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Topic 1: Principles of Criminal Responsibility

All persons are rational human beings with knowledge of the difference between right & wrong...

Children committing criminal offences - SG7 & TXT171 & Activity 1.1

At common law, there is an irrebuttable assumption that a child aged 7yrs or under cannot be guilty of a crime

Legislation in each S&T have raised the minimum age of criminal responsibility to 10yrs which mirrors the position taken in s7.1 of the *Criminal Code (Cth)*

Under both common law & statute, once a child reaches 14yrs they are regarded as an adult in terms of criminal responsibility (however there may be some leeway as to the standard of bhv accepted)

A problem arises as to how to treat those children of and over the minimum age of 10 but below the age of 14 - see TXT173

doli incapax

- *doli incapax* is a latin term for *'incapable of wrongdoing'*
- it is a common law presumption that once a child reaches the age of 7 but is under the age of 14 they do not know the difference between right & wrong and are therefore incapable of committing a crime because of a lack of *mens rea*
- the rationale for this presumption is that it protects children from the full rigour of criminal law enforcement
- the presumption is capable of being rebutted - the prosecution bears the legal burden of rebutting the presumption
    - they must prove the child committed the criminal act with the requisite fault element and they had sufficient understanding to know that what they were doing was wrong
    - Prosecution must prove the child knew the offence was wrong (rather than simply naughty or mischievous)
    - there is some degree of uncertainty as to what will amount to sufficient evidence to rebut the presumption & allow a conviction - the evidence of the offence itself is not enough on its own to show a child knew the act was wrong (*C (a minor) v DPP* which was held to be the law in Australia as well in *R v CRH (1996 unreported)*
    - the surrounding circumstances of the commission of the act may go to prove the relevant capacity to know the act was wrong: *R v F; Ex parte AG (1999)*

Proof that the child knew the act was morally wrong may not be sufficient to establish the requisite understanding: *JM (a minor) v Runeckles (1984)*

However, proof that they knew the act would result in criminal punishment may be enough: *R (a child) v Whitty (1993)*

<u>Evidence that a child knew the act was wrong may include</u>:-

- evidence of the child's upbringing: *X v X (1958)*
- admissions to the police that the child knew that the conduct was wrong: *Ex parte N (1959)*
- conduct after the criminal act, including attempts at concealment (*JM (a minor) v Runeckles (1984)*) or running away when disturbed (*A v DPP (1997)*)
- conduct & demeanour in court: *JM (a minor) v Runeckles*
- mental capacity: *JBH and JH (minors) v O'Connell (1981)*

- any relevant prior convictions: *R v A (1979)*

Corporate Criminal Liability - SG7 & TXT176 & Activity 1.2

- A corporation is considered a legal person (s22 *Acts Interpretation Act* (Cth); ss 8(d), 21(1) *Interpretation Act 1987 (NSW)*; ss32D, 36 *Acts Interpretation Act 1954* (QLD)) and may therefore be criminally liable to the same extent as a natural person
- The main restriction (at common law) is that a corporation cannot be tried for an offence which can only be punished by imprisonment (*R v ICR Haulage Ltd (1944))* however legislation in ACT& NSW converts punishment by terms of imprisonment into fines (s16 *Crimes (Sentencing Procedure) Act 1999 (NSW))*
- At common law, a corporation cannot be held criminally responsible for certain crimes which only an individual can commit (such as perjury or bigamy)
- However it may be held criminally liable for offences of complicity (*Lewis v Crafter (1942))*, conspiracy (*Canadian Dredge & Dock Co Ltd v The Queen (1985)*, attempt (*Trade Practices Commission v Tubemakers of Australia Ltd (1983))* and incitement (*Invicta Plastics Ltd v Clare (1976))*
- Because a corporation does not have a physical existence, it can only act or form an intention through its directors or employees

There are 3 ways which corporate criminal liability can be established:-

1. **The *Agency Model*** - by holding a corporation **vicariously liable** for the conduct of its employees where those employees were acting within the scope of their employment
2. **The *Identification Model*** - by holding a corporation **directly liable** for the acts of certain persons, such as the corporation's Board of Directors, its managing director or person to whom the functions of the board have been delegated, who are considered to be the embodiment of the company
3. **The *Corporate Culture Model*** - by holding the corporation **directly liable** for offences authorised or permitted through the procedures, operating systems or **culture** of the company

Vicarious Liability - TXT179

- It is now well established that a corporation may be held vicariously liable for the acts of its employees, provided they acted within the scope of their employment
- The status of the employee is irrelevant for this purpose
- However - a corporation will not be vicariously responsible for the conduct of an independent contractor except where so provided by statute: *Allen v United Carpet Mills Pty Ltd (1989) VR 323*
- It is usually in relation to strict liability offences that corporations will be found vicariously liable

The Prosecution must prove 3 elements for vicarious criminal liability to be established:-

1. The relevant legislation must intend that legal liability be applied vicarously: *Mousell Bros Ltd v London & Northwestern Railway Co (1917)*

2. The employee must have committed the relevant act within the course of employment or within the scope of their authority
    a. There is no requirement that the corporation authorise the employee to commit the offence: *Australian Stevedoring Industry Authority v Overseas & General Stevedoring Co Pty Ltd (1959) 1 FLR 298*
    b. Nor does it appear that there is a requirement that the employee act with the intention of benefitting the corporation
3. Generally, a company will not be found guilty on the basis of vicarious liability for a criminal offence having a subjective fault element, but may for offences of strict or absolute liability: *Presidential Security Services of Australia Pty Ltd v Brilley (2008)*

Direct Liability - TXT180 & Activity 1.2(3)

- Corporate criminal liability for serious offences such as manslaughter is based on direct liability
- Rather than holding the corporation criminally responsible for the acts of its employees, direct liability views the employees' acts as those of the corporation
- the mere fact the employee performed an act will not be sufficient to establish liability for a serious offence
- it must be shown that an act or omission was performed by someone with authority to act *as the corporation*
- this person must be said to embody the corporation
- the leading authority in this area is *Tesco Supermarkets Ltd v Nattrass (1972) AC 153*
- the Tesco principle limits the criminal liability of a company to the conduct and fault of those who may be said to embody the company such as the company's board of directors, its managing director or a person to whom the function of the board has been fully delegated
- Criticism of the Tesco principle: it makes it difficult to establish corporate criminal liability against large companies because offences committed by large ones are often visible only at the level of middle management whereas this principle requires proof of fault of a top-level manager
    - eg. *R v AC Hatrick Chemicals Pty Ltd (unreported 1995)* - plant engineer & plant manager were acquitted of manslaughter because they were not the "guiding mind"
- Despite criticisms of the Tesco principle it has been widely followed in Australia (however subsequent UK cases have been prepared to modify the principle)
- In *Meridian* the Privy Council held the company liable for actions of its Chief Investment Officer & Senior Portfolio Manager despite the actions being unknown to the Board of Directors or Managing Director
- The Privy Council found that knowledge of the employee's actions could be attributed to the company, but were careful to point out that it would be a 'matter of construction' in each case as to whether the particular rule requires knowledge that the act had been done or state of mind with which it was done should be attributed to the company
- In *DPP (Victoria) Reference (No 1 of 1996)* it was confirmed that Lord Hoffman's approach in *Meridian* provides a framework for analysis of direct liability
- This involves deciding whether the corporation is capable of committing the offence, then identifying whose acts or omissions or state of mind are taken to be the acts or omissions or state of mind of the corporation itself

