CANADIAN BAR ASSOCIATION

NATIONAL CRIMINAL JUSTICE SECTION

COMMITTEE ON CRIMINAL CODE REFORM

THE FAULT ELEMENT

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THE FAULT ELEMENT

> More ink has been spilled over the guilty mind concept than any other substantive criminal law topic. Writers and judges speak of the fundamental "*mens rea*", "blameworthy state of mind", "culpability", "responsibility" or "fault" requirement. They resort to a bewildering variety of terminology and to semantic acrobats. The subject brings a glint to the eyes of some scholars but a glaze to those of many others and of most judges. There can be few subjects where the basic principles are the subject of such dispute.
>
> Don Stuart, *Canadian Criminal Law* (2d ed.) @ 117

I. HISTORICAL PERSPECTIVE

In our more primitive stage of society, the preservation of order was a matter of paramount importance. A prohibited act was one of absolute liability. A man was punished for having committed the offence, regardless of his state of mind. It was only under the influence of Canon law and Roman law that the idea of moral blame first arose in England in the 13th century. This idea slowly evolved into the common law principle that *mens rea* or guilty mind was an essential element in criminal responsibility. In 1889 Stephen J. referred to this principle in *R.* v. *Tolson* 23 QBD 168 @ 187-8 in the following words:

> The principle involved appears to me, when fully considered, to amount to no more than this. The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed; or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition ...

It was against this background that the *Criminal Code of Canada* was first enacted in 1892. As it is anathema in Anglo-American societies to punish the blameless, a guiding principle of the *Criminal Code of Canada* has been "no liability without personal fault."

> It has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognized as an essential element of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law. It is so old that its first enunciation was in Latin: *actus non facit reum nisi mens sit rea.*
>
> Reference re Section 94(2) of *Motor Vehicle Act* (B.C.) (1985) 48 CR (3rd) 289 at 318 (SCC) per Lamer J.

The Supreme Court of Canada recognized the fault requirement as part of the common law in *R.* v. *City of Sault Ste. Marie* (1978) 40 CCC (2d) 353 and as part of the constitution under section 7 of the *Charter* in Reference re Section 94(2) of *Motor Vehicle Act* (B.C.), *supra*.

In Wilson J.'s judgment in *R.* v. *Tutton* (1989) 48 CCC (3d) 129 (SCC) @ 147 she stated:

> This court made clear in *Sault Ste. Marie* and other cases that the imposition of criminal liability in the absence of proof of a blameworthy state of mind, either as an inference from the nature of the act committed or by other evidence, is an anomaly which does not sit comfortably with the principles of penal liability and fundamental justice ... This is particularly so in the case of offences carrying a substantial term of imprisonment which by their nature, severity and attendant stigma are true criminal offences aimed at punishing culpable behaviour as opposed to securing the public welfare. In the absence of clear statutory language and purpose to the contrary, this court should, in my view, be most reluctant to interpret a serious criminal offence as an absolute liability offence.

Mens Rea

True criminal offences require *mens rea*. Initially the courts confined *mens rea* to intention or knowledge but over the years extended it to include recklessness and wilful blindness. In addition, there are special mental states such as dishonesty and specific intent (see Appendix pp. 10-11). The fundamental rationale for the *mens rea* presumption was stated by Dickson J. in his dissenting judgment in *R.* v. *Leary* (1977) 33 CCC (2d) 473 (SCC) @ 486:

> The notion that a court should not find a person guilty of an offence against the criminal law unless he has a blameworthy state of mind is common to all civilized penal systems. It is founded upon respect for the person and for the freedom of human will. A person is accountable for what he wills. When, in the exercise of the power of free choice, a member of society chooses to engage in harmful or otherwise undesirable conduct proscribed by the criminal law, he must accept the sanctions which that law has provided for the purpose of discouraging such conduct. Justice demands no less. But, to be criminal, the wrongdoing must have been consciously committed. To subject the offender to punishment, a mental element as well as a physical element is an essential concomitant of the crime. The mental state basic to criminal liability consists in most crimes in either (a) an intention to cause the *actus reus* of the crime, *i.e.* an intention to do the act which constitutes the crime in question, or (b) foresight or realization on the part of the person that his conduct will probably cause or may cause the *actus reus*, together with assumption or indifference to a risk, which in all other circumstances is substantial or unjustifiable. This latter mental element is sometimes characterized as recklessness.

Mens Rea Subjectively Determined

In Canadian law there is no longer today any trace of the reasoning of *D.P.P.* v. *Smith* [1961] AC 290 (HL) which suggested that proof of the *actus reus* gave rise to an irrebutable presumption of *mens rea*. For the past 35 years the Canadian courts have insisted on the subjective standard for *mens rea*: *R.* v. *Rees* [1956] SCR 640, *R.* v. *Beaver* [1957] SCR 531, *R.* v. *King* (1962) 133 CCC 1 (SCC), *O'Grady* v. *Sullivan* (1960) 128 CCC 1 (SCC), *Pappajohn* v. *The Queen* (1980) 52 CCC (2d) 481, *Sansregret* v. *The Queen* (1985) 18 CCC (3d) 223, *R.* v. *Robertson* (1987) 33 CCC (3d) 481 (SCC).

> The essence of the test of subjective awareness is whether this accused, given his or her personality, situation and circumstance, actually intended, knew or foresaw, the consequence and/or circumstance of the offence.
>
> Don Stuart, *Criminal Negligence: Deadlock and Confusion in the Supreme Court* 69 CR (3d) 331 @ 333

The standard of the reasonable man is generally not relevant as it is an objective test. In *R.* v. *Sault Ste. Marie* (1978) 40 CCC (2d) 353 (SCC), Dickson J. made a clear statement on the necessity of a subjective approach to *mens rea* at page 362:

> Where the offence is criminal, the 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 offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental element required for conviction. Within the context of a criminal prosecution a person who fails to make such inquiries as a reasonable and prudent person would make, or who fails to know facts he should have known, is innocent in the eyes of the law.

Thus the Crown must generally prove some positive statement of mind, but that requirement can be displaced by a statutory indication to the contrary, *i.e.* that mere negligence will suffice, as in section 436(2) of the *Criminal Code* - Setting a Fire by Negligence.

The emphasis on the subjective aspect of *mens rea*, particularly in serious crimes, has been re-stated in the post-*Charter* cases: *R.* v. *Vaillancourt*, (1987) 60 CR (3d) 314 (SCC), *R.* v. *Martineau* (1990) 79 CR (3d) 129 (SCC). In finding section 212(c) (now section 229(c)) and section 213 (now section 230) contravened sections 7 and 11(d) of the *Charter*, Lamer J. for the majority in *R.* v. *Martineau, supra*, stated at pages 138-139:

> The principles of fundamental justice require, because of the special nature of the stigma attached to a conviction for murder, and the available penalties, a *mens rea* reflecting the particular nature of that crime. The effect of section 213 is to violate the principle that punishment must be proportionate to the moral blameworthiness of the offender, or as Professor Hart puts it in *Punishment and Responsibility* (1968) at page 162: The fundamental principle of a morally based system of law that those causing harm intentionally be punished more severely than those causing harm unintentionally.
>
> The rationale underlining the principle that subjective foresight of death is required before a person is labelled as a murderer is linked to the more general principle that criminal liability for a particular result is not justified except where the actor possesses a culpable mental state in respect of that result: see *R.* v. *Bernard*, [1988] 2 SCR 833, 67 CR (3d) 113, 45 CCC (3d) 1, 38 CRR 82, 32 OAC 161, 90 NR 321, per McIntyre J.; and *R.* v. *Buzzanga* (1979), 25 OR (2d) 705, 101 DLR (3d) 488, 49 CCC (2d) 369 (CA), per Martin J.A.

Limits to Subjectivity

Two important points must be made about the subjective determination of *mens rea*.[1] The first is that a guilty mind need not be totally subjective. There are objective standards in criminal law and a man can be liable without feeling or believing that he is. In addition, motive is irrelevant to a defence (*R.* v. *Lewis* (1979) 47 CCC (2d) 244 (SCC)) and ignorance of the law is no excuse (*R.* v. *Molis*, (1980) 55 CCC (2d) 558 (SCC)). As Hall stated in *General Principles of Criminal Law* (2d ed., 1960) at page 104, "The insistence that guilt should be personal must be interpreted to accord with the paramount value of the objectivity of the principle of *mens rea*."

The second point is that while the test for *mens rea* is subjective, it is generally proven by objective evidence. Apart from statements and confessions, the Crown must prove the requisite *mens rea* from what the offender did and the circumstances in which he did it. The trier of fact is invited to draw the inference that the offender must have intended the natural and probable consequences of his acts. The distinction between the guilty mind subjectively determined and the objective nature of the evidence that proves it is found in the judgment of Windewer J. in *R.* v. *Vallance* (1961) 108 CLR 56 at 82 (Aust HC):

> A man's own intention is for him a subjective state, just as are his sensations of pleasure or of pain. But the state of another man's mind, or of his digestion, is an objective fact. When it has to be proved, it is to be proved in the same way as other objective facts are proved. A jury must consider the whole of the evidence relevant to it as a fact in issue. If an accused gives evidence of what his intentions were, the jury must weigh his testimony along with whatever inference as to his intentions can be drawn from his conduct or from other relevant acts. References to a "subjective test" could lead to an idea that the evidence of an accused man as to his intent is more credible than his evidence of other matters. It is not: he may or may not be believed by the jury. Whatever he says, they may be able to conclude from the whole of the evidence that beyond doubt he has a guilty mind and a guilty purpose. But always the questions are what he did in fact know, foresee, expect, intend.

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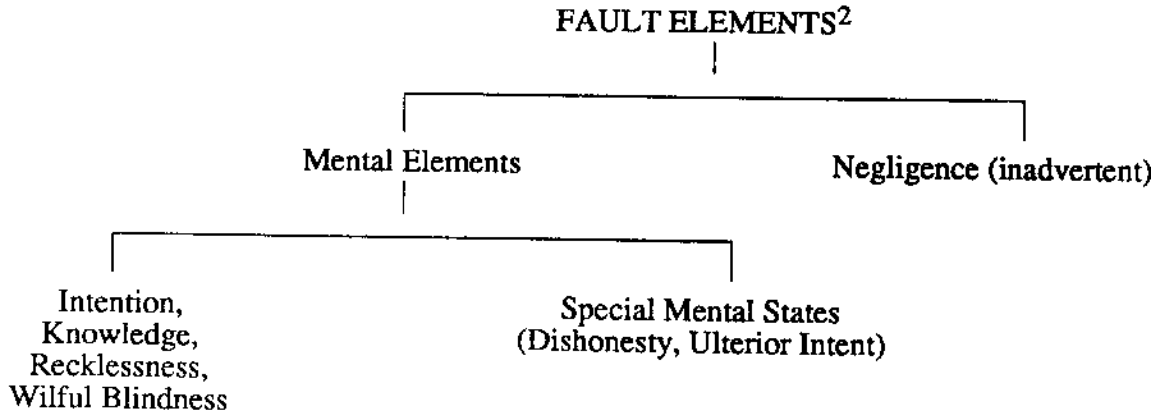
1. L.R.C., Report No. 30, *Criminal Law* (1982), pp. 182-3.

II. FAULT ELEMENTS



A. INTENTION

Intention is a difficult word to define because it may mean a number of different things. Not until the 20th century did the word attract much analysis. Even then most preferred to follow the golden rule - "to avoid any elaboration or paraphrase of what is meant by intent, and leave it to the jury's good sense to decide whether the accused acted with the necessary intent": *R.* v. *Moloney*, [1985] 2 WLR 648 (H.L.) at 664. The Law Reform Commission was of the view that "intention" gave rise to so many problems of definition that it eliminated the concept from its proposed draft *Criminal Code*. A review of the different opinions on the meaning and use of this word in criminal law is fundamental to an understanding of the various suggestions on codifying general principles of the mental element.

In J.C. Smith's paper, *Intention in Criminal Law*[3], he outlines four principal opinions on the state of mind which are included in the word "intention":

1. a consequence is intended only when it is desired;

2. a consequence is intended when either it is desired or it is foreseen as certain to result from one's act;

3. a consequence is intended when it is desired or it is foreseen as a probable result of one's act;

4. a consequence is intended when it is desired or it is foreseen as a possible consequence of one's act.

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2. Glanville Williams, *Textbook of Criminal Law* (2d) (1983), p. 54.

3. (1974) *Current Legal Problems*, p. 93 @ 108.

These four definitions cover the range of *mens rea*: intention, knowledge, recklessness. The questions for consideration in this paper are:

1. Which definition of intent is most appropriate and what word should be used to describe it?

2. If it is not the fourth and widest view, what words should be used to define the concepts of knowledge and recklessness, if any?

