

Commonwealth Code – Proof of Physical and Mental Elements of an Offence

Prior to the operation of Ch 2 of the *Criminal Code Act 1995*:

You cannot convict the defendant of the offence unless you are satisfied firstly, that he did the act which the prosecution alleges [identify act or acts said to constitute offence] and secondly, that he intended to do it. That is, you must be satisfied that the act was a willed act, something of which he was aware and meant to do.¹ It is impossible, of course, to look into someone's mind and see what they intended, but you can sometimes draw inferences from what they do and say. The prosecution invites you to infer from [identify relevant acts or statements] that the defendant intended [identify]. You should draw the inference that he did have that intention only if you are satisfied that there is no other reasonable inference available on the evidence.

Wilful Blindness

Before you could convict the defendant, the prosecution must satisfy you beyond reasonable doubt that the defendant intended to [commit the wrong act]. If you concluded that the circumstances in which he [engaged in the conduct involving the act] were so suspicious, and his failure to make inquiry so clearly deliberate, that the only reasonable inference open was that he knew his conduct involved that act, or the likelihood of it, but he persisted in it nonetheless, you would be entitled to conclude he had the necessary intention.²

Mistake (where raised on the evidence)³

If you think that the prosecution has not ruled out an honest and reasonable belief on the part of the defendant that [identify circumstances which would make the act

¹ Any direction that recognition of the probable consequences of an act amounts to intention is a misdirection: *Parker v The Queen* (1963) 111 CLR 610; *R v Schonewille* [1998] 2 VR 625; *McKnoulty v The Queen* (1995) 77 A Crim R 333.

² A combination of suspicious circumstances and failure to make inquiry (or "wilful blindness") may support an inference of knowledge of the actual or likely existence of the relevant matter: *Pereira v DPP* (1988) 82 ALR 217; *Giorgianni v The Queen* (1985) 156 CLR 473; *He Kaw The v The Queen* (1985) 157 CLR 523; *Kural v The Queen* (1987) 162 CLR 502.

³ Some controversy exists as to whether mistake has any relevance as a defence to offences requiring mens rea, since it can be said that in such cases the prosecution will necessarily fail to prove a guilty mind. (For discussion see *He Kaw The* at 532-533.) Honest and reasonable mistake provides, in any event, a defence to offences not requiring proof of intent: *Proudman v Dayman* (1941) 67 CLR 536; *R v Sheehan* [2001] 1 Qd R 198. The defence must be raised on the evidence, but it falls to the prosecution to rebut it.

said to constitute the offence innocent] **that is to say, has not satisfied you beyond reasonable doubt that the defendant was operating under that belief, you should acquit him. If the prosecution has satisfied you that the defendant did not hold that belief honestly and on reasonable grounds, you need not concern yourself with this aspect further.**

Where voluntariness is an issue

You must be satisfied beyond reasonable doubt that the act of [identify act constituting offence] was the voluntary or willed act of the defendant. It is the act which must be willed, although its consequences may not be intended.

There is a presumption, which may be displaced by contrary statutory indication, that mens rea is an element of any Commonwealth offence.⁴ Mens rea may, depending on the nature of the offence, require "intention, foresight, knowledge or awareness with respect to some act, circumstance or consequence"⁵. Ignorance of the law is irrelevant to the question of mens rea unless knowledge of the law is specifically an element of the offence.⁶

Proof of mental and physical elements after the operation of Ch 2 of the *Criminal Code Act*

Codified principles of criminal responsibility

Chapter 2 of the *Criminal Code* enacted by the [Criminal Code Act 1995](#) (Cth), codifies the general principles of criminal responsibility with respect to offences against the laws of the Commonwealth: s 2.1. Provision is made for the progressive application of the provisions of Ch 2 to Commonwealth offences. These provisions have applied to all Commonwealth offences since 15 December 2001: s 2.2.

The general principles of criminal responsibility in the *Criminal Code* do not adopt the common law concepts of *actus reus* and *mens rea*. Instead the *Criminal Code* defines criminal responsibility in terms of proof of the physical elements and fault elements of an offence: s 3.1. Liability for the commission of an offence is dependent upon proof of each physical element of the offence together with proof of the fault element that is applicable to each physical element: s 3.2.

Physical elements

The physical elements of an offence may be conduct, a result of conduct and a circumstance in which conduct, or a result of conduct, occurs: s 4.1.

⁴ *Cameron v Holt* ([1980](#)) [142 CLR 342](#).

⁵ *Kural* at 504.

⁶ See *Taib, ex parte DPP (Cth)* [[1999](#)] [2 Qd R 649](#) at 651-2, 659-6; where *Question of Law Reserved (No. 2 of 1998)* ([1998](#)) [70 SASR 502](#) was considered.

