

YOUR ESSENTIAL REVISION & STARTER GUIDE



10th edition

# NUTSHELLS

## CRIMINAL LAW

Joanne Clough, Adam Jackson  
and Natalie Wortley

- Get into the subject quickly
- Learn and memorise the key principles and cases
- Trust in your knowledge come assignment and exam time



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Published in 2014 by Thomson Reuters (Professional) UK Limited trading as Sweet & Maxwell, Friars House, 160 Blackfriars Road, London SE1 8EZ

(Registered in England & Wales, Company No 1679046.  
Registered Office and address for service:  
1 Mark Square, Leonard Street, London, EC2A 4EG

Typeset by YHT Ltd

Printed and bound in Great Britain by CPI Group (UK) Ltd, Croydon, CR0 4YY

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A CIP catalogue record for this book is available from the British Library.

ISBN 978-0-414-03190-6

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# Actus reus

1

## INTRODUCTION

A criminal offence is conduct which has been forbidden by the state, such conduct attracting punishment where the law has been breached. All criminal offences, except offences of strict liability (see Ch.3) have two distinct parts which must be proved. These are the actus reus and the mens rea. These terms derive from the Latin phrase "actus non facit reum nisi mens sit rea", i.e. "the act itself does not constitute guilt unless done with a guilty mind". Therefore both a guilty act (actus reus) and a guilty mind (mens rea) must be proven before a criminal offence has been committed. Think of criminal liability like a maths equation. Without all the elements the equation cannot be complete.



The actus reus and mens rea may comprise a number of different matters and these are referred to as the elements of an offence. Thus, for example, in theft the actus reus requires the appropriation of property belonging to another (three elements) while the mens rea requires dishonesty and an intention to permanently deprive (two elements). All elements of both the actus reus and the mens rea must be proven to constitute a criminal offence. This chapter explains the physical part of a criminal offence (actus reus). The mental element (mens rea) is considered in Ch.2.

## WHAT IS AN ACTUS REUS?

The actus reus will differ from offence to offence. At the most basic level, the actus reus of an offence will consist of an act or physical element. For example, in the offence of battery, the physical element is the use of unlawful

force (see Ch.7). However, very often, more than simply a physical act is required to constitute the actus reus of an offence. For this reason, the actus reus may comprise more than one element. If any element of the actus reus is missing then there is no liability.

Some crimes require the production of consequences as a result of the action (result crimes). For example, in murder the actus reus requires both conduct on the part of the accused (physical element) and death of the victim (consequence). Other crimes require particular circumstances to be present. For example, in the offence of theft, the accused must appropriate property but the property must belong to another, the latter element forming circumstances without which there would be no liability for theft.

As mentioned above, the actus reus alone does not normally amount to a criminal offence. Most offences require a mental element (*mens rea*) in addition. Therefore in theft, along with the appropriation of property belonging to another (actus reus), the accused must act dishonestly and with an intention to permanently deprive the other of that property (*mens rea*). Some criminal offences, particularly motoring offences, do not require any mental element. These offences are known as "strict liability" or "absolute liability" offences and will be considered in more detail in Ch.3.

### Voluntary conduct

The accused's conduct must be "voluntary" if he is to incur liability (*Bratty v Attorney General of Northern Ireland* (1963)). This means that the action must be a deliberate or willed action on the part of the accused. For example, in *Mitchell* (1983), D pushed another person (E) who in turn lost his balance and knocked into a third person, V. V fell to the ground and fractured his leg. He later died of a pulmonary embolism caused by thrombosis arising from the fracture. While E was the immediate cause of the fracture, his actions were not voluntary. It was D who was charged with and convicted of manslaughter.

### Automatism

This is considered in more detail as a defence in Ch.6. Automatism occurs when D performs a physical act or acts but is unaware of what he is doing, or is not in control of his actions. Judges have defined automatism in various ways including "acts performed involuntarily", "unconscious involuntary action", and "involuntary movement of the... limbs of a person". Automatism can be seen as relevant to actus reus in that the act is not a voluntary act, or alternatively in terms of *mens rea* in that there is no mental element present in relation to the act because the defendant is not aware of what he is doing.

