

## **CHAPTER 5: MENS REA, CONCURRENCE AND CAUSATION**

### **INTRODUCTION**

This chapter deals with three important topics. The first is the *mens rea* or intent element of offenses. Most offenses have at least one *mens rea* element. Some have none and a few have more than one such element. Second is the requirement of concurrence. The *mens rea* must concur with the criminal act or *actus reus*. Finally, if the offense has a harm or result element the acts of defendant must cause the harm.

*Mens rea* is an issue in many cases. This element is probably the most contested of all the elements of a crime, and there are more appellate opinions dealing with this issue than any other. Causation is rarely an issue and concurrence is almost never an issue. However, all three of these must be proven by the prosecution beyond a reasonable doubt to obtain a conviction.

### **MENS REA**

One of the greatest contributions of the Model Penal Code was restricting *mens rea* elements to four clearly defined types of culpability (blameworthiness). Under the Model Penal Code the four types of culpability were “purposely”, “knowingly”, “recklessly” and “negligently”. Texas largely adopted this same format but replaced “purposely” with “intentionally” and “negligently” with “criminal negligence. States like Texas that have adopted a uniform, defined set of mens rea elements have greatly simplified and clarified the law. Prior Codes used a wide variety of inconsistent and undefined terms such as “willfully,” “maliciously,” “with malice,” “deliberately,” *etc.*

As discussed in your text in the section on “The Model Penal Code Standard,” there are two basic types of *mens rea* or intent. General intent is the intent to do the act or omit to do the act. Specific intent is any other type of *mens rea* or intent requirement. Knowing that the victim is a police officer, or wanting a particular harm to occur, are examples of specific intent. Further, an offense can have more than one culpability element. Students must look for both general and specific intent elements in the statutes and in the case law interpreting the statutes.

The culpability provisions in the Texas Penal Code (TPC) are found in ch. 6:

<http://www.capitol.state.tx.us/statutes/docs/PE/content/word/pe.002.00.000006.00.doc>

It is important to note that these forms of *mens rea*, intent or culpability never stand alone. They all apply to or modify some other element of the offense, such as the act element.

Sec. 6.02 (a) and (d) provide

(a) [with some exceptions] a person does not commit an offense unless he intentionally, knowingly, recklessly, or with criminal negligence engages in conduct as the definition of the offense requires. . .

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(d) Culpable mental states are classified according to relative degrees, from highest to lowest, as follows:

- (1) intentional;
- (2) knowing;
- (3) reckless;
- (4) criminal negligence

### **Intentional**

“Intentionally” is defined in TPC sec. 6.03 (a): “A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.” Note that this is a subjective form of culpability. The state must prove that the person, in their mind, had this state of mind. Intentionality can only modify the conduct or result elements. To prove a defendant acted intentionally, the government must prove that the person consciously wanted to engage in the conduct (*e.g.*, did an act dangerous to human life) or consciously wanted to cause the result or harm (*e.g.* wanted the victim to die).

### **Knowing**

“Knowingly” is defined in TPC sec. 6.03 (b):

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

Like intentionally, knowingly is a totally subjective state of culpability. The government must prove that the defendant was aware of the relevant elements. Note that knowledge applies to or modifies (1) the nature of the conduct (2) the existence of certain circumstances (*e.g.*, age of the victim, that the property belonged to someone else) (3) the result or harm (*e.g.*, death or bodily injury to the victim).

Knowingly and intentionally are frequently grouped together in an offense, such as capital murder (sec. 19.03). These are the two most blameworthy levels of culpability and a criminal committed with either of these two will generally be punished at a higher level than if the act were committed with recklessness or criminal negligence. TPC ch. 19 is a clear example of this.

### **Reckless**

“Reckless” or “recklessly” are defined in TPC sec. 6.03 (c):

A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a

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nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Recklessness is both subjective and objective. The subjective portion is in the language "is aware of but consciously disregards." The objective portion is indicated by the language "its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances" This is the hypothetical "reasonable" person. This standard does not consider the subjective state of the actor. It only considers the actor as compared to a hypothetical reasonable person.

