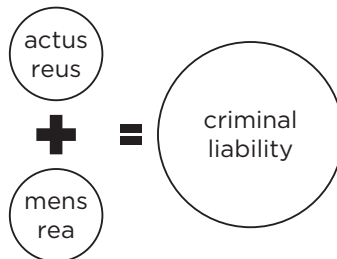


General principles of criminal law

■ MAKE SURE YOU KNOW

This chapter will cover the core principles of criminal liability. You are required to understand the terms *actus reus* and *mens rea*, and the legal principles that flow from those terms. You are required to be able to apply these legal principles and rules appropriately and effectively to realistic client-based and ethical problems and situations for your SQE1 assessment.

The SQE1 Assessment Specification has not identified that candidates are required to recall/recite any case names, or statutory materials, for *actus reus* and *mens rea*.



Overview of criminal liability

■ SQE ASSESSMENT ADVICE

As you work through this chapter, remember to pay particular attention in your revision to:

- the elements of a criminal offence
- the meaning of actus reus
- omissions liability
- establishing causation
- the various mens rea terms
- the requirement of contemporaneity.

■ WHAT DO YOU KNOW ALREADY?

Have a go at these questions before reading this chapter. If you find some difficult or cannot remember the answers, make a note to look more closely at that area during your revision.

- 1) Fill in the blank: the actus reus of an offence generally refers to _____.

[Actus reus, pages 3-12]

- 2) Can you be criminally liable for an omission to act?

[Omissions liability, pages 4-7]

- 3) True or false: an interference by a third party will always break the chain of causation and relieve the defendant of liability.

[Legal causation, pages 8-12]

- 4) What direction must be given to the jury when they are deciding whether a defendant has oblique (indirect) intent?

[Oblique intention, pages 12-13]

INTRODUCTION TO GENERAL PRINCIPLES OF CRIMINAL LAW

To begin with, we are concerned with the fundamental elements of a criminal offence. These are labelled the **actus reus** and **mens rea**.

Key term: actus reus

Actus reus broadly translates as 'guilty act' and refers to all elements of an offence that are not concerned with the state of mind of the defendant (D). It is worth noting that the actus reus of an offence does not have to be a positive act. For example, murder requires a 'killing' and this may be by way of a positive act or an omission.

Key term: mens rea

Mens rea is the term used to represent the state of mind required of D (also known as the fault element). Mens rea is either subjective (concerned with D's state of mind) or objective (assessed by reference to the reasonable person).

Most of the offences within this revision guide require that a particular result is brought about. These are called *result crimes*. For these offences you must also consider the principles of **causation**.

Key term: causation

Causation is concerned with culpability, or responsibility, and requires you to identify whether D should be held criminally culpable for a result that has been brought about.

Those offences that do not require a result to be brought about are called *conduct crimes*. We identify what crimes are 'conduct' and 'result' throughout the remaining chapters.

ACTUS REUS

The actus reus of an offence is set out in the relevant statutory or common-law definition. The actus reus provides the elements of the offence that must be established by the prosecution to prove the defendant's guilt. These may include an act or an omission, but may also require that particular circumstances exist, or that a specific result is brought about.

For example, the actus reus of murder is the 'unlawful killing of a human being within the King's peace'. This definition gives us the elements that must be established for criminal liability. There is no defined

act or omission that must be proven, but the offence requires three circumstances are proven: that the victim is a human, that the killing takes place during peace time, and the killing is unlawful. It also requires one result: the death of the victim (see **Chapter 5**).

Let us consider some general actus reus principles that could be relevant to the SQE1 assessment.

The actus reus must be voluntary

The defendant must have consciously committed the actus reus of the alleged offence or he cannot be criminally liable. By conscious commission, we mean that he must have been doing something voluntarily, under his own volition. If his muscles are not being controlled by his conscious mind, he cannot be said to be acting voluntarily. For example:

- Sam strikes out to swat a wasp in her car and loses control of the car, hitting a pedestrian.
- Mark falls down the stairs and, while plummeting, strikes Sam with his foot.
- Sam sneezes and reflexively throws the dinner plate she is drying. The plate hits Mark on the nose.

However, the defendant cannot escape liability simply because they cannot control an impulse to act, or if they argue that they did not intend to bring about that result – their conduct must be truly involuntary.

In many cases, this will be as a result of what is termed ‘automatism’. This is a specific defence that requires a total loss of control that stems from an external cause. **Chapter 4** explores where that external cause is a non-dangerous drug, but automatism may also result from something as simple as concussion.

Exam warning

Be aware that the SQE1 Assessment Specification does not expressly require you to know the substantive defence of automatism. Automatism is, however, a fundamental aspect of criminal liability generally, in that it must be proven that D acted voluntarily. Keep an eye out for those circumstances where D’s conduct may not be voluntary.

