

ACTUS REUS

1.1 Introduction

This class discusses *actus reus* as one of the elements required in establishing criminal liability. It looks at the different forms of *actus reus* and the doctrine of causation which involves a consideration of a range of factors that assist in connecting *actus reus* elements of conduct and consequence.

Key principle on criminal liability: A person is not criminally liable for a crime unless his conduct coincides with the criminal act. This is often constituted in the Latin maxim *actus non facit reum nisi mens sit rea*.

1.2 Actus Reus

Actus reus refers to the external elements of an offence. All definitions of the offence save for the mental element requirements. It may take various forms:

- Act;
- Omission;
- Proscribed circumstances/relevant circumstances and
- Prohibited consequences.

An offence may comprise various forms of *actus reus*, it may refer to both conduct and consequences, or conduct in the context of relevant circumstances or have all three features constituting conduct, proscribed circumstances (relevant circumstances) and prohibited consequences/results.

- Conduct crimes prohibit conduct alone and it is irrelevant whether there are consequences.
- Result crimes require that the prohibited conduct caused particular consequences.
- Some crimes require particular proscribed circumstances to be present for example driving without a valid road license.

For practicality purposes the prosecution does not prove its offence by breaking down elements of the offence but usually takes the approach of proving elements of the crime as a whole. Not always easy to separate with precision all elements of offence as *mens rea* or *actus reus*. Some forms of *actus reus* incorporate a *mens rea* in their description. This is the case where words describing an *actus reus* also imply an element of *mens rea* for example possession offences, or offences that require the defendant to permit, or appropriate all imply that the defendant must act with knowledge (*mens rea*), the failure to prove knowledge means there is no *actus reus*.

***Actus reus* must be voluntary-** Defendant must consciously have control over his body movements. An accused claiming his conduct was involuntary must show that he or she suffered a total loss of control caused by an external factor.

An accused person who pleads lack of voluntariness, could also be pleading automatism. It is a form of defence that applies where a person does physical acts while in an unconscious state. It is confined to “acts done while unconscious and to spasms, reflex actions and convulsions.” - ***Bratty v Attorney General of Northern Ireland [1961] 3 All E.R. 523 HL.***

A lack of consciousness resulting from the defendant’s prior fault will not relieve him of criminal responsibility. For example, where defendant realising he is tired continues to drive and falls asleep or where the defendant suffering from a medical condition realises he is about to or there is a high probability he will have an epileptic fit or heart attack but still continues driving- ***Hill v Baxter [1958] 1 QB 277; Kay v Butterworth (1945)173 LT.***

- Examples of involuntary conduct include a driver of a motor vehicle who loses control as a result of being attacked by a swarm of bees or a malevolent passenger, or he is affected by a sudden blinding pain, or suddenly suffers a blackout or his vehicle suffers some failure due to a blow out or the breaks failing: ***Bell [1984]3 All ER 842, -.***

1.2.1 Actus reus through commission

- This refers to the physical act of the offence. It is the most common form of actus reus.
- also take the nature of permitting the commission of a prohibited act ***Ali s/o Mzee vs. R (1960) EA 404 (Murphy J)*** a driver and conductor convicted for permitting persons to ride on the roof of a bus.

1.2.2 Actus reus through omissions

The law is reluctant to impose a general criminal responsibility for failing to act in situations that give rise to harmful consequences as it is likely to infringe on the autonomy/liberty of the individual.

Two conditions to be met:

- The offence must be capable of being committed by omission
- There must be a duty to act arising from common law or statutory law.

Liability for omission arises only where the defendant has a legal duty to act.

A legal duty arises under common law and statutory law.

Some statutory provisions make it an offence to fail to do something, for example failing to submit taxes, to obtain a license, and failure to take care of a child among others. See for example, section 15, 30, the Traffic Act (cap 403, Laws of Kenya); section 45 of the Anti-Corruption and Economic Crimes Act; Section 23 the Children Act

A number of situations have also been identified under common law where a duty to act may arise

- A duty to act may arise by virtue of being a public officer- ***Dytham [1979] QB 722***

- Failure to perform some contractual obligations can result into crimes, where such failure is likely to endanger the public or lives- *Pittwood (1902) 19 T.L.R. 37*; *Republic v Getrude Adhiambo Oneya [2020]eKLR Criminal Case No. 15 of 2018*- The defendant a teacher in a visually impaired school failed to safely bring newly admitted blind child to the sleeping quarters. Child lost his way a fell into a well drowning to death. Teacher liable for manslaughter by omission.
- Duty could arise from the special relationship between dependant and victim, for example failure by parent to take care of a child leading to death, or failure of a spouse to take care of spouse in need of care.
- Duty arising from assuming responsibility to care for another- *R v Instan [1893] 1 Q.B. 450*. Duty arising from voluntarily undertaking to care for another helpless person
- Duty arising from creation of a dangerous situation; *R v Miller [1983] 2 A.C 161* . The accused person is required to only take steps which are reasonable in the circumstances to counter the danger he or she inadvertently created.¹

1.3 Causation

Where an accused person is charged with a result crime, it needs to be established that there was a causal link between the defendant's conduct and the prohibited consequence. A dispute on the question of causation could arise and it is alleged that the act of a third party has broken the chain of causation. In such a case, a two stage test is adopted to determine if the defendant's conduct is both the factual and legal cause of the prohibited consequence.

