

Revision & study guides
from the **No.1** legal education publisher

Concentrate

CRIMINAL LAW

Ninth Edition

Jonathan Herring

consolidate knowledge › focus revision › maximise potential

OXFORD

Contents

Table of cases	vi
Table of legislation	xi
1 The basis of criminal liability	1
2 <i>Actus reus</i>	11
3 <i>Mens rea</i>	28
4 Strict liability	41
5 Non-fatal offences against the person	48
6 Sexual offences	68
7 Homicide I	83
8 Homicide II	95
9 Inchoate offences	109
10 Participation	119
11 Theft	131
12 Fraud	144
13 Other property offences	151
14 Defences I	163
15 Defences II	179
Exam essentials	A1
Outline answers	A3
Glossary	A9
Index	A11

Professional Bookshop
www.pbookshop.com

1.3 REFORM OF THE CRIMINAL LAW

LOOKING FOR EXTRA MARKS?

Your examiner will give you credit if you can state and apply the current law correctly, but you will be given more credit if you are then able to show the examiner how the outcome might differ if the proposals for reform. You would also do very well to be able to give a brief indication of what is to be preferred, and why.

1.3.1 Judicial reform of the criminal law

On the theme of change to the criminal law, judicial reform is unlikely to occur on a large scale. Judges cannot create new criminal offences, and can develop existing law by applying the rules of precedent (*stare decisis*)—and then only where the facts of the case give rise to that legal issue (*Shaw v DPP* [1962]). You should therefore have a good knowledge of the judicial developments in the criminal law that occur during your studies, but if you are to reform, watch carefully the proposals of the Law Commission and Parliament.

1.3.2 Influences of Europe

While Brexit has limited the impact of European Union Law on English law, the fact that England is a signatory to the **European Convention on Human Rights**, an international treaty separate from the European Union. The Human Rights Act 1998 provides that English law must comply, if possible, with the Articles in the **European Convention on Human Rights 1950**. Two Articles in particular have the potential to impact on criminal law. Article 2 provides for the right to life, and this has an effect where a person is charged with self-defence to kill an aggressor (see 15.3.3 'Self-defence and the right to life'). Article 7 states that 'No one shall be held guilty of any criminal offence on account of an act or omission which did not constitute a criminal offence under national or international law at the time when it was committed'. This means criminal law cannot operate retrospectively. In other words, if something is not a crime at the time you do the act, the government cannot later declare that what you did was unlawful. Article 7 might yet have an impact on criminal law, notably strict liability offences (see 4.2 'Can strict liability be justified?'). Manslaughter by gross negligence (8.3 'Gross negligence manslaughter' in chapter 8) and the element of dishonesty in theft (11.3.1 'Dishonesty' in chapter 11).

KEY CASES

KEY CASES

CASE	FACTS	PRINCIPLE
<i>Lambert</i> [2002] 2 AC 545	D appealed against his conviction for possession of a class A drug with intent to supply. He had been found in possession of a bag containing a drug but said he neither knew, nor suspected, nor had reason to suspect the nature of the contents of the bag. The question on appeal was whether he had to prove his lack of knowledge of the contents, or if the prosecution had to prove he did know. The section in issue was s 28 Misuse of Drugs Act 1971.	Section 28, insofar as it contained an express reverse proof burden, should be 'read down' as imposing an evidential burden only on the accused (note: this is in fact <i>obiter</i> as the majority of the House held that the Human Rights Act 1998 did not have retrospective application).
<i>Sheldrake v DPP; Attorney-General's Reference (No 4 of 2002)</i> [2005] 1 AC 264	<i>Sheldrake</i> : D was convicted of drink-driving. He appealed on the ground that the defence, which cast upon the defendant the burden of proving that there was no likelihood of his driving the vehicle while over the limit, violated his right to a fair trial under Article 6.	The House of Lords held that the allocation of a proof burden to the accused did not violate Article 6. It was directed to a legitimate objective (the prevention of death, injury, and damage caused by unfit drivers); and the likelihood of the defendant driving was a matter so closely conditioned by his own knowledge as to make it much more appropriate for him to prove on a balance of probabilities that he would not have been likely to drive than for the prosecution to prove, beyond reasonable doubt, that he would. In addition, the imposition of a legal burden on D did not go beyond what was necessary and reasonable, and was not in any way arbitrary.
	<i>Attorney-General's Reference</i> : D was charged with two offences relating to terrorism (belonging to and professing to belong to a proscribed organization). The appeal concerned the elements of the offences and related defences, and who had to prove them.	The House held that if there was a reverse proof burden, there was a real risk that a person who was innocent of any blameworthy or properly criminal conduct, but who was unable to establish a defence to one of these charges, might nevertheless be convicted. The provisions in question therefore breached the presumption of innocence.
<i>Woolmington</i> [1935] AC 462	D was charged with murder. The trial judge directed the jury that, once the prosecution had proved a person had died at D's hands, it was for D to prove it was not murder.	Viscount Sankey held that the burden of proof lies on the prosecution, and that includes proof of each element of the crime, and the elements of any defence, other than the defence of insanity and other 'statutory provisions'.

