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**MISTAKE OF FACT**  
**W.P. #3**

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## MISTAKE OF FACT

### I HISTORICAL PERSPECTIVE

*Ignorantia facti excusat, ignorantia juris non excusat.*<sup>1</sup>

This doctrine of Roman origin initially applied solely to civil actions in English law. The earliest reported case in which the doctrine of *ignorantia* was considered is *Hilary Term*, 1231.<sup>2</sup> By the 16th century the doctrine was being applied to both civil and criminal cases. In *Painter v. Manser* (1584) 2 Co. Rep. 3, a debt action, Lord Coke referred to the doctrine:

That ignorance, or want of knowledge of the law, is no excuse, is a maxim of the law, as it was of the Roman (F f. 22 6. 9); for every one is bound and presumed to know what the law of the realm is, Plowd. 343. ... But ignorance of fact is sometimes an excuse; as if a person buy a horse or other thing, in open market, without knowing that the seller had no property therein, he has good title, and the ignorance shall excuse him, Doct. and Stud. 309. ... So ignorance of fact is an excuse in criminal cases; where a man intending to do a lawful act does that which is unlawful: for here the deed and the will acting separately, there is not that conjunction between them which is necessary to form a criminal act; as if a man intending to kill a thief or housebreaker in his own house, by mistake kills one of his own family, this is no criminal action, Cro. Car. 558: but if a man, thinking he has a right to kill a person excommunicated or outlawed whenever he meets him, were to do so, it would be murder, as proceedings from a criminal ignorance of the law, 4 Bl. Com. 27. But ignorance of a fact, with full means of ascertaining it, is no defence, *Doe ex dem. Martin v. Watts*, 7 T. R. 83; and see *Field v. Serres*, 1 N. R. 121.

In the latter part of the 18th century, Blackstone referred to the doctrine in the context of the criminal law:

V. Fifthly, *ignorance or mistake* is another defect of will; when a man, intending to do a lawful act, does that which is unlawful. For here the deed and the will acting separately, there is not that conjunction between them, which is necessary to form a criminal act. But this must be an ignorance or mistake of fact, and not an error in point of law. As if a man intending to kill a thief or housebreaker in his own house, "under circumstances which would justify that act," by mistake kills one of his own family, this is no criminal action; but if a man thinks he has a right to kill a person excommunicated or outlawed, wherever he meets him, and does so, this is wilful murder. For a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence. *Ignorantia juris, quod quisque tenetur scire, neminem excusat*, is as well the maxim of our own law, as it was of the Roman.<sup>3</sup>

1. Ignorance of the fact excuses; ignorance of the law excuses not.
2. *Bracton's Note Book*, Maitland's Ed., Pl. 496.
3. Blackstone, *Commentaries on the Laws of England* (Vol. 4), p. 25.

It should be noted that in these first expressions of the doctrine there was no requirement that the belief had to be reasonable. Glanville Williams points out that even the mistaken belief of a drunkard as to the necessity for self-defence could excuse his attack on another person up until the latter part of the 19th century.<sup>4</sup>

### English Approach - Honest and Reasonable Belief

In criminal law the two leading English cases on mistake of fact are *R. v. Prince* (1875), 13 Cox C.C. 138, a case of unlawfully taking an unmarried girl under 16 from her father, and *R. v. Tolson* (1889), 23 Q.B. 168, a case of bigamy. From these cases arose the idea that the belief had to be reasonable.

It is clear that ignorance of the law does not excuse. It seems to me to follow that the maxim as to *mens rea* applies whenever the facts which are present to the prisoner's mind, and which he has reasonable ground to believe, and does believe to be the facts, would if true, make his act no criminal offence at all. It may be true to say that the meaning of the word "unlawfully" is without justification or excuse. I, of course, agree that if there be a legal justification, there can be no crime; but, I come to the conclusion that a mistake of facts on reasonable grounds, to the extent that, if the facts were as believed, the acts of the prisoner would make him guilty of no criminal offence at all, is an excuse, and that such excuse is implied in every criminal charge and every criminal enactment in England. I agree with Lord Kenyon that "such is our law," and with Cockburn, C.J., that such is the foundation of all criminal procedure.

Brett, J. in dissent in *R. v. Prince*, *supra* @ 156

At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which the prisoner is indicted an innocent act has always been held to be a good defence.

Cave, J. in *R. v. Tolson*, *supra* @ 181

Although the word "honest" is redundant to the description of an accused's belief, it continues to be used by the courts for emphasis.

Strictly speaking, I do not think that a belief, if held at all, can be held otherwise than honestly, but I read that last phrase as a warning to the jury to consider carefully whether the evidence of the defendant's belief was honest.

Lord Fraser, *D.P.P. v. Morgan* [1976] A.C. 182 @ 236-237

The English and Australian courts rigidly applied the *Tolson* rule of an honest and reasonable mistake until 1976 when the House of Lords in *D.P.P. v. Morgan*, *supra*, a case of rape, held that the mistaken belief need only be honest. Subsequent English cases have tended to restrict the *Morgan* principle of subjectivity to rape and to reaffirm the *Tolson* principle.<sup>5</sup>

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4. Williams, *Criminal Law*, The General Part (2nd ed.) p. 137.

5. D. Cowley, *The Retreat from Morgan* [1982] Crim. L.Rev. 198, Don Stuart, *Canadian Criminal Law*, (2d ed.) @ 246.

### Canadian Approach - Honest Belief

In Canada, the *Tolson* test of reasonableness was applied in many decisions over the years.<sup>6</sup> However a distinctive Canadian approach was developing at the same time. In *R. v. Rees* (1956), 115 CCC 1 the Supreme Court of Canada upheld the acquittal of an accused charged with "knowingly and wilfully" having sexual intercourse with a consenting girl under 18 years. At the time of the act, the accused reasonably believed the girl to be over that age. Cartwright, J.'s judgment is the first occasion in which a Justice of the Supreme Court of Canada stated a preference for a more subjective approach to mistake of fact. At page 11 of his judgment he said:

The first of the statements of Stephen, J., quoted above should now be read in the light of the judgment of Lord Goddard, C.J., concurred in by Lynskey and Devlin, J.J., in *Wilson v. Inyang*, [1951] 2 All E.R. 237, which, in my opinion, rightly decides that the essential question is whether the belief entertained by the accused is an honest one and that the existence or non-existence of reasonable grounds for such belief is merely relevant evidence to be weighed by the tribunal of fact in determining such essential question.