Omissions liability

An omission is a failure to act. As our system of law focuses upon prohibiting certain acts, the general position is that individuals are

not liable for offences based upon their failure to act. However, this is subject to some significant caveats. **Figure 1.1** identifies the process to undertake when considering omissions liability.

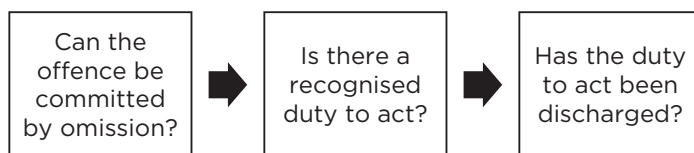


Figure 1.1: Omissions liability

Can the offence be committed by omission?

First, you need to identify whether the offence in question is capable of being committed by omission. For each offence considered in this revision guide, we will identify whether it can be committed by omission. By way of example, while murder may be committed by omission, unlawful act manslaughter cannot (see **Chapter 5**).

Is there a recognised duty to act?

The next issue is whether you are in a position that imposes a legal duty to act (rather than a moral duty). The common law has established a number of exceptions to the general principle that you are not liable for a failure to act. These are detailed in **Table 1.1**.

Practice example 1.1

Carly is a heroin addict who has moved in with her mother. Her half-sister Gemma visits their mother's house, bringing Carly some heroin that Carly then self-injects. It rapidly becomes obvious that Carly has overdosed and, although Gemma and her mother take steps to make Carly comfortable, they do not call for an ambulance as they are concerned they may get into trouble. Carly dies as a result of an overdose. Gemma is charged with gross negligence manslaughter, but Gemma must be under a duty to act to be liable.

Does Gemma owe a duty to Carly and, if so, under which category is a duty imposed?

These were the facts of *R v Evans* [2009] EWCA Crim 650. Here the court discussed the possibility of a duty arising under relationship (as Carly was Gemma's half-sister), through an assumption of care (as she took steps to look after her) and creation of/contribution to a dangerous situation. A duty does not have to be established by using only one exceptional category.

Table 1.1: Recognised duty categories

Duty category	Explanation
Statutory or contractual duty	A duty may be imposed by statute. Where a failure to fulfil a contractual term poses a risk of death, a duty to act is imposed. For example, in <i>R v Pittwood</i> (1902) 19 TLR 37, a railway employee neglected to close the gate to prevent the railway line being crossed when a train was coming. A road user was hit by the train and killed when crossing the tracks. In <i>R v Dytham</i> [1979] QB 722, a police officer saw a man being beaten and did not intervene. The man died as a result. The officer was under a duty to act by virtue of his position. This duty flowed from his contractual obligation, or his position of public office.
Special relationship	A duty may arise from a close relationship, though it is likely this only extends to parents (or guardians) and their young children. In <i>R v Gibbins and Proctor</i> (1919) 13 Cr App R 134, a father and his partner intentionally starved the man's child to death. The father was convicted of murder as he was under a duty as the child's father. His partner was also liable as she had assumed responsibility for the child (see below).
Voluntary assumption of responsibility	Where an individual takes steps to assume responsibility for another who is unable to care for themselves due to, for example, age or illness, a duty is imposed. In <i>R v Stone and Dobinson</i> [1977] QB 354, Stone's sister (Fanny) came to live with Stone and his partner. Both Stone and Dobinson were mentally impaired, and Fanny suffered from anorexia. The couple initially cared for Fanny but as her condition deteriorated the couple were unable to cope, stopped attempting to care for her and Fanny died. The couple were convicted of gross negligence manslaughter.

Table 1.1: Continued

Duty category	Explanation
Creation of/contribution to a dangerous situation	Where D inadvertently creates a dangerous situation, he is under a duty to act to rectify that situation. In <i>R v Miller</i> [1983] 2 AC 161, a squatter fell asleep and set fire to a mattress he was sleeping on with his cigarette. Upon waking he made no attempt to extinguish the fire or call the fire service, instead he moved to another room. He was convicted of arson (see Chapter 9). It was held that as he had created a danger and was aware he had done so, a duty to act would be imposed. The courts have since moved away from this purely subjective approach and a duty may now also be imposed where a person merely <i>contributes</i> to a situation that they know or <i>ought to know</i> has become life threatening (refer back to Practice example 1.1).

Has the duty to act been discharged?

Lastly, in order to be liable, the defendant must fail to discharge their duty to act. To discharge a duty, you must merely take reasonable steps. What amounts to reasonable steps will depend upon the situation and you need to look out for this in SQE1. For example, a lifeguard – contractually obliged to monitor safety at a swimming pool – would be expected upon spotting a drowning swimmer to attempt a rescue. Leaving poolside to fetch a fellow lifeguard (as he did not want to get his hair wet that day) would be unreasonable and would not discharge that duty.

Causation

Where an offence requires that a particular result is brought about, the prosecution must also prove that the defendant *caused* that result.

