FAULT ELEMENTS, STRICT LIABILITY AND ABSOLUTE LIABILITY

CRIME
A wrong punishable by the State.

Generally involves an actus reus (guilty act) and mens rea (guilty mind).

Description of a prohibited behaviour to which a penalty is prescribed.

CLASSIFICATION OF OFFENCES

Indictable offence
An offence that can be prosecuted by a judge and jury. What constitutes an indictable offence differs between jurisdictions. In SA minor indictable offences = trial by magistrate. Major indictable offences = supreme or district court depending on offence or complexity of issue.

Summary offence
An offence not punishable on indictment or for which no procedure is specified. In SA = trial by magistrate.

Commonwealth

Common Law (SA)
He Kaw The
Current leading authority on common law principles of fault and strict liability

Note, however, that this case is authority in common law jurisdictions and does not apply in to the Cth.

CLCA 1935 (SA)

Strict Liability Offences
Offences which do not require proof of fault with respect to one or more physical elements.

Defence of mistake
Section 6.1. Strict Liability-
No fault elements for any of the physical elements and defence of mistake (9.2) is available.

Absolute Liability- no defence
Section 6.2 Absolute liability- no fault elements for physical elements and defence of mistake is not available.
Voluntariness and physical elements
The prosecution must provide that the conduct of the defendant was voluntary.

Voluntary conduct has traditionally been considered as a physical element.

Howard’s Criminal Law: “The principle of voluntariness requires that before D be convicted of any criminal offence he be proved to have had at the relevant time the ability to control his conduct.”

He Kaw Teh- Brennan J: Drew attention to the moral basis for the requirements: “Thus, voluntariness and intent are the mental states ordinarily applicable to an act involved in an offence…”

Ch2 section 4.2(1): “Conduct can only be a physical element of an offence if it is voluntary.”

Fault Elements
CCA- emerging consensus on meaning of fault elements in offences.

5.1(a) a fault element for a particular physical element may be intention, knowledge, recklessness or negligence.
5.1(2) sub (1) allows law to create another fault element for an offence.

Favour subjective fault where serious crime
Where crime is serious, courts favoured subjective fault (DPP v Morgan).

HKT- demonstrated the judicial reluctance to allow ‘no fault’ liability.

INTENTION

Section 5.2 CCA (ordinary= legal meaning)
To say that a person intends to do something when they mean to do it, or that a consequence is indented when a person means to cause the consequences.

Section 5.2(3) of the Code goes beyond ordinary usage
Stating that a person has intention with respect to a result if he or she…is aware it will occur in the ordinary course of events.

To bring about result
Intention= the accused’s purpose to bring about the results or consequences of the criminal conduct (HKT per Brennan- general vs specific intent).

Transferred intention
Where the accused commits requisite physical element but with a different victim in mind. In such a case, accused is still criminally liable (Latimer).

However, in the case of stabbing a pregnant woman, no transferred intention (AG’s reference no3 of 1994).
Oblique Intent
Conduct not directly linked to intent but emerges obliquely as a consequence of that conduct. English courts recognise this as a form of intent but not Australian courts (Hyam).

KNOWLEDGE
Section 5.3
If one is aware that something is the case, I know it to be the case. The accused knows a particular circumstance exists or has awareness that a particular consequence will result from performance of conduct (includes wilful blindness).

BELIEF
The concept is not defined in the code but is often used in defining criminal liability-used in the ordinary sense.

It dilutes the requirement of knowledge and covers cases where people are mistaken (about what they are in possession of).

RECKLESSNESS
Section 5.4
Actual realisation of a substantial risk - departs from ordinary meaning.

Possibility/ probability
Accused acts in knowledge that a consequence is a probable or possible result of his or her conduct. Prove possibility or probability (except in manslaughter where both must be established).

Awareness
Describes that state of mind of the accused, whilst performing act, is aware of risk that a particular consequence is likely to result.

Same scale as intention because of moral blameworthiness
R v Crabbe- at 469:
The conduct of a person who does an act, knowing that death or grievous bodily harm is a probable consequence, can naturally be regarded...as just as blameworthy as the conduct of one who does an act intended to kill or do gbh.

‘Likely’ means ‘real and not remote’
Boughey: confirmed Crabbe and majority judgment explained ‘likely’ as meaning ‘substantial’ and a ‘real and not remote’ chance.

Analysis- realisation/ probably
Whether offence (other than rape) requires realisation of probability or likelihood, as distinct from possibility is uncertain.

B and M argue that possibility sufficient and MacPhearson v Brown supports this view.
NEGLIGENCE

Section 5.5
Objective test of reasonableness

Behaviour is assessed by reference to what the hypothetical reasonable person would have known, foreseen in the circumstances.

Narrow meaning in criminal law is quite different to the meaning in torts where lack of care would suffice. Not the case in criminal.