In considering these questions it would be wise to keep in mind the advice of John Austin when he said, "... words are our tools, and, as a minimum we should use clean tools: we should know what we mean and what we do not, ..."[4]

Intention - Narrow Definition

Consequences

> ... a consequence is intended only when it is desired.

The first of Smith's four definitions of "intention" is the most obvious and natural. It is the equivalent of "purpose" - that which a person wants to exist or occur. This narrow concept of intention so advocated by Sir John Salmond and Dr. J.W.C. Turner has been defined in the following ways:

> To intend is to have in mind a fixed purpose to reach a desired objective.
>
> Turner, Kenny's *Outlines of Criminal Law* (19 ed.) @ 36

> ... nothing can be intended which is not desired.
>
> Salmond, *Jurisprudence* (7 ed.) @ 395

> In ordinary language a consequence is said to be intended when the act or desire is that it shall follow from his conduct.
>
> Williams, *Textbook of Criminal Law* (2d) @ 51

> Intention indicates that a man is consciously shaping his conduct so as to bring about a certain event.
>
> Austin, *Jurisprudence* (4 ed.), I @ 431-2

> "When a person does an act desiring that certain consequences happen, it is easy to see that he may be said to intend those consequences."
>
> Mewitt & Manning, *Criminal Law* (2d) @ 107

> In one sense D's behaviour, or a given consequence of his behaviour, is said to be intentional if it is his "conscious object" to behave in that fashion or to bring that consequence about.
>
> Colin Howard, *Criminal Law* (3rd ed.) @ 360

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4. Quoted from Dubin, *Mens Rea Reconsidered*, 18 STAN. L. Rev. 322, at 326 n.12 (1966).

Criminal Code

The *Criminal Code* uses this narrow definition of intention in many sections, some of which are as follows:

Mental Element	Offence	Section
"Intentionally"	Assault	265
"With Intent"	Public mischief	140(1)
	Wounding	244
	Resisting arrest	270(1)(b)
	Kidnapping	279
	Hostage-taking	279.1
	Extortion by libel	302
	Theft	322
	TMVA	335
	Extortion	346(1)
	B & E	348(1)(a)
	Falsification of documents	397(1)
	Impersonation	403
	Trade marks	410
"Means To"	Murder	229(a)(b)
"For ... Purpose ..."	Party	21(b)
	Possession of weapon	87
	Sexual offences (children)	151, 152, 153
	Corrupting morals	163(1)(b), 171
	Mailing obscene matter	168
	Indecent act	173(2)
	Betting	202(1)(b)
	Soliciting	213(1)
	Robbery	343(a)
	Housebreaking instruments	351(1)

B. KNOWLEDGE

(a) Knowledge of Consequences (Wider Definition of Intent)

> ... a consequence is intended when either it is desired or it is foreseen as certain to result from one's act. (Smith #2)

Glanville Williams takes the position that intention has two meanings in law: a narrow concept confined to desire and a wider concept bringing in knowledge without desire.

> Sometimes it (intention) means direct intention, otherwise called purpose; this is intention in the narrow and ordinary sense. Sometimes it is widened slightly to include oblique intention, that is to say knowledge that a fact or an outcome is a virtual certainty, even though it is not desired or purposed.
>
> Williams, *Complicity, Purpose and the Draft Code* - 1[5]

> Except in one type of case, intention as to a consequence of what is done requires desire of the consequence. Of course, intention, for the lawyer is not a bare wish; it is a combination of wish and act (or other external element). With one exception, an act is intentional as a consequence if it is done with (motivated by) the wish, desire, purpose or aim (all synonyms in this context) of producing the result in question. The one type of case in which it is reasonable to say that an undesired consequence can be intended in law is in respect of known certainties. A person can be held (but will not always be held) to intend an undesired event that he knows for sure he is bringing about.
>
> Williams, *Oblique Intention*[6]

Colin Howard says the difference between the two definitions of intent lies in the treatment of consequences.

> No matter how inevitable a given consequence of conduct may be, it is not intentional in the first sense unless it is D's conscious object or purpose to bring that consequence about. Indifference is not enough. In the second meaning of intention D's conscious object or purpose, if any, is irrelevant. The only question is whether he foresees a given consequence as certain to follow. If and only if he does is his behaviour intentional with respect to that consequence. ... Neither meaning of intention is by itself an adequate basis for criminal responsibility.[7]

An example of oblique intention will illustrate. If someone's object is to hit a person with a brick, but he knows that he can achieve it only by breaking the window behind which that person is standing, then it is his intention in throwing the brick to break the window, even though he did not "want" to break it.

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5. [1990] Crim. L.R. 1 @ 7.

6. [1987] C.L.J. 417 @ 417-8.

7. Colin Howard, *Criminal Law* (3rd ed.) (1977), p. 360.

While there has been considerable debate in England over which definition of intention should prevail, in Canada there has been little discussion. Don Stuart suggests that the reason for the "dearth of judicial interest" in Canada is because of an increased willingness by the courts to extend intention to recklessness.[8]

In 1959 on a charge of shooting with intent to wound, the B.C.C.A. in *R.* v. ***Miller*** (1959) 125 CCC 8 @ 31 adopted the narrow definition of intention:

> Moreover, the learned judge did not point out to the jury that intention is not synonymous with foresight however certain that foresight may be; also that intention connotes the element of desire, for a man cannot be said to intend the consequences unless it is his conscious purpose to bring them about: see *Sinnasamy Selvanayagam* v. *The King*, [1951] AC 89, and also (1951), 67 L.Q. Rev. 283.

In 1979 on a charge of wilfully promoting hatred (section 319(2)) Martin J. for the Ontario Court of Appeal in *R.* v. *Buzzanga* (1979) 49 CCC (2d) 360 @ 384-5 adopted the wider definition of intention:

> I agree, however (assuming without deciding that there may be cases in which intended consequences are confined to those which it is the actor's conscious purpose to bring about), that, as a general rule, a person who foresees that a consequence is certain or substantially certain to result from an act which he does in order to achieve some other purpose, intends that consequence. The actor's foresight of the certainty on moral certainty of the consequence resulting from his conduct compels a conclusion that if he, nonetheless, acted so as to produce it, then he decided to bring it about (albeit regretfully) in order to achieve his ultimate purpose. His intention encompasses the means as well to his ultimate objective.

(b) Knowledge of Circumstances

In its narrow definition, intention can mean either desired consequence or conscious conduct. In its wider definition, it means knowledge that an outcome is a virtual certainty. However, when used in relation to circumstances intention means *knowledge* of the surrounding facts. In many offences the act becomes prohibited only if it is committed in certain circumstances.

> ... The notion of intentional action implies that the actor knows the relevant circumstances of the act. If we say that D intentionally trespassed on an airfield, we mean that he knew he was on an airfield, and knew he had no right to be there.
>
> ... An act is not to be taken as intentional as to any circumstance that is not known. Intention means not only desire of the consequence of conduct but also knowledge of the surrounding facts. If there is ignorance of any fact, then the act is not intentional as to that fact.
>
> Williams, *Textbook* @ 52

Absent an admission by the accused, knowledge, like intent, must be found by proper inferences from facts proved: *R.* v. *Kelly* [1967] 1 CCC 215 @ 222 (BCCA) per Bull J.A.

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8. Don Stuart, *Canadian Criminal Law* (2d ed.) (1987), p. 133.

Criminal Code

Some of the *Criminal Code* offences in which *knowledge* of the surrounding facts or circumstances is the requisite mental element are the following:

Mental Element	Offence	Section
"Knowing"	Possession	4(3)(a)
	Incest	155
	Corrupting morals	163(2), 171
	Betting	202(1)(a)
	Uttering threats	264.1
	Bigamy	290(1)
	Using credit card	342(1)(d)
	False pretences	361(1)
	Forgery	366(1)
	Uttering	368(1)

Knowledge - Three Kinds

Knowledge is one of three kinds - actual knowledge, deliberate ignorance (wilful blindness), or constructive knowledge. With respect to recklessness as to knowledge or circumstance Devlin J. in *Roper* v. *Taylor Central Garages Limited* [1951] 2 T.L.R. 284 @ 288-9 stated:

> There are, I think, three degrees of knowledge which it may be relevant to consider in cases of this kind. The first is actual knowledge, which the justices may find because they infer it from the nature of the act done, for no man can prove the state of another man's mind; and they may find it even if the defendant gives evidence to the contrary. They may say "we do not believe him; we think that was his state of mind." They may feel that the evidence falls short of that, and if they do they have then to consider what might be described as knowledge of the second degree; whether the defendant was, as it has been called, shutting his eyes to the obvious means of knowledge. Various expressions have been used to describe that state of mind. I do not think it necessary to look further, certainly not in cases of this type, than the phrase which Lord Hewart, C.J., used in a case under this section, *Evans* v. *Dell* (1937) 53 The Times L.R. (310) where he said (at page 313): "... the respondent deliberately refrained from making inquiries the results of which he might not care to have."
>
> The third kind of knowledge is what is generally known in law as constructive knowledge: it is what is encompassed by the words "ought to have known" in the phrase "knew or ought to have known". It does not mean actual knowledge at all; it means that the defendant had in effect the means of knowledge.

Devlin J. went on to reject constructive knowledge in criminal law in the following terms @ 289: "A case of merely neglecting to make inquiries is not knowledge at all - it comes within the legal conception of constructive knowledge, a conception which, generally speaking, has no place in the criminal law." Thus criminal law is concerned only with actual knowledge and its one limited exception, deliberate ignorance or wilful blindness.

Development of Doctrine of Wilful Blindness

In Larry Wilson's paper, *The Doctrine of Wilful Blindness*[9], he traces the development of the doctrine from its beginnings in the early 19th century English forgery cases through the Canadian cases of possession of stolen property (*R.* v. *Marabella* (1956) 117 CCC 78 (O.Co.Ct.)), possession and importation of narcotics, (*R.* v. *Blondin* (1970) 2 CCC (2d) 118 (BCCA)), and provincial environmental offences (*R.* v. *City of Sault Ste. Marie* (1976) 30 CCC (2d) 257 (OCA)).

The doctrine is normally invoked in relation to the fault requirement of knowledge of circumstances in accordance with the thinking of Glanville Williams:

> The rule that wilful blindness is equivalent to knowledge is essential and is found throughout the criminal law. It is, at the same time, an unstable rule, because judges are apt to forget its very limited scope. A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice. Any wider definition would make the doctrine of wilful blindness indistinguishable from the civil doctrine of negligence in not obtaining knowledge.
>
> Williams, *Criminal Law*, The General Part (2nd ed.) @ 159

Subjective Test

The confusion in Canadian case-law over whether the test was objective or subjective was settled by the majority decision of the Ontario Court of Appeal in *R.* v. *Currie* (1976) 24 CCC (2d) 292 and by the full court in *R.* v. *Stone* (1978) 40 CCC (2d) 241 (OCA). The purely objective test was rejected by Martin J.A. in *R.* v. *Currie, supra,* in the following words @ 295-6:

> ... the trial judge's reasons for judgment is not free from ambiguity and is reasonably open to the conclusion that the learned trial judge was of the view that the doctrine of wilful blindness applied because the accused should have been suspicious in all the circumstances of the forged endorsement on the cheque when he received it and should have made further inquiry.
>
> This was a misconception on the part of the trial judge as to the doctrine of wilful blindness, which he purported to apply ... The fact that a person ought to have known certain facts existed, while it may, for some purposes in civil proceedings, be equivalent to actual knowledge, does not constitute knowledge for the purpose of criminal liability, and does not by itself form a basis for the application of the doctrine of wilful blindness.

It is because the test is primarily subjective that the doctrine of wilful blindness is considered to be an acceptable extension of *mens rea.*

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9. (1979), 28 U.N.B.L.J. 175.

Distinction Between Wilful Blindness and Recklessness

In the Supreme Court of Canada's first application of the doctrine in *Sansregret* v. *R.* (1985) 45 CR (3d) 193, McIntyre J. made a clear distinction between recklessness and wilful blindness when he said @ 207:

> Wilful blindness is distinct from recklessness because, while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry.