### Reflex actions

Sometimes people can respond to something with a spontaneous reflex action over which they have no control. Although slightly different, this is sometimes classed as a form of automatism. The classic example is that given in *Hill v Baxter* (1958) of someone being stung by a swarm of bees while driving, and losing control of the car.

### "State of affairs" cases

Some unusual cases cannot be discussed in terms of acts and are often referred to as "state of affairs" cases. These are cases where the actus reus consists of circumstances and sometimes consequences but no "acts", i.e. "being" rather than "doing" offences. In *Winzar v Chief Constable of Kent* (1983), D was convicted of "being found drunk in a highway" contrary to s.12 of the Licensing Act 1872. The police had found D drunk in a hospital and removed him from the premises, subsequently leaving him on a highway in the same state. This conviction was upheld on appeal despite the fact that D was not responsible for being placed on the highway by the officers.

## OMISSIONS

### CHECKPOINT

"Unless a statute specifically so provides, or ... the common law imposes a duty upon one person to act in a particular way towards another ... a mere omission to act (cannot lead to criminal liability)."  
*Miller* (1983)

Some criminal offences can be committed by omission rather than by a positive act. There are two requirements to be satisfied before liability can be imposed for failing to act:

#### (1) The crime has to be capable of being committed by omission.

The actus reus of the offence usually makes it clear whether the offence is capable of being committed by omission. For example, in burglary the accused must "enter" a building as a trespasser, thus this requires a positive act. Most of the leading cases relate to offences of murder and manslaughter but offences such as arson, assault, battery and some statutory offences such as failing to provide a specimen of breath, can all be committed by omission.

## (2) D must be under a duty to act

The law has recognised a number of situations when D is under a duty to act. The following cases illustrate these situations.

### i) Duty arising from a special relationship.

A special relationship between D and the victim can create a duty to act. The courts have recognised relationships between spouses (*Smith (1979)*) and between parent and child (*Gibbins & Proctor (1918)*) as creating such a duty.

### ii) Voluntary assumption of responsibility

Someone who voluntarily assumes responsibility for another person also assumes the positive duty to act reasonably for the general welfare of that person and may be liable for omissions which prove fatal.

#### KEY CASE

##### GIBBINS & PROCTOR (1918)

Gibbins was the father of a number of children including a seven-year-old child, Nelly. He was living with his girlfriend, Proctor. They kept Nelly separate from the other children and omitted to feed the child so that she died. Gibbins buried Nelly in the brickyard where he worked, claiming that Nelly had left. Both were convicted of murder and their convictions were upheld by the Court of Criminal Appeal on the basis that Gibbins owed a duty of care as her father and Proctor had assumed a duty of care as her carer.

#### KEY CASE

##### STONE & DOBINSON (1977)

A couple (S and D) had taken in S's sister to live with them. The sister suffered from anorexia nervosa which deteriorated to the extent that she was confined to bed. The couple omitted to care for her properly, failing to call the doctor or medical services, with the result that the sister died. The couple were held to have assumed a duty of care for the sister and were found guilty of manslaughter.

### iii) Duty under a contract

A person may be under a positive duty to act because of their obligations under a contract. The duty may be to the other contracting party or to a third person.

#### KEY CASE

##### PITTWOOD (1902)

D was a railway crossing keeper who forgot to shut the gate before a train came. Someone crossing the line was struck by the train and killed. The court held that D owed a duty to all users of the crossing and not just to his employers. D was accordingly found guilty of manslaughter.

Other examples where contractual duties have been considered to exist are between a hospital anaesthetist and a patient (*Adomako (1995)*) and by a landlord to a tenant (*Singh (1999)*).

### iv) Duty due to defendant's prior conduct

If the defendant has acted positively although innocently to create a state of affairs which might cause damage or injury, and subsequently becomes aware of the danger he has created, a duty arises to act reasonably to avert that danger.

