonging to another (**s 5 TA**)
- **Mens rea:**
 - Dishonestly (**s 2 TA**)
 - With the intention to permanently deprive (**s 6 TA**)

All of the elements must exist simultaneously. This can cause problems when dealing with factual scenarios:

- Martha borrows her friend's dress for a night out, intending to give it back the following day. However, Martha then changes her mind and keeps the dress – is this theft? Do all five elements of **s 1(1)** occur at the same time?
- What if Edward's grandmother gave him some money to put towards a deposit for a house but Edward uses the money to go on holiday? Has he stolen this money?

By the time Martha and Edward have formed any dishonest intent they have already appropriated the property and, for Edward, under civil law, he was spending his own money.

Nevertheless, you will see that the **TA** caters for such scenarios and both instances could still amount to theft.

4.1 Appropriation



Appropriation: The word 'appropriation' is defined in part in **s 3(1)**:

Any assumption by a person of the rights of an owner amounts to an appropriation [...]

4.1.1 Any assumption



Key case: *R v Morris [1983] 3 All ER 288*

Facts: The defendant took items from a shelf in a self-service shop. He removed the correct price labels and replaced them with labels taken from lower-priced goods. At the checkout, the defendant paid the lower price for the items. He was arrested and subsequently convicted of theft.

Held: Both the Court of Appeal and the House of Lords dismissed his appeal against conviction. It was held that it is only necessary to assume one of the rights of the owner. It was the owner's right to label his goods, so when Morris swapped the labels this was an appropriation.

Two important points emerge from this case:

- (a) The assumption of any one of the rights of an owner amounts to an appropriation for example selling it, hiring it, giving it away or destroying it.
 - (b) Even if D does not intend by the act of appropriation itself to deprive the owner permanently of the property, D may be guilty of theft.
-

4.1.2 Consent and appropriation

The natural meaning of 'appropriation' might suggest an act which is not consented to by the owner of the property. In *R v Gomez*, the majority in the House of Lords decided that a defendant can appropriate property even with the consent of the owner.



Key case: *R v Gomez [1993] 1 All ER 1 (HL)*

Facts: Gomez was the assistant manager at an electrical store, and he allowed his co-accused to purchase electrical goods from the shop using two stolen building society cheques. Gomez asked the shop manager to authorise the sale of the goods by accepting the cheques in payment. The shop manager told Gomez to check with the bank that the cheques were acceptable. Gomez pretended to do this and later told the shop manager that the cheques were 'as good as cash'. The sale went ahead and the cheques were subsequently dishonoured. Gomez and his co-accused were charged with theft. Gomez argued that he could not be guilty of theft since the shop manager had authorised the transactions and so there had been no appropriation. Gomez was convicted of theft and he appealed to the Court of Appeal.

Held: The Court of Appeal certified the following point of law of general public importance for appeal to the House of Lords:

When theft is alleged and that which is alleged to be stolen passes to the defendant with the consent of the owner, but that consent has been obtained by a false representation, has, (a) an appropriation within the meaning of section 1(1) of the Theft Act 1968 taken place, or, (b) must such a passing of property necessarily involve an element of adverse [interference] with or usurpation of some right of the owner?

The majority of the House answered that there could still be an appropriation where property has passed with the owner's consent, as there was no need for an adverse interference with the owner's rights.

Lord Browne-Wilkinson said:

I regard the word "appropriation" in isolation as being an objective description of the act done irrespective of the mental state of either the owner or the accused.

4.1.3 Theft of gifts



Key case: *R v Hinks [2000] 4 All ER 833*

Facts: The defendant became friendly with a 53-year-old man of limited intelligence. Every day she took him to his building society and he withdrew the maximum daily amount of £300. She influenced, persuaded, or coerced him into giving her this money. Ultimately, he gave her

£60,000. She was charged with theft. The trial judge directed the jury to consider the donor's state of mind when he gave the defendant the money and whether the defendant was dishonest. The defendant was convicted. She appealed against her conviction on the grounds that the trial judge had failed to clearly direct the jury that she could not be guilty of theft if the donor had made a valid gift to her.

Held: The House of Lords dismissed the appeal and held:

- (a) Appropriation is a neutral act and the state of mind of the donor is irrelevant to appropriation;
- (b) Therefore appropriation could take place with or without the consent of the owner; and
- (c) Therefore a person could be guilty of stealing a valid *inter vivos* gift.

4.1.4 A later appropriation

All the elements of theft must exist simultaneously.

There are likely to be occasions when the defendant does not have the mens rea when first assuming an owner's right and **therefore does not commit theft at this point**.

In such circumstances, when the defendant does form the necessary mens rea later it will then be necessary to apply **s 3(1)**, which provides for a later assumption of the owner's rights to amount to an appropriation:



Appropriation: 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.**

(Emphasis added)

This section can be applied when the initial assumption of the rights of the owner does not amount to theft. It provides that a later assumption of a right, either by keeping it or by dealing with it, will be an appropriation. The theft will therefore take place when the defendant forms the mens rea, subject to the remaining elements also being present.

4.1.5 The innocent purchaser

Section 3(2) exempts a defendant from liability for theft where the defendant purchases goods in good faith and for value, then later discovers that the seller had no title to the property, but decides to keep it.

Note that *mala fides* (bad faith) precludes the protection afforded by **s 3(2)**.



Key case: *R v Adams [1993] Crim LR 72*

The defendant purchased goods not knowing that they were stolen. The trial court convicted him of theft on the basis that there had been a later appropriation under **s 3(1)** when he kept the goods after finding out that they were stolen. However, the conviction was quashed on appeal on the ground that the judge failed to direct the jury that he had a defence under **s 3(2)**.

4.2 Property

In order to prove theft, it must be established that the defendant has appropriated property. **Section 4** defines what property may be stolen.



Property: Section 4(1) states:

'Property' includes money and all other property, real or personal, including things in action and other intangible property.

Generally, all property may be stolen, although there are certain exceptions in relation to land (**s 4(2)**), things growing wild (**s 4(3)**), and wild creatures (**s 4(4)**).



Property: Exceptions: Land, s 4(2)

(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 is 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; or
- (b) when he is not in possession of the land and 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.

In general land cannot be stolen. However, a person can be guilty of theft if, for example:

- **Section 4(2)(a):** D is authorised to sell land and sells more than they are meant to;
- **Section 4(2)(b):** D is a trespasser or invited guest and removes a fence or a lavender plant;
- **Section 4(2)(c):** D is a tenant and removes or sells without removing, a fixed greenhouse.

4.2.1 Exceptions: Wild plants, section 4(3)

D will not be guilty of theft if they pick any of the following from plants growing in the wild:

- Mushrooms;
- Flowers;
- Fruit; and/or
- Foliage.

D can however be guilty of theft if:

- The purpose of picking from the wild plant is:
 - A reward;
 - To sell; or
 - For another commercial purpose.
- D uproots or cuts parts of the wild plant.
- D picks cultivated plants.



Property: Section 4(3) states:

A person who picks mushrooms growing wild on any land, or who picks flowers, fruit or foliage from a plant 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.

For the purposes of this subsection “mushroom” includes any fungus, and “plant” includes any shrub or tree.

4.2.2 Exceptions: Wild animals, s 4(4)

D will not be guilty of the theft of:

- Untamed animals; and/or
- Animals not ordinarily kept in captivity.

D can be guilty of theft of:

- Tamed animals (for example, pets such as a cat or dog);
- Animals kept in captivity (for example, in a zoo); and/or
- Animals in the course of being reduced into possession (for example, have been trapped).



Property: Section 4(4) states:

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, or another person is in course of reducing it into possession.

4.2.3 What property can be stolen?

- Money: Notes, coins including other currencies
- Real property: Land in certain circumstances discussed already
- Personal property, for example a coat, a ring, a car, water, gas
- Intangible property such as things in action (a right to sue/recover): Company shares, trademarks, patents, copyright, a debt, a credit in a bank account, forged cheques, cheques drawn on accounts in credit or those drawn on accounts within the agreed overdraft limit (as the bank is obligated to honour the cheque)
- Unlawful or illegal items such as Class A drugs (*Smith, Plummer and Haines[2011] EWCA Crim 66*)

4.2.4 What property cannot be stolen?

- Wild plants and animals, except in certain circumstances discussed already
- Electricity (*Low v Blease[1975] Crim LR 513*)
- Corpses and body parts except those which have been taken into another's possession or control such as:
 - Corpses in hospitals
 - Blood given to a blood bank
 - Corpses or body parts which have 'acquired different attributes' for scientific or teaching purposes (*Kelly and Lindsay[1999] QB 621*)
- Confidential information does not fall within the definition of intangible property (*Oxford v Moss(1978) 68 Cr App R 183*)
- Services such as a train journey
- Cheques drawn on accounts over the agreed overdraft limit (as the bank is not obligated to honour the cheque)

4.3 Belonging to another

Section 5(1) provides:

Property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest [...]

This is a wide definition, which extends beyond ownership to include those having possession or control of it or a proprietary interest in it at the moment of appropriation.

Again, there is considerable case law and additional statutory provisions that deal with the issue of when property will be deemed to belong to another.

4.3.1 When is property abandoned?

Property can cease to belong to another if it has been abandoned. However, the courts do not readily find that property has been abandoned.



Key case: *Williams v Phillips (1957) 41 Cr App R 5*

It was held that householders do not abandon goods that are put in their domestic waste. The householder intends the goods to be collected by the local authority, so a refuse collector could be guilty of theft if appropriating goods from a bin with the relevant mens rea.

Property is not abandoned just because the owner has stopped looking for it. Smith, Hogan and Ormerod's *Criminal Law* notes that a husband who has lost his wedding ring and has long since given up looking for it, will not have abandoned it.



Key case: *Hibbert v McKiernan* [1948] 1 All ER 860

It was held that lost golf balls had not been abandoned by their owners. However, this does not mean that property cannot be abandoned. It will depend on whether the owner wants the property or wants it to go to another party, or whether the owner does not mind what happens to it.

4.3.2 Possession or control

Section 5(1) states that property belongs to those having possession or control of it. The courts have found that property can belong to persons who have possession or control, not just of the specified property, but over the land upon which it was found. This can be so even if the owner of the land is unaware of its existence.



Key case: *R v Woodman* [1974] 2 All ER 955

The Court of Appeal held that, because the factory owners had taken steps to exclude trespassers, there was evidence that they were in control of the factory and thereby had control of the scrap metal, which unknown to them, had been left inside the factory.



Key case: *Parker v British Airways Board* [1982] 1 All ER 834

Facts: The defendant was an airline passenger who found a gold bracelet in a British Airways executive lounge. The court considered whether British Airways had possession or control of the bracelet.

Held: The court decided that the company did not, but stated that if it had shown an intention to exercise control over the building and things in it, the company could have secured possession of the bracelet before the defendant found it. The court held that British Airways could have demonstrated this intention either expressly, for example by putting up a notice, or impliedly. However, in this case it had shown no such intention. When the original owner did not come forward to claim the bracelet it could be kept by the passenger.

4.3.3 Can you steal your own property?



Key case: *R v Turner (No 2)* [1971] 1 WLR 901

Facts: The defendant took his car to a local garage. He later contacted the mechanic to check if the car was ready and was told that it was. The defendant took the car using his spare keys without paying the bill. He was convicted of theft and appealed.

Held: The Court of Appeal held that the mechanic was in possession and control of the car and, therefore, the car did 'belong to another'.

4.3.4 Property given to another for a particular purpose

Sometimes defendants will not form the necessary mens rea until after their initial appropriation of the property. **Section 5(3)** sets out the rules for when title of the property has passed to the defendant by the time D has formed the dishonest intent.

The general civil rule is that title in property passes at the time that the parties intend it to pass. **Section 5(3)** can be used to cover cases where property is handed over for a particular purpose, and the title in that property passes to the accused before D has formed a dishonest intention to use it for an unauthorised purpose.

Section 5(3) provides:

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.

Section 5(3) enables the prosecution to prove that the property still belongs to another for the purposes of the Act, without the need to use **s 5(1)**, which could involve much more complex legal issues.

However, **s 5(3)** will only operate where the accused is under a legal obligation to use the property for the purpose given. This is a matter of law which will be decided by the judge, having regard to civil law. Very often there will be a trust which means that the property will also belong to another under **s 5(1)** which covers equitable interests.

However, as Smith, Hogan and Ormerod's, *Criminal Law* notes, it is better to use **s 5(3)** which allows the prosecution to make out its case more easily without having to resort to the technicalities of trusts law. **Please note that for the purposes of your BPP Criminal Law assessment you are not expected to consider whether a Quistclose trust exists here.**

Following an analysis of the cases set out below, it appears that the courts have taken the view that particular arrangements should have been made with the defendant regarding the specified property.



Key case: R v Hall [1972] 2 All ER 1009

Facts: The defendant, a travel agent, took money for flights. Instead of using the money to buy airline tickets, he put it into the business account and it was used to pay off his creditors. Subsequently, the defendant went bankrupt and the customers lost the money they had paid to him.

Held: The Court of Appeal held that s 5(3) did not apply because it was not established that his clients expected him to retain and deal with the money in a particular way, or that an obligation to do so was undertaken by him. Although the clients expected tickets in return for their money, they did not expect their money to be kept separately, but rather to go towards the general running of the business.



Key case: Davidge v Bennett [1984] Crim LR 297

Facts: The defendant shared a flat with others. They all shared the costs of bills. On receipt of a gas bill for the sum of £159.75, the defendant was given cheques to the value of £109.75 towards the cost of the bill to which she was expected to add the outstanding £50.00. The defendant cashed the cheques and spent the money on Christmas presents. She was convicted of theft. The Queen's Bench Division held that she was under a legal obligation to apply the proceeds of the cheques to the payment of the gas bill.

Held: The defendant's conviction for theft was upheld. This case confirms that obligations can be imposed upon domestic/social arrangements.



Key case: R v Breaks and Huggan [1998] Crim LR 349

Facts: The defendants (B and H) were the directors of an insurance brokerage company, which placed insurance on behalf of clients with Lloyds of London, through Lloyds' brokers. They failed to keep funds given to them by clients separate from their private funds and the company's account. They did not pay the money into a separate client account. The money was used for unauthorised purposes and the defendants were charged with theft. The prosecution alleged that while the money was in the defendants' account, they were under a legal obligation to forward this money on to the insurance brokers. Accordingly, under s 5(3), the money still belonged to the clients and the defendants were guilty of stealing it when they dishonestly used it for an unauthorised purpose.

The trial judge ruled that the object of **s 5(3)** was to avoid the effects of civil law regarding the passing of title in money. **Section 5(3)** would effectively and automatically apply when money

was given with the expectation that it would be used for a particular purpose. The accused were convicted and appealed to the Court of Appeal against their convictions.

Held: The Court of Appeal held that **s 5(3)** had no automatic application. It was for the trial judge to decide, in each individual case, whether the accused was under a legal obligation according to civil law, to deal with the property in a particular way. B and H's convictions were quashed.

Key case: *R v Klineberg and Marsden [1999] 1 Cr App R 427*

Facts: The defendants (K and M) set up a company to buy a timeshare development under construction in Lanzarote and to sell the timeshares. The purchasers were told that their money would be paid to a stake-holding trust company to be held on trust until the development had been completed and was ready for occupation. Various purchasers paid a total of £500,000 for timeshares of which only £233 was paid to the trust company. The rest was paid into the company's bank account and 'lost' when the company went into liquidation. K and M were convicted of ten counts of theft. They appealed against their convictions, arguing that once the money was paid into the company's account, it no longer belonged to the customers.

Held: The Court of Appeal dismissed the appeal in part and upheld six of the ten convictions. They stated that K and M's express assurances that the money would be safeguarded by payment to a stake-holding trust company meant that they were under a legal obligation to do just that. The prosecution had proved that on six counts that the defendants were under an obligation to deal with the money in a particular way. Accordingly, under **s 5(3)** the money would be deemed to belong to the purchasers. The legal obligation need not require the defendant to retain and deal with the actual property concerned. It is enough that there is an obligation to deal with the proceeds of the property.

Key case: *R v Wain [1995] 2 Cr App R 660*

Facts: The defendant raised money in a telethon for a charity. He deposited the monies into a separate bank account, but when asked for the proceeds by the charity organisers he made excuses not to hand the money over and obtained permission to pay it into his own bank account. He then handed cheques drawn on his own account to the organisers but these were not met. At the same time, he was withdrawing money from the account for his own use.

Held: The Court of Appeal held:

[B]y virtue of section 5(3), the appellant was plainly under an obligation to retain, if not the actual notes and coins, at least their proceeds, that is to say the money credited in the bank account which he opened for the trust with the actual property. When he took the money credited to that account and moved it over to his own bank account, it was still the proceeds of the notes and coins donated which he proceeded to use for his own purposes, thereby appropriating them.

Section 5(3) does not prevent the defendant having legal ownership, but it provides that, for the purposes of the Act, the property also belongs to another. Under these circumstances, the prosecution would still have to prove that there was a dishonest appropriation, and that a defendant intended to permanently deprive. **Section 5(3)** only deals with one element of theft – 'belonging to another'.

4.3.5 Property obtained by another's mistake

Section 5(4) caters for the situation where title has passed to the defendant due to another's mistake and allows property to belong to another for the purposes of the Act.

As with **s 5(3)**, this provision only requires the obligation, whether that is the case is a matter of law. Under the law of restitution, when someone is aware they have acquired property by a mistake they are usually under a legal obligation to restore it.

Please note that you will not be expected to know the law on restitution for BPP's criminal law assessment. Instead, where money is given by a mistake, restitution is always available.

Section 5(4) provides:

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.



Key case: Attorney-General's Reference (No 1 of 1983) [1984] 3 All ER 369

Facts: The defendant, a policewoman, was mistakenly overpaid £74.74 for overtime that she had not worked and the money was credited to her bank account. At the original trial, the judge misdirected the jury to acquit the defendant, therefore the prosecution appealed to the Court of Appeal on a point of law.

Held: The Court of Appeal held that although ownership of the money had passed to the defendant, from the moment she became aware that the mistake had been made, she was under a legal obligation to restore the money she had received by mistake. Consequently, by virtue of **s 5(4)** for the purposes of the **TA**, the money would be regarded as belonging to the police authority.

Section 5(4) does not prevent the recipient of the property being the legal owner. It provides that, for the purposes of the Act, the property also belongs to the person entitled to restoration.

Under these circumstances, the prosecution would still have to prove that there was a dishonest appropriation, and that a defendant intended to permanently deprive. **Section 5(4)** notes that if there is an intention not to make restoration of the money, there is an intention to permanently deprive.

4.3.6 An alternative approach to theft of property given by mistake?

Section 5(1) states that property belongs to any person having in it any right or interest. This includes equitable interests.

In **Chase Manhattan Bank v Israel-British Bank** [1981] Ch 105 it was held that a person who gives property by a mistake retains an equitable interest in that property. This civil case was applied in **R v Shadrok-Cigari**, where the Court of Appeal upheld a conviction for theft of property given by mistake without recourse to **s 5(4)**.



Key case: R v Shadrok-Cigari [1988] Crim LR 465

Facts: The defendant was the legal guardian of his nephew. A bank mistakenly credited the child's account with £286,000 instead of £286. At the defendant's request, the child signed an authority for the issue of four separate banker's drafts. The defendant withdrew the majority of the money and he was subsequently convicted of theft.

Held: The Court of Appeal upheld the conviction on the ground that, although legal title in the money may have passed to the accused on delivery, the bank retained an equitable interest in the property that the accused had stolen under **s 5(1)**.

4.4 Dishonesty

The **Theft Act 1968** does not define the term 'dishonesty'.

It is for a jury to decide whether an appropriation is dishonest.

4.4.1 The negative aspect

Section 2 specifies three situations, in which an appropriation of property is not to be regarded as dishonest. If D appropriates property in the belief that:

- **Section 2(1)(a):** D has a right in law to deprive the other of the property;

- **Section 2(1)(b):** D would have the other's consent if the other person knew; or
- **Section 2(1)(c):** The person to whom the property belongs cannot be discovered by taking reasonable steps.

Regarding **s 2(1)(c)**, there is no need for D to take reasonable steps; it is only necessary for D to believe that taking such steps will not enable the owner to be found. Although **s 2(1)(c)** may apply to the original finding, if the owner becomes known to the accused later, then with the application of **s 3(1)** (later appropriation), keeping the property at this later stage could be dishonest and therefore theft.

The Theft Act 1968 does not require the defendant's belief to be reasonably held. As long as it is genuinely held D will not be dishonest. This has been confirmed by the courts in **R v Robinson [1977] Crim LR 173.**



Dishonesty: Section 2(1) states:

- (1) A person's appropriation of property belonging to another is not to be regarded as dishonest-
 - (a) if he appropriates the property in the 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) if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it; or
 - (c) (except where the property came to him as trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

4.4.2 The positive aspect

For situations which are not covered by **s 2(1)**, it is necessary to turn to a common law test.

For 35 years the common law test for dishonesty had been that given in the case of **R v Ghosh [1982] QB 1053.** In October 2017 the Supreme Court heard the civil case of **Ivey v Genting Casinos [2017] UKSC 67** and in the words of Rupert Jackson LJ in **Wingate v SRA [2018] EWCA Civ 366** 'the tectonic plates of the legal firmament moved'.

What was said about the criminal law test for dishonesty in **Ivey** was *obiter dictum*. However, as unanimous *obiter dictum* of the Supreme Court it is highly persuasive. It is even more persuasive in light of the extensive review of the law and the court making it clear that there is unlikely to be an opportunity to change the test in a criminal case.

After some uncertainty in the interim, the Court of Appeal in **R v Booth and Barton [2020] EWCA 575** provided confirmation that the approach in **Ivey** properly represents the law on dishonesty in criminal cases.



Key case: **Ivey v Genting Casinos [2017] UKSC 67**

Facts: Ivey was a professional gambler and the court had to consider whether what he was doing while gambling on a card game amounted to the civil law concept of cheating.

