

CHAPTER FIVE: *MENS REA*, CONCURRENCE, CAUSALITY

INTRODUCTION

Article 15 of the New York Penal Law pertains to the levels of mental culpability. As the previous chapter refers to the *actus reus* regarding culpability, this chapter defines the culpable mental states. The Penal Law defines mental culpability by the four levels similar to those provided in the Model Penal Code: intentionally, knowingly, recklessly, and criminal negligence.

The minimum requirement for culpability is a voluntary act or voluntary omission. Mental culpability defines the level at which the actor should be held responsible for the voluntary act. According to the Court of Appeals of New York, “[t]he underlying conduct, exclusive of the mental element, is the same.”¹ The evidence and circumstances surrounding the act determines the defendant’s mental state.

The reader may notice some differences between New York State’s mental culpability labels and the Model Penal Code’s. New York uses “intentionally” in place of the Model Penal Code’s purposeful mental state and criminal negligence in place of negligently. The levels of mental culpability are found in Section 15.05 of the Penal Law.

This chapter will present the statutory provisions of each level of *mens rea* in descending order of culpability. The chapter will also provide case law examples to provide a better understanding of *mens rea*. This chapter will also discuss strict liability and causality as they pertain to *mens rea*.

CHANGES IN THE PENAL LAW

Section 15.05 was new to the Penal Law and was meant to add definitional clarity to matters where *mens rea* is an element to an offense. Prior to the 1965 revision of the Penal Law, judicial decisions were hampered by lack of definitive legislative guidance. Under previous statutes, terms such as “willfully,” “intentionally,” “designedly,” “maliciously,” “with culpable negligence,” and “negligently” were so hazy that determining the level of culpability in an offense was very difficult. The new Penal Law, under section 15.05 reduced the field of culpable mental states to four.

RESOURCES

The text of §15.05 is found at the following link

http://wings.buffalo.edu/law/bclc/web/NewYork/ny15_05.htm

The following links provide full-text versions of cases discussed in this chapter,

People v. Strong: <http://wings.buffalo.edu/law/bclc/web/nystrong.htm> and

People v. Hernandez: <http://wings.buffalo.edu/law/bclc/web/nyhernandez.htm>

FOUR LEVELS OF *MENS REA*

Intentionally

According to **Section 15.05(1)**:

A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.

Mens Rea, Concurrence, Causality

The following case describes the elements of intentional murder and compares them to reckless murder.

PEOPLE V. GALLAGHER
Court of Appeals of New York
69 N.Y. 2d 525 (1987)

Opinion By: Kaye, J.

The issue in this case concerns whether a defendant charged in a single homicide and indicted on one count of intentional murder and one count of depraved mind murder can be convicted on both counts.

The defendant, an off-duty New York City police officer, shot and killed a fellow police officer after an all-night St. Patrick's Day celebration in which large quantities of alcohol were consumed. The defendant was charged with murder under §125.25(1) and §125.25(2), both of which pertain to murder in the second degree. Subsection (1) refers to intentional murder. Subsection (2) refers to depraved indifference murder which requires a reckless level of mental culpability. The trial court instructed the jury on both counts. The jury convicted defendant on intentional murder and reckless manslaughter (a lesser included offense under depraved mind murder).

The Appellate Division upheld the conviction of intentional murder and reversed the manslaughter conviction on the theory that a defendant should not be punished twice for the same criminal act.

The Court of Appeals disagreed with both the trial court and Appellate Division. According to the Court of Appeals, “[o]ne who acts intentionally in shooting a person to death – that is, with the conscious objective of bringing about that result (Penal Law §15.05[1]) – cannot at the same time act recklessly – that is, with conscious disregard of a substantial and unjustifiable risk that such a result will occur (Penal Law §15.05[3]).” The two second degree murder counts, intentional murder and depraved mind murder, are inconsistent with each other for the same offense. “[An] act is either intended or not intended; it cannot simultaneously be both. Guilt of one necessarily negates guilt of the other. “Thus, where the shooting (the act) and the death (the result) are the same, a defendant cannot be convicted twice for the murder, once for acting ‘intentionally’ and once for acting ‘recklessly.’”

In cases such as these, trial courts must direct the jury that if it renders a verdict of guilty upon one count, it must render a verdict of not guilty upon the other. Trial courts may not permit juries to find defendants guilty of both.

The Court of Appeals reversed the Appellate Court's order and ordered a new trial.

Knowingly

According to **Section 15.05(2)**:

A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists.

