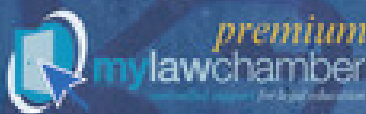


Ninth edition

# Criminal Law

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# 1

## Elements of a crime

This chapter explains:

- that the defendant must usually have both committed an *actus reus* (a guilty act) and have a *mens rea* (a guilty mind) to be liable for a criminal offence;
- that criminal offences are not normally committed by an omission;
- the three main forms of *mens rea* are intention, recklessness and negligence;
- the doctrine of transferred malice; and
- the requirement that the *actus reus* and *mens rea* of a crime should usually both exist at the same point in time.

## Introduction

A person cannot usually be found guilty of a criminal offence unless two elements are present: an *actus reus*, Latin for guilty act; and *mens rea*, Latin for guilty mind. Both these terms actually refer to more than just moral guilt, and each has a very specific meaning, which varies according to the crime, but the important thing to remember is that to be guilty of an offence, an accused must not only have behaved in a particular way, but must also usually have had a particular mental attitude to that behaviour. The exception to this rule is a small group of offences known as crimes of strict liability, which are discussed in the next chapter.

The definition of a particular crime, either in statute or under common law, will contain the required *actus reus* and *mens rea* for the offence. The prosecution has to prove both of these elements so that the magistrates or jury are satisfied beyond reasonable doubt of their existence. If this is not done, the person will be acquitted, as in English law all persons are presumed innocent until proven guilty – **Woolmington v DPP (1935)**.



**Figure 1.1** Elements of an offence

## Actus reus

An *actus reus* can consist of more than just an act, it comprises all the elements of the offence other than the state of mind of the defendant. Depending on the offence, this may include the circumstances in which it was committed, and/or the consequences of what was done. For example, the crime of rape requires unlawful sexual intercourse by a man with a person without their consent. The lack of consent is a surrounding circumstance which exists independently of the accused's act.

Similarly, the same act may be part of the *actus reus* of different crimes, depending on its consequences. Stabbing someone, for example, may form the *actus reus* of murder if the victim dies, or of causing grievous bodily harm (GBH) if the victim survives; the accused's behaviour is the same in both cases, but the consequences of it dictate whether the *actus reus* of murder or GBH has been committed.

### Conduct must be voluntary

If the accused is to be found guilty of a crime, his or her behaviour in committing the *actus reus* must have been voluntary. Behaviour will usually only be considered involuntary where the accused was not in control of his or her own body (when the defence of insanity or automatism may be available) or where there is extremely strong pressure from someone else, such as a threat that the accused will be killed if he or she does not commit a particular offence (when the defence of duress may be available).

Some accidents may be viewed by the court as amounting to involuntary conduct that does not give rise to criminal liability. However, in **R v Brady** (2006) the Court of Appeal considered the case where a young man had drunk heavily and taken drugs and then sat on a low railing on a balcony that overlooked a dance floor. He lost his balance and fell, breaking the neck of a dancer below who was subsequently wheelchair-bound. While the fall was a tragic accident the Court of Appeal pointed to his earlier voluntary conduct of becoming heavily intoxicated and sitting precariously on the railing and considered that this voluntary conduct was sufficient to be treated as having caused the injuries.

In a much criticised decision of **R v Larsonneur** (1933), a Frenchwoman was arrested as an illegal immigrant by the authorities in Ireland and brought back to the UK in custody, where she was charged with being an alien illegally in the UK and convicted. This is not what most of us would describe as acting voluntarily, but it apparently fitted the courts' definition at the time. It is probably stricter than a decision would be today, but it is important to realise that the courts do define 'involuntary' quite narrowly at times.

### ● Types of *actus reus*

Crimes can be divided into three types, depending on the nature of their *actus reus*.

#### Action crimes

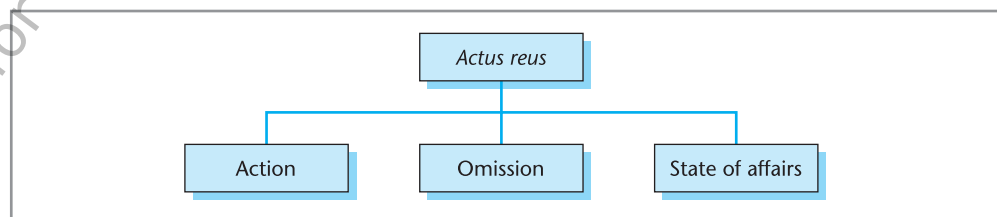
The *actus reus* here is simply an act, the consequences of that act being immaterial. For example, perjury is committed whenever someone makes a statement which they do not believe to be true while on oath. Whether or not that statement makes a difference to the trial is not important to whether the offence of perjury has been committed.

#### State of affairs crimes

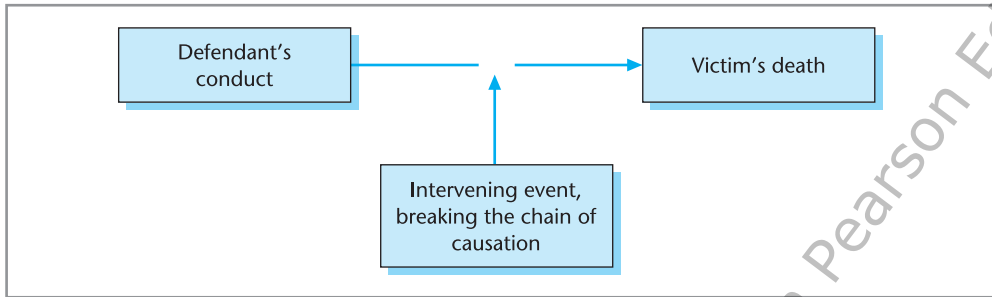
Here the *actus reus* consists of circumstances, and sometimes consequences, but no acts – they are 'being' rather than 'doing' offences. The offence committed in **R v Larsonneur** is an example of this, where the *actus reus* consisted of being a foreigner who had not been given permission to come to Britain and was found in the country.

#### Result crimes

The *actus reus* of these is distinguished by the fact that the accused's behaviour must produce a particular result – the most obvious being murder, where the accused's act must cause the death of a human being.



**Figure 1.2** *Actus reus*



**Figure 1.3** Breaking the chain of causation

## ● Causation

Result crimes raise the issue of causation: the result must be proved to have been caused by the defendant's act. If the result is caused by an intervening act or event, which was completely unconnected with the defendant's act and which could not have been foreseen, the defendant will not be liable. Where the result is caused by a combination of the defendant's act and the intervening act, and the defendant's act remains a substantial cause, then he or she will still be liable. Much of the case law on the issue of causation has arisen in the context of murder, and therefore this issue will be discussed in detail in Chapter 3 on murder at p. 56. However, it should be remembered that the issue of causation is relevant to all result crimes.

## ● Omissions

Criminal liability is rarely imposed for true omissions at common law, though there are situations where a non-lawyer would consider that there has been an omission but in law it will be treated as an act and liability will be imposed. There are also situations where the accused has a duty to act, and in these cases there may be liability for a true omission.

### Act or omission?

It must first be decided whether in law you are dealing with an act or an omission. There are three situations where this question arises: continuing acts, supervening faults and euthanasia.

### Continuing acts



The concept of a continuing act was used in **Fagan v Metropolitan Police Commissioner (1969)** to allow what seemed to be an omission to be treated as an act. The defendant was told by a police officer to park his car close to the kerb; he obeyed the order, but in doing so he accidentally drove his car on to the constable's foot. The constable shouted, 'Get off, you are on my foot.' The defendant replied, 'Fuck you, you can wait', and turned off the ignition. He was convicted of assaulting the constable in the execution of his duty. This offence requires an act; an omission is not sufficient. The defendant appealed on the grounds that at the time he committed the act of driving on to the officer's foot, he lacked *mens rea*, and though he had *mens rea* when he refused to remove the car, this was an omission, and the *actus reus* required an act. The appeal

was dismissed, on the basis that driving on to the officer's foot and staying there was one single continuous act, rather than an act followed by an omission. So long as the defendant had the *mens rea* at some point during that continuing act, he was liable.

