

Video transcript
Video Tutorial (d): Omissions liability (chp 2)

Hi, in this video I want to talk to you briefly about omissions liability and this is obviously in relation to the Actus Reus chapter which is Chapter 2 of the textbook.

Now, there's a couple things that we need to discuss, the first one it sounds so painfully obvious but is nevertheless a mistake a lot of people make particularly when they're spending some time learning about omissions liability and the specific rules in relation to it - and that is very, very importantly omissions is not an offense and obviously you're not liable, you can't be sent to prison for an omission but rather an omission as we learn about it, is a constituent element or potential constituent element of actual offenses. So, for example, although I can't be liable for omission, my omission in certain circumstances can lead to my liability for murder and lead to my liability for another offense. So just as a general point, sounds painfully obvious as I say, but nevertheless it's something that can sometimes confuse.

Now, when we're thinking about omissions liability it's something we spent quite a long time on often in lectures but the important thing to remember first of all is that if possible we don't want to apply omissions liability in practice because actually in the vast majority of cases it's much more straightforward and much more obvious to blame the defendant for something the defendant has done so i.e. an action rather than an omission. In the vast majority of problem questions and the vast majority of real-world events that's exactly what the criminal law is doing. It's looking for a criminal action as opposed to a criminal omission. However, of course, there will be times where it's not possible to find a criminal action and so therefore it is appropriate to look for omissions liability instead.

The two most obvious would be firstly where there is no action from the defendant, so for example, if the defendant is accused of murder and the evidence demonstrates our defendant had a young child whom they didn't feed and eventually the victim, the young child, died as a result - it might be impossible to identify an action which led to that result, the result of death. The actions of the defendant were simply going about their normal everyday life those didn't cause the death what caused the death was the absence of the defendant feeding their child in the way they're supposed to or at least alerting authorities. And so in that sense because there's no action you can pin liability to, we must look for omissions liability instead, omissions as a different form of conduct which can lead to liability for, in this case murder. The other scenario is where we do have an action but actually for whatever reason we can't find liability for that action and a useful demonstration of this is the case of Kennedy No.2 for example. So in Kennedy No.2, this involved the supply of drugs from the defendant so the defendant supplied drugs to the victim, the victim self-injected those drugs here and then that led to an overdose by the victim, simple skull and crossbones, where the victim then dies as a result.

Now the most obvious situation here in this case involved potentially an offense of an unlawful act manslaughter was to focus on this. To focus on the supplier of the drugs. So this is an action, a blameworthy action, that the defendant does which seems to contribute to the death of the victim later on. Now, as a result of that of course, in Kennedy No.2, they focus on this action but eventually they find they can't construct liability, they can't find liability for the manslaughter offense and the reason for that quite simply is here. The fact that the victim voluntarily self-injected the drugs and the voluntary self-injection, a free informed voluntary self-injection breaks the chain of causation and so because there's no causation link between what defendant did and the death of victim we therefore can't find liability for a manslaughter offense. Now in this scenario and of course in Kennedy No.2 this means there's no offense committed.

Now what happened is in a later case, the case of Evans in 2009, is a similar scenario, this time it was a young woman who supplied drugs to her half sister who eventually dies in an overdose. Now the interesting thing that they did in Evans was to say we can't focus on supply of drugs because again we got the chain of causation problem but what we're going to do instead is to focus here. Focus on this spell of time in between the voluntary self-injection and the death of the victim and if we're going to say that if there were signs that our victim was overdosing as a result this creates a duty on our defendant to act in order to try and repair the damage. So, at the very least, to call an ambulance to try and save the victim. And the fact that our defendant failed to do that means we can focus on her omission.

So there are two ways as I say firstly there is no action and so therefore we can only look for omissions liability or in a scenario like this it might be that there is an action but there's a problem with finding liability for that action here because of the chain of causation and so therefore we're looking for an alternative criminal event. We're looking for alternative conduct from our defendant in order to find liability and in Evans that's exactly what they found in terms of the later omission. Now in terms of omissions, in terms of then how to apply them, in a case like Evans is to require a duty essentially. So although an action is much more straightforward, if an action causes a harm, then we have conduct, we have the causation of the harms required - for omissions liability to be constructed, we generally don't blame defendants for what they fail to do. We generally want only blame them for what they have done an active participation in the crime.