Intentionally and knowingly are fairly similar concepts. The main distinction between them is that intentionally entails a conscious disregard to cause a result by one's conduct, whereas knowingly entails an awareness that the result is practically certain to result from such conduct.

Recklessly

According to **Section 15.05(3)**:

A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.

Criminal Negligence

According to **Section 15.05(4)**:

A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

Recklessly and criminal negligence are also similar concepts, although their differences are more intricate. Both involve a substantial and unjustifiable risk that a result will occur, although the reckless individual consciously disregards the risk while the criminally negligent individual fails to perceive the risk. Secondly, both involve a gross deviation from the standard of care or conduct that a reasonable person would observe in the same situation. Thus, both levels of culpability include subjective and objective elements.

The following case exemplifies the nuanced shades that differentiate the mental states and the accompanying potential difficulties courts may have in deciding which level to apply to an offense. In the following case, the difficulty between recklessness and criminal negligence is evidenced by the dissent's opinion.

PEOPLE V. STRONG, ALSO KNOWN AS OMAR ALI SHEREIFF
Court of Appeals of New York
37 N.Y. 2d 568 (1975)

Opinion By: Jasen, J.

The issue in this case concerns whether the trial court should have instructed the jury on the lesser crime of criminally negligent homicide.

The defendant in this case testified that he had belonged to the Sudan Muslim faith since birth and had become one of its leaders. One of the central beliefs of the religion was "mind over matter" whereby defendant claimed that he could stop a follower's heartbeat and plunge knives into the chest with no injury. He claimed that he had performed this ceremony successfully in the past. When defendant performed this same ritual on one of the followers, Kenneth Goings, with a hatchet and three knives, the follower died from his wounds.

The trial court refused the defense's request to instruct the jury on the crime of criminally negligent homicide (§125.10), and the jury convicted defendant of manslaughter in the second degree. The Appellate Court upheld the conviction.

Mens Rea, Concurrence, Causality

In its analysis of the distinction between recklessness and criminal negligence, the Court of Appeals stated that in one instance, “the actor perceives the risk, but consciously disregards it. In the other instance, “he negligently fails to perceive the risk.” Additionally, the Court acknowledged, “[c]riminal recklessness and criminal negligence...may...be but shades apart on the scale of criminal culpability.” The Court further stated that not every defendant charged with second degree manslaughter is entitled to a jury instruction on criminally negligent homicide.

The determination of whether a defendant is entitled to a charge of the lesser crime depends upon the evidence relating to his mental state at the time of the crime. In this case, defendant claimed to have performed the “mind over matter” knife plunging ceremony “countless” times over the past 40 years without causing an injury.

The Court in this case viewed “the record as warranting the submission of the lesser charge...since there is a reasonable basis upon which the jury could have found that the defendant failed to perceive the risk inherent in his action.” The testimony by both defendant and one of his followers indicated that the victim himself perceived no danger since he had volunteered to participate. “The defendant’s conduct and claimed lack of perception, together with the belief of the victim and defendant’s followers, if accepted by the jury, would justify a verdict of guilty of criminally negligent homicide.” Even if the jury did not believe that defendant was capable of performing such a procedure without harm to the victim, it could still determine that defendant was sincere in his belief that he did not perceive any risk of harm to the victim.

In sum, the Court stated that other “objective” indications of defendant’s state of mind should be considered to corroborate the defendant’s subjective articulation of the facts.

The Court reversed the conviction and ordered a new trial.

Dissent By: Gabrielli, J.

The dissent rejected the majority’s opinion that a verdict of criminally negligent homicide would be justified based on the belief of the defendant, the victim, and the defendant’s followers. According to the dissent, “The Appellate Division was correct in holding that ‘Defendant’s belief in his superhuman powers, whether real or simulated, did not result in his failure to perceive the risk but, rather, led him consciously to disregard the risk of which he was aware.’”

The victim, Goings, volunteered to be part of the ceremony. However, just prior to being stabbed, he objected to its continuance by saying, “No, father.” The defendant responded, “It will be alright, son.” Additionally, the defendant testified that after plunging the knives, he noticed blood seeping from the victim’s wounds and attempted to stop the flow by bandaging the victim. According to the dissent, “[I]t is readily apparent that the...defendant saw no risk of harm in the ceremony, but, rather, that he thought his powers so extraordinary that resultant injury was impossible.”

“Simply stated, a reckless offender (manslaughter) is aware of the risk and consciously disregards it; whereas, on the other hand, the ‘criminally negligent’ offender is *not* aware of the risk created and cannot thus be guilty of disregarding it.” The lesser charge was not warranted by the evidence.