Q KEY DEBATES

Topic	'What is a crime?'
Author/Academic	Grant Lamond
Viewpoint	Considers the definition of criminal law
Source	(2007) 27 OJLS 609

Actus reus

2

KEY FACTS

The **elements of an offence** are found in the definition of the offence, and that is contained in a statute or in cases (common law).

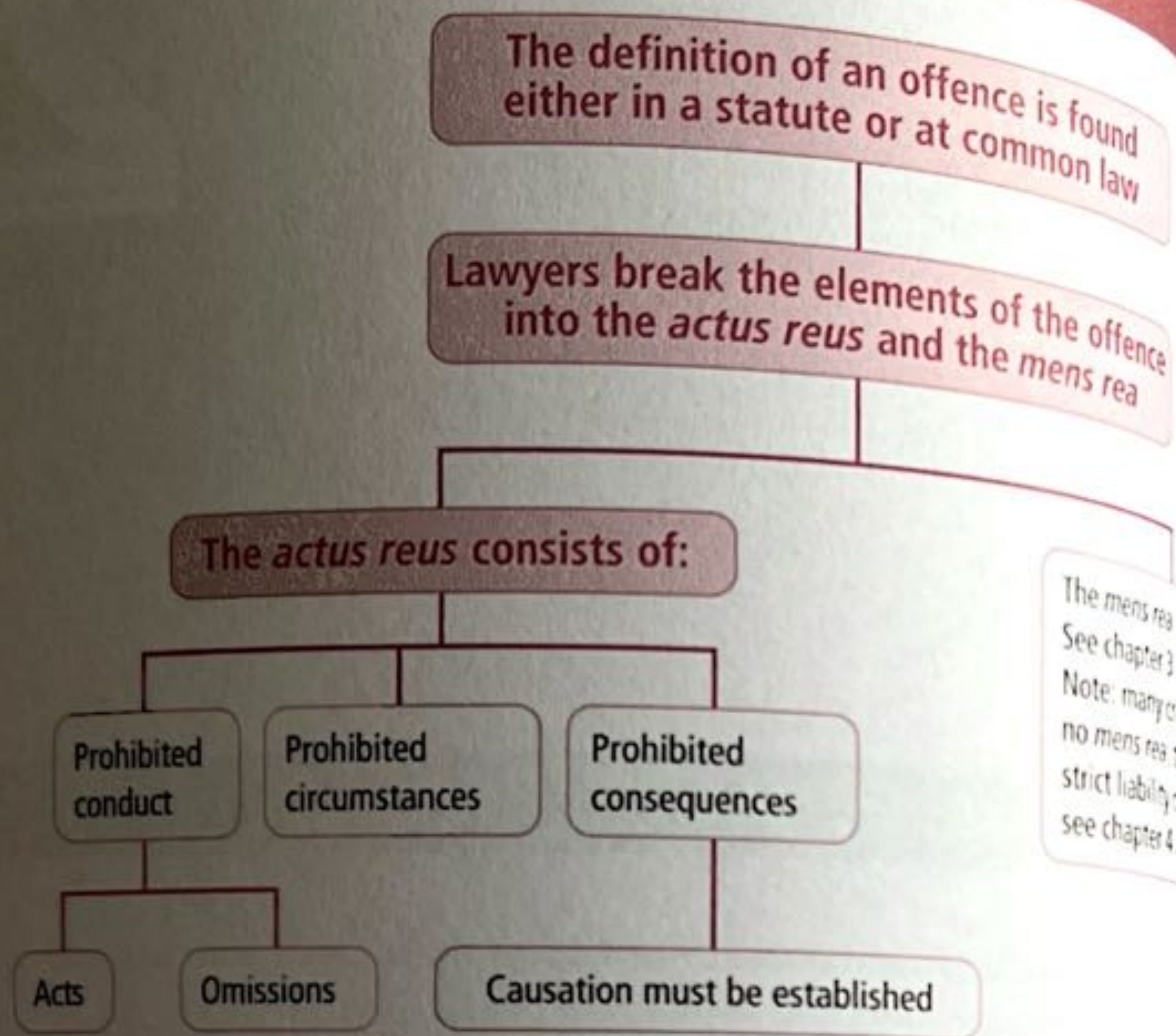
These elements are known as the **definitional elements** of the offence.