The following year the majority of the Supreme Court of Canada in *Beaver v. The Queen* (1957), 118 CCC 129, accepted Cartwright's statement. Beaver's conviction for illegal possession of a narcotic was overturned on the ground that he had an honest but mistaken belief that the substance was sugar, not a narcotic, and therefore he did not have the knowledge required for possession. The *Beaver* decision was considered the authoritative statement on mistaken belief until the decision of *Pappajohn v. The Queen* (1980), 52 CCC (2d) 481 (S.C.C.), a case of rape where Dickson, J. said @ 493-4:

Culpability rests upon commission of the offence with knowledge of the facts and circumstances comprising the crime. If, according to an accused's belief concerning the facts, his act is criminal, then he intended the offence and can be punished. If on the other hand, his act would be innocent, according to facts as he believed them to be, he does not have a criminal mind and ought not to be punished for his act: see E.R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 Harv. L. Rev. 75 @ p. 82 (1908).

Although the focus in Canada is now on the belief of the accused for offences requiring a mental element, the presence or absence of reasonable grounds for that belief is still a relevant consideration for the trier of fact. In *Pappajohn v. The Queen*, *supra*, the trial judge told the jury that for the accused's belief in consent to be effective as a defence it must have been reasonably held. The Supreme Court of Canada held that the honest belief need not be reasonable, because the effect of requiring reasonableness would deny the *mens rea* of the offence.

While the Canadian approach is more subjective than the English, the end result might not differ significantly. If there are reasonable grounds for the belief it is more likely the trier of fact will find that the offender actually held that belief. If the grounds are unreasonable, it is less likely. As Dickson, J. said in his judgment in *Pappajohn v. The Queen*, *supra* @ 500:

It will be a rare day when a jury is satisfied as to the existence of an unreasonable belief.

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6. *R. v. MacLeod* (1954) 20 C.R. 281 (B.C.C.A.), *R. v. McAuslane* [1968] 1 O.R. 209 (C.A.), *R. v. Finn* (1972) 8 CCC (2d) 233 (O.C.A.), *R. v. Woolridge* (1979), 49 CCC (2d) 300.

Eric Colvin in *Principles of Criminal Law* suggests that the delay in Canada in eliminating the "reasonableness" requirement for mistake of fact was partly due to the manner in which the concept was viewed:

The delay was due in part to the occasional practice of viewing mistake of fact as a special defence with a tangential relationship to the negation of *mens rea* as that concept is now understood. It was the gradual subsuming of the defence under the general framework of *mens rea* which led to the elimination of the "reasonableness" requirement.<sup>7</sup>

Subsuming the defence of mistake of fact under the concept of *mens rea* was probably encouraged by the decision in *R. v. City of Sault Ste. Marie* (1978) 40 CCC (2d) 353. In that case the Supreme Court of Canada at page 373 said that in the absence of a decision by Parliament to eliminate the *mens rea* requirement for a "true" criminal offence the Crown had to prove "... some positive state of mind such as intent, knowledge, or recklessness ...". Since the Supreme Court of Canada has now elevated *mens rea* from a presumed element to a constitutionally-required element in Reference re Section 94(2) of *Motor Vehicle Act* (1985), 23 CCC (3d) 289 Parliament cannot eliminate *mens rea* from a *Criminal Code* offence without providing a due diligence defence unless the proportionality test of section 1 of the *Charter* is met.<sup>8</sup>

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7. Colvin, *Principles of Criminal Law* (1986) p. 123.

8. *R. v. Nguyen* (1990), 59 CCC (3d) 161 (S.C.C.) 171, *R. v. Stevens* (1988), 41 CCC (3d) 193 (S.C.C.).

## II. NATURE OF MISTAKE OF FACT

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### Mistake or Ignorance

Ignorance and mistake are different concepts in criminal law. Ignorance means the absence of any belief at all on the subject whereas mistake means a positive but incorrect belief about some fact.<sup>9</sup> This analysis is reflected in the following passage from Glanville Williams, *Criminal Law*:

Now mistake is a kind of ignorance. Every mistake involves ignorance but not *vice versa*. Ignorance is lack of true knowledge, either (1) because the mind is a complete blank or (2) because it is filled with untrue (mistaken) knowledge on a particular subject. The first variety, lack of knowledge without mistake of knowledge, may be called simple ignorance. The second variety, lack of true knowledge coupled with the mistaken knowledge, is mistake. Ignorance is the genus of which simple ignorance and mistake are the species.

Simple ignorance is where the mind is a blank on the subject. Mistake is where it is filled with false information.<sup>10</sup>

Although it is important to appreciate the distinctive nature of the two concepts, they are often used interchangeably because their effects are identical. In both cases the accused does not know the true state of things. Colin Howard suggests that the difference is only a degree of consciousness and that the reason the defence is known as mistake of fact and not ignorance of fact is because the accused almost invariably relies upon mistake of fact.<sup>11</sup>

In *R. v. Molis* (1980) 55 CCC (2d) 558 (S.C.C.) @ 562-3, Lamer, J. for the court refused to make a distinction between ignorance and mistake insofar as it related to a question of law, given the wording of s. 19 of the *Criminal Code*. Even in the absence of that section, it is unlikely the Supreme Court of Canada would have made a distinction.

### Affirmative Defence or Negation of Mental Element

Mistake of fact is relevant to circumstances, not consequences. In crimes of intention or recklessness, mistake focuses on knowledge. Where the *actus reus* of a *mens rea* offence includes circumstances, the Crown must prove that the accused knew (wilfully blind) about them or was reckless as to their existence. Just as an act is not intentional unless all its circumstances are known,<sup>12</sup> so an act is not reckless unless there has been a recklessness about their existence.

Absent an admission by an accused, knowledge must be found by inferences from facts proved.<sup>13</sup> Facts surrounding a person's possession of property (e.g. purchase of an item far below market value from a person on a street corner) may lead to the inference that

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9. Howard, *Criminal Law*, (2nd ed.), page 376.

