Physical Elements

The actus reus of a crime may consist of

- ***Specific forms of conduct including*:**
  - Acts
    - The actus reus of most crimes will be the commission of an act or a series of acts by the accused.
  - Omissions
    - There is no legal obligation for persons to act to prevent wrong doing.
      - There is no general duty to prevent a crime: *R v Instan [1893] 1 QB 450*
      - Also, a person has not committed a crime because he or she could have reasonably prevented it: *R v Coney (1882) 8 QBD 534*

    ➡However, an omission may create criminal liability in circumstances where the common law or statute has imposed a duty.

    ★***Elements of liability of omission:***
      - have a duty, and
      - breach that duty;
        - In *R v Russell [1933] VLR 59*, a common law duty arose as a result of a familial (dependent) relationship between the parties.
        - s44 ***Crimes Act 1900 (NSW)***: If D under legal duty to provide V with necessities, and without reasonable excuse fails to so provide (intentionally/recklessly), and if failure causes danger of death or causes serious injury (or likelihood) to X

  - A state of affairs
    - State of affairs is the actus reus of various summary offences such as vagrancy; as being drunk or disorderly in a public place.
      - Some offences that criminalise state of affairs do have serious penalties.
        - Being 'knowingly concerned' in the importation of illicit drugs has a maximum penalty of life imprisonment: *He Kaw Teh (1985)*

- ***Conduct which occurs in specified circumstance (e.g., rape); or***
  - Some forms of conduct are not crimes unless it occurs in specified circumstances.
    - Thus the conduct of sexual penetration is not rape or sexual assault unless it occurs without the other person's consent (the specified circumstance): *Kingston (1994)*
- ***Results/consequences of conduct***
  - Sometimes the law is concerned less with the conduct itself but rather the result or consequence of the conduct.
    - With the crime of murder, the death of the victim is what is illegal, rather than the conduct that caused the death.
      - As long as the conduct results in the death of the victim, the actus reus of murder is established.
      - Causation will need to be proven by the prosecution before this actus reus is proved.

- *Russel (1933) – dependent relationship*
- *Miller (1983) – creation of dangerous situation*
- *Stone and Dobinson (1977) ;*
- *Taktak (1988) – voluntary assumption*
- *Pittwood (1902) – imposed by contract*

Omission

R v Russell [1933] VLR 59

The court held that "he assisted his wife by doing nothing because of the relationship of the victim and husband" by him saying nothing means that he encouraged his wife to continue drowning.
Generally, you won't be responsible for your partner.
However, if there is a mental issue on the part of your partner, you will be responsible.

1. *Russel 's wife had decided that she wanted to drown herself and her children in the bathtub.*
2. *He watched her as she did so and did nothing to intervene.*

1. The appellants, a man aged 67, John Edward Stone who was of low average intelligence, partially deaf and almost blind and his mistress, aged 43, Gwendoline Dobinson who was ineffectual and inadequate, lived in a house in a village.
2. In 1972, the man's sister, Fanny, then in her fifties, came from another village to live in the house and occupied and small front room.
3. Fanny was eccentric. She was morbidly anxious about putting on weight and denied herself proper meals. She often stayed in her room for days. The mistress occasionally gives her food.
4. In early spring 1975, the police found fanny wandering in the street. That caused the appellants try to find Fanny's doctor in the village, which she had previously lived. They failed to find him and did nothing to enlist other professional aid to fanny.
5. By July 1975, fanny was unable or unwilling to leave her bed. On 19th July, the mistress helped a neighbour to wash Fanny. They found Fanny lying in excreta with bed sores. There was no ventilation in the room.
6. From 19th July onwards the mistress expressed concern about Fanny to the local publican. The appellants made ineffectual efforts to get a doctor.
7. On 2nd August 1975, the mistress found fanny dead in bed, the cause of death was toxaemia from the infected bed sores and prolonged immobilisation.

Held, The appellants were charged with Fanny's manslaughter. The crown alleged that the appellants had undertaken the duty of caring for F and with gross negligence had failed to perform that duty thereby causing Fanny's death.

1. Miller, a vagrant, accidentally set fire to a mattress in a house in which he was sleeping. (He was drunk and lit one cigarette beside the mattress)
2. Rather than taking action to put out the fire, he moved to a different room; the fire went on to cause extensive damage to the cost of £800.
3. He was subsequently convicted of arson, under Sections 1 and 3 of the Criminal Damage Act 1971.
4. Miller's defence was that there was no actus reus coinciding with mens rea.
5. Although his reckless inattention to the fire could be said to constitute mens rea, it was not associated with the actus reus of setting the fire.
6. Nevertheless, the defendant was convicted for recklessly causing damage by omission.

