Introduction

The traditional starting point for the study of criminal law is the constituents of a criminal offence: actus reus (often referred to as the prohibited conduct, but more accurately described as the external elements of the offence) and mens rea (often referred to as the mental element, but more accurately described as the fault element). Commentators and students alike want to find consistency and certainty in the application and development of the criminal law, and most criminal law textbooks dealing with the elements of crimes try to state principles that the student should see consistently applied in later chapters covering specific offences. The main problem is that the offences have developed in a piecemeal fashion, exhibiting no underlying rationale or common approach. Thus in examining actus reus, the student might be covering an offence defined in modern terms, e.g., by the Criminal Damage Act 1971, or in obscure outdated language, e.g., in the Offences Against the Person Act 1861, or the definition of actus reus may arise from the common law, perhaps amended or augmented by statute, e.g., murder.

Similarly, when we examine our approach to mens rea, we can see little common ground. If the offence requires the prosecution to prove intention, this must generally be left to the jury without detailed guidance from the trial judge (R v Moloney [1985] 1 All ER 1025); but if recklessness is the issue, a direction spelling out to the jury what they must find may be required. If one looks at the development of the concept of recklessness one can see that, prior to the decision of the House of Lords in R v G [2003] 4 All ER 765, a case involving criminal damage would have involved a court in trying to assess whether the defendant was reckless according to the definition laid down in Metropolitan Police Commissioner v Caldwell [1981] 1 All ER 961. Following the abandonment of ‘Caldwell recklessness’ in R v G [2003] 4 All ER 765, the issue has been simplified so that a court now has to concentrate on whether or not the defendant was aware of the risk in question and if so, whether or not, in the circumstances known to the defendant, it was unreasonable for him to take the risk.
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If dishonesty is the mens rea (see Theft Acts 1968–1996) the jury must consider two specific questions (would ordinary people consider D dishonest?; if so, did D realize that they would?); but these are questions of fact for them to resolve (R v Ghosh [1982] 2 All ER 689). In other words, there are three different approaches in establishing the mens rea for different offences. A search for consistency is therefore a futile exercise!

Students should therefore be aware that studying the chapters on actus reus and mens rea can produce a distorted impression of the criminal law. One is dealing with concepts in isolation and could form the impression that these general principles are consistently applied.

One particular criticism is that the criminal law is not consistent in applying objective or subjective tests for liability. Objective tests consider what the reasonable person would have foreseen. Subjective tests judge the defendant on the facts as he honestly believed them to be. There appears to be an absence of any underlying rationale and the offences develop independently of each other. One can understand why Sir Henry Brooke (former head of the Law Commission) and many others wish for codification of some, if not all, of the criminal law (see [1995] Crim LR 911—‘The Law Commission and Criminal Law Reform’).

Even established concepts that have been applied by the courts for many years, may suddenly come under attack and be interpreted differently by the judiciary. Thus the House of Lords in Attorney-General’s Reference (No. 3 of 1994) [1997] 3 All ER 936, reversed the Court of Appeal decision ([1996] 2 WLR 412), holding that the doctrine of transferred malice could not apply to convict an accused of murder when he deliberately injured a pregnant woman in circumstances where the baby was born alive but subsequently died. Lord Mustill criticized the doctrine as having no sound intellectual basis and involving a fiction, although the Criminal Law Review disagrees with his view ([1997] Crim LR 830).

In this chapter questions have been chosen to cover all major aspects of this area. There are some problem questions, but candidates should expect the essay questions in an exam to be selected from these topics. Essays are therefore included on the important aspects of mens rea: intention and recklessness.

**Question 1**

The practice of leaving the issue of intention to the jury without any judicial guidance as to its meaning is unworkable and likely to produce inconsistent decisions.

Discuss this statement with reference to decided cases.

**Commentary**

There have been so many important decisions on this important aspect of criminal law, that it is always likely to be the subject of an examination question.
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Because the facts of *R v Moloney* [1985] 1 All ER 1025 are so well known, there is a temptation simply to regurgitate them with the House of Lords’ decisions. This must be resisted as there are many ingredients in the answer, which requires careful planning and organization.

In summary, this is a question where it is quite easy to obtain a pass mark but difficult to obtain a high grade.

**Answer plan**

- *Mens rea*
  - Intention—definition
  - *Moloney* [1985]—‘the golden rule’
  - *Woollin* [1998]—direction on intention
  - Law Commission No. 218

**Suggested answer**

Except with strict (or absolute) liability offences, in order for an accused to be found guilty of a criminal offence, the prosecution must prove that the accused committed the *actus reus* of the offence with the appropriate mens rea. *Mens rea* generally signifies blameworthiness, although in *R v Kingston* [1994] 3 All ER 353, the House of Lords confirmed that the accused was guilty of an offence requiring the prosecution to prove intention, although he was morally blameless. *Mens rea* is the mental element, which varies from one offence to another; but generally, for the more serious offences, it comprises intention or recklessness, with intention being reserved for the most serious crimes.

One would therefore think that, being of such fundamental importance, intention would be specifically defined and rigidly applied, but this is not the case. There have always been difficulties with the concept of intention within the criminal law. What is it? How should it be defined? How do the prosecution prove it? How does the trial judge direct the jury? These issues have been the subject of much judicial and academic debate in recent years.

Although the word ‘intention’ implies purpose or even desire, there have been many diverse definitions by the judiciary, and commentators have also identified different types of intention. First, direct intent, where it was the accused’s purpose or motive to bring about a result. Thus in *R v Steane* [1947] 1 All ER 813, the accused, who assisted the enemy during the war, had his conviction quashed as the court decided that he did not intend to assist the enemy; he intended to protect his family, who would have been harmed had he not cooperated. Secondly, oblique intent, where the accused does not necessarily desire the result but foresees it as highly probable. Thus in *Hyam v DPP* [1974] 2 All ER 41, the House of Lords upheld a conviction for murder where the
accused had set fire to the victim’s house even though the accused’s purpose had been only to frighten the victim. Because there was evidence that the accused foresaw that death or grievous bodily harm was highly probable the House of Lords felt justified in concluding that her state of mind could be regarded as a form of intent (on this matter the law is now as set out in *R v Woollin* [1998] 4 All ER 103—see below). Thirdly, ulterior intent, where it must be shown that in intentionally doing one act the accused has a related purpose. Thus to be guilty of burglary under s. 9(1)(a) of the Theft Act 1968, it is necessary for the prosecution to prove that the accused, when deliberately entering a building as a trespasser, did so with a specific related purpose in mind, e.g., to steal or commit criminal damage. It would not be sufficient if the accused intentionally broke into the house with the sole purpose of sheltering from the weather. The terms specific and basic intent, are also used in respect of the defence of intoxication to distinguish between those offences where intoxication is permitted as a defence and those where it is not (see further *DPP v Majewski* [1976] 2 All ER 142).

Although there is an overlap between intention on the one hand and motive and foresight on the other, and these latter concepts assist the jury in their deliberations on intention, it is clear that the concepts are not synonymous. Motive is the reason why a person acts, while intention is his or her mental awareness at the time of the act. Foresight can be evidence of intention, but it is not conclusive proof of it. Section 8 of the Criminal Justice Act 1967 states that a court shall not be bound in law to infer that the accused intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions, but ‘shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances’.