In Eric Colvin's paper, *Recklessness and Criminal Law*, he says the distinction between wilful blindness and recklessness "... lies in the purposeful omission to make inquiries. It is not simply a matter of failing to inquire; the actor chooses not to inquire in order to avoid obtaining undesirable knowledge."[10]

However there are academics who believe that the culpability of the accused in wilful blindness is not deliberately failing to inquire but rather taking the risk which was deliberately not inquired into. These writers take the view that the doctrine of wilful blindness is not "... a doctrine at all but rather a particular way in which recklessness may be proved on the facts." The overlapping of subjective recklessness with wilful blindness is found in Don Stuart's example of the accused who possesses a package knowing it contains narcotics, being wilfully blind or adverting to the risk.[11]

The Ontario Court of Appeal has followed McIntyre J.'s reasoning in *Sansregret* v. *R.*, *supra*, that wilful blindness is not an extension of the *mens rea* of recklessness: *R.* v. *Zundel* (1987) 31 CCC (3d) 97, *R.* v. *Sandhu* (1989) 50 CCC (3d) 492.

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10. (1982) 32 U.T.L.J. 345 @ 349.

11. Don Stuart, *Canadian Criminal Law*, p. 145.

C. RECKLESSNESS

> ... a consequence is intended when it is desired or it is foreseen as a probable or possible result of one's act. (Smith, #3, #4)

The only difference between the lower end of J.C. Smith's second definition (oblique intent) and his third and fourth definitions combined above is the degree of foresight of the consequence. Recklessness imposes liability for a thought process that is less than desiring or knowing certain consequences. Like intention, recklessness may exist as to a consequence of the act or as to a surrounding circumstance.

Subjective-Objective Test

> Recklessness is a branch of the law of negligence; it is that kind of negligence where there is foresight of consequences. The concept is therefore a double-barreled one, being in part subjective and in part objective. It is subjective in that one must look into the mind of the accused in order to determine whether he foresaw the consequence. If the answer is in the affirmative, that is the end of the subjective part of the inquiry and the beginning of the objective part. One must ask whether in the circumstances a reasonable man having such foresight would have proceeded with his conduct notwithstanding the risk. Only if this second question, too, is answered in the affirmative is there subjective recklessness for legal purposes.
>
> If the first requirement is negative one may still proceed to ask the second question, but the result can then only be to establish inadvertent negligence.
>
> Williams, *Criminal Law*, The General Part @ 58

This double-barreled concept of recklessness as the conscious assumption of an unjustified risk is seen in Dickson J.'s dissenting judgment in *Leary* v. *R.*, *supra*, page 4.

Williams states that there are three interwoven factors involved in an issue of recklessness:

1. the degree of risk required;

2. the defendant's knowledge of the risk of that degree;

3. the unjustifiable character of the risk.[12]

If the consequence is seen as virtually certain, it is "oblique intent" and comes within J.C. Smith's second definition of "intention." All lesser degrees of certainty - from probability to possibility - fall within the range of recklessness. What degree of foresight is required is uncertain as it varies on the facts of the case. If the act has no social utility as in Russian roulette, foresight of possibility may be all that is necessary.[13] Where the social utility is great as in a surgeon's operation, foresight of probability or substantial risk may be required.

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12. Williams, *Textbook of Criminal Law*, p. 73.

13. Smith and Hogan, *Criminal Law* (5 ed.) (1983) pp. 52-3.

> ... Knowledge of bare possibility is sufficient to convict of recklessness if the conduct has no social utility, but that the slightest social utility of the conduct will introduce an inquiry into the degree of probability of harm and a balancing of this hazard against its social utility. If this is the law, it would be useless to define probability in mathematical terms, because the degree of probability that is to constitute recklessness must vary in each instance with the magnitude of the harm foreseen and the degree of utility of the conduct.
>
> Williams, *Criminal Law*, The General Part @ 62

This uncertainty in determining the appropriate degree of risk leads some jurists to speak not in terms of knowledge of probability of risk but in terms of knowingly accepting an "unjustifiable" or "unreasonable" risk.

The subjective test of recklessness requires that the accused is aware of the risk. That awareness depends on the knowledge and experience of the accused. The subjective nature of recklessness was emphasized by McIntyre J. for the Court in *Sansregret* v. *R.* (1985) 45 CR (3d) 193 @ 203-4:

> In accordance with well-established principles for the determination of criminal liability, recklessness, to form a part of the criminal *mens rea*, must have an element of the subjective. It is found in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who seeks the risk and who takes the chance. It is in this sense that the term "recklessness" is used in the criminal law and it is clearly distinct from the concept of civil negligence.

In *Recklessness and Criminal Negligence*[14], Eric Colvin makes the following observation on subjective and objective elements in recklessness:

> Thus conceived, recklessness incorporates both subjective and objective elements. The subjective element is the actor's own knowledge that his conduct may involve consequences or circumstances which happen to constitute or form part of an *actus reus*. It is sometimes said that he is advertently negligent with respect to the occurrence of the *actus reus*. The objective element is an external determination that taking the risk was not justified, which depends on the social value of the activity and the likelihood of the risk materializing. In accordance with general principles of criminal responsibility, the actor's own state of mind with respect to the propriety of his conduct is immaterial.

And there has been a movement toward a more objective approach to recklessness holding that a person may sometimes be reckless even though he has given no thought at all of acting to the existence of a risk. The House of Lords has taken such an approach in some offences (criminal damages, *R.* v. *Caldwell* [1981] 1 All ER 974 (H.L.)), but not in other offences (reckless driving, *R.* v. *Lawrence* [1981] 1 All ER 961 and rape, *D.P.P.* v. *Morgan, supra*). The move toward a more objective approach has been widely criticized by English scholars (Smith, Williams) and not followed in

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[14] 32 U.T.L.J. 345 @ 346.

Criminal Code

Under the *Criminal Code* recklessness can arise by implication where the statute does not include reference to a specific mental element. In sexual assault (s. 271) recklessness as to the circumstance of having sexual intercourse without the victim's consent is a sufficient level of culpability. Actual knowledge need not be proven: *Pappajohn* v. *The Queen* (1980) 52 CCC (2d) 481.

Recklessness can also arise by express direction of Parliament. To date Parliament has chosen to do so for only a few offences:

i) Murder - s. 229(a)(ii), s. 229(b)(ii)

ii) Arson - s. 433

iii) Mischief - s. 430 (s. 429)

iv) Criminal Negligence - s. 219

Because of the difficulty in interpreting the words of s. 219 which is discussed below on page 18, it is still not clear whether the fault element for the offence of criminal negligence (s. 219) is recklessness or negligence.

Development of Recklessness as a Separate Mental Element

Until recent years any discussion of *mens rea* focused on intention and knowledge to such an extent that the concepts of criminal intent and *mens rea* became synonymous. It was only in the 1970's that the Supreme Court of Canada and the House of Lords recognized the extension of *mens rea* to include recklessness: *R.* v. *City of Sault Ste Marie*, *supra* and *D.P.P.* v. *Morgan* [1976] A.C. 182 (H.L.).

In Mitch Eisen's paper *Recklessness*[15], he traces the present state of the law in Canada on recklessness to the 1960's decisions of the Supreme Court of Canada on the offences of dangerous driving and criminal negligence: *O'Grady* v. *Sparling* (1960), 128 CCC 1, *Mann* v. *The Queen*, [1966] 2 CCC 273, *Binus* v. *The Queen* [1968] 1 CCC 227, *Peda* v. *The Queen* (1969) 4 CCC 245.

Glanville Williams refers to this extension of *mens rea* as an artificial legal meaning for which "... a consequence is taken to be intended whenever the actor is aware that it is probable." Austin and Lord Denning both supported this definition of intention.

The following two passages from Williams' texts are instructive:

> There are two possible explanations of the adoption by some judges of the artificial meaning. The first is that it was a way of extending liability beyond intention, properly so-called, to recklessness. At a time when the concept of recklessness was not clearly recognized, the bulk of the work appropriate to it could be done through a doctrine of constructive intention. The second explanation is that the artificial meaning is a remnant of the discredited doctrine that a man is taken to intend all the natural and probable consequences of his acts.
>
> *Textbook*, @ 63-64

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15. (1988-9) 31 C.L.Q. 347.

> The policy of the penal law frequently classifies subjective recklessness along with intentional wrongdoing, and this for two reasons: because it is sometimes barely distinguishable from intention as a matter of evidence, and because the addition of recklessness to intention gives a small margin of manoeuvre in the case which is sometimes valuable.
>
> *The Mental Element in Crime*, @ 57

The overlapping concepts of intention and recklessness are examined by Don Stuart in the following passage from his text on *Canadian Criminal Law* at 135:

> Broadly, the extension to recklessness reflects a growing recognition by writers and courts that it is preferable, at least at the stage of assessing liability, to avoid having to distinguish in terms of culpability the act of a boy who deliberately throws a stone to break a window (intentional damage) from that of one who throws a stone deliberately risking the likelihood that the window will be broken (reckless damage). In contrast, the traditional view is that there is a distinction in terms of culpability of the act of the boy who throws the stone and breaks the window without thinking about the risk although he ought to have (negligent damage). The aim of the extension to recklessness is to avoid unworldly abstraction and - or stretching the comprehensible intent concept to breaking point to achieve a sensible widening of the *mens rea* net. As long as the approach to recklessness remains one of subjective awareness of consequences and - or circumstances, the *mens rea* extension is narrow and not confused with negligence. Negligence is normally considered insufficient fault for criminal responsibility and not equivalent to *mens rea*. Unfortunately aspects of the extension to recklessness in Canada have become notoriously confused and unnecessarily convoluted.

A useful summary of the development of J.C. Smith's four definitions of intention (desire, knowledge, recklessness) can be found in the following passage from Colin Howard's text on *Criminal Law* at 366:

> As a matter of history, recklessness emerged as an extension of responsibility for intention. Similarly the concept of intention in crime evolved from its predecessor wickedness. The original meaning of one of the oldest words in this part of the law, malice, was wickedness in the popular sense. It is not difficult to understand an association between criminal responsibility and the sense of outrage which we convey by the use of such words as wicked and malicious. The most primitive idea of wrongdoing is conduct which induces in us this sense of outrage. As the criminal law has developed, however, it has come to be seen that conduct which is dangerous to the social fabric is not always necessarily conduct which promotes a sense of outrage. Conversely, it is also true that wickedness alone is not necessarily a sound basis for conviction. The old notion of malice has therefore undergone progressive refinement by the elimination of irrelevancies. Three major changes have taken place. In the first, intention, in the sense of purpose, emerged as the determinative element in the complex of related ideas which made up malice. In the second, knowledge, in the sense of believe, emerged as the determinative element in intention. In the third, advertence, in the sense of perception of possibility, emerged as the determinative element in knowledge. In this way malice has been replaced by intention, intention has been broadened to include both purpose and belief, and now recklessness is replacing parts of intention.

D. CRIMINAL NEGLIGENCE

As noted earlier, the underlying principle of the criminal law is "no responsibility without personal fault." This concept of personal fault covers not only the various mental elements but also negligence. Negligence is a form of fault that is objectively determined by the standard of the reasonable person. It cannot be included with the other mental attitudes under *mens rea* because a negligent person has no culpable state of mind. He is liable because he did not think about the consequences of his action when he ought to have done or he thought about them in a way that departed from the manner in which a reasonable man would have done. Such liability is not absolute as there is the fault element of not thinking or not thinking properly. In order to include negligence, some people prefer the term Fault Elements, rather than Mental Elements. The Law Reform Commission prefers Levels of Culpability.

Unlike recklessness, criminal negligence focuses on the accused's conduct, not his state of mind. Unlike criminal negligence, civil negligence need not be a marked or substantial departure from the standard of the reasonable man: *R.* v. ***Waite*** (1989) 48 CCC (3d) 1 (SCC), *R.* v. *Tutton* (1989) 48 CCC (3d) 129 (SCC).

Criminal Code

There is considerable debate over whether negligence should even be a fault element in the *Criminal Code*. Those in favour argue that it is necessary to have an objective approach in some offences because of the difficulty in proving the elements of an offence on a subjective basis. Those opposed reject the idea of punishing persons for not having thought like the reasonable man.

The *Criminal Code* expressly provides for objective standards through its choice of words in a number of offences:

Objective Standards	Offence	Section
"likely to cause"	Alarming Her Majesty	49(b)
"careless manner", "without reasonable precaution"	Use of a firearm	86(2)
"good reason to believe"	Wrongful delivery of firearms	94
"reasonable grounds"	Finding a weapon	104
"might reasonably be expected"	Dangerous driving	249(1)(a)
"failure to comply"	Arson by negligence	436

Section 7 of the *Charter* has been successfully used to strike down section 212(c) (now section 229(c)) of the *Criminal Code* on the ground that objective foreseeability (ought to know) is insufficient for a serious offence like murder: *R.* v. *Martineau* (1990) 79 CR (3d) 129 (SCC). However it is unlikely that a majority of the Supreme Court of Canada could be persuaded that all objective standards from the *Criminal Code* should be swept aside on the ground that the principles of fundamental justice required some degree of

subjective *mens rea* for all criminal liability: *R.* v. *Vaillancourt* (1987) 60 CR (3d) 314 @ 318 (SCC).