- The rule of attrition depends on the offence & facts of the case: *DPP (Vic) Ref (No 1 of 1996)*
- Where an employee whose conduct is attributable to a corporation has a personal defence such as mental impairment or self-defence, this defence may be available to the corporation: *Woolworths Ltd v Luff (1988) A Crim R 144*
- In relation to offences of strict liability, the defence of honest and reasonable mistake of fact may also be available

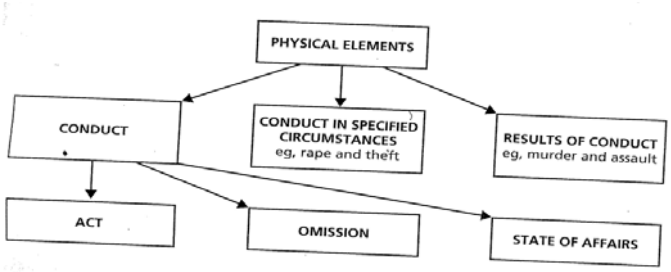
Corporate Culture - TXT182 & Activity 1.2(4)

- A model of corporate liability based on 'corporate culture' was first enacted in Australia by ss12.1-12.6 of the *Criminal Code (Cth)*
- s12.1 confirms that the Code applies to bodies corporate in the same way as for individuals & that a body corporate may be found guilty of any offence, including one punishable by imprisonment
- s12.2 states that the physical element of an offence may be attributed to a corporation where an employee, agent or officer committed the physical element whist acting within the actual or apparent scope of their employment (similar to vicarious liability)
- However if the relevant offence contains a fault element, s12.3 requires that intention, knowledge or recklessness must also be attributed to the corporation
- It is in relation to these fault elements that the Code departs from the Tesco principle
- s12.3 states that a fault element will be attributed where a corporation 'expressly, tacitly or impliedly authorised or permitted the commission of an offence'
- s12.3(2) lists 4 situations whereby such permission or authorisation may be established:-
    a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
    b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
    c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
    d) proving that the body corporate failed to create & maintain a corporate culture that required compliance with the relevant provision
- s12.3(6) defines corporate culture as *'an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place'*
- s12.4(3) also contains provisions dealing with negligent actions by a corporation
- s12.4(3) states that negligence may be evidenced by, "*inadequate corporate management, control or supervision of the conduct of 1 or more of the corporation's employees, agents or officers or by the failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate*"
- Both ACT & NT have adopted similar provisions

ELEMENTS OF A CRIME - SG7 & TXT185 & Activity 1.3

For a D to be convicted of a crime, the Prosecution needs to prove both the ***physical*** ('external' or *actus reus*) elements of a crime and the ***fault*** ('mental' or *mens rea*) elements of the crime & that the 2 concurred in time

The Physical Elements of a Crime - SG8 & TXT185 & Activity 1.4



Physical element = External element = *actus reus*

The physical elements of an offence may refer to:-

- a **specified form of conduct** such as
  - an act
  - an omission
  - a state of affairs;
- conduct which occurs in **specified circumstances**; or
- the **results or consequences** of conduct

A Specified form of Conduct - TXT185 & Activity 1.4(2)

An Act

The main issue here is identifying the relevant act - voluntariness & causation are relevant here

An Omission

An omission to act may give rise to criminal liability in situations where a duty arises at common law or imposed by statute

At common law - a duty to act may arise as a result of a family relationship btw the parties (*R v Russell (1933) VLR 59)*, or as a result of a person undertaking to care for another who is unable to care for him/herself (*Taktak (1988) 34 A Crim R 334)*

In *R v Miller (1983)*, Lord Diplock also referred to there being "*no rational ground for excluding from conduct capable of giving rise to criminal liability, conduct which consists of failing to take measures that lie within one's power to counteract a danger that one has oneself created*"

Statutory examples include a duty to provide necessities (*s44 Crimes Act 1900 (NSW); s285 Criminal Code (QLD))* and inNT a duty to rescue or provide help to a person urgently in need of it & whose life may be endangered if it is not provided (*s155 Criminal Code (NT))*

A State of Affairs

There are certain offences which criminalise a state of affairs (or state of "being" rather than conduct)

Examples include being drunk & disorderly in a public place or offences relating to vagrancy (summary offences) and status offences such as being "knowingly concerned" in the importation of illicit drugs

Conduct which occurs in specified circumstances - TXT186 & Activity 1.4(1)

A specified form of conduct may not be a crime unless it is performed in certain specific circumstances

Eg. the crime of rape or sexual assault is defined by intentional sexual penetration (conduct) which occurs without the other person's consent (the specified circumstance)

Results or consequences of conduct - TXT186 & Activity 1.4(1) & ProblemQ1

The physical element of an offence may sometimes refer to the results/consequences of conduct, rather than the conduct itself

Eg. What is prohibited in the crime of murder is the death of the victim rather than the conduct which caused the death

- the conduct which caused the death is irrelevant; providing the conduct of the accused results in the death of the victim, the physical element of murder will be established

Where the physical element of a crime refers to the results or consequences of conduct, it will be necessary for the Prosecution to prove that the conduct caused the requisite consequences (causation)

Voluntariness - SG9 & TXT187 & Activity 1.5 & ProblemQ1

The requisite physical element of a crime must be performed voluntarily, in the sense that it must be willed: *s23 Criminal Code (QLD); Ryan v The Queen (1967) 121 CLR 205*

The Prosecution must prove that Ds conduct was voluntary

- A crime cannot be committed unless Ds act was voluntary
- voluntariness constitutes a willed act, though its consequences need not be intended
- voluntariness is presumed in the absence of contrary evidence & is frequently disposed of without mention in criminal proceedings

There are 3 ways which an act may be considered at law to be involuntary:-

1. when the criminal act was incidental
    - that is - without intention, recklessness or criminal negligence
2. when the criminal act was caused by a reflex action
    - an act caused by a reflex action is an act founded on an external cause rather than intention: *Ryan v The Queen (1967)* per Barwick CJ
3. when the conduct was performed whilst the accused was in a state of impaired consciousness (automatism)

Causation - SG9 & TXT187 & ProblemQ1

When the physical elements of a crime requires the occurrence of specified results or consequences, the prosecution must prove that the conduct *caused* those results or consequences

Causation is of particular relevance to the crimes of murder/manslaughter where it must be proved that the accused's conduct caused the death of the victim

Causation is a question of fact for the jury: *R v Pagett (1983)*

The courts have developed a number of tests to assess whether the accused's conduct caused the requisite result or consequence:-

- **The Reasonable Foreseeability Test**
- **The Substantial Cause Test** (modern cases favour this but they still interchange)
- **The Natural Consequence Test**
- **The "But for" Test** - now rejected by the HC in *Arultthilakan v The Queen (2003)* because it brought with it the danger of indicating that a negligible causal relationship will suffice

In some 'unusual cases' - intention may be relevant to causation (see Brennan & McHugh JJ judgements in *Royall v The Queen (1991))* - eg. spider phobia & intending to scare with spider

The Reasonable Foreseeability Test - TXT190

This involves examining whether the consequences of the accused's conduct were reasonably foreseeable

Objective test - considering what a reasonable person would have foreseen rather than an inquiry into the accused's appreciation of the consequences of their conduct (*R v Hallett (1969) SASR 141)*

Royall v The Queen (1991) - HC majority stated that juries should not be directed in terms of foreseeability because of the risks of confusion in foreseeability as an objective standard & as a subjective state of mind however the minority favoured the use of this test which suggests that it may not have been completely laid to rest...