The issue of intention was debated by the House of Lords in *R v Moloney* [1985] 1 All ER 1025 and *R v Hancock and Shankland* [1986] 1 All ER 641. In the former case, Moloney shot his stepfather from point blank range and was convicted of murder after the trial judge (following *Archbold Criminal Pleading Evidence and Practice*, 40th edn, para. 17–13, p. 995) directed the jury that:

In law a man intends the consequence of his voluntary act:

(a) when he desires it to happen, whether or not he foresees that it probably will happen, or

(b) when he foresees that it will probably happen, whether he desires it or not.

The House of Lords quashed the conviction on the basis that this was a misdirection, Lord Bridge stating that:

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

Although the decision may be criticized on the ground that their Lordships missed a golden opportunity to define intention, it is in keeping with the modern trend of leaving more and more issues to the jury, especially the meaning of words in common use. For example, Brutus v Cozens [1972] 2 All ER 1297 (insulting); R v Feely [1973] 1 All ER 341 (dishonestly).

This decision was followed by the House of Lords’ ruling in R v Hancock and Shankland, where Lord Scarman also made the point that if intention required a detailed direction it was best to leave this to the discretion of the trial judge who would have had the benefit of hearing all the witnesses and gauging the ability of the jury. He added that the trial judge could not do as Lord Bridge suggested and simply direct the jury to consider two questions: first, was death or really serious injury in a murder case a natural consequence of the defendant’s voluntary act?; secondly, did the defendant foresee that consequence as being a natural consequence of his act?—further instructing them that if they answer ‘Yes’ to both questions it is a proper inference for them to draw that the accused intended that consequence. Lord Scarman stated that the trial judge must refer to the concept of probability—the more probable the consequence, the more likely the accused foresaw it and intended it.

Despite clear House of Lords’ dicta to the contrary, the Court of Appeal in R v Nedrick [1986] 3 All ER 1 did lay down some guidelines to the effect that the jury should not infer intention unless they considered that the accused foresaw the consequence as a virtual certainty. However, this decision has attracted criticism, and the Court of Appeal in R v Walker and Hayles [1989] 90 Cr App R 226 stated ‘we are not persuaded that it is only when death is a virtual certainty that the jury can infer intention to kill’.

Nevertheless, the status of Nedrick was confirmed by the House of Lords’ discussion in R v Woollin [1998] 4 All ER 103. The House, stating that where the simple direction was not enough, the jury should be further directed that they were not entitled to find the necessary intention unless they felt sure that death or serious bodily harm was a virtually certain result of D’s action (barring some unforeseen intervention) and, that D had appreciated that fact.

This decision also illustrates one of the difficulties of the present approach, i.e., when is the issue of intention so complicated as to warrant a detailed direction? In R v Walker and Hayles, the Court of Appeal decided that ‘the mere fact that a jury calls for a further direction on intention does not of itself make it a rare and exceptional case requiring a foresight direction’. On the other hand, in R v Hancock and Shankland, the House of Lords confirmed that the trial judge was right to give a detailed direction, even though the content of the direction was wrong.

A further problem is that different juries may have different ideas as to what constitutes intention, some insisting on purpose being necessary, while others are prepared to accept that only foresight of a probable consequence is required. There is clearly the
risk of inconsistent decisions and it is therefore not surprising that the Law Commission (Nos 122 and 218) have recommended that the following standard definition of intention be adopted:

a person acts intentionally with respect to a result when

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

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

Question 2

‘Mens rea is, by definition, the defendant’s state of mind.’

Discuss the accuracy of this statement using case law to support your argument.

Commentary

This question requires examination of some of the assumptions made about mens rea and the current trends in judicial thinking. Candidates would be expected to consider the main forms of mens rea and the extent to which courts are required to take an objective or subjective view of fault. Although ‘Caldwell recklessness’ has now been effectively consigned to legal history (for the time being at least) a good answer will need to show an awareness of that decision and its impact on the mens rea debate. Consideration also needs to be given to the issue of mistake and its relationship with mens rea. Finally, the answer should encompass some consideration of negligence as a form of mens rea and the extent to which its use accords with notions of subjective fault.

Answer plan

- The nature of mens rea
- Intention—R v Woollin—House of Lords’ decision
- The recklessness debate R v G [2003]—abandoning Caldwell
- The treatment of mistake and its effect on mens rea—DPP v Morgan [1976]
- Killing by gross negligence—whether objective or subjective
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**Suggested answer**

Although *mens rea* translates literally as ‘guilty mind’, relying on this as the meaning given to that term in modern criminal law is likely to lead to error. This is because a defendant may be found to have *mens rea* even though he himself has not acted with the intention of committing an offence, or even with the awareness that this might be the result. The better approach is to regard *mens rea* as denoting the fault element that the prosecution has to prove. In the majority of cases this will involve proof of some positive state of mind on the part of the accused, but in other cases it may be enough to show that the accused failed to advert to something that would have been obvious to the reasonable person.

The two most important fault elements used in modern criminal law are intention and recklessness. It can now be said that, as far as these two forms of *mens rea* are concerned, liability cannot be established without evidence as to what the defendant foresaw when he committed the acts causing the prohibited results. Exactly what it is that the defendant has to have foreseen, and how much foresight he must be shown to have had, are questions that go to the core of the debate relating to where the dividing line between different types of subjective *mens rea* should be drawn.

The modern definition of intention can be derived from a number of House of Lords’ decisions, notably *R v Moloney* [1985] 1 All ER 1025 and *R v Woollin* [1998] 4 All ER 103. A defendant cannot be guilty of murder unless he is proved to have acted with intent to kill or do grievous bodily harm. Where a direction on intent is deemed necessary, a jury should be instructed that they should consider the extent to which the defendant foresaw death or grievous bodily harm resulting from his actions. Only where there is evidence that he foresaw either consequence as virtually certain would it be safe for a jury to conclude that a defendant therefore intended either of those consequences. The key here is foresight. Section 8 of the *Criminal Justice Act 1967* makes clear that foresight is a subjective concept—i.e., it is based on what the defendant actually foresaw—not on what he ought to have foreseen, or indeed what the reasonable person would have foreseen had he been in the defendant’s shoes. Taken together, the definition of foresight in the 1967 Act, and the House of Lords’ ruling in *Woollin* ensure that where intention is the required *mens rea*, there can be no doubt that it will be based on the defendant’s state of mind—i.e., a subjective approach will be adopted.

The rationale for this is fairly obvious—it is hard to describe a defendant as having intended a consequence if there is no evidence of it having occurred to him. Even where there is such evidence, if the possibility of the consequence occurring has only fleetingly crossed his mind it would still be absurd to say he intended it. The law, therefore, requires a very high degree of foresight before a defendant’s state of mind is labelled as having been intentional.

Recklessness, by contrast, implies risk taking, as opposed to the defendant foreseeing a consequence as a certainty. Here there has been great controversy over the past few
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decades as to the right approach to the determination of fault. The traditional approach to recklessness as a form of mens rea very much reflected the view that mens rea had to be based on the defendant’s state of mind. In *R v Cunningham* [1957] 2 All ER 412, the Court of Appeal held that a defendant was reckless only if he took an unjustifiable risk and was at least aware of the risk materializing. The key point about this approach to recklessness was that there would be no liability if the risk never occurred to the defendant.

