

Chapter 5: The Fault Element, Or *Mens Rea*

- Mens rea means in the case of murder, malice aforethought, in case of theft, an intention to steal in the case of rape, an intention to have forcible connection with a woman without her consent
- Parliament has not clearly defined fault elements such as “purposely”, “knowingly”, “recklessly”, or “negligently”
- Mens rea= the fault element
- There are two, broad types of mens res: subjective and objective.
- Subjective describes what was actually in an accused’s mind, and always describes some level of actual knowledge about the nature and consequences of actions.
- Objective describes what an accused ought to have known, and always describes what a **reasonable person** would have known.

A) Conceptual Considerations (p.164)

- In order to explain fault element of any criminal offence accurately, it is necessary to specify:
 1. The circumstances and consequences to which fault element is directed, including its relation to actus reus of the offense
 2. The precise fault element required
- Mens rea of murder requires at least a subjective knowledge that the victim would die

1) The Relation of the Fault Element to the Prohibited Act (pg.164)

- Mens rea is concerned with the consequences of the prohibited actus reus—thus in crimes of homicide we speak of the consequences of the voluntary act—intention to cause death, or reckless and willful blind persistence in conduct which one knows is likely to cause death
- Objective foresight of the risk of bodily harm was a sufficient fault element for the crime of unlawful act manslaughter, even though actus reus of the crime was causing death as opposed to bodily harm

2) Subjective and Objective Fault Elements (p.166)

Subjective Fault:

- ⇒ Requires the crown to establish that the accused subjectively had the required guilty knowledge in relation to the specified circumstances or consequences

Objective Fault:

- ⇒ Requires only that a reasonable person in the accused’s position would have had the required guilty knowledge or would have acted differently
- Judge or jury who must determine what was in accused’s mind must rely on inferences from the evidence presented in the case
 - Since people are usually able to foresee the consequences of their acts, if a person does an act likely to produce certain consequences it is, in general, reasonable to assume that accused also foresaw the probably consequences

- Subjective mens rea operates as a doctrine that prevents the conviction of an accused who, for whatever reason, does not have knowledge and foresight that a reasonable person would have
- The function of subjective mens rea is to prevent the conviction of the morally innocent—those who do not understand or intend consequences of their acts

3) Common Law Presumptions of Mens Rea

- Supreme Court has been reluctant to constitutionalize subjective mens rea for all but the most serious crimes, but it has long relied on common law presumptions in favour of subjective mens rea in relation to all aspects of actus reus
- When offense is criminal, crown must establish a mental element, namely that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offense, or with willful blindness towards them
- Criminal offense require some form of Subjective mens rea—intent, knowledge, recklessness, or willful blindness—in relation to all aspects of the actus reus unless Parliament indicates otherwise

4) Constitutional Requirements of Mens Rea (p.171)

(a) Requirements of Subjective Fault in Relation to the Prohibited Act for Special Stigma Crimes: Murder, Attempted Murder, and War Crimes

R v. Vaillancourt (p.172)

- Principles of fundamental justice require proof of a subjective mens rea with respect to the prohibited act, in order to avoid punishing the “morally innocent”
- Subjective foresight of prohibited consequence is required for murder, attempted murder, and war crimes
- A conviction for murder carries with it the most severe stigma and punishment of any crime in our society
- Attempted murder only has max penalty of life imprisonment and not mandatory penalty as does murder
- With murder and attempted murder, the accused has the intent or “killer instinct” and required mens rea is knowledge of the probability that death will be caused

(b) Principles of Fundamental Justice as Outline in Creighton (p.174)

- According to the Supreme Court, three factors are relevant to the question of what kind of mens rea is required for what offences:
- 1) Stigma of offence
- 2) Whether punishment is proportionate to moral blameworthiness of offender
- 3) Principle that harm caused intentionally should be punished more severely than unintentional harm

(5) Fault Elements in Relations to Defense of Mistake of Fact and Intoxication (p.179)

- availability of both defenses depends on fault element of the specific offense being absent
- both defenses operate to raise a reasonable doubt as to whether the accused had the requisite fault element rather than existence of some other factor (i.e. self-defense which may excuse commission of crime)
- evidence that accused was intoxicated may raise a reasonable doubt whether the accused has required mental element for specific intent offences such as murder or robbery
- derivative nature of mistake of fact defense is revealed by caring the availability of the defense for crimes with various and no fault elements (not relevant in absolute liability offenses)

(B) The Degrees of Subjective Mens Rea (p.180)

(1) Intent, Purpose, or Wilfulness

- highest level of subjective mens rea is that which requires the accused to act with the intent or purpose to achieve the prohibited result, or to willfully pursue such a result
- this high level of mens rea is used relatively infrequently

R v. Hibbert (p.182)

- you know that what you are doing will be a crime
- Refers to the deliberate causing of a material outcome, as guided by one's knowledge of the environment and one's place within it.
- The word *Wilfully* denotes a legislative concern for a relatively high level of mens rea
- Liability ensues **if and only if** one knows that the an act will **probably** lead to a prohibited result, **and**, engages in an act precisely to achieve that result. (person new that crime would occur and wanted crime to occur)
- This is not to be confused with **motive** (R. v. Hibbert), which describes whether one wants or desires a result.