Subjective/Objective Standard

The subjective/objective debate over criminal negligence is reflected in the many cases which have interpreted the *Criminal Code* definition of criminal negligence (s. 219) since its introduction in its present form in 1955. Much of the problem of course has arisen from the words by which Parliament chose to define criminal negligence. In *R.* v. *Tutton, supra*, Wilson J. in her judgment at 149 makes the following observations on section 219:

> Section 202 (now s. 219) of the *Criminal Code* is, in my view, notorious in its ambiguity. Since its enactment in its present form in the 1955 amendments to the *Criminal Code* it has bedeviled both courts and commentators who have sought out its meaning. The interpretation put upon it usually depends upon which words are emphasized. On the one hand, my colleague's judgment demonstrates that emphasizing the use of the words "shows" and "negligence" can lead to the conclusion that an objective standard of liability was intended and that proof of unreasonable conduct alone will suffice. On the other hand, if the words "wanton or reckless disregard for the lives or safety of other persons" are stressed along with the fact that what is prohibited is not negligence simplicitor but "criminal" negligence, one might conclude that Parliament intended some degree of advertence to the risk to the lives or safety of others to be an essential element of the offence.

Whether the *mens rea* of criminal negligence is determined by an objective or subjective standard has still not been settled by the Supreme Court of Canada, even though there have been many opportunities to do so. Despite the Supreme Court of Canada's decisions in *O'Grady* v. *Sparling* (1960) 128 CCC 1 and *Leblanc* v. *The Queen* (1975) 29 CCC (2d) 97 that the fault element for criminal negligence (s. 219) requires subjectively tested advertent negligence and not inadvertent negligence, many lower courts continued to apply the objective negligence standard. In *R.* v. *Waite, supra* (operation of a motor vehicle) and *R.* v. *Tutton, supra* (failure of parents to provide medical treatment to a child) the judges of the Supreme Court of Canada divided equally - three judges adopted an objective test and three others adopted a subjective test. All did agree that no distinction should be made in relation to acts of omission or commission. In *R.* v. *Anderson* (1990) 75 CR (3d) 50, Sopinka J.'s judgment for the court recognizes both the objective and subjective approaches to criminal negligence but fails to choose one over the other.

Re-drafting the definition of criminal negligence could go a long way to resolving this dilemma. If Parliament chose a subjective approach for criminal negligence, it would not differ very much from recklessness. If an objective standard were chosen the offence might unfairly impose liability on a person whose personal characteristics (age, intelligence, education, background) prevented him from achieving objectively reasonable standards.

Qualifying the Objective Standard

Some writers and jurists suggest the answer to this problem is to permit the objective standard to be qualified by particular characteristics of the accused, as was done for the first time on a charge of murder where provocation had been raised as a defence in *R.* v. *Hill* (1985) 51 CR (3d) 97 (SCC).

For Hart, negligence can be a fault requirement for criminal responsibility only if the following two questions are answered in the affirmative:

(i) Did the accused fail to take those precautions which any reasonable man with normal capacities would in the circumstances have taken?

(ii) Could the accused, given his mental and physical capacities, have taken those precautions?[16]

For Gordon Fletcher, author of *Rethinking Criminal Law*, criminal liability from negligent conduct could also be determined in a two-step process:

(i) Was there a breach of an objective standard?

(ii) If so, was it fair to hold this particular accused responsible for the act of wrong-doing?[17]

Toni Pickard has adopted a similar approach in her paper *Culpable Mistakes and Rape: Relating Mens Rea to the Crime* (1980) 30 UTLJ 75 @ 79:

> It is entirely possible to take the relevant characteristics of the particular actor, rather than those of the ordinary person, as the background against which to measure the reasonableness of certain conducts or beliefs. The fact-finder must ask whether or not the belief was reasonably arrived at in the circumstances, given those attitudes and capabilities of the defendant which he cannot be expected to control. Such a measure avoids unfairness to those who may be incapable of achieving objectively reasonable standards without excusing those who are capable of so doing but have not exercised the capacities in a situation that required care.
>
> This individualized standard is neither "subjective" nor "objective". It partakes of the subjective position because the inquiry the fact-finder must conduct is about the defendant himself, not about some hypothetical ordinary person. It partakes of the objective position because the inquiry is not limited to what was, in fact, in the actor's mind, but includes an inquiry into what could have been in it, and a judgment about what ought to have been in it.

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16. H.L.A. Hart, *Negligence, Mens Rea and Criminal Responsibility, Punishment and Responsibility* (1968), p. 136 @ 154.

17. *Rethinking Criminal Law* (1978), p. 511.

There is little doubt the Supreme Court of Canada is being influenced in its thinking by these writers. One need only read the various judgments of the court in ***R. v. Tutton***, *supra*. In that case, Lamer J. states @ 143:

> I am of the view that, when applying the objective norm set out by Parliament in section 202 (now s. 219) of the *Criminal Code*, there must be made "a generous allowance" for factors which are particular to the accused, such as youth, mental development, education: see Don Stuart, *Canadian Criminal Law: A Treatise*, (2nd ed. 1987), p. 194, Toronto: Carswell; see also Toni Pickard, "Culpable Mistakes and Rape: Relating *Mens Rea* to the Crime" (1980), 30 UTLJ 75. When this is done, as we are considering conduct which is likely to cause death, that is high risk conduct, the adoption of a subjective or of an objective test will, in practice, nearly if not always produce the same result: see Eric Colvin, "Recklessness and Criminal Negligence" (1982), 32 UTLJ 345.

Lamer J.'s reference to Don Stuart's work on this topic is set out in part below:

> Arguments in favour of the objective standard in criminal law are persuasive but not overwhelming. They are not strong enough to proceed in a cavalier fashion. If we convict someone who was simply not thinking or who was not thinking properly, we must be honest about what we are doing - holding him up to an external (objective) standard which he did not meet. A Hart-Pickard approach does not take into account all personal factors. Even if it did, it would differ from the subjective awareness approach in that someone is deciding not only that the accused did not think when he could have but also that he ought to have. The danger is relying on so illusive a yardstick that it allows the trier of fact full reign to convict on personal whim or pet peeve. It may violate the *nullum crimen* principle. Resorting to the objective standard may constitute an unconsidered pandering to those who maintain without evidence that an extension of the criminal law is needed for reasons of law and order. The commission of many common crimes such as assault, theft and burglary clearly result from conscious thought, even though monetary. Here the subjective awareness approach is well established, workable and the most appropriate barometer of fault. Its main advantage is it obligates the judging of the individual on all his strengths and weaknesses. That the Hart-Pickard individualized approach to negligence is not yet part of our law is all the more reason for continuing to distinguish the subjective and objective approaches. Any wholesale resort to the latter (not advocated by Hart or Pickard) could constitute a tool of repression against the less fortunate.18

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18. Don Stuart, *Canadian Criminal Law*, p. 195.

III. COMPARATIVE ANALYSIS OF ANGLO-AMERICAN JURISDICTIONS

In Canada, England, Australia and New Zealand, there are proposals for codifying the different levels of culpability. The U.S. Model Penal Code which codifies culpability was enacted in 1962. The draft Codes and legislation referred to hereafter are as follows:

1.	Canada	-	Draft Criminal Code (1987), Law Reform Commission
2.	U.S.	-	Model Penal Code (1962)
3.	England	-	Draft Criminal Code (1989), Law Commission
4.	Australia	-	Crimes (Amendment) Act, (1990)
5.	New Zealand	-	Crimes Bill (1989)

A comparison of the Canadian Law Reform Commission's (L.R.C.) proposal for codifying the different levels of culpability with the other Anglo-American jurisdictions discloses the following points which will be the focus of discussion for the rest of this paper:

(1) Different Fault Elements

Canada	U.S.	England
Purpose	Purposely	Knowingly
Recklessness	Knowingly	Intentionally
Negligence	Recklessly	Recklessly
	Negligently	

Australia	New Zealand
Knowingly	Intention/Knowledge
Intentionally	Recklessness
Recklessly	Heedlessness
Negligently	Negligence

"Purpose" or "Intention"

The L.R.C. Draft Code and the U.S. Model Penal Code replace "intention" with "purpose". The L.R.C. eliminates the word "intention" from its Draft Code. The Americans took a similar approach in enacting the Model Penal Code but later found it necessary to amend the Code to include a definition of "purposely" as meaning "intentionally" or "with intent". (s. 1.13(12))

The Draft Codes in England, Australia and New Zealand have all used "intention" as the highest form of *mens rea*.

Knowledge	The L.R.C. proposal is the only one that does not include "knowledge" as a separate level of culpability.
Negligence	The English Draft Code (1989) is the only one that does not include "negligence" as a separate level of culpability. The New Zealand Crimes Bill is the only proposal that includes "heedlessness". (s. 23)

(2) External Elements

The L.R.C.'s Draft Code (s. 2(4)(a)(b)) and the U.S. Model Penal Code (s. 2.02(2)) break down the *actus reus* into three separate components: conduct circumstance and consequence (result).

The Draft Codes in England (s. 18) and New Zealand (s. 21, 22, 23, 24) specify only two: circumstance and result. The Australian Crimes Bill mentions only one - circumstance (s. 3F).

(3) Presumed Fault Requirement

Where the definition of a crime does not explicitly specify the requisite level of culpability, there is a presumption that it requires a certain level. The requisite level varies according to the jurisdiction:

Canada	-	purpose (s. 2(d))
U.S.	-	purpose, knowledge, or recklessness (s. 2.02(3))
England	-	recklessness (s. 20(1))
Australia	-	intention, knowledge (s. 3G(1))
New Zealand	-	(not specified)

(4) Proof of Greater Culpability Satisfies Lesser

All jurisdictions except New Zealand have provisions whereby proof of a lower level of culpability (*e.g.* recklessness) is satisfied by proof of a higher level:

Canada	-	(s. 2(c))
U.S.	-	(s. 2.02(4))
England	-	(s. 19)
Australia	-	(s. 3G(2)(3))

A. INTENTION

CANADA - DRAFT CRIMINAL CODE (1987)

2(4)(b) Definitions.

"Purposely"

(i) A person acts purposely as to conduct if he means to engage in such conduct, and, in the case of an omission, if he also knows the circumstances giving rise to the duty to act or is reckless as to their existence.

(ii) A person acts purposely as to a consequence if he acts in order to effect

(A) that consequence; or

(B) another consequence which he knows involves that consequence.

Comment of Law Reform Commission

In the new Code "intent" is replaced by "purpose" because of the difficulties surrounding the former term. These stem largely from the blurring in the case-law of the distinction between intention (often called "specific intent") and recklessness (often called "general intent"). This has resulted in two views on "intention" (direct and indirect intent).

As applied to conduct, that is, the initiating act, the definition of "purposely" is straightforward: the accused must do the act on purpose, or mean to do it. In the case of an omission, he must also know the facts giving rise to the duty to act or be reckless as to their existence - negligence is not sufficient. As applied to consequences, the term "purposely" covers not only the usual case where the consequence is what the accused aims at but also cases (sometimes termed cases of oblique or indirect intent) where his aim is not that consequence but some other result which, to his knowledge, will entail it: for example, if D destroys an aircraft in flight to recover the insurance money on it and thereby kills the pilot V, he is still guilty of killing V on purpose even though this is not in fact his aim.

Observations:

1. The Law Reform Commission recommended that the General Part use "purpose" rather than "intention" as the highest level of culpability.

   Perhaps the Law Reform Commission was influenced by Hall's view that "... the most common of human experiences is the direction of conduct toward the attainment of goals."[19] For Hall, all conduct involved an end sought (purpose) which manifested the intentionality of the conduct.

2. The definition of "purpose" covers direct intent (A) and oblique or indirect intent (B) but does not extend to recklessness.

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19. Hall, *Principles*, p. 76.

3. The Law Reform Commission's proposal to use "purpose" for specific intent offences and "recklessness" for general intent offences eliminates the arbitrary distinction between general and specific intent.

4. The Working Group on the General Part recommended using "intention" and explicitly including recklessness as part of its definition, as per J.C. Smith's third and fourth definitions.

Other Jurisdictions:

1. "Intention" has been used as the highest form of mens rea in the English Draft Code (s. 18(b)), the Australian Crimes (Amendment) Act (s. 3F(1)(b), and the New Zealand Crimes Bill (s. 21).

2. "Purpose" rather than "intention" was used in the U.S. Model Penal Code (s. 2.02(2)(a)). The Code was later amended to include a definition of "purposely" as meaning "intentionally" or "with intent" (s. 1.13(12)).