Subsequently, during the 1980s a contrary view held sway, following the House of Lords’ decision in *Metropolitan Police Commissioner v Caldwell* [1981] 1 All ER 961. D’s conviction for criminal damage being reckless as to whether life would be endangered, contrary to s. 1(1) of the *Criminal Damage Act 1971*, was upheld on the basis that he had created an obvious risk that property would be destroyed or damaged; and had either given no thought to the possibility of there being any such risk, or had recognized that there was some risk involved and had nevertheless gone on to do it. The ‘not thinking’ formulation of recklessness here, clearly envisaged liability being imposed even though the risk in question had not occurred to the defendant. Whilst this might have been a desirable policy goal—it made it easier for the prosecution to secure convictions—it threw up many difficult issues.

First, what of the defendant who did not think of the risk because it would not have occurred to him even if he had stopped to think? In *Elliot v C (A Minor)* [1983] 2 All ER 1005, a 14-year-old schoolgirl of low intelligence, who was tired and hungry, spilt some inflammable spirit and then dropped a lighted match on the wooden floor of a garden shed. She was charged under s. 1(1) of the *Criminal Damage Act 1971*. It was argued that she did not foresee the risk of fire, nor would she had she addressed her mind to the possible consequences of her action. Although Goff LJ stated that a test for recklessness which allowed the court to take into account the individual characteristics of the accused had much merit (a subjective approach), he felt bound by the doctrine of precedent (at that time) to follow *Caldwell*, and therefore concluded that the defendant should have convicted on the objective test basis, i.e., whether the risk would have been obvious to a reasonable man.

Secondly, there was the argument that ‘Caldwell recklessness’ was not acceptable as a form of mens rea because it was not based on the defendant’s state of mind. In *R v Reid* [1992] 3 All ER 673, Lord Keith observed by way of response that: ‘Absence of something from a person’s state of mind is as much part of his state of mind as is its presence. Inadvertence to risk is no less a subjective state of mind than is disregard of a recognised risk.’ What he meant by this was that even with ‘Caldwell recklessness’, the court had to consider the defendant’s state of mind. But, it is submitted, this is a piece of judicial sophistry, as all that was required was for the court to examine the defendant’s state of mind and, on finding ‘no thought’, conclude that he had been reckless provided the risk would have been obvious to the reasonable prudent bystander.

Whilst many might have applauded Lord Diplock’s efforts to penalize thoughtlessness in terms of a social policy initiative, the real question was whether he was right to
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pursue this via a radical judicial reinterpretation of the term ‘recklessness’. It is significant that Parliament intervened shortly after *Caldwell* to reform the offence of reckless driving (and therefore causing death by reckless driving) by replacing it with the offence of dangerous driving—see the *Road Traffic Act 1991*. The effect of this was to make clear that the offence could now be committed without any form of *mens rea* that required reference to the defendant’s state of mind. Recklessness was replaced, as a fault element, by the term ‘dangerous’. Whilst it could and was argued that recklessness implied some conscious risk-taking by the accused, there was no doubt that ‘dangerousness’ as a fault element rested entirely upon an objective assessment of the defendant’s conduct. In other words a defendant could drive dangerously because he had a badly secured load on the back of his trailer—there was no need for him to be aware of this. In summary this suggests that Parliament liked the idea of criminal liability based on failure to think about risk, but was not comfortable with the idea that ‘traditional’ *mens rea* terms like ‘recklessness’ might be used to describe it.

As far as recklessness is concerned the subjectivist argument has found favour again, as evidenced by the House of Lords’ decision in *R v G* [*2003*] 4 All ER 765, where it was held that a defendant could not be properly convicted under s. 1 of the *Criminal Damage Act 1971* on the basis that he was reckless as to whether property was destroyed or damaged when he gave no thought to the risk and, by reason of his age and/or personal characteristics, the risk would not have been obvious to him, even if he had thought about it. Lord Bingham observed that recklessness should at least require a knowing disregard of an appreciated and unacceptable risk of, or a deliberate closing of the mind to, such risk. In his view it was not clearly blameworthy to do something involving a risk of injury to another if one genuinely did not perceive the risk.

*R v G* reflects a general judicial trend in favour of subjectivity, as evidenced in decisions such as *B v DPP* [*2000*] 1 All ER 833. Indeed, the high watermark of this approach to fault was the House of Lords’ decision in *DPP v Morgan* [*1976*] AC 182, where it was held that if a defendant made a genuine mistake of fact—such as wrongly believing that a woman was consenting to sexual intercourse, he had to be judged on the facts as he believed them to be, not as the reasonable person would have believed them to be. Lord Hailsham made it clear that there was no room either for a ‘defence’ of honest belief or mistake, or of a defence of honest and reasonable belief or mistake. The reasonableness of the defendant’s honest belief was simply a factor relating to its credibility. The mental element in the offence of rape has now been modified by the *Sexual Offences Act 2003*, so that rape is effectively now an offence with a fault element based on negligence. The rationale of *DPP v Morgan* survives, however, at common law to the extent that a defendant should normally be judged on the facts as he honestly believes them to be.

As has been noted above in the case of dangerous driving, fault elements that do not require reference to the defendant’s state of mind are used. At common law this can be seen in the offence of killing by gross negligence. In *R v Adomako* [*1994*] 3 WLR 288, Lord Mackay LC explained that liability would be established if the prosecution could prove that the defendant’s conduct departed from the proper standard of care incumbent
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upon him, thereby creating a risk of death, and involved such a departure from acceptable standards of care as to deserve the stigma of criminalization. As was made clear in Attorney-General’s Reference (No. 2 of 1999) [2000] 3 All ER 182, evidence of the defendant’s state of mind might be useful in guiding a jury as to whether or not the negligence was gross, but this fault element can be made out without any direct evidence as to the defendant’s state of mind. Whilst this may seem to run counter to the trend in favour of subjectivity it should be remembered that it serves a useful social purpose in making it easier to impose criminal liability on companies that kill.

In summary, therefore, it is undoubtedly true to say that mens rea normally does involve an examination of the defendant’s state of mind to ascertain a degree of awareness of the consequences of his actions. The law will, however, allow departures from this where the social utility of doing so outweighs the need to ensure the fairness to the defendant that ensues from adopting a subjective approach to fault.

Question 3

You are told that the (fictional) Ancient Book Act 2009 has just received the Royal Assent and that s. 1 provides, ‘It shall be an offence to destroy any book printed before 1800’.

Discuss the criminal liability of each party (in relation to the 2009 Act) in the following situation.

Arthur owns 200 books, which he thinks are worthless. He is concerned in case any of the books were printed before 1800 and consults Ben, an expert on old books, who assures him that all the books were printed long after 1800. Arthur destroys the books and is now horrified to discover that three of them were printed in 1750.

Commentary

This is an unusual question which has caused students difficulties, with many writing about the offence of criminal damage. This is a mistake as the question requires a detailed analysis of the mens rea requirement of the Ancient Book Act 2009, and in particular analysis of the concept of strict liability.

In a survey by Justice referred to in an article by A. Ashworth and M. Blake, ‘The Presumption of Innocence in English Criminal Law’ [1996] Crim LR 306, it is estimated that in over one half of criminal offences either strict liability is imposed, or the prosecution have the benefit of a presumption. It is obviously an important topic, and popular with examiners!