Held: Lord Hughes (with whom all the other justices agreed) upheld the trial judge's decision that Ivey's conduct did amount to cheating. He then went on to discuss the criminal law test for dishonesty at length. First he noted all the criticisms of the test in **R v Ghosh**, and then he surveyed the history of the test for dishonesty in the criminal law. He noted that the opportunity to change the test was unlikely to arise in a criminal case as trial judges would always give the test in **R v Ghosh**. He said that the test for dishonesty in the criminal law should be the same as that in the civil law: the test given in the case of **Royal Brunei Airlines v Tan.**

Lord Hughes:

When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the

question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.

So to summarise, for this test the Supreme Court gave two questions to ask:

- (a) What was the defendant's knowledge and belief as to the facts?
- (b) Given that knowledge and those beliefs, was the defendant dishonest by the standards of ordinary decent people?

4.4.3 Willingness to pay

Section 2(2) provides that a person can appropriate property dishonestly, despite being willing to pay for the property.

This allows people to be convicted of theft when they take property that the owner does not wish to sell, intending to pay for that property.



Dishonesty: Section 2(2) Theft Act 1968 states:

(2) A person's appropriation of property belonging to another may be dishonest notwithstanding that he is willing to pay for the property.

4.4.4 Timing of dishonesty

The dishonest intent must be formed at a time when the goods belong to another. A person cannot be convicted of theft if D only forms the dishonest intent after ownership of the property has passed to D. An example can be found in **Edwards v Ddin [1976] 1 WLR 942**. The general civil rule is that title in property passes at the time at which the parties intend it to pass. Ownership of property usually passes when it is paid for, but ownership of food passes when:

- It is eaten (**Corcoran v Whent [1977] Crim LR 52**) (at which point it also ceases to be property); or
- Possibly before it is eaten, for example when food is ordered and cooked in a restaurant.

Ownership of petrol passes when it is put in a petrol tank.

In the absence of *mens rea* from the outset, the appropriate charge for this type of offence would be making off without payment under **s 3 Theft Act 1978** which was brought in to cover those who were unable to be convicted of theft in these situations.

In other cases where someone forms a dishonest intent after acquiring the property **s 3(1), s 5(3)** and **s 5(4)** may assist in making the defendant liable for theft.

4.5 Intention to permanently deprive

Section 1(1) requires that the accused must 'intend to permanently deprive' the owner of their property. There is no requirement that the owner is actually deprived of their property permanently. The defendant must have the intention to permanently deprive at the time of the appropriation.

The Act does not define intention to permanently deprive and it should be given its ordinary everyday meaning. **Section 6** should not be referred to where it is clear that the defendant does intend the owner to lose their property permanently (**R v Lloyd [1985] 2 All ER 661**).

6 "With the intention of permanently depriving the other of it"

(1) A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it 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.

[Emphasis added]

4.5.1 Intention to treat the thing as their own to dispose of regardless of the other's rights

Section 6(1) extends the meaning of intention to permanently deprive to cover certain circumstances when the defendant does not intend the owner to lose the property itself.

Section 6(1) states that if the defendant has an intention to treat the thing as their own to dispose of regardless of the others rights, this will amount to an intention to permanently deprive. What follows is a review of how the courts have applied this phrase 'his intention is to treat the thing as his own to dispose of regardless of the other's rights' to cases.

The courts have given different ways in which this requirement can be satisfied:

- The dictionary definition of 'to dispose of':
 - The defendant attempting to sell the owner their own property;
 - The defendant using the owner's property for bargaining (ransom cases);
 - Rendering the property useless.
- Intending to treat it in a manner which risks its loss.
- More than 'dealing with' is required.

4.5.2 The dictionary definition

Key case: *R v Cahill [1993] Crim LR 141*

Facts: In this case, the defendant and his co-accused, Jenner, were returning home after a night out. Both defendants were intoxicated. Two plain-clothed officers watched the defendants as they headed down the street. Cahill stumbled over a pile of newspapers meant for the nearby newsagents. It was alleged by the prosecution that Jenner took one of the papers and that Cahill picked up the package of newspapers and walked off with them. Both men were immediately arrested and subsequently convicted of theft. Cahill argued that he thought that he had picked up a bag of rubbish and he was under the impression that it would be left on a friend's doorstep as a practical joke.

Held: His conviction for theft was quashed, on the basis that the original trial judge misdirected the jury on the meaning of **s 6(1)**, by failing to mention the words 'to dispose of'. The Court of Appeal determined that the phrase 'to dispose of' limited the operation of **s 6(1)**. It quoted Sir John Smith and like him gave the Shorter Oxford Dictionary definition of 'to dispose of':

To deal with definitely: to get rid of; to get done with, finish. To make over by way of sale or bargain, sell.

4.5.3 D attempts to sell the owner their own property

The dictionary definition in *R v Cahill* accords with what had been stated previously by Lord Lane in *R v Lloyd* [1985] 2 All ER 661. He said the first part of **s 6(1)** covers situations where the defendant takes things and then offers them back to the owner to buy if they wish. He said it also covers 'ransom cases' where D will only return the owner's property on the fulfilment of a condition.

An example of the defendant attempting to sell the owner their own property is *R v Scott*.

Key case: *R v Scott [1987] Crim LR 235*

Facts: Scott 'stole' a pair of curtains from a store intending to return them the following day, alleging that she had purchased them and claiming a refund.

Held: Her conviction for theft was upheld since she had treated the thing as her own to dispose of regardless of the other's rights.

4.5.4 Ransom cases

Examples of D using the owner's property for bargaining are ransom cases.



Key case: *R v Raphael [2008] EWCA Crim 1014*

Facts: The defendants had taken the victims' cars by force, demanding money in exchange for its return.

Held: The Divisional Court agreed that this situation was covered by s 6(1).



Key case: *R v Waters [2015] EWCA Crim 402*

Facts: A group of people who knew one another met in a park. W took a mobile phone from V and said he would not return it until she had persuaded a young person called Dale to come and talk to them. The trial judge had told the jury that if W had told V she would only get her mobile back on the fulfilment of a condition this would constitute an intention to permanently deprive.

Held: In overturning the conviction, the Court of Appeal said that if the condition as to an item's return can readily be fulfilled and may be fulfilled in the near future, the jury may well conclude that an intention to permanently deprive had not been made out.

4.5.5 Rendering the property useless



Key case: *DPP v J [2002] EWHC 291*

Facts: The defendants had accosted a boy on his way home from school. One of them snatched the boy's headphones and another defendant snapped them in two.

Held: Silber J noted that once the headphones had been snapped, they were useless and could be said to have been dealt with definitely, to have been got rid of, or finished under the dictionary definition given in *R v Cahill*. He said that the intention of the defendants has to be inferred from their acts, thus this defendant had demonstrated an intention to treat the headphones as his own to dispose of regardless of the owner's rights.

4.5.6 Intending to treat it in a manner which risks its loss

Another meaning of the phrase 'his intention is to treat the thing as his own to dispose of regardless of the other's rights' was given by the Court of Appeal in *R v Fernandes*.



Key case: *R v Fernandes [1996] 1 Cr App R 175*

Facts: Fernandes was a solicitor who transferred money out of his clients' accounts and invested it in a risky money-lending business. The money was lost. He claimed not to have had an intention to permanently deprive as he intended to return the money. It was argued on his behalf that s 6(1) only covered cases of selling the owner his own property, of borrowing and of pawning (which is covered by s 6(2)).

Held: The Court of Appeal held that these were merely three examples of treating property as your own to dispose of regardless of the other's rights and there could be others – Auld LJ:

We consider that section 6 may apply to a person in possession or control of another's property who, dishonestly and for his own purpose, deals with that property in such a manner that he knows he is risking its loss.

4.5.7 More than 'dealing with' is required

'To dispose of' does not simply mean dealing with the property, as it was previously thought. If 'to dispose of' simply meant dealing with the property the phrase 'to dispose of' is superfluous. This was not thought to be what Parliament intended.



Key case: *R v Mitchell [2008] EWCA Crim 850*

Facts: The defendant was believed to be part of a gang who took a car by force in order to escape from the police. The car was found abandoned a short while later with its doors open and hazard lights on. Following his arrest, the defendant was charged with robbery, which requires as part of the rules, that a complete theft had been committed. The defendant was believed to be part of a gang who took a car by force in order to escape from the police. The car was found abandoned a short while later with its doors open and hazard lights on. Following his arrest, the defendant was charged with robbery, which requires as part of the rules, that a complete theft had been committed.

Held: The Court of Appeal criticised the trial judge's direction to jury as he had omitted any reference to the words 'to dispose of'. The Court of Appeal stated that it is not enough to merely deal with the property as your own. They referred to the dictionary definition as quoted in *Cahill* and, on the facts, did not feel that the car had been 'got rid of, sold or bargained with'. Nor did the judges feel that the defendant had dealt with the car in a manner knowing that he was risking its loss, as per *Fernandes*. The manner in which the car was left suggested that they knew the owner of the car would get it back. On that basis, the defendant was successful in his appeal and his conviction was quashed, the defendant had not intended to treat the car as his own to dispose of regardless of the owner's rights.



Key case: *R v Vinall [2011] EWCA 6252*

A review of all the important cases on this element was undertaken by the Court of Appeal in *R v Vinall*. Pitchford LJ said:

What section 6(1) requires is a state of mind in the defendant which Parliament regards as the equivalent of an intention permanently to deprive, namely "his intention to treat the thing as his own to dispose of regardless of the other's rights". The subsection does not require that the thing has been disposed of, nor does it require that the defendant intends to dispose of the thing in any particular way. No doubt evidence of a particular disposal or a particular intention to dispose of the thing will constitute evidence of the defendant's state of mind but it is, in our view, for the jury to decide upon the circumstances proved whether the defendant harboured the statutory intention.

4.6 Borrowing

The statute specifies two other situations which will count as 'treating the property as your own to dispose of regardless of the other's rights'.

The second half of **s 6(1)** states that borrowing or lending of property can amount to intending to treat it as their own to dispose of regardless of the other's rights. This will be the case if the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.

The key case on what constitutes circumstances making it equivalent to an outright taking or disposal is *R v Lloyd*.

Section 6(1)

A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it 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.**

[Emphasis added]



Key case: *R v Lloyd [1985] QB 829*

Facts: Lloyd was a projectionist in a cinema. He borrowed films from the cinema, and with others, he copied them onto videotape, sold the videotapes, and then returned the original films to the cinema ready for the next show. Lloyd and his co-accused were convicted of conspiracy to steal (theft).

Held: On appeal, the Court of Appeal quashed the convictions. Refusing to hold that their actions were covered by s 6(1), Lord Lane CJ said:

In this case we are concerned with the second part of s 6(1), namely the words after the semi-colon: “and a borrowing or a lending of it may amount to so treating 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 half of the subsection [...] is intended to make it clear that a mere borrowing is never enough to constitute the necessary guilty mind, unless the intention is to return the “thing” in such a changed state that it can truly be said that all its goodness or virtue has gone: for example: *R v Beecham (1891) 5 Cox CC 181*, where the defendant stole railway tickets intending that they should be returned to the railway company in the usual way only after the journeys had been completed [...]. The judge in the present case gave another example, namely the taking of a torch battery with the intention of returning it only when its power is exhausted.

The goodness, the virtue, the practical value of the films to the owners has not gone out of the article. The film could still be projected to paying audiences, and, had everything gone according to the conspirators’ plans, would have been projected in the ordinary way to audiences at the Odeon Cinema, Barking, who would have paid for their seats. Our view is that those particular films which were the subject of this alleged conspiracy had not themselves diminished in value at all. What had happened was that the borrowed film had been used or was going to be used to perpetrate a copyright swindle on the owners whereby their commercial interests were grossly and adversely affected [...]

So the question to ask where property has been borrowed is: ‘Was the intention to return it minus **all** its goodness, virtue and practical value?’ If the answer is ‘yes’, then this will be equivalent to an outright taking or disposal, which **s 6(1)** states counts as treating it as D’s own to dispose of regardless of the other’s rights, which is equivalent to having an intention to permanently deprive.

4.7 Section 6(2)

Section 6(2) states that a person who parts with property under a condition as to its return, which they may not be able to perform, is deemed to be treating the property as their own to dispose of regardless of the other’s rights.

This subsection covers cases where D pledges P’s property as security for a loan. At the time D may intend to redeem the loan and return the property to P. However, P has parted with the property under a condition as to its return which D might not be able to fulfil.

Section 6(2)

Without prejudice to the generality of subsection (1) above, where a person, having possession or control (lawfully or not) of property belonging to another, parts with the property under a condition as to its return which he may not be able to perform, this (if done for purposes of his own and without the other’s authority) amounts to treating the property as his own to dispose of regardless of the other’s rights.

4.7.1 Interchangeable property

When assessing whether there is an intention to permanently deprive, the courts have considered the actual property taken and disregarded an intention to replace it with equivalent property.

The case of **Velumyl** relates to the issue of an intention to permanently deprive and should not be confused with **Wain** which was concerned with whether the property could be said to belong to another by virtue of s 5(3). In that case, D, who raised money in a telethon for a charity was

under an obligation to keep, if not the actual notes and coins but at least the proceeds to hand over to the charity.

Key case: *R v Velumyl* [1989] Crim LR 299

Facts: The defendant had borrowed money from his employer's safe, even though he knew this was against company rules. He said he intended to repay it on the following day after a debt had been repaid to him.

Held: It was held by the Court of Appeal that intending to return notes and coins of an equivalent value is not the same as intending to return the identical ones that were taken. Therefore, although such an intention may be relevant to the issue of dishonesty, it does not negative the intention to permanently deprive the owner of the original notes and coins.

4.8 Summary

Actus reus:

- **Appropriation** is 'any assumption by a person of the rights of an owner':
 - Only one right needs to be assumed (*R v Morris*)
 - You can appropriate even with the consent of the owner (*R v Gomez*)
 - You can steal a valid gift (*R v Hinks*)
 - If the defendant does not have the mens rea when first assuming an owner's right, check whether there is a later appropriation under s 3(1)
 - An innocent purchaser is not guilty of theft by virtue of s 3(2)
- **Property:** Generally, all property may be stolen, although there are certain statutory exceptions in relation to land (s 4(2)), things growing wild (s 4(3)) and wild creatures (s 4(4)) along with case law exceptions such as electricity and confidential information.
- **Belonging to another**

When considering whether property 'belongs to another', first consider the general provisions in s 5(1): 'Property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest [...]'

- Courts do not readily find property abandoned, not even domestic waste as this belongs to the householder until collected by the council (*Williams v Phillips*) and owners would presumably want their lost golf balls returned (*Hibbert v McKiernan*)
- You can control property you didn't know was on your land (*R v Woodman*) but you must demonstrate your intention to exercise control over items found either expressly through putting up a notice or impliedly (*Parker v British Airways Board*)
- Your property can belong to another who is in possession or control of it, until a bill for services is paid for example (*R v Turner (No 2)*)

Then consider the situations where title to the property has passed to the defendant before a dishonest intent is formed (s 5(3) and s 5(4)).

Section 5(3):

- Property must be given to D for a particular purpose (civil law title passes to D here)
- D must be under a legal obligation to deal with the property in a particular way. This is a matter of law decided by the judge rather than having automatic application (*R v Breaks and Huggan*). Cases illustrate when a legal obligation might be found to exist:
 - **Davidge v Bennett:** The flatmate that spent the gas bill money on Christmas presents. Shows a legal obligation can be found in domestic circumstances.
 - **R v Hall:** The travel agent that put client money towards the general running of the business. Shows that a legal obligation may not exist in business circumstances if there is no expectation or undertaking that money be kept separately for example.
 - **R v Klineberg and Marsden:** There was a legal obligation to deal with some timeshare purchasers property or proceeds in a particular way as the defendants had given express assurances that it would be safeguarded by a stake-holding trust company.

- **R v Wain:** The sponsorship notes/coins raised or the proceeds were held to belong to the trustees of the charity the money was raised for.
- **Section 5(3)** then allows the property to belong to another for the purposes of the **Theft Act 1968** and D.

Section 5(4):

- Property must be given to D by mistake (civil law title passes to D here)
- D must be under a legal obligation to make restoration.
 - This is a matter of law decided by the judge, however under the law of restitution, when someone is aware they have acquired property by a mistake they are usually under a legal obligation to restore it.
 - See **AG's Ref (No 1 of 1983)** where a policewoman was overpaid by her employer - she was under a legal obligation to restore the overpayment at the moment she became aware of the mistake.
- **Section 5(4)** then allows the property to belong to another (the person entitled to restoration) for the purposes of the Theft Act 1968 and D.

Mens rea:

- Dishonesty

The negative aspect: Do any of the exceptions set out in **s 2(1)(a)–(c)** apply?

D will not be dishonest if appropriating property in the genuine belief (**R v Robinson**) that:

- **Section 2(1)(a):** D has a right in law to deprive the other of the property;
- **Section 2(1)(b):** D would have the other's consent if the other person knew; or
- **Section 2(1)(c):** The person to whom the property belongs cannot be discovered by taking reasonable steps.
- **The positive aspect:** *Ivey v Genting Casinos* test for dishonesty:
 - What was the defendant's knowledge and belief as to the facts?
 - Given that knowledge and those beliefs, was the defendant dishonest by the standards of ordinary decent people?

Both questions must be considered.
- **Section 2(2)** provides that a person can appropriate property dishonestly, despite being willing to pay for the property.
- Intention to permanently deprive
 - **Section 6** does not define intention to permanently deprive. In most cases, the phrase should be given its ordinary everyday meaning and intention to permanently deprive will be clear on the facts. **Section 6** should not be referred to where it is clear that the defendant does intend the owner to lose their property permanently (**R v Lloyd**).
 - Intending to return notes and coins of an equivalent value is not good enough to avoid intention to permanently deprive (**R v Velumyl**).
 - If intention to permanently deprive is not clear on the facts then it will be necessary to consider the provisions of **s 6** and case law.

Section 6(1) states an intention to treat the thing as their own to dispose of regardless of the others rights, will amount to an intention to permanently deprive which can mean:

- The dictionary definition of 'to dispose of': 'to deal with definitely; to get rid of; to get done with, finish. To make over by way of sale or bargain, sell' (**R v Cahill**). Examples include:
 - The defendant attempting to sell the owner their own property (**R v Scott**).
 - The defendant using the owner's property for bargaining (ransom cases) (**R v Raphael**).
 - Rendering the property useless (**DPP v J**).
- Intending to treat it in a manner which risks its loss (**R v Fernandes**).
- More than 'dealing with' is required (**R v Vinall**).
- Borrowing or lending for a period and in circumstances making it equivalent to an outright taking or disposal (**s 6(1)**). Was the intention to return it minus all its goodness, virtue and practical value? (**R v Lloyd**)

- **Section 6(2):** A person who parts with property under a condition as to its return, which they may not be able to perform.

5 Robbery

5.1 Introduction

Section 8 Theft Act 1968 provides:

(1) A person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force.

(2) A person guilty of robbery, or of an assault with intent to rob, shall on conviction on indictment be liable to imprisonment for life.

From this definition we can pick out the elements of robbery as follows:

Actus reus:

- Actus reus of theft
- Force (in one of three ways - uses force, puts any person in fear or seeks to put any person in fear of being then and there subjected to force)
- On any person
- Use or threat of force immediately before or at the time of stealing

Mens rea:

- Mens rea of theft
- Intend to use force in order to steal

5.2 Actus reus

5.2.1 Theft

Robbery is an aggravated form of theft, and the wording of **s 8** tells us we must establish that the accused has stolen. A conviction for robbery will only follow if all the elements of theft as defined in **s 1(1)** are satisfied.



Assessment tip

If there is no theft, there is no robbery. You should consider whether the full offence of theft is satisfied first before moving onto whether it becomes a robbery. Although theft contains some actus reus and mens rea elements, it is easier to consider the whole offence at this stage.



Key case: *R v Robinson [1977] Crim LR 173*

Facts: The defendant ran a clothing club. He was charged, inter alia, with robbery from the victim who contributed, with his wife, to the club. The defendant and two others approached the victim, whose wife owed £7 to the club. A fight ensued and the defendant brandished a knife. A £5 note fell from the pocket of the victim. The defendant took the note and asked for £2 more. The defendant's defence at court was that he was not dishonest because he received the money as payment for the debt.

Held: His conviction was quashed on the grounds that the trial judge had failed to direct the jury that he was entitled to an acquittal if he believed he had the legal right to take the property. See **s 2(1)(a)**. This case illustrates the legal principle that if there is no theft, there can be no robbery.

5.2.2 Force or threat of force

There are three ways in which this element can be satisfied, if the defendant:

- (a) Uses force; or
- (b) Puts a person in fear of being then and there subjected to force; or
- (c) Seeks to put a person in fear of being then and there subjected to force.

This is the aggravating element which elevates a theft to a robbery.

Use of force

Force is not defined in the **TA** and it is a matter of fact for the jury whether the defendant's actions amount to force.

It is however clear that 'force' does not require violence.



Key case: R v Dawson and James [1976] 64 Cr App R 170, CA

Facts: One man nudged the victim while another took his wallet.

Held: Their conviction for robbery was upheld because the Court of Appeal rejected their argument that their actions did not amount to force. The word used in the statute was force, not violence. The court held that as force is an ordinary word, which juries can be expected to understand, it is a matter for them whether force on a person had been used.

Force can be applied through property



Key case: R v Clunden [1987] Crim LR 56

Facts: The defendant approached the victim from behind, wrenched her shopping bag out of her grasp with his hands and ran off.

Held: The Court of Appeal said that force used against the property must cause force against the person for this element to be satisfied. Force to detach property can count as force on the person and had done so here, so the conviction was upheld.



Key case: P & Others v DPP [2012] All ER (D) 197

Facts: The defendant removed a cigarette from the victim's hand.

Held: The Administrative Court held that there was no force as there had been no direct contact, any indirect contact was very minimal and there was no evidence of resistance from the victim. The court likened the defendant's acts to that of a pickpocket.

Puts a person in fear

There is no need to apply physical force against a person to satisfy this element. A threat by the defendant which causes the person to think that force will be used against them or at the very least apprehend that fact, will be enough.