The definitional elements are broken down, to manage them more easily, into **actus reus** and **mens rea**.

The **actus reus** consists of prohibited conduct (acts or omissions), prohibited circumstances, and/or prohibited consequences (results).

A person can be criminally liable for failing to act (ie an omission), but only where there is a duty to act. Imposing criminal liability for an omission can be controversial.

Causation is a key part of consequence/result crimes. The prosecution must prove that the result was caused by the defendant. In order to do this, the **chain of causation** must first be established, and then consideration must be given to any intervention which might break the chain.



2.1 What is *actus reus*?

2.1.1 Identifying the definitional elements of an offence

We saw in chapter 1 that criminal liability is found when the prosecution can prove the defendant satisfies the elements of the crime, and has no defence. The elements of each offence (and of each defence) are found in its definition, and the definition is found either at common law (cases only) or under statute (an Act of Parliament, supplemented by case law which interprets the statutory provision).

The first step is to take the definition of a crime and see if you can break it down into its components. As an example we will look at one offence.

REVISION TIP

For each offence on your syllabus, make sure you are able to recite *each* element. If there are five elements to a crime, you must know all five; you cannot explain and apply only four of them and still reach a sensible conclusion as to liability!

How to identify the definitional elements of criminal damage

An example of a statutory offence is criminal damage. This is governed by s 1 Criminal Damage Act 1971, which provides:

A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.

The definitional elements of the crime could therefore be listed as:

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

REVISION TIP

What we have done for this example above is break the offence into its constituent elements; and once you can do this with confidence for any offence you come across, you will never forget how to do it.

Once you can list the elements, the next step in your revision is to add cases for each element, including the key facts and *ratio decidendi*, and then add some commentary on the case, particularly if it has been criticized.

2.1 WHAT IS ACTUS REUS?

To make offences easier to handle, lawyers split the crime into two parts, *actus reus* and the *mens rea*.

2.1.2 What does *actus reus* mean?

Have another look at the offence of criminal damage above. It has been broken down into two parts: *actus reus* and *mens rea*. Criminal damage consists of conduct (destroying or damaging), in particular, property belonging to another) with a particular state of mind (intention or recklessness to the elements listed earlier). Most criminal offences have similar components. We classify the elements as either *actus reus* or *mens rea*, from the Latin phrase *non facit reum nisi mens sit rea*. The phrase translates into English as 'the act is not guilty unless the mind is guilty'. Hence the *actus* (act) must be *reum* (guilty) and the *mens* (mind) must also be *rea* (guilty). We examine *mens rea* in chapter 3. We tackle *actus reus* here.

The definition of *actus reus*

The translation of *actus reus* to 'guilty act' is misleading. *Actus reus* does not necessarily refer to the prohibited act, but refers to the prohibited circumstance, or result (or a combination of them). Secondly, the *actus reus* does not necessarily have to be an act; the conduct could be satisfied by an omission (see 2.3 'Omissions'). Thirdly, the *actus reus* includes far more than conduct. The term is used to cover any circumstances mentioned in the definition of the offence and any consequence (or result) too.