A good answer will require a detailed consideration of the possibility of this offence being one of strict liability and the effect of this. Candidates should also consider the position if the courts decide that intention or recklessness is the appropriate mental state.
The first point to note is that s. 1 of the Ancient Book Act 2009 is silent as to the mens rea requirement of the offence. This could mean that the offence is one of absolute liability (i.e., strict liability in the sense that no mens rea whatsoever is required). Alternatively it could be a strict liability offence in the sense that intention, recklessness or negligence is only required as regards one or more elements of the actus reus. The imposition of absolute liability may be very harsh on the defendant. For example, in *Pharmaceutical Society of Great Britain v Storkwain* [1986] 2 All ER 635, the House of Lords upheld the conviction of a pharmacist who had given drugs to a patient with a forged doctor’s prescription, although the court found the pharmacist blameless. Whilst the decision demonstrates the inherent unfairness of strict liability, it can be justified on the basis that the misuse of drugs is a grave social evil and therefore should be prevented at all costs.

The first case of statutory strict liability was *R v Woodrow* (1846) 15 M & W 404, where the accused was found guilty of being in possession of adulterated tobacco, even though he did not know that it was adulterated. Many early decisions revealed an inconsistent approach as the courts were trying to interpret old statutes in ascertaining the will of Parliament. However, Lord Reid in the House of Lords’ decision in *Sweet v Parsley* [1969] 1 All ER 347 laid down the following guidelines:

(a) Wherever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, words importing mens rea must be read into the provision.

(b) It is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted.

(c) The fact that other sections of the Act expressly require mens rea is not in itself sufficient to justify a decision that a section which is silent as to mens rea creates an absolute offence. It is necessary to go outside the Act and examine all relevant circumstances in order to establish that this must have been the intention of Parliament.
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So in *Cundy v Le Coq* (1884) 13 QB 207, a publican was found guilty of selling intoxicating liquor to a drunken person under s. 13 of the Licensing Act 1872, even though the publican did not know and had no reason to know that the customer was drunk; whereas in *Sherras v De Rutzen* [1895] 1 QB 918, a publican was not guilty under s. 16(2) of the Licensing Act 1872 of serving alcohol to a police constable while on duty when the accused did not know or have reason to know that the police constable was on duty. The former case was held to be an offence of strict liability, whereas in the latter, in order to obtain a conviction, the prosecution had to prove *mens rea* on behalf of the publican, which they were unable to do.

Despite the fact that there is a presumption in favour of *mens rea* when a statute is silent, the courts have been prepared to rebut this presumption on many occasions. The leading case on this point is *Gammon v Attorney-General for Hong Kong* [1985] AC 1, where Lord Scarman set out the applicable principles. If the offence is truly criminal in character the presumption is particularly strong, but it can be displaced where the statute is concerned with an issue of social concern. Thus, in *Gammon*, as the accused’s activities involved public safety, the Privy Council were prepared to hold that the legislature intended the offence to be one of strict liability.

On analysis these principles appear inconsistent. It could be argued that all crimes by definition are grave social evils, yet if the offence is truly criminal in character, strict liability does not apply. In practice, the courts have adopted a flexible approach, but it is recognized that certain spheres of activity are always likely to attract the conclusion that this is an offence of strict liability. Thus in *R v St Margaret’s Trust Ltd* [1958] 2 All ER 289), pollution (*Alphacell Ltd v Woodward* [1972] 2 All ER 475), and dangerous drugs (*Pharmaceutical Society of Great Britain v Storkwain*, above) are traditional areas where strict liability has been imposed. However, it does seem in recent years that the category of grave social concern is expanding to encompass new social activity to include acting as a director whilst disqualified (*R v Brockley* [1994] Crim LR 671) and unauthorized possession of a dangerous dog (*R v Bezzina* [1994] 1 WLR 1057).

However, the House of Lords have again emphasized the need for the prosecution to prove *mens rea* in *B (A minor) v DPP* [2000] 1 All ER 833, where Lord Hutton stated (at p. 855), ‘the test is not whether it is a reasonable implication that the statute rules out mens rea as a constituent part of the crime—the test is whether it is a necessary implication’. Further in *R v Lambert* [2001] 3 All ER 577, the House held that although s. 28 of the *Misuse of Drugs Act 1971* required the defence to prove a defence, this only meant introduce evidence of, rather than establish a defence on the balance of probabilities.

In view of these developments, it is submitted that it would be most unlikely for s. 1 of the Ancient Book Act 2009 to be an offence of strict liability, and therefore Arthur will only be guilty if the prosecution can establish that he had the necessary *mens rea*. As Rix LJ observed in *R v M* [2009] EWCA 2615, even if the provision in question is silent as to *mens rea* and other provisions in the statute expressly require it, the presumption in
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Favour of *mens rea* will not be rebutted unless the circumstances are such as to compel such a conclusion.

If the court were to decide that the offence required the prosecution to prove intention, it is submitted that Arthur would not be convicted. He obtained the opinion of Ben, an expert and clearly did not desire or even foresee the consequence that protected books would be destroyed. Arthur has made a mistake, and even if an accused makes an unreasonable mistake, in accordance with the House of Lords’ decision in *DPP v Morgan* [1976] AC 182, he is, in the absence of any clear statutory intent to the contrary, entitled to be judged on the facts as he believed them to be.

If the court decides that the offence could be committed recklessly, it would still be very difficult for the prosecution to establish the appropriate *mens rea*. It is almost certainly the case that subjective recklessness would have to be proved—i.e., the prosecution must show that the accused foresaw the consequence and took an unjustified risk (*R v Cunningham* [1957] 2 All ER 412 and *R v G* [2003] 4 All ER 765) (although technically the latter only deals with the issue of recklessness in relation to criminal damage). As Arthur sought the opinion of an expert it is difficult to see how it could be argued that he was consciously taking an unjustified risk.

It is therefore submitted that Arthur could be guilty of the offence only if the court decides that s. 1 of the Ancient Book Act 2009 creates an offence of strict liability.

Turning to Ben’s liability, if he genuinely believed the books to be of post-1800 vintage and the courts interpret the offence as requiring at least recklessness on this issue, he could not be convicted as an accomplice as he would lack the necessary *mens rea*. If the offence were held to be one of strict or absolute liability Ben could only be convicted as an accomplice if he knew of the facts that constituted the offence—i.e. he knew the books dated from before 1800—see *Johnson v Youden* [1950] 1 KB 544.

Alternatively, if Ben knew or believed the books to date from before 1800 he could be charged with either:

(i) doing an act capable of encouraging or assisting the commission of an offence intending to encourage or assist its commission contrary to s. 44 of the Serious Crime Act 2007; or

(ii) doing an act capable of encouraging or assisting the commission of an offence believing that the offence will be committed and that his act will encourage or assist its commission contrary to s. 45 of the Serious Crime Act 2007.

The act in question would be giving advice to Arthur he knew to be wrong. The fact that Arthur, in destroying the books, might have acted without *mens rea* will not absolve Ben. If the offence under the Ancient Book Act 2009 is construed as requiring fault it will be sufficient for the prosecution to prove that Ben’s state of mind was such that, had he destroyed the books, he would have acted with the degree of fault required for the full offence; see s. 47(5)(a)(iii) of the 2007 Act. If the 2009 Act is a strict liability offence, Ben can be convicted under the Serious Crime Act 2007, provided he believed that the books dated from before 1800 or was reckless as to whether or not they did.
Question 4

Gloria, Wood’s eccentric aunt, aged 57, was invited to stay with Wood and his girlfriend Mary at their property on the coast. It was agreed that Gloria would stay for three weeks and would occupy ‘the lodge’ in the garden of the Wood’s house some 30 yards away. Gloria also agreed to pay £40 to cover the electricity she would use in the lodge.