In short, what you are looking for in an SQE scenario is an unbroken set of events that has led to the result. If the defendant cannot be said to be responsible because he had not contributed to that result, or his contribution was diminished to insignificance as another party had

played a greater role in bringing about the result, then he cannot be held criminally culpable.

In most cases, causation will be a straightforward question. In more difficult cases, consider the process in **Figure 1.2**.

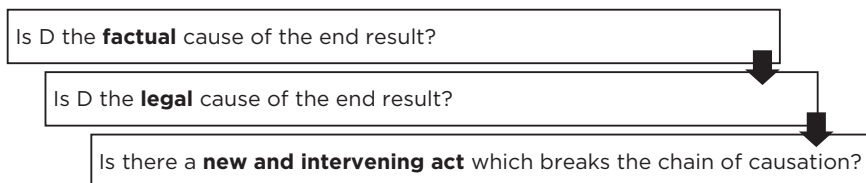


Figure 1.2: Elements of causation

Factual causation

First, the defendant must be the factual cause of the result. This is established through the ‘but for’ test; ‘but for the defendant’s actions, would the prohibited result have occurred?’ If the result would have happened regardless, then the defendant is not responsible.

When the defendant is charged with a homicide offence, this means we must find that there has been an *acceleration* of death – as everyone will (eventually) die (see **Practice example 1.2**).

Practice example 1.2

John puts potassium cyanide (a poison) into his mother’s drink, intending to kill her. She dies that night, but it is established that she had died of natural causes before the poison took effect.

Has John, in fact, caused her death?

These were the facts of *R v White* [1910] 2 KB 124. John could not be the factual cause of death as his mother would have died when she did regardless of his act. John was liable, however, for attempted murder (see Chapter 3).

If factual causation is satisfied, the next step is to establish legal causation.

Legal causation

The second test is whether the defendant is *legally* culpable. There are a number of key principles you need to be aware of. These are outlined in **Table 1.2**.

Table 1.2: Understanding legal causation

Principle	Explanation and examples
D need only be a more than minimal cause of the prohibited result	D must be the 'substantial' cause of the result, though this has been held to mean 'more than slight and trifling'. For example, in <i>R v Pagett</i> (1983) 76 Cr App R 279, D shot at the police officers who were attempting to arrest him. The officers returned fire and killed a young girl who D was using as a human shield. D was convicted of manslaughter as he was a substantial cause of the result and the officers had not broken the chain of causation.
D need not be the only cause of the result	There may be several causes that bring about the result, and D need not be the only cause as long as he is a 'substantial' cause. In <i>R v Benge</i> (1865) 4 F & F 504, D, a railway foreman misread a train timetable when a section of the track was being raised. Flagmen were supposed to wave a warning if a train was approaching but were not at the correct distance. The train hit the raised track, resulting in several deaths. Despite the fact that a number of acts (including that of the train driver who was not paying full attention) contributed to the deaths, D could still be held responsible.
D must be the operating cause	D must be the operating cause at the time of death (ie there is no break in the chain of causation). In <i>R v Smith</i> [1959] 2 QB 35, D had stabbed a comrade during a fight. V was carried to the hospital and dropped twice in the process. When he arrived at the hospital he was not examined fully and left to bleed to death. A blood transfusion would have saved his life. D was still responsible for V's death as the stab wound he had delivered was still the 'operating and substantial' cause of death.

Exam warning

Make sure that you do not confuse the causation principles in criminal law with those studied in tort law. While factual causation is the same in both areas of law, legal causation is an additional hurdle in criminal law cases.

New and intervening acts

As outlined in **Table 1.2**, the defendant must be the operating cause of the prohibited result. The defendant will not be liable for that offence if there is a break in the chain of causation – if an intervening event means that he can no longer be said to be the true cause of the result. The SQE1 assessment may require you to know any of the following intervening acts:

- Acts by the victim:
 - The victim will break the chain of causation if he acts in a way that is informed and voluntary (ie self-injecting drugs he has been supplied with, and so bringing about his own death).
 - Where the victim causes or contributes to his own injuries or his own demise this may be attributable to the defendant if the victim's actions were 'proportionate' to the threat posed (see *R v Roberts* (1972) 56 Cr App R 95 in **Chapter 6**). For example, Mark runs into the path of a car and suffers serious injuries while trying to escape from Sam, who was threatening him with a knife. This is a proportionate response and Sam will be responsible for the serious injuries inflicted. Only where the response is unreasonable (or 'daft') will it break the chain.
 - Where the victim neglects injuries inflicted by the defendant (ie by failing to seek treatment after being stabbed), the defendant will remain responsible for the extent of the injuries suffered (see **Take your victim as you find them**).
- A 'free, deliberate and informed' intervention by a third party:
 - An independent third party may intervene and break the chain of causation if their action is 'free, independent and informed'. For example, if Mark punches Sam and, while she is laying on the floor, Jensen (who has a grudge against Sam) runs over and stabs her to death, Mark will not be responsible for her death (merely the original injuries). In *Page*, considered in **Table 1.2**, the chain of causation was not broken by the police officers as they were not acting 'freely' when they were forced to return fire.
- Medical treatment:
 - Our starting point is that it is highly unusual for medical treatment (or medical neglect) to break the chain of causation. Treatment that is merely negligent will not break the chain of causation.
 - To break the chain, the treatment must be an independent act that is 'so potent' that the defendant's contribution is insignificant. The treatment (or lack thereof) must be 'so overwhelming' that it makes the original injury 'part of the history'. This potent and independent act must amount to treatment that can be characterised as 'palpably wrong'.