Reckless modifies either the circumstances element or the result element. Recklessness is sometimes referred to a conscious risk creation. As will become clear, recklessness is basically criminal negligence (which is totally objective) plus the subjective component of conscious awareness of risk. In terms of culpability and punishment, acts committed recklessly are punished somewhere in between those committed knowing or recklessly on the one hand, and those committed with criminal negligence on the other.

Note that even if the defendant denies subjective awareness of the risk, the judge or jury is not required to believe that denial if it is not credible. For instance, a defendant who points a loaded gun and fires two shots in the direction of the victim, can be convicted of recklessness even if he or she testifies that they did not think the behavior would result in a "substantial and unjustifiable risk" to the victim. An example would be backing up a tractor-trailer the wrong way on a busy traffic lane.

### **Criminal Negligence**

Criminal negligence is the least blameworthy or culpable state of mind. It is defined in TPC sec. 6.03 (d):

A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Criminal negligence is a totally objective standard. The defendant is measure against an "ordinary" or reasonable person. The prosecution does not have to prove any subjective motivation or knowledge on the part of the defendant. Criminal negligence differs from the negligence that creates civil liability (sometimes called "ordinary negligence") in that criminal negligence requires a "gross" deviation from what an ordinary person would have done or been aware of. Ordinary negligence is satisfied by showing any deviation from what a reasonable person would have done. Thus, criminal negligence is harder to prove and is a more blameworthy state of mind than civil negligence. As a general rule, the law does not impose criminal liability for ordinary negligence.

Surrounding circumstances and results of the conduct are the only two other elements that can be modified by criminal negligence. In other words, a reasonable person would have been aware of the risk. The state does not have to prove that the defendant was subjectively aware.

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The line between being convicted of recklessness and criminal negligence is sometimes difficult to see in some of the cases. Examples of behavior that has been found to constitute criminal negligence (but could also be reckless) are (1) speeding and running a red light on a city street at 11:30 pm.; and (2) throwing a brick or large rock at a person.

### **Culpability and Other Elements**

To summarize and clarify, these four forms of culpability can apply to three other elements of crimes mentioned in the TPC. The four types of *mens rea* could theoretically apply to either the (1) forbidden conduct (nature of conduct, act or *actus reus*), (2) the results of the conduct (harm), and/or (3) attendant circumstances. This yields 12 possible combinations (4 x 3). However, all 12 are not provided for in the TPC.

The mental state of intentionality only applies to (1) nature of conduct [act] and (2) results of conduct [harm]. It does not apply to attendant circumstances. Thus, it can never be an element of an offense that the person intended the attendant circumstances to be present.

The mental state of knowingly applies to all three: nature of conduct, results/harm and attendant circumstances. Recklessness and criminal negligence apply only to result/harm and circumstances. As set up in the TPC, a person cannot act recklessly or negligently with regard to the act (nature of conduct). Thus it can never be an element of an offense that a person was reckless or criminally negligent with regard to the act or nature of his conduct. If a combination is not mentioned in sec. 6.03, it cannot be an offense, and a court (acting under sec. 6.02 (b)) cannot read in such an element).

Further it is important to remember that a crime can have more than one *mens rea* component. For instance, one version of capital murder, (sec. 19.03 (a) (1)) requires that the person intentionally or knowingly cause the death of an individual and know that the victim is a peace officer or fireman. Thus the person must knowingly or intentionally cause the result (death of individual) and know of the attendant circumstance (victim is fireman or peace officer).

### **Courts Authorized to Add Culpability Requirements**

In Texas and most states, there is a general presumption against strict liability offenses (offenses without a *mens rea* requirement). Sec. 6.02 (b) and (c) authorizes courts to read in culpability requirements, even if the statute does not provide them.