10. Williams, *Criminal Law*, The General Part (2nd ed.) (1961), pp. 151-52.

11. Howard, *Criminal Law*, (2nd ed.), page 378.

12. Williams, *Criminal Law*, The General Part, (2nd ed.), page 141.

13. *R. v. Kelly* (1967), 1CC 215 @ 222 (B.C.C.A.).



the accused knew or was wilfully blind about the stolen nature of the property. Conduct during the importation of a narcotic (e.g. transporting for a known drug user a bulky package in one's undergarments) will almost certainly lead to the inference that the accused was at least reckless about whether or not the package contained a prohibited drug.<sup>14</sup>

To counter such inferences, the accused may point to evidence in the Crown's case or testify that he was ignorant or mistaken about the nature of the property. By raising a reasonable doubt about his knowledge, the accused negates proof of the requisite mental element. It is because the Crown rarely has knowledge of the subjective factors which may have caused the ignorance or mistaken belief that the evidentiary burden falls on the accused.<sup>15</sup> For this reason it is often viewed as a defence.

Whether mistake of fact is more accurately described as the negation of mental element or as a positive defence is only important if the concept is to be codified. If it is the former, it may suffice to specify "Knowledge" as a separate fault element in the General Part of the Code under section 2. If the latter, mistake of fact should be included as a separate defence under section 3.

In *Pappajohn v. The Queen*, *supra*, at 507-515, McIntyre, J. spoke of lack of knowledge of the circumstance of non-consent of the complainant in the traditional words of a defence of mistake of fact. Dickson, J. preferred to view the concept as "negation of guilty intention":

Mistake is a defence, then, where it prevents an accused from having the *mens rea* which the law requires for the very crime with which he is charged. Mistake of fact is more accurately seen as a negation of guilty intention than as the affirmation of a positive defence. It avails an accused who acts innocently, pursuant to a flawed perception of the facts, and nonetheless commits the *actus reus* of an offence.<sup>16</sup>

This confusion over the precise nature of mistake of fact is covered by John Williams in his paper, *Mistake of Fact: The Legacy of Pappajohn v. The Queen*:

The defence of mistake of fact is often misunderstood. Stated simply, it is a positive formulation of the defence of "no *mens rea*." As pointed out above, it is a fundamental principle of our criminal law, that in the absence of contrary language or implication, an accused cannot be convicted of a crime unless it is proven that he had the necessary *mens rea* or guilty mind. Therefore an accused who acted under a mistake which effectively negated the *mens rea* must be acquitted. Defined, mistake of fact occurs for the purpose of the criminal law, where an accused holds a positive belief in a fact or state of facts which is untrue, but in furtherance of the mistaken belief commits the *actus reus* of an offence. The accused's ignorance of fact will be a defence if it results in an absence of the *mens rea* which is required by the definition of the offence charged.

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14. Whether recklessness is sufficient where "knowledge" is expressly mentioned in an offence section is now open to some doubt: *R. v. Zundel*, (1987), 56 C.R. (3d) 1 (O.C.A.); *R. v. Sandhu*, 50 CCC (3d) 492 (O.C.A.).

15. *Pappajohn v. The Queen* (1980), 52 CCC 481 (S.C.C.) @ 195.

16. *Pappajohn v. The Queen*, *supra* @ 494.

It will be seen then, that mistake of fact is not a "defence" in the same sense that provocation, self-defence, duress, and necessity are defences. These latter defences *justify* or *excuse*, either partially or totally, what would otherwise be criminal conduct. A mistake of fact which negates the *mens rea* renders the committed act innocent and thus there never arises any question of exonerating criminal conduct.

An accused may thus be acquitted, notwithstanding proof of the commission of the prohibited act, because the Crown failed to prove the mental element of the crime. When a mistake of fact defence is raised, the trier of fact is provided with *a reason why* the accused lacked the necessary *mens rea*.<sup>17</sup>

### Reasonableness

Understanding the meaning of "reasonableness" is fundamental to an appreciation of mistake of fact and its proposed codification by the Law Reform Commission.<sup>18</sup> Reasonableness is the ordinary man's standard of care, skill and prudence against which an accused's mental state and conduct can be measured. The extent of its application in the proof of the Crown's case varies with the fault element of the offence for crimes of:

- i) Intent - reasonableness cannot be used as a measure of an accused's mental state.
- ii) Recklessness - reasonableness is not relevant if the L.R.C.'s proposed formulation of subjective recklessness is used (s. 2(b)); it would be if the L.R.C.'s alternative formulation was used for that covers the issue of whether the risk was "highly unreasonable."
- iii) Negligence - reasonableness is the main yardstick to measure culpability.

As the law presently stands, it is this varied application of reasonableness in proving the different fault elements that determines whether the scope of mistake of fact is narrow (reasonable grounds) or wide (reasonable or unreasonable grounds).<sup>19</sup>

### Crimes of Intention

Whether the mistaken belief in a crime of intent was reasonable or unreasonable cannot alter the fact that an accused did not know a material circumstance and thus did not intend to commit the *actus reus*. A theft is not intentional if it is done under the mistaken belief that the property belonged to the defendant. There is an absence of knowledge.

The following passage from Edwin Keedy's paper, *Ignorance and Mistake in the Criminal Law*, shows why mistake must be wide in scope for offences requiring a mental element (intention, recklessness):

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17. (1985), 63 Can. Bar Rev. 597 @ 604-5.

18. Howard, *The Reasonableness of Mistake in the Criminal Law*, (1961-64), 4 U. Queensland L.J. 45.

19. See Toni Pickard's proposal for change in *Culpable Mistakes and Rape: Harsh Words on Pappajohn* (1980), 30 UTLJ 415.

Must the mistake be reasonable? An act is reasonable in law when it is such as a man of ordinary care, skill, and prudence would do under similar circumstances. To require that the mistake be reasonable means that if the defendant is to have a defence, he must have acted up to the standard of an average man, whether the defendant is himself such a man or not. This is the application of an outer standard to the individual. If the defendant, being mistaken as to material facts, is to be punished because his mistake is one which an average man would not make, punishment will sometimes be inflicted when the criminal mind does not exist. Such a result is contrary to fundamental principles, and is plainly unjust, for a man should not be held criminal because of a lack of intelligence. If the mistake, whether reasonable or unreasonable, as judged by an external standard, does negative the criminal mind, there should be no conviction.<sup>20</sup>

Reasonableness does have a limited role in *mens rea* offences in assessing the credibility of the accused who testifies about a mistaken belief.

The jury will be concerned to consider the reasonableness of any grounds found, or asserted to be available, to support the defence of mistake. Although "reasonable grounds" is not a pre-condition to the availability of a plea of honest belief in consent, those grounds determine the weight to be given the defence. The reasonableness, or otherwise, of the accused's belief is only evidence for, or against, the view that the belief was actually held and the intent was, therefore, lacking.