This was confirmed by the Divisional Court in **R v DPP [2007] EWHC 739**, where it was held that there is no need for the victim to fear the force they think will be used against them. This makes sense, otherwise defendants could avoid liability if they happen to threaten a particularly brave person.

Seeks to put in fear

The defendant can still be liable, even if the person is not aware that they are being threatened with force, provided the defendant intends to make that person think they will be subjected, then and there, to force.

This legal principle is illustrated by the case of **R v Taylor [1996] 10 Archbold News 2 (CA)** on the next page.



Key case: *R v Taylor [1996] 10 Archbold News 2 (CA)*

Facts: The defendant handed a bank cashier a note which demanded that the cashier hand over money otherwise D would hurt the customer standing behind him. No force was used against the customer standing behind him, nor was the customer put in fear that he would be subjected then and there to force. In this case, neither could it be argued that the defendant sought to put the customer in fear that he would be subjected then and there to force because his threat against the customer was directed to the bank cashier.

Held: There was no robbery, however, the defendant had committed an offence of blackmail.

5.2.3 On any person

This element confirms that the threat or use of force does not have to be directed towards the person from whom the property is stolen. The threat or use of force can be 'on any person'.

5.2.4 Use or threat of force immediately before or at the time of stealing

There is usually no problem in determining whether this requirement is satisfied.

Difficulties will arise however, if the threat or use of force occurs after the theft has technically been committed.

This was considered in the case of *R v Hale* and the issue was dealt with by treating the appropriation as a continuous act.

Key case: *R v Hale [1978] 68 Cr App R 415*

Facts: The defendant and his co-accused went to the house of the victim. They wore stockings over their heads. The defendant put his hand over the victim's mouth to stop her screaming. He then went upstairs and took a jewellery box. Both men then tied up the victim, gagged her and told her not to phone the police for at least five minutes after they had left, otherwise they would do something to her little boy.

The defendants were convicted and they appealed, submitting that the judge had misdirected the jury, by indicating that if an accused used force in order to make good his escape with the stolen goods that would suffice for robbery. The appellants contended that the theft was complete when the jewellery box was first seized and any force used after that point was not 'immediately before or at the time of stealing' nor was it used 'in order to steal'.

Held: The court dismissed the appeal and held that the appropriation should be regarded as a continuing act. It was for the jury to decide when the act of appropriation had come to an end. Thus, the jury were entitled to rely upon the act of tying up the victim after seizing the jewellery box, provided they were satisfied that the force was used in order to steal.

Note that the jury were entitled to convict of robbery relying on the force used when the defendant put his hand over the victim's mouth:

To say that the conduct is over and done with as soon as he lays hands upon the property, or when he first manifests an intention to deal with it as his, is contrary to common sense and to the natural meaning of the words. A thief who steals a motor car first opens the door. Is it to be said that the act of starting up the motor is no more a part of the theft? [...] the act of appropriation does not suddenly cease. It is a continuous act and it is a matter for the jury to decide whether or not the act of appropriation has finished.

(Per Eveleigh LJ)

5.3 Mens rea

The defendant must:

- Act with the mens rea of theft; and
- Intend to use force in order to steal.

The continuing act theory from **R v Hale** might be useful here, for example in cases where the defendant has started stealing before force is used.

R v Vinall [2012] 1 Cr App R 29 highlights that force must be used at the time of theft. In this case, force was used against two victims during a fight and a bike was taken by the defendants as an afterthought and then left abandoned. It was held that where an intention to permanently deprive is formed at a later point in time than force is used, there would not have been a theft at the time the force was used and therefore no conviction for robbery.

5.4 Summary

Actus reus:

- Actus reus of theft: **Robinson** (no theft, no robbery)
- Force or threat of force
 - Use of force: **Dawson and James** (force doesn't require violence) and **Clouden** (force can be applied through property)
 - Puts any person in fear of being then and there subjected to force (meaning apprehend rather than fear, **R v DPP**)
 - Seeks to put any person in fear of being then and there subjected to force (**Taylor**)
- On any person
- Use or threat of force immediately before or at the time of stealing (assisted when necessary by the principle that appropriation is a continuing act and for the jury to decide when it has come to an end, **Hale**).

Mens rea:

- Mens rea of theft
- Intention to use force in order to steal (rather than steal as an afterthought to the force, **Vinall**).

6 Burglary

Under **s 9 Theft Act 1968 (TA 1968)**:

(1) 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 a building 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.

(2) The offences referred to in subsection (1)(a) above are offences of stealing anything in the building or part of a building in question, of inflicting on any person therein any grievous bodily harm [...] therein, and of doing unlawful damage to the building or anything therein.

(3) A person guilty of burglary shall on conviction on indictment be liable to imprisonment for a term not exceeding—

(a) where the offence was committed in respect of a building or part of a building which is a dwelling, fourteen years;

(b) in any other case, ten years.

(4) References in subsections (1) and (2) above to a building, and the reference to subsection (3) above to a building which is a dwelling, shall apply also to an inhabited vehicle or vessel, and shall apply to any such vehicle or vessel at times when the person having a habitation in it is not there as well as at times when he is.

6.1 Two types of burglary

Section 9(1)(a) burglary: In brief, for a **s 9(1)(a)** burglary, the defendant must:

- Enter as a trespasser; and
- Have the intention to commit one of these ulterior offences as they do so:
 - Steal;
 - Inflict grievous bodily harm; or
 - Unlawfully damage property.

The burglary is committed at the point of entry. It does not matter whether or not the defendant goes on to commit the ulterior offence. The key issue is whether the defendant intended to commit the ulterior offence at the point of entry.

Section 9(1)(b) burglary: In brief, for a **s 9(1)(b)** burglary, the defendant must:

- Have entered as a trespasser; and
- Once inside:
 - Steal or attempt to steal; or
 - Inflict, or attempt to inflict, grievous bodily harm.

The burglary is committed at the point of attempt or commission of the theft or infliction of grievous bodily harm. In terms of sentencing, it makes no difference whether the defendant is convicted of a **s 9(1)(a)** or a **s 9(1)(b)** burglary. It will be a matter of evidence which of the two the prosecution decides to charge.

6.2 Section 9(1)(a) burglary

To secure a conviction under **s 9(1)(a)**, the prosecution must establish the following:

Actus reus:

- The defendant enters
- A building or part of a building
- As a trespasser

Mens rea:

- Knowing or being reckless as to entry as a trespasser
- At the time of entry D intended any of the ulterior offences listed in s 9(2):
 - Steal anything in the building or part of the building;
 - Inflict grievous bodily harm on any person in the building or part of the building; or
 - Damage unlawfully the building or anything therein.

6.2.1 When is the offence of s 9(1)(a) burglary committed?

Under **s 9(1)(a)**, burglary is complete upon entry, provided this is done as a trespasser and accompanied by the intention to commit the ulterior offence.

There is no need for the defendant actually to commit the ulterior offence.

Now let us consider all the elements which must be satisfied to establish a **s 9(1)(a)** burglary, beginning with the *actus reus*:

- Enters
- Building or part of a building
- As a trespasser.

6.2.2 Enters

What amounts to entry has been considered by the courts several times over the years. The old common law rule was that entry was satisfied when any part of a person's body entered a building (or part of a building). In the case of **R v Ryan** the Court of Appeal laid down the current position.

It is not difficult for a jury to determine as a question of fact when there has been a partial entry sufficient for establishing this element and it is not likely to raise complexities in practice.



Key case: *R v Ryan [1996] Crim LR 320*

Facts: The defendant was found by an elderly resident with his head and one arm stuck through the window of the house. The defendant argued that since he was stuck and had to be removed by the fire brigade, his conduct did not constitute an entry in law as required by s 9(1).

Held: The Court of Appeal held that partial presence is all that is required and that it did not matter that the defendant was not physically able to steal from the premises.

6.2.3 Building or part of a building

Building

The **Theft Act 1968** only contains a partial definition of this element. According to s 9(4), 'building' for the purposes of the TA 1968, s 9(1) and (2) includes an inhabited vehicle or vessel, whether the person living there is present at the time or not.

Outside this, guidance can be sought from case law. What constitutes 'a building' is a question of fact.

The case of **Stevens v Gourley** [1859] 7 CBNS 99 held that a building must be 'a structure of considerable size and intended to be permanent or at least endure for a considerable time'.



Key case: *B and S v Leathley [1979] Crim LR 314 (Crown Ct)*

Facts: This case involved a freezer container used to store frozen food, which was detached from its chassis and was resting on railway sleepers. It had been in position for two years and was fitted with electricity and was 25 feet long by seven feet square.

Held: It was held to be a building.



Key case: *Norfolk Constabulary v Seekings & Gould [1986] Crim LR 167*

Facts: In this case, two similar containers, still on their wheeled chassis, positioned at the rear of a supermarket and used for temporary storage.

Held: They were not buildings even though electricity was laid on. The only way that burglary could be committed would be if they were inhabited.

Part of a building



Key case: *R v Walkington [1979] 2 All ER 716 (CA)*

Facts: D entered a department store lawfully and then went into an area bounded by a moveable three-sided counter where he opened a cash till.

Held: What amounts to a part of a building is a question of fact for the jury to decide. On the facts of this case, it was clear that the defendant knew that he was not allowed into the till area. Consequently, the jury could find that he had entered part of a building.

The next part of the *actus reus* is that the defendant enters, the building or part of a building 'as a trespasser'. There are two ways in which the defendant can enter as a trespasser:

- Without consent; or
- In excess of authority: At times the defendant can still be a trespasser even if given consent to enter.

We will consider each of these in turn.

6.2.4 As a trespasser - no consent

For this part of the offence, we must borrow from the rules in tort law. Entry into a building or part of a building is a trespass where the building or part entered is in the possession of another, who does not consent to the entry (**R v Collins [1972] 2 All ER 1105 (CA)**).

For burglary, it must be proved that a person entered a building (or part) as a trespasser. Where, at the time of entering, a person is **not** a trespasser, but later becomes one (for example, by exceeding any express or implied limitation on the permission to be on the premises), there can be no conviction for burglary.

Key case: *R v Jones & Smith [1976] 3 All ER 54 (CA)*

Facts: J and S entered the home of S's father and took two television sets. They were convicted of burglary and appealed against conviction. One of the grounds of appeal was that a person with general permission to enter the premises of another could not be a trespasser. At the trial, S's father said that his son could never be a trespasser in his house at any time.

Held: The appeals were dismissed on the basis that their entry was in excess of permission given to them. The court was satisfied they entered against the consent or in excess of consent given by Mr Smith to his son.

[...] it is our view that a person is a trespasser for the purpose of s 9(1)(b) of the Theft Act 1968 if he enters premises of another knowing that he is entering in excess of the permission that has been given to him, or being reckless as to whether he is entering in excess of the permission that has been given to him to enter. Provided that the facts are known to the accused which enable him to realise that he is acting in excess of the permission given or that he is acting recklessly as to whether he exceeds that permission, then that is sufficient for the jury to decide that he is in fact a trespasser.

(Per James LJ)

6.3 Mens rea

Enters knowing or being reckless that the entry was a trespass: It need not be proved that the defendant knew **in law** that they were a trespasser. The defendant merely has to know or be reckless as to the **facts** which make them a trespasser, for example acting in excess of permission.

Intending to commit one of the ulterior offences contained in s 9(2) at the time of entry: It must be proved that upon entry the defendant intended to commit one of the ulterior offences listed in s 9(2). Therefore, upon entry the defendant must:

- Intend to steal from the building or part of the building; and/or
- Intend to inflict GBH on any person in the building or part of the building; and/or
- Intend unlawfully to damage the building or anything in the building or part of the building.

6.3.1 Conditional intent

Before we leave the mens rea of s 9(1)(a), what if the intention of the defendant is simply to have a look inside the property and only steal anything they feel is worth stealing?

Such a conditional intention has been held to count as an intention in **A-G's References (Nos 1 & 2 of 1979)** [1979] 3 All ER 143 (CA).

6.4 Section 9(1)(b) burglary

To secure a conviction under **s 9(1)(b)**, the prosecution must establish:

- The defendant entered
- A building or part of a building
- As a trespasser
- Knowing or being reckless as to entry as a trespasser
- D did one of the following:
 - Stole something from the building or part of the building
 - Attempted to steal something from the building or part of the building
 - Inflicted GBH on any person
 - Attempted to inflict GBH on any person.

It is easier and acceptable to consider this offence by establishing each of the five elements in turn rather than by breaking the offence down into *actus reus* and *mens rea*.

6.4.1 When is the offence of s 9(1)(b) burglary committed?

A s 9(1)(b) burglary requires that once inside the building (or part of the building), having entered as a trespasser, the defendant goes on to commit theft or GBH or attempts to commit these offences.

The burglary is committed at the time of the commission or attempted commission of the offence.

6.4.2 Establishing s 9(1)(b) burglary

- 'Having entered' 'a building or part of a building' 'as a trespasser': For s 9(1)(b) the burglary occurs once the defendant is inside the building or part of the building.
- Entered knowing or being reckless that the entry was a trespass.
- Must commit/attempt to commit theft or inflict/attempt to inflict grievous bodily harm. Once inside, the defendant must actually commit one or more of the following offences:
 - Theft; and/or
 - Attempted theft; and/or
 - Infliction of GBH; and/or
 - Attempted infliction of GBH.

The full *actus reus* and *mens rea* for theft or attempted theft are required.

If, on the other hand, the charge is based upon an infliction of grievous bodily harm, a number of different crimes may suffice. This is because, unlike s 9(1)(a), s 9(1)(b) does not specify that the defendant must **intend** to inflict grievous bodily harm and the term grievous bodily harm describes a level of harm rather than a specific offence. Therefore a number of offences can fall within s 9(1)(b), such as the **Offences Against the Person Act 1861**:

- Section 18; and
- Section 20.

The case of **R v Jenkins** states that no offence and thus no *mens rea* at all is required in relation to the infliction of grievous bodily harm.



Key case: R v Jenkins [1983] 1 All ER 1000

The Court of Appeal said that from the wording of the statute, the infliction of grievous bodily harm need not amount to an offence of any kind and that all was needed was the infliction of this harm.

This is obiter dictum and has been the subject of academic criticism. See Smith, Hogan and Ormerod's, *Criminal Law* where it is noted that Professor Smith considered there had been a drafting error in not including the word 'offence' in the statute.

However, it can also be noted that the case strictly follows the words of the statute. **R v Jenkins** went to the House of Lords on another issue where no allusion to or criticism was made of what the Court of Appeal had said on this issue. It is therefore the current law.

6.5 Summary

This section considered the offence of burglary under **s 9 Theft Act 1968**.

There are two separate offences:

- **Section 9 (1)(a)** committed at the point of entry into the building as a trespasser and the defendant must know or be reckless as to entry as a trespasser and intend to commit one of the offences set out in s 9(2): theft, GBH or criminal damage.
- **Section 9(1)(b)** committed when, having entered the building as a trespasser, knowing or being reckless as to entry as a trespasser, the defendant goes on to commit:
 - Theft or attempted theft; or
 - GBH or attempted GBH.

Note. Although criminal damage is stated as a relevant offence in **s 9(2)** for the purposes of a s 9(1)(a) offence, it is **not** included in a **s 9(1)(b)** offence.

7 Aggravated burglary

7.1 Section 10, Theft Act 1968

(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 airpistol, 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.

(2) A person guilty of aggravated burglary shall on conviction on indictment be liable to imprisonment for life.

7.2 Why do we need another offence of burglary?

Consider the maximum sentences set out in the statute for burglary and aggravated burglary.

- The maximum sentence for burglary is set out in **s 9(3) Theft Act 1968** as:
 - 14 years, where the building or part of a building was a dwelling; or
 - 10 years, in any other case.
- The maximum sentence for aggravated burglary is set out in **s 10(2)** as life imprisonment.

Burglary when in possession of a firearm, weapon of offence or explosive is deemed so serious to warrant a maximum of life imprisonment. The reason given by the Criminal Law Revision Committee at the time for this maximum sentence is that aggravated burglary could be very frightening to anyone in the building and could potentially lead to fatal consequences.

We will now consider in greater depth the articles which fall within a ‘weapon of offence’ for the purposes of **s 10(1)(b)**.

7.3 What will amount to a ‘weapon of offence’?

If you break down the wording of **s 10(1)(b)** a ‘weapon of offence’ can be any article:

- Made or adapted for causing injury to or incapacitating a person; or
- Which, at the time of committing the burglary, the defendant possesses with the intention of causing injury to or incapacitating a person.



Key case: *R v Stones [1989] 89 Cr App R 26 (CA)*

Facts: The defendant was seen running away from a house which had just been burgled. He had a knife in his possession. He claimed he had to for self-defence.

Held: The phrase ‘intended by the person having it with him for such use’ does not impose a requirement to prove that the intended use was with respect to the particular burglary.



Key case: *R v Kelly [1993] 97 Cr App R 245 (CA)*

Facts: K used a screwdriver to break into a house. When surprised by the householder, K told him to unplug the video and then stabbed the householder with the screwdriver. On leaving, K was arrested with a video in one hand and the screwdriver in the other.

Held: His appeal against conviction for aggravated burglary was dismissed. The court said that K was charged on the basis of the **Theft Act 1968, s 9(1)(b)**. Therefore, the time at which K had to be proved to have had a weapon of offence, in order to be guilty of aggravated burglary, was at the time that he actually stole. The screwdriver would become a weapon of offence when K intended to use it for causing injury to, or incapacitating any person. He had this intent by the time of the theft. This construction followed from the clear language of the **Theft Act 1968, s 10** and was consistent with its purpose.

7.4 When must D have the article with them?

It is important to establish that the defendant has the offending article with them **at the time they commit the relevant burglary**, be it a **s 9(1)(a) burglary** (at the point of entry) or **s 9(1)(b) burglary** (on commission or attempted commission of theft or grievous bodily harm). This was confirmed in the following cases.



Key case: *R v O'Leary [1986] 82 Cr App R 341 (CA)*

Facts: Here, the appellant forced entry into a private house while unarmed. He then picked up a knife from the kitchen and went upstairs where he confronted the two occupants. He committed a theft and injured the occupants. In answer to a charge of **s 9(1)(b) aggravated burglary**, the appellant claimed he could not be guilty because he was not armed when he entered the house.

Held: However, the Court of Appeal held that the time when he must have the weapon of offence was the time at which he actually stole. In this case, that was when he confronted the householders and demanded their cash.



Key case: *R v Francis [1982] Crim LR 363 (CA)*

Facts: Ds, who were armed with sticks, were allowed by V to enter after they noisily demanded entry. They then discarded their sticks and subsequently stole articles in the house.

Held: Their convictions for aggravated burglary were quashed; they may have entered with weapons of offence, but there was no evidence that at the point of entry they intended to steal.



Key case: *R v Klass [1998] 1 Cr App R 453 (CA)*

Facts: K and two other men, one of whom had a piece of pole in his hand, wrenched open the door of a caravan and demanded money from the occupant. The occupant ran out of the caravan. Once outside, the occupant was repeatedly assaulted with the pole by one of the accomplices. There was no evidence that this accomplice with the pole ever went inside the building. K then entered the caravan without the pole and committed burglary. He was convicted of aggravated burglary.

Held: The Court of Appeal allowed the appeal on the grounds that there was no entry into the building with a weapon.

7.5 Summary

This section considered the offence of aggravated burglary under **s 10 Theft Act 1968**.

- First it is necessary to establish that a burglary under **s 9(1)(a)** or **(b)** has occurred.
- If so, for **s 10** to apply, the defendant must have with them, at the time of the burglary, one of the articles set out in **s 10 (1)(a)–(c)**, that is:
 - Firearms or imitation firearms;
 - A weapon of offence which ‘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’; or
 - Explosives.

- For aggravated burglary relying on a:
 - **Section 9(1)(a)** offence: The defendant must have this article with them when entering the building; or
 - **Section 9(1)(b)** offence: The defendant must have this article with them when committing the theft (or attempt) or the grievous bodily harm (or attempt).

8 Fraud by false representation

8.1 Three ways of committing fraud

The Fraud Act 2006 (FA) abolished the old offences related to deception. They were replaced primarily by one offence of fraud under **s 1 FA**. The Act lists three different ways in which fraud can be committed:

- **fraud by false representation (s 2);**
- **fraud by failure to disclose (s 3); and**
- **fraud by abuse of position (s 4).**

This element will focus on fraud by false representation.

The maximum penalty for fraud, in relation to each of the different ways it can be committed, is the same and is also set out in **s 1**. If the defendant is tried on indictment, the maximum penalty is ten years in prison, or an unlimited fine.

9 Fraud by false representation

This offence most closely matches the old offences of deception, and therefore reference will be made to case law that assists in explaining the concepts involved. It is, however, much wider than the deception offences, being a conduct rather than a result crime.

All that is required for the *actus reus* is a false representation. There is no requirement that this representation deceives anyone.

Section 2 provides:

- (1) A person is in breach of this section if he—
 - dishonestly makes a false representation, and
 - intends, by making the representation—
 - to make a gain for himself or another, or
 - to cause loss to another or to expose another to a risk of loss.

9.1 Actus reus

According to **s 2**:

- (2) A representation is false if—
 - it is untrue or misleading [...]
- (3) “Representation” means any representation as to fact or law, including a representation as to the state of mind of—
 - the person making the representation, or
 - any other person.
- (4) A representation may be express or implied.

We will look at three aspects of a false representation.

9.1.1 Express or implied representation

The representation that forms the heart of the case can be made expressly by the defendant, or can be implied (**s 2(4)**). An implied representation can arise from:

- What the defendant says: In **R v King [1979] Crim LR 122** a second-hand car dealer who stated that the mileage reading on a particular car ‘may not be correct’ impliedly represented that he was not certain the reading was wrong when in fact he knew it was wrong as he had altered it; or
- The defendant’s conduct: In **DPP v Ray [1974] AC 370** the court held that the respondent made a continuing implied representation when entering a restaurant, ordering and eating a meal that he had the means and the intention of paying for it before he left.

Pure silence, without an accompanying action cannot amount to a representation (**R v Twaite**).