#### KEY CASE

##### MILLER (1983)

D was squatting in a house and fell asleep while smoking. The mattress caught fire and he woke up. Instead of putting out the fire he moved into another room and went back to sleep. The house caught fire and the House of Lords upheld his conviction for arson. D had unwittingly brought about a situation of danger to property. Once he realised this, he was under a self-induced duty to act positively to avert it.

### v) Statutory duty of care

In some circumstances a statute makes it a criminal offence to omit to do something. For example, s.170 of the Road Traffic Act 1988 makes it an offence, if one is involved in an accident, to omit to either report it within 24 hours to the police or to give all relevant details to any other person at the scene of the accident reasonably requesting them.

### Cessation of duty to act

The issue of when a duty to act ceases can cause difficulties for the courts. In *Airedale NHS Trust v Bland (1993)* the House of Lords attempted to provide guidance on when a person can be released from a duty to act. This was a civil case involving a person in a persistent vegetative state who was on a life support machine following injury in the Hillsborough Stadium disaster. His

parents sought to have the life support discontinued. The House of Lords held that it was not unlawful to withdraw artificial nutrition and hydration for such a person. It was lawful not to continue to supply the patient with care which would prolong his life. The House of Lords considered this to be an omission rather than a positive step to end a person's life, as to do the latter would be euthanasia which is illegal in England and Wales.

## PROPOSALS FOR REFORM

The Law Commission in its Report No. 218 *Offences Against the Person and General Principles* (1994), in relation to offences against the person, states that liability for omission should be limited to serious offences, namely homicide, intentional serious injury, torture, unlawful detention, kidnapping, abduction and aggravated abduction. The Law Commission also decided for the present not to try to limit the common law duties to act which currently give rise to liability for omissions. Some academics suggest that there should be a positive duty to act where a person could save someone's life without putting themselves in danger. This suggestion is not without its difficulties. For example, who would be prosecuted in a situation where there was a crowd of people who failed to rescue a drowning child?

## CAUSATION

In "result crimes" (i.e. where a consequence is part of the actus reus), it is necessary to prove that the accused's conduct caused the required consequence. Murder is a clear example of a result crime as death is a consequence required as part of the actus reus. It is for the jury to decide if the accused caused the prohibited result following prohibited conduct.

There are two key tests which must both be satisfied to establish causation:

### (1) Causation in fact

This is established by applying the "but for" test, which requires proof that the consequence would not have occurred "but for" the accused's actions.

## KEY CASE

### WHITE (1910)

D poisoned his mother's drink with intent to kill her. She died after taking some of the drink but medical evidence found that the cause of death was a heart attack rather than poisoning. D was charged with murder but acquitted as he had not caused his mother's death in fact (note that he was convicted of attempted murder).

### (2) Causation in law

This principle is concerned with whether the prohibited consequence is the fault of the accused. There must be a complete chain of causation between the accused's action and the consequence to establish causation in law. The de minimis principle states that where D's act is a minimal contribution to the consequence, D will not be the legal cause of death. It has been established in *Pagett* (1983) that for liability to exist, D's conduct need not be the sole or even the main cause of death but it must contribute significantly to the result. In *Hughes* (2013) the court considered that a cause was "significant" if it was "more than minimal". Where there are multiple causes more than one person can be held responsible for the result.

### Intervening acts

Sometimes, after the accused's initial act, and before the required consequence occurs, there is an intervening act or event which contributes to that consequence. If the intervening act or event is completely unconnected with the defendant's act, was unforeseeable, and brought about the consequence on its own, then it breaks the chain of causation and the defendant incurs no liability for the consequence. If the consequence is caused by a combination of the two causes and the defendant's act remains a significant cause, then the defendant will still be liable.

### Actions of third parties

Where a third party does something between the accused's act/omission and the result, this may break the chain of causation.

## KEY CASE

### PAGETT [1983]

D was hiding in his girlfriend's flat when police were trying to arrest him for various offences. D armed himself with a shotgun and used his girlfriend's body as a shield, putting her between himself and the police. D fired at officers and they returned fire, three bullets hitting the

girlfriend. She died from the wounds. D was convicted of manslaughter. He appealed on the basis that the death was caused by the police officers. His appeal was dismissed. Where the third party act is a reasonable response to D's initial act, the chain will not be broken.