1. The defendant was employed by a railway company to man the gate at a level crossing.
2. The defendant lifted the gate to allow a cart to pass and then went off to lunch failing to put it back down.
3. A train later collided with a horse and cart killing the train driver.

The defendant was liable for the death of the train driver as it was his contractual duty to close the gate.

The Customs Act 1901 (Cth), s 233B(1), provides: "Any person who — ...

- (b) imports, or attempts to import, into Australia any prohibited imports to which this section applies or exports, or attempts to export, from Australia any prohibited exports to which this section applies; or
- (c) without reasonable excuse (proof whereof shall lie upon him) has in his possession, or attempts to obtain possession of, any prohibited imports to which this section applies which have been

R v Stone and Dobinson [1977] 1 QB 354

There is no dispute, broadly speaking, as to matters on which the jury must be satisfied before they can convict of manslaughter in circumstances such as the present. They are:

(1) that the defendant undertook the care of a person ho by reason of age or infirmity was unable to care for himself;

(2) that the defendant was grossly negligent in regard to his duty of care;

(3) that by reason of such negligence the person died. It was submitted on behalf of the appellants that the judge's direction to the jury with regard to the first two items was incorrect.

This court rejects the proposition. Whether Fanny was a lodger or not she was a blood relation of the appellants Stone; she was occupying a room in his house; Mrs Dobinson had undertaken the duty of trying to wash her, of taking such food to her as she required. There was ample evidence that each appellant was aware of the poor condition she was in by mid-July. It was not disputed that no effort was made of Mrs. Wilson and Mrs. West. A social worker used to visit Cyril. No words were spoken to him. All these were matters which the jury entitled to take into account when considering whether the necessary assumption of a duty of care for Fanny had been proved.

If you voluntarily takes someone in, and they cannot get help from others, you have a duty to make sure they are safe.

Taktak (1988) 14 NSWLR 226

R v Miller (1983) 2 AC 161

Lord Diplock:

I see no rational ground for excluding from conduct capable of giving rise to criminal liability, conduct which consists of failing to take measures that lie within one's power to counteract a danger that one has oneself created, if at the time of such conduct one's state of mind is such as constitutes a necessary ingredient of the offence.

- The decision in effect established that the actus reus was in fact the set of events, starting with the time the fire was set, and ending with the **reckless refusal** to extinguish it, establishing the requisite mens rea and actus reus requirements.
- Therefore, an omission to act may constitute actus reus. Actions can create a duty, and failure to act on such a duty can therefore be branded blameworthy. Secondly, an act and subsequent omission constitute a collective actus reus. This has been described as the **principle of 'supervening fault'**.

He create the dangerous situation, you have a duty to make sure that the danger to be extinguished.

Pittwood (1902) TLR 37

Liability can be imposed by contract.

States of Affairs

He Kaw Teh (1985) 157 CLR 523

Gibbs CJ:

'...if it is held that guilty knowledge is not an ingredient of an offence, it does not follow that the offence is an absolute one. A middle course, between imposing absolute liability and requiring proof of guilty knowledge or intention, is to hold that an accused will not be guilty if he acted under an honest and reasonable mistake as the existence of facts, which, if true, would have made his act innocent.'

Factors to be considered to determine whether to rebut the presumption of Mens Rea:

In deciding whether the presumption has been displaced by s. 233B(1)(b), and whether the Parliament intended that the offence created by that provision should have no mental ingredient, there are a number of matters to be considered

First, of course, one must have regard to the **words of the statute** creating the offence.

➡ The words of par. (b) of s. 233B(1) themselves contain no clear indication of Parliament's intention. However they stand in marked contrast to pars. (a), (c) and (ca) of the sub-section, all of which deal with the possession of prohibited imports in certain circumstances and all of which contain the words "without reasonable excuse (proof whereof shall lie upon him)". The absence of those words from par. (b) suggests that no reasonable excuse will avail a person who imports narcotics. That would lead to an absurdly Draconian result if it meant that a person who unwittingly brought into Australia narcotics which had been planted in his baggage might be liable to life imprisonment notwithstanding that he was completely innocent of any connexion

with the narcotics and that he was unaware that he was carrying anything illicit. On the other hand, if guilty knowledge is an ingredient of the offence, it becomes understandable that no excuse should be allowed to a person who has knowingly imported narcotics. This provides an indication, although only a slight one, that by par. (b) the Parliament did not intend to displace the presumption of the common law that a blameworthy state of mind is an ingredient of the offence.