False representation by conduct



Key case: **Idrees v DPP [2011] EWHC 624**

Idrees had failed his driving theory test 15 times. An unknown person then took the test pretending to be Idrees and passed. There was good evidence that Idrees had arranged this: Idrees had booked the test slot and he had booked it in English despite having taken the previous 15 tests in Urdu. It was found that the person who took the test made a false representation by conduct that he was Idrees and he did this as Idrees’s agent. The magistrates’ court convicted Idrees of fraud by false representation and the High Court upheld the conviction.

9.1.2 Representation as to fact, law or state of mind

Section 2(3)

A representation as to fact or law will normally be relatively straightforward. A representation as to the state of mind, whether of the defendant or any other person, requires further consideration. A false representation as to one’s belief may satisfy the requirements of **s 2** if it can be shown that the defendant does not in fact hold that opinion or belief.



Key case: **Edgington v Fitzmaurice (1885) 29 Ch D 459**

The court stated:

It is very difficult to prove what the state of a man’s mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man’s mind is therefore, a misstatement of fact [...]



Key case: **R v King [1979] Crim LR 122**

A second-hand car dealer stated that the mileage reading on a particular car ‘may not be correct’. The court held that the defendant had impliedly represented that he was not certain the reading was wrong (in fact he knew it was wrong as he had altered it). The latter representation is one of present fact, about the dealer’s mental state.



Key case: **Smith v Land and House Property Corporation (1884) 28 Ch D 7**

Bowen LJ stated:

If the facts are not equally well known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of material fact, for he impliedly states that he knows facts which justify his opinion.

If the defendant is in a better position to express the belief or opinion than the other party, this may also amount to a false representation.



Key case: *DPP v Ray* [1974] AC 370

The state of mind required can also relate to an intention. If the defendant states an intention to do something, when D in fact has no such intention, this may also amount to a false representation.

In this case, it was implied from the respondent's course of conduct that he would pay for his meal before leaving the restaurant, which was a false representation of his intention/ state of mind after he made the decision to leave without paying.

9.1.3 The representation must be untrue or misleading

Section 2(2)(a)

The issue as to whether a representation is untrue will be an issue of fact for the jury to determine and will often be a straightforward one to resolve.

The Act appears to create an alternative approach by describing a false representation as one that is untrue or misleading. It is, however, unclear at present what the term 'misleading' adds.

9.1.4 Overcharging

One situation that the courts had to resolve under the old deception offences, was whether a trader or service provider, who charges a customer a sum for goods or services significantly above the market rate, was guilty of deception.

It has been argued that the basic principle in English law is that a person is entitled to charge whatever sum they consider appropriate – it is up to the customer to assess whether the amount charged represents a fair price. Nevertheless, criminal law has been willing to impose liability in certain circumstances for such overcharging.

We will look at two cases on the next pages:

- *R v Silverman*, where Watkins LJ found that a false representation arose because of 'circumstances of mutual trust'; and
- *R v Jones*, where Auld LJ referred to the defendant being the victim's 'trusted friend'.

Note. It might be possible in a similar situation to charge the defendant with fraud by abuse of position (see the separate element on this) but a more straightforward route would be to establish liability under **s 2** on the grounds that there was an implied representation that the charge was fair.



Key case: *R v Silverman* (1988) 86 Cr App R 213

This case concerned a builder who had worked for the family of two elderly sisters for a number of years. On several occasions, he charged excessive amounts for work done on their home. He argued that he made no specific comment about the fairness of the charge.

It seems clear to us that the complainants, far from being worldly wise, were unquestionably gullible [...]. [T]hey relied implicitly upon the word of the appellant about their requirements in their maisonette. In such **circumstances of mutual trust**, one party depending upon the other for fair and reasonable conduct, the criminal law may apply if one party takes dishonest advantage of the other by representing as a fair charge that which he but not the other knows is dishonestly excessive.

(Per Watkins LJ – emphasis added)

Note that the method the Court of Appeal used to impose liability in these circumstances was to imply a false representation into the dealings between the defendant and the victims that the charge made was a fair one.

Watkins LJ referred in the quote above to the victims in **Silverman** as being ‘far from worldly wise’ and ‘unquestionably gullible’. Does this mean that an essential factor required where overcharging can be regarded as fraud, is that the victim is in some way ‘vulnerable’?



Key case: *R v Jones (1993) The Times, 15 February*

Facts: J, a milkman, was convicted of obtaining property by deception for overcharging for crates of milk. The purchaser regarded J as a friend.

It is true that [the victim] was not gullible in the same sense as was alleged in the case of **Silverman**. He was an experienced businessman who has been running a busy corner shop for many years [...]. But he was gullible in the sense that in his busy life he never for a minute felt that he needed to check what **his long time and trusted friend** asked for each week or to relate it to the actual quantities received. It may be that he was remarkably stupid or careless about this. But on the evidence it was a stupidity or carelessness born of trust, and it was a stupidity or carelessness of which the appellant was aware and of which he was able to take advantage for many years.

(Per Auld J – emphasis added)

9.1.5 Deceiving a machine

This is covered by **s 2(5)** which states:

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).

This provision will catch those using stolen credit cards and PIN codes to get money from ATMs, and also those who use such cards to make online purchases. In such cases a defendant could be charged with the theft of the card, and also for using the card to falsely represent to a machine that they are entitled to withdraw the funds, or are entitled to make a payment for the sum, which D attempts to spend.

9.2 Mens rea

There are three aspects of the mens rea of fraud by false representation:

- Dishonesty;
- Mens rea for the false statement; and
- Intention to make a gain or cause a loss.

9.2.1 Dishonesty

The test for dishonesty has always been the same as that applied in theft. This means that **Ivey v Genting Casinos** is the test which should be applied.

Note, however, that the negative definitions of dishonesty contained in the **s 2(1) Theft Act 1968** apply only to the offence of theft and therefore will **not** apply to offences under the **FA**. This means that the first part of the test in **Ivey**, which directs the jury to the defendant’s knowledge and belief, may well prove to be significant.



Key case: *Ivey v Genting Casinos [2017] UKSC 67*

The Supreme court gave two questions to ask regarding the test for dishonesty:

- (a) What was the defendant’s knowledge and belief as to the facts?
- (b) Given that knowledge and those beliefs, was the defendant dishonest by the standards of ordinary decent people?



Key case: *R v Clarke [1996] Crim LR 824*

This is an interesting case to bear in mind, when considering the issue of dishonesty. It is a case decided under the old law, although the principle which flows from it is thought to be equally valid under the **Fraud Act 2006**.

In this case Clarke, a private investigator, falsely told a group of potential clients that he was a former fraud squad officer and a court bailiff. As a result of those representations, he had been engaged to trace funds of a group of victims of fraud. He was charged under **s 16 Theft Act 1968** (now repealed). The judge directed the jury that he was dishonest if he made these deceptions. Clarke's case was that he believed he was able to do the work well, so was not dishonest. The Court of Appeal allowed an appeal. The interpretation of the trial judge's indication was that he thought it was necessarily dishonest to tell lies to obtain employment, irrespective of whether or not the liar thought he could do the job properly and intended to do so. Parliament had included in the offence the requirement of dishonesty as well as the requirement for a deception. Therefore, there should have been a direction on dishonesty.

9.2.2 Mens rea for the false statement

The defendant must know, or be aware, that the statement is untrue or misleading (**s 2(2)(b)**).

It appears that the requirement that the defendant is aware that the statement is untrue or misleading will be satisfied if D is subjectively aware of the possibility that what they are saying or implying is false.



Key case: *R v Staines (1974) 60 Cr App R 160*

The Court of Appeal held that recklessness with regard to a false statement requires more than mere carelessness or negligence; there must be an indifference to, or disregard of, whether a statement is true or false. A belief, however unreasonable, that the representation is true will prevent the defendant's conduct from amounting to deception. Thus, if a person knows the statement they are making might be false, then they should make that clear to the person they are making it to. If a person gives a clear caveat, then they do not make a false statement, but a true statement.

9.2.3 Intention to make a gain or cause a loss

This requirement of mens rea (which is common to all the ways that the offence of fraud can be committed) marks one of the most important differences between the old deception offences and those created by the **FA**. The deception offences, such as obtaining property by deception, required that the defendant actually obtain something as a result of D's representation (property in the case of this specific offence).

The requirement of an actual gain or loss is absent from the offences of fraud under the **FA**. All that is required is that the defendant **intended** to make a gain, even if no such gain arose. In fact, this element of mens rea is much wider than that as it is enough that the defendant:

- Intends to make a gain for themselves;
- Intends to make a gain for someone else;
- Intends to cause a loss to another; or
- Exposes someone to a risk of loss.

In *R v Dziruni [2008] EWCA Crim 3348* a false representation made with a view to getting a job could be regarded as intention to make a gain in terms of money.

Reference must be made to s 5 to find the full definition of 'gain' and 'loss':

(2) "Gain" and "loss"—

(a) extends only to gain or loss in money or other property;

(b) includes 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.

(4) “Loss” includes a loss by not getting what one might get, as well as a loss by parting with what one has.

9.3 Summary

This section considered one of the ways to commit the offence of fraud under **s 1**.

The key elements of fraud by false representation are set out in **s 2**:

Actus reus: false representation

- Express or implied representation
- Representation as to fact, law or state of mind
- Representation must be untrue or misleading

A false representation can arise in certain circumstances of overcharging (**Silverman, Jones**) and representations include those made to a machine (**s 2(5)**).

Mens rea:

- Dishonesty: use the test from *Ivey v Genting Casinos*
- Mens rea for the false statement
- Intention to make a gain or cause a loss (see **s 5**)

10 Fraud by failure to disclose

This method of committing fraud is set out in **s 3**:

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 **actus reus** of fraud by failure to disclose requires:

- Existence of a legal duty; and
- Failure to disclose.

10.1 Actus reus

10.1.1 Existence of a legal duty to disclose

The **Fraud Act 2006** makes no attempt to define the type of duty to which this section applies.

Some guidance can be obtained from the Law Commission’s report that led to the Act.

The Commission suggested a number of examples of the type of duty involved, including a duty:

- (a) Arising from statute (such as the provisions governing company prospectuses);
- (b) Within a transaction of the utmost good faith (such as a contract of insurance);
- (c) Contained in the express or implied terms of a contract;
- (d) Arising from a custom in a particular trade or market; and
- (e) Arising from a fiduciary relationship (such as that between a principal and agent).



Key case: *R v Razoq [2012] EWCA Crim 674*

An example of a duty arising from contract.

Razoq was a doctor who signed a contract with a locum agency in which he agreed to inform the agency of any disciplinary proceedings against him. When he failed to disclose this information, he was found guilty of **s 3 FA** on the basis that his legal duty to disclose arose from an express term of a contract.



Key case: *R v Mashta [2010] EWCA 2595*

Mashta was claiming benefits on the grounds of destitution.

During this time, he obtained employment.

He was held to be under a legal duty to disclose the change in his financial circumstances.

10.1.2 Failure to disclose

Once the existence of a legal duty has been established, the prosecution must prove that the defendant failed to disclose the information to another person.

This will be a matter of fact, and in most instances will be easy to prove.

10.2 Mens rea

Two aspects of mens rea are required, which are very similar to the mens rea for fraud by false representation. The first is dishonesty.

10.2.1 Dishonesty

The test for dishonesty has always been the same as that applied in theft. This means that *Ivey v Genting Casinos* is the test which should be applied.

Note, however, that the negative definitions of dishonesty contained in **s 2(1) Theft Act 1968**, apply only to the offence of theft and therefore will **not** apply to offences under the FA.

10.2.2 Intention to make a gain or cause a loss

Reference must be made to the **Fraud Act 2006, s 5** to find the full definition of 'gain' and 'loss':

In *R v Dziruni* [2008] EWCA Crim 3348 a false representation made with a view to getting a job could be regarded as intention to make a gain in terms of money. This could also apply to fraud by failure to disclose.

10.3 Summary

This section considered one of the ways to commit the offence of fraud under **s 1**.

The key elements of fraud by failure to disclose are set out in **s 3**:

Actus reus:

- Existence of a legal duty to disclose eg from statute, a transaction of the utmost good faith, contained in the express or implied terms of a contract, arising from a custom in a particular trade or market or arising from a fiduciary relationship.
- Failure to disclose information to another person: a matter of fact.

Mens rea:

- Dishonesty: Use the test from *Ivey v Genting Casinos*
 - What was the defendant's knowledge and belief as to the facts?
 - Given that knowledge and those beliefs, was the defendant dishonest by the standards of ordinary decent people?
- Intention to make a gain or cause a loss (see **s 5**).

11 Fraud by abuse of position

Details of this form of fraud can be found in **s 4 FA 2006**:

- (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.'

11.1 Actus reus

11.1.1 Occupying a position

The Act does not seek to define the type of position required, except to state that this position must be one requiring the defendant to look after the victim's financial wellbeing.

The Law Commission's report which led to the **FA** gives some assistance:

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. This does not of course mean that it would be entirely a matter for the fact-finders whether the necessary relationship exists. The question whether the particular facts alleged can properly be described as giving rise to that relationship will be an issue capable of being ruled upon by the judge and, if the case goes to the jury, of being the subject of directions.

The conclusion that can be drawn from the explanation from the Law Commission seems to be that the position required by **s 4**, will be easy to prove where there is a professional, fiduciary or long-term business relationship.

However, the type of fraud outlined in the **s 4** is clearly not limited to such relationships.



Exercise: Challenge yourself

If, for example, a woman starts visiting her elderly neighbour and helping with his shopping one can see that this relationship would fit into the last example given by the Law Commission of 'voluntary work.' This would be particularly true if the neighbour asked the woman to help him in any way with his finances, such as collecting his pension from the Post Office.



Key case: *R v Pennock & Pennock [2014] EWCA Crim 598*

Court of Appeal has confirmed that this is a matter which will be determined on a case-by-case basis. This case primarily deals with the issue of abuse of this position and will be discussed later in this element.



Key case: *R v Marshall [2009] EWCA Crim 2076*

Marshall was the manager of a residential home for adults with severe learning difficulties. She had control over the residents' bank accounts. She withdrew money from the bank account of one resident and spent it on herself. She was convicted of s 4.



Key case: *R v Valujevs and another [2014] EWCA Crim 2888*

Valujevs and Mezals were gang masters who controlled a group of Latvian and Lithuanian workers who had come to Cambridgeshire in search of agricultural work. They found work for these workers and took responsibility for paying their wages and finding their accommodation. Valujevs and Mezals had been making deductions from the workers' wages and had charged the workers inflated rents for their accommodation. The trial judge held that V and M were not in a position in which they were expected to safeguard or not act against the financial interests of the workers.

The decision was overturned by the Court of Appeal. In finding that the defendants occupied a position of trust as required by s 4, the court said it was clear from the wording of the section that Parliament did not intend to restrict the application of s 4 to those who owed a fiduciary duty to the victim. However, if there was no fiduciary duty it was necessary for the prosecution to show an obligation that is akin to a fiduciary duty.

Fulford LJ agreed with the judge that s 4 should not apply in 'the general commercial area where individuals and businesses compete in markets of one kind or another, including labour markets, and are entitled to and expected to look after their own interests'. So he concluded that the fact that the defendants provided accommodation for the workers did not give rise to the relevant position. What was crucial and put them into the required position was that the defendants assumed responsibility for collecting the workers' wages.

He went on to consider whose expectation it should be that a defendant would not act against the financial interests of another person.

Although the statute does not provide any assistance on the issue, in our view the "expectation" in **section 4 of the 2006 Act** is an objective one. **It is for the judge to assess whether the position held by the individual is capable of being one "in which he is expected to safeguard, or not to act against, the financial interests of another person.**

If it is so capable, it will be for the jury thereafter to determine whether or not they are sure that was the case. It would be untenable to suggest that the expectation should be that of either the potential victim (the test would, in all likelihood, be too low) or the defendant (the test is likely to be set too high). Therefore, this is an objective test based on the position of the reasonable person.

11.1.2 Abuse of position

Once the prosecution have shown that the defendant occupied a position requiring D to safeguard the position of the victim of the fraud, they must then prove that the position has been abused. Once again, there is no guidance from the FA as what would amount to an abuse of position.

However, some direction has been provided from the case of ***R v Pennock & Pennock [2014] EWCA Crim 598***. The Court of Appeal adopted the definition suggested in Archbold, namely: 'uses incorrectly' or 'puts to improper use' the position held in a manner that is contrary to the expectation that arises because of that position.

The way in which the Court of Appeal applied this definition against the facts in **Pennock** provides a useful insight of how this may apply within particular scenarios.



Key case: *R v Pennock & Pennock [2014] EWCA Crim 598*

In this case, the defendants, Mr and Mrs Pennock befriended Mrs Pennock's elderly great uncle, Mr Spann. Mr Spann was residing in New Zealand at the time but, partly for health reasons, he decided to move back to the UK.

When Mr Spann moved to the UK, he lived with Mr and Mrs Pennock for several months and his savings were put into various joint bank accounts in the names of Mr Spann and Mr Pennock. The evidence from the bank manager who set up these accounts was that Mr Spann was able to and happy to agree to the setting up of these accounts. It should be noted that all parties were considerably wealthy in their own right.

After a few months, a house was bought for Mr Spann to move into. The cost of the house was £265,000, of which £100,000 came from Mr Spann's savings. Mr Pennock transferred this money from one of the joint accounts to an account of his own before forwarding it on to the solicitor acting on the purchase. The house was bought in the names of Mr and Mrs Pennock but later transferred to their daughter, they claimed for tax planning reasons. The daughter did not pay anything for the house.

Mr and Mrs Pennock were charged with two offences of fraud by abuse of position. One for the transfer of the money from the joint account, and the second offence was for the transfer of title to the house to their daughter. They were convicted and appealed to the Court of Appeal.

Interestingly, the appeal was allowed following the court's application of the definition of abuse. The Court of Appeal seemed to suggest that, based on the indictment as drafted, on neither occasion had the defendants done anything illegal and therefore had not abused their position.

Regarding the first count, the court noted that in relation to a joint bank account, either signatory to the account can withdraw any amount of money unless there are specific restrictions put in place to prevent one signatory acting alone. There were no such restrictions here, therefore Mr Pennock had not acted 'improperly' in relation to the transfer.

Regarding the second offence, the Court of Appeal noted that, although Mr Spann's name did not appear on the title to the property, he nevertheless retained an equitable interest, given that his money was in part used to purchase it. As Mr and Mrs Pennock's daughter was not a bona fide purchaser for value, her ownership was still subject to Mr Spann's equitable interest. The Court of Appeal stated that even if Mr and Mrs Pennock had been attempting to deprive Mr Spann of his equitable interest, they had failed to do so, therefore there had been no abuse of position.

Having reflected upon this judgment, the Court of Appeal may well have got this wrong. Suggesting that the offence would only be committed following a successful unlawful act seems unduly narrow and contrary to the definition upon which they purport to rely. This would mean that a defendant, who dishonestly embarks on an improper purpose, will avoid criminal liability because it subsequently transpires that D's acts are lawful.

Based on the definition used for the word 'abuse', it is submitted that cannot be right! The definition seems much wider than this application would suggest. Although it was not possible to question Mr Spann on this point, due to his ill health, it is likely that he would have confirmed that he had given Mr Pennock authorisation to conduct his affairs.

However, surely Mr Spann would have expected such acts to be carried out in a way that would be to his benefit. By definition, to do otherwise would be an 'improper' and/or 'incorrect' use of the position and therefore could amount to an abuse of that position. The Court of Appeal seems to have taken a very legalistic approach to the issue of authorisation and expectation.

Also, it appears that there is a degree of overlap between the abuse element and that of dishonesty. It seems logical that, if the jury conclude, by application of the Ivey test, that the defendant is dishonest, they will also conclude that the defendant has abused their position.

Nevertheless, we have been directed by the Court of Appeal to deal with these elements separately, and until the matter is addressed further by the courts, it is the direction we are obliged to follow.

Abuse of position by omission

Note that s 4(2) provides that this offence can be committed by an omission as well as by an act.

An example of how this might occur is when an employee who has a duty to collect payment on behalf of their employer fails to do so.

11.2 Mens rea

There are two aspects to the mens rea of fraud by abuse of position:

- Dishonesty; and
- Intention to make a gain or cause a loss.

11.2.1 Dishonesty

Section 4(1)(b): dishonestly abuses that position

Note, however, that the negative definitions of dishonesty contained in **s 2(1) Theft Act 1968**, apply only to the offence of theft and therefore will not apply to offences under the **Fraud Act 2006**.

11.2.2 Intention to make a gain or cause a loss

Section 4(1)(c): an intention to make a gain or cause a loss

The second aspect of the mens rea is intention to make a gain or cause a loss. The requirement of an actual gain or loss is absent from the offences of fraud under the **Fraud Act 2006**. All that is required is that the defendant **intended** to make a gain, even if no such gain arose. In fact, this element of mens rea is much wider than that as it is enough that the defendant: intends to make a gain for themselves, intends to make a gain for someone else, intends to cause a loss to another or exposes someone to a risk of loss.

Note. Where an employee fails to collect sums owed to their employer, due to laziness (rather than assisting the person who should be paying or punishing their employer), there would be an oblique intention to make a gain for another and cause a loss to their employer. Applying the test in **R v Woollin**, it would be virtually certain that such a gain and loss would be caused and the defendant would appreciate this to be the case.

11.3 Summary

This section considered one of the ways to commit the offence of fraud under **s 1**. To be liable for fraud by abuse of position (**s 4**) D must:

Actus reus:

- Occupy a position which requires D to look after V's financial wellbeing. Determined on a case-by-case basis. Can be a professional, fiduciary or long-term business relationship or even within the family or voluntary work.
- Abuse that position: use it incorrectly or put it to improper use (**R v Pennock & Pennock**).

Mens rea:

- Dishonesty: Use the test from **Ivey v Genting Casinos**:
 - What was the defendant's knowledge and belief as to the facts?
 - Given that knowledge and those beliefs, was the defendant dishonest by the standards of ordinary decent people?
 - Given that knowledge and those beliefs, was the defendant dishonest by the standards of ordinary decent people?
- Intention to make a gain or cause a loss (see **s 5**).