3. All four jurisdictions include indirect intent in its formulation of the highest level of culpability but do so in different ways using different words:

U.S. Model Penal Code, s. 2.02 (2(b)(2)):

> **Knowingly - a person acts knowingly with respect to a material element of an offence when: (ii) if the element involves a result of his conduct, he is *aware that it is practically certain that his conduct will cause such a result.***

English Draft Code, s. 18(b):

> **A person acts "intentionally" with respect to (ii) a result when he acts either in order to bring it about or *being aware that it will occur in the ordinary course of events*;**

Australian Crimes (Amendment) Act, s. 3F(1)(b):

> **A person is taken to act intentionally with respect to a circumstance if the person means it to exist or occur or *knows that it will probably exist or probably occur.***

New Zealand Crimes Bill, s. 21(2)(b):

> **A person intends or knows any consequence of any act or omission where the person does or omits to do any act *knowing or believing that that consequence is highly probable.***

Goods Points:

1. The formulation clearly distinguishes a level of culpability for those offences committed on purpose (intended) from those committed by recklessness.

2. It eliminates the false categorization of offences into general and specific intent offences which has been so entrenched in Canadian criminal law since *The Queen* v. *George* (1960) SCR 871 and so criticized by the dissenting judgments of Dickson C.J. in Leary v. R. (1977) 33 CCC (2d) 473 and *R.* v. *Bernard* (1988) 38 CRR 82 (SCC).

3. By including indirect intent it is consistent with *R.* v. *Buzzanga* (1979) 49 CCC (2d) 360 (O.C.A.) and the other Anglo-American jurisdictions considered in this paper. It covers a gap that would otherwise appear if the formulation were limited to direct intent alone:

> It will be seen that neither meaning of intention (direct or indirect) is by itself an adequate basis for criminal responsibility. If intentional consequences are limited to the conscious objects of behaviour it follows that no matter how clearly he foresees it D must not act intentionally with respect to a consequence to which he is indifferent. A standard example is where D blows down a door with explosives for the purpose of breaking into a building and in so doing kills the caretaker sleeping nearby. However clearly he foresees the death, D cannot be said to have killed intentionally if intention is restricted to conscious objects and D's conscious object is only to break into the building, the presence or absence of the caretaker being a matter of indifference to him. On the other hand, if intentional consequences are limited to those foreseen as certain, or even highly probably, no allowance is made for the case where D's chances of success in accomplishing his object are slight. The usual example of this situation is shooting at someone almost out of range.
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> Difficulties of these kinds have been surmounted by using both concepts of intention, applying to any particular set of facts the one which fits best on the assumption that either is a sufficient basis for conviction.
>
> Howard, *Criminal Law* @ 360

Bad Points:

1. The Law Reform Commission's recommendation removes from the vocabulary of Canadian criminal law one of its most fundamental words - "intention".

   The English obviously believe they can accomplish the same objective of keeping apart the two levels of culpability (intention and recklessness) without replacing "intention" with "purpose".

   The many problems arising from the classification of offences into general and specific intent might be overcome through more careful legislative drafting of the intent requirements for each offence rather than replacing the word "intent" altogether. In *Canadian Criminal Law* at 153 Don Stuart states, "At the level of legislative reform, it would seem possible to draft crimes that resort far less to special intents and so avoid a yardstick of liability requiring a degree of specificity not often found in real life."

2. The extension of "purpose" to cover indirect intent creates an artificial meaning. It might be preferable to restrict the highest level of culpability to its natural meaning - direct intent - and to cover indirect intent by recklessness. Colin Howard addresses this issue in *Criminal Law* at 360 in the following words:

> ... Intention is best confined to the conscious object sense. The basis of this view is that the foresight of consequence meaning of intention is indistinguishable from recklessness. The concept of recklessness postulates foresight of consequences. The only way in which foresight of consequences in recklessness can be distinguished from foresight of consequences in intention, in the absence of a purpose element, is by confining intention to foresight of

> certainty and calling foresight of any lesser degree of probability recklessness. Such a distinction has neither theoretical nor practical utility. Instead of dividing the idea of foresight of consequences between recklessness and intention, thereby causing intention to have two different meanings and sometimes to become even further confused by being regarded as including recklessness, it seems far preferable to give intention a reasonably clear meaning of conscious object or purpose and call all forms of foresight of consequences recklessness.

3. Using "purpose" may have the effect of slowly eroding away the distinction between intent and motive.

The distinction between intent and motive, the underlying reason for the conduct, is fundamental in criminal law: *Lewis* v. *R.* (1979) 47 CCC (2d) 24 (SCC).

Where an offence requires only one intent, there is little difficulty in keeping the two concepts apart. Often there is no problem because they are one and the same. For example, in sexual assault the motive and intent are generally sexual gratification. Even where they are different, for example where a man assaults his victim because he had slept with his wife, there is little difficulty in keeping the reason for the assault extraneous to the legal issue of whether an assault was intended. Thus in a single intent offence, the motive is not relevant.

However, where an offence requires two intents, as for example in Break and Enter With Intent (s. 348(1)(a)), the second or ulterior intent is a part of the mental element and is sometimes referred to as motive. The intentional entry of a place occurs with the ulterior intent of committing a crime in the premise. The motive or reason for entry is the ulterior intent. That is in accord with Glanville Williams' definition of "motive", which was adopted by Dickson J. in *Leary* v. *R.*, *supra.*

> Motive is ulterior intention - the intention with which an intentional act is done (or, more clearly, the intention with which an intentional consequence is brought about). Intention, when distinguished from motive, relates to the means, motive to the end.
>
> Williams, *Criminal Law*, The General Part, @ 48

Where an offence has an ulterior intention, motive is a requisite element. An inquiry into the purpose of an accused's conduct is thus appropriate. If "purpose" is used to define specific intent offences only, no violation of the common law tradition of distinguishing between intention and motive occurs. However, once "purpose" is entrenched as the highest level of culpability, motive, by definition is given a prominent place. Without realizing it, the inquiry may focus on motive rather than purpose, asking whether the reasons for the act were prohibited rather than whether the accused intended to do the act with the ulterior intent.

The same problem arises if "purpose" is used to define single intent offences.

Issues for consideration:

1. Should a mental element be defined in the General Part for the highest level of culpability?

2. If a term is to be defined should it be "purpose" or "intention"?

3. Should the concept of "intention" be limited to direct intent or include indirect intent?

4. Should the concept of "intention" include recklessness or should recklessness be a distinct mental element?

B. KNOWLEDGE

CANADA - DRAFT CRIMINAL CODE (1987)

Defences

3(2) Lack of Knowledge

(a) Mistake of Fact. No one is liable for a crime committed through lack of knowledge which is due to mistake or ignorance as to the relevant circumstances; but where in the facts as he believed them he would have committed an included crime or a different crime from that charged, he shall be liable for committing that included crime or attempting that different crime.

(b) Exception: recklessness and negligence: This clause shall not apply as a defence to crimes that can be committed by recklessness or negligence where the lack of knowledge is due to the defendant's recklessness or negligence as the case may be.

Observations:

1. The Law Reform Commission did not recommend a separate level of culpability for "knowledge" in the General Part. It did recognize "knowledge" as a constituent part of the mental element for crimes of "purpose" and "recklessness" (s. 2(4)(a)(b)) but not as a distinctive mental element in its own right.

2. The reasons of the Law Reform Commission for taking such an approach are found in its Working Paper No. 29 (1982) where it stated at pages 25-26 the following:

> Knowledge, then, is the necessary condition for criminal liability. It is not, however, a sufficient condition for several reasons. First, the definition of the offence in question may require some special purpose on the part of the accused. Second, the offence may be one which can be committed only with some motive connected with the failure enfringed by that offence, *e.g.* without lawful excuse, fraudulently, correctly, etc. Third, an accused may act knowingly but still not be liable because of the operation of some general defence, *e.g.* duress, necessity or self-defence. In all these situations knowledge alone will not entail liability but lack of knowledge precludes guilt. Knowledge, then, remains a *sine qua non* of liability for crimes.

3. The Law Reform Commission has taken the view that since lack of knowledge precluded guilt, it was better to state the concept as a defence under Mistake of Fact (s. 3(2)).

4. The Law Reform Commission recommended that no special rule be placed in the General Part about wilful blindness but recommended that those labouring under mistake of fact due to their own recklessness or negligence have no defence to crimes of either recklessness or negligence respectively (s. 3(2)).

5. The Working Group on the General Part suggested that an alternative to the Law Reform Commission scheme would be to add "knowledge" as a separate mental state. The Working Group states that the advantage of doing so would be to recognize a state of mind which is particularly appropriate for crimes like possessing property obtained by crime.

6. The Working Group on the General Part recommended that the General Part contain a specific provision addressing wilful blindness.

7. The Federal Provincial Working Group on Homicide recommended that the definition of "knowledge" be changed so as to require actual knowledge of the facts or knowledge of sufficient facts to know that other facts are relevant, coupled with a wilful blindness with respect to those other facts. The Group submitted that the wilful blindness aspect was essential to the "knowledge" concept.

Other jurisdictions:

1. "Knowledge" is specified as a separate fault element in the General Parts in the U.S. Model Penal Code (s. 2.02(2)(b)), the English Law Commission's Draft Code (s. 18(a)) and the Australian Crimes Act (s. 3F(1)(a)) (see Appendix, pp. 3, 5, 6). Their definitions are two-part - actual knowledge and wilful blindness.

2. In defining "actual knowledge", the English and Australians go one step further than the Americans by including knowledge of circumstances that "will exist" to cover any offences that might require a state of mind requiring knowledge with respect to future facts.

3. The second part of the "knowledge" definition for the three Codes illustrates the different approach to the doctrine of wilful blindness referred to in page 13 above. The English Draft Code follows the Canadian case-law in treating deliberate ignorance as a doctrine separate from recklessness. The U.S. Model Penal Code and the Australian Crime Bill tend to view the question not as a separate doctrine but rather as an extension of recklessness.

4. All three jurisdictions emphasize the subjective nature of this mental element.

Good Points:

None.

Bad Points:

1. The absence of "knowledge" as a separate mental element is difficult to understand as it is particularly appropriate for a number of offences in the *Criminal Code*, like possession of stolen property, which are prohibited because of the offender's knowledge of the facts or circumstances in which he conducted himself (see p. 10). Working Paper No. 29 of the Law Reform Commission recommended "knowledge" as a separate level of culpability.

2. This recommendation of the Law Reform Commission is inconsistent with the approach taken by the Americans, English and Australians. The New Zealand Crimes Bill does not specify "knowledge" as a separate fault element.

3. The absence of a reference to wilful blindness in the General Part leaves that doctrine to the mercy of being interpreted as part of recklessness under Mistake of Fact, section 3(2). The common law is against such an interpretation (*Sansregret* v. *R.* (1985) 45 CR (3d) 193), although some scholars and jurisdictions (U.S., Australia) advocate it.

Issues for consideration:

1. Should "knowledge" be included as a separate level of culpability in the General Part, or should "lack of knowledge" be included as a defence under Defences?

2. If "knowledge" is to be included as a separate level of culpability in the General Part, should it make reference to future facts as proposed by the English and Australians?

3. If not, how should it be formulated?

4. Should deliberate ignorance be included in the General Part as part of a definition of "knowledge" or included under Defences as part of a definition of "lack of knowledge"?

5. If deliberate ignorance is to be included in the General Part, should it be formulated as a separate doctrine of wilful blindness or as an extension of recklessness?

6. If so, how should it be formulated?

U.S. - Model Penal Code (1962)

Section 2.02. General Requirements of Culpability

(2) (b) Knowingly.

A person acts knowingly with respect to a material element of an offense when:

(i) **if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and**

(ii) **if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result**

(7) Requirement of Knowledge Satisfied by Knowledge of High Probability. **When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.**

England - Draft Criminal Code (1989)

Fault

18. **For the purposes of this Act and of any offence other than a pre-Code offence as defined in section 6 a person acts -**

(a) **"knowingly" with respect to a circumstance not only when he is aware that it exists or will exist, but also when he avoids taking steps that might confirm his belief that it exists or will exist;**

Australia - Crimes (Amendment) Act, (1990)

Definition of degrees of fault

3F. (1) (a) **a person is taken to act knowingly with respect to a circumstance if the person is aware that the circumstance exists or will exist or that it is probable that it exists or will exist;**

C. RECKLESSNESS

CANADA - DRAFT CRIMINAL CODE (1987)

(b) **Definitions.**

"Recklessly." A person is reckless as to consequences or circumstances if, in acting as he does, he is conscious that such consequences will probably result or that such circumstances probably obtain.