The same principle was held to apply in **Kaitamaki** (1985). The accused was charged with rape, and his defence was that at the time when he penetrated the woman, he had thought she was consenting. However, he did not withdraw when he realised that she was not consenting. The court held that the *actus reus* of rape was a continuing act, and so when Kaitamaki realised that his victim did not consent (and therefore formed the necessary *mens rea*) the *actus reus* was still in progress.

### Creating a dangerous situation

A person who is aware or ought to have been aware that he or she has created a dangerous situation and does nothing to prevent the relevant harm occurring, may be criminally liable, with the original act being treated as the *actus reus* of the crime. This area of law is sometimes called the doctrine of supervening fault. In practice this principle can impose liability on defendants who do not have *mens rea* when they commit the original act, but do have it at the point when they fail to act to prevent the harm they have caused.

#### KEY CASE

This was the case in **R v Miller** (1982). The defendant was squatting in a building. He lay on a mattress, lit a cigarette and fell asleep. Some time later, he woke up to find the mattress on fire. Making no attempt to put the fire out, he simply moved into the next room and went back to sleep. The house suffered serious damage in the subsequent fire. Miller was convicted of arson. As the fire was his fault, the court was prepared to treat the *actus reus* of the offence as being his original act of dropping the cigarette.

People who create a dangerous situation are under a duty to act to put a stop to that danger when they become aware of it.

**Miller** had created a subjective test, requiring defendants themselves to have realised that they had created a dangerous situation before imposing a duty to act. But in the more recent case of **Evans (2009)** the Court of Appeal laid down an objective test which would be satisfied if defendants ought to have realised that they had created a dangerous situation. In addition, it has been argued by Dennis Baker (2010) that **Evans** is stretching the **Miller** principle to cases where the defendant simply contributed to, rather than created, the dangerous situation.

A rare example of the principle in **Miller** being applied by the courts is the case of **Director of Public Prosecutions v Santra-Bermudez** (2003). A police officer had decided to undertake a search of the defendant, as she suspected that he was a ticket tout. Initially she had asked him to empty his pockets and in doing so he revealed that he was in possession of some syringes without needles attached to them. The police officer asked the defendant if he was in possession of any needles or sharp objects. He replied that he was not. The police officer proceeded to put her hand into the defendant's pocket to continue the search when her finger was pricked by a hypodermic needle. When challenged that he had said he was not in possession of any other sharp items, the defendant shrugged his shoulders and smirked at the police officer. The defendant was



subsequently found guilty of an assault occasioning actual bodily harm (discussed on p. 152). This offence is defined as requiring the commission of an act, as opposed to an omission, but the appeal court applied the principles laid down in **Miller**. By informing the police officer that he was not in possession of any sharp items or needles, the defendant had created a dangerous situation; he was then under a duty to prevent the harm occurring. He had failed to carry out his duty by telling the police officer the truth.

A recent example of **Miller** being applied is **R v Evans** (2009). In that case the appellant was the elder half-sister of the victim. She had supplied the victim with heroin and after the victim had injected herself with the drug, the victim had shown signs of overdosing. The appellant had recognised those signs but had been frightened to call for medical assistance in case she or the victim got into trouble. She therefore put the victim to bed, wiped water on her face to cool her and hoped that she would sleep it off. In the morning the victim was dead. Following the case of **R v Kennedy (No. 2)** a prosecution for constructive manslaughter could not succeed because the requirement of causation would not be satisfied. Instead the appellant was successfully prosecuted for gross negligence manslaughter and her appeal dismissed. A duty to act was found relying on the case of **Miller**. The weakness in this approach is that it is easier to convict family members than typical drug dealers where a drug user dies, which does not effectively tackle the social problem posed by drug dealing or reflect the personal fault of the individuals involved. Why protect drug dealers who only care about their financial profit and care nothing for the misery caused by their trade, and criminalise the family and friends who have maintained a close relationship with the drug user? While Evans deserved punishment, is a manslaughter conviction disproportionate on these facts? It is arguable that she was stupid rather than evil, and her level of liability should reflect this.



## TOPICAL ISSUE

### Euthanasia

Euthanasia is the name given to the practice of helping severely ill people to die, either at their request, or by taking the decision that life support should be withdrawn when the person is no longer capable of making that decision. In some countries euthanasia is legal but, in this country, intentionally causing someone's death can constitute murder, even if carried out for the most compassionate reasons. However, in the light of the case of **Airedale National Health Service Trust v Bland** (1993), liability will only be imposed in such cases for a positive act, and the courts will sometimes say there was a mere omission when strictly speaking there would appear to have been an act, in order to avoid imposing criminal liability. The case concerned Anthony Bland, who had been seriously injured in the Hillsborough football stadium disaster when only 17. As a result he suffered irreversible brain damage, leaving him in a persistent vegetative state, with no hope of recovery or improvement, though he was not actually brain-dead. His family and the health trust responsible for his medical treatment wanted to turn off his life-support machine but, in order to ensure that this did not make them liable for murder, they went to the High Court to seek a declaration that if they did this they would not be committing any criminal offence or civil wrong.

The declaration was granted by the High Court, and upheld by the House of Lords. Since the House was acting in its civil capacity, strictly speaking the case is not binding on the criminal courts, but it is highly persuasive. Part of the decision stated that turning off the life-support system should be viewed as an omission, rather than an act. Lord Goff said:



I agree that the doctor's conduct in discontinuing life support can properly be categorised as an omission. It is true that it may be difficult to describe what the doctor actually does as an omission, for example where he takes some positive step to bring the life support to an end. But discontinuation of life support is, for present purposes, no different from not initiating life support in the first place. In each case, the doctor is simply allowing his patient to die in the sense that he is desisting from taking a step which might, in certain circumstances, prevent his patient from dying as a result of his pre-existing condition: and as a matter of general principle an omission such as this will not be unlawful unless it constitutes a breach of duty to the patient.

In this case, it was pointed out that there was no breach of duty, because it was no longer in Anthony Bland's interests to continue treatment as there was no hope of recovery.

The decision of **Bland** was found to conform with the European Convention on Human Rights by the High Court in **NHS Trust A v M** and **NHS Trust B v H** (2000). In particular, there was no violation of the right to life protected by Art. 2 of the Convention. The High Court stated that the scope of Art. 2 was restricted to positive acts, and did not apply to mere omissions.

### Offences capable of being committed by omission

Where the conduct in question is genuinely an omission, and not one of the categories just discussed, the next question is whether the particular offence can, in law, be committed by omission. This depends on the definition of the offence. Some of the offences have been defined always to require an act; some can be committed by either an act or an omission. For example, murder and manslaughter can be committed by omission, but assault cannot (**Fagan v Metropolitan Police Commissioner**, above).

An example of the offence of murder being committed by an omission is **R v Gibbins and Proctor** (1918). In that case, a man and a woman were living together with the man's daughter. They failed to give the child food and she died. The judge directed that they were guilty of murder if they withheld food with intent to cause her grievous bodily harm, as a result of which she died. Their conviction was upheld by the Court of Appeal.

### A duty to act

Where the offence is capable in law of being committed by an omission, it can only be committed by a person who was under a duty to act (in other words, a duty not to commit that omission). This is because English law places no general duty on people to help each other or save each other from harm. Thus, if a man sees a boy drowning in a lake, it is arguable that under English criminal law the man is under no duty to save him, and can walk past without incurring criminal liability for the child's subsequent death.

A duty to act will only be imposed where there is some kind of relationship between the two people, and the closer the relationship the more likely it is that a duty to act will exist. So far the courts have recognised a range of relationships as giving rise to a duty to act, and other relationships may in the future be recognised as so doing.