Everything went well for two weeks, with all three sharing meals at the house. However, a change of mood then came over Gloria who decided that she no longer wanted to have meals with Wood and Mary. Gloria spent more and more time by herself at the lodge.

After 20 days of the holiday Gloria, whose physical condition had visibly deteriorated, announced that she refused to leave the lodge and was going to stay there the rest of the winter. This so enraged Wood and Mary that the next day they told her to leave immediately, which she did.

Six hours later, at 11 pm, Gloria rang their bell pleading to be let in as she was cold and hungry and had nowhere else to go. Wood and Mary refused, and during that night Gloria was taken to hospital suffering from hypothermia.

While in hospital, Gloria fell unconscious and was placed on a life support machine. After five days she was correctly diagnosed by Dr Spock as being in a persistent vegetative state with no hope of recovery. He accordingly disconnected the machine.

Discuss the criminal responsibility (if any) of Wood and Mary.

Commentary

The sensible way to tackle this question is to start with an examination of failure to act as a basis for liability. The key aspect of this will be the comparison of the given cases with earlier decisions such as *R v Instan* and *R v Stone and Dobinson*. Care must be taken to distinguish between the facts of those cases and the current problem. The facts of the question require an examination of at least three bases for liability: blood relationship, reliance, and creating a dangerous situation.

Do not fall into the trap of thinking that the discussion of omission is all that is required. Candidates must establish a causal link between the omission and the death—in fact and in law.

Finally, candidates will need to consider the most appropriate form of homicide. Candidates are advised not to waste valuable time considering murder or unlawful act manslaughter—they are clearly not relevant on the facts. In relation to killing by gross negligence, candidates need to devote some time to the issue of duty of care—note that this covers very similar ground to the discussion relating to liability for omission—but the decision in *R v Evans* is particularly helpful and relevant here. *Note:* Candidates are not required to consider the responsibility of Dr Spock.
The elements of a crime: actus reus and mens rea

**Answer plan**

- Is there a causative omission?
- Examine the bases for liability for failing to act—statutory, contractual, and common law
- Distinguish *R v Instan* and *R v Stone & Dobinson*
- Consider *R v Miller* and *R v Evans*
- Consider killing by gross negligence
- Can a duty of care be established?
- Is the degree of fault required made out on the facts?

**Suggested answer**

The first issue to be resolved is whether or not Wood and Mary can be said to have caused the death of Gloria. As there is no positive act by either of them that causes death, the court would need to investigate whether or not liability can be based on the failure of either or both of them to prevent Gloria’s death.

The question as to whether an omission, as opposed to an act, can actually cause a consequence is a moot point. Traditionally, the criminal law has always drawn a clear distinction between acts and omissions, being loath to punish the latter. Other European countries—e.g., Greece, France and Germany—do not exhibit the same reluctance, and there is dispute as to whether the English approach is correct. See in particular the different views of Professors A. Ashworth (1989) 105 LQR 424 and G. Williams (1991) 107 LQR 109. However, apart from the numerous statutes that impose a duty to act, e.g., s. 170 of the Road Traffic Act 1988, it appears that the common law will impose a duty to act only in very limited circumstances.

There can be no criminal liability imposed on Wood and Mary in respect of their failing to care for Gloria unless the prosecution can establish that they were under a positive legal duty to care for her. Such a duty can be imposed by statute, but that is clearly not the case here. Similarly a legal duty to act can arise from a contract between the parties. For example in *R v Pittwood* (1902) 19 TLR 37, where the defendant, a railway gate operator, was found guilty of manslaughter when a person was killed crossing a railway line as a result of the defendant leaving the gate open when a train was coming. In the present case it could be argued that there was a contractual relationship, in that Gloria agreed to pay for her electricity and was in occupation of the lodge, but it is hard to see how any positive duty to care for Gloria can be implied—and in any event it would be argued that the contract was only for the initial three-week period, and that it was a purely domestic arrangement not intended to give rise to legally enforceable obligations.

In respect of Wood it could be argued that he was under a common law duty to care for Gloria because she was a relative. Where the relationship is that of parent and child the common law has had little difficulty in identifying a positive legal duty of care so
that failing to act can result in liability where it causes harm; see *R v Gibbins and Proctor* (1918) 13 Cr App R 134. In *R v Instan* [1893] 1 QB 450, liability for manslaughter was imposed upon a niece who failed to care for her aunt with whom she was living, having been given money by the aunt to supply groceries. Liability in *Instan* was largely based on the existence of a blood relationship between the parties. This would seem to suggest that, at least in the case of Wood, there might be a common law duty to act. It is submitted that the present case can be distinguished from *Instan*. In *Instan* the defendant actually occupied the same house as the deceased, and had expressly undertaken the task of purchasing food for her, which she subsequently failed to do, knowing well that her aunt could not fend for herself. In the present case Gloria decided for herself that she wanted to stay in the lodge alone, thus raising the question of whether Wood was obliged to do anything more for her than he had been doing during the first two weeks of her stay. Furthermore the evidence suggests that it was refusing to readmit Gloria after she had been told to leave that led to her death—raising the question of whether Wood was under any obligation to readmit Gloria.

The much more promising argument for the prosecution is that a positive legal duty to act at common law arose in respect of both Wood and Mary because they had allowed a relationship of reliance to develop between themselves and Gloria. The key authority here is *R v Stone and Dobinson* [1977] QB 354. In that case the Court of Appeal upheld convictions for killing by gross negligence on the basis that the defendants had admitted the deceased to their house and had attempted to care for her. They then failed to discharge their duty adequately and failed to summon any assistance in discharging that duty. The court stressed that the duty to act arose not simply because of a blood relationship between one of the defendants and the deceased, but because of the reliance relationship.

It could be argued that in allowing Gloria to stay Wood and Mary allowed a relationship of reliance to develop—but the present case can be distinguished from *Stone and Dobinson* on the grounds that Wood and Mary placed a time limit on Gloria’s stay, and Gloria left of her own volition. Thus the argument as to whether or not there is any liability for failing to act is finely balanced.

The prosecution could run an alternative argument on the basis that when Gloria begs to be readmitted to the house Wood and Mary are aware that their expulsion of Gloria has created a dangerous situation. There is evidence that Gloria’s physical condition had visibly deteriorated. Gloria was cold, hungry, and had nowhere to go. There was evidence that Gloria was eccentric. Applying *R v Miller* [1983] 1 All ER 978, where the House of Lords upheld the accused’s conviction for criminal damage where he had inadvertently started a fire and then, when he realized what he had done, simply left the building without making any attempt to prevent the fire spreading or to call the fire brigade, it could be argued that by failing to offer Gloria shelter, Wood and Mary committed culpable omission that caused Gloria’s death. For the *Miller* principle to apply, the prosecution would have to show that the defendants were both aware that their expulsion of Gloria had created a dangerous situation. On the facts this should not be too difficult.
Assuming that the failure to care for Gloria, or the refusal to readmit her to the house, can form the basis of liability, the prosecution will have to show that this omission caused Gloria’s death. It is not necessary for the prosecution to prove that the omission was the sole or main cause, merely that it contributed significantly to the victim’s death (R v Cheshire [1991] 3 All ER 670). The accused could argue that the doctor’s turning off the life support system constituted a *novus actus interveniens*, breaking the chain of causation; but this argument was rejected by the House of Lords in *R v Malcherek; R v Steel* [1981] 2 All ER 422, where Lord Lane CJ stated that ‘the fact that the victim has died, despite or because of medical treatment for the initial injury given by careful and skilled medical practitioners, will not exonerate the original assailant from responsibility for the death’.

