

## 2

# *Actus reus*

### Chapter Overview

Introduction	15
<i>Actus reus</i> : the law	16
Making sense of <i>actus reus</i>	16
Key <i>actus reus</i> principles	17
<i>Actus reus</i> and causation	19
<i>Actus reus</i> in criminal justice practice	21
Example I: the construction of crime	21
Example II: <i>actus reus</i> , the police and PACE	23
Example III: <i>actus reus</i> and the Crown Prosecution Service	26
Example IV: <i>actus reus</i> , victims of crime and criminal justice	28
Discussion and conclusions	29
Further reading	31

### Chapter Aims

After reading Chapter 2 you should be able to understand:

- The basic meaning of *actus reus*
- The key criminal law principles which are included within *actus reus*
- The meaning of factual and legal causation in the criminal law
- How *actus reus* is represented in crime statistics
- How the police use *actus reus* in criminal justice practice
- How the CPS use *actus reus* in criminal justice practice
- How victims of crime who report *actus reus* are treated by the police and CPS
- How the evidence on *actus reus* in the criminal law and criminal justice fits in with the theoretical models introduced in Chapter 1

### Introduction

In this chapter, the concept of *actus reus*, or the 'guilty act', will be explained and analysed. In Chapter 1, it was stated that the term '*actus reus*' meant 'guilty act' – 'it identifies the conduct which the criminal law considers harmful' (Herring 2006: 86).

## 16 | General principles of criminal law

But *actus reus* is not as straightforward as this. The first part of this chapter uses case law and statute law to explain the rules of *actus reus* in more detail. The second part of the chapter discusses the ways in which the concept of *actus reus* is used by criminal justice – using the police and the Crown Prosecution Service (CPS) as examples, as well as considering crime victims' relationship with these agencies.

### Actus Reus: The Law

#### Making sense of *actus reus*

##### DEFINITION BOX 2.1

###### *ACTUS REUS*

The external behaviour or conduct which is prohibited by the criminal law.

*Actus reus* means more than just 'guilty acts'. It also includes a range of other behaviour requirements, defined in each criminal offence. For example, the *actus reus* of theft is taking someone else's property, and the *actus reus* of murder is unlawfully killing another person. But, as these two examples show, the types of illegal behaviour vary greatly between different types of offence. Clarkson (2005: 13–14) splits *actus reus* up into two types of offence. First, there are conduct crimes, which involve doing or being something illegal – for example, possessing illegal drugs. Secondly, there are result crimes, which involve causing a result which is illegal – for example, causing someone's unlawful death as part of a murder or manslaughter offence. Herring (2006: 85), meanwhile, distinguishes between four different *actus reus* requirements – the 'four Cs':

- **Conduct.** Here, the *actus reus* involves illegal behaviour – for example, perjury, a crime which involves lying when giving evidence in court.
- **Circumstances.** Here, the *actus reus* involves behaviour done in a particular scenario which makes it illegal. For example, the crime of criminal damage involves damaging or destroying property *belonging to someone else*, so the key circumstance here is that the property does not belong to you.
- **Context.** Here, it is an internal or 'state of mind' element which makes the behaviour a criminal offence. For example, the crime of rape involves sexual intercourse, but done without the victim's (from now on referred to by the letter 'V') consent, which makes it illegal. Here, V's consent is not something which can be 'seen'. It is their state of mind that counts.
- **Consequences.** Here, the *actus reus* involves producing an illegal result through behaviour – for example, murder, where conduct causes the unlawful death of someone else. If the consequence was not caused by D's behaviour, the offence is not proved (e.g. *White* [1910] 2 KB 124).

Since the term '*actus reus*' covers so many different types of criminal behaviour in the criminal law, most criminal offences will only have some of the 'four Cs', not all of them. For example, context is not relevant to the crime of murder – D would still be guilty of murder even if V asked, or even begged, D to kill them, as long as all of the *actus reus* and *mens rea* requirements were present.

### STUDY EXERCISE 2.1

Using an Internet statute database, find one example of an offence containing a 'conduct' element as part of the *actus reus*, one example of a 'circumstances' offence, one example of a 'context' offence, and one example of a 'consequences' offence.

The next part of this chapter considers some of the key principles of *actus reus* as it operates in practice.

### Key *actus reus* principles

#### *No mens rea without actus reus*

Often, in the criminal law, a crime is committed when there is a combination of *actus reus* and *mens rea* (the guilty mind required for each criminal offence – see Chapter 3 for more details). The *actus reus* for each crime must be established. It is not enough that the *mens rea* for the crime was present, if the *actus reus* was not committed as well (*Hensler* (1870) 11 Cox CC 570; *Deller* (1952) 36 Cr App Rep 184). The main reason for this is that the criminal law in England and Wales, as Clarkson (2005: 20) explains, insists on some expression of someone's criminal thoughts through their actions before it will intervene to punish them.