The second *matter to be considered is the* ***subject-matter with which the statute deals****.*

➡ *Paragraph (b) of s. 233B(1) and the other paragraphs of that sub-section deal with a grave social evil which the Parliament naturally intends should be rigorously suppressed. The importation of and trade in narcotics creates a serious threat to the well-being of the Australian community. It has led to a great increase in crime, to corruption and to the ruin of innocent lives. The fact that the consequences of an offence against s. 233B(1)(b) may be so serious suggests that the Parliament may have intended to make the offence an absolute one. On the other hand, the sub-section does not deal with acts which "are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty", to repeat the words used in Sherras v. De Rutzen [40] , to describe the first of the three classes of exceptions to the general rule which that case laid down. On the contrary, offences of this kind, at least where heroin in commercial quantities is involved, are truly criminal; a convicted offender is exposed to obloquy and disgrace and becomes liable to the highest penalty that may be imposed under the law. It is unlikely that the Parliament intended that the consequences of committing an offence so serious should be visited on a person who had no intention to do anything wrong and no knowledge that he was doing so.*

A third *consideration is "to inquire whether putting the defendant under strict liability will* ***assist in the enforcement of the regulations****. That means that there must be something he can do, directly or indirectly … which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim."*

➡ *A person bringing baggage into a country can no doubt take care to ensure that no drugs are contained in it. The public interest demands that such care should be taken. There is thus an argument, the strength of which I shall later consider, in favour of the view that the Parliament may have intended to penalise importation that was no more than careless. Clearly, however, no good purpose would be served by punishing a person who had taken reasonable care and yet had unknowingly been an* ***innocent agent*** *to import narcotics.*

These indications do not all point in the same direction, but at least they suggest the conclusion that the Parliament did not intend that the offence defined in par. (b) should be an absolute one.

Brennan J:

The general principles which I would apply to the interpretation of s. 233B(l)(b) and (c) may now be summarised:

1. *There is a presumption that in every statutory offence, it is implied as an element of the offence that the person who commits the actus reus does the physical act defined in the offence voluntarily and with the intention of doing an act of the defined kind.*
2. *There is a further presumption in relation to the external elements of a statutory offence that are circumstances attendant on the doing of the physical act involved. It is implied as an element of the offence that, at the time when the person who commits the actus reus does the physical act involved, he either - (a) knows the circumstances which make the doing of that act an offence; or (b)* ***does not believe honestly and on reasonable grounds*** *that the circumstances which are attendant on the doing of that act are such as to make the doing of that act innocent.*
3. *The state of mind to be implied under (2) is the state of mind which is more consonant with the fulfilment of the purpose of the statute. Prima facie, knowledge is that state of mind.*
4. *The prosecution bears the onus of proving the elements referred to in (l) and (2)* ***beyond reasonable doubt*** *except in the case of insanity and except where statute otherwise provides.*

Voluntariness and Intention:

[The contrast] appears more clearly if we divide an action, somewhat artificially, into a mere movement and the circumstances that are an integral part of the action and which give it its character. When D strikes V, his action can be divided into D's movement of his fist and V's presence in the path of D's movement. Although D's movement may be voluntary, he is not said to strike V intentionally unless he knows that V (or someone else) is in the path of his moving fist.

Dawson J:

A person cannot possess something when the person is unaware of its existence or presence. However, the person will possess the prohibited substance if the person has custody or control of the thing itself, provided that the person knows of its presence.

There need not be knowledge of what the substance is. Therefore, having knowledge of its presence is sufficient to be charged with possessing prohibited substances. (Note, that it is merely being charged with the crime, not a conviction)

Held, by Gibbs C.J., Mason, Brennan and Dawson JJ., Wilson J. dissenting,

(1) that the presumption that mens rea is required before a person can be held guilty of a grave criminal offence is not displaced in relation to s. 233B(1)(b), and the prosecution bears the onus of proving that the accused knew that he was importing a prohibited import.

(2) That in a proceeding under s. 233B(1)(c) the prosecution bears the onus of proving that the accused knew of the existence of the prohibited import that was in his exclusive physical control.

Per Gibbs C.J., Mason, Brennan and Dawson JJ. Where a statute makes it an offence to have possession of goods, knowledge of the accused that those goods are in his custody, in the absence of a sufficient indication of a contrary intention, will be a necessary ingredient of the offence, because the word "possession" itself necessarily imports a mental element.

1. The defendant, a French woman, was deported against her will, from Ireland to England, by the Irish authorities. Upon her arrival she was immediately charged with the offence of 'being' an illegal alien.