Dickson, J. in *Pappajohn v. The Queen*, *supra* @ 499-500 <sup>21</sup>

### Crimes of Recklessness

Just as belief in a mistaken fact is inconsistent with knowledge of that fact, so it is inconsistent with consciously risking the existence of that fact. In *Pappajohn v. The Queen*, *supra* at 494 Dickson, J. saw no difference in the effect of a mistaken belief in crimes of intent and recklessness. Both entitled the accused to an acquittal. Dickson, J. relied on the following passage from Glanville Williams' text:

It is impossible to assert that a crime requiring intention or recklessness can be committed although the accused laboured under a mistake negating the requisite intention of recklessness. Such an assertion carries its own refutation.<sup>22</sup>

There is considerable debate over whether the mistaken belief which displaces recklessness should require reasonable grounds or not. *Pappajohn v. The Queen*, *supra* decided such a requirement would violate the requisite *mens rea*. Toni Pickard argues in favour of a narrow reasonable mistake of fact for some offences like rape, but a wider scope based on reasonable or unreasonable grounds for other offences like possession.<sup>23</sup> Her view is that the nature of the offence should determine the scope of mistake of fact and not the requisite fault element of the offence.

The following analysis from Pickard's paper on unreasonable mistaken belief negating recklessness is instructive as it raises the question of distinguishing between situations in

20. Keedy, *Ignorance and Mistake in the Criminal Law*, (1908) 22 Harv. L.Rev. 75 @ 82.

21. See also *R. v. Bulmer* (1987) 58 C.R. (3d) 48 (S.C.C.); *R. v. Robertson* (1987), 8 C.R. (3d) 28 (S.C.C.).

22. Williams, *Criminal Law*, The General Part, (2nd ed.) (1961) p. 173.

23. Pickard, *Culpable Mistakes and Rape: Harsh Words on Pappajohn* (1980), 30 UTLJ 415.

which unreasonable mistakes are blameworthy from those in which they are not, an idea which undoubtedly influenced the Law Reform Commission's proposed codification of mistake of fact (section 3(2)):

The strongest claim of those who would argue that some mistakes must be based on reasonable grounds is that making an unreasonable mistake can sometimes be reckless in the sense of unacceptably carelessness with respect to the well-being of others.<sup>24</sup> Consideration of this claim in the specific context of mistakes about consent to intercourse led me, in the article to which this postscript relates, to isolate some factors which may be useful generally to distinguish situations in which unreasonable mistakes are blameworthy from those in which they are not (*e.g.*, whether or not the actor's mind must necessarily be focused on the legally relevant transaction at the relevant time; whether or not the risk of harm is both great and specific; whether or not inquiry into the relevant facts is simple, etc.). Where those, or perhaps other factors exist, the argument is that the making of the mistake is blameworthy to an extent which warrants criminal sanctions; that far from negating recklessness and therefore liability, the making of such a mistake is itself the culpable behaviour which grounds both.

### Crimes of Negligence

Where negligence is the fault element, the Crown must prove the accused's conduct was a marked departure from the standard of the reasonable man: *R. v. Tutton* (1989), 48 CCC (3d) 129 (S.C.C.). If mistake of fact is raised it cannot negative the *mens rea* as there is no mental element required. In crimes of negligence the focus is on conduct. An accused's understanding of the facts is nevertheless relevant to determine whether or not his conduct, given his belief, was reasonable.<sup>25</sup> The example of the welder charged with manslaughter given by McIntyre, J. on page 141 of his judgment is useful:

If an accused under section 202 (now section 219) has an honest and reasonably held belief in the existence of certain facts, it may be a relevant consideration in assessing the reasonableness of his conduct. For example, a welder, who is engaged to work in a confined space believing on the assurance of the owner of the premises that no combustible or explosive material is stored nearby, should be entitled to have his perception, as to the presence or absence of dangerous materials, before the jury on a charge of manslaughter when his welding torch causes an explosion and a consequent death.

The Crown would then have to prove that the welder did not have a mistaken belief, or if he did, it was unreasonable. To convict, the mistake cannot be reasonable, otherwise the conduct would not be negligent. For this reason mistake of fact in a crime of negligence is narrow in scope. It requires reasonable grounds. Where mistake of fact is raised for a crime of negligence, it is more accurate to describe the issue in terms of whether the mistake was unreasonable rather than whether the mistake negated the fault element.<sup>26</sup>

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24. Toni Pickard, *Culpable Mistakes and Rape: Relating Mens Rea to the Crime*, (1980), 30 UTLJ 75-83.

25. *R. v. Tutton* (1989), 48 CCC (3d) 129 (S.C.C.) @ 141, per McIntyre, J.

26. Toni Pickard, *Culpable Mistakes and Rape: Harsh Words on Pappajohn*, (1980), 30 UTLJ 415 @ 417.

## Where Mistake of Fact is Not Applicable:

### **Wilful Blindness**

Mistake of fact is not available where the accused has wilfully blinded himself to a material circumstance of the *actus reus*:

Having wilfully blinded himself to the facts before him, the fact that an accused may be enabled to preserve what would be called an honest belief, in the sense that he has no specific knowledge to the contrary, will not afford a defence because, where the accused becomes deliberately blind to the existing facts, he is fixed by law with actual knowledge and his belief in another state of facts is irrelevant.

McIntyre, J. in *Sansregret v. The Queen*, (1985), 45 C.R. (3d) 193 (S.C.C.) 208

### **Intoxication-Induced Mistake**

An intoxication-induced mistake of fact can negate a specific intent offence but not a general intent offence. The Supreme Court of Canada has in recent decisions re-affirmed the distinction between specific and general intent offences and the *Leary* principle<sup>27</sup> of restricting the defence of self-induced intoxication to specific intent offences: *R. v. Bernard* (1988), 45 CCC (3d) 1, *R. v. Quin* (1988), 44 CCC (3d) 570, *Penno v. The Queen* (1990) 49 C.R.R. 50.

Where mistake of fact is raised as a defence to a general intent offence, the trier of fact must ignore the evidence of intoxication and then determine (1) whether the mistake of fact was honestly held and (2) whether the accused would have made the same mistake if he had been sober.<sup>28</sup>

In *R. v. Moreau* (1986) 28 CCC (3d) 359 (O.C.A.), a case of sexual assault, Martin, J. made the following statement at 378-9:

It is true, of course, that intoxication may induce a mistake of fact. In crimes of specific intent an honest but mistaken belief induced by intoxication as to the existence of an essential element of the offence negatives criminal liability, even though the mistake is not reasonable. For example, an intoxicated person who takes the property of another in the honest but mistaken belief induced by intoxication that he is taking his own property is not guilty of theft.