#### *Voluntary acts*

Not all illegal acts count as *actus reus*. Acts must be voluntary before they can be considered as criminal behaviour. If D has no control over their physical actions for some reason, and commits a crime while 'out of control' in this way, then there is no *actus reus*. In *Hill v Baxter* [1958] 1 QB 277, the Court of Appeal stated that if D was attacked by a swarm of killer bees while driving, and the bees caused D to lose control of the car and hit a pedestrian crossing the road, D would not commit any *actus reus* because their actions were not voluntary.

In a situation like this, D is conscious, but has lost control over their physical actions. In other cases, though, D might be either partly or completely unconscious. For example, D may be sleepwalking, or suffering from various medical or psychological conditions, such as hypoglycaemia (Simester and Sullivan 2007). The 'voluntary act' principle can apply in these circumstances to remove the *actus reus*, just as it can where D is fully conscious.

## 18 | General principles of criminal law

### *Actus reus and 'status offences'*

*Actus reus* does not have to be about doing something. It can also be about status – being something or somewhere that is prohibited by the criminal law, or possessing something that is prohibited. Examples include possession of a prohibited drug (Misuse of Drugs Act 1971 s. 5(1)). Occasionally, the lack of the requirement of voluntary action can lead to what seem to be very unfair convictions under status offences, where D appeared to have no control over the situation. Two good examples of this are *Larsonneur* (1933) 24 Cr App Rep 74 and *Winzar v Chief Constable of Kent* (1983), *The Times*, 28 March.

### *Actus reus and omissions*

In a few situations, someone can be convicted and punished for *not* doing something, that is for an omission rather than an act. The courts have made people liable for omissions, where the omission has caused a crime, in the following situations:

- Where D has voluntarily agreed to take care of V, but has failed to take reasonable steps to do so (e.g. *Stone and Dobinson* [1977] QB 354);
- Where D, a parent, has failed to look after their child to a reasonable standard (e.g. *Downes* (1875) 13 Cox CC 111);
- Where it is D's duty to do something as part of their job contract, but D does not do it (e.g. *Pittwood* (1902) 19 TLR 37);
- Where D has duties as part of their public office (e.g. as a police officer), but does not carry them out (e.g. *Dytham* [1979] QB 722);
- Where D has created a dangerous situation accidentally or unknowingly, but then realises that it is dangerous and does not take steps to remove the danger (e.g. *Fagan v Metropolitan Police Commissioner* [1969] 1 QB 438; *Miller* [1983] 2 AC 161; *Santana-Bermudez* [2004] Crim LR 471).

In some cases there seems to be very little difference between an act and an omission. For example, in *Speck* [1977] 2 All ER 859, D was guilty of gross indecency with a child because his failure to stop her doing what she did was an 'invitation to continue' the gross indecency. On the other hand, in *Airedale NHS Trust v Bland* [1993] AC 789, the House of Lords decided that a victim of the Hillsborough disaster who had been in a coma for three years and who had no chance of recovery should be allowed to die by doctors ceasing to feed and medicate him through tubes, and stated that this would be an omission (which would not lead to criminal liability for murder) rather than a deliberate act of killing by the doctors at the hospital (which would lead to liability).

### STUDY EXERCISE 2.2

Compare and contrast the arguments of Ashworth (1989) and Hogan (1987) on how far liability for omissions should go in the criminal law. Which argument do you think is better, and why?

## Actus reus and causation

### DEFINITION BOX 2.2

#### CAUSATION

The criminal law principles requiring D's actions to be connected to the outcome which is prohibited by the criminal law.

Result crimes require D to cause a prohibited consequence before liability can be proved. There has to be a 'chain of causation' between what D did and the prohibited result. For example, for murder and manslaughter, the prohibited result is the unlawful death of another person. There are two types of causation in the criminal law. These are *factual causation* and *legal causation*. Both factual and legal causation need to be proved before causation can be established.

#### *Factual causation*

Factual causation is sometimes known as 'but for' causation because proving it involves asking the question: if D's act had not happened, would the prohibited result have occurred? For example, in *White* D put cyanide into V's lemonade in order to kill her. V died shortly afterwards but the cyanide was not the cause of death – she had had a heart attack. V would have died regardless of D's act, so the factual chain of causation between D's act and V's death was not there. *Dalloway* (1847) 2 Cox CC 273 shows that where D could not have done anything to prevent V's death, they are not guilty because factual causation was not present – even where, as in this case, D's conduct was blameworthy in itself.

For factual causation, D's act does not have to be the only cause of the prohibited result, or even the main cause. It just has to be an 'operating and substantial' cause of the result. In *Pagett* (1983) 76 Cr App Rep 279, the main cause of V's death was the police firing bullets at her, but D was still guilty of manslaughter because he had been using V as a human shield while firing at the police at the time of V's death. If a reasonable act of self-defence, or in the execution of duty, by a third party against D's act causes V's death, then the chain of factual causation is not broken. However, in *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22, D was convicted of polluting a river, even though a third party had maliciously and deliberately opened the tap on D's tank of diesel, causing the diesel to leak into the river. The House of Lords said that as the vandalism was foreseeable by a reasonable person, D had still caused the prohibited outcome, despite the voluntary damage caused by the third party here.