Her conviction was upheld despite the fact that she had not voluntarily come to England.

R v Larsonneur (1933) 24 Cr App R 74

1. The defendant was brought on a stretcher to hospital.
2. The doctor discovered that he was merely drunk and asked him to leave.
3. He was later seen slumped on a seat in the corridor and so the police were called.
4. They removed him to the roadway, "formed the opinion he was drunk," and placed him in their car parked nearby.

He was charged with being found drunk in a highway and convicted.

Winzar v Chief Constable of Kent [1983] Times 28/3/83

In my judgment, looking at the purpose of this particular offence, it is designed ... to deal with the nuisance which can be caused by persons who are drunk in a public place. This kind of offence is caused quite simply when a person is found drunk in a public place or in a highway... [A]n example ... illustrates how sensible that conclusion is. Suppose a person was found as being drunk in a restaurant or a place of that kind and was asked to leave. If he was asked to leave, he would walk out of the door of the restaurant and would be in a public place or in a highway of his own volition. He would be there of his own volition because he had responded to a request. However, if a man in a restaurant made a thorough nuisance of himself, was asked to leave, objected and was ejected, in those circumstances, he would not be in a public place of his own volition because he would have been put there either by a gentleman on the door of the restaurant, or by a police officer, who might have been called to deal with the man in question. It would be nonsense if one were to say that the man who responded to the plea to leave could be said to be found drunk in a public place or in a highway, whereas the man who had been compelled to leave could not.

This leads me to the conclusion that a person is 'found to be drunk in a public place or in a highway,' within the meaning of those words as used in the section, when he is perceived to be drunk in a public place. It is enough for the commission of the offence if (1) a person is in a public place or a highway, (2) he is drunk, and (3) in those circumstances he is perceived to be there and to be drunk. Once those criteria have been fulfilled, he is liable to be convicted of the offence of being found drunk in a highway. Finally, I turn to the question: Does it matter if the Appellant was only momentarily in the highway? In my judgment, it makes no difference. A man may be perceived to be drunk in the highway for five minutes, for one minute or for ten seconds. However short the period of time, if a man is perceived to be drunk in a highway, he is guilty of the offence under the section. Of course, if the period of time is very short, the penalty imposed may be minimal; indeed in such circumstances a police officer, using his discretion, may think it unnecessary to charge the man. The point is simply that the offence is committed if a person is perceived to be drunk in a public place or in the highway. Once that criterion is fulfilled, then the offence is committed.

1. Tifanga's temporary immigration permit was extended from time to time.
2. It was revoked when he was found guilty of a crime.
3. When he was released, he was to leave the country, but he had no money and eventually became an illegal immigrant.

Tifaga v Department of Labour [1980] 2 NZLR 235

- The law recognises a defence of impossibility of compliance, but not when you brought the situation onto yourself.
- Public policy of 'impossibility of compliance': the legislature is not to be assumed to have intended to punish for failure to perform the impossible - arises only when D could really not have done anything about it.
- Distinguished from Killbride: Situation no involuntary, it merely lacked practical choice. Tifaga should have planned for a deportation, knowing it to be possible.

1. Kingston had a business dispute with a couple.
2. They employed Penn to gain some damaging information on Kingston in order to blackmail him.
3. Kingston was homosexual with paedophiliac predilections.
4. Penn invited a 15 year old boy to his room and gave him a soporific drug in his drink.
5. The boy remembers nothing from the time of sitting drinking the drink on Penn's bed until waking the next morning.
6. Penn then invited Kingston to the room and drugged his drink without his knowledge.
7. Penn and Kingston then both engaged in gross sexual acts with the unconscious boy.
8. Penn recorded the events and took photographs.
9. Kingston was charged with indecent assault on a youth.
10. In the trial, the jury convicted Kinston, however, his conviction was quashed by Court of Appeal.
11. Now on appeal by the prosecution.

Held,
Appeal allowed. Judgement for the prosecution.

Conduct occurs in specified circumstances

Kingston (1994) 99 Cr App Rep 386

There is no principle of English law which allows a defence based on involuntary intoxication where the defendant is found to have the necessary mens rea for the crime. The prosecution had established the defendant had the necessary intent for the crime - a drunken intent is still an intent.