[Alternative

"Recklessly." A person is reckless as to consequences or circumstances if, in acting as he does, he consciously takes a risk, which in the circumstances known to him is highly unreasonable to take, that such consequences may result or that such circumstances may obtain.]

Comment of Law Reform Commission

Both formulations are in line with traditional understanding of the word "recklessly" in criminal law rather than with recent House of Lords jurisprudence (R. v. Lawrence (1981), [1981] 1 All E.R. 974, R. v. Caldwell (1981), [1981] 1 All E.R. 96). The first formulation of "recklessly" locates the central meaning of the term in the notion of consciousness of probability. The accused need not aim at the consequences but need only know that they are probable; he must foresee their likelihood. Likewise he need not know of the existence of the circumstances specified by the definition but need only know that they probably exist; he must realize their likelihood.

The alternative formulation defines "recklessly" as a function of two factors: (1) the risk consciously taken, and (2) the objective unreasonableness of taking it in the circumstances known to the accused. A risk may be one of less than fifty per cent but may still be most unreasonable and therefore reckless: if D deliberately points a loaded gun at V, this would generally be regarded as reckless despite a less than fifty per cent chance of the gun going off. Conversely, there may be high probability of a consequence without recklessness if the risk is not unreasonable in the circumstances: a surgeon performing an operation with more than a fifty per cent chance of death will not necessarily be reckless, as when, for example, he performs a dangerous operation on a consenting patient to save his sight, hearing or other faculty.

Observations:

1. The Law Reform Commission recommended codifying "recklessness" as a separate level of culpability and not as an extension of "purpose".

2. The formulation does not cover foresight of certainty.

3. It covers "recklessness" in relation to both consequences and circumstances.

4. The formulation offers two alternate definitions of recklessness:

   i) knowledge of a likely risk based on the subjective approach, and

   ii) knowledge of an unreasonable risk, based on the subjective-objective approach of Glanville Williams and the Canadian courts.

5. In the first formulation the degree of risk required is "probable" which is more favourable to an accused than a "possible" risk.

6. The alternative focuses not on the probability of the risk in the mind of the accused but rather on the unreasonableness of the risk. The words " highly unreasonable" are used to describe the risk rather than "unjustifiable" as used by Glanville Williams and Dickson J. in *Leary* v. *R.* (1977) 33 CCC (2d) 473 @ 486.

Other jurisdictions:

1. The Americans, English, Australians and New Zealanders have all codified "recklessness" on the double-barreled approach. The U.S. Model Penal Code uses the words "substantial and justifiable" to describe the risk (s. 2.02(2)(c)).

2. None of the Code drafters in any of the jurisdictions have proposed extending the concept of recklessness to include a case in which a person doing the act was heedless in giving no thought to the possibility of there being a risk, as suggested in *R.* v. *Lawrence*, *supra* and *R.* v. *Caldwell*, *supra*. However, the New Zealand Crimes Bill (s. 23) does include "heedlessness" as a separate mental element.

Good Point:

1. The Law Reform Commission properly distinguishes "recklessness" from "purpose" as a separate level of culpability.

Bad Point:

1. Both formulations use the word "conscious" when "awareness" might be more easily understood.

First Formulation

Good Points:

1. The first formulation is simple, easy to understand and ensures that only subjective considerations are relevant.

2. The first formulation could cover "indirect intent" as foresight of certainty. There is little practical difference between foresight of a practical certainty and foresight of a probability. As Colin Howard states, "... certainty is best understood as the highest degree of probability."

Bad Point:

1. The first formulation is not so sensitive to social utility - it could catch the high risk act that was reasonable (surgeon's operation) but ignore the low risk act that was unreasonable (Russian roulette).

Alternative Formulation

Good Point:

1. The double-barreled formulation is more flexible than the first. It catches a low risk act that is highly unreasonable but does not interfere with a high risk act that is reasonable.

   Don Stuart prefers the simplicity of the first formulation but points out in *Canadian Criminal Law* @ 140 some advantages of the double-barreled approach:

   > ... It provides sufficient flexibility for policy considerations that would have no place if the inquiry were to remain purely one of subjective foresight. It also obviates the arbitrary choice of uncertainty, probability, likelihood or possibility as the standard of foresight required. Once the accused subjectively foresaw a consequence or circumstance, the degree of foresight involved is merely one of the factors to consider at the second stage of the test in deciding, objectively, whether the risk assumed or created was justified.

Bad Point:

1. The second formulation is more complex in that it involves two inquiries:

   i) Did the accused foresee the risk?

   ii) In the circumstances known to the accused, was it an unreasonable risk based on an objective standard?

   Such a process of inquiry runs the risk of blurring the subjective-objective distinction.

Issues for consideration:

1. Should recklessness be included as a separate level of culpability in the General Part?

2. If so, how should it be formulated?

3. If "recklessness" is formulated on the double-barreled approach, should it require that the risk taken be:

   i) substantial and unjustifiable, or

   ii) highly unreasonable in the circumstances known to the accused?

Legislation from Other Jurisdictions

U.S. - Model Penal Code (1962)

Section 2.02. General Requirements of Culpability

(2) **Kinds of Culpability Defined.**

(c) **Recklessly.**

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

England - Draft Criminal Code (1989)

Fault

18. **For the purposes of this Act and of any offence other than a pre-Code offence as defined in section 6 a person acts -**

(c) "recklessly" with respect to -

(i) **a circumstance when he is aware of a risk that it exists or will exist;**

(ii) **a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk.**

Australia - Crimes (Amendment) Act, (1990)

Definition of degrees of fault

3F. (1) Unless the contrary intention appears in a law of the Commonwealth creating an offence:

(c) a person is taken to act recklessly with respect to a circumstance if:

(i) the person is aware of a risk that it exists or will exist; and

(ii) in the circumstances known to the person, it is unreasonable to take the risk; and

New Zealand - Crimes Bill (1989)

22. Recklessness -

(1) For the purpose of criminal responsibility, a person is reckless as to any consequence of any act or omission where -

(a) The person does or omits to do the act knowing or believing that there is a risk that the consequence will result; and

(b) It is, in the circumstances known to the person, unreasonable to take that risk.

(2) For the purposes of criminal responsibility, a person is reckless as to any circumstance of any act or omission where -

(a) The person does or omits to do the act knowing or believing that there is a risk that the circumstance exists or will exist; and

(b) It is, in the circumstances known to the person unreasonable to take that risk.

D. NEGLIGENCE

CANADA - DRAFT CRIMINAL CODE (1987)

Section 2(4)(b)

"Negligently." A person is negligent as to conduct, circumstances or consequences if it is a marked departure from the ordinary standard of reasonable care to engage in such conduct, to take the risk (conscious or otherwise) that such consequences will result, or to take the risk (conscious or otherwise) that such circumstances obtain.

Comment by Law Reform Commission

The essence of civil negligence is departure from the standard of reasonable care. Criminal negligence, however, requires more than just this; it requires what recent case-law has termed "a marked departure." As to the initiating act, or conduct, it means behaving without due care rather than intentionally or accidentally. As to the circumstances and consequences, it means taking a risk, consciously or otherwise, which one ought not to take. Where the risk is taken consciously, the difference between negligence and recklessness is that, in the latter instance, it is much more unreasonable to take it; this calls for a value judgement in each individual case.

Observations:

1. The Law Reform Commission recommended that the General Part contain a provision for "negligence" as the lowest level of culpability.

2. The formulation requires a "marked departure" from the ordinary standard of care in accordance with the recent decisions of the Supreme Court of Canada: *R.* v. *Waite* (1989) 48 CCC (3d) 1, *R.* v. *Tutton* (1989) 48 CCC (3d) 129, *R.* v. *Anderson* (1990) 75 CR (3d) 50.

3. A person can be negligent even if he is not aware (conscious) that the circumstance and/or consequence would occur.

4. Where the person is aware of the circumstance and/or consequence of the risk, there is a striking similarity with recklessness. However the difference in the two concepts is that in "recklessness" the risk is much more unreasonable.

5. The Law Reform Commission formulation of negligence does not take into account personal factors of the accused such as age, intelligence, education or physical capacity.

6. In a working paper of the Law Reform Commission (No. 46) "Omission, Negligence and Endangering" (1985), the Law Reform Commission stated that not every act of negligence should constitute a crime. It suggested criminal negligence be restricted to causing death or serious bodily harm. It left open the question of whether it should be extended to causing serious harm or risk to property, for example by fire or explosion.

7. The Working Group on the General Part recommended that the test for negligence be an objective one and that the definition of negligence be one of a "marked and substantial departure" or "marked departure from the standard of care of the reasonable person."

Other jurisdictions:

1. The English Draft Code is the only one that does not codify negligence. It chose not to do so because it wanted a Code that stayed within the mainstream of English criminal law - to punish only those who have a guilty mind. None of its proposed definitions of offences in Part II (the Special Part) of the Code require negligence. However the English Law Commission did recognize that Parliament might want to enact offences based on a lower level of culpability, in which case Parliament might choose to add negligence to the Code.

2. The Australian Draft Bill (s. 3F(1)(d)) and the New Zealand Crime Bill (s. 24) are much simpler in formulation as they relate only to circumstances.

3. In the U.S. Model Penal Code the only difference between negligence and recklessness is that the former has the objective standard and the latter has subjective awareness (s. 2.02(2)(c), (d)).

4. None of these formulations for negligence are qualified by an accused's personal characteristics.

Good Points:

1. Whether its inclusion as a level of culpability in the General Part is a good or bad point depends on one's point of view on criminal liability.

2. Its requirement that the departure from the ordinary standard of reasonable care be "marked" helps to distinguish criminal negligence from civil negligence and is consistent with common law in Canada and with the Codes in the United States, Australia and New Zealand.

3. Whether its failure to take into account personal factors such as age, intelligence or physical capacity of the accused is a good or bad point, again depends on one's point of view. Their absence is perhaps a recognition of the fact that the more one considers personal characteristics the more difficult it becomes to apply an objective standard. However the answer may also lie in the fact that the Supreme Court of Canada appears to have become more sensitive to such a qualification after the Law Reform Commission made its report in June 1987.

Bad Points:

1. By including "a conscious risk" in its formulation of "negligence", some confusion may develop between "negligence" and "recklessness" where conscious risk is also an issue. If it does not matter whether the risk is "conscious or otherwise" why include the words? The Law Reform Commission recommendation seems to lie somewhere between the simple approach of the Australians and New Zealanders and the more complex approach of the Americans.

Issues for consideration:

1. Should negligence be included as a distinctive level of culpability in the General Part?

2. If so, what should be the degree of departure from the ordinary standard of care - "marked" ("gross", "serious") or a lesser degree?

3. Should the objective standard of negligence be qualified by the Hart-Pickard individualized approach or a variation thereof?

Legislation from Other Jurisdictions

U.S. - Model Penal Code (1962)

Section 2.02. General Requirements of Culpability

(2) Kinds of Culpability Defined.

(d) Negligently.

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and justifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to hm, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

Australia - Crimes (Amendment) Act, (1990)

Definition of degrees of fault

3F. (1) Unless the contrary intention appears in a law of the Commonwealth creating an offence:

(d) a person is taken to act negligently with respect to a circumstance if the person's behaviour with respect to the circumstance is a very serious deviation from the standard of care that would be expected of a reasonable person.

5. New Zealand - Crimes Bill (1989)

24. Negligence - For the purposes of criminal responsibility, a person is negligent in respect of any act if that act is in the circumstances a very serious deviation from the standard of care expected of a reasonable person.

IV. PROCEDURAL CONSIDERATIONS

A. BREAKDOWN OF EXTERNAL ELEMENTS

CANADA - DRAFT CRIMINAL CODE (1987)

2(4)(a) General Requirements as to Level of Culpability. Unless other provided:

(i) Where the definition of a crime requires purpose, no-one is liable unless as concerns its elements he acts -

(A) purposely as to the conduct specified by that definition,

(B) purposely as to the consequences, if any, so specified; and

(C) knowingly or recklessly as to the circumstances, if any, so specified;

(ii) where the definition of a crime requires recklessness, no-one is liable unless as concerns its elements he acts

(A) purposely as to the conduct specified by that definition,

(B) purposely as to the consequences, if any, so specified, and

(C) recklessly as to the circumstances, whether specified or not

(iii) where the definition of a crime requires negligence, no-one is liable unless as concerns its elements he acts

(A) negligently as to the conduct specified by that definition

(B) negligently as to the consequences, if any, so specified, and

(C) negligently as to the circumstances, specified or not.