The Substantial Cause Test - TXT190

AKA "significant cause" test AKA "Operating & substantial cause test" AKA "substantial contribution test"

'Whether an act or series of acts (or omissions/series of omissions) consciously performed by the accused is or are so connected with the event that it or they must be regarded as having a sufficiently causal effect which subsisted up to the happening of the event, without being spent or without being in the eyes of the law sufficiently interrupted by some other act or event' (*R v Hallett* at 149*)*

The SC held in *Hallett* that the accused's original blow which rendered the victim unconscious started the events which led to the victim drowning. It could not be said that the tide coming in broke the chain of causation.

The accused's conduct need not be the sole cause of death in relation to the rimes of murder & manslaughter (*R v Pagett (1983))*

Death may result from several causes, but all that must be proved is that the accused conduct was a substantial cause.

The Natural Consequence Test - TXT191

AKA "common sense" test

This may apply to situations where the victim has contributed to his/her own death by seeking to escape or attempting to avoid being attacked by the accused

The main case that sets out this test is *Royall v The Queen (1991):-*

'Where the conduct of the accused induces in the victim a well-founded apprehension of physical harm such as to make it a natural consequence (or reasonable) that the victim would seek to escape & the victim is injured in the course of escaping, the injury is caused by the accused's conduct [at 389]

Novus actus interveniens - TXT191 & ProblemQ1

If a subsequent event renders the prohibited consequence no longer a reasonably foreseeable, substantial cause or natural consequence of the accused's conduct, the courts have held that this amounts to *novus actus interveniens* which breaks the chain of causation

Some courts have stressed that the intervening act must be of an extraordinary/unexpected nature

R v Hallett - SC SA held that the incoming tide was not unexpected or an event which would break the chain of causation as opposed to (eg) an extraordinary tidal wave

There are 2 kinds of *novus actus interveniens* that have been considered by the courts:-

- The acts of the victim
- The acts of a third party

The Acts of the Victim - TXT192 & ProblemQ1

Case law deals with 3 different types of acts committed by the victim that may break the chain of causation:-

(a) Seeking to escape violence

Where a victim is killed seeking to escape the violence of the accused, the victim's actions may break the chain of causation

The victim's act of self-preservation must be proportionate to that conduct

Royall v The Queen (1991) - HC unanimously held that the victim's actions of falling/jumping from the bathroom window of her 6th floor flat to avoid an attack was not regarded as *novus actus interveniens*

- Even though they were divided with which test of causation to use, the majority applied the natural consequence test to the victim's reaction in preference to reasonably foreseeability test
- Brennan J stated the victim's **act of self preservation must be reasonable**, having regard to the nature of the accused's conduct and the fear that it was likely to have induced [at 398]
- Deane & Dawson JJ - the victim's attempt at self-preservation does not break the causal link if (a) the victim's fear/apprehension is well-founded or reasonable in all the circumstances, and (b) the victim's act of escape or self-preservation was the natural consequence of the accused's behaviour [at 412-413]
- Mason CJ & McHugh J concluded that the victim's act of self-preservation need not be reasonable & Mason CJ held there was no requirement that the steps taken to escape be reasonable [at 390]

(b) Failing to take medical advice

There have been some cases where injuries sustained by a victim might not have resulted in death except for the fact they failed to take medical advice

In these cases, courts have been reluctant to find that the victim's actions break the chain of causation

R v Bingapore (1975) 11 SASR 469 - SC SA held there had been no *novus actus interveniens*; there had only been the loss of possible opportunity of avoiding death (hit in head & left hosp too early)

R v Holland (1841) - accused assaulted victim & injured their finger; rejected the surgeon's advice to have finger amputated & died of lockjaw; Maule J rejected the accused's submission that the cause of death was not the wound inflicted, but the victim's refusal to have the finger amputated

R v Blaue (1975) - victim was stabbed & refused blood transfusion because they were Jehovah's witness which probably would have saved her life; English CA held the victim's refusal did not break the chain of causation

(c) **Suicide**

There have been some rare cases where the victim has committed suicide after being assaulted

2 American cases show a reluctance by the courts to see the victim's acts as breaking the chain of causation (*People v Lewis; Stephenson v State*)

The Acts of a Third Party - TXT194 & ProblemQ1

Medical Treatment

The act of a third party may (in rare circumstances) break the chain of causation

The main circumstances which this will arise is where a victim receives medical treatment which may be an independent cause of death

R v Pagett (1983) - refers to acts of a 3rd party in a wider sense & stands for the principle that the act of a 3rd party will only be considered *novus actus interveniens* when it is a voluntary act, in the sense that it is "free, deliberate & informed" [at 289]

- The accused's ex-girlfriend was shot by a police officer as they returned fire upon him shooting at armed police while using his ex-girlfriend as a shield
- The accused was convicted of manslaughter
- English CA rejected his argument that the victim's death was caused by her being shot by the officer & was an act of a 3rd party which was a *novus actus interveniens*
- The court held that, in determining whether or not a homicide may be attributed to those cases where the immediate cause of death was the act of another, the ordinary principles of causation apply
- The court concluded the police officer's actions were not "free & deliberate" - the shooting was an act performed for the purpose of self-preservation & in performance of a legal duty
- "*[a] reasonable act of self-preservation, being of course itself an act caused by the accused's own act, does not operate as novus actus interveniens*" [at 289]

It should be left to the jury to determine whether the causal connection between the accused's conduct and the death has been established

The case law in this area is mainly concerned with whether or not medical treatment given by a 3rd party may break the chain of causation

It appears that it will only be in the most exceptional circumstances that medical treatment (if given negligently) will be held to be a *novus actus interveniens*

R v Jordan (1956) - one of the rare cases where negligent medical treatment has been found to break the chain of causation

- the victim died after being stitched up in hospital from being stabbed & it was found the death was caused by the administration of an antibiotic & IV of too much liquid which gave them broncho-pneumonia (it was not the stab wound)
- The UK court thought that treatment that was palpably wrong could be regarded as *novus actus interveniens* which could break the chain of causation
- subsequent cases have stated that this case should be regarded as a case which was decided on its own special facts

R v Evans and Gardiner (No 2) (1976) - Vic CA referred to *R v Smith (1959)* UK case with approval where a victim was stabbed in the stomach by 2 fellow prisoners - TXT195-6