Occasionally, the victim will react to the accused's actions and contribute to the result. It has been held that where the victim contributes to the consequence, the chain of causation will only be broken if the victim's act is so "daft" or unexpected that no reasonable person could be expected to foresee it.

### KEY CASE

#### ROBERTS (1972)

A car driver gave a lift to a young woman. He ordered her to remove her clothes and began pulling at her coat. She opened the door and jumped out of the moving car, suffering some injuries. He appealed against his conviction for assault occasioning actual bodily harm, claiming that he had not caused her injuries. Dismissing the appeal, the Court of Appeal held that where a victim is injured in attempting to escape from threatened violence, the test of causation is whether the injuries were "the natural result of what the [accused] said and did, in the sense that [they] could reasonably have been foreseen as the consequence of what he was saying or doing".

A refusal by the victim to accept treatment is not an intervening act and it will not break the chain of causation. In *Dear* (1996), D had slashed V several times with a knife, causing a severed artery. V died from blood loss a few days later and D was charged with murder. At the trial, D claimed that the chain of causation had been broken by V, who had committed suicide by either re-opening the wounds or failing to treat re-opened wounds. The jury convicted D on the basis that the wounds remained an "operating" and "substantial" cause of death.

### The thin skull rule

#### CHECKPOINT

"It has long been the policy of the law that those who use violence on other people must take their victim as they find them. This in our judgement means the whole man, not just the physical man." Lawton L.J. in *Blaue* (1975).

Due to this rule, the accused does not escape liability if his victim is susceptible to injury or has a belief that prevents the victim from accepting treatment. In *Blaue* (1976), D stabbed his victim, piercing her lung. She refused on religious grounds to accept a blood transfusion which would have saved her life. The Court of Appeal held that her refusal of treatment, whether reasonable or unreasonable, did not break the chain of causation. It was said that the accused must "take his victim as he finds her", i.e. in this case, a Jehovah's Witness who refused treatment.

It can be argued that the same approach should also apply to an intervening act by the victim. An act by the victim which is so "daft" as to be totally unforeseeable can, if it alone brings about the consequence, break the chain of causation (see *Roberts*, above).

### Medical negligence cases

The courts have had to consider a number of murder/manslaughter cases in which the acts of the victim's medical team have contributed to the victim's death. The courts are now very unwilling, as a matter of policy, to find that medical treatment has broken the chain of causation when the treatment follows an initial unlawful act by someone else. The first two cases below conflict with each other. The first case has subsequently been distinguished on its own particular facts and has very little general application any longer.

#### KEY CASE

##### JORDAN (1956)

D stabbed his victim, who died several days later after undergoing medical treatment. It was finally established on appeal that the wound had been healing well but the medical treatment was grossly negligent. The victim had unnecessarily been given an antibiotic to which he was allergic. This "palpably wrong" treatment may have been the medical cause of death. The court held that the jury might have reached a verdict of not guilty if they had had all the medical evidence, and the conviction was quashed.

#### KEY CASE

##### SMITH (1959)

D, a soldier, stabbed another soldier, who was carried to the medical officer in charge. The medical officer was dealing with a series of emergencies and failed to appreciate the seriousness of the victim's wounds. The treatment he gave him was not beneficial and may well

have made his condition worse. The victim died of his stab wounds. D was found guilty of murder and appealed. Dismissing the appeal, and distinguishing *Jordan*, the court held that D's stabbing was an operating and substantial cause of death. The chain of causation will be broken only if the original wound is merely the setting in which another cause operates, i.e. only if the second cause is so overwhelming as to make the original wound merely part of the history.

The Court of Appeal has subsequently confirmed the approach taken in *Smith*, indicating that *Jordan* has virtually no relevance any more, except in the most "extraordinary or extreme" case.

