

Chapter 1C

The Anatomy of a Crime

I. Introduction

Crimes vary immensely in gravity, complexity, the kind of harm done, the state of mind required, and the excuses which may be allowed. In order to ease the task of analysing and applying the rules relating to any given crime, lawyers traditionally break the definition of the crime into two parts, the physical which they call the 'actus reus' (Latin for criminal act) and the mental aspect which carries the corresponding Latin tag 'mens rea' (criminal mind). This traditional usage is hard-wearing¹ but it is defective because it caters inadequately for a third element which has to be described in negative terms as absence of a valid defence.²

This can be illustrated by a set of simple examples based on murder. In each example a human being has been killed and the named person is accused. Adam says, 'I killed him because he would not hand over the money I demanded and I wanted the onlookers to realise I meant business'. Bill says, 'I wish I had killed her. She was blackmailing several people. But I did not do it. It must have been one of the others'. Charlotte says, 'I did kill him but I didn't mean to. I didn't know anyone was standing behind the target'. Doris says, 'I had to kill him, he was trying to rape me and it was the only way I could stop him'.

Most people would have no difficulty, assuming the parties are telling the truth, in holding that Adam is the only murderer. The various reasons why the others are not guilty of murder provide us with a means of analysing the basis for Adam's guilt. Bill is not liable because he has not performed the physical act, even though he may have had the state of mind of a murderer. Charlotte is not liable because, though she has performed the physical act of killing, she has not done so with a sufficiently evil state of mind to be called a murderer. Doris seems to have killed intentionally and so has performed the

1 It is adopted by the *Criminal Code* (Cth) and Model Criminal Code s 3.1. See also Duff RA, *Intention, Agency and Criminal Liability* (1980) pp 7-8; Norrie A, 'Simulacra of Morality' in Duff RA (ed), *Philosophy and the Criminal Law* (1998) p 19.

2 For other suggestions for replacing the actus reus/mens rea dichotomy, see Horder J, 'Criminal Law: Between Determinism Liberalism and Criminal Justice' (1996) 49 *CLP* 159 at 160-172; Robinson PH, 'Should the Criminal Law Abandon the Actus-Reus-Mens Rea Distinction' in Shute S, Gardner J and Horder J (eds), *Action and Value in Criminal Law* (1993).

physical act together with a murderous state of mind, but the law may excuse her because she was acting to defend herself from the very serious offence of rape.

These diverse reasons for acquitting Bill, Charlotte and Doris point to an analysis of Adam's guilt. Adam is guilty because he performed the physical act of killing, he possessed the mental state required of a murderer because he evidently intended to kill, and he could not point to any excuse which the law would even remotely want to recognise. He is guilty because he performed the physical act, he possessed the required state of mind and he had no valid defence.

The rest of this chapter will build upon the three-fold structure just described. A more detailed application of the analysis will appear in the chapters dealing with specific crimes.

II. The Physical Elements of a Crime (Actus Reus)

There are so many different kinds of crime that a single term like physical act, even if conveniently obscured by its entombment in its Latin form *actus reus*, is apt to be misleading. The physical element of most crimes however is likely to fall under one or more of the following heads:

- A. A physical act by the accused
- B. A failure to act (an omission) by the accused
- C. A status possessed by the accused person
- D. A state of mind on the part of the alleged victim.

A. A physical act

This is the most obvious and often encountered physical element. It may take such forms as shooting, stabbing, poisoning or touching people or animals or destroying, damaging or taking property. Many other examples could be given but there is little more that need be said at this stage. The only problem arises when the action has been performed involuntarily. Can it then be said to be the act of the accused person? It is tempting to say that there is no act and so no *actus reus* in such cases. This provides a means of acquittal where, as will usually be the case, the defendant is not at fault. But this solution may also lead to acquittal where the defendant is at fault at an earlier stage. The theory that there is no *actus reus* where the defendant acts involuntarily provides an excuse for the worthy and unworthy alike. If the involuntary act is treated as an *actus reus*, the defendant's liability can be assessed by reference to the *mens rea* or the availability of a defence. In this way there can be proper discrimination between the innocent and the blameworthy. This approach also provides a solution to cases where the definition of the crime requires no act (or omission) but only a status or state of affairs.³

³ See pp 3-5 this chapter.

B. A failure to act

Harm may occur because a suspect does not prevent it. If Eric stands by and watches a baby drowning in a puddle of water, there is a sense in which we can say that Eric caused the baby's death, even though Eric has done nothing active to contribute to the tragedy. But the law does not hold Eric guilty unless he has a duty of care towards the child. There is no general duty of care. In other words, the fact that Eric has a moral duty to help the child as one human being to another does not carry with it a legal duty to save the child's life. Something extra is needed to convert the moral duty into a legal one. That duty can arise because of some special relationship between the accused and the victim, because the accused has undertaken a duty or because of some prior act by the accused which imposes on him or her a duty to rectify the situation. So if Eric is the child's father or if he has agreed to look after the child he will be liable if he fails to save the child. These rules will be considered in more detail in the section on manslaughter by omission,⁴ because it is largely in that context that this kind of problem has arisen. The third type of duty has been imposed in the case of damage to property. In *R v Miller*⁵ the accused fell asleep on a mattress in another person's house while holding a cigarette. He woke to find the mattress alight but made no effort to put the fire out. The fire spread and damaged the premises. The House of Lords held that he was guilty of recklessly damaging the premises. His positive act of falling asleep with a lighted cigarette in his possession cast upon him a duty to prevent further damage once he realised that the premises were in danger. The same kind of reasoning could apply to causing personal injury. So if the accused innocently injures the victim and fails to obtain help and the victim dies, the accused could be found guilty of homicide.

Another way in which the law views omissions with greater indulgence than acts is that a greater amount of fault may be required before a person is made guilty on the basis of an omission as opposed to a corresponding positive act. Again the law of manslaughter by omission, which will be considered later, provides a good example of this.