- bowel operation was successful but she died 11mths later
- Immediate cause was a fibrous ring that caused a stricture in the small bowel at the site of the resection operation & medical evidence showed the stricture was not an uncommon occurrence after such an operation
- There was also evidence that her condition should have been diagnosed & an op performed to rectify it
- despite all this, the Full Court of SCV upheld the 2 accused's convictions for manslaughter
- *"the failure of the medical practitioners to diagnose correctly the victim's condition, however inept or unskilful, was not the cause of death... the real Q for the jury was whether the blockage was due to the stabbing"* [at 534]

R v Cheshire (1991) UK - English CA reiterated that only in the most extraordinary circumstances will medical treatment (however negligent) break the chain of causation (shot & died of cardio failure)

- *"even though negligence in the treatment of the victim was the immediate cause of his death, the jury should not regard it as excluding the responsibility of the accused unless the negligent treatment was so independent of his acts, and in itself so potent in causing death that they regard the contribution made by his acts as insignificant"* [at 852] - TXT196

The cases since Jordan show a marked reluctance on the part of the courts to break the chain of causation, even where medical negligence is an immediate cause of death

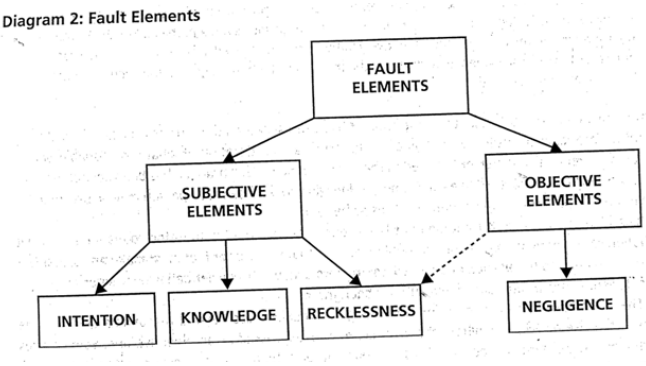
Only in cases involving gross negligence will medical treatment be regarded as *novus actus interveniens*

Withdrawing life-support

R v Malcherek; R v Steele (1981) - English CA withdrew the issue of causation from the jury on the basis that the infliction of the original injuries was the substantial cause of death; CA held that where competent medical treatment involved placing a victim on a life-support system, the decision to disconnect that system would not break the chain of causation btw the infliction of the original injury & the victim's death [at 429]

The Fault Elements of a Crime - SG12 & TXT197

Diagram 2: Fault Elements



Traditionally, the fault elements have been divided into 'subjective' and (occasionally) 'objective' elements

Fault element = Mental element = *mens rea*

Subjective -V- Objective fault - TXT197 & Activity 1.7(1)-(2)

- Subjective components of fault are interconnected

- Wilson, Deane & Dawson JJ referred to intention as being *based* on knowledge: *Giorgianni v The Queen (1985) 156 CLR 473* [at 505]
- Where the fault element is subjective, the Prosecution must prove beyond reasonable doubt that (at the time of the commission of the crime) the accused possessed the requisite state of mind (this may often be difficult to prove)
- In absence of an admission or confession, it is impossible to know beyond reasonable doubt what the accused was thinking at the time of the commission of the crime
- The law in this area is based upon a 'deeply entrenched' approach to mental state attribution known as "**Folk Psychology**"
    - This '*involves interpreting someone as a perceiver with beliefs and desires which lead him/her to act in the world*'
    - What the trier of fact is being asked to do in assessing a person's intention, knowledge or recklessness, is to see whether one of these mental states can be attributed to the person, taking into account his/her behaviour & experiences
    - By Leading legal philosopher, Peter Cane - model attracts legal academic criticism
- The difficulty of proving subjective intention or knowledge of the accused was recognised by Kirby J in *Peters v The Queen (1998)*:
    - *"...intention must be ordinarily inferred from all the evidence admitted at the trial...but the search is not for an intention which the law objectively imputes to the accused. It is a search, by the process of inference from the evidence, to discover the intention which, subjectively, the accused actually had*" [at 551]
- Despite the emphasis on 'subjective' intention, it has been accepted that in the process of attributing a mental state to an accused, jurors will often resort to a consideration of what a reasonable person might have intended or known or believed in the circumstances
    - This approach has been accepted by the courts as unavoidable: *Pemble v The Queen*
- The idea of this type of fault element being purely "subjective" is questionable
    - What the notion of subjectivity in this context really means is the trier or fact must make an assessment of fault in relation to the particular accused, taking into account their behaviour, experiences and characteristics such as age, social & cultural background
- The difficulty in proving intention, knowledge or recklessness beyond reasonable doubt is one factor in the rise of offences where the fault element is expressed as an 'objective one'
- Some crimes incorporate an element of negligence as the basis upon which criminal responsibility is assigned
- Subjective fault is a fault that requires a "bad mind" in the accused
- Objective fault requires no purposeful or conscious bad mind in the accused; it sets a standard of what a reasonable person should have known in the circumstances
- The courts have shown a preference for subjective fault elements in relation to serious crimes

Intention - TXT199

The fault element of most serious crimes is generally expressed as an intention to bring about the requisite physical element of the offence

- Intention refers to the accused deciding to perform the conduct
- In the sense of intentional conduct, it is closely connected with the requirement that conduct be voluntary in that it must be willed or consciously performed
- In relation to the physical element regarding the results or consequences of conduct, the prosecution must prove that the accused's *purpose* was to bring about the results or consequences of the conduct: *Boughey v The Queen (1986) 161 CLR 10*
    - Where an accused has this purpose, he/she acts intentionally even where (to that persons' knowledge) the chance of them causing the result are small: *Leonard v Morris (1975) 10 SASR 528*
    - If the accused does not have this purpose, then he/she does not act intentionally, even though to their knowledge the chances of causing the result are high (recklessness may be made out here though)
- The difference in intention as it relates to conduct & as it relates to consequences is referred to as the distinction between 'basic' and 'specific' intent
- Brennan J drew a number of distinctions in *He Kaw Teh v The Queen* in the use of the term 'intention' in criminal offences:-
    - *'General intent & specific intent are ... distinct mental states. General or basic intent relates to the doing of the act involved in the offence; special or specific intent relates to the results caused by the act done.*
    - *In statutory offences, general/basic intent is an intent to do an act of the character prescribed by the statute creating the offence; special/specific intent is an intent to cause the results to which the intent is expressed to relate"* [at 569-570]
- Where a person intends to commit the requisite physical element, they may still be convicted even where the victim is not the intended victim (*R v Latimer (1886) 17 QBD 359)* or where the crime takes effect in a manner unforeseen or unintended (*R v Evans (No 2) (1976) VR 523)*

Motive & Intention

- Intention is not the same as motive, which is generally referred to as an emotion prompting an act
    - *"...It is the emotion which gives rise to the intention and it is the latter & not the former which converts an actus reus into a criminal act"* (*Hyam v DPP (1975)* at 73*)*
- Motive may be relevant in attributing intention to an accused
- It may form part of the circumstantial evidence that may establish that the accused did have the requisite state of mind
- Motive becomes legally relevant in some areas such as the meaning of dishonesty for property offences & terrorism offences (& highly relevant at sentencing)

Direct & Oblique Intention - TXT200

Direct Intention: - Brennan J stated in *He Kaw Teh v The Queen* that intention *"connotes a decision to bring about a situation so far as it is possible to do so - to bring about an act of a particular kind or a particular result*" (purpose)