Defences

1 Intoxication

1.1 Absence of a valid defence

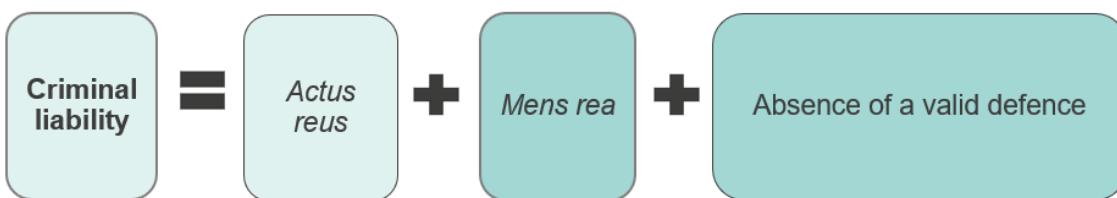


Figure 6.1: Elements for criminal liability

For a defendant to be criminally liable, they must have the *actus reus* and *mens rea* of the relevant offence and the absence of a valid defence - a justification or excuse for D's behaviour. If a valid and complete defence exists, D will not be criminally liable.

Intoxication is available to almost any crime. You will come across intoxication in two different forms:

- A way to negate the *mens rea* of an offence; or
- An influencing factor on another legal principle/defence.

First, let us consider the law when addressing whether intoxication can be used to negate *mens rea*.

1.2 How intoxication works to negate the *mens rea*

The principle of intoxication allows the defendant to use evidence of their intoxication to show that they did not form the necessary *mens rea* for the offence. Strictly speaking, it is not a defence, but many practitioners and academics refer to it in that way. Since the leading case on the burden of proof, **Woolmington [1935] AC 462**, it has been clear that the prosecution need to prove, beyond reasonable doubt, that the defendant has committed the *actus reus* with the necessary *mens rea*. If, due to intoxication, the defendant did not form the necessary *mens rea*, then under certain circumstances, the defendant will be entitled to a **full acquittal**.

R v Bennett [1995] Crim LR 877 (CA): It was held that the judge is obliged to direct the jury on intoxication whenever there is evidence such that a reasonable jury might conclude that there is a reasonable possibility that the accused did not form the *mens rea*.

If the accused's drunkenness was not such as to negate *mens rea*, it is no answer for the accused to say that they would not have behaved as they did but for being drunk. If the prosecution can establish that the defendant formed the necessary *mens rea*, despite their intoxication, then intoxication will **not** assist the defendant.

A good example of this legal principle is the case of **R v Kingston [1995] 2 AC 355**, see below. Please note the facts of this case contains a description of an indecent assault on a child which is

sadly common in this type of work. This reflects the nature of this subject, our society and the realities of practice.



Key case: *R v Pordage* [1975] Crim LR 575 (CA)

Confirmed that the question at issue is not whether the defendant was **incapable** of forming the mens rea, but whether, even if still capable, they **did** form it.

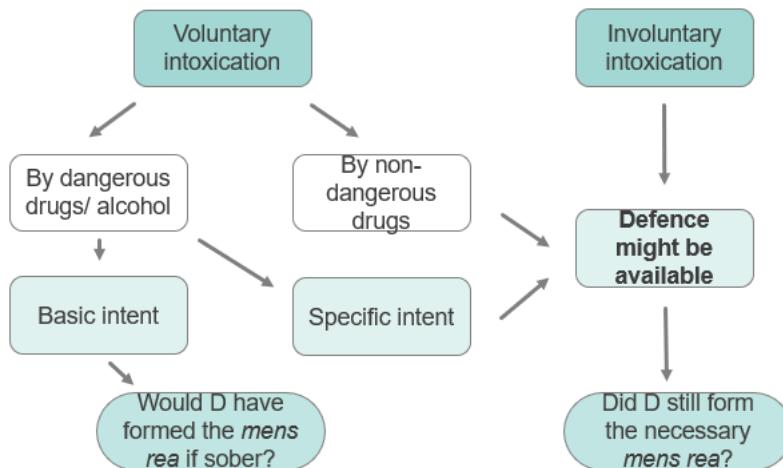


Figure 6.2: Intoxication as a way to negate the mens rea of an offence

1.3 When can intoxication operate to negate the mens rea?

- In any crime where the intoxication is caused by drink or drugs taken **involuntarily**, ie 'spiking' or 'lacing' someone's drink or food with a drug or alcohol
- In any crime where the intoxication is caused by drugs taken voluntarily, but in *bona fide* pursuance of medical treatment
- In any crime where the intoxication is caused by **non-dangerous drugs** taken voluntarily (dangerous drugs are those which are illegal or alcohol)
- In crimes where a **specific intent** is required (generally where the offence cannot be committed recklessly)

It would appear that there is an evidential burden on the defendant to raise the issue of intoxication, and then the prosecution needs to prove beyond reasonable doubt that the defendant formed the necessary *mens rea*.

When addressing whether intoxication will negate the mens rea of the alleged offence you should ask the following three questions:

- (a) Is the defendant voluntarily intoxicated or involuntarily intoxicated?
- (b) Is the intoxicant a dangerous alcohol/drug or a non-dangerous drug?
- (c) Is it a crime of basic intent or specific intent?

1.4 Involuntary intoxication

Where the intoxication is involuntary, the defence of intoxication may be available for any offence (both specific and basic intent crimes).

This could arise where D was forced to consume alcohol or other intoxicating drugs, or was deceived into doing so, for example by drugs being placed in their food or their drink being laced with alcohol. See *R v Kingston*.

However, where the defendant is aware that they are drinking alcohol, but is mistaken as to the strength of the alcohol, this will not count as involuntary intoxication (*R v Allen* [1988] Crim LR 698).



Key case: *R v Kingston* [1995] 2 AC 355

Kingston (K) admitted to paedophilic tendencies, which he said he managed to keep under control. As a result of a business dispute, P arranged to blackmail K by photographing and audiotaping him in a compromising situation. P lured a boy of 15 to his flat where he gave the boy sedatives and some cannabis. The boy fell asleep on the bed and remembered nothing until he woke up next morning. P invited K to his flat and gave him some coffee. He then showed K the boy asleep on a bed and invited him to indecently assault the boy. This the appellant did and he was photographed and taped doing so. K's defence was that he was involuntarily intoxicated. He claimed that P had drugged the coffee and this had the effect of making him lose his inhibitions and commit the offence. The House of Lords held that K was liable, saying that if he had still formed the mens rea in his intoxicated state, it was no defence to plead that he would not have committed the offence when sober.

1.5 Voluntary intoxication



Key case: *DPP v Majewski* [1977] AC 443

This is the key case in this area.

The defendant was involved in a pub brawl in which he attacked the landlord and was charged with an assault occasioning actual bodily harm contrary to s 47 OAPA. The trial judge refused to direct the jury that the defendant's drunkenness may constitute a defence. The defendant was convicted and appealed to the Court of Appeal against his conviction.

The Court of Appeal certified the following question for the House of Lords:

Whether a defendant may properly be convicted of an assault notwithstanding that, by reason of his self-induced incapacity, he did not intend to do the act alleged to constitute the assault.

The House of Lords held that voluntary intoxication could be a defence to a charge of **specific intent**, where the defendant's intoxication negated the mens rea required for the offence charged.

However, voluntary intoxication would not be a defence to a charge of **basic intent**.

Lord Elwyn-Jones:

If a man of his own volition takes a substance which causes him to cast off restraints of reason and conscience, no wrong is done to him by holding him answerable criminally for any injury he may do while in that condition. His course of conduct by reducing himself by drugs and drink to that condition on my view supplies the evidence of mens rea, of guilty mind certainly sufficient for crimes of basic intent. It is a reckless course of conduct and recklessness is enough to constitute the necessary mens rea in assault cases. The drunkenness is in itself an intrinsic, an integral part of the crime, the other part being the evidence of the unlawful use of force against the victim. Together they add up to criminal recklessness. Self-induced intoxication, however gross and even if it has produced a condition akin to automatism cannot excuse crimes of basic intent [...]

It is not clear from *DPP v Majewski* how the jury should be directed when a defendant who is voluntarily intoxicated has committed a basic intent crime. The extract from Lord Elwyn-Jones suggests that the prosecution is excused having to prove the mens rea, while Lord Salmon in the same case referred to the defendant being unable to use intoxication as a defence.

As Lord Elwyn-Jones's method has been criticised, the method used by the courts today is for the jury to consider whether the defendant would have seen the risk had they not been intoxicated (*R v Coley, McGhee and Harris* [2013] EWCA Crim 223).

The Judicial Studies Board Crown Court Book gives the following direction for the first part of the test in *R v G*:

If the defendant's ability to appreciate the risk was or may have been impaired through drink the jury should be asked to consider his awareness as it would have been had the defendant been sober. If they are sure the defendant would have been aware of the risk if he had been sober, the first stage is satisfied.

1.5.1 Dangerous and non-dangerous drugs

The court in **R v Hardie** [1985] 1 WLR 64 held that drugs are divided into two categories.

- Dangerous drugs:** Where it is common knowledge that a drug is liable to cause the taker to become aggressive, or to do dangerous or unpredictable things, that drug is to be classed with alcohol. Illegal drugs will fall into this category.
- Non-dangerous drugs:** Where there is no such common knowledge, eg a merely soporific or sedative drug. Different rules apply for non-dangerous drugs, the defence of intoxication might be available if D did not form the necessary mens rea.



Key case: R v Hardie [1985] 1 WLR 64

Facts: In this case D took Valium belonging to his girlfriend. Later he started a fire and said, when charged with criminal damage, that he had no mens rea because of the Valium. He was convicted as the judge directed the jury that drugs were to be treated as drink and the **Majewski** rules applied.

Held: The Court of Appeal allowed his appeal on the basis that the Valium was taken for calming his nerves, and there was no evidence that the appellant knew it would make him aggressive, incapable of appreciating risks to others or susceptible to other side effects, so as to make his taking it reckless.

1.5.2 The distinction between crimes of basic and specific intent

Majewski provided a leading method for categorising crimes for some time.

Basic intent offence

A crime was categorised as one of basic intent where the defendant could be convicted on the basis of recklessness as to the consequences, or where no foresight as to the consequences is required.

An example of a basic intent offence is battery as D must intend or be reckless as to applying unlawful force on another.

Specific intent offence

Crimes of specific intent were those where intention was the only form of mens rea available, ie where recklessness was insufficient mens rea for the offence to be made out.

An example of a specific intent offence is murder as D must intend to kill or cause grievous bodily harm, recklessness is not enough.

Examples of specific and basic intent offences

Specific intent crimes	Basic intent crimes
<ul style="list-style-type: none">• Murder	<ul style="list-style-type: none">• Unlawful act manslaughter• Gross negligence manslaughter
<ul style="list-style-type: none">• Wounding or grievous bodily harm with intent, s 18 Offences Against the Person Act (OAPA) 1861	<ul style="list-style-type: none">• Malicious wounding/inflicting GBH, s 20• Assault occasioning ABH, s 47• Battery• Assault

Specific intent crimes	Basic intent crimes
	<ul style="list-style-type: none"> Basic criminal damage and aggravated criminal damage, s 1(1) and s 1(2) CDA 1971
• Theft	
• Robbery	
<ul style="list-style-type: none"> All burglary under s 9(1)(a) TA 1968 Burglary under s 9(1)(b) where D has fulfilled the last element by: <ul style="list-style-type: none"> - Stealing - Attempting to steal or attempting to cause GBH 	<ul style="list-style-type: none"> Burglary under s 9(1)(b) where D has fulfilled the last element by causing GBH
• Attempts	

Specific and basic intent offences

However, there is no agreed definition of specific and basic intent offences. In the controversial Court of Appeal case of **R v Heard [2007] EWCA Crim 125**, Lord Justice Hughes gave the following rule for determining specific intent crimes:

[...] proof of a state of mind addressing something beyond the prohibited act itself, namely its consequences.

If the **Heard** definition was applied, it would mean that aggravated criminal damage contrary to **s 1(2) CDA 1971** which is generally thought of as a basic intent offence would be treated as a specific intent offence, as the *mens rea* includes an intention or recklessness as to life being endangered by the defendant's act of criminal damage.

Application of **R v Heard** on aggravated criminal damage

Section 1(2) Criminal Damage Act 1971:

Actus reus

- Destroy or damage
- Property

Mens rea

- Intention or recklessness as to the destruction or damage of property
- Intention or recklessness as to the endangerment of life by the damage or destruction

However, more recently Hughes LJ in **Coley, McGhee and Harris**, while noting that there was now room for doubt as to whether aggravated criminal damage was a crime of basic intent due to the 'passing obiter reference' in **Heard**, said there was force in the argument that voluntary intoxication should not be a defence to crimes of recklessness. He said it was not necessary to resolve the matter in the case before him.

Dennis J Baker in Glanville Williams's *Criminal Law* described the court in **Heard** as having 'embarked on an ill-considered legislative venture' and the court's reasoning as being 'contradictory and fallacious'. The case is also criticised by David Ormerod in Smith, Hogan and Ormerod's *Criminal Law*, where he concludes that any offence which may be committed recklessly ought to be held to be an offence of basic intent.

It is therefore proposed that you concentrate on the **Majewski** method for distinguishing between crimes of basic and specific intent.

1.6 Intoxication and other defences

Up to this point, we have considered intoxication as a way to negate the *mens rea* of an offence.

The second way that intoxication can impact your legal analysis is as an influencing factor on another legal principle or defence.

Generally, intoxication will not enable a defendant to rely on a defence, whether the crime they have committed is one of specific or basic intent.

1.7 Summary

Intoxication working to negate the *mens rea*

The court will ask whether the defendant did form the *mens rea* even though intoxicated:

- If yes, a drunken intent is still intent, D will be criminally liable, see **Kingston**. Another example would be if D takes drugs or alcohol in order to commit a specific intent crime (sometimes referred to as ‘Dutch courage’).
- If no, D lacks the *mens rea* and will be acquitted eg D was so intoxicated they did not know what they were doing.

The court will ask whether the defendant did form the *mens rea* even though intoxicated, in cases of:

- Involuntary intoxication (such as being drugged without consent);
- Voluntary intoxication by non-dangerous drugs (eg **Hardie**, the D who took Valium to calm his nerves); or
- Voluntary intoxication and D has committed a specific intent crime (eg murder).

Intoxication working to negate the *mens rea*

Where D is voluntary intoxicated by dangerous drugs/alcohol and commits a less serious crime of basic intent (where recklessness is a form of *mens rea* available), the defendant will be deemed reckless if they would have formed the MR if sober (**Coley, McGhee and Harris**):

- If yes, D will be criminally liable eg if D got drunk and started throwing pebbles at a window which smashed. D will be criminally liable if they would have realised the risk of damaging the window had they been sober.
- If no, D will not be criminally liable eg if D smashed the window by tripping over a broken step that they would have tripped on if sober.

Intoxication and other defences

- **Self-defence:** D cannot rely on a drunken mistake as to the need to use self-defence.
- **Loss of control and diminished responsibility** can still be pleaded if D was intoxicated but it does impact various aspects of the legal analysis.
- **Consent:** If the jury are satisfied that V consented to the accidental infliction of injury or D (even wrongly) believed that V consented (due to their intoxication), D may have a defence (**Richardson & Irwin**).
- **Statutory defences**, where these allow for an honest belief, D will be able to use the defence even if their belief is due to voluntary intoxication, see **Jaggard v Dickinson** on the lawful excuse defence for criminal damage.

2 Consent

For offences against the person, the consent of the victim may also preclude a crime. It is not clear whether consent operates as a defence to the crime or whether the absence of consent is an element of the offence. The Law Lords in the important House of Lords case of **R v Brown [1994] AC 212** were divided on this. Lords Jauncey and Templeman said consent was a defence, while Lord Mustill said lack of consent was part of the offence. Lord Lowry spoke of it as a defence, but then cited the Law Commission’s Draft Code, which treats the absence of consent as an element of the offence of common assault. For the purposes of this Workbook it is being treated as a defence.

There are two elements to consent:

- (a) Either the victim consented or the defendant believed the victim consented.
- (b) The offence is one which a victim can consent to.

2.1 Either the victim consented or the defendant believed the victim consented

It is for the prosecution to prove both that the victim did not consent and that the defendant did not believe in the victim's consent. So if the defendant wrongly believed the victim consented, the defence could be available (**R v Richardson and Irwin**). Equally if the victim consented, even if the defendant did not know this, the defence could be available. Whether the defence of consent is available will depend on the level of harm inflicted on the victim and the circumstance in which the harm was inflicted.

Key case: **R v Richardson and Irwin [1999] 1 Cr App R 392**

Facts: The defendants were university students. After drinking at a student union bar they decamped to a flat belonging to one of their friends, the victim. Horseplay ensued during which the defendants lifted and dropped the victim over a balcony where he fell a distance of 10–12 feet (around 3/3.5 m), sustaining injuries. The defendants were charged under **s 20 OAPA**. The defendants were convicted and appealed against their conviction.

Held: The Court of Appeal upheld their appeal and quashed their convictions on the basis that there had been misdirection by the trial judge. Their Lordships stated:

- (a) That if the jury were satisfied that V had in fact consented to the accidental infliction of injury, this would be a defence; and
- (b) That the jury should have been allowed to consider whether the defendant believed that V consented, even if the defendants wrongly believed that V consented due to their intoxication!

2.2 The offence is one which a victim can consent to

The general rule is that consent is only available as a defence to assault and battery.

Key case: **AG's Reference(No 6 of 1980) [1981] QB 715**

Two boys decided to settle an argument by a fight and one sustained a bleeding nose and bruises. It was held that the other was guilty under **s 47 OAPA** of assault occasioning actual bodily harm (ABH).

[...] 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. So, in our judgment, it is immaterial whether the act occurs in public or private [...] this means that most fights will be unlawful regardless of consent.

(Per Lord Lane CJ)

Key case: **R v Brown [1994] AC 212**

The general rule that consent is only available as a defence to assault and battery was confirmed by the House of Lords in this case.

Facts: A group of sadomasochists, caused injuries to each other for sexual pleasure. No medical treatment was required. The participants were charged with offences under **s 47** and **s 20 OAPA**. The defence of consent failed.

Held: The court held that consent could not be a defence to anything greater than a battery, unless it fell into one of the accepted 'good reasons':

[...] the line properly falls to be drawn between assault at common law and the offence of assault occasioning ABH created by sec 47 of the 1861 Act with the result that consent of the victim is no answer to anyone charged with the latter offence or sec 20 unless the circumstances fall within one of the well-known exceptions such as organised sporting contests and games, parental chastisement or reasonable surgery.



Key case: *R v Meachen* [2006] EWCA Crim 2414

This subsequent Court of Appeal case has extended the use of consent.

Consent is available as a defence, even where actual bodily harm or worse is caused provided the defendant:

- Intended only to commit a battery with the consent of the victim; and
- Did not see the risk of inflicting actual bodily harm.

If however, the defendant intended to cause actual bodily harm, then consent is not available as a defence, even if the victim consented (unless the conduct falls into one of the exceptions which follow).

The situation regarding being reckless as to causing actual bodily harm with the victim's consent is unclear and is still the subject of academic debate.

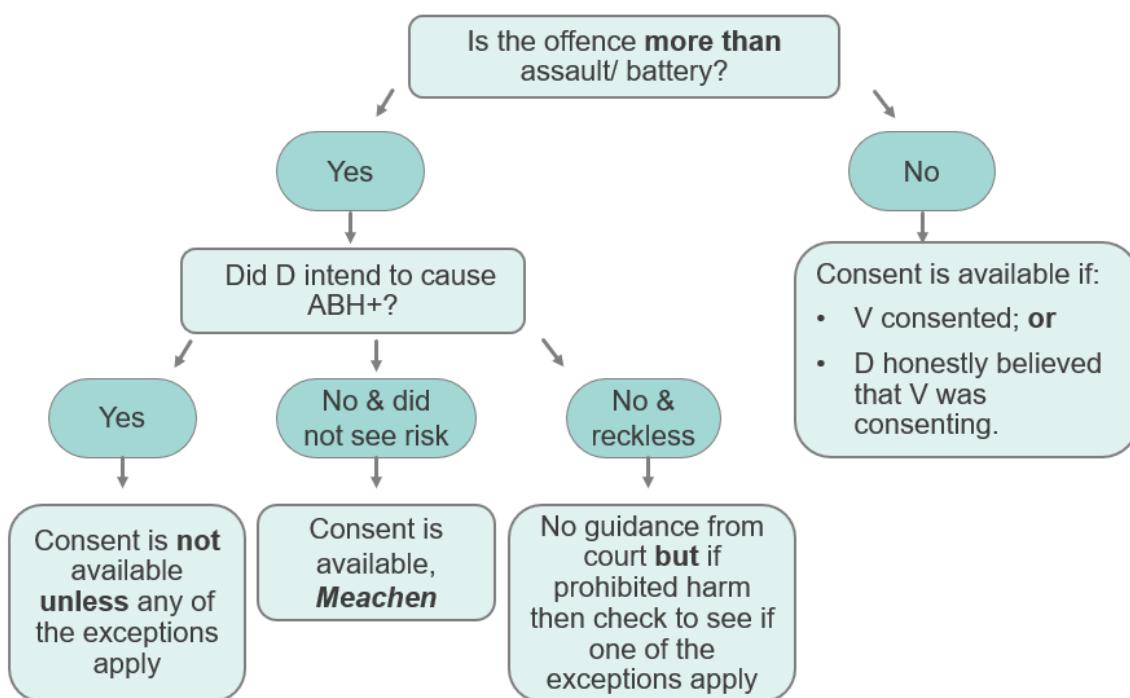


Figure 6.3: Consent overview

2.3 The exceptions

The general rule is that consent is only available as a defence to assault and battery. However, the victim can consent to offences against the person of ABH and above if the situation falls under one of the public interest exceptions such as:

- Medical treatment;
- Sport;
- Horseplay;
- Tattooing, body piercing and personal adornment; and
- Sexual gratification/accidental infliction of harm.
- Lawful correction of a child

2.3.1 Medical treatment

Consent can be given for surgery and other medical treatment that causes harm. Consent can be given to a high risk of death.