Observations:

1. The Law Reform Commission adopted the American approach and recommended that the levels of culpability be differentiated for conduct, circumstances and consequences. No explanation was given. Presumably it was done to avoid having different levels of culpability in the same section defining one offence.

   The recent amendments of July 1, 1990 to the *Criminal Code* on the arson offences illustrate what the Law Reform Commission seeks to avoid:

   > 433. **Every person who *intentionally* or *recklessly* causes damage by fire or explosion to property, whether or not that person owns the property, is guilty of an indictable offence and liable to imprisonment for life where**

> **(a) the person *knows* that or is *reckless* with respect to whether the property is inhabited or occupied; or**
>
> **(b) the fire or explosion causes bodily harm to another person.**

By virtue of section 2(4)(c) of the Draft Code which permits a greater culpability being satisfied by a lesser culpability, this arson offence would be categorized by the Law Reform Commission as one requiring recklessness and could be then drafted in the following words:

> **Every person who recklessly causes damage by fire or explosion to property, whether or not that person owns the property commits a crime where**
>
> **(a) the property is inhabited or occupied; or**
>
> **(b) the fire or explosion causes bodily harm to another person.**

As "recklessly" has been specified as the level of culpability, the definitions in the General Part of the Draft Code indicate that a person will be liable if he acts:

(i) purposely or recklessly in respect to the consequence of damage (s. 2(4)(c)), and

(ii) knowingly or recklessly in respect to the circumstance of the property being inhabited or occupied (s. 2(4)(a)(i)(C), (ii)(C)).

2. The Law Reform Commission recommended specifying the level of culpability for conduct in addition to consequences and circumstances. The Law Reform Commission defined conduct as "... the act or omission performed by that person" (s. 2(3)). The Law Reform Commission uses the word "conduct" in the narrow sense of "initiating act" or "muscular contraction."

In a crime requiring "purpose" or "recklessness", the initiating act must be done purposely or deliberately. Mere carelessness or accident is not sufficient. That which distinguishes "purpose" crimes from "reckless" crimes is the mental element in respect of consequences and circumstances and not the mental element in conduct. The initiating act in crimes of negligence of course must be done carelessly.

Whether it is necessary to have a separate level of culpability for "conduct" is questionable. An act (or omission) by itself does not attract criminal liability. It is prohibited only because it is done in specified circumstances and/or causes specific consequences.

Reference to the above example on arson demonstrates that it is not the initiating act of setting a fire or causing an explosion that attracts criminal liability. Rather it is the act done in the context of the other external elements of the offence (consequences - damage to property and/or person; circumstance - knowing that the property is inhabited or occupied) that make the act criminal.

> As a matter of fundamental principle, we never talk about culpability in respect of conduct in the abstract or, as Dickson C.J. puts it, "in the air", *Leary* v. *R.* (1977) 33 CCC (2d) 473 @ 494 (SCC).
>
> Don Stuart, *Canadian Criminal Law* @ 147

Glanville Williams has expressed a similar viewpoint in *Criminal Law, The General Part* @ 19:

> ... it is not possible to draw a satisfactory line between the physical act and its environment. One cannot formulate a test for the ingredients of an act, except the test of what is required by law for the external situation of a crime. Writers have often pointed out that there is generally no harm in a man's crooking his right forefinger, unless it is (for example) around the trigger of a loaded gun which is pointing at someone. The muscular contraction, regarded as an *actus reus*, cannot be separated from its circumstances. When the specification of a crime includes a number of circumstances, all of these are essential to the crime and all must be regarded as part of the *actus reus*. It will be shown later that any narrower view is undesirable because it creates great uncertainty and also because it leads straight to haphazard strict responsibility in crime, enabling different judges to pick and choose in different ways between the elements of a crime for the purpose of the requirement of *mens rea*. The view that *actus reus* means *all* the external ingredients of the crime is not only the simplest and clearest but the one that gives the most satisfactory results.

3. The subsections dealing with consequences and circumstances have the additional words of "if any, so specified" and "whether specified or not", words which are not found in any other legislation in the other jurisdictions.

A criminal offence only specifies those circumstances and consequences that form part of the prohibited act.

> Circumstances and consequences are of two kinds, according as they are relevant or irrelevant to the question of liability. Out of the infinite array of circumstances and the endless chain of consequences the law selects some few as material. They and they alone are constituent parts of the wrongful act. All the others are irrelevant and without legal significance ... It is for the law ... to select and define the relevant and material facts in each particular species of wrong.
>
> Salmond, *Jurisprudence*, (11th ed.), @ 41

By adding the words "if any so specified" the Law Reform Commission makes it clear that the level of culpability is only directed at those consequences that are specified as forming part of the *actus reus*. If there are additional or unspecified consequences the Crown need not prove them by the same level of culpability required for the specified consequences. For example, on a charge of murder where purpose is required the fact that an accused inherited the victim's fortune may be relevant as motive. However, the Crown need not prove the inheritance was an intended consequence of the accused's act.

"Circumstances" are treated differently. For crimes of recklessness, a person must be reckless as to the existence of all relevant circumstances, whether specified or not. For crimes of purpose, a person can know or be reckless about the existence of specified circumstances but must have the higher level of culpability - actual knowledge - for unspecified circumstances (for example, that the gun was loaded or the drink was poisoned).

Other jurisdictions:

1. The U.S. Model Penal Code specifies a level of culpability for conduct only when defining "Purposely" and "Knowingly" and not "recklessly" or "negligently." In doing so it groups "conduct" with result under "purposely" (s. 2.02(2)(a)) and with circumstances under "knowingly" (s. 2.02(2)(b)).

> **U.S. Model Penal Code Section 2.02. General Requirements of Culpability**
>
> (2) Kinds of Culpability Defined.
>
> (a) Purposely.
>
> **A person acts purposely with respect to material element of an offense when:**
>
> **(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and**
>
> **(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.**
>
> (b) Knowingly.
>
> A person acts knowingly with respect to a material element of an offense when:
>
> **(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and**
>
> **(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result**

The English and New Zealanders differentiate levels of culpability only for circumstances and consequences while the Australians, only for circumstances. Perhaps the drafters of the Australian Bill were influenced by Colin Howard's views that the term *actus reus* and its constituent parts - act, consequences and circumstances - should be discarded in favour of the all-inclusive term "external circumstances."[20]

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20. Colin Howard, *Criminal Law*, pp. 11-12.

Good Points:

1. It allows for greater analysis of the elements of an offence.

2. It permits the offence sections to be drafted without reference to different levels of culpability, where required.

Bad Points:

1. Having Code sections with little or no reference to the required mental elements is contrary to the increasing tendency over recent years to specify them in the *Criminal Code* for greater certainty.

2. It is unnecessary to designate a level of culpability for "conduct." This could give rise to complications, not the least of which is the probability that the word "conduct" would be understood by many as covering all elements of the *actus reus* and thus undermine the very purpose of having this section.

> ... the point of drawing distinctions is to facilitate exposition, not to produce logical purity for its own sake. Neither terminology nor analysis is an end in itself. The purpose of each is to convey knowledge. Strict consistency should be subordinated to this end.
>
> Colin Howard, *Criminal Law*, @ 12

3. The words "... if any so specified" that qualified consequences in all three categories of offences are cumbersome. Could it not be improved by simply stating that a person acts purposely (recklessly, negligently) as to any specified consequences?

4. By including as part of the offence any circumstances that are not specified the section creates uncertainty with respect to the requisite elements of an offence.

Issues for consideration:

1. Should the different mental elements be specified in each section defining an offence like the English Draft Code or in a reference section in the General Part as recommended by the Law Reform Commission?

2. In either system, should mental element in relation to "conduct" be specified?

3. If the recommendation of the Law Reform Commission is adopted:

   (i) can the words "if any so specified" which qualify consequences be improved upon; and

   (ii) should "circumstances" include unspecified ones?

B. PRESUMED LEVEL OF CULPABILITY (FAULT REQUIREMENT)

CANADA - DRAFT CRIMINAL CODE (1987)

2(4)(d) Residual Rule. Where the definition of a crime does not explicitly specify the requisite level of culpability, it shall be interpreted as requiring purpose.

Comment by Law Reform Commission

Where nothing is said in the definition of a crime, that definition is to be taken as creating a "purpose" crime. This rule avoids the repetition of culpability requirements in "purpose" crimes, but of course necessitates it in "reckless" and "negligent" crimes.

Observation:

1. The level of culpability chosen by the Law Reform Commission is "purpose" and not "recklessness."

Other jurisdictions:

1. A presumed fault requirement in the other jurisdictions is as follows:

   United States - purpose, knowledge, or recklessness (s. 2.02(3))
   England - recklessness (s. 20(1))
   Australia - intention, knowledge (s. 3G(1))
   New Zealand - not specified

Good Point:

1. It is important to have a presumed fault requirement unless the requisite mental elements are going to be specified in every section of the Code.

Bad Point:

1. Using "purpose" as the presumed fault requirement is not in keeping with Canadian criminal law. Those offences in the *Criminal Code* that do not specify the requisite mental element can often be proven by the lesser level of culpability "recklessness." It is only when Parliament requires the higher level of intent, that the mental element is specified. The Law Reform Commission recommended just the opposite.

Issues for consideration:

1. Should there be a presumed level culpability or fault requirement?

2. If so, should it be "purpose" ("intention") or "recklessness"?

C. GREATER CULPABILITY REQUIREMENT SATISFIES LESSER

CANADA - DRAFT CRIMINAL CODE (1987)

2(4)(c) Greater Culpability Requirement Satisfies Lesser.

(i) Where the definition of a crime requires negligence, a person may be liable if he acts, or omits to act, purposely or recklessly as to one or more of the elements in that definition.

(ii) Where the definition of a crime requires recklessness, a person may be liable if he acts, or omits to act, purposely as to one or more of the elements in that definition.

Comment by Law Reform Commission

This provision simply prevents the avoidance of liability by the defendant's actually having a higher level of culpability than that charged. A person charged with negligent killing will not escape conviction because he kills on purpose.

Good Point:

1. It makes explicit the rule not articulated in the *Criminal Code*.

Bad Point:

1. Such a provision is not necessary.

Issues for consideration:

1. Should the General Part contain a requirement that any level of culpability is satisfied by proof of a higher level of culpability?

2. If so, should the more simplified formulation of the Australian Draft Act be followed?

V. SUMMARY OF ISSUES FOR CONSIDERATION

Intention:

1. Should a mental element "intention" or "purpose" be defined in the General Part at all?

2. If a term is to be defined should it be "intention" rather than "purpose"?

3. Should the concept of "intention" be limited to direct intent or include indirect intent?

4. Should the concept of "intention" include recklessness or should recklessness be a distinct mental element?

Knowledge:

1. Should "knowledge" be included as a separate level of culpability in the General Part?

2. If so, how should it be formulated?

3. Should deliberate ignorance be included in the General Part either as a separate doctrine of wilful blindness or as an extension of recklessness?

4. If so, how should it be formulated?

Recklessness:

1. If recklessness if a separate mental state, what should the definition of recklessness be?

2. If recklessness if to be formulated on the double-barreled approach, should it require that the risk taken be:

   i) substantial and unjustifiable, or

   ii) unreasonable in the circumstances known to the accused?

Negligence:

1. Should negligence be included as a distinctive level of culpability in the General Part?

2. If so, what should be the degree of departure from the ordinary standard of care - "marked", "gross", "serious" or a lesser degree?

3. Should the objective standard of negligence be qualified by the Hart-Pickard individualized approach or a variation thereof?

Breakdown of external elements:

1. Should the different mental elements be specified in each section defining an offence like the English Draft Code or in a reference section in the General Part as recommended by the Law Reform Commission?

2. In either system, should mental element in relation to "conduct" be specified?

3. If the recommendation of the Law Reform Commission is adopted:

   (i) can the words "if any so specified" which qualify consequences be improved upon; and

   (ii) should circumstances include unspecified ones?

Presumed level of culpability (fault requirement):

1. Should there be a presumed level culpability or fault requirement?

2. If so, should it be "purpose", "intention" or "recklessness"?

Greater culpability requirement satisfies lesser:

1. Should the General Part contain a requirement that any level of culpability is satisfied by proof of a higher level of culpability?

2. If so, should the more simplified formulation of the Australian Draft Act be followed?

VI. PROPOSAL

For discussion purposes, I have outlined below a suggestion on how the Fault Element might be codified.

General Principles of Criminal Responsibility

For the purposes of this Part, the following are degrees of fault that may be required in relation to an element of an offence:

(a) **Intention**

(b) **Knowledge**

(c) **Recklessness**

(d) **Negligence.**

Fault Definition

Definition of Degrees of Fault

(a) **Intentionally**

A person acts intentionally with respect to a circumstance when he or she acts in order to bring it about.