- (b) If the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element.
- (c) If the definition of an offense does not prescribe a culpable mental state, but one is nevertheless required under Subsection (b), intent, knowledge, or recklessness suffices to establish criminal responsibility.

An example is *West v. State*, 67 S.W.2d 515, 516 (Tex.Crim. App. 1978)

Appellant was charged with criminal trespass under Sec. 30.05(a)(1), supra, which provides: "(a) A person commits an offense if he enters or remains on property or in a building of another without effective consent and he: "(1) had notice that the entry was forbidden; . . . "

The statutory language does not prescribe a culpable mental state. V.T.C.A., Penal Code Sec. 6.02 (b) and (c) requires one nevertheless:

"(b) If the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element. "(c) If the definition of an offense does not prescribe a culpable mental state, but one is nevertheless required under Subsection (b) of this section, intent, knowledge, or recklessness suffices to establish criminal responsibility."

Although Sec. 30.05, supra, does not prescribe a culpable mental state, we hold that a culpable mental state of intentionally, knowingly, or recklessly is required by Sec. 6.02

Thus, although the statute did not say so, the CCA required that the entry or remaining be knowing, intentional or reckless.

This is one of the reasons why it is always risky to rely on just the wording of a statute to determine its meaning. The case law must be consulted to see what has been added by the courts.

An example of where the legislature has specifically stated that courts may not read in a culpability requirement is TPC sec. 49.11. "Proof of Mental State Unnecessary. (a) Notwithstanding Section 6.02(b), proof of a culpable mental state is not required for conviction of an offense under this chapter." If a crime has no mens rea elements, it is termed a "strict liability" crime. (This topic is discussed in your text in Ch.5 under the heading "Strict Liability.").

### **Proof of a Higher Degree of Culpability than that Charged**

TPC sec. 6.02 (e) provides that "Proof of a higher degree of culpability than that charged constitutes proof of the culpability charged." For example, if a defendant is charged only with criminally negligent homicide but the prosecution's case proves it was an intentional homicide, the defendant can be convicted of criminally negligent homicide. Under due process and the Sixth Amendment, the defendant could not be convicted of an intentional homicide (or any crime more serious than criminally negligent homicide) unless specifically charged with such an offense.

## **CONCURRENCE**

The requirement that the criminal act concur with or flow from the criminal intent is not specifically covered in the TPC. It is, however, indirectly covered. First, sec. 6.02 (a), quoted above, requires that before criminal liability can attach a person must engage in some form of "conduct." "Conduct" is defined in TPC sec. 1.07 as "an act or omission and its accompanying mental state." Cases on this concept are extremely rare. An example is *State v. Rose* (1973) found in ch 5 in your text.

## **CAUSATION**

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If a crime has a harm or result element (*e.g.*, death of an individual), the prosecution must prove the defendant's acts caused the result. This is covered in TPC sec. 6.04. It provides that a person is criminally liable for a harm, if the harm "would not have occurred but for" the defendant's conduct. If the harm would not have occurred if the defendant had not acted, the defendant's acts are deemed to be the cause. In a homicide, for instance can we say that "but for" the defendant's acts, the victim would still be alive? If the answer to this question is "yes" there is causation by the defendant. This topic is discussed in your text in the section titled "Cause in Fact." (See also the case of *Dowden v. State*, *infra* ch. 11)

However, sometimes a harm or result can have one or more causes. These are referred to as concurrent causes. Under sec. 6.04 (a) if the defendant's acts and some other cause occur at the same time the defendant is still deemed to be the cause "unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient."

Sec. 6.04 (b) deals with another causation issues.

- (b) A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that:
- (1) a different offense was committed; or
  - (2) a different person or property was injured, harmed, or otherwise affected.