... a mistaken belief as to the existence of an element of the offence negates intention or recklessness with respect to that element. However, where the mistake is induced by voluntary intoxication, the mistake on policy grounds does not exempt an accused from liability for an offence of general intent ... For the purpose of criminal liability no distinction is made between a person who by reason of self-induced intoxication does not realize that the complainant does not consent and one who has a positive belief produced by self-induced intoxication that she consent.

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27. *R. v. Leary* (1977), 33 CCC (2d) 473 (S.C.C.); see also *Swietlinski v. The Queen* (1980), 55 CCC (2d) 481 (S.C.C.), *D.P.P. v. Majewski* (1976), 62 Cr. App. R. 261 (H.L.).

28. Williams, *Textbook on Criminal Law* (2nd ed.) (1983) pages 481-2; *R. v. Moreau* (1986) 28 CCC (3d) 359 (O.C.A.) 386; K.L. Campbell, *Intoxicated Mistakes* (1988-89) 32 CLQ.

### III. CRIMINAL CODE

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#### Common Law

When the *Criminal Code* was first enacted in 1892 the common law defence of mistake of fact was preserved by s. 8(3). In *R. v. Kirzner* (1979), 38 CCC (2d) 131 (S.C.C.) 138, Laskin, J. made the point that s. 8(3) did not freeze the power of the courts to enlarge the content of the common law. Thus the Canadian courts were entitled to subsequently take a more subjective approach to mistake of fact than was found in the common law of 1892. Examples of *Criminal Code* offences where mistake of fact, subjectively determined, has been recognized are:

<u>Offence</u>	<u>Section</u>	<u>Authority</u>
Sexual assault	271	<i>Pappajohn v. The Queen</i> (1980) 52 CCC (2d) 481 (S.C.C.), <i>R. v. Robertson</i> (1987) 58 C.R. (3d) 28 (S.C.C.)
Theft	322	<i>R. v. Howson</i> (1966) 47 C.R. 322 (O.C.A.), <i>R. v. DeMarco</i> (1973) 13 CCC (2d) 369 (O.C.A.), <i>R. v. Lilly</i> (1983) 34 C.R. (3d) 297 (S.C.C.)
Possession	4, N.C.A.	<i>Beaver v. R.</i> (1957) 26 C.R. 193 (S.C.C.)

#### Codification

Parliament's sporadic codification of mistake of fact as a defence is not consistent or logical. For one category of offences, Assault, Parliament codified a subjective mistaken belief after the decision of *Pappajohn v. The Queen*, *supra* with the proviso that the absence of reasonable grounds was to be considered by the trier of fact in determining the honesty of the accused's belief.

For other offences which were enacted long before the *Charter*, Parliament expressly denied a defence of mistake of fact: Distributing Obscene Written Matter, s. 163(6), and Statutory Rape, s. 146(1). Such denial created offences of absolute liability. They have now been struck down by section 7 of the *Charter*: *R. v. Metro News Limited* (1986), 29 CCC (3d) 35 (O.C.A.), *R. v. Nguyen* (1990), 59 CCC (3d) 161 (S.C.C.). Wilson, J., for the majority in *R. v. Nguyen*, *supra* at 171 referred to the restricted power of Parliament in legislating mistake of fact as a defence under the *Charter*:

Prior to the *Charter*, Parliament had to use express statutory language in order to displace the requirement that the prosecutor prove *mens rea*. With the advent of the *Charter*, Parliament must now be prepared to show that a provision that purports to make it unnecessary for the Crown to prove *mens rea* and that does not provide an accused, at a minimum, with a due diligence defence is a reasonable limit that can be demonstrably justified in a free and democratic society.<sup>29</sup>

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29. See also Wilson, J. in *R. v. Stevens* (1988), 41 CCC (3d) 193 (S.C.C.).

Parliament has given other *mens rea* offences a narrow mistake of fact defence based on reasonable grounds: Bigamy, s. 290(2)(a) and sexual offences where the age of the complainant is a material circumstance, s. 150.1(4)(5). The effect of such a narrow defence is to change a *mens rea* offence into a crime of negligence. An example will illustrate. Where a person is charged with sexual assault in respect of a complainant under 14 years of age, consent is not a defence (s. 150.1(1)). A mistaken belief that the complainant was 14 years or older is not available to an accused unless he has taken all reasonable steps to ascertain the age of the complainant (s. 150.1(4)). If he had acted under an unreasonable mistake about the complainant's age, that would prevail over the mental element of the offence (knowledge, recklessness) to convict him.

Glanville Williams suggests that the idea that a mistake must be reasonable persists amongst code drafters for two reasons: the existence in law of crimes of negligence which measure fault by reasonableness, and the fact that reasonableness goes to the credibility of the accused in weighing his mistaken belief.<sup>30</sup>

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30. Williams, *Criminal Law*, The General Part (2nd ed.) pp. 202-206.

#### IV. TRANSFERRED MISTAKE OF FACT

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Fundamental to criminal law is the principle that a person cannot be liable unless he has a blameworthy mind in respect of a particular circumstance or consequence. The *mens rea* must coincide with the *actus reus*. An exception to this principle is found in the doctrine of transferred intent. Where a person throws a chair at A that strikes B, the common law doctrine transfers the *mens rea* for the act that did not occur (A) to the act that did occur (B): *R. v. Deakin* 26 C.R.N.S. 236 (Man. C.A.), *R. v. Pembliton* (1874), L.R. 2, *R. v. Latimer* (1886), 17 Q.B.D. 359. Parliament has codified the transfer of *mens rea* for different victims of the same crime: Murder (s. 229(b)), Wounding (s. 244).