Thirdly, a greater range of defences seem to be available where harm is caused by an omission than is the case with acts. This has come into prominence with the growing recognition of the right to refuse medical treatment and will be examined in more detail under the discussion of euthanasia.

C. Status or state of affairs offences

Occasionally, a person is made liable not for what he or she does or omits to do but for what he or she is or for the situation in which he or she is found. To make someone guilty of an offence for possessing some permanent characteristic like colour or race would be the height of oppression and is not part of Australian law. Status offences found in practice are likely to be much more

⁴ See Chapter 4, pp 212-222.

⁵ [1983] 2 AC 161.

involved and are likely to imply some degree of fault somewhere along the line. Even so, the fact that one is punished in part for what one is rather than what one does or fails to do is capable of producing injustice, especially when the element of fault which lies behind the prohibition is missing. The lack of an act or omission on which to pin liability may suggest that liability can be attracted even where there is no blame attached to the conduct of the accused person.

The best known case on a status crime is *R v Larsonneur*.⁶ British immigration legislation made it an offence for an alien to be found in England without a permit. Miss Larsonneur, a French woman, was required to leave England. She did so and went to Ireland. She was arrested by the Irish police and returned to England. She was charged with the offence and argued that she was not guilty because she had been forced to return to England. The Court of Criminal Appeal rejected this defence and held that she was guilty of the crime.

This case has been strenuously criticised on the ground that it punished a person who was in no way at fault. The fact that the legislation punished a status rather than an act or omission certainly seems to limit the options a sympathetic court might employ to soften the offence in order to acquit the blameless. One option sometimes adopted is to argue that a person who is physically forced to do an act is not really acting at all. That argument, which also runs into difficulties in other aspects of the law, fails to work here because there is no act on which to pin the argument.

The oppression which seems to be inherent in status offences can be avoided by the analysis of criminal liability advocated in this chapter, and this can be reconciled with the decision in *Larsonneur* once further facts are taken into account. If physical compulsion is seen not as something which prevents the compelled action from being regarded as an act but as being a defence in its own right, the fact that there is no positive act in the definition of the crime will not automatically lead to guilt. But, as with certain other defences, it will only apply if the situation has come about without fault on the part of the accused.⁷

How does this square with the result in *Larsonneur* itself? The answer lies in taking account of further facts which did not appear in the appeal court's judgment but appear from an earlier stage of the case, the committal proceedings.⁸ From these proceedings it appears that Miss Larsonneur was sent back to England under arrest because she attempted to avoid the immigration

6 (1933) 149 LT 542. See also *O'Sullivan v Fisher* [1954] SASR 33 and *Wiznar v Chief Constable of Kent* (1983) Times 28 March.

7 Contrast Fisher J, 'Voluntariness-The Missing Link' (1988) 6 *Auckland University LR* 1 at 10-13.

8 See Lanham D, 'Larsonneur Revisited' [1976] *Crim LR* 276. See also Doegar RC, 'Strict Liability in Criminal Law and Larsonneur Reassessed' [1998] *Crim LR* 791; Smith JC, 'R v Larsonneur' [1999] *Crim LR* 100; Doegar RC, Correspondence [1999] *Crim LR* 100; Lanham D, Correspondence [1999] *Crim LR* 683; Doegar RC [1999] *Crim LR* 684 (correspondence); Smith KJM and Wilson W, 'Impaired Voluntariness and Criminal Responsibility' (1993) 13 *OJLS* 70.

laws by going through a bogus marriage with an Englishman. By doing so she created the situation under which she was returned to England by force. Had she returned to France and been kidnapped and taken back to England by terrorists she would, on the analysis in this chapter, have been entitled to the defence of physical compulsion.

D. The victim's state of mind

Sometimes a person's guilt will depend on the state of mind of the alleged victim. A good example is consent. Some actions are criminal when performed without another's consent but lawful when that consent is given. Rape is a crime which turns on the absence of the alleged victim's consent. Not all crimes turn on the consent of the victim. Consent is irrelevant for instance in the case of positive acts of murder. In some cases consent may be seen as a defence but in others it is treated as part of the physical part of the crime. Again rape is a good example.

III. The Criminal State of Mind (Mens Rea)⁹

With so many different kinds of crime, it is not surprising that a variety of words are employed to describe the mental element required. The various words used are explained in part by what was in fashion or thought to be appropriate when the crime was created or developed. Words like wilful, malicious, wicked, wanton, fraudulent, appear in the definitions of crimes created in past times while words currently or still in vogue include dishonestly, intentionally, recklessly and negligently. In some cases the older terms are used interchangeably with the more recent ones. This is the case of fraud and dishonesty. But in other cases there is a tendency for the older, more emotion-laden terms to be replaced by or refined in terms of what is taken to be the greater precision of the more modern ones. The best known example is malice aforethought which in some States and countries is still the formal description of the mental state required for murder. Courts which have this term to contend with generally replace it at least in part with such terms as intention (England) or intention and recklessness (for example, South Australia and Victoria).

Apart from the notion of dishonesty,¹⁰ which relates to a limited though important range of offences, and taking into account crimes where no mental state must be proved, the most frequently encountered mental states can be arranged in descending order of blameworthiness as follows:

9 Duff RA, *Intention, Agency and Criminal Liability* (1990); Gardner J and Jung H, 'Making Sense of Mens Rea: Antony Duff's Account' (1991) 11 *OJLS* 559; Laing JA, 'The Prospects of a Theory of Criminal Liability: Mens Rea and Methodological Doubt' (1994) 14 *OJLS* 57; Gardner J, 'Criminal Law and Uses of Theory: A Reply to Laing' (1994) 14 *OJLS* 217; Horder J, 'Two histories and four hidden principles of mens rea' (1997) 113 *LQR* 95; Norrie A, 'Intention: more loose talk' [1990] *Crim LR* 642.