Oblique Intention:- a broader form of intention where it relates to the situation where the outcome of the accused's conduct was not directly linked to his/her intention, but emerges obliquely as a consequence of that conduct

- *Hyam v DPP (1975) AC 55* - The House of Lords defined intention broadly in this case to include not only direct intention but also foresight of a probable consequence
    - Lord Hailsham took the view that to intentionally & deliberately commit an act which exposes a victim to the risk of possible grievous bodily harm or death is 'morally indistinguishable' from intending to kill another person [at 78]
    - If the accused foresaw that death was a probable consequence of her actions, then she had the relevant intent to kill (petrol in neighbours letterbox kills 2 daughters)
- The effect of *Hyam* was to introduce into the criminal law a broad definition of 'intention' which overlaps with recklessness
- Lord Bridge in *R v Moloney (1985) AC 905* stated that the meaning of intention is best left to the jury to decide on whether the accused acted with the necessary intent [at 926]
    - As a result of this case, the scope for giving a direction on oblique intention has been restricted quite substantially
- In practice, fact situations giving rise to an analysis of oblique intention in Australia can usually fall within the concept of recklessness (at least for the purpose of the law of homicide)

Transferred Intention - TXT202

This doctrine applies where an accused intends a particular crime & commits the requisite physical element of that crime, but with a different victim to the one they had in mind

- they are still held criminally responsible for their conduct
- it is usually considered in the context of murder & other crimes such as malicious wounding
- antenatal injuries cases in UK & HK pg202-3
- it is unclear whether Australian courts will follow the approach of the House of Lords in holding that transferred intention cannot be used to hold an accused guilty of the death of a child who has suffered antenatal injuries

Knowledge - TXT203

An accused may be criminally responsible if he/she acts with the knowledge that a particular circumstance exists, or with the awareness that a particular consequence will result from the performance of the conduct

- the requirement for the existence of knowledge or awareness relates to the physical element of the crime as conduct that occurs in specified circumstances, and the physical element as the results or consequence of conduct
- An accused may claim a mistaken belief in order to show that he/she did not possess the requisite knowledge (eg. Rape & believing it was consensual)
- In certain jurisdictions, mistaken belief has the effect of negating the requirement that the accused be aware that the victim was not consenting

Knowledge & the Role of Wilful Blindness - TXT204

In some cases, an accused has been deemed to possess the requisite knowledge for an offence where he/she deliberately refrained from making inquiries or wilfully shut his/her eyes in fear they may learn the truth (sometimes referred to as *'wilful blindness'*)

- Courts in Australia have been reluctant to equate wilful blindness with actual knowledge
- *Kural v The Queen (1987)* - HC had to determine the meaning of *'intention to import a prohibited import*' & held that this intention did not require actual knowledge of what was being imported - a belief falling short of actual knowledge could sustain an inference of intention [at 505]
    - Majority pointed out that wilful blindness was not an alternative fault element for this offence, it was simply evidence that a jury could use to infer intention
- *Pereira v DPP (1982)* - HC considered the offence of possession of a prohibited import in contravention of the *Customs Act* 1901 (Cth)
    - delivered cricket balls & jewellery case with cannabis resin in it but had not opened the package before she was raided
    - Trial Judge directed the jury as to the importance of proving knowledge & that wilful blindness is the equivalent of knowledge
    - The jury was directed that the accused could be considered wilfully blind if her suspicions about receiving a parcel from o/s were aroused & she refrained from making any inquiries for fear that she would learn the truth
    - HC referred to previous decision in *Kural* & held that in contrast to the offence of importing a prohibited import, the offence of the possession of a prohibited import DID require **actual knowledge** (not imputed knowledge)
    - A state of mind less than actual knowledge was not sufficient
    - However the accused's suspicion coupled with a failure to inquire may be evidence from which a jury can infer knowledge [at 220]
- The majority decisions in *Kural* and *Pereira* relegate wilful blindness to an evidential role which seems to echo the restriction of the concept of oblique intention

Recklessness - TXT205 & Activity 1.7(3)

It describes the state of mind of the person who, while performing an act, is aware of the risk that a particular consequence is *likely* to result from that act

- Awareness of a risk is the essence of recklessness
- However this fault element is also formulated as one of knowledge, foresight or realisation that a consequence is likely to result
- The usual shorthand for recklessness is having foresight of the likelihood of a consequence or circumstance occurring
- An accused is said to be reckless when they engage in conduct (act or omission) in the knowledge that a consequence is a probable or possible result of their conduct: *R v Crabbe*
- Recklessness in relation to murder in Australia is defined as foresight of a **probable** consequence, and in relation to other offences, as foresight of a **possible** consequence: *R v Crabbe (1985)*
- An accused may also be said to be reckless where he/she is aware of the possible existence of certain circumstances but acts regardless of their existence (eg. Sexual penetration with possibility of no consent)

- It is treated on the same scale as intention because of the notion of blameworthiness
- What is important is that recklessness relates to a subjective attribution of awareness of risks that are substantial and the 'real and not remote' chance that the consequences will occur: *Boughey v The Queen (1986)* [at 21] per Mason, Wilson & Deane JJ

Recklessness & Indifference - TXT206

s18(1)(a) *Crimes Act 1900* (NSW): Murder shall be taken to have been committed where the act of the accused, or thing by him/her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life

In NSW - it requires foresight of the probability of death; foresight of probability of grievous bodily harm is not enough (*Royall v The Queen* at 396 per Mason CJ)

Under common law = it was not necessary that an accused's knowledge of the probable consequences of their actions be accompanied by indifference (*R v Crabbe)*

Eg. DR carrying out high risk surgery on patient with consent...

2 defences could be raised:-

1 - onus is on accused to raise some evidence that the conduct was justified - defence of necessity

2 - adopt a narrower definition of recklessness by requiring the accused's risk taking to be **unjustifiable**, with the burden of proving this quality of the conduct falling on the prosecution

- In deciding whether an act is unjustifiable, its social purpose & social utility is impt
- Recklessness (in this sense) could be defined as substantial & unjustifiable risk taking
- Eg. DRs regularly foresee the risk of harm occurring, but as the risk is 1 that is socially justifiable, DRs are not considered to be reckless
- This notion was adopted by the *Criminal Code (Cth) - s5.4(1) & (2)* - TXT207
- This code definition of recklessness has been applied in ACT, NT & SA

Recklessness & Wilful Blindness - TXT207

- The HCA in *Crabbe* made it clear that the test of recklessness for murder at common law is the knowledge that death or grievous bodily harm will probably result from one's actions
- For offences other than murder, the courts have not applied the high level of recklessness based on foresight of probable consequence
- *R v Coleman* - NSW CCA held that for all statutory offences other than murder, recklessness is defined as the foresight of possibility not probability [at 476]
- As a result of these cases, it is impt that the trial judge direct the jury as to the approp meaning of recklessness
- *La Fontaine v The Queen* - Gibbs J made 2 suggestions regarding recklessness:-
    - In murder trials, a direction concerning the issue of recklessness should '*only be given where the facts of the case make it a practical issue*'
    - He suggested that the term 'reckless' should not be used in the trial judge's direction to the jury as it is liable to confuse