### Special relationship

Special relationships tend to be implied between members of the same family. An obvious example of a special relationship giving rise to a duty to act is that of parents to their children. In **R v Lowe** (1973), a father failed to call a doctor when his nine-week-old baby became ill. He had a duty to act, though on the facts he lacked the *mens rea* of an offence partly because he was of low intelligence.



In **Evans** (discussed on p. 18, where the drug user died from an overdose), as well as the half-sister who supplied the drugs being found to have a duty to act under the **Miller** principle, the mother was also found to have a duty to act because she had a 'special relationship' with her daughter. By failing to call an ambulance when her daughter became unconscious she had breached that duty to act and was liable for manslaughter.

### **Voluntary acceptance of responsibility for another**

People may choose to take on responsibility for another. They will then have a duty to act to protect that person if the person falls into difficulty. In **Gibbins and Proctor**, a woman lived with a man who had a daughter from an earlier relationship. He paid the woman money to buy food for the family. Sadly they did not feed the child, and the child died of starvation. The woman was found to have voluntarily accepted responsibility for the child and was liable, along with the child's father, for murder.

#### **KEY CASE**

In **R v Stone and Dobinson** (1977), Stone's sister, Fanny, lived with him and his girlfriend, Dobinson. Fanny was mentally ill, and became very anxious about putting on weight. She stopped eating properly and became bed-bound. Realising that she was ill, the defendants had made half-hearted and unsuccessful attempts to get medical help and after several weeks she died. The couple's efforts were found to have been inadequate. The Court of Appeal said that they had accepted responsibility for Fanny as her carers, and that once she became bed bound the appellants were, in the circumstances, obliged either to summon help or else to care for her themselves. As they had done neither, they were both found to be liable for manslaughter.

People may have a duty to act to protect another when they voluntarily assume responsibility for them.

### **Contract**

A contract may give rise to a duty to act. This duty can extend not just for the benefit of the parties to the contract, but also to those who are not party to the contract, but are likely to be injured by failure to perform it. In **R v Pittwood** (1902), a gatekeeper of a railway crossing opened the gate to let a car through, and then forgot to shut it when he went off to lunch. As a result, a haycart crossed the line while a train was approaching, and was hit, causing the driver's death. The gatekeeper was convicted of manslaughter.

### **Statute**

Some pieces of legislation impose duties to act on individuals. For example, s. 1 of the Children and Young Persons Act 1933 imposes a duty to provide for a child in one's care. Failure to do so constitutes an offence.

### **Defendant created a dangerous situation**

Where a defendant has created a dangerous situation, they are under a duty to act to remedy this. This duty is illustrated by the case of **R v Miller**, which is discussed at p. 17.

**Table 1.1** Duty to act

<i>Existence of a duty to act</i>	<i>Case authority</i>
Special relationship	<b>R v Lowe</b>
Voluntary acceptance of responsibility for another	<b>R v Stone and Dobinson</b>
Contract	<b>R v Pittwood</b>
Statute	
Defendant created a dangerous situation	<b>R v Miller</b>

### Criticism

It will depend on the facts of each case whether the court is prepared to conclude that the relationship is sufficiently close to justify criminal liability for a failure to act to protect a victim. This approach has been heavily criticised by some academics, who argue that the moral basis of the law is undermined by a situation which allows people to ignore a drowning child whom they could have easily saved, and incur no criminal liability so long as they are strangers. In some countries, legislation has created special offences which impose liability on those who fail to take steps which could be taken without any personal risk to themselves in order to save another from death or serious personal injury. The offence created is not necessarily a homicide offence, but it is an acknowledgement by the criminal law that the individual should have taken action in these circumstances. Photographers involved in the death of Princess Diana were prosecuted for such an offence in France.

### Termination of the duty

The duty to act will terminate when the special relationship ends, so a parent, for example, probably stops having a duty to act once the child is grown up.

## Mens rea

*Mens rea* is the Latin for 'guilty mind' and traditionally refers to the state of mind of the person committing the crime. The required *mens rea* varies depending on the offence, but there are two main states of mind which separately or together can constitute the necessary *mens rea* of a criminal offence: intention and recklessness.

When discussing *mens rea*, we often refer to the difference between subjective and objective tests. Put simply, a subjective test involves looking at what the actual defendant was thinking (or, in practice, what the magistrates or jury believe the defendant was thinking), whereas an objective test considers what a reasonable person would have thought in the defendant's position. The courts today are showing a strong preference for subjective tests for *mens rea*.

### Intention

Intention is a subjective concept: a court is concerned purely with what the particular defendant was intending at the time of the offence, and not what a reasonable person would have intended in the same circumstances.

To help comprehension of the legal meaning of intention, the concept can be divided into two: direct intention and indirect intention. Where the consequence of an intention is actually desired, it is called direct intent – where, for example, Ann shoots at Ben because Ann wants to kill Ben. However, a jury is also entitled to find intention where a defendant did not desire a result, but it is a virtually certain consequence of the act, and the accused realises this and goes ahead anyway. This is called indirect intention (or sometimes oblique intention). An example might be where Ann throws a rock at Ben through a closed window, hoping to hit Ben on the head with it. Ann may not actively want the window to smash, but knows that it will happen. Therefore, when Ann throws the rock Ann intends to break the window as well as to hit Ben. It should be noted that Lord Steyn suggested *obiter*, in the House of Lords judgment of **R v Woollin (1998)**, that ‘intention’ did not necessarily have precisely the same meaning in every context in the criminal law. He suggested that for some offences nothing less than purpose (direct intention) would be sufficient. He gave a possible example as the case of **Steane (1947)** which concerned the offence of assisting the enemy with intent to do so. Steane had given a broadcast for the Nazis in order to save his family from being sent to concentration camps. The accused did not desire to help the Nazis and was found to be not guilty of the offence.

The developments in the law on intention have come about as a result of murder cases, and so we discuss intention more fully in Chapter 3.

## ● Recklessness

In everyday language, recklessness means taking an unjustified risk. Its legal definition has radically changed in recent years. It is now clear that it is a subjective form of *mens rea*, so the focus is on what the defendant was thinking. In 1981, in the case of **MPC v Caldwell**, Lord Diplock created an objective form of recklessness, but this was abolished in 2003 by the case of **R v G and another**.

### A subjective test

Following the House of Lords judgment of **R v G and another**, recklessness will always be interpreted as requiring a subjective test. In that case, the House favoured the definition of recklessness provided by the Law Commission’s Draft Criminal Code Bill in 1989:

- A person acts recklessly . . . 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.

Defendants must always be aware of the risk in order to satisfy this test of recklessness. In addition, their conduct must have been unreasonable. It would appear that any level of awareness of a risk will be sufficient, provided the court finds the risk taking unreasonable.

Until the case of **R v G and another**, the leading case on subjective recklessness was **R v Cunningham (1957)**. In **R v Cunningham**, the defendant broke a gas meter to steal the money in it, and the gas seeped out into the house next door. Cunningham’s prospective mother-in-law was sleeping there, and became so ill that her life was endangered. Cunningham was charged under s. 23 of the Offences Against the Person Act 1861 with ‘maliciously administering a noxious thing so as to endanger life’.

The Court of Appeal said that 'maliciously' meant intentionally or recklessly. They defined recklessness as where: 'the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it.' This is called a subjective test: the accused must actually have had the required foresight. *Cunningham* would therefore have been reckless if he realised there was a risk of the gas escaping and endangering someone, and went ahead anyway. His conviction was in fact quashed because of a misdirection at the trial.

In order to define recklessness, the House of Lords in *R v G and another* preferred to use the words of the Law Commission's Draft Criminal Code Bill (the Draft Code), rather than its own earlier words in *Cunningham*. It is likely, therefore, in future that the Draft Code's definition will become the single definition of recklessness, and the phrasing in *Cunningham* will no longer be used.