2.3.2 Sport

There is a public interest in encouraging people to play sport, and therefore any incidental injury caused while playing within the rules of the game will not be an offence. Participants have consented to such incidental injury. The following cases have explored this issue. There is a public interest in encouraging people to play sport, and therefore any incidental injury caused while playing within the rules of the game will not be an offence. Participants have consented to such incidental injury. The following cases have explored this issue.



Key case: *R v Barnes [2005] WLR 910*

Held: The Court of Appeal said that in organised sport, criminal prosecution should be reserved for those situations where the conduct was sufficiently grave properly to be categorised as criminal. If what occurred went beyond what a player could reasonably be regarded as having accepted by taking part in the sport, this would indicate that the conduct was not covered by the defence of consent. Whether conduct reached this level depended on all the circumstances, which included the type of sport, the level at which it was played, the nature of the act, the degree of force used, the extent of the risk of injury, and the state of mind of the defendant. In highly competitive sports, conduct outside the rules might be expected to occur in the heat of the moment; the fact that such conduct was penalised and even resulted in a warning or a sending off, did not necessarily mean that the threshold level required for it to be regarded as criminal had been reached. Here, V had sustained a serious leg injury as a result of a late tackle by D in a football match. The jury needed to consider whether the contact had been so obviously late and/or violent that it was not to be regarded as an instinctive reaction, error or misjudgement in the heat of the game.



Key case: *R v Billinghurst [1978] Crim LR 553*

Facts: B punched G and fractured his jaw in two places during a rugby match in an off-the-ball incident. He was charged under **s 20 OAPA**.

Held: The judge directed that the players are deemed to consent to force of ‘a kind which could reasonably be expected to happen during a game’. The victim said he had been punched on previous occasions and had punched others. Mervyn Davies, a former Welsh International said that in the modern game punching is the rule not the exception! However, the judge considered ‘on the ball’ and ‘off the ball’ play and as B’s conduct was found to be ‘off the ball’ it was outside the scope of the implied consent. B was therefore convicted.

In some Canadian cases, it has been held that spectators at ice hockey matches consent to a certain amount of violence!

2.3.3 Horseplay

This exception has received much criticism.



Key case: *R v Richardson and Irwin [1999] 1 Cr App R 392*

The defendants seized their friend whom they claimed they believed was consenting and held him over a balcony. They dropped him and he broke several bones. Their conviction was quashed as the trial judge had not directed the jury to consider consent.



Key case: *R v Jones (1986) 83 Cr App R 375*

Some boys at a youth club tossed two other boys into the air, resulting in one suffering a ruptured spleen and the other a broken arm. The Court of Appeal held that they ought to have been

allowed to raise the issue of consent to injuries sustained through ‘rough and undisciplined’ horseplay, for the jury to then consider.



Key case: *R v Aitken* [1992] 1 WLR 1006

Drunken RAF officers were setting fire to one another’s fire-resistant suits, treating it as a joke. Later they set fire to the victim’s suit and he was severely burned. The Court Martial Appeal Court quashed the conviction, relying on **Jones**.

2.3.4 Tattooing, body piercing and personal adornment



Key case: *R v Wilson* [1997] QB 47 (CA)

Facts: The defendant used a hot knife to brand his initials onto the buttocks of his wife, at her request. He argued consent to a charge under s 47 OAPA and was successful.

Held: The Court of Appeal held that there was no logical difference between this type of branding, tattooing, body piercing, and similar personal adornments, which is a lawful activity.



Key case: *R v BM* [2018] EWCA Crim 560

The Court of Appeal refused to include body modification, in particular the removal of an ear, the removal of a nipple and the division of a tongue into a fork like a reptile, in the category of tattooing and personal adornment.

2.3.5 Sexual gratification

It used to be the case that a defendant may have a defence in consent to accidental injuries sustained during consensual sexual activity, however in light of s 71 Domestic Abuse Act 2021, a person cannot consent to the infliction of harm that results in ABH or more, for the purposes of obtaining sexual gratification.

The only exception is that a person may consent to the risk of acquiring a sexually transmitted infection.



Key case: *R v Dica* [2004] QB 1257

The Court of Appeal held that if the complainant consents to the risk of contracting HIV through having sexual intercourse, the defendant does have a defence to a charge under **s 20 OAPA**. After examining the cases on sexual gratification, Judge LJ stated:

It does not follow [...] that consensual acts of sexual intercourse are unlawful merely because there may be a known risk to the health of one or other participant. These participants are not intent on spreading or becoming infected with disease through sexual intercourse. They are not indulging in serious violence for the purposes of sexual gratification. They are simply prepared, knowingly, to run the risk – not the certainty – of infection, as well as all the other risks inherent in and possible consequences of sexual intercourse, such as, and despite the most careful precautions, an unintended pregnancy. Modern society has not thought to criminalise those who have willingly accepted the risks, and we know of no cases where one or other of the consenting adults has been prosecuted, let alone convicted, for the consequences of doing so.

However, it is not possible to consent to deliberate HIV infection because HIV is considered grievous bodily harm as it disables the victim and requires long-term healthcare treatment.



2.3.6 Lawful correction of a child

Key case: *R v Hopley* (1860) 2 F & F 202

A parent has a defence of reasonable chastisement in applying force to a child.

This is now open to challenge under **Article 3, European Convention on Human Rights**, which states that no one shall be subjected to torture or inhuman or degrading treatment.



Key case: *R v H* [2002] 1 Cr App R 7

In considering whether or not a parent could use this defence, the jury must look at the nature and context of the parent's behaviour, its duration, the physical and mental consequences for the child, and the reasons why the punishment was inflicted.

This area is also governed by the Children Act 2004, s 58 which outlines that the reasonable punishment defence cannot be relied on if it results in ABH or above for example.

2.4 Limitation on extending the categories of exceptions

R v BM [2018] EWCA Crim 560: Lord Burnett of Maldon said these categories should not be extended by the courts.

New exceptions should not be recognised on a case by case basis, save perhaps where there is a close analogy with an existing exception to the general rule established in the **Brown** case. The recognition of an entirely new exception would involve a value judgement which is policy laden, and on which there may be powerful conflicting views in society. The criminal trial process is inapt to enable a wide-ranging inquiry into the underlying policy issues, which are much better explored in the political environment.

2.5 Summary

This section considered one of the general defences to a crime, consent:

- The victim's consent can sometimes prevent a defendant being liable for a crime, eg belief in owner's consent (**s 5(2)(a) CDA 1971** and **s 2(1)(b) TA 1968**).
- For offences against the person the victim's consent may also prevent the defendant from being liable for a crime:
 - The general rule is that consent is only available as a defence to assault and battery (**AG's Reference (No 6 of 1980)**).
 - The general rule was extended by **R v Meachen**: consent is available even where ABH or worse is caused provided D only intended to commit a battery with the consent of the victim and did not see the risk of inflicting ABH or above.
 - If ABH or above has been caused to the victim and the defendant intended to cause such harm (or possibly saw a risk of causing such harm), consent is not available unless D's behaviour falls into one of the exceptions to the general rule: medical treatment, sport, horseplay, tattooing, body piercing or personal adornment or accidental infliction of harm.

3 Self-defence

3.1 What is self-defence?

The term 'self-defence' can be taken to cover a number of defences, where a person acts to:

- Protect themselves;
- Protect someone else;
- Protect property;
- Prevent a crime; or

- Assist in the arrest of an offender.

The defence of self-defence (which includes defending another and protecting property) is a long-established common law defence, which, if successfully pleaded, results in an acquittal.

This is supplemented by a statutory defence contained in **s 3 Criminal Law Act 1967 (CLA)** (which works in almost exactly the same way as common law self-defence).

In recent times, these defences have proved controversial, with many politicians and others calling either for greater clarity of the existing rights of ordinary people to defend themselves or for additional protection for such people, especially homeowners who are faced by potentially violent burglars in their own homes. Celebrated and controversial cases such as those involving Tony Martin and Munir Hussain led to calls for clarification of or changes to the law.

3.2 A single statutory defence or a mix of statute and common law?

Successive governments have responded to calls for reform with legislation, contained within **s 76 Criminal Justice and Immigration Act 2008 (CJIA)**, as amended twice in 2012 and 2013.

Section 76 CJIA does not purport to set out in comprehensive form the whole of the law relating to these defences. It does not codify all the provisions of either the common law defence or the statutory defence under the **CLA** (which remains in force). **Section 76(1)(b)** states that it applies when ‘the question arises whether the degree of force used by D against a person (“V”) was reasonable in the circumstances’. This is the second part of the common law test – the response.

In **R (on the application of Denby Collins) v the Secretary of State for Justice [2016] EWHC 3**, Sir Brian Leveson noted that s 76 governs the second limb of the defence. However, earlier cases, such as **R v Dawes, Hatter & Bower [2013] EWCA Crim 322** had adopted the section as applying to both parts of the defence, and this approach is followed in Smith, Hogan and Ormerod.

Section 76(2) CJIA, identifies the defences to which the section applies:

- (a) the common law defence of self-defence; and
- (aa) the common law defence of defence of property; and
- (b) the defence provided by section 3(1) of the Criminal Law Act 1967 [...] (use of force in prevention of crime or making arrest).

The **common law** defence envisaged two possible reasons for acting:

- In the protection of life and limb of yourself or another: see eg **R v Gladstone Williams (1984) 78 Cr App R 276 (CA)**.
- In the protection of property: **R v Hussey (1925) 18 Cr App R 160 (CA)**.

What is clear is that self-defence can only be used to protect yourself or another, or property from imminent attack: ie from a threat of physical force, not a threat to one's peace of mind. **R v Bullerton (1992) NLJ 1725**:

In our view, the question raised is one of great importance; is a citizen entitled to defend himself against psychological and emotional attack by physical means or must he reply in kind?

The appellant believed the force he used was necessary to prevent the harm to himself from occurring. But we feel constrained to agree with the judge below that physical force may not be used to prevent psychological harm. Like must be met with like.

By **s 3 CLA 1967**:

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.

In many instances, the common law plea of self-defence overlaps with the plea under the **s 3 CLA**. The same legal rules apply to both defences so the courts and commentators usually refer to self-defence without specifying whether they are referring to the common law defence or that contained in the **CLA**.

For the most part, **s 76 CJIA** was intended to clarify both the common law and the statutory defences. It initially made no discernible changes to the previous law but simply re-enacted the old common law principles in statutory form. However, the most recent amendments do seek to make a change to the law that applies where the defendant seeking to make use of any of these defences is a ‘householder’.

Section 76(9) CJIA states: ‘This section, except so far as making different provision for householder cases, is intended to clarify the operation of the existing defences mentioned in subsection (2).’

Note that all references to a ‘defence’ or ‘defences’ below can be taken to refer to all or any of the defences listed here.

3.3 The test for the defences

A defendant is entitled to rely on any of these defences if:

- The defendant honestly believed that the use of force was necessary; and
- The level of force the defendant used in response was objectively reasonable in the circumstances as the defendant believed them to be.

These two requirements have been referred to as the **trigger** and the **response**.

Note that it is for the prosecution to disprove that the defendant acted in self-defence. It is an all or nothing general defence, so D will either be acquitted by self-defence or the defence will fail.

Key case: *R v Clegg [1995] 1 AC 482 (HL)*

Held: Self-defence is a complete defence against all crimes. However, if it fails in any way, the defence will fail in its entirety, eg if a defendant uses slightly excessive force, there is no partial defence of self-defence. However, where the charge that the defendant is facing is murder, and a defence of self-defence fails, it is possible that a jury will convict the defendant of the lesser offence of voluntary manslaughter on the basis of a loss of control: see *R v Dawes, Hatter & Bower* [2013] EWCA Crim 322.

3.4 The trigger: D honestly believed that the use of force was necessary

A defendant is to be judged on the facts as they subjectively believed them to be, whether the belief is reasonable or not.

For instance, if a defendant mistakenly believed that they were being attacked with a deadly weapon and used such force as was reasonable to repel an attack with a deadly weapon, then D has a defence; it is immaterial that they were mistaken and they were in fact being attacked with something less deadly.

The common law authority for this is *R v Gladstone Williams*.

Key case: *R v Gladstone Williams (1984) 78 Cr App R 276 (CA)*

Facts: In this case, V saw a woman being robbed and attempted to lawfully apprehend the robber. Williams arrived on the scene and mistakenly thought that the robber was being unlawfully attacked by V. Williams attacked V and was later charged under **s 47 Offences Against the Person Act 1861**. Williams successfully argued self-defence. In fact, force was not necessary as the robber was not being unlawfully attacked. Williams was mistaken.

Held: The court held that his actions must be judged according to the facts as he honestly believed them to be:

The reasonableness or unreasonableness of the defendant’s belief is material to the question of whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, is neither here nor there. It is irrelevant.

In a case of self defence, where self defence or the prevention of crime is concerned, if the jury come to the conclusion that the defendant believed, or may have believed, that he was being

attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution will not have proved their case.

3.4.1 Mistake induced by voluntary intoxication

Key case: *R v O'Connor [1991] Crim LR 135 (CA)*

If the mistaken belief is due to the voluntary intoxication of the defendant, then the defendant will not be able to rely on their mistake. This is the case whether the crime committed is a specific or basic intent crime. This approach is confirmed in s 76(5) CJIA 2008.

Key case: *R v Hatton [2005] EWCA Crim 2951*

Facts: H had drunk over 20 pints of beer and killed the victim with a sledgehammer. He had been convicted of murder. The victim had been pretending to be a member of the SAS and a stick, owned by H and which H had fashioned to look like a samurai sword, was found by the victim's body. H said he had only a vague recollection of what had happened, but put forward a defence on the basis that he believed he was being attacked by an SAS officer with a sword.

Held: the Court of Appeal applied *R v O'Connor* and the earlier case of *R v O'Grady* and held that the mistake that he was being attacked by a sword had been induced by the defendant's intoxication so could not be relied upon.

3.4.2 There is no duty to retreat

Despite the fact that the force must have been reasonable, there is no duty to retreat in English law. Although the fact that the defendant had an opportunity to retreat may be regarded as a relevant factor.

Key case: *R v Bird [1985] 1 WLR 816 (CA)*

Lord Diplock said:

There is however, no rule of law that a person attacked is bound to run away if he can, but it has been said that [...] "what is necessary is that he should demonstrate by his actions that he does not want to fight. He must demonstrate that he is prepared to temporise and disengage and perhaps to make some physical withdrawal." It is submitted that it goes too far to say that action of this kind is necessary. A demonstration by the accused that at the time he did not want to fight is, no doubt, the best evidence that he was acting reasonably and in good faith in self defence; but it is no more than that. A person may in some circumstances so act without temporising, disengaging or withdrawing; and he should have a good defence.

3.4.3 Anticipatory self-defence

A defendant may make the first blow and still rely on the defence. However, there is no doubt that the principles set out here are still applicable.

Key case: *AG's Reference(No 2 of 1983) [1984] QB 456 (CA)*

Lord Lane CJ stated that the accused would be entitled to the defence of self-defence if:

[...] his object was to protect himself or his family or his property against imminent apprehended attack and to do so by means which he believed were no more than reasonably necessary to meet the force used by the attackers.



Key case: *Beckford v R* [1988] AC 130 (PC)

Per Lord Griffiths:

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.



Key case: *Devlin v Armstrong* [1971] NI 13 (NI CA)

Per MacDermott LJ:

The plea of self-defence may afford a defence where the party raising the defence uses force, not merely to counter an actual attack, but to ward off or prevent an attack which he honestly anticipated. In that case, however, the anticipated attack must be imminent [...]

3.4.4 Self-defence may be used by an antagonist



Key case: *R v Forrester* [1992] Crim LR 792 (CA)

Facts: F was a tenant of W who had retained F's deposit on termination of the tenancy. F and others burst into the premises and removed some of W's property. Evidence suggested that while on the premises F could have been attacked by W. The judge told the jury:

[...] if F went in as a trespasser, though, how can he possibly say that he was being unlawfully attacked when W rushed at him, and if he was not unlawfully attacked when W rushed at him, how can there be any room for any suggestion that he was merely defending himself by any blow that he might have struck subsequently? Well, it is a matter for you. You have got to try this case according to the evidence.

Held: His appeal against conviction for assault was allowed. It was held that this direction was, in effect, removing from the jury's consideration the issue of whether or not F was attacked by W, in such a way as to entitle him to use reasonable force to defend himself. Whether or not F was a trespasser did not entitle W to use excessive force to remove him. F would be entitled to rely on self-defence if W used excessive force in attempting to remove him, if that was what W was trying to do.



Key case: *R v Rashford* [2005] EWCA Crim 3377 (CA)

Held: The Court of Appeal held that self-defence is not automatically precluded in a situation where the defendant was the initial aggressor and the victim retaliated. The success of the defence would depend upon the circumstances of the case. The court made it clear that self-defence is available to the person who started the fight if the person whom they attack not only defends themselves but goes over to the offensive. It would then be for the jury to decide whether or not the defendant honestly believed that it was necessary for them to use force to defend themselves and whether the amount of force they used was reasonable.



Key case: *R v Keane and McGrath* [2010] EWCA Crim 2514

The Court of Appeal said:

The Criminal Justice and Immigration Act 2008, s 76 did not alter the law as it had stood for many years [...]. It was not the law that where a defendant had either started the fight with the victim, or entered it willingly, that would always and inevitably be a bar to self-defence arising. Self-defence could arise in the case of the original aggressor, but only where the violence offered by the victim was so out of proportion to what the original aggressor did that the roles were effectively reversed [...]

3.4.5 Force can be used against an innocent third party



Key case: R v Hichens [2011] 2 Cr App R 26

Facts: In this case, D had moved in with a friend (Y), but Y's ex-boyfriend objected to the arrangement. He had come to the flat twice and threatened D. The police were called on both occasions, and warned the ex-boyfriend to stay away. On one previous occasion he had gained access to the flat and attempted to fight D. The ex-boyfriend came to the flat again and Y wanted to let him in. D urged her not to, and slapped her across the face when she would not listen to him. D claimed that he had used reasonable force to prevent the commission of a crime/act in self-defence, since, if the ex-boyfriend had entered the flat, there might have been an altercation between them.

In response to a jury question, the judge stated that Y was not about to commit a crime, and the possibility that the ex-boyfriend might do so was not sufficient to justify D's actions in slapping her. D was convicted. He appealed, submitting that the judge had erred in directing that self-defence was not available to him.

Held: The appeal was dismissed. However, the court did confirm that this defence was capable of extending to the use of force against an innocent third party to prevent a crime being committed by someone else. The court felt that facts capable of giving rise to such a defence would only rarely be encountered and might include:

- A police constable bundling a passer-by out of the way to get at a person the constable believed was about to shoot a firearm or detonate an explosive device; or
- A person seeking to give car keys to another to enable them to drive and X, believing that other to be unfit to drive through drink, knocked the keys out of the first person's hands and retained them.

The Court of Appeal confirmed that a defendant could use force against an innocent third party to protect themselves.

3.5 The response: The level of force the defendant used in response

At this point the jury has concluded that the defendant believed that force was necessary because they or someone else was facing an imminent attack, or D believed they were facing an imminent attack. The jury must go on to consider the level of force used in response to that threat. The level of force must be reasonable. The **CJIA 2008** (as amended) works on the assumption that what is reasonable will depend on the circumstances in which the force is used and differentiates between:

- Non-'householder' cases; and
- 'Householder' cases.

3.6 Non-'householder' cases

The relevant provisions of s 76 CJIA 2008 are:

(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, and subsections (4) to (8) also apply in connection with deciding that question [...]

(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.

(6) In a case other than 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 disproportionate in those circumstances.

(7) In deciding the question mentioned in subsection (3) the following considerations are to be taken into account (so far as relevant in the circumstances of the case)-

(a) 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

(b) 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.

(8) Subsection (7) is not to be read as preventing other matters from being taken into account where they are relevant to deciding the question mentioned in subsection (3).

This is an objective test.

Again, this does not change the law from that set out in common law cases that predated the provisions and, indeed, some of those provisions are taken from the judgments referred to on the pages that follow.

Key case: *R v Owino [1996] 2 Cr App R 128 (CA)*

The essential elements of self defence are clear enough. The jury must decide whether the defendant honestly believed that the circumstances were such as to require the use of force to defend himself from an attack or a threatened attack. In this respect a defendant must be judged in accordance with his honest belief, even though that belief may have been mistaken. But the jury must then decide whether the force used was reasonable in the circumstances as he believed them to be.

It is also worth noting that the Court of Appeal held in *R v Harvey [2009] EWCA Crim 469* that the defendant must be judged not just on the circumstances as they believed them to be, but also on the danger as they believed it to be.

Also, in *R v Press and Thompson [2013] EWCA Crim 1849* a soldier, who had just completed a tour of Afghanistan, was allowed to rely on psychiatric evidence that he suffered from post-traumatic stress disorder to substantiate his mistaken beliefs.

Therefore, in considering the force used, the jury must decide if the force used was objectively reasonable, given the facts as the defendant **subjectively** believed them to be **s 76(3), s 76(4) and s 76(6)**.

Several cases have emphasised that, when considering whether the force used was reasonable, the jury must bear in mind that the defendant may have acted 'in the heat of the moment'.

Key case: *A-G's Reference for N Ireland (No 1 of 1975) [1977] AC 105 (HL)*

Lord Diplock stated:

The jury should remind themselves that the postulated balancing of risk against risk, harm against harm, by the reasonable man is not undertaken in the calm analytical atmosphere of the court room after counsel, with the benefit of hindsight, have expounded at length the reasons for and against the kind of degree of force that was used by the accused; but in the

brief second or two which the accused had to decide whether to shoot or not and under all the stresses to which he was exposed.



Key case: *Rv Palmer [1971] AC 814 (PC)*

Lord Morris stated:

If there has been an attack so that defence is reasonably necessary, it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken.

The two points made by **s 76(7)** replicate the common law:

- **Section 76(7)(a):**
 - ‘that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action’ is derived from *Palmer v R*; and
 - ‘in the circumstances one did not use jewellers’ scales to measure reasonable force’ comes from Geoffrey Lane J in *Reed v Wastie*[1972] Crim LR 221.
- **Section 76(7)(b):** ‘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’ is also taken from *R v Palmer*.