Other cases, however, more clearly distinguish the nuances between recklessness and criminal negligence. In *People v. Gates*, defendant was convicted of criminally negligent homicide. Defendant struck the rear of a vehicle that was in front of him. He swerved to avoid the car only when the passenger in his car screamed his name and attempted to grab the wheel. Defendant assumed he only clipped the car in front and kept driving. He was arrested 2 ½ hours later at a location about a quarter of a mile from the accident. He was found slumped over his steering wheel. A breathalyzer test administered 3 ½ hours after the accident revealed his blood alcohol to be .15%. Defendant had also killed the passenger of the car he hit. He was convicted

for criminally negligent homicide. On appeal, defendant claimed that the evidence did not support the verdict beyond a reasonable doubt.

The Supreme Court of New York held that in order to sustain a verdict of criminally negligent homicide, the prosecution must prove that defendant engaged in conduct that involved a substantial and unjustifiable risk of death and constituted a gross deviation from the standard of conduct or care that a reasonable person would observe in the situation. A defendant's awareness of the risk determines the degree of culpability. In this case, "the jury's verdict is adequately supported by the evidence since 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" ²

STRICT LIABILITY

In New York, an offense that does not include an element of culpability in its definition is a strict liability offense. The Court of Appeals has held that offenses of strict liability are those where the statute specifies only an *actus reus* and where the legislative history indicates that the offense was one of strict liability. These offenses are rare as most offenses are defined by one of the four culpable mental states. Strict liability offenses typically include those that promote the public health.

In *People v. Ben Nemadi, Sharok Jacobi and Shaben Realty Associates, Inc.* the Criminal Court of the City of New York supported the violation of the window guard law as a strict liability offense. Failure to provide window guards in apartments inhabited by children under the age of 11 is a violation of law. According to the court, this offense requires no *mens rea* "since effective enforcement of a program designed to protect the lives of young children from accidental death and injury resulting from window falls would be illusory if intent were made an element of the offense." The court also enumerated other strict liability offenses, including those controlling the exposure of workers to industrial hazards, the crowding and conditions of living quarters, the mass distribution of food and drugs, and mechanized transportation. ³

In another case promoting the welfare of children, the court upheld the strict liability offense of endangering the welfare of a child when it ruled that the father of a child abused by her drug addicted mother should have removed the child from her mother until the mother was no longer a danger to the child. ⁴

CAUSALITY

Unlike the Model Penal Code, the New York Penal Law does not define causation by statute. But the issue of causality comes into question especially during felony murder cases which will be discussed in greater detail in Chapter Eleven. Prior to 1965, New York followed the agency theory adopted under the common law. The agency theory asserted that felons would be responsible for homicide only if they committed the final act. Since the murder statutes were revised in 1965, the proximate cause theory was imposed by the Penal Law. Murder in the second degree (§125.25(3)) was rewritten with a provision that a person is culpable for felony murder when, during the commission of an enumerated felony or attempt, either the defendant or an accomplice "causes the death of a person other than one of the participants" in the original felony.

In the following case, the Court of Appeals makes the distinction between the common law and current causality interpretations.

PEOPLE V. HERNANDEZ
PEOPLE V. SANTANA
Court of Appeals of New York
82 N.Y. 2d 309 (1993)

Opinion By: Simons, J.

The issue before the Court in this case concerns whether a conviction of felony murder under Penal Law §125.25(3) should be sustained where the homicide victim, a police officer, was shot not by one of the defendants but by a fellow officer during a gun battle following defendants' attempted robbery.

The defendants conspired to ambush and rob a man who was coming to a New York City apartment building to buy drugs. They planned to lure him into the building stairwell where Hernandez waited with a gun. In fact, the man meeting them at the building was an undercover state trooper who wore a transmitter and had a backup team waiting outside. Once the trooper was inside the building, Hernandez accosted him and pointed a gun at his head. An altercation ensued where the trooper announced that he was the police, pulled out his service revolver, and began firing. Hernandez, still armed, ran from the building into a courtyard where he was confronted by members of the backup team. They ordered him to stop. He aimed his gun at one of the troopers and continued toward the trooper. The troopers then began firing and one, Trooper Joseph Aversa, was fatally shot in the head. Hernandez was apprehended after being wounded and Santana was arrested inside the building.

Both defendants were convicted of felony murder and other charges. On appeal, defendants argued that their murder charges should have been dismissed since neither fired the fatal shot. The Appellate Division rejected that argument and held that they were responsible for felony murder because their conduct forged a "critical link in the chain of events that led to Trooper Aversa's death."