There are three main differences between the definition of subjective recklessness in the Draft Code, and the definition in *Cunningham*. First, the *Cunningham* test only refers to taking risks as to a result and makes no mention of taking risks as to a circumstance. The Law Commission, in preparing its Draft Code, felt that this was a gap in the law. It therefore expressly applies the test of recklessness to the taking of risks in relation to a circumstance. Secondly, the Draft Code adds an additional restriction to a finding of recklessness: the defendant's risk taking must have been 'unreasonable'. To determine whether the risk taking was unreasonable the courts will balance such factors as the seriousness of the risk and the social value of the defendant's conduct. William Wilson (2003) observes that: 'Jumping a traffic light is likely to be deemed reckless if actuated by a desire to get home quickly for tea but not if the desire was to get a seriously ill person to hospital.' Thirdly, the *Cunningham* test for recklessness only requires foresight of the type of harm that actually occurred. It is arguable that the Law Commission's Draft Code requires awareness of the risk that the actual damage caused might occur (see Davies (2004) listed in the bibliography).

In *Booth v CPS* (2006) the High Court applied *R v G and another* and interpreted it as including where a person, being aware of a risk, chooses to close their mind to that risk. In that case the defendant had run onto a road without looking and caused damage to a car as a result. The High Court held that as the defendant was aware of the risks of running into the road and, being aware of those risks, put them out of his mind, he was reckless as to the causing of damage to property and was liable.

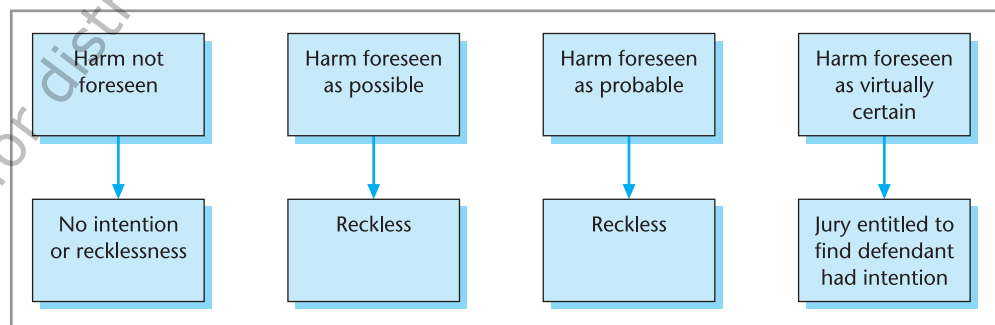


Figure 1.4 Foresight and mens rea

In the tragic case of **R v Brady** (2006) where a young intoxicated man in a nightclub fell from a balcony onto a dancer, breaking her neck, the man appealed against his conviction for causing a non-fatal offence against the person on the basis that the jury had been misdirected on the issue of *mens rea*. He argued that the jury should have been told that recklessness for the purposes of **R v G and another** required foresight of an 'obvious and significant risk' of injury to another by his actions. This argument was rejected by the Court of Appeal which stated that foresight of some risk of harm was sufficient.

### **Caldwell recklessness abolished**

In 1981, the case of **Metropolitan Police Commission v Caldwell** created a new and much wider test for recklessness. Caldwell was an ex-employee of a hotel and nursed a grudge against its owner. He started a fire at the hotel, which caused some damage, and was charged with arson. This offence is defined in the Criminal Damage Act 1971 as requiring either recklessness or intention.

On the facts, there was no intention and, on the issue of recklessness, Lord Diplock stated that the definition of recklessness in **Cunningham** was too narrow for the Criminal Damage Act 1971. For that Act, he said, recklessness should not only include the **Cunningham** meaning, but also go further. He said that a person was reckless as to whether any property would be destroyed or damaged if:

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

Thus, there were actually two potential ways that **Caldwell** recklessness could be proved. The first way was very similar to the **Cunningham** test: 'he does an act which in fact creates . . . a risk . . . and . . . has recognised that there was some risk.' The second way was the important extension to the meaning of recklessness: 'he does an act which in fact creates . . . an obvious risk . . . and . . . he has not given any thought to the possibility of there being any such risk.'

The first limb of this definition is essentially a subjective test, because it requires the defendant actually to see the risk – we will call this limb the 'advertent' limb as the defendant adverts to the risk; he or she sees the risk.

The second limb is more difficult to categorise. It has often been described as an objective test, because the defendant does not actually have to see the risk, so long as the risk was so obvious that a reasonable person would have seen it. For this reason, **Caldwell** recklessness as a whole is often described as an objective standard because, although its first limb is subjective, it is much easier for the prosecution to prove the second limb – it is more difficult to prove what was actually going through defendants' minds at any particular time than it is to prove what reasonable people would consider should have been going through their minds. However, the label 'objective' was criticised by the House of Lords in **R v Reid** (1990), on the basis that, even for the second limb, the actual state of mind of the particular defendant is still relevant, since the defendant is required to have given no thought to the risk. We will therefore call this the 'inadvertent' limb

because essentially it means that the defendant failed to advert to the risk; he or she failed to think about the risk.

In **R v Lawrence** (1982), decided immediately after **Caldwell**, the House of Lords looked at the meaning of recklessness in the context of the old offence of reckless driving, and held that the **Caldwell** test of recklessness applied to this offence. They reformulated the test slightly in their judgment, so that the phrase 'obvious risk' became 'obvious and serious risk'. The test also had to be adapted to take into account the fact that the type of risk would inevitably be different for this different offence. Therefore, instead of talking about a risk that 'property would be destroyed or damaged', they spoke of a risk of 'injury to the person or of substantial damage to property'.

The **Caldwell** test was further adapted and analysed by the House of Lords in **R v Reid** (1990). Reid had been driving his car along a busy road near Hyde Park in London. He tried to overtake a car on the inside lane, but the inside lane narrowed to accommodate a taxi-drivers' hut. Reid's car hit the hut, and spun off into the oncoming traffic. His passenger was killed and he was charged with the old offence of causing death by reckless driving. The jury were directed in accordance with the **Caldwell/Lawrence** test, and he was convicted. An appeal against this conviction eventually reached the House of Lords; it was rejected, but the House tried to clarify certain issues relating to the **Caldwell** test. They made it clear that, while Lord Diplock had given a model direction in **Caldwell** (as amended by **Lawrence**), it was no longer necessary to use his exact words, for it could be adapted to fit the particular offence. Courts were free to move away from his words altogether if it would assist the jury to understand the meaning of the test.

Following Lord Goff's comments in **Reid**, it appears that when Lord Diplock spoke of the risk being 'obvious', the risk only needed to be obvious in relation to the inadvertent limb, and it need not be proved in relation to the advertent limb. The logic for this conclusion is that if the defendant actually personally saw the risk then it does not really matter whether a reasonable person would have seen it: the defendant is at fault for seeing the risk and going ahead anyway. On the other hand, both limbs of the test required that the risk must be serious.

Taking into account these points of clarification, Lord Diplock's model direction could be redrafted as follows:

A person will be reckless if (1) he or she does an act which in fact creates a serious risk that property would be destroyed or damaged and (2) either (a) when he or she does the act he or she has not given any thought to the possibility of there being any such risk, and the risk was in fact obvious; or (b) has recognised that there was some risk of that kind involved and has nonetheless gone on to do it.

### Where did **Caldwell** apply?

Following the decision of **Caldwell**, two tests for recklessness existed. **Cunningham** applied to most offences requiring recklessness and **Caldwell** applied to a small minority of offences. Initially it was thought that **Caldwell** would have a wide application. In **Seymour**, Watkins LJ stated that '[t]he *Lawrence* direction on recklessness is comprehensive and of general application to all offences . . .' unless otherwise specified by Parliament. In fact, **Caldwell** was only applied to a narrow range of offences. Thus, **Caldwell** was the *mens rea* for criminal damage, which was the offence in **Caldwell** itself.