*Nydam v The Queen*
Where the accused’s behaviour involved, ‘such a great falling short of the standard of care which a reasonable (person) would have exercised…’

In the case of manslaughter for negligence, required to establish:
1. Great falling short of the SOC
2. Reasonable person would have foreseen the risk of the particular consequence occurring
3. Doing of act must merit criminal punishment (all in common law).

STRICT LIABILITY

No Fault: form of criminal liability- the accused is liable to conviction though the prosecution cannot prove fault with respect to one or more physical elements of the offence.

Defence: mistake of fact- note, however, the accused is not guilty simply because the conduct is forbidden- there are a number of defences to crimes of strict liability, especially reasonable mistake of fact.

HKT: sets out method for determining liability and in this case held that with such a severe penalty a fault element must be required.

Code Law Statutory Interpretation
Is proof of fault required:

Chapter 2 of the code makes specific provisions for fault requirements where the legislation is silent
S5.6 (code) offences that do not specify fault elements
1. if the law does not specify for physical elements of conduct- the fault element required is intention
2. if the law does not specify fault element for physical element for circumstance/ result- the fault element required is recklessness.

Common law interpretation of statute

In common law jurisdictions where no code or statute guides the process of interpretations the court looks at:

1. Any reference to fault elements? NO
2. Presumption that a person may not be convicted of an offence unless the prohibited act/ omission was accompanied by a subjective fault element
3. But can the presumption be rebutted/ displaced and the offence be one of strict/ absolute liability?
The court will consider:
1. The words of the statute
2. The subject of the statute
3. The utility of imposing strict liability - in attempting to gain the intention of parliament.

**Strict Liability**

Where an offence imposes strict liability the prosecution is not required to prove fault. The reoccurring problem for the courts is determining between strict or absolute liability where the legislature has not specified.

In determining, must consider -
1. Any reference to a fault element? Intention, knowledge, recklessness
2. Presumption- A person may not be convicted of an offence unless the prohibited act or omission was accompanied by a subjective fault element.
3. But can the presumption be rebutted or displaced and the offence be one of strict/absolute liability? CONSIDER
   a. Words of the statute
   b. Subject of the statute = intention of the legislature
   c. Utility of imposing strict liability
4. If the presumption has been displaced; can the accused raise the defence of honest and reasonable mistake of fact?
5. PRESUMPTION- the defence will excuse an accused from liability
6. But- can the presumption be rebutted/ displaced and the offence be one of absolute liability? Consider a, b and c.

**DEFENCES**

**Reasonable mistake of fact**

The defence of reasonable mistake of fact - mistake and ignorance

Defence is usually available but can be excluded expressly or impliedly through statute.

**Defence excluded**

If the defence is excluded it makes the offence one of absolute liability and if available the offence is one of strict liability.

The mistake must be one of fact, not ignorance:

The D must have turned their mind to the relevant facts (Green v Sergeant).

Honestly held and on reasonable grounds. The honestly held must be in fact (GI Coles v Goldsworthy).

The mistake must then also render the act innocent and thus not be a breach of the criminal law (Bergin v Stack).

In relation to the balance of probabilities, the prosecution has the legal burden of disproving the mistake of fact (Proudman v Dayman) and the Defence has the evidential burden (HKT).
“The word mistake in itself is ambiguous” (Gleeson CJ State Rail Authority v Hunter Water Board, in obiter)- suggesting that the meaning of mistake may vary according to the legislative context in which it imposes strict liability.

The meaning of mistake- two possible escape routes:
1. Reasonable mistake includes reasonable ignorance- appears not to be available though as not so far been accepted by the courts and the code also rejects the suggestion.
2. Reasonable mistake includes reasonable assumption- assume unconsciously-one could say that an assumption can be a mistaken belief??? Gleeson CJ in State Rail (above) appears to support that possibility and the Code under section 9.2(2) also could accept this notion as it enlarges the definition of mistake (section 9.2 (1)(a) “…under a mistaken but reasonable belief about those facts…”

Intervening event
At common law known as act of a stranger (B and M page 348).

The Code provides at s10.1
“where the physical event is brought about by another person over whom the person has no control... [and] the person could not reasonably be expected to guard against it...”

Statutory defences
Statutory defences; due diligence for example: Food Act SA 1985 as seen in B&M p352.
Modern statutes frequently provide for additional defences when creating offences of strict liability.

These statutory defences usually reverse the BOP and require the accused to prove innocence (unlike common law defence of reasonable mistake and the code).

Chief of the General Staff v Stuart- defence of D proves ‘reasonable steps for the safekeeping of the property’

Holloway v Gilport PL- defence if circumstances were due to a cause ‘beyond the D control’

Burdens of Proof
Prosecution bears the legal and persuasive burden. Also, evidential with regard to their case. Defence bears evidential burden. Legislation can alter positions.

Sentencing
Evidence of remorse or its absence, good character, previous convictions, employment, marital status etc. can be introduced at the sentencing stage.