It is therefore clear that the medical treatment, of itself, will not be held to have broken the chain of causation in law.

Wood and Mary could be charged with manslaughter on the basis of killing by gross negligence, which, unlike unlawful act manslaughter, can be based on an omission; see *R v Lowe* [1973] 1 All ER 805.

The key authority regarding killing by gross negligence is the House of Lords’ ruling in *R v Adomako* [1994] 3 All ER 79, where their Lordships held that an accused would be guilty of manslaughter if the following four conditions were satisfied:

(i) the accused owed a duty of care to the victim;
(ii) that duty was broken;
(iii) the conduct of the accused was grossly negligent;
(iv) that conduct caused the victim’s death.

In some cases the existence of a duty of care will be self-evident, for example doctor and patient, parent and child etc. Notwithstanding the decision in *R v Instan*, it should not be assumed that all familial relationships will give rise to a legal duty of care, and in any event this would not assist as regards Mary. Significantly, the Court of Appeal decision in *R v Evans* [2009] EWCA Crim 650, indicates that a duty of care will be recognized by the courts in what might be referred to as ‘*R v Miller*’ situations—i.e., where the defendant has created a dangerous situation and is aware, or ought reasonably to be aware, that this is the case. Allowing Gloria’s physical condition to deteriorate and then not allowing her back into the house might provide the evidential basis for this.

The trial judge in the present case should direct that they can conclude that a duty of care existed provided they find certain facts established—and the trial judge should make clear to the jury what those key facts are. It is submitted that there is sufficient evidence for the jury to conclude that a duty of care existed.

The breach of the duty of care is evident in their not helping Gloria and not attempting to obtain any alternative assistance for her—they did not even call the police to
The elements of a crime: \textit{actus reus} and \textit{mens rea}

\section*{Commentary}

Occasionally an exam will contain a question that requires candidates to take a wider view of the criminal law. This is such a question. Candidates cannot simply home in on a specific area and cover it in detail. Candidates must try to think of instances throughout the syllabus that can be used in your arguments to answer the question. Avoid the common mistake of interpreting the question to read ‘Choose one area of the criminal law where there are difficulties and write all about them’! This question has been included as it enables candidates to think more widely about the role of the criminal law within the legal system and society as a whole. Providing a good answer requires the ability to take a broad view of the syllabus—something candidates who revise topics in isolation are not always able to do.

advise them of the problem. The issue of whether this breach of the duty of care can be said to have caused the death of Gloria has already been considered above.

The remaining live issue, therefore, is that of gross negligence. Following the House of Lords’ decision in \textit{R v Adomako} the jury will have to determine whether or not the accused’s conduct:

(a) departed from the proper standard of care incumbent upon them;
(b) involved a risk of death to the victim;
(c) was so grossly negligent that it ought to be regarded as criminal.

As later cases such as \textit{R v Mark and another [2004] All ER (D) 35 (Oct)} indicate, actual foresight of risk of death by the accused is not required. The test for \textit{mens rea} is objective—does the jury regard the act or omission leading to the breach of duty as being so culpable that it should be labelled as ‘criminal’? Evidence that the defendants knew they would cause harm by not acting is admissible to establish the required fault, but is not essential. Similarly, evidence that Mary and Wood had never thought about what might happen to Gloria could be admissible to show that they should not be labelled as criminals, but such evidence would not preclude a finding by the jury that they had acted, or failed to act, in a manner that was grossly negligent.

\section*{Question 5}

Critically analyse with reference to decided cases, the reasons why the development and application of the criminal law is often unpredictable and inconsistent.
The elements of a crime: *actus reus* and *mens rea*

**Answer plan**

- Constant change—*R v R* [1991]
- Lack of code—*Caldwell* [1981], *Morgan* [1975]
- Logic v policy
- Role of House of Lords—*Clegg* [1995]

**Suggested answer**

The development of many areas of law follows a consistent and logical course. The basic foundations, their concepts and application are accepted by the vast majority, and only fine tuning or adjustments of these principles are required to meet new situations. Unfortunately this cannot be said about criminal law, where the debate about fundamental concepts—such as whether recklessness should be interpreted subjectively or objectively; whether a mistake of fact relied upon by a defendant should have to be one that a reasonable person would have made; whether duress should be a defence to a charge of murder—is still ongoing.

One of the problems is that the criminal law is subject to constant change. It has to adapt to cover new phenomena, such as stalking, drug abuse, and internet fraud and to reflect society’s changing social and moral standards. As the House of Lords stated in *R v R* [1991] 4 All ER 481, abolishing the husband’s marital rape exemption, the common law is capable of evolving in the light of social, economic and cultural developments. In that case the recognition that the status of women had changed out of all recognition from the time (*Hale’s Pleas of the Crown* 1736) when the husband’s marital rape exemption was initially recognized was long overdue. Similarly, the criminal law once reflected the moral position that it was a crime to take one’s own life. Failure in such an enterprise was prosecuted as attempted suicide and could be punished. However, attitudes softened and it was recognized that such a person needed help, not a criminal trial; the law was consequently amended by the *Suicide Act 1961*. The 1960s saw similar changes in respect of the law relating to homosexuality and abortion. Changes in the law can also result from a shift in ideology on the part of an elected government, or as a response to new threats to the safety and stability of society—for example legislation to combat terrorism.

There is no doubt that the development and application of the criminal law would be more consistent and predictable if the courts exhibited a more uniform approach to its development. The problem is illustrated by two House of Lords’ decisions: *Metropolitan Police Commissioner v Caldwell* [1981] 1 All ER 961, where an objective approach to recklessness was used, and *DPP v Morgan* [1975] 2 All ER 347, where a subjective approach to mistake was applied. Why was it that liability for recklessness was imposed on an objective basis, but where a defendant made a mistake of fact he
The elements of a crime: actus reus and mens rea

was entitled (subject to any statutory provision to the contrary) to be judged on the facts as he honestly believed them to be? Commentators may argue that two different areas of the criminal law were being considered, criminal damage and rape (note that the law has since been changed as regards rape by the Sexual Offences Act 2003), but the inconsistency is still stark. At least in so far as recklessness is concerned, the House of Lords has now embraced the notion of subjectivity again in _R v G_ [2003] 4 All ER 765, but the very fact that the legal definition of such a basic concept can change so much in the space of 20 years is itself startling.

The Law Commission has long argued that the solution lies in codifying the law (see Law Com. No. 143) on the basis that: ‘the criminal law could then exhibit a uniform approach to all crimes and defences’.