3.7 What is a ‘householder case’?

Under s 76(8A)-(8F), householder case is one where the defendant:

- Relies on the common law defence of self-defence: ie protecting yourself or another but not protecting property, preventing a crime or assisting in the arrest of an offender.
- Uses force while in or partly in a building, or part of a building, that is a dwelling or is forces accommodation (or is both):
 - ‘Building’ includes a vehicle or vessel; and
 - ‘Part of a building, that is a dwelling’ includes places of work and internal access routes:
 - If the defendant or another person dwells in part of a building; and
 - Another part of the building is a place of work for D or another person; and
 - You can move between the dwelling and place of work through an internal access route.
 - Is not a trespasser at the time the force is used; and
 - Believed the victim to be in, or entering, the building or part as a trespasser.

Non-householder cases are those which do not meet these criteria.

Section 76(8A)–(8F) CJIA 2008

(8A) For the purposes of this section “a householder case” is a case where –

- a) the defence concerned is the common law defence of self defence,
- b) the force concerned is force used by D while in or partly in a building, or part of a building, that is a dwelling or is forces accommodation (or is both),
- c) D is not a trespasser at the time the force is used, and
- d) at that time D believed V to be in, or entering, the building or part as a trespasser.

(8B) Where –

- a) a part of a building is a dwelling where D dwells,
- b) another part of the building is a place of work for D or another person who dwells in the first part, and
- c) that other part is internally accessible from the first part, that other part, and any internal means of access between the two parts, are each treated for the purposes of subsection (8A) as a part of a building that is a dwelling.

(8C) Where –

- a) a part of a building is forces accommodation that is living or sleeping accommodation for D,
- b) another part of the building is a place of work for D or another person for whom the first part is living or sleeping accommodation, and
- c) that other part is internally accessible from the first part, that other part, and any internal means of access between the two parts, are each treated for the purposes of subsection (8A) as a part of a building that is forces accommodation.

(8D) Subsections (4) and (5) apply for the purposes of subsection (8A)(d) as they apply for the purposes of subsection (3).

(8E) The fact that a person derives title from a trespasser, or has the permission of a trespasser, does not prevent the person from being a trespasser for the purposes of subsection (8A).

(8F) In subsections (8A) to (8C) “building” includes a vehicle or vessel, and “forces accommodation” means service living accommodation for the purposes of Part 3 of the Armed Forces Act 2006 by virtue of section 96(1)(a) or (b) of that Act.

3.8 The test for ‘householder’ cases

Section 76(5A) CJIA 2008 states:

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.

Here, the objective was to make it easier for a defendant who is a ‘householder’ to make use of the defences. It had been thought that this provision brought about a change in the law and that the use of force in householder cases did not have to be reasonable.



Key case: *R (on the application of Denby Collins) v the Secretary of State for Justice [2016] EWHC 3*

However, this was held not to be the case by the High Court. Here, the Court was considering what the test for self-defence should be as a result of the amendments and whether the amendments were in accordance with **Article 2, European Convention of Human Rights**. Sir Brian Leveson concluded:

Having regard to the analysis above, I am satisfied that s. 76(5A) of the 2008 Act does not extend the ambit in law of the second limb of self-defence but, properly construed, provides emphasis to the requirement to consider all the circumstances permitting a degree of force to be used on an intruder in householder cases which is reasonable in all the circumstances (whether that degree of force was disproportionate or less than disproportionate).

Sir Brian Leveson had previously noted:

To summarise, on a proper construction of s. 76(5A), its true meaning and effect is:

- I. Whether the degree of force used in any case is reasonable is to be considered by reference to the circumstances as the defendant believed them to be (the common law and s. 76(3));
 - II. A householder is not regarded as having acted reasonably in the circumstances if the degree of force used was grossly disproportionate (s. 76(5A));
 - III. A degree of force that went completely over the top *prima facie* would be grossly disproportionate;
 - IV. However, a householder may or may not be regarded as having acted reasonably in the circumstances if the degree of force used was disproportionate.
-

Sir Brian Leveson said that for householder cases there is a two-part test for the second limb of self-defence. First, the jury must be asked if the force was grossly disproportionate in the circumstances as the defendant believed them to be. If it was, there can be no defence. If it was not, secondly, the jury must be asked whether the level of force was reasonable.

He noted that the effect and purpose of making a different category of householder cases was to allow a discretionary area of judgment with a different emphasis from non-householder cases. The most obvious example would be the extent to which it is appropriate to take account of the opportunity to retreat. He said it was clear that, as with non-householder cases, the jury should take into account the matters referred to in **R v Palmer** and codified in **s 76(7) CJIA 2008** – that the level of force should not be weighed to a nicety and that if the defendant believed in a moment of unexpected anguish that they were using reasonable force, that was very good evidence that the force was reasonable.



Key case: **R v Ray(Steven)** [2017] EWCA Crim 1391

The Court of Appeal met with an especially enlarged number of five judges including the Lord Chief Justice to decide the matter in this case.

It approved the approach in **R (on the application of Denby Collins) v the Secretary of State for Justice**.

Lord Thomas of Cwmgiedd CJ said that once the jury had determined the facts as the defendant believed them to be it should determine whether the use of force was grossly disproportionate. If it was, then the degree of force used was unreasonable and the defence would not be available. If the jury decided the degree of force was not grossly disproportionate, it should then decide whether the degree of force was reasonable. The use of disproportionate force which is not grossly disproportionate may or may not be reasonable.

He said it could be pointed out to the jury that what might be an unreasonable degree of force used when confronting an aggressive individual in a club might not be so when used by a householder confronting an intruder in their home and it is important that the jury assess the defendant's actions by reference to the circumstances in which D found themselves and as D believed them to be.

It would often be helpful, for that purpose, to spell out the kind of circumstances which the jury should consider in determining whether the degree of force used by a householder was reasonable. These might, for example, include the shock of coming upon an intruder, the time of day, the presence of other help, the desire to protect the home and its occupants, the vulnerability of the occupants, particularly children, or the picking up of an object (such as a knife or stick that would be lawfully to hand in the home), the conduct of the intruder at the time (or on any relevant previous occasion if known to the defendant). Each of these might lead to the view that what was done, such as using a knife, which otherwise in a different context might be unreasonable, in the circumstances of a householder coming on an intruder might, in all the circumstances of such a case, be reasonable.

3.9 Summary

This section considered one of the general defences to a crime: self-defence.

- Self-defence can be used to protect yourself, another or property from attack or imminent anticipated physical attack. It can also be used to prevent a crime or assist in the arrest of an offender.
- It is a defence that is found in both common law and **s 76 CJIA (as amended)**. The defendant is entitled to rely on the defence if the trigger and response are satisfied:
 - **The trigger:** the defendant honestly believed that the use of force was necessary.
 - Subjective test, whether the belief is reasonable or not. However, if a mistaken belief is due to the voluntary intoxication of the defendant, then the defendant will not be able to rely on their mistake.
 - There is no duty to retreat but the opportunity to do so may be a relevant factor.
 - It can be used by an antagonist and it can be used against an innocent third party.
 - **The response:** the level of force the defendant used in response was objectively reasonable in the circumstances and the danger as the defendant subjectively believed them to be.
- Reasonable depends on whether it is a non – ‘householder’ case or ‘householder’.

Non-‘householder’ cases

- Force will not be reasonable if it was disproportionate. In deciding this, the jury must take into account 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.
- The defendant can be mistaken and the mistake does not need to be a reasonable one.

‘Householder’ cases

A householder case is one where D:

- Acts to protect themselves or another;
- Uses force while in or partly in a building, or part of a building, that is a dwelling (including vehicles, vessels and buildings that are dwellings and places of work if connected by an internal access route);
- Is not a trespasser at the time the force is used; and
- Believed the victim to be in, or entering, the building or part as a trespasser.

The ‘trigger’ is unchanged but the ‘response’ is more lenient towards householders.

The jury must be asked two questions:

- Was the force grossly disproportionate in the circumstances as D believed them to be? If it was, there can be no defence.
- If not, was the level of force reasonable? The jury should take into account that the level of force should not be weighed to a nicety and that if the defendant believed in a moment of unexpected anguish that they were using reasonable force, that was very good evidence that the force was reasonable. **R v Ray (Steven)** listed circumstances which the jury should consider in determining whether the degree of force used by a householder was reasonable eg the shock of coming upon an intruder, the time of day, the vulnerability of the occupants, particularly children etc.



7

Inchoate offences

1 Attempts



Inchoate offences: Inchoate means unfinished or incomplete.

An inchoate offence occurs when the defendant takes some steps towards committing a crime but the full offence is not committed.

We have inchoate offences to prevent harm, to people or property for example. It allows the police to arrest a person for attempted criminal damage for example, before any damage actually occurs.

We will consider attempts to commit a crime in this section. An attempted offence is when a defendant has not completed a crime but has taken enough steps that the behaviour becomes criminal such as attempted murder.

There are other types of inchoate offences such as conspiracy to commit a crime but that is beyond the scope of this module.

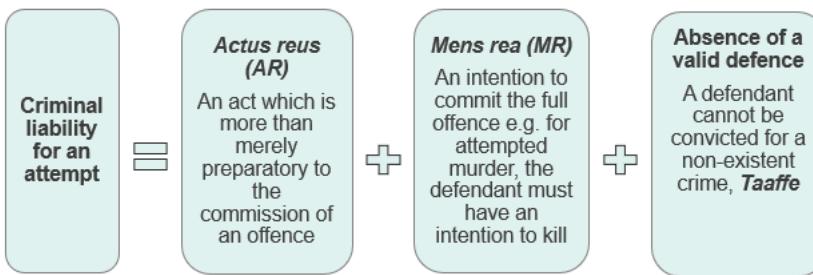
1.1 When does an inchoate offence occur?

Merely thinking you will commit a criminal offence is not enough to be liable for an inchoate offence. The defendant's conduct must reach a certain threshold that warrants criminal liability.

If you thought about punching a colleague (a battery) but you don't act on that thought, you won't be criminally liable for an inchoate offence.

Even if you tried to find out where that colleague is in your building and thought about how to avoid the video cameras, this preparation and planning won't make you criminally liable for an offence.

Once you take steps to do so then an inchoate offence occurs (an attempt), as the safety of your colleague is at risk.



Criminal Attempts Act 1981

Figure 7.1: Attempt

Attempting to commit a crime was a long-standing common-law offence, however it has now been reformed through legislation.

Under **s 1 Criminal Attempts Act 1981 (CAA)**:

(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 an offence, he is guilty of an attempt to commit that offence.

(2) A person may be guilty of an attempt to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible.

(3) 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.

2 Actus reus

'An act which is more than merely preparatory.'

The question of whether the actions of the accused are more than merely preparatory is one of fact to be decided by the jury, providing the judge is satisfied that the actions are capable of being more than merely preparatory (**s 4(3) CAA**).

There are no clear rules on whether conduct is merely preparatory (not an attempt) or more than merely preparatory (an attempt) so we must look to case law for guidance.



Key case: *R v Gullefer [1990] 3 All ER 82*

Lord Lane CJ stated:

An attempt begins when the merely preparatory acts come to an end and the defendant embarks on the crime proper or the actual commission of the offence.

2.1 Examples: Not an attempt - merely preparatory



Key case: *R v Campbell (1990) 93 Cr App R 350*

Facts: The defendant was convicted of attempted robbery of a post office. He was stopped before he entered by a police officer and was found to have a threatening note and imitation gun.

Held: His appeal was allowed. His acts were seen to be merely preparatory.



Key case: *R v Geddes [1996] Crim LR 894*

Facts: The defendant was found in a school toilet, with a large knife and rolls of tape. He was convicted of attempted false imprisonment.

Held: His appeal was allowed. As there were no school children, his action was held to be merely preparatory.



2.2 Examples: Attempt - more than merely preparatory

Key case: *R v Jones (1990) 91 Cr App R 351*

Facts: The defendant bought a shot gun, climbed into a car with the victim inside, pointed the gun at the victim and said: 'You are not going to like this'. The safety catch was on the gun, but it was unclear whether the defendant had his finger on the trigger. The victim grabbed the gun and there was a struggle. The victim managed to escape unharmed. The defendant was convicted of attempted murder and he appealed against his conviction.

Held: The judge was right to allow the case to go to the jury, and the appeal against conviction was dismissed. His acts were seen to be more than merely preparatory.



Key case: *R v Tosti [1997] Crim LR 746*

Facts: The defendants were found examining the padlock of a door of a barn. Hidden in a hedge nearby, was some oxyacetylene equipment. Two cars were parked in the lay-by with their engines still warm. The defendants were convicted of attempted burglary. They appealed against conviction on the ground that there was no evidence upon which the jury could have found that an attempted burglary had been committed.

Held: Their appeals were dismissed; their acts were enough to amount to more than merely preparatory.

3 Mens rea

The accused must intend to bring about the consequences required for the full offence.

This can be illustrated by the case of *R v Whybrow [1951] 35 Cr App R 141*. The mens rea of murder is intention to kill or intention to cause grievous bodily harm. Here, the charge was attempted murder and therefore it was necessary to prove that the defendant intended to kill. Intention to cause grievous bodily harm was not enough for attempted murder.



Key case: *R v Toole [1997] EWCA Crim 2163*

Held: If the substantive offence has the mens rea of either intention or recklessness as to the actus reus, to convict of the attempted offence proof of intention is required.

The charge in this case was attempted arson and no property was burnt. It was necessary to show an intention to damage property by fire.

3.1 Oblique intent



Key case: *R v Walker & Hayles (1989) 90 Cr App R 226*

Facts: This case was on attempted murder. The appellants threw the victim from a third-floor balcony.

Held: The court held that the jury may (but do not necessarily have to) [find] intention where they are satisfied that the defendant foresaw the result as a virtual certainty.

3.2 Conditional intent

A conditional intention counts as an intention. So where a defendant only intends to commit an offence subject to certain condition(s), the defendant will still have the sufficient mens rea for an attempt (**AG's Ref (Nos 1 & 2 of 1979) [1980] QB 180**).

An example of this type of intention is where D picks up a bag and looks through it but decides that there is nothing worth taking. D could be convicted of attempted theft as they have the intention to steal.

3.3 Intention to achieve only what is missing from the full offence

What if the *mens rea* of the offence includes an element which does not relate to the *actus reus*? The *mens rea* for an attempt to commit this offence is then an intention to achieve that what is missing from the *actus reus*, plus the *mens rea* for the full offence. This principle applies to attempted aggravated criminal damage. This is illustrated as follows.

Exercise: Engage

Aggravated criminal damage (full offence)	Attempted aggravated criminal damage
<p>Actus reus:</p> <ul style="list-style-type: none">To destroy or damage property belonging to another. <p>Mens rea:</p> <ul style="list-style-type: none">Intention or recklessness as to destroying or damaging property belonging to another.Intention or recklessness as to endangering life by the destruction or damage.	<p>Actus reus:</p> <ul style="list-style-type: none">Doing an act which is more than merely preparatory. <p>Mens rea:</p> <ul style="list-style-type: none">Intention to destroy or damage property belonging to another. [Intention to achieve what is missing from the <i>actus reus</i>. D must intend to bring about the consequences required for the full offence. Recklessness is not enough for this part of the <i>mens rea</i>.]Intention or recklessness as to endangering life by the destruction or damage. [Mens rea which does not relate to the <i>actus reus</i>. Mens rea for the full offence. Recklessness is sufficient for this part of the <i>mens rea</i>.]

Key case: Attorney General's Reference (No 3 of 1992) [1994] 2 All ER 121

Facts: The respondents were in a moving car from which a lighted petrol bomb was thrown at an occupied car, beside a pavement on which persons were standing. The bomb passed over the car and hit a wall adjacent to the pavement. The wall was not damaged. They were charged with attempted aggravated arson contrary **ss 1(2) and (3) Criminal Damage Act 1971**. The *mens rea* for the full offence is:

- Intention or recklessness as to damaging property by fire; and
- Intention or recklessness as to endangering life by the fire damage.

The *actus reus* of this offence is damaging property by fire. There is no need for life to be endangered. The trial judge ruled that there was no evidence on which the jury could find an intent to endanger life so the respondents were not liable.

Held: The Court of Appeal held that for an attempt to commit aggravated arson (**ss 1(2) and (3) Criminal Damage Act 1971**), it was only necessary to prove an intent to achieve what was missing from the full offence, together with the other *mens rea* required for the offence. In the present case, what was missing to prevent a conviction for the completed offence was damage to the property by fire. Therefore, for an attempt it must be shown that D had an intention to damage property by fire and the remaining state of mind required for the offence of aggravated arson – that is recklessness as to whether life was thereby endangered.

It was said that another way of putting it is that the defendant had the state of mind for the full offence and they intended to do the physical element which was missing.

4 Impossibility

Where a defendant sets out to commit a crime, which is in fact impossible to commit, can the prosecution nevertheless seek D's conviction for an attempt or will the impossibility of committing the full offence provide a defence?

There are three main types of impossibility:

- Non-existent crime;
- Through inadequacy; and
- In fact.

4.1 Non-existent crime

This arises where the accused believes that what they are doing is an offence, whereas it is in fact lawful.

You cannot turn a lawful act into an unlawful act. Therefore a prosecutor, seeking to convict a defendant of an offence, relying on the defendant's intent to do something else which is not in itself a crime, will not succeed (*R v Taaffe*).



Key case: *R v Taaffe* [1983] 2 All ER 625

Facts: Taaffe was caught importing illegal drugs into the United Kingdom. He thought the bag containing the drugs contained currency and he mistakenly thought that it was an offence to import this currency into the UK.

Held: Taaffe could not be convicted of an attempt to import currency into the UK, because there is no such offence.

4.2 Impossibility through inadequacy

Impossibility through inadequacy arises where the crime itself is perfectly feasible, but the defendants adopt, or seek to adopt, a method that cannot work, eg 'poisoning' someone with a substance that, unknown to them is harmless, or trying to open a bombproof safe with explosives which cannot blow it open.

Logic clearly shows that such an argument cannot succeed in any situation: a defendant who sets out to kill should not get off simply because they choose a method that is doomed to fail. Such a defendant will be convicted of an appropriate inchoate offence such as attempted murder.

4.3 Impossibility in fact

Sections 1(2) and (3) in relation to statutory attempt have reversed the common law position on impossibility in fact. This is now no longer a defence to attempt.

So, for example, if D stabs V, but V is already dead, then D will be liable for attempted murder.

This is illustrated in the House of Lords case of *R v Shivpuri*.



Key case: *R v Shivpuri* [1987] AC 1

Facts: D was arrested with a suitcase. He admitted that it contained illegal drugs. It turned out that the contents of the suitcase were not drugs.

Held: He was convicted of attempting to knowingly be concerned in dealing with a prohibited drug contrary to s 1(1). The conviction was upheld by the House of Lords.

5 Summary

The *actus reus* element of an attempt is ‘an act which is more than merely preparatory’. The jury will decide if the defendant’s conduct was more than merely preparatory. There are no clear rules on whether conduct is merely preparatory (not an attempt) or more than merely preparatory (an attempt). Guidance can be taken from case law such as:

Not an attempt	Attempt
Being outside a post office with a threatening note and fake gun (not attempted robbery, Campbell)	Getting into a car with a loaded gun and pointing it at the victim (attempted murder, Jones)

The mens rea element of an attempt is an intention to commit the full offence eg with attempted murder, the defendant must have an intention to kill.

Impossibility through inadequacy and in fact is no defence to an attempt (**ss 1(2) and (3) Criminal Attempts Act 1981**) eg if you try to poison someone with a substance that unknown to you is harmless you could still be criminally liable for attempted murder. However, a defendant cannot be convicted for attempting a non-existent crime (**Taaffe**).



8

Parties to a crime

1 Introduction

Defendants do not always work alone.

A conviction for a criminal offence may not necessarily require the accused to do the act that forms the *actus reus* of the crime.

For example, Fred could break into Ahmed's house and commit burglary. However Mary could also be liable for the offence if she:

- **Assisted** Fred by driving him to Ahmed's house or provided a hammer with which to break the window to gain entry;
- **Encouraged** him to carry out the burglary;
- **Procured** the offence by suggesting Fred commit the burglary.

All these modes of participation could make Mary liable for the offence as an accessory.

Alternatively the parties might take part in a **joint enterprise**. Fred and Mary may break into Ahmed's house together. Both enter the house, both intend to steal from the house, and both will be liable for burglary. If, in the course of the break-in, Fred confronts Ahmed and stabs him, killing him, Fred will probably be guilty of murder. Depending on her mens rea, Mary might also be guilty of murder as an **accessory**.

1.1 Principal offenders

It is necessary to distinguish between the principal offender and accessories, otherwise referred to as secondary parties.



Principal: The principal (P) is the person who, with appropriate mens rea, commits the *actus reus* of the offence. It is always possible to have more than one principal: if Fred and Mary break into a house together and both have an intention to steal they will be joint principals for the burglary.

Innocent agents: In certain circumstances, a person may be guilty of an offence as a principal, even if another person actually performs the *actus reus*. This occurs where the person acting can be described as an 'innocent agent'.

Examples of this include where the person carrying out the *actus reus* is under the age of criminal liability or is deceived as to what they are doing.



Key case: *R v Michael (1840) 9 C & P 356*

A woman gave a child a dose of poison and the child gave it to the victim.

The woman was the principal offender.



Key case: *R v Stringer and Banks* (1991) Crim LR 639

An employer told his employees to make accounting transactions which (unknown to those employees) resulted in fraudulent transfers. The employer was the principal and the employees were innocent agents.

1.2 Secondary parties



Secondary parties: Section 8, Accessories and Abettors Act 1861 identifies the ways in which someone can be an accessory to a crime. It provides as follows:

Whosoever shall aid, abet, counsel or procure the commission of any offence whether the same be an offence at common law or by virtue of any Act passed, shall be liable to be tried, indicted and punished as a principal offender.