- Rather, '*it is enough to tell [the jury] that it is only if the accused actually knows that his/her act will probably cause death or grievous bodily harm that he/she can be convicted of murder*' [at 77]

In the UK: *Commissioner of Police of Metropolis v Caldwell* - House of Lords held that recklessness has 2 meanings - (1) it embraces the subjective awareness of risk (the person who is aware of a risk but goes ahead in any case) - (2) also embraces an objective aspect (the person who fails to appreciate the risk when the risk would be obvious to the reasonable person [at 354]

- In Australia, the *Caldwell* approach to recklessness continues to be influential with some judges - an objective form of inadvertent recklessness applies to the statutory offences of sexual & indecent assault in NSW

Negligence - TXT209 & Activity 1.7(3)-(4)

- Is measured on an objective standard
- Because of this, it does not sit well with the concept of the fault element of a crime as a 'guilty mind' or a subjective state of mind
- Negligence may apply to any form of the physical element
- The objective standard is generally that of *reasonableness* (reasonable person)
- The accused's behaviour is assessed by reference to what a hypothetical reasonable person would have known, foreseen or done in the circumstances
- Often it will be difficult to distinguish recklessness from negligent conduct
- The distinction lies in the accused's subjective awareness of the danger he/she is creating: *Andrews v DPP (1937) AC 576*
- Simple lack of care that may constitute civil liability is normally not enough for a crime to be committed negligently

Leading case is *Nydam v The Queen* (throwing petrol on 2 women & igniting it) - The court stated that for manslaughter by negligence to be made out, it must be proved that the accused's behaviour involved:-

"*such a great falling short of the standard of care which a reasonable (person) would have exercised and which involved such a high degree of risk that death or grievous bodily harm would follow that the doing of the act merit(s) criminal punishment*" [at 445]

- The court found that the weight of authority favoured an objective rather than subjective test
- The *Nydam* test as adopted by s5.5 of *Criminal Code* (Cth)

Strict Liability & Absolute Liability Offences - SG13 & TXT214 & Activity 1.8

There are 3 types of offences:-

1. Offences which have a (subjective) **fault element** (*mens rea)*
2. **Absolute liability offences** (where no fault element needs to be proved)
3. **Strict liability offences** (where no fault element needs to be proved - but evidence of honest & reliable mistake of fact is open to the accused)

- It will be a matter of statutory interpretation as to the category which the offence falls

- Common law = there is a range of matters that may be considered in construing the classification of an offence (NSW, Vic & SA)
- Code jurisdictions = the type of offence is constructed solely by the provisions of the section creating the offence & the relevant *Criminal Code* (Qld, WA & Tas)
    - If the section creating the offence does not contain a fault element, the provisions of the relevant Code relating to criminal responsibility will apply
- *Model Criminal Code* adopts a different approach which requires the legislature (rather than courts) to determine in advance whether or not criminal offences dispense with fault elements (Cth, NT & ACT)
- Strict & liability offences are creatures of statute - the Prosecution need only prove the accused committed the physical element of the crime

TXT215 - Gibbs CJ pointed out 4 factors which need to be assessed in determining whether or not the presumption of subjective fault has been displaced in *He Kaw Teh v The Queen*:-

- The language of the section
    - if the section creating the offence uses words such as "knowingly", "dishonestly" or "wilfully", it will be difficult to show that the presumption of subjective fault has been displaced
    - the absence of such words does not immediately imply that an offence will be one of strict/absolute liability - other facts may be taken into account
- The subject matter of the statute
    - If the subject matter of the statute is to regulate behaviour in some way, & the prohibited acts are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty, then it is likely that the presumption of subjective fault will be displaced
- Consequences for the community
    - This requirement is generally weighed against the potential consequences for the accused if convicted
    - Consequences to the community have outweighed those for the accused in the case of environmental damage (*Allen v United Carpet Mills (1989)*), and speeding offences (*Kearon v Grant (1991)*) & the presumption of subjective fault has been displaced
- Potential consequences for the accused
    - The more serious the potential consequences for the accused on conviction, the less likely it is that the presumption of subject fault will be displaced
    - *He Kaw Teh v The Queen* - HC majority held that severe penal provisions relating to the importation & possession of heroin enforced the presumption that subjective fault was required & should not be displaced
    - If the potential consequences to the accused involve a financial penalty, it is likely the presumption of subjective fault will be displaced

Absolute Liability Offences

Offences which do not require *mens rea* - conviction is secured simply by proving *actus reus*

- Rationale - requiring proof of actual state of mind of accused @ the time of *actus reus* would impose an onerous burden on the prosecution

- The imposition of absolute liability would encourage people to take many precautions & case to avoid the prohibited act, given the social ramifications etc
- Because of its severity, absolute liability offences are quite rare
- Examples of some absolute liability offences - TXT217

Strict Liability Offences

Similar to absolute liability offences in that there is no *mens rea* requirements - conviction is secured by simply proving the *actus reus*

- However if the D argues that he/she was under an honest, reasonable mistake of fact (HRMF) the prosecution will need to negate that claim beyond all reasonable doubt to secure a conviction
- D has the evidentiary burden to raise HRMF, otherwise there is no *mens rea*
- Prosecution then has to negative this HRMF beyond reasonable doubt - it is thus a persuasive burden on the prosecution
- The defence of a HRMF originated from *Proudman v Dayman* - Activity 1.8(7)

Mistake of Fact & Strict Liability Offences - TXT218

The type of mistake of fact which negates the fault element as a defence at common law would need to satisfy the following components:-

- There must be a mistake & not mere ignorance;
- The mistake must be one of fact & not law;
- The mistake must be honest and reasonable; and
- The mistake must render the accused's act innocent.

In TAS & ACT (MCC) - the defence which negates the fault element is similar to that at common law in that it is only available where no offence would have been committed on the facts as they were believed to be

In QLD & WA (Code) - the defence which negates the fault element is broader in that it enables a mistaken belief to lead to a conviction for a lesser offence as well as to an acquittal - if an accused honestly & reasonably believed in facts that would render him/her guilty of a lesser offence/lower penalty, then he/she can be convicted of that lesser offence or given a lower penalty (so the 4th component at common law does not apply here)

Mistake rather than Ignorance - TXT219

Proudman v Dayman (1941)

- Facts: The D was charged with having an unlicensed driver drive their car
- Held: D was guilty, unless at the time of the driving, he was under an honest & reasonable belief that the driver was licensed
- what will be sufficient to constitute a mistake - this was outlined in *State Rail Authority v Hunter District Water Board*:-
    - A positive belief that the act was permissible will constitute a mistake
    - The absence of a reason to believe that the facts were otherwise will not constitute a mistake
    - The failure to consider whether the facts were otherwise will not constitute a mistake
    - A mistake can only be made where this is a positive or affirmative belief present

- A positive belief is more than a mere absence of knowledge or ignorance
- The accused must have turned their mind to the relevant facts: *Gherashe v Boase (1959)*

Green v Sergeant (1951)