#### *Legal causation*

Proving legal causation involves asking the question: if factual causation is present, are there any other legal principles which will break the chain of causation, and remove D's liability for the prohibited outcome? First, was there

## 20 | General principles of criminal law

an independent and voluntary act by a third party (i.e. not D) which broke the chain of causation? In *Pagett*, it was the police which directly caused V's death by shooting her. But they only did this because D, who was holding V hostage, had shot at them first. As a result, the Court of Appeal decided that the police's act was only a 'reflex', not a voluntary independent act. The police firing at V did not break the chain of causation and D was still guilty of manslaughter.

A second category of 'third-party intervention' involves V dying after receiving poor medical treatment for injuries which have originally been caused by D. *Smith* [1959] 2 QB 35 stated that if what D did is still a 'substantial and operative cause' of V's death, even poor medical treatment will not break the chain (see also *Cheshire* [1991] 3 All ER 670 and *Malcherek* [1981] 2 All ER 422). On the other hand, doctors' treatment of V in *Jordan* (1956) 40 Cr App Rep 152 did break the causation chain because the court decided that the treatment had been 'palpably bad'. D was therefore not guilty of causing V's death – but *Jordan* was an exceptional case in terms of how bad the doctors' treatment of V was.

### STUDY EXERCISE 2.3

Is it ever fair to allow bad medical treatment by doctors to break the causation chain? If so, how bad would the medical treatment have to be?

The third category of 'third-party intervention' cases involves situations where D has assisted V to take drugs in some way, V has voluntarily taken the drugs, and V has died as a result of taking them. On the basis of the discussion above, D should not be guilty of causing V's death because V has taken the drugs of their own free will, and so the chain of causation has been broken. This was what was decided in *Dalby* [1982] 1 All ER 916. After some uncertainty in the law, the House of Lords resolved the confusion in *Kennedy (No. 2)* [2007] 3 WLR 612 by stating that where D prepares drugs and gives them to V to take, and V dies as a result of taking the drugs, D is not guilty of manslaughter as long as V made a 'voluntary and informed' decision to take the drugs.

A fourth category involves V, previously injured by D, contributing to their own death by some kind of neglect or intervention. The basic rule here is that D has to 'take the victim as they find them'. In other words, any physical or psychological characteristics which might make V more vulnerable to being harmed are irrelevant as long as what D did is still a 'substantial and operative cause' of V's death. This principle is illustrated by *Holland* (1841) 2 Mood & R 351, *Blaue* [1975] 3 All ER 446, and *Dear* [1996] Crim LR 595.

Where V is injured, or killed, trying to escape from D, the escape will only break the chain of causation if it was not 'reasonably foreseeable'. So, if an ordinary person who was present at the scene would not have expected V to try to escape, then the chain of causation will be broken (*Pitts* (1842) Car & M 284 and *Roberts* (1971) 56 Cr App Rep 95). However, D must have actually committed a

*crime* which caused V to try to escape (*Arobieke* [1988] Crim LR 314). Causation can also be proved where D frightens V to death. D can still be liable for murder or manslaughter in such a case (*Towers* (1874) 12 Cox CC 530 and *Hayward* (1908) 21 Cox CC 692).

Apart from this list of principles of legal causation, there are two other topics that are relevant in this area of the law. These are the issues of *transfer of malice* and *contemporaneity*. These topics will be covered in Chapter 3.

The next step is to examine the relationship between *actus reus* principles and criminal justice practice. The following section uses the roles played by the police and the Crown Prosecution Service as case studies to examine the relationship between *actus reus* in law and in criminal justice. As an introduction, though, the discussion takes a brief look at how crime is defined, and the relationship between the *actus reus* in law and the criminal statistics which form the basis of what is known about crime in England and Wales.

## Actus Reus In Criminal Justice Practice

### Example I: the construction of crime

As shown in Chapter 1, there is no behaviour which is automatically criminal. Behaviour must be criminalised in either common law or statute law, and a range of individuals, social groups and factors play a part in deciding which behaviour will be outlawed by the criminal law, and become an *actus reus*. The key players in this process are summarised by Lacey et al. (2003: 78–80). First, the public and their opinions play a part, not just in their voting for politicians and governments which introduce new laws, and the importance attached to appealing to public opinion on acceptable and unacceptable behaviour by politicians (Bottoms 1995), but also in terms of how they report some crimes more than others, perceive some kinds of behaviour as being more dangerous than others (Lacey 1995) and fear certain types of criminal behaviour more than others (Hope and Sparks 2000). The media also plays a crucial part in both shaping public opinion on crime and reporting it (Jewkes 2004). Secondly, Parliament, judges, magistrates and their clerks all create and interpret the meaning of *actus reus* in practice. Thirdly, the Home Office and the Ministry of Justice introduce and develop new criminal laws and policies.