+ LOOKING FOR EXTRA MARKS?

If you are answering an essay question on *actus reus* in the exam, you might find it useful to refer to the Law Commission (among others) has called for the term *actus reus* to be replaced with 'fault elements' and *mens rea* with 'fault elements' to reflect better their true meanings. Lord Bingham [1983] said that it would be 'conducive to clarity ... if we were to avoid bad Latin and instead speak ... about the conduct of the accused and his state of mind at the time of the offence, instead of speaking of *actus reus* and *mens rea*'.

By far the easiest way to find the *actus reus* is to take away the *mens rea* (chapter 3). What is left must be *actus reus*, even if that consists of the state of mind of the victim (e.g. consent, or rather the lack of it, in the offence of rape). So, returning to criminal damage, the *actus reus* of criminal damage is therefore:

- destroying or damaging
- any property
- belonging to another.

2.2 CONDUCT

The element 'without lawful excuse' is probably another element of the *actus reus*, but might be a defence. Do not worry about this lack of certainty. Judges have struggled for decades to decide whether what we call defences are in fact defences (ie they exist separately from the *actus reus* and *mens rea*) or are part of the *actus reus* or *mens rea*. It is not your job to make this decision for them! You will be relieved to know that this issue does not have to concern us again until chapter 14.

2.2 Conduct

2.2.1 Acts and omissions

Some crimes can be committed either by doing something (ie a positive act) or by not doing something (ie an omission). An example of a crime that can be committed by either act or omission is murder. If D intentionally stabs V and V dies, that is murder by an act. On the other hand, if D is under a legal responsibility to care for V, and D, intending to kill V, fails to feed her and V dies, that is murder by omission (see *Gibbins and Proctor* (1918) in 'Familial relationships' in section 2.3.1).

Some crimes, however, can only be committed by an act, because that is what the definition of the crime says. For example, the offence of robbery (see 13.2 'Robbery' in chapter 13) could not be committed without D actually doing something (such as using force, or threatening to use force, etc, in order to steal). On the other hand, some crimes can be committed only by omission. For example, s 36 Road Traffic Act 1988 provides that a person who drives a vehicle and who fails to comply with a road sign (such as a 'stop' sign) is guilty of an offence. It is the failure to comply which gives rise to criminal liability.

2.2.2 Voluntariness and automatism

Whether the *actus reus* is committed by an act or by omission, it must be committed voluntarily. Conduct which is involuntary in law is conduct which is not subject to D's conscious will. This may be because of an uncontrollable impulse, such as if D crashes a car while having a heart attack, or it may be as a result of an unanticipated and serious side effect of taking prescription medication. Where D's conduct amounts to the *actus reus* of a crime, but is involuntary, criminal lawyers tend to say they have the defence of automatism. Actually, it would be more accurate to say that it is a denial of *actus reus*.

- LOOKING FOR EXTRA MARKS?

Refer to the chapters on the defences (chapters 14 and 15), and make sure you are able to state which are 'true' defences and those which are assertions which amount to a denial of one or more of the definitional elements of the crime.

We return to the 'defence' of automatism in chapter 14.

2.3 OMISSIONS

2.3 Omissions

The common law traditionally prohibits acts and does not criminalize omissions. Liability will usually arise in relation to a failure to act. There are some good reasons for this approach, including:

- imposing liability for an offence of failing to act would be hard if not impossible to enforce;
- proving causation might be impossible;
- convicting for omissions would conflict with the principle of autonomy: the fact that we are individually responsible for our conduct, we should not be responsible for the conduct of others. At any given time there are thousands of people we could be held responsible for by donating money to charity, donating an organ, visiting someone in hospital, etc. We cannot reasonably be responsible for everything we are not doing.

REVISION TIP

Essay questions often ask you to evaluate the circumstances in which the law will and will not impose liability for an omission. You should have thoroughly read this topic in at least one of the textbooks.

The law does prohibit certain omissions (as the exception to the general rule) where the following conditions are satisfied:

1. the offence in question is capable of being committed by omission (explained earlier);
2. D is under a legal duty to act, either at common law or under statute;
3. D has breached that duty; and
4. D's breach of duty caused the harm.