- Accused was charged with killing native game on proclaimed sanctuary
- Accused claimed he did not know it was a sanctuary
- Martin J held there was no defence available because his ignorance does not necessarily mean that he had an honest belief that would make his actions innocent
- Inadvertence will not amount to a mistake: *Von Lieven v Stewart (1990)*
- The belief must also relate to the elements of the particular crime: *State Rail Authority (NSW) v Hunter Water Board (1992)*

Mayer v Merchant (1973) 5 SASR 567

- Tanker overloaded with distillate
- SC majority agreed the accused should be acquitted but on the basis that the appropriate defence was that of an act of a stranger
- The court considered it was not necessary to show the accused had thought about whether the load in Q was overweight (defence of mistake of fact)
- The accused's ignorance was irrelevant
- The Q concerned was whether or not the accused had a general belief that a certain # of gallons of distillate would produce a load of certain weight & whether this was an honest and reasonable belief [at 558]
- The SC was prepared to look at whether a general mistake had been made, rather than assessing the accused's ignorance of the actual weight of the load
- This suggests that the courts may take a rather flexible approach to the distinction btw ignorance & mistake

Mistake of Fact - TXT221

- At common law, the mistake must be one of fact & not law: *He Kaw Teh v The Queen*
- s14 Criminal Code (TAS) - the mistake must relate to a 'state of facts'
- s36 & s43AX *Criminal Code* (ACT & NT) - the mistake must relate to 'facts' whereas in other code jurisdictions, the words 'state of things' is used
    - these words have been interpreted to mean a belief in relation to 'present' facts rather than future events or consequences: *R v Gould and Barnes (1960)*
- it is often difficult to distinguish between fact & law & there are no clear tests for determining the difference between the two
- *"Generally speaking, a fact is something perceptible by the senses, while law is an idea in the minds of [individuals] ... the definition of a fact is something perceptible by the senses needs qualification in one respect. A state of mind is also a fact, though not directly perceptible by the senses"*
- *Australian Fisheries Management Authority v Mei Ying Su (2009) 255 ALR 454* - he had mistakenly believed that a red line on the boat's global positioning system unit represented the Australian fishing zone
- In comparison - Qs concerning the effect of statutory provision, the elements of an offence, or whether a person or thing falls within a statutory description, are said to be matters of law: *Ianella v French (1968)*
- If there is some mixture btw the two - a mistake as to the existence of a compound event consisting of law & fact the mistake will generally be treated as one of fact: *R v Thomas (1937)*

- If a mistaken belief is flawed by an earlier mistake as to a relevant & important fax, the mistake will be taken to be one of fact: *Griffith v Marsh (1994)*
- *Thomas v The Queen (1937)* - accused was convicted of bigomy but HC allowed appeal & quashed conviction on the basis of honest & reasonable mistake of fact (thought his former marriage was void)

Honest & Reasonable Mistake - TXT222

The mistake by the accused must not only be honestly held, it must also be based upon reasonable grounds: *Proudman v Dayman*

- An honest belief is simply one that is held in fact: *GJ Coles & Co Ltd v Goldsworthy (1985)*
- A belief based on reasonable grounds is one that is based upon the accused's 'appreciation of primary objective fact that is in reason capable of sustaining the belief': *GJ Coles*
- A mistake made carelessly is not a reasonable one: *GJ Coles*
- *Australian Fisheries Management Authority v Mei Ying Su (2009)* - Federal Court accepted that s9.2 *Criminal Code (Cth)* requires the accused's belief to be objectively reasonable & this may be 'assessed by reference to the subjective circumstances in which the accused was placed, including their personal attributes & info available to them at the time'

Mistake must render the accused's act innocent - TXT222

At common law & in TAS, NT & ACT - an honest & reasonable but mistaken belief in a set of facts will only exculpate an accused if the truth of the belief would mean that no offence was being committed, rendering the accused act as innocent: *Proudman*

- Innocent = not a breach of the criminal law
- *Bergin v Stack (1953) 88 CLR 248* - the accused's act of selling liquor after 6pm in a club that didnt have a liquor licence & at a time when no club could be licensed to sell liquor would not have rendered him innocent if they accepted he did not know the club did not have a liquor license because the act was still in breach of criminal law

Burden of Proof - TXT223

The Prosecution bears the legal burden of proof in disproving a mistake of fact: *Proudman*

The Defence bears the evidentiary burden of providing evidence of an exculpatory mistake of fact or pointing to evidence in the Prosecution's case from which a mistake can be inferred: *He Kaw Teh*

Criminal Negligence & Due Diligence - TXT223

There are statements to the effect that there may be a scope for developing a defence of due diligence at common law (indpt of a defence of honest & reasonable mistake) however such a defence does not exist at common law - statutory provisions may recognise such a defence

- It appears that the defence of honest & reasonable mistake of fact is not equivalent to an absence of negligence or presence of due diligence: *Australian Iron & Steel P/L v Environment Protection Authority (1992) 29 NSWLR 497*
- This is because taking reasonable steps to avoid an event is not the same as making a reasonable mistake
- Contrast: *Allen v United Carpet Mills P/L* - single judge of SCV was prepared to accept that a defence of taking all reasonable care & diligence could be subsumed with the concept of honest & reasonable mistake & should be available to offences of strict liability (Nathan J in obiter)
- For regulatory offences imposing strict or absolute liability, the legislature often makes available the defence of 'due diligence'
    - Due diligence is in law the converse of negligence

- The Q of whether an accused has taken 'reasonable care' is a Q of fact for the Jury or Magistrate & it seems different standards of care have been applied for different types of offences
- In Australia, due diligence is a statutory defence for many consumer, corporate & environmental offences
- Reliance on legal advice (even if mistaken) may support a claim of due diligence

Mistake of Law - TXT224 & Activity 1.9

A mistake of law has been held to occur where the accused made a mistake as to the legal effect or legal significance of facts known to him/her (*Pollard v DPP (Cth) (1992))* and where the accused has mistakenly believed that the act in Q was lawful because it was unregulated or because the requirements of law had been satisfied: *Von Lieven v Stewart (1990) 21 NSWLR 52*

- Mistake of law or ignorance of law will generally not provide an accused with a defence to a crime: *Pollard v DPP (Cth)*
- Policy reasons for the doctrine include:-
  - The impossibility of ascertaining whether the accused was actually ignorant of the law & the difficulty in distinguishing between exculpatory & non-exculpatory mistakes of law
  - The admission of the defence would encourage ignorance of law
  - Citizens have a legal duty to acquaint themselves with their legal obligations
  - It would allow the substitution of a mistaken view of the law for what the law actually is
- There are 4 main exceptions to the doctrine that ignorance of the law is no excuse:-
  - (1) knowledge of the unlawfulness as a *fault element*
  - (2) The defence of claim of right
  - (3) The non-discoverability of laws
  - (4) The statutory defence of "with lawful excuse"
  - Cultural implications - Activity 1.9(2)

We will examine these exceptions in turn:-

<u>Knowledge of unlawfulness as a fault element</u> - TXT226

- Some offences require knowledge of unlawfulness as an element of the offence
  - Eg. Perjury requires not only the accused to swear to something that is not true, but also do it 'wilfully' and 'corruptly'
- In this offence, the term wilfully means dishonestly, or at least awareness the behaviour was unlawful
- A mistake of law may exonerate the accused in circumstances where knowledge of unlawfulness is an element of the offence
- This approach is in NT, QLD & WA (Criminal Code)