In the trial, the judge directed the jury:
In deciding whether Kingston intended to commit this offence, you must take into account any findings that you may make that he was affected by drugs. If you think that because he was so affected by drugs he did not intend or may not have intended to commit an indecent assault upon [D.C.], then you must acquit him; but if you are sure that despite the effect of any drugs that he might have been slipped - and it is for you to find whether he was drugged or not - this part of the case is proved, because ***a drugged intent is still an intent****. So intention is crucial, intention at the time; and, of course, members of the jury, you will bear in mind there is a distinction between intention at the time and a lack of memory as to what happened after the time.*

Result / Consequence of the Conduct - Causation Required

Where results of consequences of conduct constitutes the actus reus, the prosecution must prove that the accused's conduct caused the result / consequence of the conduct.

- This issue of causation is most relevant to the crimes of manslaughter and murder.
- It is the jury that determines whether causation is proved --> ***it is a question of fact***: *R v Evans and Gardiner (No 2) [1976] VR 523*
  - In determining the question of causation, the jury is expected to apply their common sense in determining whether the accused's conduct cause the death of the victim: *Campbell v The Queen [1981] WAR 286*
  - The courts have developed three tests to help the jury assess whether the accused's conduct caused the result or consequence:
    - The natural consequence test;
    - The reasonable foreseeability test; and
    - The substantial cause test
      - Novus actus interveniens test
    - All the three tests are objective, they are not based on what the accused subjectively intended.
    - While modern cases appear to favour the substantial cause test, courts do sometimes refer to the tests interchangeably.
      - In *Royall v The Queen (1991) 172 CLR 378*, it is demonstrated that there is no consensus among the High Court judges as to which test to use.
        - The majority applied the natural consequences test.
        - Toohey and Gaudron JJ applied the substantial cause test
        - Brennan and McHugh applied the reasonable foreseeability test.

Natural Consequence Test

- The test is set out in *Royall (1991)*
- It may apply where the victim contributed to his or her death by seeking to escape or attempting to avoid being attacked by the accused.

Royall (1991) 172 CLR 378

Reasonable Foreseeability Test

- The reasonable foreseeability test requires the objective examination of whether the prohibited consequence was reasonably foreseeable to occur from the accused's action.

Substantial Cause Test

- The test is also sometimes referred to as the 'significant cause test', or the 'operating and substantial cause' test.

- Note however that the accused's conduct does not need to be the sole cause of the victim's death: *R v Pagett (1983) 76 Cr App R 279*.
  - ➡The death may have been caused by several causes, in these cases the prosecution just needs to prove that the accused's conduct was a substantial cause: *R v Hallett [1969] SASR 141; Royall v The Queen (1991) 172 CLR*

Hallett [1969] SASR 141

Novus Actus Interveniens

- Where a prohibited consequence or result cannot be reasonably foreseen or deemed a substantial cause or a natural consequence of the accused's conduct because of a subsequent event, ***the chain of causation is broken***.
- The subsequent event is termed as a ***novus actus interveniens*** and some courts have stressed that this act must be of an unexpected or extraordinary nature.

R v Pagett (1983) 76 Cr App Rep 279

A reasonable act performed for the purpose of self-preservation or done in performance of a legal duty, being of course itself an act caused by the accused's own conduct, does not operate as a novus acuts interveniens.

Reasons:

- *When determining if an intervening 3rd party, not acting in concert with the accused, could relieve the accused of criminal responsibility, you consider whether the intervention is voluntary (free, deliberate, and informed).*
- *Accused acts need not be sole cause, or even the main cause of the victims death, it being enough that his act contributed significantly to that result.*
- *Novus actus interveniens – an intervening act of another person was independent of the act of the accused that it should be regarded in law as the cause of the victims death, as the exclusion of the act of the accused.*

1. *The appellant aged 31 had separated from his wife and formed a relationship with a 16 year old girl.*
2. *She finished the relationship when she was six months pregnant because he was violent towards her.*
3. *He did not take the break up well and drove to her parents house armed with a shotgun.*
4. *He shot the father in the leg and took the mother at gunpoint and demanded she took him to where her daughter was.*
5. *When there, after various threatening and violent behaviour, he then took the girl.*
6. *He drove off with the mother and daughter.*
7. *The police caught up with him and he kicked the mother out of the car and drove off with the daughter.*
8. *He took her to a flat and kept her hostage.*
9. *He used the girl as a shield as he came out of the flat and walked along the balcony.*
10. *The appellant fired shots at the police and the police returned fire.*
11. *The police shot the girl who died.*
12. *The appellant was convicted of possession of a firearm with intent to endanger life, kidnap of the mother and daughter, attempted murder on the father and two police officers and the manslaughter of the girl.*
13. *He appealed against the manslaughter conviction on the issue of causation.*

Held,
conviction upheld. The firing at the police officers caused them to fire back. In firing back the police officers were acting in self - defence. His using the girl as a shield caused her death.