Fourthly, the power of the Attorney-General and the Director for Public Prosecutions to allow particular types of prosecution to be brought gives them power to determine what is and is not *actus reus*. Next, the Lord Chief Justice, the senior criminal judge in England and Wales, plays a key role in developing sentencing policy as well as hearing criminal appeal cases – both of these help to determine the shape of *actus reus*. Finally, pressure groups such as Liberty, the pro-human rights organisation, the Law Commission, and the Association of Chief Police Officers (ACPO) all put forward their own views on how the

**22 | General principles of criminal law**

criminal law should look. All of these different individuals and agencies play a key part in the development of *actus reus* and how it is applied in criminal justice practice.

How accurately do the crime statistics that are available from the government (and other sources) reflect the number of '*actus reuses*' which are committed in England and Wales? Crime statistics are published annually by the Home Office. They are taken from two main sources: police statistics – the crimes recorded by the police and then divided up into different types of offence; and the British Crime Survey (BCS) – the results of a survey asking a selected group of adults in England and Wales about their experiences of being victims of crime over the previous year (Coleman and Moynihan 1996). Police statistics for 2006/07 recorded around 5 million crimes in England and Wales, while BCS figures for the same time period recorded around 11 million crimes, a decrease of 42% from the peak BCS figure in 1995 (Thorpe et al. 2007: 18).

These crime statistics are often portrayed as being an accurate representation of all the crime, or all of the '*actus reuses*', that exist in England and Wales at any given time – for example, by the tabloid press – but the reality is very different. As Mayhew (2007) points out, not only do the police not record all of the crime that is reported to them – because they feel it is too minor or too vague to be put into a specific category of crime, for example – but also there is a substantial 'dark figure' of crime which is not reported to the police at all. Also, there have been changes in what crime is actually counted by police – only 'notifiable offences' are included. For example, in 1998, common assaults were counted as 'notifiable offences' for the first time, and each crime was recorded individually for each victim rather than recording only the most serious of a series of crimes between the same offender and victim. Both of these changes had the effect of increasing the amount of crime in the police statistics (Jones 2005: 62). As a result, there is a clear gap between the criminal law and what is known about when it is broken in the criminal justice process, in terms of police statistics.

The British Crime Survey also has its weaknesses in terms of how accurately it measures crime. While the BCS does pick up some of the 'dark figure' of crime which is not reported to the police, there are several other categories of crime which it does not cover – for example, crimes committed against children, 'victimless' crimes such as drug-dealing, and crimes against businesses (Maguire 2007: 268). As a result, neither the BCS nor the police statistics can measure the full extent of *actus reus* being committed. They simply give a partial picture of it, in different ways (because of the different sources of data and the different categories of crime the data is broken down into). Like crime itself, crime statistics are social constructions, and what is counted 'in' or 'out' can and does change over time. This supports the view that both crime and crime statistics reflect not only changes in society's views on what should and should not be criminalised, and liberal views on the maximisation of individual people's freedom to live their lives as they wish, but also the interests of the powerful and their attempts to hold on to their position of power in society (Lacey 2007).

---

**STUDY EXERCISE 2.4**

---

Since the BCS picks up more crime than the police-recorded crime statistics, is there any point in continuing to collect the police statistics? Explain your answer.

---

The next section of the chapter considers the relationship between *actus reus* and the police, as an example of the role played by *actus reus* in the criminal justice process.

**Example II: *actus reus*, the police<sup>1</sup> and PACE**

This subsection of the chapter examines how the public police use *actus reus* in criminal justice practice.

***Actus reus and the police: PACE powers and the 'gap' between actus reus and criminal justice***

The power of the police to intervene in people's lives to enforce the criminal law, in terms of powers to stop, search, arrest, detain and interrogate those it suspects of committing an *actus reus*, is largely governed by the Police and Criminal Evidence Act 1984 (hereafter 'PACE'). PACE sets out the police's powers in legislation, and widened many of them (Ashworth and Redmayne 2005: 9), but also introduced formal 'rights' for defendants for the first time, attempting to reach a balance between crime control and due process.

For example, s. 1 of PACE allows police officers to stop and search persons and vehicles if they have a reasonable suspicion that they will find either stolen or prohibited articles, but PACE Code of Practice A gives protection against its abuse by police. For example, stops and searches must be based on objective evidence, and cannot be carried out merely as a result of prejudice on age, gender, racial or other grounds (Home Office 2005a: para. 2.2). Under s. 110 of the Serious Organised Crime and Police Act 2005, which replaces s. 24 of PACE, a police officer can arrest someone without a warrant for any offence which that person is committing or about to commit, or for any offence which the officer reasonably suspects that person is committing or about to commit. But these powers can only be used where a police officer has reasonable grounds for believing that one of a list of reasons applies, including preventing the suspect from causing injury or damage. PACE Code of Practice G emphasises that the use of the power of arrest must be necessary, and that officers must consider whether less intrusive ways of

---

<sup>1</sup>It should be noted that writers such as Zedner (2004) see 'policing' as involving a wider range of groups and organisations than the public police, including policing activities by the general public, and by private policing and security firms. This discussion focuses only on the public police, what is known about their criminal law enforcement practice, and how it relates to the law itself.