- Unforeseeable natural causes:
 - ‘Acts of God’ will only break the chain when they are both unforeseeable to the reasonable person and were unforeseen by the defendant. For example, suppose Mark leaves Sam injured and unable to move on a beach at low tide. Mark will be responsible for Sam’s death when Sam drowns as it is foreseeable that the tide will come in. But where Mark leaves Sam injured and unable to move in her garden, and Sam dies as a result of being struck by lightning, Mark will not be responsible for her death.

Exam warning

Try to remember that the chain of causation can be broken in three main ways: by acts of a third party, by acts of the victim and by acts of God (ie a natural unforeseeable event). If you are faced with a multiple-choice question (MCQ) assessing causation, keep an eye out for one of these three intervening acts.

Take your victim as you find them

A factor that cannot break the chain of causation is an inherent weakness of the victim. Suppose Sam punches Mark, who has an abnormally thin skull. She will be responsible for Mark’s death despite the fact Mark is abnormally sensitive to injury.

This principle extends further than physical vulnerabilities. Consider the following examples:

- A man cut the victim’s finger. The victim refused medical treatment and died of tetanus (a bacterial infection).
- A woman who was a Jehovah’s Witness refused a blood transfusion after being stabbed as her religion did not allow her to undergo that procedure. She died from her injuries.

In both of these cases, the defendants were held responsible for the deaths of their victims. In the first, the judge merely directed the jury to ask whether the injury was the actual cause of death. In the modern day, failing to seek treatment for a relatively minor injury may seem unreasonable, but in the second example, the court made it clear that it is irrelevant whether the victim’s response is reasonable.

Summary: what do we know about actus reus?

What is actus reus concerned with?

Actus reus refers to the external elements of a crime and is concerned with the conduct, circumstances and results (if any) of a crime.

Does the actus reus require an 'act'?	While most crimes will be committed by way of a positive act, it is possible for many offences to be committed by a failure to act (ie an omission). In order for this to be the case, the crime has to be capable of being committed by omission and there must be a legal duty on D to act.
What is the test for causation in criminal law?	The magistrates or jury must be satisfied that D was the factual (ie 'but for') cause of harm, as well as being the legal cause of harm. As part of causation, there must not be a new and intervening act that breaks the chain of causation.

MENS REA

The following discusses the common mens rea terms of intention, subjective recklessness and negligence.

Intention

Intention is the highest standard of mens rea required for serious offences such as murder (see **Chapter 5**) and causing grievous bodily harm with intent (see **Chapter 6**).

Intention has been given two different interpretations in criminal law: **direct intention** and **oblique intention**. Both are subjective, focusing on the defendant's state of mind at the time the actus reus is performed.

Key term: direct intention

Direct intention is where it is D's aim or purpose to bring about a prohibited result. For example, Sam points a gun at Mark, intending to kill him, and pulls the trigger.

Key term: oblique intention

Oblique intention is where it is not D's aim or purpose to bring about a prohibited result, but he foresees that result as virtually certain to occur as a result of his actions. For example, Mark intends to kill Sam by shooting her and Sam is standing behind a window. His direct intent will be to kill Sam, but his oblique intent will be to break the glass.

There is no statutory definition of intention, and its meaning has been established in common law.

Direct intention

Motive and desire are irrelevant to the question of whether someone has direct intent. We can establish whether it is your aim or purpose to bring about a consequence without asking why you have acted in that way. For example, you can desperately wish that someone does not have to die, yet still intend to kill them.

Oblique intention

Oblique intention is not a different type of intention, it is merely a way of finding intention. A direction on oblique intention will only be given in cases where it is not the defendant's aim or purpose to bring about the prohibited result. Consider the following examples:

- Sam sets fire to a house as she has a grudge against the resident. Her purpose is not to kill any of the residents, but a child dies in the fire.
- Mark throws his infant child towards his pram as he has lost his temper. He intended for the child to land in his pram, but the child hits the floor and dies.

The key test for oblique intent is that laid out by Lord Steyn in *Woollin* [1999] 1 AC 82 and is detailed in **Figure 1.3**.