All other major European countries (France, Germany, and Spain) have a detailed criminal code, with a uniform approach providing a starting point for interpreting the law. The criminal law in England and Wales has developed in a piecemeal fashion, with one offence’s development showing little consistency with another’s. So often it is difficult to say what our law actually is, even before lawyers start to debate how it should be applied, e.g., _R v Savage; R v Parmenter_ [1992] 1 AC 699, interpreting (after over 130 years of use) the provisions of the Offences Against the Person Act 1861. A code could be expressed in clear language with definitions of fundamental concepts such as intention and recklessness, as suggested by the Law Commission’s Draft Criminal Code; although, as the former chairman of the Law Commission Justice Henry Brooke stated ([1995] Crim LR 911): ‘Nobody in their right mind would want to put the existing criminal law into a codified form’.

Often the criminal law follows a logical approach in its application; but as it does not exist in a vacuum and is not simply the application of academic principles, policy considerations sometimes have to prevail. As Lord Salmon stated in _DPP v Majewski_ [1976] 2 All ER 142, regarding the defence of intoxication, ‘the answer is that in strict logic the view [intoxication is no defence to crimes of basic intent] cannot be justified. But this is the view that has been adopted by the common law which is founded on common sense and experience rather than strict logic’. Policy considerations are also behind s. 1(3) of the Criminal Attempts Act 1981, whereby in the offence of attempt, the facts are to be as the accused believes them to be. Thus an accused, objectively viewed, may appear not to be committing a criminal act but because they believe they are, they can be guilty of attempting to commit that criminal act, as in _R v Shivpuri_ [1986] 2 All ER 334.

There is often no means of predicting which approach will prevail. In _Jaggard v Dickinson_ [1980] 3 All ER 716, the accused, who had been informed by her friend X that she could break into X’s house to shelter, while drunk mistakenly broke into V’s house. She was charged with criminal damage under s. 1(1) of the Criminal Damage Act 1971, but argued that she had a lawful excuse under s. 5(2) of the Act as she honestly believed that she had the owner’s consent. Although the prosecution contended that this was a crime of basic intent and therefore drunkenness was no defence (citing the
House of Lords’ decisions of *Metropolitan Police Commissioner v Caldwell* and *DPP v Majewski* in support), the Court of Appeal quashed her conviction, giving priority to the statutory provision of s. 5(2) of the 1971 Act.

One important aspect of the criminal law process in recent years, which has caused uncertainty, is the role of the House of Lords in changing the criminal law. Clearly judges are there to say what the law is, not what it should be; but Lord Simon in *DPP for Northern Ireland v Lynch* [1975] 1 All ER 913 said: ‘I am all for recognising that judges do make law. And I am all for judges exercising their responsibilities boldly at the proper time and place…where matters of social policy are not involved which the collective wisdom of Parliament is better suited to resolve’. Thus in *R v R*, the House of Lords changed the law of rape, by abolishing the husband’s defence of marital rape immunity without waiting for Parliament to implement the Law Commission’s recommendations. However, their Lordships took the opposite view in *R v Clegg* [1995] 1 All ER 334, where they refused to follow the Law Commission’s suggestion that a person who was entitled to use force in self-defence but who used unreasonable force, thereby killing the victim, would be guilty of manslaughter, not murder. Lord Lloyd stated:

I am not adverse to judges developing law, or indeed making new law, when they can see their way clearly, even where questions of social policy are involved. [A good example is *R v R*.] But in the present case I am in no doubt that your Lordships should abstain from law making. The reduction of what would otherwise be murder to manslaughter in a particular class of case seems to me essentially a matter for decision by the legislature.

It is difficult to appreciate the essential difference in issues in these two cases, despite Lord Lowry’s justifications in *R v Clegg* that ‘*R v R* dealt with a specific act and not with a general principle governing criminal liability’. Clearly there is a difference in opinion amongst the Law Lords as to the correct application of these principles. This is well illustrated by the House of Lords’ decision in *R v Gotts* [1992] 1 All ER 832. The majority decision not to allow duress as a defence to attempted murder was on the basis that duress was no defence to murder. The minority view to the contrary revealed a different analysis. They argued that duress is a general defence throughout the criminal law with the exceptions of the offences of murder and treason. It is for Parliament, and not the courts, to limit the ambit of a defence; and as attempted murder is a different offence to murder, duress must therefore be available.

It is submitted that these are the main reasons why the development and application of the criminal law is often uncertain and unpredictable. There are other factors, such as whether an issue is a question of law for the judge or fact for the jury, e.g., the meaning of ‘administer’ (*R v Gillard* (1988) 87 Cr App R 189); the difficulty in ascertaining the *ratio decidendi* of many cases, e.g., *R v Brown* [1993] 2 All ER 75 (consent); and the possible effect of the decisions of the European Court of Human Rights. But it is the lack of a code and uniform principles which are the main factors causing the inherent uncertainty.
The elements of a crime: *actus reus* and *mens rea*

**Question 6**

Critically assess the grounds upon which liability for failing to act will be imposed in English criminal law.

**Commentary**

Liability for omissions is a popular topic with examiners, either as an element of a problem question—typically linked to killing by gross negligence to bring out the duty of care issues—or as an essay topic in its own right. To deal comfortably with essay-style questions on omissions it is necessary to have a good knowledge of the basic cases. For degree level examinations, however, it is likely that some element of analysis will be necessary. The extent to which this is the case will vary according to the level at which the paper is set. Second and third year undergraduates and CPE students would be expected to display more developed skills of critical evaluation. Try to avoid simply describing the law—ensure that some comment is provided on the examples given. There is not a great deal of material on law reform in this area—the Law Commission has not explored it in great detail, but it should not be difficult to identify some of the anomalies that the case law throws up.

For a flowchart on liability for failing to act, visit the Online Resource Centre at: www.oxfordtextbooks.co.uk/orc/qanda/.

**Answer plan**

- Basic rule on liability for omissions
- Legal duty based on statute
- Legal duty based on contract
- Legal duty based on office
- Common law duty to act
- Where a duty ceases to exist
- Possible reforms

**Suggested answer**

Every offence in criminal law requires proof of an *actus reus* on the part of the accused. In the vast majority of cases statute or common law defines this *actus reus* in terms of a positive act. Indeed, the expression *actus reus* literally translates as ‘guilty act’. A
The elements of a crime: actus reus and mens rea

A moment’s thought reveals, however, that a defendant can commit an offence by failing to act, just as readily as he can by positive action. If the parents of a newly born baby administer a lethal dose of poison to the child no one would seriously suggest that there would be a problem in establishing actus reus. Why should it be any different where the defendants decide not to feed the child, with the result that the child dies of starvation? The answer is that there is no difference in criminal law, but the method by which liability is established may differ where it is based on an omission as opposed to a positive act.

The basic rule in English criminal law is that there is no general positive duty to act to prevent the commission of criminal offences or to limit the effect of harm caused by the actions of others. This position reflects what is sometimes referred to as the individualistic approach to liability. If D is at a swimming pool, and he sees P (a young child with whom he has no connection) drowning in the deep end, why should D be required to go to P’s aid? D has no special responsibility for P, and did not cause the risk to arise. It is pure chance that D is in a position to help. Why should fate be the basis for imposing a liability for failing to prevent P’s death? Critics of the current position at common law argue for a ‘social responsibility’ approach. This view proposes that liability should arise for failing to attend those in peril partly because of the moral obligation to do so, but also because it reflects a more complex social pact. A positive duty to aid others would impose a responsibility but would also confer a corresponding benefit. D might one day find himself compelled to help P, but the next day he might be the beneficiary of the duty on P to aid D where D is in peril. At a macro level society benefits because less harm is suffered by individuals.