Proportionality
R v Simoni
Cannot convict for offence not yet committed.
ATTEMPTS AND PREPARATOR CRIMES

In all jurisdictions it is an offence to attempt to commit a crime, even though for some reason the offence was not actually committed,

ATTEMPT
Definition
Offence under common law and statute of attempting to commit and offence:
CTC Crimes Act section 7.

The primary ingredient of attempt is intention to commit a complete offence:
Alister v R.

Britten v Alpoghout per Murphy J;
“...a criminal attempt is committed if it is proven that the accused had at all material times the guilty intent to commit a recognised crime and it is proven that at the same time he did act or acts (which in appropriate circumstances would include omissions) which are seen to be sufficiently proximate to the commission of the said crime and are not seen to be merely preparatory to it.”

Note that intention alone is not sufficient
Need conduct sufficiently proximate to the commission of the completed offence (R v Mai).

Attempt at Commonwealth- codification
Law of attempt is codified in Ch 2 of the code (Part 2.4 extensions of criminal liability; 11.1 attempt).

Although the physical and fault elements cannot be proved, criminal liability is imposed if the offender attempted to commit the offence.

CTH- Crimes Act 1914 section 7
Applies to any offences against the Cth.
Penalty is the same as if the offence had been completed.

SA Codification of law of attempt- partial
In SA although the offence is found in statute (section 270A CLCA) its scope is defined in common law.

In SA an accused may be guilty of attempting to commit ay offence, whether indictable or summary (s270A (1) CLCA).

Penalty: Max penalty is 2/3 of the completed offences penalty or 12 years for offence that would have resulted in a life sentence if completed (section 270 A (3)).

Attempts at common law
Requires:
1. Intent
2. Sufficient proximity
3. Not merely preparatory
Fault elements
   1. Requisite for the offence attempted

Physical elements
   1. Of offence
   2. Sufficient proximate

**Other Inchoate Offences**

**Conspiracy**
An agreement between two or more people to carry out future unlawful acts, or lawful acts by unlawful means. SA common law offence: Mulchay v The Queen/ Cth Code s11.5

**Incitement**
SA common law offence
S11.4 Cth Code- inciting someone to commit a crime.

**The elements of attempt:**
Attempts are dissected into physical and fault elements (section 3.1(1) Criminal Code).

**Attempts- case analysis:**
   1. Completed offence accused may be charged of?
      a. Physical elements?
         i. Did the accused commit an offence? If the physical elements are incomplete, look to attempt.

   **Accused cannot be convicted for complete offence:**
   2. Attempted offence the accused may be charged with?
      a. Fault elements for attempt
         i. Did the accused act with the requisite fault elements for the particular offence?
      b. Physical elements for attempt
         i. Can the physical elements for attempt be proven
         ii. Proximity sufficient or merely preparatory?

**FAULT**
Requisite fault element of attempt is intention to commit the completed offence: Britten v Alpogut.

Thus, it is not sufficient that the accused merely engaged in conduct foreseeing the possibility that the offence could be committed.

**Recklessness**
Recklessness problem- ordinary language= to attempt to do something is to try to do it and one cannot try unless one intends. Does the law require proof of intention or is recklessness sufficient?

**Cth Code**
Section 11.1(3) 1995: for the offence of attempting an offence, intention and knowledge are fault elements in relation to each of the physical element of the offence attempted.
In SA
Fault elements determined by common law.

_Leavitt-_ liability for attempt requires proof of an intention to commit an offence. _Fisse Howards Criminal Law_- argues that recklessness is sufficient on grounds of principle and argues that case law is consistent with that position. _B&M-_ agree that nothing short of intention will suffice. _Alister-_ 3 members of HC agreed that recklessness as to death is sufficient for attempted murder.

Different in RAPE cases in SA: Evans v R
Rape, HELD- reckless indifference to the victims consent to intercourse is sufficient to constitute the mental element for the crime (usually intent) for the crime of attempted rape.

This is so because ‘circumstance crime’- significant body of law to support that recklessness sufficient in rape (R v Bell, R v Khan, R v Zorad).

On balance, in appears that recklessness as to the incriminating consequences or result is NOT sufficient when liability for attempt is in issue. Brennan represents minority view.

_Recklessness inconsistent/ no good_
Recklessness or negligence is inconsistent with an intention to commit the completed offence: Knight v R, R v Leavitt, McGee v R.

STRICT LIABILITY
The requirement of intention extends to offences of strict liability, despite the fact that the completed offence has no fault element: Trade Practices Com v Tubemakers of Aus.

_Common Law_
It is the subject of dispute

_Code_= section 11.1 (3)
Expresses the prevailing view in Australia.

When liability for attempt is in issue, ‘intention and knowledge are fault elements with respect to each physical element of the offence attempted.

_No attempt for crimes of negligence_
Cannot attempt to be negligence

_PHYSICAL ELEMENTS- CONDUCT MUST BE:_
1. Sufficiently proximate and not merely preparatory (Britten v Alpogut) and
2. Accused must have intended to commit it.

_Crucial distinction in attempt is between preparing to commit a crime and attempting it:_