### KEY CASE

#### CHESHIRE (1991)

D shot his victim. Taken to hospital, the victim contracted a respiratory infection causing a respiratory blockage. He died from the operation which was consequently undertaken, and he was possibly negligently treated by the doctors. Dismissing D's appeal against his murder conviction, the Court of Appeal held that even where negligent treatment is the immediate cause of death, that does not break the chain of causation unless it was so independent of the accused's acts and so potent in causing the death, as to render the acts of the accused insignificant.

Where doctors cease treatment in a situation where there is no prospect of the victim recovering, this will not break the chain of causation even where this medical intervention is the final cause of death. In *Malcherek* (1981), D's victim was put on a life support machine as a result of the injuries D inflicted. After several days, and acting in accordance with the practice of a receiving body of medical opinion, doctors turned off the machine and the victim died. D was convicted of murder and appealed on the issue of causation, which he said should have been put to the jury. The appeal was dismissed. The court said that D's act was a substantial cause of death and any other contributory cause was immaterial.

### PROPOSALS FOR REFORM

In 2002, the Law Commission produced a working paper with a proposal to codify the law on causation. It was suggested that a defendant would be considered to have caused a result which is an element of an offence when:

(a) he does an act which makes a substantial and operative contribution to its occurrence or, (b) he omits to do an act which he is under a duty to do according to the law relating to the offence, and, the failure to act makes a substantial and operative contribution to its occurrence. To date the common law position on which these proposals are based, still prevails.

### REVISION CHECKLIST

You should now know and understand:

- that a criminal offence requires both actus reus and mens rea;
- that the actus reus refers to the physical element of the crime; this can comprise conduct, consequences and/or circumstances depending on the offence;
- that some offences can be committed by failing to act;
- the courts have identified circumstances in which a duty to act is imposed;
- in result crimes, there must be a causal link between the accused's conduct and the consequence/result;
- the principles of causation—there must be factual causation and legal causation.

### QUESTION AND ANSWER

#### QUESTION

Tim has been charged with manslaughter. He was involved in a fight when he punched James, who fell and hit his head on the edge of the pavement. While James was unconscious, a bystander called the paramedics. They arrived ten minutes later and dropped James while they were putting him into the ambulance van. This aggravated the internal head injuries caused by James hitting his head on the pavement and James required surgery. The anaesthetist was a young doctor who gave James too much anaesthetic, which put James into a coma. After a few days the medical team declared that there was no hope of James recovering and they switched off his life support machine.

Explain, with authority, whether there are any intervening acts in this scenario which might break the chain of causation.

## ADVICE AND THE ANSWER

You should start by looking for anything in the facts that might constitute a break in the chain of causation. This might be the act of a third party, the act of a medical professional or the act of the victim, for example. Then take each in turn, applying the law on causation to each incident separately, to determine whether each incident has caused a break in the chain of causation.

## Answer guide:

*James hitting his head on the pavement.* This occurred as a direct result of D's actions and does not break the chain of causation.

*Paramedics dropping James.* This does not break the chain of causation under the principles in *Smith*. The original injury remains the operating cause of death.

*Young anaesthetist.* This is similar to the events in *Cheshire* where the chain of causation was not broken. The original injury remained the substantial and operating cause and the treatment was neither independent nor potent enough in itself for it to break the chain of causation. Note that if the doctor is considered to be a cause of death, it is possible to prosecute him/her also for their role in the death.

*Switching off life support.* Where doctors cease treatment in circumstances where there is no prospect of recovery, this does not break the chain of causation under the principles in *Malcherek*.

## Mens rea

## INTRODUCTION

As outlined in Ch.1, many offences require a physical element, the *actus reus*, and a mental element, the *mens rea*. This chapter is concerned with the latter.

*Mens rea* is the culpable state of mind which is necessary, together with the *actus reus*, for a criminal offence to be committed. The *mens rea* required varies from crime to crime. There are a number of states of mind which, separately or together, can constitute the necessary *mens rea* for a criminal offence.

## INTENTION

Intention must be distinguished from motive, which is irrelevant to liability. A motive might help to prove intent but it is not the same thing as intent. Where a criminal offence requires intent as its *mens rea*, this generally requires proof that the accused *desired* a particular result. There are two types of intent in criminal law as outlined below:

## Direct intent

Direct intent is where the consequence is desired and the accused decides to bring it about, or to do his best to do so. For example, for murder, the accused must intend to kill or cause serious harm to the victim. Thus, D will have direct intent if he desires that the victim either dies or suffers serious injury as a result of his actions.