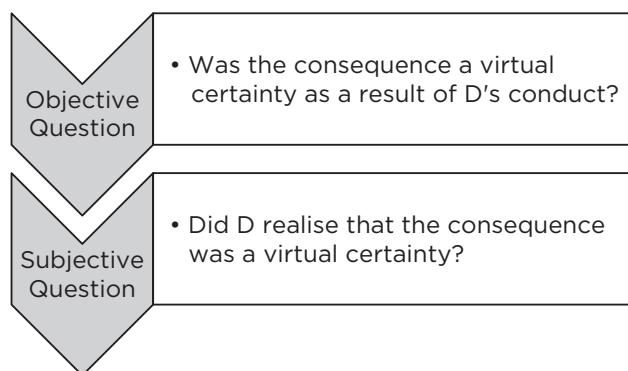


Figure 1.3: Test for oblique intention

Revision tip

Only foresight by D of a *virtual certainty* will suffice. Where the result is seen as a possible, probable, or even highly probable consequence, D may be reckless (see **Subjective recklessness**), but

he *does not* intend to bring about that consequence. Pay close attention to the wording of an MCQ to identify whether the result was actually a virtual certainty or not.

Exam warning

Despite the fact there is an objective element, virtual certainty is, overall, a subjective test. The jury must conclude that D foresaw the prohibited consequence as a virtually certain result of his actions. Do not allow an MCQ to trick you into thinking that D is not required to foresee the result as being virtually certain (see **Practice example 1.3**).

Practice example 1.3

Barbara has planted a bomb in her local supermarket as they had recently fired her son from his Saturday job. Her aim is to cause the supermarket to lose revenue by forcing its closure. She calls in a warning an hour before the bomb is timed to explode, but the bomb explodes early, killing a police officer. Barbara is charged with murder and the judge directs the jury that as it was virtually certain the bomb would cause death or serious injury, they are bound to find that Barbara had the necessary intention.

Has the judge correctly directed the jury?

The direction that must be given is that from *Woollin* (above) and the judge has not given the jury that direction, nor has he made clear that it is a decision for them to reach on the facts. As Barbara called in a timely warning, it would be difficult to conclude that she had the necessary intention as she anticipated that the shop would be empty when the bomb exploded.

Exam warning

Importantly, foresight of a virtually certain result is *not* equivalent to intention; such foresight is only *evidence* of an intention. This means that the jury are not bound to find that D intended a result that was virtually certain. An MCQ may suggest that foresight of a virtually certain result means that the jury *must* find that D intended that result. Do not allow yourself to be confused by this.

Subjective recklessness

Recklessness is concerned with unjustifiable risk-taking and is satisfied where the jury can be sure of two things (see **Figure 1.4**).

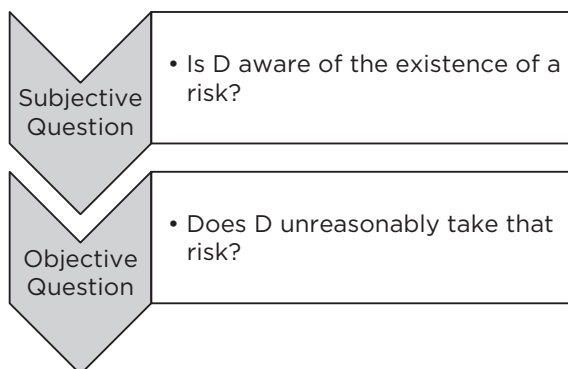


Figure 1.4: Subjective recklessness

Awareness of a risk

To amount to subjective recklessness, the risk must be seen by the defendant; if he does not foresee the risk, he cannot be reckless. This is the case even where that risk would have been evident to the reasonable prudent person.

The defendant's characteristics are taken into account in assessing whether he had appreciated the risk. This will include his age, mental state, the situation in which he finds himself and any other relevant factors (see **Practice example 1.4**).

Practice example 1.4

A man suffering from schizophrenia is looking for somewhere warm to sleep and settles in a haystack. As it is cold, he lights a fire in the haystack. The fire spreads and causes substantial damage. He is charged with arson (see **Chapter 9**). The trial judge directed the jury that they could convict him of this offence (which requires D to have intentionally or recklessly destroyed or damaged property), even if he had not recognised there was a risk of damage or had closed his mind to that risk.

Has the judge correctly directed the jury?

These are the facts of *R v Stephenson* [1979] QB 695. The Court of Appeal quashed the conviction as the test should have been given as a purely subjective one. D's schizophrenia may have prevented him from recognising the risk and, to be reckless, D *must* appreciate the risk.

Exam warning

An MCQ may speak about the fact that D 'should have' or 'ought to have' known of the existence of a risk. This is an incorrect statement of law; you should be focusing your attention on words that import a subjective test (eg where D 'knew' or 'knows'). Pay close attention to wording like this.