10 Which will be examined in detail in Chapter 7.

- A. Intention
- B. Recklessness
- C. Negligence
- D. Absence of Fault

Though there are four different states of mind, there is some blurring at the edges and there are some sub-categories. There are at least two kinds of intention, recklessness and negligence and there is the possibility of some overlap between intention and recklessness and recklessness and negligence. Nonetheless, there are more differences than similarities and those differences are treated as significant in various parts of the criminal law. The neatest example is the system of serious injury offences inspired by the work of the English Criminal Law Revision Committee¹¹ and introduced by legislation in Victoria in 1986. Under this regime, causing serious injury intentionally is punishable by up to 20 years imprisonment¹² doing so recklessly is punishable by up to 15 years¹³ and doing the same negligently by five years.¹⁴ Where serious injury is caused without any of those fault elements, no punishment is provided for at all by this piece of legislation.

As the precise meaning of intention, recklessness and negligence varies with the type of crime in which they appear, only a general description of those terms will be given in this chapter. A more detailed discussion will be undertaken when the relevant crimes are dealt with.

A. Intention

After a few false starts, intention in modern criminal law boils down to three main types, purpose, foresight of certainty and concomitant intention.

1. Purpose

This is the most commonly understood and accepted meaning of intention. It covers the case where the accused wishes or means to bring about the harmful consequence. There is no need to show that the accused expected to cause the harm. So if Freda shoots at George who is standing a long way off she may intend to kill him even though she thinks that the chance of hitting him is slim.¹⁵

In principle this type of intention should be sufficient however small the possibility of success in the eyes of the defendant. Professor Duff however places some kind of limitation on this suggestion. He argues that one unskilled at darts cannot intend to throw a triple twenty. Such a person can only hope to do so.¹⁶ It is difficult to see how he reconciles this with his acceptance

11 *Offences Against the Person Report No 14* (1980).

12 *Crimes Act 1958 (Vic)* s 16.

13 *Crimes Act 1958 (Vic)* s 7.

14 *Crimes Act 1958 (Vic)* s 24.

15 See Lord Hailsham LC in *Hyam v DPP* [1975] AC 55 at 77.

16 Duff RA, *Intention, Agency and Criminal Liability* (1990) pp 56-57.

of an intention to hit a distant target.¹⁷ It may be a matter of degree as he accepts that there is intention in the case of the distant target, even though the defendant believes that he or she will probably miss it. Professor Duff's limitation seems heavily influenced by a civil case, *Cunliffe v Goodman*.¹⁸ There Asquith LJ defined intention as a decision on the part of the person concerned, so far as in him lies to bring something about, and which in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition.¹⁹ In *Hyam v DPP*,²⁰ Lord Hailsham said he knew of no better judicial interpretation of intention. But if the reference to reasonable prospect is supposed to place some form of substantial limitation on the possibility of success element, it conflicts with Lord Hailsham's view of intention in the shooting example, where he speaks in terms of the odds being very much against hitting the target.²¹ The limitation to reasonable prospect in Asquith LJ's judgment must be seen in the light of the context in which intention was relevant in interpreting the provisions in the civil case. This reveals a significance far removed from the concerns of either the criminal law or the hopeful dart player. In *Cunliffe*, legislation protected a tenant from paying damages for non-repair if the premises were to be pulled down. An earlier case held that it was enough that the landlord had decided to pull the premises down. This is sensible enough because if the landlord decides to pull the premises down and there are no restrictions on his or her power of decision, the decision is likely to be carried out. But if there are restrictions making it no more than a possibility that the decision will come into effect, the intention to pull the premises down is insufficient to fulfil the condition that the premises were to be pulled down. In short the intention was not a statutory requirement. It was a judicial extension of the statutory requirement, an extension which could not be allowed to go too far from the statutory requirement itself. If it had been a criminal offence, say under heritage legislation, to do any preparatory act with intention to demolish the building, the intention would surely have been made out.

Professor Duff's homely example of the darts player also looks very wrong if placed in a criminal setting. Suppose a metre or so away from the dart board there is in the thin wall a hole about the size of the triple twenty slot. One can usually see light through the hole but as the defendant is about to throw the dart, he notices that the hole is blocked and believes that his old enemy, Fred, is watching through the hole. The defendant recognises a slim possibility of blinding Fred in one eye and of being able to pass it off as incompetence in playing darts. He aims at the hole in the wall hoping to hit Fred's eye, but believing he will almost certainly fail. If the defendant succeeds can it be doubted that he or she has caused serious harm with

17 Ibid p 55.

18 [1950] 2 KB 237.

19 Ibid at 253.

20 [1975] AC 55 at 74.

21 Ibid at 77.

intent? If the defendant fails can there be doubt that he or she has attempted to cause serious harm?

The dart player acts with intent whether his hope is to hit the triple twenty or to injure Fred. If however there is something about the meaning of intent in non-criminal contexts which enables the dart player to deny intent to hit the triple twenty, that factor should not stand in the way of a conviction in the criminal context.

2. *Foresight or knowledge*

There is more doubt whether foresight or knowledge by itself can ever equal intention. The strongest case is that where the harm is foreseen as certain or virtually certain to eventuate from the accused's action. A person can possess this state of mind without wanting the harmful consequence to occur. If Helena blows up an aeroplane in mid-flight in order to claim on an insurance policy she may regret the death of the passengers but foresee that it is a virtual certainty. Such a state of mind is sometimes equated with intention.²² But not always. In *R v Steane*²³ the accused was charged with doing an act with intent to assist the enemy in wartime. He broadcast for Germany but did so in order to save his family from a German concentration camp. The English Court of Criminal Appeal held that his state of mind did not amount to an intent to assist the enemy. The case is controversial²⁴ and the problem will be considered below²⁵ and in Chapter 4 under murder where many of the difficulties associated with intention have occurred.