In **R v Seymour** (1983) it was used for a common law offence of reckless manslaughter, but later in **R v Adomako** (1994) the House of Lords held that this offence did not exist (see p. 126).

### The Caldwell lacuna

The idea behind the test developed in **Caldwell** was to broaden the concept of recklessness, so that people who it was felt were morally at fault could not escape liability because it was impossible to prove their actual state of mind. Unfortunately, the test left a loophole, or 'lacuna', through which equally blameworthy conduct could escape liability. **Caldwell** recklessness imposed liability on those who either realised there was a risk and took it anyway, or who failed to see a risk that, by the standards of ordinary people, they ought to have seen. But what about the defendant who did consider whether there was a risk, but wrongly concluded that there was not? An example might be where a person is driving a car and wants to overtake a lorry. In approaching a bend, the car driver considers whether there is a risk involved in overtaking on this stretch of the road, and wrongly decides that there is not. In fact there is a risk and an accident is caused. In theory, the car driver in this situation would appear to fall outside Lord Diplock's two limbs of recklessness, yet most people would agree that the driver was at least as much at fault as a person who fell within the inadvertent recklessness limb by failing even to consider a risk.

The issue was eventually tackled by the House of Lords in **R v Reid**. The House recognised that the lacuna did in fact exist, but said that it was narrower than some academics had originally suggested. It was held that people would only fall within the lacuna if they thought about whether there was a risk and, due to a *bona fide* mistake (meaning a genuine, honest mistake), decided there was none; in such cases they would not be considered reckless. If they thought about whether there was a risk, and decided on the basis of a grossly negligent mistake that there was none, then they would still be reckless for the purposes of **Caldwell**. The logical conclusion seems to be, though the House of Lords did not specifically state this, that this last scenario actually created a third limb of **Caldwell** recklessness.

### Problems with Caldwell recklessness

#### Two tests

Having two different tests for the same word caused confusion and was unnecessary. There was concern that the higher **Cunningham** standard applied to rape and the lower **Caldwell** standard applied to criminal damage. This meant that property was better protected than people.

**Table 1.2** Caldwell recklessness

Think about the risk	See the risk	Mens rea
Yes	Yes	Subjective limb of <b>Caldwell</b> recklessness
No	No	Objective limb of <b>Caldwell</b> recklessness
Yes	No	Lacuna, not <b>Caldwell</b> recklessness



### Objective standard for mens rea

The adoption of **Caldwell** recklessness meant that a potentially objective standard was being applied to determine *mens rea*, while many academics and practitioners felt that a *mens rea* requirement should always be subjective. Lord Diplock argued that there were three good reasons for extending the test for recklessness in this way. First, a defendant may be reckless in the ordinary sense of the word, meaning careless, regardless or heedless of the possible consequences, even though the risk of harm had not crossed his or her mind. Secondly, a tribunal of fact cannot be expected to rule confidently on whether the accused's state of mind has crossed 'the narrow dividing line' between being aware of risk and not troubling to consider it. Thirdly, the latter state of mind was no less blameworthy than the former.

### Overlap with negligence

The **Caldwell** test blurred the distinction between recklessness and negligence (discussed on p. 29). Before **Caldwell**, there was an obvious difference: recklessness meant knowingly taking a risk; negligence traditionally meant unknowingly taking a risk of which you should have been aware. **Caldwell** clearly came very close to negligence.

### The lacuna

A person who falls within the lacuna appears to be as morally at fault as a person who falls within the advertent limb of **Caldwell** recklessness. The case of **R v Merrick** has been criticised as unrealistic. In practice, replacing electrical equipment often creates a temporary danger which cannot be avoided, yet technically each time in criminal law the electrician is reckless.

### Problems for juries

The **Caldwell/Lawrence** formula is notorious for being difficult for juries to understand.

### Defendant incapable of seeing the risk

The harshness of the **Caldwell** test for recklessness was highlighted by the case of **Elliott v C**. That case drew attention to the fact that a defendant could be found to be reckless under **Caldwell** when they had not seen a risk and were incapable of seeing the risk because, for example, they were young and of low intelligence. The defendant was a 14-year-old girl, who was in a remedial class at school. Playing with matches and white spirit, she set fire to a neighbour's shed, which was destroyed. The magistrates found that she gave no thought to the risk of damage, but, even if she had, she would not have been capable of appreciating it. Consequently, she was acquitted of recklessly destroying the shed. The Divisional Court allowed an appeal by the prosecution, on the grounds that the **Caldwell** test was purely objective, and the fact that the girl was not capable of appreciating the risk was irrelevant to the issue of recklessness. When the court in **Caldwell** had talked about an obvious risk, it had meant obvious to a hypothetical reasonable person, and not obvious to the particular defendant if he or she had thought about it.

An attempt was made to moderate the harshness of the inadvertent test of recklessness in **R v R** (1991), a case in which marital rape was first recognised as a crime. Counsel

for the accused unsuccessfully argued that in deciding what was obvious to the reasonable person, that reasonable person should be assumed to have the permanent, relevant characteristics of the accused. This method is used by the courts to moderate the objective test for the partial defence of provocation (see p. 90). The Court of Appeal held that there was no reason for bringing such an approach into the **Caldwell** test.

However, in **R v Reid** the harsh approach to this issue taken in these two cases was softened slightly. The House of Lords recognised that sometimes the issue of capacity could be relevant, but the examples given were limited to situations where there was a sudden loss of capacity, such as a heart attack while driving. More recently in **R v Coles** (1994), a case involving arson committed by a youth of an allegedly low mental capacity, the Court of Appeal followed **Elliott** strictly. It stated that the only relevant capacity was that of the average person. This was the central issue in the leading case of **R v G and another** (2003).



## KEY CASE

In **R v G and another** (2003) two boys aged 11 and 12 had gone camping without their parents' permission. In the middle of the night they had entered the back yard of a shop where they had found some bundles of newspaper. They had started to read the newspapers and had then set light to some of the papers. They put the burning newspapers underneath a large plastic wheelie bin and left the premises. A large fire resulted that caused £1 million-worth of damage. The boys had thought that the newspaper fire would extinguish itself on the concrete floor of the yard. Neither of them realised that there was any risk of the fire spreading as it did. The trial judge and the Court of Appeal both felt bound by the precedents and reluctantly convicted the boys of arson under the Criminal Damage Act 1971. The House of Lords, however, allowed the appeal and dramatically overruled **Caldwell**. The House considered the option of simply refining the **Caldwell** test in order to achieve justice in the case, by, for example, taking into account the actual characteristics of the defendant when determining whether there was an obvious risk. However, Lord Hutton concluded that Lord Diplock's speech in **Caldwell**:

The test for recklessness is subjective.

... has proved notoriously difficult to interpret and those difficulties would not have ended with any refinements which your Lordships might have made to the decision. Indeed those refinements themselves would almost inevitably have prompted further questions and appeals. In these circumstances the preferable course is to overrule **Caldwell**.

The House did not mince its words in criticising the **Caldwell** decision. It stated:

The surest test of a new legal rule is not whether it satisfies a team of logicians but how it performs in the real world. With the benefit of hindsight the verdict must be that the rule laid down by the majority in **Caldwell** failed this test. It was severely criticised by academic lawyers of distinction. It did not command respect among practitioners and judges. Jurors found it difficult to understand; it also sometimes offended their sense of justice. Experience suggests that in **Caldwell** the law took a wrong turn.

Having abolished **Caldwell** recklessness, the court then quoted with approval the subjective definition of recklessness provided by the Draft Criminal Code Bill, discussed above.