2.3.1 Liability for omissions at common law

The common law recognizes that duties arise in only some circumstances or categories. You will find an illustration of the categories of duty, and leading cases, with some examples in the case boxes, but you should supplement this with wider and deeper reading in standard textbooks.

2.3 OMISSIONS

Duties may arise in situations of Contract

Pittwood (1902) 19 TLR 37

D worked as a level-crossing operator. He forgot to close the gate and V was killed by a train. D's contractual duties were used to find a duty because his breach of contract endangered the public.

Familial relationships

Gibbins and Proctor (1918) 13 CR APP R 134

D (V's father) and D2 (V's stepmother) deliberately failed to feed V, who died. D and D2 were both convicted of murder. D owed V a duty as parent, but D2 also owed a duty as she had assumed de facto (meaning in reality or as good as) parental responsibility.

Assumption of responsibility

Stone and Dobinson [1977] 2 ALL ER 341

D (V's sister) and D2 (D's partner) were convicted of manslaughter. D and D2 had failed to summon help for V, who had died whilst under their care. V had been anorexic and had refused to eat. The Court of Appeal held there was a legal duty, not just because V was D's sister but also because V lived in D's and D2's house, and they had voluntarily assumed a duty to act by their attempts to care for her. The decision is controversial and you are strongly advised to read commentary on it.

Ruffell [2003] 2 CR APP R (S) 53

D and V had each self-injected with drugs. When V showed signs of overdose, D first tried to revive him and then left V outside his house. D telephoned V's mother asking her to collect her son. V later died of hypothermia and opiate intoxication. D owed V a duty of care; he had assumed the duty when he tried to revive him, and breached it when he left him outside in the cold.

Bowditch (2017) The Times, 27 January

D and V met at a club. They were 'messaging about' by the sea, when V fell in. D simply walked away and left her to drown. D was convicted of manslaughter. The basis of the conviction was unclear. It may be that because they had embarked on a risky activity together, they could be said to have undertaken to rescue each other if either got into trouble.

2.3 OMISSIONS

Danger, where D is responsible for creating the danger

Miller [1983] 1 ALL ER 978

D, a squatter, fell asleep smoking a cigarette. When he woke up, he realized a fire had started and did not extinguish it or summon help. The House of Lords held that even where the defendant is negligent, when D subsequently became aware of the danger he had caused he had a duty to prevent or reduce the risk by his own efforts, or if necessary by summoning the fire service.

Evans [2009] 1 WLR 1999

D gave her sister heroin. The sister self-administered it. The Court of Appeal held that when a person has created or contributed to the creation of a state of affairs which is reasonably to know, has become life threatening, a consequent duty on the person to take steps to save the other's life will normally arise.



LOOKING FOR EXTRA MARKS?

The principle in *Miller* has clearly been extended in *Ruffell* and *Evans*. Consider the principle might be taken.

DPP v Santana-Bermudez [2004] CRIM LR 471

This case extended the *Miller* principle to include the situation where the original act was negligent and there was a reasonably foreseeable risk of injury to another. D failed to search D's pockets that there were exposed hypodermic syringes in those pockets.

Public office

Dytham (1979) 69 CR APP R 387

A uniformed police officer stood and watched a man being beaten and kicked to death only 30 yards away. The officer made no move to intervene or summon assistance. He was convicted of the common law offence of misconduct of an officer.

Liability for failing to act under statute

Statutory liability for an omission is not unusual and there are hundreds of offences which are capable of being committed by omission, or can be committed only by omission. We looked at the offence of criminal damage in 'How to identify the defendant'.

2.4 CAUSATION

criminal damage' in 2.1.1, we noticed the result required is destroying or damaging. As you can see from *Miller*, it is possible to commit this offence by inaction (provided there is a duty). Criminal damage may therefore be committed by an act or an omission.

2.4 Causation

Causation is only an issue for result crimes; that is, crimes which have a result or consequence specified in the offence definition. Examples of result crimes include:

- murder (ie death); and
- causing grievous bodily harm with intent (ie **grievous bodily harm**).