The Supreme Court in *R v Jogee* [2016] UKSC 8 stated that the principles governing those who set out on a joint enterprise are the same as for those who aid, abet, counsel or procure. There are therefore five ways in which someone can be liable as an accessory:

- To aid
- To abet
- To counsel
- To procure
- To be a party to a joint enterprise

With the exception of procuring, these actions can be summarised as ‘assisting or encouraging the commission of the principal’s offence’. This was the term used in *R v Jogee*.

2 Actus reus



Key case: Attorney General's Reference (No 1 of 1975) 2 All ER 684

Lord Widgery stated:

We approach s 8 of the 1861 Act on the basis that the words should be given their ordinary meaning, if possible. We approach the section on the basis also that if four words are employed here, ‘aid, abet, counsel or procure’, the probability is that there is a difference between each of those four words and the other three, because, if there were no such difference, then Parliament would be wasting time in using four words where two or three would do.

However, despite Lord Widgery’s implication that the words used in the Act are ordinary words, capable of being understood without explanation, some discussion of the terms, and particularly the differences between them, will be of assistance.

2.1 Procuring



Key case: AG's Ref(No 1 of 1975) 2 All ER 684

‘To procure means to produce by endeavour.’

In this case D added alcohol to P’s drink without his knowledge or consent. When P later got in his car and drove, his blood/alcohol concentration was higher than the prescribed limit. D had procured P to commit a drink-driving offence. There is no need for consensus. It is immaterial whether the procuring is relied on. In this case it was done without P’s knowledge or consent.



Key case: **Beatty v Gillibanks (1882) 9 QBD 308**

Officers of the Salvation Army arranged a meeting in Weston-super-Mare which they knew was likely to produce a violent reaction from the Skeleton Army. There was a violent reaction. However, it was held that the Salvation Army officers had not procured the violence. They were not endeavouring to cause the violence.

There must be a causal link between D's act and the commission of the offence.

2.2 Aiding

This is perhaps the easiest term to understand. It requires the accessory to give help, support or assistance to the principal offender in carrying out the principal offence.

Examples include:

- Supplying materials or tools to commit the offence (**Thambiah v R** [1966] AC 37)
- Giving information which helps the principal to commit a crime (**AG v Able** [1984] QB 795)
- Holding down a victim in assault (**R v Clarkson** [1971] 3 All ER 344)

Key case: **R v Bryce [2004] 2 Cr App R 35**

B drove P to a caravan close to V's home. B argued that he was not liable as an accessory to P's subsequent murder of V because of a 12-hour delay between P's arrival at the caravan and the murder, particularly as P had not fully made up his mind to kill when B drove him there.

Despite this, the Court of Appeal held that B's act could amount to aiding.

There need be no causation in the sense that but for the assistance the crime would not have happened.

There need be no consensus, eg if D sees P committing a crime and comes to P's assistance by, for example, talking to or restraining a police officer who would have prevented P from committing the crime, D is guilty even if D's assistance is unforeseen and unwanted by and unknown to P.

An accessory before the fact is one who helps before the crime. An accessory before the fact would come under the category of 'aiding'.

An accessory after the fact has been abolished. Such a person would now be convicted of assisting an offender under **s 4 Criminal Law Act 1967**.

2.3 Counselling

This has been held to mean giving advice or encouragement before the commission of the offence.

Key case: **R v Calhaem [1985] QB 808**

Held that 'there is no implication that there should be any causal connection between the counselling and the offence'. There need be **no** causal link eg but for the counselling, the crime would not be committed.

However, there must be contact between the parties and a connection between the counselling and the offence. The act done must be within the scope of the advice and the principal offender must know of the counselling, ie there must be consensus.

Key case: **R v Jogee [2016] UKSC 8**

Once encouragement or assistance is proved to have been given the prosecution does not have to go so far as to prove that it had a positive effect on P's conduct or on the outcome - **R v Calhaem** [1985] QB 808. In many cases that would be impossible to prove. There might, for example, have been many supporters encouraging [P] so that the encouragement of a single

one of them could not be shown to have made a difference. The encouragement might have been ignored, yet the counselled offence committed.

2.4 Abetting

This is defined in the Oxford English Dictionary as ‘to incite, instigate or encourage’.

Devlin J in **NCB v Gamble [1959] 1 QB 11** suggested that it means encouraging at the time the offence is being committed. This is in contrast to counselling which is encouraging before the commission of the offence.

As with counselling, there need be no causal link and there must be communication. The principal must know they are being abetted.



Key case: **R v Giannetto [1997] 1 Cr App R 1**

Kennedy LJ considered what kind of encouragement might amount to abetting and concluded:

Suppose somebody came up to G and said, “I am going to kill your wife”, if he played any part, either in encouragement, as little as patting him on the back, nodding, saying “Oh goody”, that would be sufficient to involve him in the murder to make him guilty, because he is encouraging the murder [...]. Any involvement from mere encouragement upwards would suffice.

2.4.1 Mere presence at the scene of the crime

This is not necessarily enough to count as abetting.



Key case: **R v Coney [1882] 8 QBD 534**

Three spectators at an illegal prize-fight were charged with battery as accessories (the principals being the two fighters). Although the Divisional Court accepted that the presence of the spectators could be seen as an encouragement, since the fighters would not be fighting if there was no audience, the conviction of the defendants was quashed as the trial judge’s summing up may have lead the jury to conclude that mere presence at the scene would be sufficient to amount to the offence.



Key case: **Wilcox v Jeffrey [1951] 1 All ER 464**

It is possible to abet by mere presence.

H, an American jazz musician, played at a concert in London despite the fact that his permission to enter the UK prohibited him from working. W attended the concert and later wrote a favourable review in a magazine that he owned. It was held that W’s presence at the concert was an encouragement to the offence.

2.4.2 Failure to prevent an offence

Where D has the right or duty to control the actions of another and deliberately refrains from exercising it, D’s inactivity may be a positive encouragement to the other to perform an illegal act and would therefore be abetting.



Key case: **R v Russell [1933] VLR 59**

Parent: A husband who stood by and watched his wife drown their children was guilty of aiding and abetting the homicide. His deliberate abstention from action gave encouragement and authority to his wife’s act.



Key case: *Tuck v Robson [1970] 1 WLR 741*

Publican: If a licensee of a pub stands by and watches their customers drinking after hours, the licensee is guilty of aiding and abetting them in doing so.



Key case: *Du Cross v Lamourne [1907] 1 KB 40*

Car owner: If D's car was being driven at a dangerous speed by E in D's presence, D could be convicted, for he was in control, could and ought to have prevented her from driving in a dangerous manner.



Key case: *R v J F Alford Transport Ltd [1997] 3 Cr App R 326*

Employer: The company, together with the managing director and transport director, were convicted as accessories to offences of falsifying tachograph records, committed by 19 drivers employed by the company. They appealed, arguing that convictions required evidence of positive assistance or encouragement to commit the offence.

The Court of Appeal held that the company was in a position of control over the drivers and that passive acquiescence in such a circumstance was sufficient. It was not even necessary for the prosecution to prove that the appellants intended their acquiescence to encourage the drivers, just that they knew their silence would have this effect. This case also confirms that it is not necessary for an inactive participant to be present at the scene of the crime.

2.5 Joint enterprise

A joint enterprise is where two or more people are committing a crime together.

Fred and Mary may break into Ahmed's house together. Both enter the house, both intend to steal from the house, and both will be liable for burglary. If, in the course of the break-in, Fred confronts Ahmed and stabs him, killing him, Fred will probably be guilty of murder. Depending on her *mens rea*, Mary might also be guilty of murder as an **accessory**.

This example illustrates that the issue of accessory liability arises when one of the parties goes on to commit a different crime.

Lord Philips described it in *R v Gnango [2010] EWCA Crim 1691* as follows: D1 and D2 have a common intention to commit crime A. D1, as an incident of committing crime A, commits crime B.

In a joint enterprise case, at the time of the accessory offence, the accomplice was committing another offence with the principal.

In a simple case of aiding, abetting etc, the accomplice is not committing an offence as a principal.

2.5.1 Key principles

To be liable under this principle there is no need to show that D2 aided or encouraged the offence. It is enough that D2 was a party to the joint enterprise and had the relevant *mens rea* for an accessory.

An important requirement is that crime B must be committed in the course of or be incidental to crime A. If D1 and D2 got to a house to beat up a man and on the way home together D1 throws a brick through the window of a house, D2 cannot be liable for this criminal damage.

A party cannot be liable for any offences committed before they join the enterprise.

3 Mens rea



Key case: *R v Jogee [2016] UKSC 8*

This was stated by Lord Hughes and Lord Toulson in the Supreme Court as follows:

The mental element in assisting or encouraging is an intention to assist or encourage the commission of the crime and this requires knowledge of any existing facts necessary for it to be criminal [...]. If the crime requires a particular intent, D2 must intend to assist or encourage D1 to act with such intent.

This is broken down by Smith, Hogan and Ormerod into three parts:

- An intention to assist or encourage the principal's conduct.
- If the crime requires a *mens rea*, an intention that the principal will do the *actus reus* with that *mens rea*. (Procuring would appear to be an exception to this rule.)
- Knowledge of existing facts or circumstances necessary for the offence to be criminal.

3.1 An intention to aid or encourage

This has two elements. D must intend:

- To do the act which aids or encourages; and
- It to aid or encourage the commission of the crime.

For example, if D supplies P with a gun which P uses to commit a murder, it must be proved that D intended:

- (a) To give it to P rather than accidentally leaving it where P could pick it up; and
- (b) P to use it to cause serious harm to someone.



Key case: *Lynch v DPP for Northern Ireland [1975] AC 653*

Facts: In this case members of the IRA threatened to kill Lynch, a taxi driver, unless he drove them to the house of a police officer. Lynch knew that the men intended to murder the police officer. He therefore intended to assist them in this crime even though he was horrified by it.

Held: It was held that intention in this context does not mean desire, so there is no need for direct intent. It is enough that D had oblique intent.



Key case: *R v Jogee [2016] UKSC 8*

The court said that D need not have a positive intent that the crime be committed (at paragraph 10).

It gave the example of D who supplies a weapon where, at the time of supplying the weapon, D intends to give P the means to commit a crime, but it remains unclear what P might do. D would be liable even if they have no further interest in whether or not P commits the crime.

Smith, Hogan and Ormerod says this suggests that it is sufficient D intended their act might assist in the crime, even if it cannot be said that it definitely will do so. Perhaps the test is as suggested by Herring for conditional intent – that the jury should convict if it decides that D would not mind if the crime were committed. This is suggested by the words 'D would be liable even if they have no further interest in whether or not P commits the crime'.

3.2 An intention that P will commit the crime with the necessary mens rea

We will consider two issues here:

- Conditional intention; and
- Crimes where the *mens rea* does not correspond to the *actus reus*.

3.2.1 Conditional intention

It was accepted in *Jogee* that it is enough that D has a conditional intent that P will commit a crime with the necessary *mens rea*. For example, if D supplies P with a gun to use in a burglary and intends P to use it to cause serious harm only if disturbed in the burglary, then D intends P to use the gun to cause serious harm.

This is particularly helpful in cases of joint enterprise. If D and P set out on a burglary and D intends that P will use a weapon to cause serious harm to someone if they are disturbed, D will be liable for the serious harm P causes when they are disturbed.

It was made clear in **Jogee** that to establish conditional intent in such a case more was required than foresight that P might cause serious harm if the condition arose. On the other hand, it cannot be required that D must know P would definitely cause serious harm as per oblique intent. The court gave little guidance on when it is possible to find conditional intent based on foresight, merely saying that conditional intent could be inferred from foresight, but need not be.

Herring suggests that the best guidance for the jury would be to consider what D's attitude would be if P did commit the crime. If D is pleased or accepting of the fact that P acted that way, then the jury should find D has conditional intent the crime would be committed. If D is dismayed that P has committed the crime, then the jury cannot find conditional intention. In cases where P is dismayed, only oblique intention will suffice.

3.2.2 Crimes where the mens rea does not correspond to the actus reus

It was stated in **Jogee** that if D1 intends D2 to do serious harm to the victim, D1 will be liable for murder when D2 injures the victim with intent to do serious harm and the victim dies as a result.

This will be despite the fact that D1 could not be said to have intended murder to be committed. Presumably the same rule applies to s 47 and s 20 Offences Against the Person Act 1861.

3.3 Knowledge of the facts or circumstances

If the offence requires goods to be stolen, D needs to know that they are stolen.

If the offence requires lack of consent, D must know that the victim does not consent.

Key case: *Johnson v Youden* [1950] 1 KB 544

Facts: A builder committed an offence by selling a house for £250 more than the maximum permitted under a statutory regulation. The £250 was paid to him in advance by the purchaser. The builder then instructed a firm of solicitors to act for him in the sale. Two of the partners in the firm had no knowledge of the earlier payment, but they were convicted by the magistrates of aiding and abetting the builder's offence.

Held: Their convictions were quashed by the Divisional Court because they had no knowledge of the facts which gave the transaction its criminal character. They therefore lacked the mens rea to be guilty as accessories.

Knowledge here includes wilful blindness; a defendant who deliberately shuts their eyes to the obvious will be deemed to have knowledge (*R v J F Alford Transport*).

D need not know the exact details of the crime which will be committed. D does not need to know the identity of the victim or the day on which the crime will be committed.

Key case: *R v Bainbridge* [1960] 43 Cr App Rep 194

Lord Parker, quoting with approval from the direction given to the jury by the trial judge, said:

The knowledge that is required to be proved in the mind of the appellant is not the knowledge of the precise crime. In other words it need not be proved that he knew that the Midland Bank, Stoke Newington branch was going to be broken and entered, and money stolen from that particular bank, but he must know the type of crime that was in fact committed. In this case it is a breaking and entering of premises and the stealing of property from those premises.

It is also enough to know that the principal may commit any one of a number of crimes including the crime which the principal does in fact commit (*DPP for NI v Maxwell*).

3.3.1 Defendants with a lesser intent

Jogee: If a person is party to a violent attack on another, without an intent to assist in the causing of death or really serious harm, but the violence escalates and results in death, that person will be not guilty as an accessory to murder but can be guilty as a principal for the crime of manslaughter.



Key case: *DPP for Northern Ireland v Maxwell [1978] 3 All ER 1140*

Maxwell was a member of the Ulster Volunteer Force and had driven the principals to the pub where they planted a bomb. The organisation had a history of violent acts with explosives and firearms. Therefore, it was held that even if Maxwell did not know which crime would be committed among a variety of offences such as shooting people at the pub, committing a robbery at the pub or planting a bomb, he knew that planting a bomb was amongst those crimes he could be assisting, so was liable.

This case was approved in *Jogee*.

4 Withdrawal

A secondary party may change their mind and want to withdraw their help or encouragement.

The general rule is that it is not enough to just have a change of mind. Something must be done and, at the very least, the withdrawal must be communicated to the principal or a law enforcement agency. Further acts may be required depending on the circumstances of the case.



Key case: *R v O'Flaherty [2004] Cr App R 20*

Mantell LJ stated:

[F]or there to be withdrawal, mere repentance does not suffice. To disengage from an incident a person must do enough to demonstrate that he or she is withdrawing from the joint enterprise. This is ultimately a question of fact and degree for the jury. Account will be taken inter alia of the nature of the assistance and encouragement already given and how imminent the infliction of the fatal injury or injuries is, as well as the nature of the action said to constitute withdrawal.



Key case: *R v Rook [1993] 2 All ER 955*

Facts: Rook and another were recruited by a man to kill his wife and paid money to do so. Rook recruited a fourth man to help. On the day of the killing, the husband drove his wife to the place where it was arranged she should be killed and the fourth man killed her. Rook never turned up and claimed he never intended to be involved in the killing, he just wanted the money.

Held: Lord Justice Lloyd held that the minimum which was required was unequivocal communication of his intention to withdraw. It may be that further steps would have been necessary to neutralise his actions, but as the minimum was not there, the court did not consider what else would be required.

For assistance, the relevant time for the mens rea is at the time of the act of assistance, not at the time when the principal commits the crime.

Therefore, the withdrawal must take place, before the act of assistance.

Where D has supplied the principal with the means of committing the crime and has given assistance, this will be less easily neutralised than where D has just given advice.



Key case: *R v Becerra* (1975) 62 Cr App R 212

Facts: Becerra had broken into a house with C and G, intending to steal. B gave a knife to C to use on anyone interrupting them if necessary. The tenant of the upstairs flat came down to investigate the noise. B said, 'come on, let's go' and got out through a window.

Held: The Court of Appeal held that something 'vastly different and vastly more effective' was required for a sufficient communication of withdrawal. Roskill LJ stated, *obiter*, that a point of time might be reached when the only way he could effectively withdraw so as to free himself from joint responsibility for any act C thereafter did in furtherance of the common design, would be physically to intervene so as to stop C attacking the victim, by interposing his own body between them or somehow getting in between them.

4.1 Withdrawal from spontaneous violence

Key case: *R v Mitchell and King* [1999] Crim LR 496

In this case it was suggested in that the test is less onerous for acts of spontaneous violence.

Facts: A fight broke out in a restaurant in which A, B and D assaulted two customers and damaged the restaurant on their way out. They were followed out by the owner and his two sons. The fight continued outside the restaurant, during which the victim was left on the ground. D returned to beat the victim further and killed him.

Held: The Court of Appeal held that communication of withdrawal was required only in cases of pre-planned violence, not a case like the one before them. Otton LJ said:

Communication of withdrawal is a necessary condition for dissociation from pre-planned violence. It is not necessary when the violence is spontaneous. Although absent any communication, it may, as a matter of evidence, be easier to persuade a jury that a defendant, who had previously participated, had not in fact withdrawn. Such considerations are clearly relevant in such cases [ie of pre-planned violence], but less so when the violence has erupted spontaneously.

R v Mitchell and King has been strongly criticised on the grounds that if the principal, P, does not know that D has withdrawn, they may still be encouraged to commit the offence by (what they believe is) D's support. Thus D will still be abetting.

R v Mitchell and King was confined to its facts by the Court of Appeal in **R v Robinson** [2000] EWCA Crim 8, where it was pointed out that A, B and D had left the scene and that D's return was in effect a new attack.

Key case: *R v O'Flaherty* [2004] Cr App R 20

However the Court of Appeal, not having been referred to **R v Robinson**, said, *obiter*, that communication was not necessary for withdrawal from spontaneous violence.

5 Conviction of secondary party and acquittal of principal

Conviction of a secondary party and acquittal of the principal is possible and could occur when the principal has been acquitted due to insufficient evidence or the principal could not be found.

As long as it is clear that someone has committed the offence to which D was a secondary party, D can be convicted.

Another occasion when D can be convicted and the principal acquitted is where the principal has done the *actus reus* with the *mens rea*, but has a defence as in **R v Bourne** [1952] 36 Cr App R 125. Bourne procured his wife to do the *actus reus* with the *mens rea* of the offence, but she had the defence of marital coercion.

The general rule is that if it cannot be proved which of two people committed the crime, both must be acquitted.

However, if it can be proved that the one who did not commit the crime as the principal was a secondary party to the crime, then both can be convicted.



Key case: R v Russell and Russell [1987] 85 Crim App R 388

Both parents of a 16-month-old daughter were convicted of manslaughter after she died from a massive dose of methadone. It did not matter that it could not be proven which parent had given her the dose, as long as the other had been there when it happened, so abetted the offence. The Court of Appeal was satisfied that the jury had convicted on this basis.

6 Interaction with attempt

It is not an offence to attempt to aid, abet, counsel or procure an offence (**s 1(4)(b) Criminal Attempts Act 1861**).

It is an offence to aid, abet, counsel or procure an attempt to commit an offence (**R v Hui Chi-Ming [1991] 3 All ER 897**).

7 Summary

Principal

- The principal (P) is the person who, with appropriate *mens rea*, commits the *actus reus* of the offence.

Accessorial liability or secondary participation

Actus reus: any of the following five ways:

- **To aid P in committing the offence:** Giving help, support or assistance before or at the time of the offence eg giving information, supplying tools or driving P.
- **To abet P in committing the offence:** Incite, instigate or encourage P at the time of the offence which must be communicated to P. Mere presence at the scene of the crime is not necessarily enough. If D has a right or duty to control the actions of another and refrains from doing so, this can be abetting eg parent, employer.
- **To counsel P in committing the offence:** Giving P advice or encouragement before the offence is committed. There must be contact and consensus between P and D along with a connection between the advice and the crime. Causation isn't needed.
- **To procure P to commit the offence:** To produce by endeavour. There must be a causal link between D's act and P's commission of the offence.
- **To be a party to a joint enterprise with P regarding one offence and during the enterprise P commits a second, different offence** eg P and D commit burglary as principals, P murders the homeowner, D becomes an accessory to P's murder.

Mens rea:

- **An intention to assist or encourage the principal's conduct.** D must intend:
 - To do the act which aids or encourages; and
 - It to aid or encourage the commission of the crime (oblique intent is sufficient, conditional intent may be sufficient).
- **If the crime requires a mens rea, an intention that the principal will do the actus reus with that mens rea.**
 - Conditional intention is enough here.
 - D can be liable for greater harm than intended for crimes where the MR does not correspond with the AR eg D might intend P do serious harm but if P does serious harm and V dies, D will be liable as an accessory to P's murder.

- **Knowledge of existing facts or circumstances necessary for the offence to be criminal** eg if the offence requires lack of consent, D must know that the victim does not consent.
 - A defendant who deliberately shuts their eyes to the obvious has knowledge.
 - D need not know the exact details of the crime which will be committed eg V's identity, the day of the crime or which of a number of crimes D knows P could commit.
- **Other key principles regarding accessory liability covered in this section were:**
 - Withdrawal: Something must be done and in the case of pre-planned (but not necessarily spontaneous) violence, communicated to the principal or a law enforcement agency.
 - Conviction of a secondary party and acquittal of the principal is possible.
 - If it can be proved that the person who did not commit the crime as the principal was a secondary party to the crime, then both can be convicted.
 - It is not an offence to attempt to aid, abet, counsel or procure an offence.
 - It is an offence to aid, abet, counsel or procure an attempt to commit an offence.