(b) **Knowingly**

A person acts knowingly when he or she is aware that the circumstance exists or will exist or that it is probable that it exists or will exist.

(c) **Recklessly**

A person acts recklessly when he or she is aware that the circumstance probably exists or will probably exist.

(d) **Negligently**

A person acts negligently when that person's conduct is a marked departure from the standard of care expected of a reasonable person, unless that person's mental or physical capacities prevent him or her from reaching that standard.

General Requirement of Fault

Where the definition of a crime does not explicitly specify the requisite fault element, it shall be interpreted as requiring recklessness.

Comment

1. All external elements of an offence (conduct, consequences and circumstances) are included in one term "circumstance."

2. "Intention", not "purpose is used as the highest fault element.

3. "Intention" is restricted to its narrow meaning of desire. Oblique (indirect) intent is covered by recklessness.

4. "Knowledge" is included as a separate fault element. It covers wilful blindness by extending actual knowledge to recklessness.

5. The harsh standard of negligence is qualified by a consideration of the relevant characteristics of the offender.

6. The presumed fault requirement is "recklessness" not "purpose".

7. Where an offence requires different fault elements, it should specify them in the offence and not rely on the general reference section like section 2(4)(a) of the Draft Criminal Code (LRC).

APPENDIX

1. Canada - Draft Criminal Code (1987)

s. 2(4)(a) General Requirements as to Level of Culpability. Unless other provided:

(i) Where the definition of a crime requires purpose, no-one is liable unless as concerns its elements he acts -

(A) purposely as to the conduct specified by that definition,

(B) purposely as to the consequences, if any, so specified; and

(C) knowingly or recklessly as to the circumstances, if any, so specified;

(ii) where the definition of a crime requires recklessness, no-one is liable unless as concerns its elements he acts

(A) purposely as to the conduct specified by that definition,

(B) purposely as to the consequences, if any, so specified, and

(C) recklessly as to the circumstances, whether specified or not;

(iii) where the definition of a crime requires negligence, no-one is liable unless as concerns its elements he acts

(A) negligently as to the conduct specified by that definition,

(B) negligently as to the consequences, if any, so specified, and

(C) negligently as to the circumstances, specified or not.

(b) Definitions.

"Purposely"

(i) A person acts purposely as to conduct if he means to engage in such conduct, and, in the case of an omission, if he also knows the circumstances giving rise to the duty to act or is reckless as to their existence.

(ii) a person acts purposely as to a consequence if he acts in order to effect

(A) that consequence; or

(B) another consequence which he knows involves that consequence.

"Recklessly" - A person is reckless as to consequences or circumstances if, in acting as he does, he is conscious that such consequences will be the probable result or that such circumstances probably obtain.

"Negligently" - A person is negligent as to conduct in circumstances if it is a marked departure from the ordinary standard of reasonable care to engage in such conduct, to take the risk (conscious or otherwise) that such circumstances will obtain.

2. U.S. - Model Penal Code (1962)

Section 1.13. General Definitions

In this Code, unless a different meaning plainly is required:

(5) "conduct" means an action or omission and its accompanying state of mind, or, where relevant, a series of acts and omissions;

(9) "element of an offense" means (i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as

(a) is included in the description of the forbidden conduct in the definition of the offense; or

(b) establishes the required kind of culpability; or

(c) negatives an excuse or justification for such conduct; or

(d) negatives a defense under the statute of limitations; or

(e) establishes jurisdiction or venue;

(10) "material element of an offense" means an element that does not relate exclusively to the statute of limitations, jurisdiction, venue, or to any other matter similarly unconnected with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse for such conduct;

(11) "purposely" has the meaning specified in Section 2.02 and equivalent terms such as "with purpose," "designed" or "with design" have the same meaning;

(12) "intentionally" or "with intent" means purposely;

Section 2.02. General Requirements of Culpability

(1) Minimum Requirements of Culpability. Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.

(2) Kinds of Culpability Defined.

(a) Purposely.

A person acts purposely with respect to material element of an offense when:

(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

(b) Knowingly.

A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

(c) Recklessly.

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

(d) Negligently.

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to hm, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

(3) Culpability Required Unless Otherwise Provided. When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.

(4) Prescribed Culpability Requirement Applies to All Material Elements. When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

(5) Substitutes for Negligence, Recklessness and knowledge. When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.

(6) Requirement of Purpose Satisfied if Purpose Is Conditional. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense.

(7) Requirement of Knowledge Satisfied by Knowledge of High Probability. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

(8) Requirement of Wilfulness Satisfied by Acting Knowingly. A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears.

(9) Culpability as to Illegality of Conduct. Neither knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense, unless the definition of the offense or the Code so provides.

(10) Culpability as Determinant of Grade of Offense. When the grade or degree of an offense depends on whether the offense is committed purposely, knowingly, recklessly or negligently, its grade or degree shall be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense.

3. England - Draft Criminal Code (1989)

6. In this Act, unless the context otherwise requires -

"fault element" means an element of an offence consisting -

(a) of a state of mind with which a person acts; or

(b) of a failure to comply with a standard of conduct; or

(c) partly of such a state of mind and partly of such a failure,

and "fault", "degree of fault", and related expressions, shall be construed accordingly;

Fault

18. For the purposes of this Act and of any offence other than a pre-Code offence as defined in section 6 (to which section 2(3) applies) a person acts -

(a) "knowingly" with respect to a circumstance not only when he is aware that it exists or will exist, but also when he avoids taking steps that might confirm his belief that it exists or will exist;

(b) "intentionally" with respect to -

(i) a circumstance when he hopes or knows that it exists or will exist;

(ii) a result when he acts either in order to bring it about or being aware that it will occur in the ordinary course of events;

(c) "recklessly" with respect to -

(i) a circumstance when he is aware of a risk that it exists or will exist;

(ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk;

and these and related words (such as "knowledge", "intention", "recklessness") shall be construed accordingly unless the context otherwise requires.

19. (1) An allegation in an indictment or information of knowledge or intention includes an allegation of recklessness.

(2) A requirement of recklessness is satisfied by knowledge or intention.

(3) This section does not apply to pre-Code offences as defined in section 6 (to which section 2(3) applies).

20. (1) Every offence requires a fault element of recklessness with respect to each of its elements other than fault elements, unless otherwise provided.

(2) Subsection 1 does not apply to pre-Code offences as defined in section 6 (to which section 2(3) applies).

4. Australia - Crimes (Amendment) Act, (1990)

Interpretation

2. Section 3 of the Principal Act is amended:

(a) by inserting in subsection (1) the following definitions:

"fault element", in relation to an offence against a law of the Commonwealth, means an element of the offence consisting:

(a) of a state of mind with which a person acts; or

(b) of a failure to comply with a standard of conduct; or

(c) partly of such a state of mind and partly of such a failure;

and **"fault"** and **"degree of fault"** are to be construed accordingly;

Division 2 - Fault

Definition of degrees of fault

3F. (1) Unless the contrary intention appears in a law of the Commonwealth creating an offence:

(a) a person is taken to act knowingly with respect to a circumstance if the person is aware that the circumstance exists or will exist or that it is probable that it exists or will exist; and

(b) a person is taken to act intentionally with respect to a circumstance if the person means it to exist or occur or knows that it will probably exist or probably occur; and

(c) a person is taken to act recklessly with respect to a circumstance if:

(i) the person is aware of a risk that it exists or will exist; and

(ii) in the circumstances known to the person, it is unreasonable to take the risk; and

(d) a person is taken to act negligently with respect to a circumstance if the person's behaviour with respect to the circumstance is a very serious deviation from the standard of care that would be expected of a reasonable person.

Intention etc. required

3G. (1) A person who is charged with an offence is not, unless the law creating the offence otherwise specifies, to be found guilty of the offence unless the person is found to have acted knowingly or intentionally in respect of each element of the offence.

(2) Where a person is proved to have acted knowingly or intentionally in relation to an element of an offence, that proof is sufficient to show that the person also acted recklessly and negligently with respect to that element.

(3) Where a person is proved to have acted recklessly in relation to an element of an offence, that proof is sufficient to show that the person also acted negligently with respect to that element.

5. New Zealand - Crimes Bill (1989)

21. **Intention and knowledge -**

(1) For the purposes of criminal responsibility, a person intends or knows any consequence of any act or omission where the person does or omits to do any act -

(a) Meaning to bring about that consequence; or

(b) Knowing or believing that that consequence is highly probable.

(2) For the purposes of criminal responsibility, a person knows any circumstance of any act or omission where the person does the act or omission -

(a) Being aware of the circumstance; or

(b) Knowing or believing that the existence of the circumstance is highly probable.

22. **Recklessness -**

(1) For the purpose of criminal responsibility, a person is reckless as to any consequence of any act or omission where -

(a) The person does or omits to do the act knowing or believing that there is a risk that the consequence will result; and

(b) It is, in the circumstances known to the person, unreasonable to take that risk.

(2) For the purposes of criminal responsibility, a person is reckless as to any circumstance of any act or omission where -

(a) The person does or omits to do the act knowing or believing that there is a risk that the circumstance exists or will exist; and

(b) It is, in the circumstances known to the person unreasonable to take that risk.

23. **Heedlessness -**

(1) For the purposes of criminal responsibility, a person is heedless as to any consequence of any act or omission where -

(a) The person gives no thought to whether there is a risk that the consequence will result, even though the risk would be obvious to any reasonable person; and

(b) It is, in the circumstances, unreasonable to take the risk.

(2) For the purposes of criminal responsibility, a person is heedless as to any circumstances of any act or omission where -

(a) The person does or omits to do the act without giving any thought to whether there is a risk that the circumstance exists or will exist, even though the risk would be obvious to any reasonable person; and

(b) It is, in the circumstances, unreasonable to take the risk.

24. **Negligence** - For the purposes of criminal responsibility, a person is negligent in respect of any act if that act is in the circumstances a very serious deviation from the standard of care expected of a reasonable person.

FAULT ELEMENTS IN THE *CRIMINAL CODE*

The confusion in determining the requisite mental element for a particular *Criminal Code* offence arises not only from the difficulty in defining the various mental elements but also from the wording of the *Criminal Code*.

Where the statute does not expressly proscribe any fault element there is of course a presumption of *mens rea*: *R.* v. *Sault Ste. Marie* (1978) 40 CCC (2d) 353, *Leary* v. *R.* [1978] 1 SCR 29-34. But the questions remain:

(1) What fault element is required? - Intention, knowledge, recklessness or wilful blindness?

(2) Where the offence has several external elements which may include the doing of an act, the circumstances in which it is done and the consequences that follow from it, is the fault element the same for all the elements or different?

Where a statute expressly refers to the fault element, it may use a variety of expressions, some of which have been interpreted differently. The *Criminal Code* refers to the following fault elements in some of the sections:

Mental Element	Offence	Section
"Intentionally"	Assault	265
"Knowing"	Possession	4(3)(a)
	Incest	155
	Corrupting morals	163(2), 171
	Betting	202(1)(a)
	Uttering threats	264.1
	Bigamy	290(1)
	Using credit card	342(1)(d)
	False pretences	361(1)
	Forgery	366.1
	Uttering	368.1
"Recklessness"	Criminal negligence causing death	220
	Criminal negligence causing bodily harm	221
	Manslaughter	222(5)(b), 234
	Wilfully causing event (mischief)	429(1)
"Negligence"	Firearm	86(2)
	Arson	436
"With Intent"	Public mischief	140(1)
	Wounding	244
	Resisting arrest	270(1)(a)
	Kidnapping	279
	Hostage-taking	279.1
	Libel	302
	Theft	322
	TMVA	335
	Extortion	346(1)

	B & E	348(1)(a)
	Falsification of documents	397
	Impersonation	403
	Trade marks	410
"Means To"	Murder	229(a)(b)
"For ... Purpose ..."	Party	21(b)
	Possession of weapon	87
	Sexual offences (children)	151, 152, 153
	Corrupting morals	163(1)(b), 171
	Mailing obscene matter	168
	Indecent act	173(2)
	Betting	202(1)(b)
	Soliciting	213(1)
	Robbery	343(a)
	Housebreaking instruments	351(1)
"Wilfully"	Obstructing justice	139
	Indecent act	173(1)
	Spreading false news	181
	Interception of communication	184(1)
	Promoting hatred	319(2)
	Mischief	430
	Arson	433
"Corruptly"	Bribery	119, 120
	Secret commission	426
"Fraudulently"	Theft	322
	Destroying documents	340
	Unauthorized use of computers	342.1
	Witchcraft	365
	Fraud	380
	Impersonation	403