It would be possible to avoid some of these problems and achieve greater precision if intention were limited to purpose, and foresight of certainty were to be called knowledge. Knowledge would then stand in the hierarchy of mental states between intention and recklessness. This is the way the term 'knowingly' is used in the American Law Institute's Model Penal Code.²⁶ But in Australian law, the crimes of murder and personal injury offences tend to employ notions of intention or recklessness and to avoid the language of knowledge. In some cases where knowledge is the mens rea selected, either by legislative expression, common law reasoning, or interpretation, it tends to have a wider meaning, more akin to recklessness than to intention. So in *He Kaw Teh v R*,²⁷ the High Court of Australia held that an offence of importing prohibited imports was to be interpreted as knowingly importing the substances. But in *Kural v R*²⁸ the High Court made it clear that knowledge was not limited to knowledge of the certainty of the importation of a prohibited substance but extended to awareness of the likelihood of such importation. However, mere suspicion, even if it amounts to wilful blindness, does not

22 See Lord Hailsham in *Hyam v DPP* [1975] AC 55 at 74; *R v Woollin* [1999] 1 AC 82.

23 [1947] KB 616.

24 See Williams G, *Criminal Law, The General Part* (2nd edn 1961) pp 40-41.

25 See section 4 (pp 9-10 this chapter).

26 *Proposed Official Draft* (1962) s 2.02.

27 (1985) 157 CLR 523.

28 (1987) 162 CLR 502.

amount to knowledge but is merely evidence from which an inference may be drawn.²⁹ The remaining question is whether likelihood in this context extends to a good chance rather than a mathematical probability of over 50 per cent. On analogy with the test of likelihood in the law of murder³⁰ it should do so.

If this discussion of knowledge is recast in terms of recklessness, the overall position is that the legislation prohibits the reckless importation of the relevant substances, but recklessness involves foresight of probability rather than of possibility.³¹ The language of knowledge has made the matter more complicated than necessary, and at the same time has made it impossible to use knowledge as a form of mens rea between intention and recklessness. Instead of this, foresight of certainty has come in some cases to be regarded as a form of intention.

3. *Concomitant intention*

The third form of intention requires neither purpose nor foresight of certainty but is merely concomitant on the main purpose. If the defendant places an unreliable bomb on a plane knowing that there is a fair chance that it will not go off, the defendant's purpose to destroy the plane for insurance reasons may well be unaccompanied by a purpose to kill or foresight that death is virtually certain. But death will be virtually certain if the purpose of destroying the plane is achieved. This state of mind is also a species of intention.³²

4. *Which intention applies?*

As there are three kinds of intention it becomes necessary in a case of a crime requiring intention to identify the type of intention required. This may happen even within a single crime. The problem has arisen within the crime of murder and the matter is considered in detail in Chapter 4. Here the problem will be discussed in broader terms, going across different crimes.

Perhaps the clearest cases involving the difference between 'purpose' intention and 'foresight' intention are those where duress is present. Where the defendant knows that the harm will occur but inflicts it only to avoid the duress, there is a case of intention in the sense of foresight of certainty but not in the sense of purpose. In *R v Steane*³³ the defendant did broadcasts which he knew would assist the enemy but he did so to avoid threats to his family. The Court of Criminal Appeal held that he did not intend to assist the enemy. Contrast *R v Howe*³⁴ where the House of Lords held that defendants who participated in a murder were liable even if they acted under a threat to their own lives. The House held that duress was no defence to the crime of murder.

29 *Pereira v DPP* (1988) 82 ALR 217.

30 See *Boughhey v R* (1986) 161 CLR 10.

31 Contrast on this point the English case *Attorney-General's Reference (No 1 of 1998)* (1999) 163 JP 390.

32 Law Commission, *Offences Against the Person and General Principles* Report No 218 (1983) pp 8-10, citing Lord Hailsham in *Hyam v DPP* [1975] AC 55 at 74.

33 [1947] KB 616.

34 [1987] 1 AC 417.

In both cases the crime was one which required intention. In both cases the prohibited result was an unwanted side product of the defendant's object to protect himself or his family. Yet in *Steane* there was held to be no intention to assist the enemy and in *Howe* there was found to be an intention to kill.

The key to this conflict is the recognition that intention does not carry with it necessary overtones of criminality. While intention is regarded as a more serious mens rea than recklessness or negligence, paradoxically, by itself it lacks the element of wrongfulness inherent in the other two terms. Intention to cause a harmful result carries with it only a provisional invitation to censure. What completes the invitation is the absence of any explanation which justifies, excuses or mitigates the action of the defendant.

There is a choice between the two-fold and the three-fold analysis of liability. If there are only two components – actus reus and mens rea, criminal liability cannot be predicated on harm and intention to cause harm alone. In addition to intention there has to be the absence of a legally recognised exculpation. So in a case of alleged self-defence the mens rea has to be not only the intention to kill but also the absence of a purpose to act in self-defence. If intention is now asked to do the work of this second element as well as the first, it can do so by confining it to purpose. One who kills in self-defence can then claim that his or her purpose was to preserve his or her own life and that taking the assailant's life was an unwanted by-product of the fulfilment of that purpose.

But this analysis not only overloads the concept of intention, it also opens the door to cases where the law would not wish to recognise the defendant's purpose. In the case of self-defence, the law does not recognise the right to kill to prevent a minor assault. Other motives like enrichment will not count at all. Duress may count in some crimes but not others. These matters can be dealt with by the three-fold analysis under which harm and intention are not enough for criminal liability: there has also to be an absence of a recognised defence. Those who act in a way which they know will cause harm can be held to have intended to cause that harm but may yet escape if the reason why they did so, say to defend themselves against a lethal attack, justifies acquittal or mitigation. The solution then is to recognise purpose, concomitant intention and foresight of virtual certainty as forms of intention. This will open the door to the conviction of people like the plane-bomber who does not wish to kill the pilot but who knows that the pilot will be killed. But it must not be assumed that the same range of defences will apply where intention takes the form of foresight as apply to cases of purpose. If the law is to come down conclusively on the side of treating foresight of certainty as intention it will need to have a capacity for developing defences which apply to this form of intention beyond those which apply to the purposeful causing of harm.³⁵ This is discussed further in Chapter 4 on murder.