An offence may comprise more than one physical element and different fault elements may apply to each physical element: s 3.1 (However, the law that creates an offence may provide that there is no fault element for one or more of the physical elements of the offence: s 3.1(2)).

A physical element of an offence may be conduct; or a result of conduct; or a circumstance in which conduct, or a result of conduct occurs: s 4.1. “Conduct” means an act, an omission to perform an act or a state of affairs. “Engage in conduct” means to do an act or omit to perform an act.

Fault elements

Under the *Criminal Code* the fault elements of an offence may be “intention”⁷, “knowledge”, “recklessness” and “negligence”: s 5.1 (additional fault elements may be specified for the physical elements of a given offence). These concepts are defined in Division 5 of Ch 2.

Where the law creating an offence does not specify a fault element for a physical element, the *Criminal Code* makes provision for a fault element by default: s 5.6. Thus where no fault element is specified for a physical element that consists only of conduct, intention applies as the fault element for that physical element: s 5.6(1). Where no fault element is specified for a physical element that consists of a circumstance or a result, recklessness applies as the fault element: s 5.6(2). See *Crowther v Sala* [\[2008\] 1 Qd R 127](#).

Suggested directions

Intention

Intention is an element of the offence.

[Where conduct the physical element] **A person has intention with respect to the conduct of [insert details] if the person means to engage in that conduct.**

Or

[Where circumstance is the physical element] **A person has intention with respect to the circumstance of [insert details] if the person believes that it exists or will exist.**

Or

[Where the result is physical element] **A person has intention with respect to the result that [insert details] if the person means to bring it about or is aware that it will occur in the ordinary course of events.**

⁷ So far as proof of intention is concerned, the pre Code law in respect possession and importation remains pertinent: *R v Saengsai-Or* (2004) 61 NSWLR 135, [\[2004\] NSWCCA 108](#) at [74]; *Cao v The Queen* (2006) 198 FLR 200; [\[2006\] NSWCCA 89](#); see *R v Kaldor* (2004) 150 A Crim R 271; [\[2004\] NSWCCA 425](#) at [45]; *R v Lam (Ruling No10)* (2005) 191 FLR 261.

Intention is a state of mind. In ascertaining a defendant’s intention, you are drawing an inference from facts which you find established by the evidence concerning the defendant’s state of mind. The prosecution invites you to draw an inference as to the defendant’s state of mind from certain facts. You are entitled to infer such intent as is put to you by the prosecution if, after considering all the evidence, you are satisfied beyond reasonable doubt that it is the only reasonable inference open on that evidence.⁸

Knowledge or belief is often relevant to intention.⁹ The prosecution may establish intention by inference based on a belief.¹⁰

Knowledge

A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events

Recklessness¹¹

A person is reckless with respect to a circumstance if the person is aware of a substantial risk that the circumstance exists or will exist; and having regard to the circumstances known to the person, it is unjustifiable to take the risk.

A person is reckless with respect to a result if the person is aware of a substantial risk that the result will occur; and having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

The question whether taking a risk is unjustifiable is one of fact.

Recklessness can be established by proving intention, knowledge or recklessness.

⁸ It is appropriate for a judge in directing a jury on proof of intention under the Criminal Code to provide assistance as to how (in the absence of admission) the prosecution may establish intention by inferential reasoning in the same way as intention may be proved at common law: *R v Saengsai-Or* (2004) 61 NSWLR 135, [2004] NSWCCA 108 at [74]; *Cao v The Queen* (2006) 198 FLR 200; [2006] NSWCCA 89; see *R v Kaldor* (2004) 150 A Crim R 271; [2004] NSWCCA 425 at [45]; *R v Lam (Ruling No10)* (2005) 191 FLR 261.

⁹ *R v Tang* (2008) 237 CLR 1; 82 ALJR 1334 at 1348.

¹⁰ The jury may be directed in case where the prosecution are required to prove intention to import or take possession of narcotic goods that such an intention may be inferred from a finding that the defendant acted with a knowledge or belief that the thing being imported or to be possessed was likely to be narcotic goods: *Cao v The Queen* (2006) 198 FLR 200; [2006] NSWCCA 89 at [52], [53], [60]; see *R v Kaldor* (2004) 150 A Crim R 271; [2004] NSWCCA 425 at [45]

¹¹ See *Hann v DPP (Cth)* (2004) 144 A Crim R 534, [2004] SASC 86 as to the term “substantial risk”.

Negligence

A person is negligent with respect to a physical element of an offence if his or her conduct involves:

- 1. such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and**
- 2. such a high risk that the physical element exists or will exist;**

that the conduct merits criminal punishment for the offence.