achieving their objectives can be used instead (Home Office 2005b: para. 1.3). Police also have the basic right to detain suspects (PACE s. 41ff.) and question them (s. 66) but, again, PACE limits these powers in various ways. Suspects must be taken to a police station as soon as possible after being arrested. Once they are at the station, they should be brought to a custody officer as soon as is practicable, and suspects can only be detained for a maximum of 36 hours before either being charged or released (Criminal Justice Act 2003 s. 7, amending PACE ss. 41–42). If more time is required, the police can apply to a magistrates' court to detain the suspect for further 'blocks' of 36 hours, up to a maximum of 96 hours (PACE ss. 43–44). Throughout the custody period, the suspect's detention should be reviewed by a custody officer (i.e. a senior police officer), after six hours initially, and then every nine hours after that.

There has been a great deal of debate among criminologists about how well PACE works in terms of balancing crime control and due process. One body of critical research has argued that PACE has done very little to close the gap between criminal law and criminal justice in terms of the response to *actus reus* that the police are aware of. McConville et al. (1991) argued that PACE had very little impact on the police's behaviour in terms of stretching the concept of criminal behaviour in the form of *actus reus*. Instead, the police's 'working rules', or patterns of using their informal discretion, were what mattered in terms of how the criminal law was used. These working rules were based around the 'crime control' approach to criminal justice, whereby obtaining as many convictions as possible was prioritised, even if this meant some innocent people being convicted along the way. They pointed out that the police were a prosecution agency, and aimed to construct a case for the prosecution focusing on evidence that pointed to guilt, rather than all available evidence (including evidence that suggested innocence). They argued, as a result, that detention of suspects was automatically authorised, as custody officers tended not to question what other officers claimed, and that suspects were either informed of their rights at the police station in a way that they did not understand, or were not informed of their rights at all (ibid.). They also highlighted the key role of confession evidence in the process of crime control, since this removes or greatly reduces the need for supporting evidence indicating guilt (Sanders and Young 2006: 273) as well removing the need for the case to go to trial at court (which in turn saves time and money). On this view, the way in which the police uses *actus reus* in practice could breach s. 6 of the Human Rights Act, which requires them to comply with the ECHR, because of the challenges to Article 3 (the right not to be treated inhumanely, which could be threatened by aggressive interrogation tactics) and Article 5 (the right to liberty, which could be threatened by deliberately keeping suspects in custody in an attempt to obtain confessions).

On the other hand, other criminologists believe that while PACE has faced problems in reducing wrongful use of police discretionary powers, and thereby reducing the gap between *actus reus* and its accurate detection in criminal justice, it has had a positive impact on police practices. Brown (1997), for example, argues that in the first 10 years of PACE's operation, there was an increase in the

percentage of suspects receiving free legal advice – to around one-third of all suspects. He also claims that the use of illegal tactics to extract confessions or incriminating evidence appeared to have declined during this time, and that the tape-recording of interviews had become standard practice. This suggests that PACE has not only reduced the amount of police discretion, but has also led to police using their powers to reduce miscarriages of justice and unfair tactics.

Dixon (1997) points out that PACE has had some effects, such as the fact that suspects are almost always informed of their rights on arrival at police station, and so it is overstating things to claim, as McConville et al. (1991) do, that law can do very little to change police culture, attitudes and behaviour. Maguire (2002), meanwhile, while acknowledging the difficulties PACE has had in changing usage of police discretion in practice – for example, in terms of implementing independent checks on police activity while detaining and questioning suspects – points out that PACE has been valuable in introducing a clear legal structure for police activities which was lacking before its implementation. Morgan (1995) also criticises the arguments of McConville et al., claiming that their study deliberately highlights evidence which shows the police (and PACE's influence) in a negative light, and plays down evidence which suggests that PACE had made a difference to police behaviour in their study.

#### STUDY EXERCISE 2.5

Given the research evidence on PACE discussed in this subsection, do you think current government proposals to allow the police to detain terrorism suspects for 42 days without charge are necessary to fight back against serious crime, or a dangerous limitation of civil liberties which could lead to more miscarriages of justice? Give reasons for your answer.

#### *Actus reus and the police: causation and criminal investigation*

Causation, as shown above, is an essential element in investigating and detecting the *actus reus* of crimes, especially result crimes. In doing these activities, police must gather evidence that particular suspects have caused an outcome which is prohibited by the criminal law, satisfying the factual causation principles which were discussed earlier in this chapter. There are a range of different types of evidence which the police can use to build a case. Newburn (2007: 605–6) lists the main categories of forensic evidence:

- Fingerprints – either impressions in soft materials, visible fingerprints (e.g. blood or ink stains containing prints), or prints left on a surface (e.g. glass);
- DNA – taken from various sources (e.g. skin or blood), and recovered by swabbing or scraping stains, or by recovering an item suspected to contain DNA;
- The National DNA database which has now been set up.