So, whenever we have omissions liability there are three additional questions we have to ask whatever the offences is being charged. The first one, is to say - is the offense capable? Is the offense one that is capable of being committed by omission? Now most defences are nowadays capable of being committed by omission but there are still a number offenses which aren't. A good example of that would be unlawful act manslaughter. So in Evans for example they then had to charge gross negligence manslaughter because unlawful act manslaughter can't be committed by omission so always check the offense first of all. Is it capable of being committed by omission? Secondly, we then need to identify the duty, a duty to act.

This is not the same as a duty of care but rather a smaller category where there is a sufficient duty on the defendant that the law requires them to act in some way. So in Evans for example that was because the defendant created the dangerous situation contributed to it by supplying the drugs. That thereby created a duty that she should try and help and try and prevent the harm coming about and there are various duties which we discuss within Chapter 2 which can amount to a duty to act. And then thirdly we need a breach of that duty. So if for example if we go back to our example of the parents who allows the child to starve if that parent was in that scenario we might charge the offense of murder. Murder is capable of being committed by omission so it passes this test. Then we say it's their duty to act, and there is a duty to act between parents and their children so we have a duty to act. Then we have to look at the breach, here has a defendant act or fail to act in a reasonable manner. So if for example the parents were tied up so you may have been robbed or burgled by a group of criminals and tied up on a chair so they couldn't move, yes the parents in that scenario have failed to feed their child but they haven't breached their duty. They have done everything that could reasonably be expected of them, they were tied up, it was impossible for them to feed their child in which case it would fail here and there will be no liability for murder. However, if they were physically able to perform the actions that the duty requires of them and they failed to do that, then there would be breach in that duty and therefore we could construct omissions liability in that way. But remember whenever you're dealing with omissions liability each of these three aspects needs to be satisfied.

Now, the last thing I want to mention as well is the issue of omissions and causation and this is something that often students struggle with. So here to find a valid omission this, this just gives us our conduct elements, this gives us the equivalent of a physical action from the defendant in other circumstances. But we still need to ask where it's a result crime (something like murder), has the conduct of the defendant caused the result to come about. In relation to actions, that's relatively straightforward. If, did I move my body in the certain way that I did, did it cause the harm to result. But in relation to omissions that can be a little bit more tricky. Rather than asking has our omission caused, rather try and think about what is it that the omission, what is it the duty of act required our defendant to do, what should they have done. The question then becomes has their failure to do that reasonable conduct impacted the result coming about. Now an easy way to think about this is a couple of examples. The first one is in the case of Evans when there was liability for gross negligence manslaughter and the reason for that is because the victim was suffering an overdose over a period of hours during the night and the defendant rather than doing what was required i.e. phoning an ambulance rather simply put the victim to bed and hoped that she'd get over it. She didn't and she eventually died. Now when we're looking at the question of causation there we're saying if the defendant had called the ambulance could the ambulance potentially have impacted that outcome and prevented the death happening. And the answer there because it was over such an extended period of time was yes there could have been something usefully done to prevent the death and therefore the omission caused or caused and contributed to that death coming about which satisfies then the actus reus of gross negligence manslaughter.

But let's say it happens slightly different, let's say the victim in Evans self-injects drugs and immediately drops dead or drops dead after just a few seconds such that even if our defendant did what was reasonable, even if she phoned an ambulance there's absolutely no way the ambulance could have saved the victim. Now in that scenario, yes there's a criminal omission, there is an omission of conduct element, but that conduct element, that omission, has not caused the result to come about. Because even if our defendant had done what was reasonable it would not have impacted the result it, would not have prevented the harm coming. And in that scenario we have our conduct element but there's a lack of causation and therefore for a charge like gross negligence manslaughter or murder or whatever any result crime there could be no liability.

Okay, thank you.