Intent, Purpose, or Wilfulness Distinguished from Motive (p.184)

- Criminal law does not require proof of a motive for a crime and an argument that accused had no motive or some innocent motivation will not exonerate one who has otherwise committed the crime with necessary guilty intent
- Mens rea relates to the "intent" (i.e. the exercise of a free will to use particular means to produce a particular result)
- Mental element of crime usually involves no reference to motive
- Crown does not need to prove motive, but evidence relating to it can be relevant and assist the crown and sometimes the accused
- Court indicated that in most cases, the motive of avoiding harm to self or others would not negate the issue of intent
- Good motive is no defense to intentional crimes it may however be relevant to exercise of prosecutorial or sentencing discretion

- Although neither motive nor beliefs about legality are relevant for most criminal offense, they may be relevant to some offenses such as theft and other property offenses that allow a colour of right defense
- One exception to principle that motive is not an essential element of offences are terrorism offenses created by Parliament
- Prosecutor must not only prove various forms of intent beyond reasonable doubt, but also that the act was committed in whole or in part for a political, religious, or ideological purpose

Knowledge (p.187)

- Slightly lower form of subjective mens rea than intent or purpose
- S. 229(c) of Code states that a person is guilty of murder if he “knows” that he is “likely to cause death to a human being, notwithstanding that he desired to effect his object without causing bodily harm or death”
- Knowledge is a common form of mens rea for possession-based offenses

R.V.Beaver (p.187)

- Court held that a person in physical possession of a substance could not be said to possess that substance unless he or she knew the nature of the substance (person with honest belief that substance was baking soda would not have mens rea for possession even if the substance turned out to be heroin)
- If it was ignorance of law (i.e. person did not know heroin was illegal.. would still be convicted)

Wilful Blindness (p.198)

- Seen as substitute for knowledge in cases where an accused subjectively sees the need for further inquiries about the existence of prohibited consequences or circumstances but deliberately fails to make such inquiries because he or she does not want to know the truth
- Wilful blindness is when accused suspects a fact and realizes the probability, but refrains from obtaining final confirmation because he wanted in any event to be able to deny knowledge

R.V.Sansregret

- Accused broke into the home of complainant after she called relationship off and took knife to bedroom
- Complainant had sexual intercourse with accused to calm him down and then later sued for rape
- Sansregret was charged because even if he was not subjectively aware that there was no consent, he was willfully blind to the lack of consent
- Accused refused to inquire whether or not complainant was consenting even though he was aware that he should have
- The defense of mistake of fact cannot apply

Recklessness (p.191)

- Lower form of mens rea than intent, purpose, wilful blindness, but in Canada is still form of subjective mens rea

- Recklessness requires subjective advertence to the prohibited risk and can be distinguished from negligence, which requires only that a reasonable person in the accused's circumstances would have recognized the risk
- A person recklessly commits sexual assault if he recognizes the risk that women is not consenting, while a person would negligently commit sexual assault is reasonable person in his circumstances would have known there was a risk that woman does not consent
- Recklessness requires only subjective awareness of the risk of prohibited act as opposed to knowledge of likelihood of the act

Transferred Subjective Mens Rea (p.192)

- S.229(b) of common law doctrine of transferred intent
- **R.v. Droste**
 - ⇒ Accused who deliberate attempted to kill his wife set fire to car, causing two children buckled in back seat to die
 - ⇒ Court concluded that because the attempted murder of accused wife was planned and deliberate, the intent of planning and deliberation as well as knowledge that death would result could be transferred to children's' death

The Degrees Of Objective Mens Rea (p.193)

- Supreme Court indicated that objective, as opposed to subjective fault is constitutionally sufficient for unlawful act manslaughter and other criminal offenses less serious than murder, attempted murder and war crimes

Who IS Reasonable Person (p.193)

- Reasonable person will not be invested with the personal characteristics of the accused unless the characteristics are so extreme as to create an incapacity to appreciate the prohibited risk or the quality of the prohibited act
- Relevant person characteristic could be illiteracy if he or she was charged with a crime stemming from mishandeling of a marked container containing a dangerous substance
- Accused age and level f education not normally considered to determine reasonable person