35 See Simester AP, 'Why distinguish Intention from Foresight?' in Simester AP and Smith ATH, *Harm and Culpability* (1995) p 71 especially p 99; Ashworth A, 'The Treatment of Good Intentions', *ibid* p 173.

B. Recklessness

Some of the problems in marking out the limits of intention have been reduced by the recognition of recklessness as a state of mind sufficient for imposing criminal liability. As with intention there is some common ground and some areas of doubt. Two states of mind clearly amount to recklessness, two others are controversial. The four can be described in shorthand as foresight of probability, foresight of possibility, indifference and obvious risk.

1. *Foresight of probability*

There is general agreement that if a person foresees that his or her conduct will probably cause harm, but goes ahead anyway, that person behaves recklessly, unless there is some justification or excuse for taking the risk.

Not so long ago there was some support for the view that foresight of probability was a species of intention. Lord Diplock thought so in *Hyam*³⁶ and the High Court of Australia regarded it as such in *R v Crabbe*.³⁷ But more recent cases have rejected the view that foresight of probability is equal to intention.³⁸ The much discussed heart surgeon case shows the good sense in this more recent approach. A heart surgeon may operate knowing that the operation will probably kill the patient but may give the patient a longer and better life. It seems ludicrous to suggest that the surgeon intends to kill the patient when he or she is doing all possible to improve the quality of the patient's life.

Where however there is no good reason for incurring the risk it is easy to see that conduct performed by one who foresees the probability of harm can justly be called reckless.

Where the law does require foresight of probability the question arises whether this requires foresight that the result will be more probable than not.³⁹ This question will be discussed in the context of murder in Chapter 4.

2. *Foresight of possibility*

In the case of some crimes, for example murder, there may be a case for keeping the definition of recklessness fairly narrow. Indeed for English law the House of Lords have gone a step further and refused to regard recklessness as a sufficient mental state for murder at all.⁴⁰ In Australia the High Court⁴¹ has recognised recklessness as sufficient for murder but has insisted on foresight of probability as opposed to possibility. Whatever the merits of this restriction in the case of murder it is not appropriate in other branches of the law. So, for instance, in the case of rape it is enough if the

36 [1975] AC 55 at 86.

37 (1985) 156 CLR 464.

38 *R v Moloney* [1985] AC 905; *R v Hancock* [1986] AC 455; *R v Woollin* [1999] 1 AC 82.

39 For differing views on this question in relation to wilfulness, see *R v T* [1997] 1 Qd R 623.

40 *R v Moloney* [1985] AC 905; *R v Hancock* [1986] AC 455; *R v Woollin* [1999] 1 AC 82.

41 *R v Crabbe* (1985) 156 CLR 464.

accused foresees the possibility that the victim is not consenting to the act of intercourse.⁴²

3. *Indifference*

In terms of ordinary English, this might be thought to be the most appropriate simile for recklessness. Its claim to legal usage however has not been very successful. In *Pemble v R*⁴³ the High Court of Australia refused to regard indifference as a substitute for foresight of harm for the purpose of the law of murder, though Barwick CJ thought that it might be an additional ingredient to foresight. That view was later rejected by the High Court of Australia in *Crabbe*. In some jurisdictions indifference is an alternative head of recklessness in the case of sexual offences.⁴⁴

4. *Obvious risk*

In a number of recent English cases the House of Lords has recognised that, for some purposes, a person may be reckless if he or she fails to foresee an obvious and serious risk and acts in a way which incurs the risk, even if he or she gave no thought to the risk.⁴⁵ This form of recklessness was applied in England to reckless driving⁴⁶ (now abolished) and to recklessly causing criminal damage,⁴⁷ but has been rejected in relation to such crimes as assault,⁴⁸ rape⁴⁹ and malicious wounding.⁵⁰ It has generally made little headway in Australia.⁵¹

C. Negligence

The general (common) law does not usually regard negligence as enough to hold a person guilty of a serious criminal offence. The main exception is manslaughter. Under current Australian laws, a person may be guilty of this crime if he or she kills with gross negligence. This will be examined in the chapter on manslaughter.

For the moment we can note that negligence, even gross negligence, differs from the first two types of recklessness in that the accused may be guilty of negligence even if he or she does not foresee the risk of harm. It is enough that there actually is a risk and that the accused's conduct falls short of a reasonable person in a similar situation.

42 *DPP v Morgan* [1976] AC 182.

43 (1971) 124 CLR 107.

44 See Chapter 6.

45 See Smith JC, *Smith and Hogan's Criminal Law* (10th edn 2002) pp 79-82.

46 *R v Lawrence* [1982] AC 510; *R v Reid* [1992] 1 WLR 793.

47 *R v Caldwell* [1982] AC 341.

48 *R v Kimber* [1983] 1 WLR 1118.

49 *R v Satnam* (1983) 78 Cr App R 149.

50 *R v Dolbey* (1983) 88 Cr App R 1.

51 *R v Tolmie* (1995) 37 NSWLR 660. Leave to appeal dismissed; see *Tolmie v R* (unreported, HCA, s 148/1995).

While general (common) law does not often accept negligence as a basis of criminal liability the position is different under legislation. In some cases negligence may be built into the definition of the crime, for example driving without due care and attention, which is another way of saying driving negligently. In addition, where legislation specifies no mental element at all, Australian courts are usually willing to recognise a defence of reasonable mistake of fact, the overall effect of which is to impose liability for a kind of negligence. This type of case is considered in the next section.