Transferred intent can limit the availability of mistake of fact. Where an accused honestly believed in a set of facts which make him innocent of the offence charged (A) but guilty of another offence (B), mistake of fact is not available. Common law permits the transfer of *mens rea* from (B) to (A) for:

- |      |                          |   |   |
|------|--------------------------|---|---|
| i)   | The same kind of offence | narcotics   | <i>R. v. Blondin</i> (1971), 2 CC (2d) 118 (B.C.C.A.), affd. (1972), 4 CC (2d) 566 n. (S.C.C.); |
| ii)  | A less serious offence   | from assaulting a peace officer to common assault         | <i>R. v. McLeod</i> (1954), 111 CCC 106 (B.C.C.A.)  |
| iii) | A more serious offence   | narcotics, from mescaline to LSD                          | <i>R. v. Kundeus</i> (1975), 24 CCC (2d) 276  |
|      |                          | sexual offence, from interfering with a dead body to rape | <i>R. v. Ladue</i> (1965), 4 CCC 264  |

The underlying policy behind this transference of *mens rea* is the reluctance of the courts to free a person who is guilty of another offence.

The conflicting policy is found in the writings of most authors who maintain that the *actus reus* and the *mens rea* must relate to the same crime although they might have different objects or victims, as in Murder (s. 229(b)) or Wounding (s. 244). The only exception is where the offence charged includes a lesser included offence of which the accused may be found guilty, as codified by Parliament in s. 662(1).



In *Criminal Law*, Glanville Williams states:

The accused can be convicted where he both has the *mens rea* and commits the *actus reus* specified in the rule of law creating the crime, though they exist in respect of different objects.<sup>31</sup> He cannot be convicted if his *mens rea* relates to one crime and his *actus reus* to a different crime, because that would be to disregard the requirement of an appropriate *mens rea*.<sup>32</sup>

In *R. v. Kundeus*, *supra*, Laskin gave a strong dissenting judgment in support of the scholars and against relaxing the requirement of concurrent *mens rea* without direction from Parliament:

Certainly, it cannot be said that, in general, where *mens rea* is an ingredient of an offence and the *actus reus* is proved it is enough if an intent is shown that would support a conviction of another crime, whether more or less serious than the offence actually committed.

The matter, in terms of principle, depends on how strict an observance there should be of the requirement of *mens rea*. If there is to be a relaxation of the requirement, should it not come from Parliament, which could provide for the substitution of a conviction of the lesser offence, in the same way as provision now exists in our criminal law for entering a conviction on an included offence?<sup>33</sup>

It will be interesting to see how the Supreme Court of Canada resolves this issue of transferred *mens rea* under the *Charter*. If its decision in *R. v. Martineau* (1990), 79 C.R. (3d) 129 (S.C.C.) is any indication the doctrine of transferred intent for different crimes might not survive. In finding section 212(c) (now s. 229(c)) and section 213 (now s. 230) contravened section 7 and 11(d) of the *Charter*, Lamer, J. for the majority in *R. v. Martineau*, *supra*, at 139 states:

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 S.C.R. 833, 67 C.R. (3d) 113, 45 CCC (3d) 1, 38 C.R.R. 82, 32 O.A.C. 161, 90 N.R. 321, per McIntyre, J.; and *R. v. Buzzanga* (1979), 25 O.R. (2d) 705, 101 D.L.R. (3d) 488, 49 CCC (2d) 369 (C.A.), per Martin, J.A.

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31. Smith and Hogan, *Criminal Law*, 3rd ed. (1979), pages 49-51, Smith, *The Guilty Mind in the Criminal Law*, (1960) 76 LQR 78, Howard, *Australian Criminal Law*, 2nd. ed. (1970), page 375.

32. *Criminal Law*, The General Part, 2nd ed. (1961) page 129.

33. *R. v. Kundeus* (1975) 24 CCC (2d) 276 @ 286.

## V. CODIFICATION

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### 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.

##### 3(17) Mistaken Belief as to Defence

- (a) **General Rule.** No one is liable if on the facts as he believed them he would have had a defence under section 3(1) or 3(8) to 3(16).
- (b) **Exception.** This clause does not apply where the accused is charged with a crime that can be committed through negligence and the mistaken belief arose through his negligence.

#### Comment of Law Reform Commission

Mistake of fact, which of course in purpose and reckless crimes may negate *mens rea*, is well known to common law if not to the present *Criminal Code*. Present law, however, is unsatisfactory in two respects. First, it has not fully solved the problem of the accused who mistakenly thinks he is committing, not the crime charged, but some different offence. Sometimes such a mistake results in complete acquittal although the accused thinks he was engaged in crime; sometimes it results in conviction for the crime charged although he lacks *mens rea* for it: *R. v. Kundeus* (1975), 2 S.C.R. 272. Clause 3(2) provides that in such cases the accused is liable for attempting to commit the crime he thinks he is committing.

Second, present law has not completely solved the problem of the accused who is mistaken but is to blame for his mistake. Sometimes such culpable mistakes result unjustly in a complete acquittal, sometimes illogically, on the ground that mistake must be reasonable to be a defence, in a conviction for the crime charged despite lack of purpose or knowledge. Clause 3(2)(b) provides that, in such cases, if the crime charged can be committed by recklessness or negligence, the accused may be convicted if his mistake arose through recklessness and negligence, as the case may be.

**Observations:**

1. The Law Reform Commission recommended codifying "Lack of Knowledge" as a defence under Mistake of Fact, rather than codifying "Knowledge" as a separate level of culpability under s. 2.
2. No distinction is made between mistake and ignorance.
3. No specific mention is made of reasonable or unreasonable mistakes although the distinction remains implicit in the Exception, s. 3(2)(b).
4. The formulation places two limitations on the availability of the mistaken belief defence:
  - i) The first one is that the scope of the defence varies according to the requisite fault element of the offence. If the offence requires intention or knowledge the defence is wide in scope. Even an unreasonable mistake will negate criminal liability. However, where the offence can be committed by recklessness or negligence, the question of how the mistake arose becomes relevant. If the mistake was due to the accused's own recklessness or negligence (e.g. voluntary intoxication or failure to ascertain the true facts when the means were available) the defence is not available.
  - ii) The second limitation on the codification of the defence is that it cannot acquit a defendant unless he was innocent of any criminal wrongdoing. The provision is wide in scope and permits transferred intent not only for included offences but also for different crimes, whether they be more or less serious. Where there is transferred intent, the defendant will be liable for committing an included offence or attempting a different crime.
5. The Draft Code has two sections on mistaken belief: section 3(2)(a) applies the defence to the material circumstances of the offence, and section 3(17)(a) applies it to the codified defences.
6. The codified defences referred to in s. 3(17)(a) deal with compulsion, impossibility, automatism, duress, necessity, defence of the person, protection of movable property, protection of immovable property, protection of persons acting under legal authority, authority over children, superior of orders and lawful assistance.
7. The Law Reform Commission felt that by providing a separate mistaken belief section relating to codified defences it could eliminate any inconsistency in the law on mistake of fact as it related to excuses and justifications. The Law Reform Commission was concerned with Eric Colvin's suggestion in *Principles of Criminal Law* at page 167 that the common law would allow a mistake grounded in an excuse, if genuine, but only allow a mistake grounded in justification, if reasonable.
8. When dealing with codified defences the formulation excludes the mistaken belief defence only for crimes of negligence where the mistake was due to the accused's own negligence (section 3(17)(b)).