Unjustifiable taking of the risk

The risk the defendant is taking must be an unjustifiable risk. It must be unreasonable to run the risk of the harmful consequence.

Whether a risk is unjustifiable is an objective question. Many everyday activities we engage in involve a risk of damaging persons or property (eg driving a car, hitting a hard cricket ball in a garden or walking a dog). Whether a risk is unjustifiable is a question for the court and they will take into account the social utility of the activity. For example, overtaking someone at speed on a road may be unjustifiable if you are rushing to meet a friend, but may be justifiable if you are driving your spouse to hospital as they have been injured.

Negligence

Negligence is a failure by the defendant to act in conformity with an objective standard. Unlike intention and recklessness, the focus is not upon the defendant's actual state of mind at the time the actus reus is satisfied. The factfinders will instead be directed to consider how a reasonable person would have acted in those circumstances and whether the defendant's behaviour falls short of that objective standard.

Revision tip

For the purposes of SQE1, negligence is relevant only to the offence of gross negligence manslaughter and is discussed in **Chapter 5**.

Summary: what do we know about mens rea?

What is intention?	Intention can either be direct or oblique. Direct intention is where it is your aim or purpose to bring about the prohibited consequence. Oblique intention is where the result is a virtually certain one and D foresees that result as virtually certain.
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What is recklessness?	Recklessness is seeing a risk and going on to take it. It must be an unjustifiable risk and the focus is on whether D saw that risk. As a subjective test, D's characteristics must be taken into account in deciding whether they saw that risk.
What is negligence?	Here we are concerned with the conduct of the accused and whether it fails to meet the standards of the reasonable person.

COINCIDENCE OF ACTUS REUS AND MENS REA

For the defendant to be liable, the prosecution must establish that the relevant actus reus and mens rea elements of the offence coincide. For example, Mark hates Sam and wishes she was dead. He has devised a plan to kill her but, before he gets a chance to execute his plan, he accidentally runs Sam over with his car. Sam had stepped out in front of the car and Mark had not seen her. Mark may have intended to kill, but that mens rea element did not coincide with the prohibited consequence. Therefore, there can be no liability for homicide. Mark's guilty thoughts will not make him liable in this situation due to the lack of contemporaneity.

There are situations where it is in the interests of justice to find that the defendant has the actus reus and mens rea for the offence alleged even though these elements do not exist at precisely the same moment. These are set out in **Table 1.3** (overleaf).

TRANSFERRED MALICE

Where the defendant fulfils the actus reus of an offence, for example, Mark intends to kill Sam by shooting her, but Mark misses and shoots Adam, we can still find liability for murder through the doctrine of **transferred malice**. Here the mens rea (an intention to kill) is transferred from Sam to create liability for the killing of Adam.

Key term: transferred malice

Transferred malice is a legal doctrine that allows for a transfer of mens rea when an offence targeted at a particular individual or piece of property results in injury/damage to a different person or piece of property.

Table 1.3: Contemporaneity in criminal law

Principle	Explanation and examples
Continuing act	Where the actus reus can be satisfied by a continuing act it is sufficient that D has the mens rea at some point while that act is continuing. For example, in <i>Fagan v Metropolitan Police Commissioner</i> [1969] 1 QB 439, D drove on to a police officer's foot accidentally. When the officer told him to move the car, he refused. It was held that he was liable for a battery (see Chapter 6). Although D did not initially have mens rea when he applied force, he did when he failed to move the car.
A series of acts	An offence may be committed through a series of acts and D may not have the prescribed mens rea when committing each act. Where this is the case, it is sufficient that D has the mens rea at some point during that series of acts. For example, in <i>Thabo Meli v R</i> [1954] 1 All ER 373, V was struck numerous times by several men who intended to kill him. When they thought he was dead, his body was rolled over a cliff edge to make his death appear accidental. In fact, he was not dead and later died from exposure. The men had the mens rea for murder at the time of the beating, but the actus reus was not complete (the killing). When they rolled his body off the cliff this had resulted in his death, but they did not intend to kill as they thought he was already dead. Please note this must be a series of acts/events – not a series of unconnected events.

There are two limitations to the doctrine of transferred malice:

- The defendant's mens rea can only be transferred when it is for the same offence. If Mark had shot at Sam and missed, but his bullet had broken a window, the mens rea could not be transferred to criminal damage.
- There can be no double or general transfer of mens rea. Where a man stabs a woman intending to kill her, but also injures a foetus she is

carrying, who is later born alive but then dies from their injuries, the mens rea for murder cannot be transferred.

STRICT LIABILITY

There are some offences for which the prosecution is not required to prove mens rea for one or more elements of the actus reus. These include driving offences such as speeding and driving without insurance. Where no mens rea is required *at all*, the offence is termed one of 'absolute liability' – these are usually less serious regulatory offences.