1.3.1 Factual causation: But for test

The accused person's acts must be a *sine qua non* of the result. In other words, it needs to be shown that the prohibited result would not have happened as and when it did 'but for' the defendant's actions (*White [1910]2 K.B. 124*).

1.3.2 Legal causation:

Once it is established that the defendant's conduct was a but-for cause, it still needs to be determined if the consequence can legally be attributed to the defendant's conduct. In most cases the harm is obviously imputable to the defendant. Where it is not, it needs to be determined if in all fairness the result should be attributable to the defendant. Result will be legally attributable to the defendant, where the defendant's conduct is regarded as having significantly contributed to the prohibited result (*R v Pagett [1983] Crim LR 393*) or if the defendant's actions or omissions was the "operating and substantial" cause of the result-*Smith [1959] 2 All E.R. 193 CMAC*.

A defendant's act need **not** be the sole or main cause of the prohibited result in order to be found criminally liable for it. He or she must however, have performed a culpable act which makes a **more than minimal contribution** to the result.

¹ M. Allen, Criminal Law, 12th edn (Oxford: OUP, 2013), p. 50.

Causation analysis must focus on the relevant act – which act is it that caused the prohibited result? The focus should be on whether the defendant’s conduct significantly contributed to the prohibited results.

Several principles have been identified by the courts to determine whether the defendant’s conduct legally caused the prohibited consequences.

- **Connection between fault and result:** The defendant’s culpable conduct must make a relevant contribution to the prohibited consequence- *R. v Dolloway (1847)2 Cox 273*-Held that a driver negligently driving a cart was not responsible for death of a three year old child who ran across the road and was knocked by the cart. It was established the accident would have still occurred in the same manner even if defendant had been driving carefully. Would the result have occurred regardless of the manner of the defendant’s conduct? If the answer is yes the defendant is not liable. The prohibited consequences must be causally connected to the defendant’s conduct that is at fault.
 - **Negligeable causes:** The defendant’s conduct needs to be a more than minimal cause of the event.
 - **Contributory Causes:** Where there are allegations of multiple causations, it must be shown that the harm was the result of the defendant’s conduct rather than some coincidental or intervening event. The defendant is liable if his or her contribution to the outcome was significant, even if there were other contributing causes.
 - **Intervening acts:** Intervening events may break the causal chain between the defendant’s actions and the end result. Such events include natural disasters, negligent medical treatment, negligent and intentional acts of third parties and the victim.
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- Chain of causation not broken if defendant’s conduct a continuing and operative cause of the prohibited consequences- a significant contributory cause/ an operating and substantial cause of the prohibited result.
 - Chain of causation is broken if it is considered that the defendant’s conduct is too remote from the prohibited consequences which occur as a result of the intervention of some new cause.
 - An act of nature that is extraordinary and unforeseeable often classified as an ‘Act of God’ will break the chain of causation, example where D hits V leaving him unconscious in a building which later collapses due to an earthquake. However, an act of nature that was reasonably foreseeable will not break the chain of causation; example D hits V leaving him at the beach next to the high water mark. If V drowns as a result of being carried away into the seas by the incoming tide, D will be held responsible. The high tide was foreseeable.

- An act by a third party will only break the chain of causation if it was ‘free, deliberate and informed’.
- Where the defendant induces an insane or minor the prohibited consequences will be attributable to the defendant.
- A truly involuntary conduct by the third party resulting from the defendant’s conduct does not break the chain of causation-D startles X who involuntarily drops a weight damaging V’s property; D will be liable for the damage.
- Where third party acts instinctively or reasonably in self defence or in execution of a legal duty the chain of causation will not be broken- **R v. Pagett (1983) 76 Cr App R 279.**
- **Peter Shirau Amakobe v R [2017]eKLR, Criminal Appeal No. 1 of 2016**, court considered act by third party in self defence was reasonably foreseeable and did not break the chain of causation.
- Improper or negligent medical treatment will not break the chain of causation if the original injury is still playing a significant role at the time of death (or other consequence). To break the chain of causation the medical treatment would have to be extraordinary and unusual, with the treatment in itself, considered to be so potent in causing the death (or prohibited consequence) making the defendant’s contribution insignificant.- **Smith v R (1959) 2 QB 35; Cheshire (1991) 3 All ER 670.**
- Victim must take his victim as he finds him. “Thin skull rule” or “eggshell skull rule”-Where victim already suffers from some hidden physiological defect making him more likely to suffer more serious harm than would otherwise have been, the defendant will still be liable. Principle also applies to consequences flowing from the victim’s mental condition and religious beliefs.
- Thus where victim is negligent or refuses medical treatment for injuries inflicted by the defendant, the defendant still remains liable. **Holland (1841) 2 Mood & R 351; Blaue (1975) 3 All ER 446.**
- Where the victim in an effort to escape harm from the defendant reacts in a manner that endangers himself, the defendant will be found to have caused the victim’s injuries.
- Defendant remains liable if the response was proportionate to the danger posed and not so daft as to be considered unforeseeable and daft in the circumstances.

Reasonably foresight principle: Accused not only liable for the harm that he directly causes, but also harm caused indirectly if it was foreseeable that such harm could result from his conduct-**R v Roberts (1971) 56 Cr. App. R. 95.** Was the result a reasonably foreseeable consequence of the defendant’s conduct? Only harm caused by reasonably foreseeable intervening events can be attributed to the defendant.