For any result crime, the prosecution must prove the defendant *caused* the result.

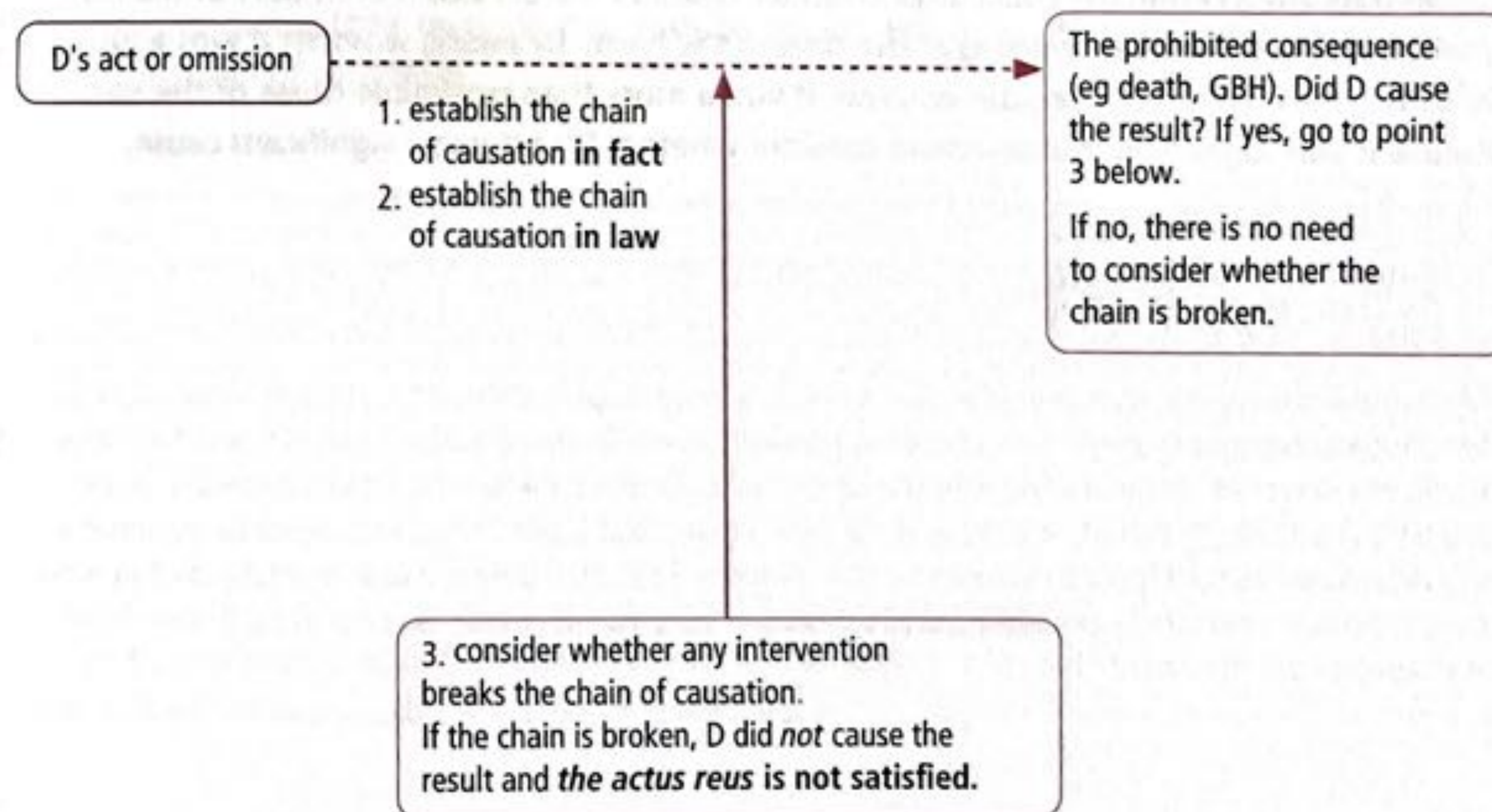
A preliminary point must be made. You must not ask *what* caused the result, but *did D* cause the result?

This is very important. Why?