There is a presumption in criminal law that mens rea is always required. Consequently, if the mens rea is not stated, the court may read (ie infer) a required state of mind into the offence. The wording may make it entirely clear that the offence is one of strict liability. If it does not, consider:

- Where the offence seeks to promote public safety (eg driving and environmental offences), it is more likely to be one of strict liability.
- If the offence targets a group of people obliged to act carefully in order to protect the public from harms arising from tainted food, the sale of drugs and alcohol or are those engaged in industrial activities that pose a danger, then the courts are more likely to find an offence is one of strict liability.
- If the offence will have the effect of encouraging compliance with the law (eg selling lottery tickets to underage persons), it is more likely to be a strict liability offence.

■ KEY POINT CHECKLIST

This chapter has covered the following key knowledge points. You can use these to structure your revision, ensuring you recall the key details for each point, as covered in this chapter.

- Actus reus and mens rea are the building blocks of criminal liability. Both must be proven to the criminal standard for the defendant to be criminally liable.
- Offences can be committed by a failure to act but only where they are capable of being committed by omission and D is under a duty to act.
- For result offences, the defendant must have caused the prohibited result. There are two tests for causation (the factual and the legal test) and both must be satisfied for liability to attach.

- The requisite mens rea must be satisfied for the elements of the actus reus, and the actus reus and mens rea must coincide.
- Intention may be either direct or oblique. Direct intention is where it is the defendant's aim or purpose to bring about the result. Intention may alternatively be found through a direction asking whether the consequence was a virtually certain one and the defendant appreciated such.
- Recklessness is subjective and is where the defendant takes an unjustifiable risk and is aware of that risk.
- Negligence is objective and looks to whether the defendant's conduct falls short of the standard expected by the reasonable person.
- Offences may be strict liability, requiring no mens rea for one or more elements of the actus reus.

■ KEY TERMS AND CONCEPTS

- actus reus (**page 3**)
- mens rea (**page 3**)
- causation (**page 3**)
- direct intention (**page 12**)
- oblique intention (**page 12**)
- transferred malice (**page 17**)

■ SQE1-STYLE QUESTIONS

QUESTION 1

A man stabs a love rival in the stomach and the victim is taken to the hospital. At the hospital, the victim is given antibiotics to prevent infection. Unbeknown to the medical staff, he is allergic to the antibiotics and he swiftly dies. The man is charged with murder.

Has the medical treatment broken the chain of causation?

- A. Yes, the medical team have acted negligently, and this breaks the chain of causation.
- B. Yes, the treatment was palpably wrong, and this broke the chain of causation.
- C. No, the chain of causation has actually been broken by the unanticipated vulnerability of the victim.

- D. No, you must take your victim as you find them, and this includes undiagnosed conditions.
- E. Yes, this was a voluntary act by the medical staff that breaks the chain of causation.

QUESTION 2

A man is playing with a shotgun that he has discovered at his friend's farmhouse. That evening, the man and his friend get into an argument and he points the gun at his friend's legs, telling him, 'If you don't shut up, I'll blow off your kneecaps.' The argument continues and the man points the gun near his friend and pulls the trigger. The bullet enters his chest and the friend dies immediately. The man says he was simply trying to scare his friend into shutting up. The man is charged with murder and the judge directs the jury that if death or serious injury was a highly probable result of the man's actions, and he appreciated such, then the jury can find he had the necessary intent.

Is the judge's direction correct?

- A. Yes, as the direction has been given as an evidential one.
- B. Yes, as the jury have been asked to consider whether they thought the result highly probable and then whether the man thought it highly probable.
- C. No, the judge should have given the direction as a legal test, that if the jury found the result was highly probable and the man appreciated this that they must find intent.
- D. No, the judge has used incorrect terminology. The direction should have been given in terms of virtual certainty.
- E. No, the judge has used incorrect terminology. The direction should have been given in terms of virtual certainty and as a legal test.

QUESTION 3

A woman works as a community nurse and one of her clients is an elderly lady. One afternoon, the woman goes on a scheduled visit to her elderly client's house but gets to the house an hour later than arranged. When no one answers the door, she peers through the window and sees her client laying on the kitchen floor. She decides not to do anything as calling the authorities would alert her employers to the fact that she was late. It is later established that her client had fallen and had died later that day of an embolism.

Was the woman under a duty to act?

- A. Yes, all persons are under a duty to act to prevent harm from occurring to others.
- B. No, as the woman had not created a dangerous situation, she was not under a duty to act.
- C. Yes, as the visiting community nurse, the woman had an obligation to discharge her contractual duty.
- D. Yes, by virtue of their close relationship, the woman was under a duty to act.
- E. No, only immediate relatives are under a duty to act.