D. Absence of fault

Only in a few types of crime (like criminal libel and contempt of court) does the general (common) law punish those who cause harm without intention, recklessness or negligence. By contrast, legislation often prohibits conduct without indicating what state of mind is required to make such conduct criminal. A section of an Act which says, 'It is an offence to pollute a river', for example, does not indicate whether parliament intended to punish only those who do so intentionally, those who do so intentionally or recklessly or also those who do so negligently. It is also possible that parliament intended to punish those who pollute rivers quite by accident, without any fault at all.

Australian and English law recognises these possibilities, including the last of them, but Australian law holds that in some cases an accused person may rely on a defence of reasonable mistake. As noted in the last section, where this defence applies, the overall position is liability for a kind of negligence; it differs from crimes like manslaughter because the prosecution do not have to prove gross negligence as part of their case but have only to refute the reasonable mistake defence if the accused person effectively raises it. And where the mistake of fact defence is not recognised liability is imposed without negligence. These matters will be discussed further in Chapter 8.

Two other aspects of the mental element cut across the analysis above. In lay terms these might be described as presumed and misdirected mental states. Lawyers use the more polite titles constructive liability and transferred malice (or mens rea). They will be added to the earlier list under headings E and F.

E. Presumed (or constructive) mental states⁵²

The general position is that whatever mental state a given crime requires, it must be directed to the harm prohibited.⁵³ So, if it is a crime intentionally to cause physical injury it is not enough that the accused intended only to frighten the victim or cause property damage. But in some cases the law is

⁵² See Horder J, 'A Critique of the Correspondence Principle' [1995] *Crim LR* 759; Mitchell B, 'In Defence of a Principle of Correspondence' [1999] *Crim LR* 195; Horder J, 'Questioning the Correspondence Principle - A Reply' [1999] *Crim LR* 206.

⁵³ *R v Westaway* (1991) 52 A Crim R 336; *Attorney-General's Reference (No 3 of 1994)* [1998] AC 245 at 261 (Lord Mustill), 269 (Lord Hope); *R v Pembliton* (1874) LR 2 CCR 119.

prepared to punish people whose mental state is directed at harm less than that prohibited by the crime in question. There are not many such crimes but two prominent ones are constructive murder and unlawful and dangerous act manslaughter. These crimes will be examined in Chapter 4. For the moment one example will suffice. Imogen kills Joanna accidentally in the course of an armed robbery. If Imogen did not intend or foresee Joanna's death she would not be guilty of murder, under normal rules relating to the mental state, though by intentionally taking part in the armed robbery, she would be guilty of armed robbery. But by the constructive murder rule her intent to rob is treated as though it were an intent to kill and she would be guilty of murder as well as armed robbery.

F. Misdirected (or transferred) mental state

Even where the law requires that the mental state should be directed at the harm prohibited by the crime in question, it does not require that the person harmed should be the person whom the accused wished to harm or foresaw would be harmed. So if Kath throws a stone at Lana, intending to injure her, but the stone misses Lana and hits Mike, who was hiding behind a bush, Kath would be guilty of intentionally causing injury even though she knew nothing of Mike's presence or even existence. The law transfers her intent from Lana to Mike. This form of mens rea will be considered further in Chapter 4.

G. Mens rea and the State and Territory Codes

Most of the forms of mens rea described above are to be found not only at common law but also under the Criminal Codes. The main difference is between the common law and the Tasmanian and Northern Territory Codes on the one hand and the Queensland and Western Australian Codes on the other. Under the common law and the Tasmanian and Northern Territory Codes some form of subjective mens rea is required unless excluded.⁵⁴ Under the Queensland and Western Australian Codes, no subjective mental state is required unless it is specified. In other cases the defendant has to rely on a range of defences provided by the Codes rather than on denying subjective mens rea.⁵⁵

IV. Defences

Some of the major defences are examined in Chapter 2. All that is needed here is to underline the point that defences should not be seen merely as an afterthought, to be sorted out once the problems of actus reus and mens rea have been solved. Instead, the potential for solving the problem by providing a defence may take pressure off the other two elements and avoid the

⁵⁴ *He Kaw Teh v R* (1985) 157 CLR 523; *Criminal Code* (Tas) s 13; *Criminal Code* (NT) s 31.

⁵⁵ Criminal Law Officers Committee, *Model Criminal Code, General Principles of Criminal Responsibility* Report (1992) p 21.

difficulties of unjust acquittals or conviction or the artificial use of language to secure the desired result.

V. The Criminal Code (Cth) and the Model Criminal Code

These Codes adopt the two-fold structure of criminal liability by providing that a crime consists of a conduct element and a fault element.⁵⁶ Defences are recognised⁵⁷ but they are an afterthought, applying only if the conduct and fault elements are made out. This has led to the need for apparent fictions to avoid the logic of acquittals where a conduct element is not made out but liability is appropriate. Moreover, the fictions are not sufficiently comprehensive to avoid all the possibilities of unjust acquittal. The scheme of the Codes can be examined under the same head as the pre-Code position above.

A. The physical element of the crime

A physical element may be conduct, a circumstance in which conduct occurs or a result of conduct.⁵⁸ Conduct means an act, an omission or a state of affairs.⁵⁹ The Codes then endorse and extend the idea that an involuntary act is not an act at all, by providing that conduct can only be a physical element if it is voluntary. Conduct is only voluntary if it is the product of the will of the person whose conduct it is.⁶⁰ The Codes then give examples of involuntary conduct. They are spasms, convulsions or other unwilled bodily movements, acts performed during sleep or unconsciousness and acts performed during impaired consciousness, depriving the person of the will to act.⁶¹ An omission is voluntary only if the person is capable of acting,⁶² and a state of affairs is voluntary only if it is one over which the person is capable of exercising control.⁶³

This definition of conduct has the potential to lead to unmeritorious acquittals because a person could be in a position of involuntariness as a result of relevant fault on his or her own part. An obvious example is self-induced intoxication. The Codes anticipate this difficulty by, in effect, deeming conduct made involuntary as a result of self-induced intoxication to be voluntary. They do so by providing that evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary.⁶⁴ Intoxication is self-induced unless it came about involuntarily or as a result of

56 *Criminal Code (Cth)* and Model Criminal Code s 3.1.