### A future for Caldwell recklessness?

In this chapter we have taken the view that **Caldwell** recklessness has been abolished and will no longer be applied in criminal law. However, an alternative interpretation of the impact of **R v G and another** (2003) has been put forward by the respected criminal law academics Simester and Sullivan (2007). They point out that Lord Bingham at the start of his judgment stated: 'I mean to make it as plain as I can that I am not addressing the meaning of "reckless" in any other statutory or common law context.' Relying on this statement Simester and Sullivan argue that **Caldwell** recklessness could theoretically still be applied to some statutory offences. They suggest that the most likely offences where this may occur are those where the recklessness refers to the *manner* in which an *actus reus* is performed (e.g. reckless driving).

This argument is not persuasive. The judges in the House of Lords pointed to fundamental problems with the old **Caldwell** test and, in the light of those criticisms, it seems unlikely that they would then decide that it was suitable to be applied in the future. The Court of Appeal has stated in **Attorney-General's Reference No. 3 of 2003** (2004) that **R v G and another** recklessness did not only apply to criminal damage and that it applied to conduct crimes (including misconduct in public office) as well as result crimes such as criminal damage. In practice, even before **R v G and another**, **Caldwell** was barely being applied by the criminal courts, the main offence to which it did apply was criminal damage. So even if Simester and Sullivan are right in their interpretation of **R v G and another** there could only be a very small range of offences to which **Caldwell** could be applied.

## Negligence

Negligence is a concept that is most often found in civil law, but it does have some relevance to criminal law as well. The existence of negligence is traditionally determined according to an objective test, which asks whether the defendant's conduct has fallen below the standards of the reasonable person. Historically, the standard of the reasonable person for the purposes of criminal negligence took no account of the defendant's actual characteristics: in **McCrone v Riding** (1938), which concerned a charge of careless driving, it was held that the accused's driving could be considered careless if he had failed to come up to the standard of a reasonably experienced driver, even though he was himself a learner driver.

True crimes of negligence are rare in criminal law, though there are some statutory offences of negligence, particularly those concerned with motoring. More commonly, an offence of strict liability (where no *mens rea* is required) may allow the accused to use the defence of having acted with all due diligence: in other words, of not being negligent.

There is one important common law crime where negligence is an element of the offence: gross negligence manslaughter. Because this is a very serious offence, the courts are not just looking for negligence but for gross negligence. The leading case on the meaning of gross negligence is the House of Lords judgment of **R v Adomako** (1994). In that case the House stated that the question of whether gross negligence existed was a jury issue to be determined taking into account all the circumstances. The jury had to

consider whether the defendant had been so negligent that their conduct went beyond a mere matter of compensation for the civil courts and justified criminal liability.

There is some academic debate as to whether negligence can be properly described as a form of *mens rea*. In **Attorney-General's Reference (No. 2 of 1999)** the Court of Appeal stated it was not a form of *mens rea* as it could be proved without the jury having to look at the state of mind of the defendant. This case arose from the unsuccessful prosecution of Great Western Trains following the Southall train crash in 1997. While the Court of Appeal accepted that gross negligence was not a form of *mens rea*, a person's state of mind could still be relevant to proving gross negligence. It could be relevant because **Adomako** requires the jury, when deciding whether gross negligence exists, to consider all the circumstances of the case. But the jury were not required always to look at the mental state of the defendant; they might find that their physical conduct alone fell so far below the standards of the reasonable person that it justified criminal liability. For example, following the Hatfield railway disaster, a jury might find that the simple fact of not repairing the railway line constituted gross negligence, without needing to look at the mental state of any particular company employee.

We will consider the concept of gross negligence in much more detail when we look at the offence of gross negligence manslaughter at p. 118.

## Transferred malice

If Ann shoots at Ben, intending to kill him, but happens to miss, and shoots and kills Chris instead, Ann will be liable for the murder of Chris. This is because of the principle known as transferred malice. Under this principle, if Ann has the *mens rea* of a particular crime and does the *actus reus* of the crime, Ann is guilty of the crime even though the *actus reus* may differ in some way from that intended. The *mens rea* is simply transferred to the new *actus reus*. Either intention or recklessness can be so transferred.

As a result the defendant will be liable for the same crime even if the victim is not the intended victim. In **Latimer** (1886), the defendant aimed a blow at someone with his belt. The belt recoiled off that person and hit the victim, who was severely injured. The court held that Latimer was liable for maliciously wounding the unexpected victim. His intention to wound the person he aimed at was transferred to the person actually injured.

Where the accused would have had a defence if the crime committed had been completed against the intended victim, that defence is also transferred. So if Ann shot at Ben in self-defence and hit and killed Chris instead, Ann would be able to rely on the defence if charged with Chris's murder.

In **Attorney-General's Reference (No. 3 of 1994)** the defendant stabbed his girlfriend who was to his knowledge between 22 and 24 weeks pregnant with their child. The girlfriend underwent an operation on a cut in the wall of her uterus but it was not realised at the time that the stabbing had damaged the foetus's abdomen. She subsequently gave birth prematurely to a baby girl who later died from the complications of a premature birth. Before the child's death the defendant was charged with the offence of wounding his girlfriend with intent to cause her grievous bodily harm to which he pleaded guilty. After the child died, he was in addition charged with murdering the child.

At the close of the prosecution case the judge upheld a defence submission that the facts could not give rise to a conviction for murder or manslaughter and accordingly directed the jury to acquit. The Attorney-General referred the case to the Court of Appeal for a ruling to clarify the law in the field. The Court of Appeal considered the foetus to be an integral part of the mother until its birth. Thus any intention to injure the mother prior to its birth was treated as an intention to injure the foetus. If on birth the baby subsequently died, an intention to injure the baby could be found by applying the doctrine of transferred malice. This approach was rejected by the House of Lords. It held that the foetus was not an integral part of the mother, but a unique organism. The principle of transferred malice could not therefore be applied, and the direction was criticised as being of 'no sound intellectual basis'.

More recently, in **R v Gnango** (2011) the Supreme Court stated that the doctrine of transferred malice applied to accomplices. In that case a man was actually trying to shoot his accomplice but shot and killed an innocent member of the public by mistake. The doctrine of transferred malice justified liability for murder being imposed on the man who fired the gun, but also on the accomplice (it did not matter that the accomplice was the intended victim).

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

The *mens rea* of an offence must be present at the time the *actus reus* is committed. So if, for example, Ann intends to kill Ben on Friday night, but for some reason fails to do so, then quite accidentally runs Ben over on Saturday morning, Ann will not be liable for Ben's murder. However, there are two ways in which the courts have introduced flexibility into this area: continuing acts, which are described on p. 16, and the interpretation of a continuous series of acts as a single transaction. An example of the latter occurred in **Thabo Meli v R** (1954). The defendants had attempted to kill their victim by beating him over the head, then threw what they assumed was a dead body over a cliff. The victim did die, but from the fall and exposure, and not from the beating. Thus there was an argument that at the time of the *actus reus* the defendants no longer had the *mens rea*. The Privy Council held that throwing him over the cliff was part of one series of acts following through a preconceived plan of action, which therefore could not be seen as separate acts at all, but as a single transaction. The defendants had the required *mens rea* when that transaction began, and therefore *mens rea* and *actus reus* had coincided.

Another example of the single transaction doctrine is the case of **R v Le Brun** (1992). The defendant had punched his wife on the jaw, knocking her unconscious. He then tried to carry her from the garden into the house. As he attempted to carry her, he dropped her, fracturing her skull and it was this injury which caused her death. The defendant had the *mens rea* for manslaughter but he did not commit the *actus reus* until the later time when he dropped his wife. The Court of Appeal applied the single transaction doctrine and Le Brun's conviction for manslaughter was upheld. It noted, however, that the doctrine of a single transaction would not have applied if the defendant had been trying to help his wife when he subsequently dropped her.