These add to other types of evidence which the police can gather, such as ballistic evidence to show whether a gun has been fired, documentary evidence such as letters, and 'real' evidence, that is objects which are relevant as evidence.

There is therefore a wide range of types of evidence which the police can use to establish that an *actus reus* has been committed, particularly since the establishment of the National DNA database in 1995. On 31 March 2006, the database contained 3,785,571 samples, making it the largest DNA database in the world (Home Office 2006). Section 10 of the Criminal Justice Act 2003 amends s. 63 of PACE to allow the police to take DNA samples from anyone who is arrested for a recordable offence – not just those who are charged or convicted. The increased power to gather evidence even from those who have not been convicted of an offence has arguably made criminal investigation – and proving substantial and operative factual and legal causation – easier for the police. Government statistics show that in 2004/05, a further 15,732 crimes were detected as a result of further investigations linked to the original case in which DNA was recovered, and the National Database provided the police with 3,000 case matches per month on average (Home Office 2005c).

Research such as this suggests that new techniques of evidence-gathering are closing the gap between *actus reuses* which are committed and criminal justice. For example, they enable the police to solve ‘cold cases’ where crimes have been committed years before, but for which no one was convicted, such as the so-called ‘Wearside Jack’ case in which a phone hoaxer misled police who were investigating the Yorkshire Ripper murders. However, no evidence is 100% reliable in terms of from where or from whom it came. This is the case whether the evidence in question is ‘traditional’ evidence, such as handwriting or firearms examination, or even apparently more exact sources of evidence, such as fingerprints and DNA, which are often portrayed by those using them as unique and unproblematic (Broeders 2007). An example of DNA evidence leading to an innocent person being wrongly accused of committing an *actus reus* is the case of Raymond Easton, who was charged with burglary in 1999 after his DNA sample matched one taken at the crime scene on six test points, even though it was physically impossible for him to have committed the crime.

It is therefore clear that while advances in evidence-gathering technology have created new opportunities for the police to establish causation, and therefore to match *actus reuses* with the people who committed them, there is still scope for ‘wrong turnings’ in the establishment of evidence in a case. The strength and reliability of evidence are also key questions when considering the role and practice of the Crown Prosecution Service, discussed in the next section.

### Example III: *actus reus* and the Crown Prosecution Service

The Crown Prosecution Service (hereafter ‘CPS’) decides whether or not a case should proceed to the court stage after the police have charged a suspect, and selects appropriate charges in cases which it does take to court. The police consult their local CPS branch before deciding whether or not to charge a suspect, and pass on details of the case to the CPS. The local Principal Crown Prosecutor then allocates the case to a member of their team, and only the Principal Crown

Prosecutor has the power to decide whether or not to continue with the case. Next, the CPS must provide a constant review of the progress made with each case, in terms of the quantity and quality of evidence obtained. Finally, the CPS makes the decision whether or not to prosecute, using the *Code for Crown Prosecutors* (e.g. Crown Prosecution Service 2004) as a guide. They use two key tests: whether or not there is sufficient evidence to provide a realistic prospect of conviction if the case reaches court, and whether or not prosecution is in the public interest. The CPS's task, in principle, is to 'close the gap' between *actus reus* in the law and criminal justice, in two ways: by ensuring that there is enough evidence to prove that the right person is matched up with an *actus reus*, and ensuring that an appropriate offence charge is found to match the criminal behaviour committed.

HM Crown Prosecution Inspectorate (2005) found that in 2004/05, 98% of prosecuted cases in England and Wales met the evidential test, and that 99% of cases met the public interest test. However, other evidence suggests that the CPS faces operational and institutional problems which limit its effectiveness in bringing *actus reus* and criminal justice closer together. One problem is the *Code for Crown Prosecutors* itself. In theory, it is supposed to provide all of the guidance that CPS workers need to make the decision on whether or not to prosecute. Yet Hoyano et al. (1997) found that the language used in the *Code* has become more and more simplified each time that a new version of the *Code* is published. They identified the lack of clarity in explanations of the policies CPS workers should follow as a key factor for their finding that the *Code* had very little impact on decisions made by the CPS day to day.

The tests used to decide whether or not to prosecute have also been criticised as unhelpful. The *Code* (CPS 2004) defines the 'realistic prospect of conviction' test as being an objective test: is a court more likely than not to convict on the basis of the evidence available, based on the admissibility and reliability of that evidence? Yet this test oversimplifies the wide discretion which courts have to decide on admissibility of evidence, and to decide the facts of the case in different ways. Similarly, the 'public interest' test hides the reality of the greater number of evidential factors in favour of prosecution than against it, the presumption in favour of prosecution unless there are factors present which are against prosecution, and the CPS reliance on (sometimes very limited) police information on whether prosecution would be in the public interest or not (McConville et al. 1991).