9. For crimes of negligence and recklessness the trier of fact must decide whether there was a mistake and then determine:
- i) whether the mistake was negligent or reckless?
  - ii) whether the accused was to blame?

If the answer to either question is no, the mistake can displace the fault element. If the answer to both questions is yes, the mistake cannot displace the fault element.

Negligent and reckless mistakes are similar in that they both require unreasonableness - something the ordinary person faced with the same circumstances would not think. However they are distinctive in that a reckless mistake has an additional component - an awareness by the actor that the material circumstance was significant (*e.g.* consent in sexual assault, nature of contents of a package in possession of a narcotic). The degree of unreasonableness of the mistake assists the fact finder in determining whether the actor adverted to the material circumstance. The more unreasonable the mistake, the more likely he adverted.

The test of reasonableness is a harsh test in cases where an actor's personal characteristics (age, education, intelligence, temper, racial origin or cultural background) over which he has little control, will sometimes prevent him from reaching the objective standard of the reasonable man. To soften the blow the Law Reform Commission proposes a more individualized standard by directing the fact finder's attention to the issue of whether the accused was to blame for his mistake.<sup>34</sup>

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34. See Toni Pickard's, *Culpable Mistakes and Rape: Relating Mens Rea to the Crime*, (1980), 30 UTLJ 75.

## Other Anglo-American Jurisdictions:

### 1. United Kingdom

The Law Commission in the United Kingdom chose not to codify mistake of fact. The Code Team had proposed codifying both mistake of fact and law in the following words:

Ignorance or mistake whether of fact or of law may negate the fault element of an offence.

However, the Law Commission chose to codify only mistake of law. The Law Commission took the view that it was not necessary to state in the Code what is in fact a truism. It was of the view that the point was covered by section 14 of the Draft Code which states:

A court or jury, in determining whether a person had, or may have had, a particular state of mind, shall have regard to all the evidence including, where appropriate, the presence or absence of reasonable grounds for having that state of mind.

The English Draft Code provides for transferred fault but only insofar as it relates to different objects or victims different from those particularized in the offence charged, as advocated by Glanville Williams in the passage cited above.<sup>35</sup>

#### English Draft Code, s. 24:

- (1) In determining whether a person is guilty of an offence, his intention to cause, or his recklessness whether he causes, a result in relation to a person or thing capable of being the victim or subject matter of the offence shall be treated as an intention to cause or, as the case may be, recklessness whether he causes that result in relation to any other person or thing affected by his conduct.
- (2) Any defence on which a person might have relied on a charge of an offence in relation to a person or thing within his contemplation is open to him on a charge of the same offence in relation to a person or thing not within his contemplation.

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35. Williams, *Criminal Law*, The General Part (2nd ed.) page 129; *supra*, page 15.

2. United States

The U.S. Model Penal Code has a provision for mistake of fact. The defence is codified for all levels of culpability without any variation in scope. It provides for transferred intent. However where that doctrine is invoked a defendant may only be convicted of a less serious offence, not a more serious offence.

**U.S. Model Penal Code, s. 2.04:**

**Ignorance or Mistake.**

- (1) Ignorance or mistake as to a matter of fact or law is a defence if:
  - (a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offence; or
  - (b) the law provides that the state of mind established by such ignorance or mistake constitutes a defence.
- (2) Although ignorance or mistake would otherwise afford a defence to the offence charged, the defence is not available if the defendant would be guilty of another offence had the situation been as he supposed. In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the offence of which he may be convicted to those of the offence of which he would be guilty had the situation been as he supposed.

3. Australia

The Review Committee of the *Australian Crimes Act* (1990) recognized that codification of mistaken belief was a truism but felt it was unwise to omit a statement of principle which was relevant and important.<sup>36</sup>

The subjective approach was codified. Mistake of fact or ignorance, however unreasonable, on the part of the accused could negate the existence of an offence which required intention or knowledge.

Like the formulation of the Law Reform Commission of Canada, this provision is qualified so that reckless mistake or ignorance cannot negate the fault element of an offence requiring recklessness and negligent mistake or ignorance cannot negate the fault element of an offence requiring negligence.

There is a provision for transferred intent (section 3M(5)) but it is not as wide as the Canadian formulation. The Australian proposal allows intent to be transferred from the *actus reus* that was not committed to the *actus reus* that was committed on three conditions: the act committed is constituted by acts or omissions included in the offence charged, it is not more serious than the offence charged and the accused had the requisite fault element for the offence committed.

**Australian Crimes (Amendment) Act, s. 3M:**

**Mistake of Fact**

**(1) Subject to subsection (3), where:**

- (a) a person is charged with an offence involving a fault element; and**
- (b) the person acted under a mistaken belief as to the existence or non-existence of facts; and**
- (c) if the facts had been as the person believed them to be, the fault element would be negated;**

**the person is not, unless the law of the commonwealth creating the offence otherwise specifies, to be found guilty of the offence.**

**(2) Subject to subsection (3), where:**

- (a) a person is charged with an offence involving a fault element; and**
- (b) the person acted under a mistaken belief as to the existence or non-existence of facts; and**

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36. *Interim Report, Review of Commonwealth Criminal Law*, July 1990, page 72.

- (c) if the facts had been as the person believed them to be, the person would have a defence to the charge;

the defence is, unless the law of the commonwealth creating the offence otherwise specifies, available to the person.

- (3) Where the fault element in relation to an offence referred to in subsection (1) or (2) is recklessness or negligence, that subsection does not apply to a mistaken belief that was held recklessly or negligently, as the case may be.

- (4) Where:

- (a) a person is charged with an offence not involving any fault elements; and
- (b) the person acted under a reasonable but mistaken belief as to the existence or non-existence of facts; and
- (c) if the facts had been as the person believed them to be, the person would not be guilty of the offence;

the person is not, unless the law of the commonwealth creating the offence otherwise specifies to be found guilty of the offence.