1. There could be a number of competing, conflicting, or contributory causes. D can be guilty even if they are not the sole or even the main cause.
2. D will not have a defence based on the fact other people caused the result. If it is shown that D was one of the substantial and operating causes of the harm then D will be guilty even if other people contributed to the result.

To establish a chain of causation, first D's act must *in fact* have caused the result. Secondly, that factual chain must also exist *in law*, and thirdly, it must not be broken by an intervention. See Figure 2.1.

Figure 2.1 Establishing the chain of causation



2.4.1 Establishing the chain of causation in fact

If the result would have happened anyway, then causation has not occurred in fact. The question which must be asked is this: *but for D's conduct*, would the result have happened? If the answer is 'no', D has factually caused the result. If the answer is 'yes', D has not.

White [1910] 2 KB 124

D had put cyanide in his mother's drink, but she died of unrelated heart failure and no cyanide was found in her body. D had not caused her death, so he could not be convicted of murder.

However, it is not enough just to show factual causation. In *Hughes [2013] (UKSC 62)*, the defendant pleaded why the legal causation was not the same as factual causation: 'If it were held that D had caused her husband's death if he perished in a fatal road accident on the way to work, the case law there is a well recognised distinction between conduct which sets the scene for the occurrence and conduct which on a common sense view is regarded as instrumental to the occurrence.'

2.4.2 Establishing the chain of causation in law

The next step, once factual causation is established, is to ensure that D is also the legal cause. The law is clear that if D's conduct was a cause, and that does not mean the only cause, D can be found to have been the legal cause of the result. The standard test is whether D's act was an operating and substantial cause of the death. In asking whether D's act was an operating cause, the court must consider whether the act was merely part of a chain of events or whether the effect was ongoing at the time of the harm. By asking whether it was a substantial cause, the court must consider whether it was a more than negligible cause of the result. In *Wallace* it was suggested the jury could consider whether D's act was a significant cause.



LOOKING FOR EXTRA MARKS?

Most authors recognize that causation is not simply a neutral application of the rules of causation, but involves questions of morality and blameworthiness. The most cynical view is that the law thinks the defendant is morally responsible for producing a result, the defendant will be held liable for it. Certainly, the courts will try to make sure a defendant is only found to have caused the result if it is reasonable to hold them to account for it. In *Hughes [2013]*, D did not cause death by driving though he was uninsured, unqualified, and unlicensed, because his *driving* was not at fault. The court had stepped out in front of his car.

2.4.3 Breaking the chain of causation

The most difficult cases involve those where a defendant claims that they did not cause a result because something happened after their act which meant they were no longer responsible for the consequences. In legal terms this is known as a break in the chain of causation (or a *novus actus interveniens*, a new intervening act). A good example would be where Alfred punches Tim and then afterwards Susan shoots Tim dead. In this case Alfred would not be said to have caused Tim's death. Susan's act in shooting Tim was an intervening act which broke the chain of causation. This is so even if it was only because of Alfred's punch that Susan was able to get a good shot at Tim. The punch was a part of the 'history' and was no longer playing an active role in causing the death.

Whether a *novus actus interveniens* does break the chain of causation depends on what type of intervention it is, and what legal test is adopted.

2.4.4 Natural events

If the natural event was not reasonably foreseeable, it breaks the chain of causation. There is no case law here, but most standard textbooks illustrate this by example. Where a defendant left an injured victim on a beach, and that victim was then drowned by the tide, the defendant could not complain that the incoming sea broke the chain of causation, because that was foreseeable. However, if the injured victim was killed by a bolt of lightning, that might well be seen as not reasonably foreseeable and hence a break in the chain of causation.

2.4.5 Victim's acts

If the victim causes their own injuries through an act which was free and voluntary, that will break the chain of causation.

Kennedy [2008] 1 AC 269

At the victim's request, D prepared a syringe of heroin and gave it to V. V self-injected the drug and subsequently died. The House of Lords allowed D's appeal, holding that where a defendant has been involved in the supply of a class A 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, D has not caused the death where V is a fully informed and responsible adult.

Notice this rule only applies where the victim was acting in a free, voluntary, and informed way. In the following case V's act was not voluntary.