The Court of Appeals began its analysis by defining the term "causes the death" in §125.25(3). "The term is used consistently throughout article 125 and has been construed to mean that homicide is properly charged when the defendant's culpable act is 'a sufficiently direct cause' of the death so that the fatal result was reasonably foreseeable." The Court supported the prosecution's view that "it was highly foreseeable that someone would be killed in a shootout when Hernandez refused to put down his gun and instead persisted in threatening the life of one of the back-up officers." Hernandez thus caused the death of Aversa, and "because his attempt to avoid arrest was in furtherance of a common criminal objective shared with Santana," the prosecution also attributed the murder to Santana under the principle of accomplice liability.

Further, according to the court, the causal language used in the felony murder provision is one "where we held that the accused need not commit the final, fatal act to be culpable for causing death." "Unlike defendants and those courts adopting the so-called agency theory, we believe New York's view of causality, based on a proximate cause theory, to be consistent with fundamental principles of criminal law. Advocates of the agency theory suggest that no culpable party has the requisite *mens rea* when a nonparticipant is the shooter. We disagree. The basic tenet of felony murder liability is that the *mens rea* of the underlying felony is imputed to the participant responsible for the killing. By operation of that legal fiction, the transferred intent allows the law to characterize a homicide, through unintended and not in the common design of the felons, as an intentional killing. Thus, the presence or absence of the requisite *mens rea* is an issue turning on whether the felon is acting in furtherance of the underlying crime at the time of the homicide, not on the proximity or attenuation of the death resulting from the felon's acts. Whether the death is an immediate result or an attenuated one, the necessary *mens rea* is present if the causal act is part of the felonious conduct."

The court further articulated that the prosecution still retains the “significant obstacle” in proving that the felons should be held responsible for causing the death beyond a reasonable doubt. And both defendants have an affirmative defense. The defense is available to defendants who do not cause the death, are unarmed, have no reason to believe that the co-felon is armed, and have no reason to believe that the co-felon will engage in conduct likely to result in death or serious physical injury.

The court concluded that the trial court properly instructed the jury as to Santana’s culpability. “The jury was properly charged that more than ‘but for’ causation was required; that it must find the fatal result was the sufficiently direct and foreseeable result of Hernandez’s acts...Foreseeability does not mean that the result must be the most likely event. Undoubtedly, in planning the robbery, defendants did not anticipate that their victim would be a State Trooper...Yet, it was foreseeable that police would try to thwart crime, and Hernandez was aware that police were on the scene at the point he resisted arrest and remained armed.”

The Court of Appeals affirmed the order of the Appellate Division.

REVIEW QUESTIONS

1. A day after arguing with his roommate, a man tells his friends that he’s going to kill the roommate. He then takes a shotgun without permission from a friend’s house, buys three shotgun shells from another friend, goes home, shoots and kills his roommate. The man can be charged with what crime?
 - A. intentional murder
 - B. reckless murder
 - C. depraved indifference murder
 - D. criminally negligent homicide
2. A strict liability offense does **not** consider which of the following elements?
 - A. *actus reus*
 - B. *mens rea*
 - C. voluntariness
 - D. criminal negligence
3. The managers of a petroleum transport corporation allow an employee to clean a tank containing petroleum waste without adequate ventilation. The vapors explode while the employee is inside and kill him. The managers can be charged at what level of mental culpability?
 - A. intentionally
 - B. knowing
 - C. reckless
 - D. criminal negligence

Mens Rea, Concurrence, Causality

4. A pub employee grabs a helplessly intoxicated patron and throws him outside from the top of a flight of stairs whereupon the patron becomes airborne, hits his head on the pavement at the bottom of the stairs, and subsequently dies. The employee can be charged with what crime?
 - A. intentional murder
 - B. reckless murder
 - C. depraved indifference murder
 - D. criminally negligent homicide

5. A convenience store owner who sells outdated milk and causes the illness of several customers is acting with _____ culpability.
 - A. intentional
 - B. knowing
 - C. reckless
 - D. strictly liable

REFERENCES

- ¹ People v. Strong (37 N.Y. 2d 568 (1975))
- ² 504 N.Y.S. 2d 538 (1986)
- ³ 531 N.Y.S. 2d 693 (1988)
- ⁴ People v. Scully (513 N.Y.S. 2d 625 (1987))

ANSWERS

1. A; 2. B; 3. C; 4. D; 5. D.