## Oblique intent

Oblique intent (also referred to as indirect intent) is where the accused does not desire a particular consequence but realises that the consequence is *virtually certain* to occur as a result of his actions. This is not intention in itself. However, if the accused foresaw the consequence as virtually certain, that may lead the jury to conclude that the accused did intend to produce the consequence.

The degree of foresight required for oblique intent has been an ongoing issue for the courts over the years. The starting point was *DPP v Smith* (1961), in which the House of Lords stated that there was an irrebuttable presumption that an accused foresaw and intended any "natural consequence" of his actions and that the test for determining what was a natural consequence was a purely objective one (i.e. what an outsider would consider to be a natural consequence of the accused's actions). This was reversed by the Criminal Justice Act 1967 s.8, which states that in determining whether a person has committed an offence, a court or jury shall not be bound to infer that a result was intended or foreseen only where it is a "natural and probable" consequence of those actions. Two cases followed shortly after, discussing the same point:

### KEY CASE

#### MOLONEY (1985)

D and his stepfather had a shooting contest to see who could load and fire a shotgun faster. D loaded and aimed his gun first. It was aimed at his stepfather who challenged him to fire. D did this and killed his stepfather. He was charged with murder. The direction to the jury on intention was that D had the necessary mens rea if he had foreseen death as a "probable consequence" of his actions, even if he did not desire it. The House of Lords quashed D's murder conviction, substituting a verdict of guilty of manslaughter. It was held that only an intention to kill or to cause really serious injury would suffice for murder. Lord Bridge suggested guidelines which could be given to a jury to help them decide upon the issue of intention: (1) Was death or really serious injury a natural consequence of what the accused did? (2) Did the accused realise that death or really serious injury was a natural consequence of what the accused did? If the jury considered that the answer to both of these questions was yes, that was not conclusive proof of intention but was something from which the jury might infer that the accused intended death or really serious injury.

### KEY CASE

#### HANCOCK AND SHANKLAND (1986)

D and another had dropped concrete blocks onto a motorway from a bridge in order to block the road and stop a taxi which was carrying a working miner to work during a miners' strike. One block hit the taxi's windscreen and killed the driver. At the murder trial, the judge directed the jury using the guidelines given by Lord Bridge in *Moloney* (above).

The House of Lords quashed the resulting convictions for murder and substituted manslaughter convictions. Their Lordships held that the *Moloney* guidelines were defective since they did not direct the jury to consider the matter of probability. The jury should be asked to consider: (1) Was death or really serious injury a natural and probable consequence of what the accused did? (2) Did the accused realise that death or really serious injury was a natural and probable consequence of what the accused did? The jury should be told that the more probable it was, the more likely it was that the accused foresaw it; and the more probable the accused realised it to be, the more likely it was that he intended it. These were guidelines which the jury could be given to help them to decide whether to draw the inference that the accused intended death or really serious injury.

Following these cases, the law was clarified by the Court of Appeal in *Nedrick* (1986).

### KEY CASE

#### NEDRICK (1986)

D pushed lighted material through a letter box in order to frighten his victim, but in fact killed two occupants of the house. The judge directed the jury that if D realised that death was "highly likely" to result, then he was guilty of murder. The Court of Appeal allowed D's appeal, holding that the judge had equated foresight with intention. The judge should have made it clear that it was for the jury to decide whether D had the necessary intention. Lord Lane C.J. gave a model direction which increased the degree of foresight required and set a clear precedent for the law on oblique intent:

"... the jury should be directed that they are not entitled to infer the necessary intention unless they feel sure that death or serious bodily harm was a *virtual certainty* (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case".

The leading case is now that of *Woollin* (1999). In this case, the House of Lords retained the high degree of foresight (virtual certainty) but amended the word "infer" to the word "find", stating that the latter would be more easily understood by juries.