Other research indicates that the CPS takes cases which are evidentially weak to court more often than the evidence from HM Crown Prosecution Inspectorate (see above) suggests. In Baldwin's (1997) study, early warning signs about prosecutions ending in acquittal in court were noticed by the CPS in 87.3% of the judge-ordered acquittals,<sup>2</sup> 73.1% of the judge-directed acquittals,<sup>3</sup> and 58.8% of acquittals by a jury in the Crown Court. Problems have also arisen regarding the

---

<sup>2</sup>Where a judge orders that the defendant is acquitted before the jury has been sworn in at the start of a Crown Court trial – for example, because the CPS has offered no evidence to the court.

<sup>3</sup>Where a judge directs the jury to acquit the defendant during the course of a trial.

accountability of the CPS for its decisions. Ashworth and Redmayne (2005) show that weaknesses have been found in terms of recording CPS decisions, and in terms of communication of vital information from person to person within the CPS.

### STUDY EXERCISE 2.6

Read the CPS explanation on their website of their decision not to prosecute any police officers in connection with the death of Frank Ogboru on 26 September 2006 (at [www.cps.gov.uk/news/press\\_releases/132\\_08](http://www.cps.gov.uk/news/press_releases/132_08)). Applying the two CPS prosecution tests, do you agree with the CPS decision reached in this case? Explain your answer.

The next section of this chapter considers how victims of crime who report *actus reuses* to criminal justice agencies are dealt with by the police and CPS.

#### Example IV: *actus reus*, victims of crime and criminal justice

##### *Actus reus, victims and the police*

The reporting of crime to criminal justice agencies by victims is vital in 'closing the gap' between the occurrence of the *actus reus* and the prosecution, conviction and punishment of people for breaking the law, since most crimes come to the police's attention via the public, and victims of crime play a vital role in giving evidence in court which forms the basis of successful prosecution. As the discussion of crime statistics above showed, there is a gap between the number of *actus reuses* experienced by victims and the number which are recorded by the police. The BCS indicates that when a 'comparable subset' of BCS and police crime categories is considered, only 42% of comparable crime included in the BCS is reported to the police, and only 30% of comparable crime is recorded by the police. Clarkson et al. (1994) identified key reasons for victims not reporting crimes to the police as including the victim's perception that their crime is not detectable, the victim's reluctance to have their own conduct scrutinised, and fear of reprisals.

Some criminologists (e.g. Shapland et al. 1985) argue that the police have traditionally been slow to recognise the needs of victims who report their crimes, especially victims who are vulnerable because of their age, gender, ethnicity, or class. Reeves and Mulley (2000) found that the support and information that police provided to victims varied greatly from police force to police force, depending on other police work and priorities, such as the detection and investigation of crime. Research done into the impact of other police-led initiatives designed to make reporting crime easier for victims has also had mixed results. For example, the Second Victim's Charter (1996) introduced a pilot victim statement scheme, which allowed selected victims to make a statement to police explaining how the crime committed against them had affected their lives. This statement could later be used in court. Sanders et al. (2001) found that of 148 victims who made

statements, 77% of victims thought making a statement was the right thing to do at the start of the criminal process, compared with 57% at the end. Sanders et al. concluded from these findings that victims experienced a great deal of dissatisfaction as a result of victim statements, and had often had their expectations falsely raised by statements. However, other research has found more positive effects for victim statements. Chalmers et al.'s (2007) evaluation of a Scottish pilot project based around a written statement made by the victim to the police and passed on to the judge hearing the victim's court case found that while only 14% of eligible victims made a statement, 86% of the victims taking part thought that making a statement was the right thing to do at the end of their case. These conflicting research studies show the impact of police discretion – at individual, force and national level – in deciding how far victims' needs during the giving of information about an *actus reus* will be met, and also show the importance of good communication between police and victims about the processes of criminal justice.

#### STUDY EXERCISE 2.7

Read the articles by Sanders et al. (2001) and Chalmers et al. (2007). On the basis of the research findings reported in these two articles, would you make a victim statement if you had the opportunity to do so?

#### *Actus reus, victims and the CPS*

Measures have recently been introduced that try to improve communication between the CPS and victims, and aim to make victims a central part of criminal justice. For example, *CPS Codes for Crown Prosecutors* from 2000 onwards (e.g. CPS 2004) state that the CPS must take the victim's views into account when deciding whether or not to prosecute in a particular case, and the *Attorney-General's Guidelines on the Acceptance of Pleas*, issued to all CPS workers, states that the victim's interests must also be considered before the prosecution accepts a guilty plea from a defendant in court (Attorney-General's Office 2005).

However, the victim's interest must be balanced against the CPS's main two tests for deciding whether or not to prosecute a case – that is the public interest in prosecution and the prospect of a realistic conviction. These tests will take priority over the interests of the victim and, if there is a conflict between the two, would be decisive in reaching a decision on prosecution. Also, as Sanders (2002) points out, these guidelines do not cover victims whose cases are handled by other prosecution agencies, such as the Health and Safety Executive, rather than by the CPS.