<u>The Defence of Claim of Right</u> - TXT227

- A person who honestly believes they are entitled to do what they are doing may be afforded the defence of an honest claim of right: *R v Nundah (1916) 16 SR (NSW) 482*

- The defence is generally relevant to a situation where an accused has stolen, damaged or destroyed property & the fault element of the offence is negated by the existence of an honest claim of right to do the prohibited act: *R v Love (1989) 17 NSWLR 608*
- The belief must be honest, but it need not be reasonable: *R v Love (1989)*
- What is essential is that the accused believed there was a claim of right, regardless of whether or not one exists at law
- *R v Bernhard (1978)* - mistress demanding money to keep quiet about affair (conviction quashed on appeal)

The Non-Discoverability of Laws - TXT227

- Ignorance or mistake of law may afford an excuse where an offence is committed before publication of the law has been brought to the notice of the accused, or in circumstances which acquisition of knowledge of the existence of law is impossible
- *R v Bailey (1800) 168 ER 651* - accused charge of statute within weeks of being passed when he was on the high seas & impossible to know the law (pardoned)
- *Lim Chin Aik v The Queen (1963) AC 160* - judicial committee rejected the maxim that ignorance of the law is no excuse on the ground that non-publication of the order excluded the operation of the maxim (remaining in Singapore as a prohibited person)
- An argument based on non-discoverability of laws is difficult to establish in Australia because states are published by the Govt printer & are now available on the internet & there is usually a period of time before they come into effect
- NT, QLD & Cth have some recognition of a defence of mistake or ignorance of delegated or subordinate legislation & it may be getting increasing support in other jurisdictions given the sheer number of regulations passed each year

The Statutory Defence of with Lawful Excuse - TXT229

- An accused may be afforded this defence if they mistakenly believe there was a lawful excuse to do what they did
- This defence only applies to statutory crimes that require the criminal act be performed "without lawful excuse"
- *R v Smith (1974) QB 354* - CA held the accused's mistaken belief that he had a lawful excuse to destroy the property was a good defence (he thought it was his)
- This shows the readiness of courts to take into account a mistake in relation to the legality of an act where a statutory provision allows for this
- *Ostrowski v Palmer (2002) 128 A CRIM R 56* - reliance on incorrect advice from those in authority
    - HC made it clear that mistaken advice from an official could not convert a mistake of law into one of fact (fishing for rock lobster)

Concurrence of Physical & Fault Elements - SG15 & TXT231 & Activity 1.10

There is a general principle of criminal responsibility that requires that the physical elements of a crime must coincide with the fault element of that crime (assuming the crime requires proof of fault ie. Mental element)

- So in order for an accused to be convicted of an offence, it must proved that the fault element coincided with (or existed) at the same time as the physical element: *Ryan v The Queen (1967)*
- This model of criminal responsibility separates an accused's thoughts from their actions
- This dualist approach to responsibility has been criticised
- RA Duff - in practice, ordinary people do not adopt such a refined notion of human behaviour which separates act from will
- Ludwig Wittgenstein - intending to do something is not a mental state dissociated from the act but rather part & parcel of the act; people thus make a global judgment of behaviour that encompasses both act and attitude
- This dualist approach also causes problems with separating voluntariness from the fault element of a crime
- Occasionally, the dualist approach causes a problem with the concurrence of the fault/physical elements - this has tested the ingenuity of the courts
    - The courts have occasionally stretched this requirement such that the fault element has been imposed upon a series of acts or a 'continuing act': *Jiminez v The Queen (1992) 173 CLR 572*

Fault Element imposed upon a "series of acts" - TXT232

- *Thabo Meli v The Queen (1954) 1 WLR 228* - the fault element & physical element coincided because the accused possessed the requisite fault element at the time they started the series of acts (got victim drunk, hit him in the head, pushed him over cliff, died of exposure)
    - Frame-by-frame showed 2 acts - attack in the hut (fault element but was not the cause of death) & rolling victim off cliff (cause of death but no fault element)
    - Their Lordships preferred to regard the whole of the conduct as one indivisible transaction causing death or as one continuing act
- This 'series of act' approach to the coincidence of the fault element & *actus reus* has been followed in *McFarland and Holland (1977) 1 NSWLR 714*

Fault Element imposed upon a "continuing act" - TXT232

- Another way to approach concurrence is to view the physical element as a continuing act
- *Fagan v Metropolitan Commissioner of Police (1969) 1 QB 439* - the relevant act was a continuing one which started when the wheel was driven onto the constable's foot & ended when it was removed [at 455]
    - The accused had argued the act of the wheel moving onto the victim's foot occurred without the fault element (rejected)
    - Viewed this way, the fault element could be super-imposed upon the physical element
    - *"it is not necessary that [the fault element] should be present at the inception of the [physical element]; it can be superimposed upon an existing act. On the other hand the subsequent inception of [the fault element] cannot convert an act which has been completed without [the fault element] into an assault"* [at 445]
- *R v Miller (1983) 2 AC 161* - the failure to act after awareness of a dangerous situation was enough to make out criminal responsibility
    - accused (homeless man) was charged & convicted of arson
    - Arson requires a fault element of intention or recklessness as to damage to property
    - The problem of concurrence arose b/c at the time the initial act of damage occurred, the accused lacked intention or recklessness as to damage
    - Prosecution relied on the accused's recklessness *after* he had become aware the bed was on fire

- English CA took a 'continuing act' approach to the problem of concurrence & justified it on the basis of duty arising from the creation of a dangerous situation
- CA held that once the accused became aware of the danger he created, a duty arose to take reasonable steps to counteract that danger

- *Jiminez v The Queen (1992) 173 CLR 572* - HC was prepared to look at antecedent conduct in order to impose criminal responsibility
  - HC also took a relaxed approach in this case
  - This is an impt decision because it demonstrates that concurrence problems are not restricted to crimes that contain fault elements
  - This case also raises concerns about voluntariness
  - Accused charged & convicted of causing death by culpable driving for falling asleep at the wheel & killing the front passenger
  - The physical element of the offence is driving and causing death
  - There is no fault element required, although Prosecution must prove that the accused was driving the car in a manner dangerous to the public "at the time of the impact"
  - The principle of concurrence here requires the accused's driving to be both dangerous & cause death
  - The facts of the case posed a problem because *at the time of the impact* that caused death the accused had momentarily fallen asleep & he therefore argued he was not driving
  - HC affirmed that a person falling asleep is not acting voluntarily & so such person cannot be regarded as driving whilst asleep
  - Majority solved problem by focusing on earlier conduct
  - The court examined whether the accused was driving in a manner dangerous to the public *before* he fell asleep which meant examining whether he was so tired his driving was dangerous
  - This approach is an inversion of the continuing act approach
  - The court are looking at earlier conduct which is sufficiently culpable to ground criminal responsibility; rather than conduct after a dangerous event like *Miller*
  - HC was prepared to relax the strict requirement of concurrence
- In all, the courts have shown a willingness to construct occurrence by either imposing the fault element over a series of acts or upon a continuing act