## **Mens rea and motive**

It is essential to realise that *mens rea* has nothing to do with motive. To illustrate this, take the example of a man who suffocates his wife with a pillow, intending to kill her because she is afflicted with a terminal disease which causes her terrible and constant pain. Many people would say that this man's motive is not a bad one – in fact many people would reject the label 'murder' for what he has done. But there is no doubt that he has the necessary *mens rea* for murder, because he intends to kill his wife, even if he does not want to do so. He may not have a guilty mind in the everyday sense, but he does have *mens rea*. Motive may be relevant when the decision is made on whether or not to prosecute, or later for sentencing, but it makes no difference with regard to legal liability.

## **Proof of mens rea**

Under s. 8 of the Criminal Justice Act 1967, where the definition of an offence requires the prosecution to prove that the accused intended or foresaw something, the question of whether that is proved is one for the court or jury to decide on the basis of all the evidence. The fact that a consequence is proved to be the natural and probable result of the accused's actions does not mean that it is proved that he or she intended or foresaw such a result; the jury or the court must decide.

### **Problems with the law on *mens rea***

#### **Unclear terminology**

The terminology used has become very unclear and uncertain. The same word may be defined differently in different offences. For example, 'malice' means one thing in relation to murder, another in the Offences Against the Person Act 1861 and yet another in relation to libel. Some clarity may have been provided by the decision of **R v G and another**, which seeks to give a single definition of recklessness.

#### **Mens rea and morality**

Problems arise because in practice the courts stretch the law in order to convict those whose conduct they see as blameworthy, while acquitting those whose behaviour they feel does not deserve the strongest censure. For example, the offence of murder requires a finding of intention to kill or to cause serious injury. The courts want to convict terrorists of murder when they kill, yet do they have the requisite *mens rea*? If you plant a bomb but give a warning, do you intend to kill or to cause serious injury? Assuming a fair warning, could death or serious injury be seen as a virtually certain consequence of your acts? What if a terrorist bomber gives a warning that would normally allow sufficient time to evacuate the relevant premises, but, owing to the negligence of the police, the evacuation fails to take place quickly enough and people are killed? The courts are likely to be reluctant to allow this to reduce the terrorist's liability, yet it is hard to see how this terrorist could be said to intend deaths or serious injury to occur – in fact the giving of a warning might suggest the opposite. The courts are equally reluctant to impose liability for murder where it is difficult to find real moral guilt, even though technically this should be irrelevant. The



problem is linked to the fact that murder carries a mandatory life sentence, which prevents the judge from taking degrees of moral guilt into account in sentencing (see p. 70).

The academic Alan Norrie has written an exciting article on this subject called 'After Woollin'. He argues that the attempt of the law to separate the question of *mens rea* from broader issues of motive and morality is artificial and not possible in practice. He points to the fact that the jury are merely 'entitled to find' indirect intention and that for some offences (illustrated by *Steane*) only direct intention will suffice. In his view, through this flexibility the courts want to allow themselves the freedom to acquit in morally appropriate cases. Such moral judgments on the basis of the defendant's motive are traditionally excluded from decisions on *mens rea*.

George Fletcher (1978) has noted how historically there has been a development of the law from terms with a moral content such as 'malice' to the identification of 'specific mental states of intending and knowing'. Fletcher observes that:

Descriptive theorists seek to minimise the normative content of the criminal law in order to render it, in their view, precise and free from the passions of subjective moral judgement. . . . [Such a concern] may impel courts and theorists towards value free rules and concepts; the reality of judgement, blame and punishment generates the contrary pressure and ensures that the quest for a value free science of law cannot succeed.

Making a judgement on someone that he is a 'murderer' and that he should have a life sentence are both moral judgements. Judges are constantly making judgments on right and wrong and what should happen to wrongdoers. But they have to render these judgments in specialist legal terms using concepts such as 'intention' and 'foresight'. These terms are different from everyday terms of moral judgement, but they are used to address moral issues. Norrie argues:

. . . as a result of this, lawyers end up investing 'nominally descriptive terms with moral force'. Thus terms like 'intent', 'state of mind' and 'mental state' which appear to be descriptive are used to refer to issues that require normative judgement.

In Norrie's view the desire to exclude 'subjective moral judgement' really results from the desire in the past to safeguard a criminal code based on the protection of a particular social order. He considers that:

. . . if one examines the historical development of the criminal law, one finds that a legal code designed to establish an order based on private property and individual right was legitimated by reference to the dangers of subjective anarchy. This argument was the ideological window-dressing justifying the profound institutional changes taking place.

Thus, he considers that the apparently impartial language used to describe *mens rea* is actually very partial and unfair to many. The law is based upon the supposed characteristics of the average person, stressing the free will of the individual. It ignores the 'substantive moral differences that exist between individuals as they are located across different social classes and according to other relevant divisions such as culture and gender'.

One way to avoid this tension between the legal rules and the moral reality is to develop the defences that are available. Defences such as duress (discussed at p. 376) explicitly allow moral issues to enter into the legal debate through questions of proportionality. Defendants in situations such as *Steane* should be able to avoid liability through the use of a defence such as duress rather than an inconsistent application of the law on *mens rea*.



## Subjective principles in criminal law

In the case of **R v G and another** the House of Lords clearly stated that *mens rea* should consist of a subjective test. Lord Bingham observed:

... it is a salutary principle that conviction of serious crime should depend on proof not simply that the defendant caused (by act or omission) an injurious result to another but that his state of mind when so acting was culpable... It is clearly blameworthy to take an obvious and significant risk of causing injury to another. But it is not clearly blameworthy to do something involving a risk of injury to another if (for reasons other than self-induced intoxication: **R v Majewski** [1977] AC 443) one genuinely does not perceive the risk. Such a person may fairly be accused of stupidity or lack of imagination, but neither of those failings should expose him to conviction of serious crime or the risk of punishment.



Has the House of Lords gone too far down the subjective route? Abandoning an objective form of recklessness assumes that a person who fails to think about a risk is less at fault than one who sees the risk and goes ahead and takes it. This assumption is open to debate. The great legal philosopher Hart observed that the role of *mens rea* was to ensure that defendants had a fair opportunity to exercise their physical and mental capacities to avoid infringing the law. Hart concluded:

it does not appear unduly harsh, or a sign of archaic or unenlightened conceptions of responsibility to include gross, unthinking carelessness among the things for which we blame and punish.

It is certainly appropriate for the law to take into account the limited intellectual skills of a child or a mentally disabled person when determining their criminal liability. But is it unfair to apply an objective standard to ordinary citizens? Was Lord Diplock right in **Caldwell** to be worried that if a purely subjective test is applied, some people who are morally at fault would be able to avoid liability? Should the House of Lords have simply amended the **Caldwell** model direction so that the specific characteristics of the defendant (such as youth) could have been taken into account when deciding whether the risk was obvious?

The House of Lords in **R v G and another** were of the view that the criminal law was moving in the direction of applying subjective principles generally. Over the years, objective tests in criminal law have been supplemented with elements of subjectivity (this will be seen in the context of duress (at p. 380) and provocation (at p. 90) later in this book. In the context of age-based sexual offences (such as having sexual intercourse with a girl under the age of 16) the House of Lords held that liability would not be imposed if the defendant genuinely believed that the victim was over the relevant age: **B v DPP** (1998) and **R v K** (2001). However, Parliament has moved in the opposite direction, effectively overruling these cases in the Sexual Offences Act 2003. This Act also imposes a test of reasonableness for liability for some of the most serious sexual offences, including rape (discussed on p. 173). In addition, strict liability offences (discussed in Chapter 2) run contrary to the principle of subjectivity. It is arguable that *mens rea* should always be subjective, but defences (discussed in Chapter 13) can be objective: that a person should be able to avoid liability if their conduct objectively provides a justification or an excuse for their conduct.

In **R v Misra and Srivastava** (2004) and **R v Mark** (2004) the defence lawyers argued that following **R v G and another**, the offence of gross negligence manslaughter which applies an objective test to determine liability, should be replaced by subjective reckless manslaughter. This argument was rejected by the Court of Appeal.