#### Discussion and Conclusions

*Actus reus* has been developed and portrayed as a way of holding individual people responsible for behaviour that the criminal law states is wrong. The emphasis on acts being voluntary and requiring *mens rea* to go with them, for

example, points to the criminal law view of *actus reus* being a liberal one – only blaming people for behaviour which has been a conscious decision to break the law, allowing all other conduct to go unpunished, and allowing individuals to remain free from any social or political interference as long as they do not break the law (Norrie 2001). This also fits in with the law and economics approach, which emphasises that people commit crimes of their own free will.

However, *actus reus* can also involve being somewhere or possessing something which the criminal law will not allow, even where, as in *Larsonneur* or *Winzar*, there was no voluntary decision to go to the ‘forbidden’ place. Similarly, the criminal law also punishes people for omissions, in certain limited circumstances – for example, where someone fails to protect a vulnerable person in their care (*Downes, Stone and Dobinson*), or where someone does not do what their job requires them to do (*Pittwood, Dytham*). None of these scenarios would be punished under an entirely liberal criminal law. Instead, they offer evidence that *actus reus* can also be used paternalistically, to protect vulnerable people in society from being harmed by others who do not do what is expected of them. But these social uses of *actus reus*, which depend on ties between people being wrongly broken, are hidden by the general liberal principles commonly associated with *actus reus* (Norrie 2001).

If causation is re-examined, *actus reus* is again not as liberal as it first appears. Factual, ‘but for’ causation is a liberal idea – people are only held responsible for their *actus reus* if the prohibited outcome would not have happened if they had not done what they did. If D voluntarily changes the course of V’s life, for example by killing or injuring V, then it is right to hold D responsible in the criminal law for what happens to V as a result of their actions, unless a third person’s voluntary act intervenes to break the chain (Hart and Honoré 1985). However, as Norrie (2001) points out, this does not take into account the social circumstances that shape the decisions and actions made and done by individual people in their everyday lives. It does not try to understand *why* the individual has done what they have done.

Considering legal causation, the liberalism of *actus reus* is limited even further. The courts have decided that doctors should not be held liable for breaking the causation chain between D and V, even where they treat V very badly (*Smith, Cheshire*), unless their treatment was ‘palpably bad’ (*Jordan*). This shows that *actus reus* is about something more than protecting the vulnerable in society. It is also about regulating the social order, and making moral judgements about the behaviour of certain types of ‘socially acceptable’ people, regardless of their liability under liberal principles (Norrie 2001). Overall, then, the core of *actus reus* may claim to be liberal and individualistic, but in fact this hides a variety of criminal law aims, some of which contradict each other and promote divisions and discrimination in society (Norrie 2005).

Turning now to criminal justice, there is a considerable gap between every *actus reus* that occurs in England and Wales and the response to them from criminal justice. As well as crime itself being a social construction, the criminal statistics that claim to measure the number of crimes are in no way an accurate representation of crime, due to limitations on what is reported to and recorded by police and the

BCS. Again, therefore, the liberal and positivist view of crime statistics as being an accurate picture of crime hides a range of social issues which decide which *actus reus* will be included in criminal statistics and which will not.

In terms of how the police and the CPS use the rules on *actus reus* set out in the liberally-centred criminal law, and how they use the rules for deciding when to use the power of criminal justice against the public, there is a body of evidence, spearheaded by McConville et al. (1991), that argues that the legal rules (such as PACE), which claim to structure what the police and the CPS do, have very little impact in practice. The evidence of McConville et al. suggests that police and CPS work is more about crime control than due process and human rights. Others, such as Choongh (1997), argue that the police use their power to extend social control and social exclusion as far as possible. However, work such as that by Dixon (1997) argues that due process-based law can have, and has had, an impact on criminal justice practice by structuring that practice according to a set of rules, and reducing the misuse of power. This suggests that criminal justice, like criminal law, has a conflicting set of aims in terms of how it uses *actus reus*. Sometimes due process wins, but at other times criminal justice practice is characterised by the crime control or power models. On this view, criminal justice is best characterised as 'a related but not entirely co-ordinated set of practices geared to the construction and maintenance of social order' (Lacey 1994: 28). This conflict and confusion is particular significant for victims, who have a set of needs of their own when they inform criminal justice of an *actus reus* that has affected their lives, but who must fit in with the wider aims of the criminal justice process as reflected in the daily practice of the police and the CPS – aims which can be very different from their own, and the conflict over which can lead to victims' expectations being frustrated in their dealings with the police and CPS.

The next chapter applies the same analytical approach to *mens rea*, in terms of its legal and criminal justice context.

#### FURTHER READING

- Allen, M. (2007), *Criminal Law* (9th edn): chapter 2. Oxford: Oxford University Press.
- Ashworth, A., and Redmayne, M. (2005), *The Criminal Process* (3rd edn). Oxford: Oxford University Press.
- Dignan, J. (2005), *Understanding Victims and Restorative Justice*. Maidenhead: Open University Press.
- Sanders, A., and Young, R. (2006), *Criminal Justice* (3rd edn). Oxford: Oxford University Press.
- Simester, A.P., and Sullivan, R. (2007), *Criminal Law: Theory and Doctrine* (3rd edn): chapter 4. Oxford: Hart.