- (5) Where:

- (a) a person who is charged with an offence (in this subsection called the "charged offence") is not guilty of the charged offence because of subsection (1), (2) or (4); and
- (b) in so acting, the person had the requisite fault (if any) for the commission of another offence, been another offence:
  - i) that is constituted by acts included in the acts constituting the charged offence; and
  - ii) the maximum penalty for which is the same as or lower than the maximum penalty for the charged offence; and
- (c) if the facts had been as the person believed them to be, the person would be guilty of the other offence;

the person may, unless the law of the commonwealth creating the other offence otherwise specifies, be found guilty of the offence.



4. New Zealand

The New Zealand Draft Crimes Bill codified subjective mistake of fact. Like the Canadian and Australian proposals, the scope of the defence varies according to the fault element.

The Crimes Bill does not contain a provision for transferred *mens rea*.

**New Zealand Draft Crimes Bill (1989), s. 25:**

- (1) Subject to subsection (2) of this section, a person is not criminally responsible for an offence involving intention, knowledge, recklessness, heedlessness, or negligence in respect of any act done or omitted to be done if, at the time of the act or omission, the person mistakenly believes in the existence of any fact or circumstance that, if it existed, would negate that intention, knowledge, recklessness, heedlessness, or negligence.
- (2) This section does not apply to an offence involving recklessness where the person's mistaken belief is attributable to his or her recklessness.
- (3) This section does not apply to an offence involving heedlessness where the person's mistaken belief is attributable to his or her recklessness or heedlessness.
- (4) This section does not apply to an offence involving negligence where the person's mistaken belief is attributable to his or her recklessness, heedlessness or negligence.

## Canadian Draft Code

### Good Points:

1. If "Knowledge" is omitted as a fault element, as proposed by the Law Reform Commission, it is important to codify "Lack of Knowledge" due to mistake or ignorance. Even if "Knowledge" was included, it might still be useful to codify mistake of fact under Defences.
2. There is no restriction on the scope of the mistake of fact which can displace the fault element of knowledge.
3. The formulation does not change the common law in respect to crimes of intention (knowledge) or negligence. An unreasonable mistake could still displace knowledge but not negligence. Only a reasonable mistake could be considered in determining whether the conduct was negligent.
4. The formulation changes the common law for crimes of recklessness. At present a mistake of fact, whether reasonable or unreasonable, displaces recklessness. The proposal would not allow a reckless mistake to displace the fault element if the mistake was due to the accused's own recklessness.
5. The Exception (section 3(2)) will permit the fact finder to distinguish situations in which unreasonable mistakes are blameworthy from those in which they are not for crimes of negligence and recklessness. The harsh standard of the reasonable man is softened by a more individualized approach to the capabilities of the accused.

### Bad Points:

1. If "Knowledge" is specified as a fault element, it is repetitious to include "Lack of Knowledge" as a Defence (section 3(2)).
2. The formulation of the Law Reform Commission in section 3(2) narrows the scope of the law on mistake of fact which at present allows honest belief to be raised for offences committed by intention or recklessness. The proposal, which is similar to that found in the Australian and New Zealand Draft Crime Codes, would preclude an accused charged with sexual assault from raising a defence of a reckless mistake in respect to the complainant's consent. That may not be significant given the reluctance of any fact finder to hold that an unreasonable belief was actually held, although as Don Stuart points out that is what the trial judge found in *R. v. Sansregret* (1983) 34 C.R. (3d) 162 (Man. Co. Ct.).<sup>37</sup>
3. The distinction between negligent and reckless mistakes may lead to confusing deliberations. It may be difficult for a jury to determine whether a mistake was reckless or merely negligent. The difference is crucial where the fault element is recklessness.

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37. Don Stuart, *Canadian Criminal Law* (2nd ed.), p. 143.

4. A separate section for mistake of fact relating to codified defences (section 3(17)) is not necessary. The only difference between this section and section 3(2) is that the former excludes the defence for offences of negligence while the latter excludes the defence for offences of recklessness and negligence. No other jurisdiction has such duplication or detailed codification.
5. The formulation on transferred *mens rea* is the widest scope of any of the Anglo-American jurisdictions. The compensating fact is that the accused can only be convicted of an attempt of the uncharged offence. Whether it could withstand a section 7 challenge under the *Charter* is debatable given the Supreme Court of Canada's strong preference for concurrence of *actus reus* and *mens rea*.

## VI. PROPOSAL

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For discussion purposes I have outlined below a suggestion on how mistake of fact might be codified:

### Summary of section 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 on the facts as he believed them he would have committed an included crime, he shall be liable for committing that included crime.

### Comment

1. The exception clause (s. 3(2)(b)) is omitted. It would be left to the flexibility of the common law to determine the extent to which mistake of fact might change from the present law of having a mistake, reasonable or unreasonable, displace the fault element on crimes of intention (knowledge) and recklessness and a reasonable mistake displace the fault element on crimes of negligence. The courts are becoming more sensitive to the individualized approach in determining culpability for crimes of recklessness and negligence: *R. v. Tutton* (1989), 48 CCC (3d) 129 (S.C.C.).
2. A special formulation for mistake of fact applicable to Defences (section 3(17)) is omitted as unnecessary codification.
3. Transferred mistake of fact is restricted to its narrowest form - included offences. It does not extend to different crimes, whether more or less serious.

## VII. ISSUES FOR CONSIDERATION

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1. Should the General Part include a provision that no one is liable for a crime if committed through lack of knowledge which is due to a mistake of ignorance as to the relevant circumstances?
2. If so, should there be a second section like section 3(17) expressing criminal liability if the person mistakenly believes in the existence of a codified defence such as compulsion, impossibility, self-defence, etc.
3. Should there be a limitation on the defence that if the accused's lack of knowledge is due to recklessness or negligence and the crime can be committed recklessly or negligently, then the accused would still be guilty of that crime? Or should the limitation be restricted to crimes of negligence only?
4. To what extent, if any, should there be a provision for transferred mistake of fact? Should it be one of the following:
  - i) limited to included offences (the Australian Crimes Bill, s. 3M(5)),
  - ii) limited to crimes of the same or lesser degree of culpability (U.S. Model Penal Code s. 2.04(2)), or
  - iii) cover all crimes, for which the person would then be liable for attempting to commit the uncharged offence (Canadian Draft Code s. 3(2)(a))?