## ? Answering questions

- 1 'Recklessness remains a difficult concept to explain to juries though it is only another way of saying that the defendant foresaw the results of what he was doing as possible and this gives rise to the offence.'

**Discuss** (*London External LLB*)

This is a straightforward essay question on recklessness. The essay could be divided into three parts:

- difficulties for the jury
- objective and subjective tests
- injustice.

You could use these as subheadings in your essay to make the structure of your essay clear to the reader.

### Difficulties for the jury

The concept was extremely complex when two definitions of recklessness existed, and may have become easier for the jury following the decision of **R v G and another**. You could point out the complexities of Lord Diplock's model direction in **Caldwell**, which had been repeatedly changed by the courts. One of the reasons the courts moved away from **Caldwell** reckless manslaughter and replaced it with gross negligence manslaughter was because of the difficulties for the jury in understanding the test. The new test contained in **R v G and another** does itself contain some complexities which could cause problems for the jury.

### Objective and subjective tests

You could discuss the fact that the law has been simplified following the case of **R v G and another**, which provides a single, subjective definition of recklessness. **Caldwell** had extended the law to cover where the defendant did not foresee the result, but a reasonable person would have foreseen the result. **Caldwell** has now been overruled.

### Injustice

The concluding section of your essay could argue that the real difficulties with the concept of recklessness in the past was that **Caldwell** recklessness could cause injustice. You could point in particular to the problem that the law ignored the capacity of the actual defendant, as illustrated by the case of **Elliott**. The House of Lords hopes that the law contained in **R v G and another** will not cause such injustice.

**2 Critically analyse the situations where a person can be liable in criminal law for an omission to act.**

This is not a difficult question – the circumstances in which criminal liability will be imposed for true omissions are clearly explained above. You should also include the situations in which liability is imposed for conduct which would in everyday language be described as an omission, but which in law is an act, and vice versa. Remember that you are asked to analyse the law critically, so it is not good enough simply to provide a description; you should also evaluate the law by pointing out its strengths and weaknesses. For example, you could look at the issue of the drowning child and whether the law is adequate in this situation and you could also consider the approach taken by the courts to Tony Bland's case.

**3 The term 'recklessness' plays a crucial role in determining criminal liability yet its meaning still appears uncertain. Critically assess the meaning of the term 'reckless' in criminal law. (OCR)**

Most of the material discussed under the heading 'Recklessness' is relevant here. You might start by explaining why recklessness 'plays a crucial role in determining criminal liability'. To do so you could point out that most offences require proof of *mens rea*. In proving *mens rea* a distinction often has to be drawn between recklessness and intention because the more serious offences often require intention only, conviction for which would impose a higher sentence. For lesser offences recklessness is usually sufficient and a lighter sentence would be imposed.

The rest of your essay could be structured in much the same order as the relevant section of this book. In looking at the meaning of the term 'recklessness' you would have to discuss the meaning of recklessness in the light of **R v G and another**. As you are asked to 'critically assess', a mere description of the law will not be sufficient – you will need, in addition, to look at issues raised under the headings 'Problems with Caldwell recklessness' and whether recklessness should be restricted to a subjective test.



## Summary

### **Actus reus**

An *actus reus* can consist of more than just an act, it comprises all the elements of the offence other than the state of mind of the defendant.

### **Conduct must be voluntary**

If the accused is to be found guilty of a crime, his or her behaviour in committing the *actus reus* must have been voluntary.

### **Types of actus reus**

Crimes can be divided into three types, depending on the nature of their *actus reus*:

- action crimes
- state of affairs crimes
- result crimes.

### Omissions

Criminal liability is rarely imposed for true omissions at common law. However, in some situations the accused has a duty to act, and in these cases there may be liability for a true omission. A duty to act will only be imposed where there is some kind of relationship between the two people, and the closer the relationship the more likely it is that a duty to act will exist. So far the courts have recognised a range of situations as giving rise to a duty to act. These are where:

- there is a special relationship
- there is voluntary acceptance of responsibility for another
- there is a contractual relationship
- statute imposes a duty
- the defendant created a dangerous situation.

### Mens rea

*Mens rea* is the Latin for 'guilty mind' and traditionally refers to the state of mind of the person committing the crime.

### Intention

Intention is a subjective concept. To help comprehension of the legal meaning of intention, the concept can be divided into two: direct intention and indirect intention. Where the consequence of an intention is actually desired, it is called direct intention. However, a jury is also entitled to find intention where a defendant did not desire a result, but it is a virtually certain consequence of the act, and the accused realises this and goes ahead anyway. This is called indirect intention.

### Recklessness

In everyday language, recklessness means taking an unjustified risk. Its legal definition has radically changed in recent years. It is now clear, following the case of **R v G and another**, overruling **MPC v Caldwell**, that recklessness is a subjective form of *mens rea*.

### Negligence

The existence of negligence is traditionally determined according to an objective test, which asks whether the defendant's conduct has fallen below the standards of the reasonable person. There is one important common law crime where negligence is an element of the offence: gross negligence manslaughter. The leading case on the meaning of gross negligence is the House of Lords judgment of **R v Adomako** (1994).

### Transferred malice

Under the principle of transferred malice, if Ann has the *mens rea* of a particular crime and does the *actus reus* of the crime, Ann is guilty of the crime even though the *actus reus* may differ in some way from that intended. The *mens rea* is simply transferred to the new *actus reus*.

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

The *mens rea* of an offence must be present at the time the *actus reus* is committed.

### Mens rea and motive

It is essential to realise that *mens rea* has nothing to do with motive.



## Reading list

- Baker, D. (2010) 'Omissions liability for homicide offences: reconciling *R v Kennedy* with *R v Evans*' [2010] *Journal of Criminal Law* 310.
- Bohlander, M. (2010) 'Problems of transferred malice in multiple-actor scenarios' [2010] *Journal of Criminal Law* 145.
- Crosby, C. (2008) 'Recklessness – the continuing search for a definition' [2008] *Journal of Criminal Law* 72, 313.
- Hall, J. (1963) 'Negligent behaviour should be excluded from penal liability' 63 *Columbia Law Review* 632.
- Haralambous, N. (2004) 'Retreating from Caldwell: restoring subjectivism' [2004] *New Law Journal* 1712.
- Mackay, R.D. and Mitchell, B.J. (2006) 'Sleepwalking, automatism and insanity' [2006] *Criminal Law Review* 901.
- Padfield, N. (1995) 'Clean water and muddy causation: is causation a question of law or fact, or just a way of allocating blame?' [1995] *Criminal Law Review* 683.
- Williams, G. (1991) 'Criminal omissions – the conventional view' 107 *Law Quarterly Review* 86.

### Reading on the internet

The House of Lords' judgment of **R v Woollin** (1998) on intention is available on Parliament's website at:

<http://www.publications.parliament.uk/pa/ld199798/ldjudgmt/jd980722/wool.htm>

The House of Lords' judgment of **R v G and another** (2003) on recklessness is available on Parliament's website at:

<http://www.publications.parliament.uk/pa/ld200203/ldjudgmt/jd031016/g-1.htm>

Visit [www.mylawchamber.co.uk/elliottcriminal](http://www.mylawchamber.co.uk/elliottcriminal) to access tools to help you develop and test your knowledge of criminal law, including interactive multiple choice questions, practice exam questions with guidance, glossary, glossary flashcards, legal newsfeed, legal updates.



Use **Case Navigator** to read in full some of the key cases referenced in this chapter with commentary and questions:

- *R v Adomako* [1995] AC 171
- *R v Cunningham* [1957] 2 All ER 412
- *R v Evans* [2009] 2 Cr App R 10
- *Fagan v MPC* [1968] 3 All ER 442
- *R v G* [2003] UKHL 50; [2004] 1 AC 1034
- *R v Kennedy* (No. 2) [2005] EWCA Crim 685
- *DPP v Majewski* [1977] AC 443
- *R v Woollin* [1998] 4 All ER 103