57 *Criminal Code (Cth)* and Model Criminal Code Pt 2.3.

58 *Criminal Code (Cth)* and Model Criminal Code s 4.1(1).

59 *Criminal Code (Cth)* and Model Criminal Code s 4.1(2).

60 *Criminal Code (Cth)* and Model Criminal Code s 4.2.

61 *Criminal Code (Cth)* and Model Criminal Code s 4.2(3).

62 *Criminal Code (Cth)* and Model Criminal Code s 4.2(4).

63 *Criminal Code (Cth)* and Model Criminal Code s 4.2(5).

64 *Criminal Code (Cth)* and Model Criminal Code s 4.2(6).

fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force.⁶⁵ The Codes, like the pre-Code law, limit liability for omissions to cases where the law makes an omission a physical element of an offence or where there is a duty to act.⁶⁶

The difficulty with this package is that with the exception of self-induced intoxication, prior fault cannot make up for involuntariness at the time of the conduct. The original draft did not even allow for the exception,⁶⁷ but the Criminal Law Officers Committee's approach to intoxication was rejected by the Standing Committee of Attorneys-General, and the exception relating to intoxication was built into the conduct sections.⁶⁸ The exception is justified because the prior fault in becoming intoxicated provides a proper basis for conviction, if the fault elements of the offence are made out, and no defence is available. But the existence of the exception and its limited scope reveal the incoherent nature of the rule.

The difficulty can be brought out by comparing the Code provisions and the common law approach in *Chia Gee v Martin*.⁶⁹ The defendant aliens stowed away on a ship bound for Australia with intent to land in Australia. They were caught and came into Australia in custody. They were charged with being prohibited immigrants found within Australia. The High Court of Australia held the fact that they entered Australia involuntarily afforded them no defence.

Being found was a status offence, and so required no act like entering to make up the actus reus of the offence. It would however have been easy enough to have acquitted them if, instead of stowing away, they had been kidnapped and brought against their will to Australia. They would still have been found, but a defence of involuntary conduct would have provided a firm foundation for their acquittal. On the facts, however, no such defence was appropriate as they had brought about the involuntary entry into Australia by their own blameworthy conduct. The denial of the defence had nothing to do with the foreseeability of the discovery of the stowaways. Even if they could have shown that the manner of their hiding meant only the slightest chance of discovery, they would still have been liable.

Under the Codes, however, they would have a better chance of undeserved acquittal. Though the offence would still be a status offence, if governed by the Codes it would require voluntary conduct on the defendants' part. The state of affairs would have had to be one over which they were capable of exercising control. At the time the state of affairs – being found in Australia – arose they were not capable of exercising control. In order to achieve the same appropriate result as the common law, the words 'is capable of exercising

65 *Criminal Code* (Cth) and Model Criminal Code s 4.2(7).

66 *Criminal Code* (Cth) and Model Criminal Code s 4.3.

67 Criminal Law Officers Committee, *Model Criminal Code, General Principles of Criminal Responsibility* Report (1992) pp 13-14.

68 Model Criminal Code Officers Committee, *Model Criminal Code, Conspiracy to Defraud* Report (1997) p i.

69 (1905) 3 CLR 649. But see a criticism of this case by O'Connor D and Fairall PA, *Criminal Defences* (3rd edn 1996) p 118.

control' would have to be interpreted to mean 'is, or was at a relevant earlier point, capable of exercising control'. The argument would then run that they could have exercised control earlier by not stowing away. That would secure a conviction but the process of reasoning is unnecessarily artificial and might be rejected on the ground that 'is' means 'is' and not 'is or was'. The answer would be that there seems to be no clear intention to overrule the common law solution on facts such as these. This adds another level of complexity in reaching the right result.

Another problem is that the involuntary conduct may come about by reason of mental impairment. Where the defence of mental impairment applies, the qualified verdict of not guilty on the ground of mental impairment enables the court to make an order for the protection of the community or of the defendant. Where however the defendant has not committed the actus reus of the offence, there is no need to invoke the defence of mental impairment and the defendant would be entitled to an unqualified acquittal. However the Codes head off this argument by creating within the section dealing with the defence of mental impairment, a further exception to the rule that conduct must be voluntary. This provides that a person cannot rely on mental impairment to deny voluntariness.⁷⁰ The result is the right one, but again it shows some incoherence when it is necessary to look at a defence section to piece together a full picture of the actus reus.

B. The fault elements – mens rea

The Model Criminal Code follows the common law fairly closely in recognising a variety of mental states commonly to be found in the definition of a given offence. They are intention, knowledge, recklessness, negligence and absence of fault in the shape of strict and absolute liability. These will be considered in turn.

1. Intention

This has three aspects. A person has an intention with respect to conduct if he or she means to engage in that conduct.⁷¹ There is intention with respect to a circumstance if the defendant believes that it exists or will exist.⁷² A person has an intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.⁷³

Apart from the reference to circumstances, the Code adopts the dominant common law approach to intention, in extending it beyond purpose to foresight of certainty, but in rejecting foresight of probability as an equivalent to intention.⁷⁴

70 Model Criminal Code s 7.3(6).

71 Model Criminal Code s 5.2(1).

72 Model Criminal Code s 5.2(2).

73 Model Criminal Code s 5.2(3).

74 See Criminal Law Officers Committee, *Model Criminal Code, General Principles of Criminal Responsibility Report* (1992) p 25.