QUESTION 4

A woman has a grudge against a co-worker who she is sure has been stealing her lunch from the office fridge. One afternoon she sees her co-worker sitting at his desk eating a yogurt that she had just discovered was missing. Losing her temper, she threw down the stapler she was holding. It bounced off her desk and hit her supervisor in the leg. The woman has been charged with battery. It was accepted she did not intend to apply force to her supervisor, but she is convicted of battery as the magistrates concluded a reasonable person would have seen a risk of force being applied and it does not matter that the woman may not have done.

Did the magistrates approach recklessness correctly?

- A. Yes, it would have been obvious to the reasonable person that there was a risk of the stapler hitting someone.
- B. No, this was a justifiable risk.
- C. Yes, the woman chose to take that risk and the magistrates need only consider whether a reasonable person would also see the risk.
- D. No, the focus should be on whether the woman saw a risk of the prohibited result and went on to take that risk.
- E. Yes, recklessness can be approached via an objective or a subjective test.

QUESTION 5

A man is involved in a fight with a woman outside a public house. The man throws a large stone in the direction of the woman, intending

that the stone will strike the woman. The stone misses the woman and smashes a large window. The man did not intend or foresee the risk that the stone would damage the window. The man is charged with criminal damage of the window.

Is the man guilty of criminal damage?

- A. No, the man cannot be liable on the basis that he lacked intention or recklessness as to criminal damage and his intention to strike the woman cannot be transferred to the window.
- B. No, the man cannot be liable as the concept of transferred malice only applies to offences against the person.
- C. Yes, the man can be liable on the basis that his intention to strike the woman can be transferred to the window, despite the fact that he did not intend nor was he reckless as to damaging the window.
- D. Yes, the man can be liable on the basis that the reasonable person would have foreseen the risk that the window would be damaged as a result of the throwing of the stone.
- E. Yes, the man can be liable on the basis that breaking the window was a virtually certain result of his conduct and the reasonable man would have appreciated the result as being a virtual certainty.

■ ANSWERS TO QUESTIONS

Answers to 'What do you know already?' questions at the start of the chapter

- 1) The actus reus of an offence generally refers to the external elements of an offence, those that do not relate to the state of mind of the defendant (or any objective fault requirement).
- 2) Yes, but the alleged offence must be one capable of being committed by omission and the defendant must be under a duty to act.
- 3) False. It may break the chain of causation but only when it is an independent and voluntary act by the third party (and palpably bad in the case of medical treatment) or it is an act of the victim that is unreasonable in the circumstances.
- 4) The jury must be directed in line with the *Woollin* direction and be asked whether death or serious injury is a virtually certain result of the defendant's actions and whether the defendant realised such.

Answers to end-of-chapter SQE1-style questions

Question 1:

The correct answer was D. Though medical treatment can break the chain of causation it must be palpably wrong (not merely negligent, so option A is wrong) and be an independent cause of death. Here the victim had an undiagnosed vulnerability and the principle is that you must take your victim as you find them (therefore option C is incorrect). Option B is incorrect as, though the medical treatment may be classified as palpably wrong, the option ignores the application of the thin skull rule. Option E is wrong as a voluntary act is not sufficient for medical negligence to break the chain of causation.

Question 2:

The correct answer was D. The direction should have been given in terms of virtual certainty and as an evidential test. Option A is wrong because, while the test is an evidential one, the reference to 'highly probable' is wrong. Terms such as 'highly probable' or 'possible' indicate recklessness, not intention, and should not be used in directing a jury (hence options B and C are incorrect). Although there has been some debate about whether the direction is legal or evidential, it is generally accepted as an evidential test allowing juries to 'find' intention, therefore option E is incorrect.

Question 3:

The correct answer was C. We are not all placed under a duty to act (option A is therefore incorrect), but by virtue of her position as a community nurse and, specifically, as the nurse to this particular client, she was under a duty to act. Option B is wrong as it supposes that the creation of a dangerous situation is the only circumstances in which the woman could be liable. Option D is incorrect as a mere close relationship is not normally sufficient to impose a duty to act. Option E also is wrong because it, much like option B, ignores the other ways in which a duty to act may arise.

Question 4:

The correct answer was D. Recklessness is the taking of an unjustifiable risk and that is an objective question, but that is not the crux of subjective recklessness (so options A, B and C are incorrect). The magistrates should have considered whether the woman actually saw the risk. There is no discretion here (so option E is incorrect), it must be approached in terms of subjectivity.

Question 5:

The correct answer was A. This was because the man's malice against the woman cannot be transferred to the window (therefore

option C is incorrect). Options D and E are incorrect as they suggest the test for both recklessness and virtual certainty is an objective one, asking what the reasonable man would have foreseen. Option B is incorrect as transferred malice is a general principle and is not restricted to offences against the person.

■ KEY CASES, RULES, STATUTES AND INSTRUMENTS

The SQE1 Assessment Specification does not require you to know any case names, or statutory materials, for the topic of actus reus and mens rea.