In reality English criminal law does impose criminal liability for failing to act, but it does so on the basis of exceptions. Thus D will not incur liability for failing to act unless the prosecution can point to a positive legal duty to act.

The most obvious source of such legal duties will be statute. Parliament creates liability for failing to act in two ways. At a very simple level it creates offences of omission. It is an offence for the owner of a vehicle to fail to display a valid tax disc. It is an offence to fail to submit a tax return, or to provide company accounts, etc. In these cases the omission itself is the crime. In many cases they are offences of strict or absolute liability. Alternatively Parliament may enact legislation that places a category of person under a duty to act in a particular way. A failure to comply with this duty may result in liability where the failure causes the commission of some prohibited consequence. Perhaps the best known example of this is provided by the Children and Young Persons Act 1933, which places parents and guardians under a legal duty to care for children. Suppose that parents go out for the evening leaving a four-year-old child alone. Whilst they are out he falls onto a fire and is killed. It is likely that the court would find that there was a culpable omission based on the breach of statutory duty, and liability could be imposed if causation and fault are also established.

An alternative basis for establishing a legal duty to act is where D is subject to a contractual duty or holds an office that suggests the imposition of a duty. In the case of employees the court will look at the express or implied terms of the contract to determine
The elements of a crime: actus reus and mens rea

the extent and nature of the duties imposed on D. In *R v Pittwood* (1902) 19 TLR 37, a railway crossing gatekeeper opened the gate to let a cart pass, but then went off to lunch, forgetting to close the gate. A hay cart crossed the line and was hit by a train. The defendant was convicted of manslaughter. He argued that the only duty he owed was to his employers, with whom he had a contract. It was held, however, that his contract imposed a wider duty upon him to users of the crossing. Thus the duty arising under a contract inures to the benefit of those who are not privy to the contract—i.e., the passengers on the train. In *R v Dytham* [1979] 3 All ER 641, D was a police constable on duty. He witnessed V being ejected from a nightclub and beaten up by a doorman. D did not intervene. V died from his injuries. D was convicted of the common law offence of misfeasance in public office and his appeal against conviction was dismissed. The case begs the question—why was D not charged with causing the death of V by his failure to intervene? The answer may be that in cases of failing to act, proof of causation may be problematic. D obviously failed in his duty as a police officer—but would his intervention have prevented V’s death? The mere fact that there is an agreement between parties does not necessarily mean that there will be a contractual duty to act. In *R v Instan* [1893] 1 QB 450, D was given money by her aunt to buy groceries. D failed to care for her aunt who subsequently died. It is unlikely that any contractual duty existed in this case, as the agreement was a domestic one—hence there would have been no intention to create legal relations.

Inevitably there are situations where, despite the absence of any statutory or contractual duty to act, it is felt that liability ought to be imposed. In such cases it falls to the common law to perform its residual function of supplying the omission. Judges ‘discover’ new common law duties to act because it is felt they ought to exist. *R v Instan* is a case in point. For the last 12 days of her life the aunt was suffering from gangrene in her leg and was unable to look after herself. Only D knew this. D did not provide her aunt with food nor did she obtain medical attention. This omission accelerated the aunt’s death. D’s conviction for manslaughter was upheld, the court proceeding on the basis that a common law duty was simply a moral duty so fundamental the courts had to enforce it. As Lord Coleridge CJ observed, a legal common law duty is nothing else than the enforcing by law of that which is a moral obligation without legal enforcement.

The problem with the common law is that it is reactive—it only develops because cases come to the courts on appeal. A narrow reading of *R v Instan* suggests that a common law duty is owed to one’s blood relatives, but clearly the scope should be wider than that. The court in *R v Gibbins and Proctor* (1918) 13 Cr App R 134, accepted that a duty could be imposed upon a common law wife to care for her partner’s child because, although the child was not hers, she had assumed a duty towards the child by choosing to live with the child’s father and accept housekeeping money to buy food for them all. The problem with such rulings is that the limits of liability are left vague—what if D had lived with the child’s father only on weekends?

Imposing liability for omissions where D undertakes to care for P and P becomes reliant on D may even be counter-productive. In *R v Stone and Dobinson* [1977] QB 354, the defendants were convicted of the manslaughter of Stone’s sister Fanny because they...
took her in but failed to care for her adequately. With hindsight they might have been advised not to help her in the first place. The law therefore sends mixed messages. One ought to care for others, but one should not start to do so unless one is able to discharge that duty properly.

The common law duty to act was developed further by the important House of Lords’ decision in *R v Miller* [1983] 1 All ER 978. D, who was squatting in an empty house, fell asleep whilst smoking a cigarette. Whilst he was asleep the cigarette set fire to the mattress. D woke, realized the mattress was on fire, but took no steps to douse the fire. The house was damaged in the ensuing blaze. He was obviously not under a statutory duty to put the fire out, nor was he under a contractual duty to do so. At the time the common law duties to act were based on duties owed to blood relatives, or arising from reliance. The House of Lords had little choice but to ‘discover’ a new legal duty at common law. Such a duty arises where D accidentally causes harm, realizes that he has done so, and it lies within his power to take steps, either himself or by calling for the assistance to prevent or minimize the harm. The omission itself is not, of course, the offence. For criminal damage it must be shown that the omission caused the harm, and that D had the requisite *mens rea* at the time of the *actus reus*. The doctrine has since been applied to killing by gross negligence in *R v Evans (Gemma)* [2009] EWCA 650, where it was held that awareness of having caused a dangerous situation could of itself give rise to the duty of care (effectively the duty to act) that forms the basis of the offence. Whilst the ruling in *R v Miller* is socially desirable—there is great social utility in D being required to limit the effect of his careless actions—there are many uncertainties. What is it that D is required to do once he realizes he has caused harm? Is the test subjective or objective? Must he act as the reasonable person would have done, or does he simply have to do his best? The latter would certainly accord with the general trend towards subjectivity in criminal law.

Even where a positive legal duty to act can be identified, uncertainties may arise as to whether D has been or can be absolved from that duty. In *R v Smith* [1979] Crim LR 251, D’s wife was seriously ill. She asked D not to seek help. Her condition worsened and she eventually asked D to get help, which he did, but it was too late to save her. D was charged with manslaughter and the trial judge directed the jury that D was under a duty by virtue of being the victim’s husband, but he could be released from that duty if she so indicated and she was of sound mind at the time. This places the husband in a difficult legal position. At what point must he ignore his wife’s wishes and obtain medical help? Some clarification is provided by the House of Lords’ decision in *Airedale NHS Trust v Bland* [1993] AC 789, where it was held that doctors were under a duty to treat a patient where it was in the patient’s best interests to do so. Where, however, all hope of the patient recovering had disappeared, the duty to nourish and maintain the patient would also cease.

To date the Law Commission has done little more than suggest a codification of the common law position as outlined above. It is submitted that a more radical approach would be to adopt the French model of creating a general statutory duty of ‘easy rescue’. Essentially there would be liability for failing to prevent harm where such prevention...
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would not be too onerous or difficult for D to achieve. The accident that led to the death of Princess Diana in the Paris underpass illustrates the point. French photographers were charged with manslaughter based on their failure to help because they allegedly photographed the crash scene when they could have been offering aid to the injured. Such a prosecution would not have been possible under English law.

Further reading