The extension of intention to foresight of certainty as opposed to purpose has proved problematic both at common law and under the homicide provisions of the Model Criminal Code. The difficulties relate to palliative care and allowing patients who wish to die to do so. These problems are discussed in Chapter 4.

In one respect the Codes are narrower than the common law in that they make no provision for concomitant intention as in the case of the unreliable bomb.⁷⁵ The Codes should be amended to reflect this species of intention.

2. Knowledge

Knowledge is tied to circumstances and results but not to conduct.⁷⁶ A person has knowledge of a circumstance or result if he or she is aware that it exists or will exist in the ordinary course of events.⁷⁷ The Criminal Law Officers Committee rejected wilful blindness as an equivalent to knowledge.⁷⁸

3. Recklessness

Like knowledge, recklessness is tied to circumstances and results but not to conduct. Recklessness consists of two elements, awareness of a substantial risk that the circumstances exist or will exist or that the result will occur and the unjustifiable nature of the risk having regard to the circumstances known to the defendant.⁷⁹ The question whether taking a risk is unjustifiable is one of fact.⁸⁰ If recklessness is the fault element it is satisfied by proof of intention, knowledge or recklessness.⁸¹

The Criminal Law Officers Committee adopted a substantial risk rather than a probability or possibility test to avoid speculation about mathematical chances which created problems at common law.⁸² The evaluative part of the test is expressed in terms of lack of justification, rather than unreasonableness, to avoid confusion with negligence.⁸³ There is a subjective aspect to this element in that justification must be assessed on the facts as the defendant saw them, but whether the risk was justified on those facts is decided objectively and not on the basis of the defendant's set of values.⁸⁴

75 Law Commission, *Offences Against the Person and General Principles* Report No 218 (1983) pp 8-10, citing Lord Hailsham in *Hyam v DPP* [1975] AC 55 at 74.

76 See Criminal Law Officers Committee, *Model Criminal Code, General Principles of Criminal Responsibility* Report (1992) p 29.

77 Model Criminal Code s 5.3.

78 See Criminal Law Officers Committee, *Model Criminal Code, General Principles of Criminal Responsibility* Report (1992) p 29.

79 Model Criminal Code s 5.4(1)-(2).

80 Model Criminal Code s 5.4(3).

81 Model Criminal Code s 5.4(4).

82 See Criminal Law Officers Committee, *Model Criminal Code, General Principles of Criminal Responsibility* Report (1992) p 29.

83 Ibid.

84 Ibid at 31.

The definition of recklessness in Model Criminal Code s 5.4 appears to be intended as a universal one. The Committee noted that at common law recklessness in murder (involving foresight of probability) is different from recklessness in other crimes where foresight of possibility is enough. Even so the definition under the Codes does not discriminate between different degrees of recklessness. This move towards uniformity was later confirmed by a discussion paper on homicide, where the general definition of recklessness was built into the mens rea of murder.⁸⁵

That leaves the point that a wider definition of recklessness applies at common law in at least some other contexts. The clearest one is rape. In this context the Model Criminal Code now departs from the standard definition in s 5.4 and adds a further definition which requires no foresight of risk at all.⁸⁶ These matters are discussed further in the chapters on homicide and sexual offences.

4. *Negligence*

Conduct is negligent if it involves such a great falling short of the standard of care that a reasonable person would exercise in the circumstances and such a high risk that the physical element of the offence exists or will exist that the conduct merits criminal punishment for the offence.⁸⁷

This definition is a generalised version of the text of negligence adopted in *Nydam v R*⁸⁸ in the context of manslaughter. The matter is discussed further in the chapter on homicide (Chapter 4).

5. *Absence of fault*

The Codes recognise that offences may exist in which the prosecution does not have to prove mens rea. Sections 6.1 and 6.2 make provision for crimes of strict and absolute liability. These matters are discussed in Chapter 8 Part 1.

6. *Constructive mens rea*

The general principles part of the Codes contains no reference to constructive mens rea. The main areas of law where this form of mens rea occurs under pre-Code law are murder and manslaughter.

The Model Criminal Code Officers Committee have recommended the abolition both of constructive murder⁸⁹ and constructive manslaughter⁹⁰ and so they make no appearance in the Model Criminal Code.

85 Model Criminal Code s 5.1.9. See Model Criminal Code Officers Committee, *Model Criminal Code, Fatal Offences Against the Person Discussion Paper* (1998) pp 53-59.

86 Model Criminal Code s 5.2.6(3) . See Model Criminal Code Officers Committee, *Model Criminal Code, Sexual Offences Against the Person Report* (1999) pp 87-91.

87 Model Criminal Code s 5.5.

88 [1977] VR 420.

89 Model Criminal Code s 5.1.9. See Model Criminal Code Officers Committee, *Model Criminal Code, Fatal Offences Against the Person Discussion Paper* (1998) pp 53-59.

90 *Ibid* p 149.

7. *Transferred mens rea*

There is no reference to transferred mens rea in the general principles part of the Codes. However the concept, if not the name, is kept alive in the definition of individual offences where appropriate. For example, murder requires an intention to kill or recklessness as to the death of the victim or any other person.⁹¹ Similarly, the offences of causing serious harm require intention, recklessness or negligence in relation to the victim or anyone else.⁹²

C. Defences

The Codes recognise the existence of general defences in Part 2.3 which is headed 'circumstances in which there is no criminal responsibility'. Defences limited to certain crimes or types of crime are dealt with in the context of those crimes rather than in the more general defence section. As is the case of the pre-Codes position, the defences under the Codes are considered in Chapter 2 of this work. Missing from the list of defences under the Codes are those involving involuntary conduct. That is because involuntariness has been built into the actus reus or conduct element of the anatomy of a crime. The structural and policy implications of this approach have been discussed under actus reus in Part II above.

91 Model Criminal Code s 5.1.9.

92 Model Criminal Code ss 5.1.14-5.1.16.