With regard to (b)(1) assume a defendant only intends to give the victim a shove and cause a little pain. The defendant does not intend to inflict serious bodily injury. If only bodily injury (*e.g.* pain) occurs this is an assault under TPC sec. 22.01 (a)(1). This is a class A misdemeanor. Here the offense the defendant intended was an ordinary assault. However, assume the victim falls backward, strikes his head and suffers "serious" bodily injury, the offense is an aggravated assault under sec. 22.02 (a)(1). This is typically a felony of the second degree. Is the defendant guilty of ordinary assault or aggravated assault. Under 6.04 (b) it is an aggravated assault. Although only an ordinary assault was "desired, contemplated or risked" something else actually occurred—a different offense (aggravated assault) was committed.

### **Case on Transferred Intent**

*Aguirre v. State*. Subsec. (b)(2) deals with the concept of transferred intent. A tragic example is *Aguirre v State*, 732 S.W.2d 320 (Tex.Crim.App. 1980). Benny Aguirre was charged with intentionally and knowingly murdering his daughter. The evidence was as follows:

Esther Aguirre testified that she is appellant's [Bennie Aguirre's] ex-wife. Appellant and Aguirre were divorced in 1975 after 15 years of marriage. During the course of that marriage, the couple had four children including the deceased, Elizabeth Aguirre. On February 11, 1978, appellant went to Aguirre's home and demanded that she let him inside. She related that she refused to open the door and ran to the kitchen with Elizabeth. While standing in the kitchen, Aguirre heard a shotgun blast and saw that Elizabeth had sustained a gunshot wound. Aguirre related that the child died within 48 hours of reaching the hospital.

Appellant [Benny Aguirre] testified that he had gone to [Esther] Aguirre's home on February 11 to speak to her about leaving the children alone at night. He testified that when his ex-wife refused to let him into the house, he went to his truck and retrieved a shotgun. He testified that he shot at the door in order to open it and did not consider the fact that someone could have been behind the door. Finally, appellant testified that he knew that three of his four children were probably in the house at the time he fired at the door with his shotgun. 732 S.W.2d at 326.

Aguirre argued that there was no evidence that he had no intent to kill his daughter. He argued that he intended only to kill his ex-wife and therefore is not guilty of intentionally killing his daughter. The CCA rejected his argument.

In his first point of error, appellant contends that there is no evidence to show that he "intentionally and knowingly" caused the death of his daughter. The State argues that when he fired through the door appellant intended to kill his former wife and that felonious intent transferred over to the killing of the child. We agree. V.T.C.A., Penal Code Section 6.04 (b)(2) , provides as follows:

"(b) A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that:

(2) a different person or property was injured, harmed, or otherwise affected."

The jury was charged on the law of transferred intent.

Viewing the evidence in the light most favorable to the verdict of guilty, we find the evidence sufficient to show that appellant was acting with the intent to kill his wife. Under V.T.C.A., Penal Code Section 6.04 (b)(2), this intent carried over to the death of the victim. 732 S.W.2d at 326.

### **Case on Transferred intent and *Mens Rea***

*Zubia v. State*. The defendant/appellant was a member of a street gang who appealed his conviction to the CCA 998 S.W.2d 226 (Tex.Crim.App. 1999). At the time of the shooting Zubia "believed that a rival gang had driven by his house and fired a gunshot at it. He and other gang members drove within range of a rival gang member's house. The appellant fired a gun at people standing in the yard of the house. He hit one of the people, a four-year old child, causing serious bodily injury." 998 S.W.2d at 226

He was convicted of violating the following sec. of the TPC.

#### 22.04. Injury to a Child, Elderly Individual, or Disabled Individual

(a) A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child, elderly individual, or disabled individual:

(1) serious bodily injury;

(2) serious mental deficiency, impairment, or injury; or

(3) bodily injury.

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One of Zubia's arguments was that while intent can be transferred between adult victims, it cannot be transferred when the statute has a specific element that the transferred-intent victim be a child. He intended only to kill or injure an adult. Note that the statute says nothing about whether the defendant must know the victim is a child or that there be a specific intent to injure a child. The CCA affirmed the conviction finding no *mens rea* element relating to age of the victim, and that the State could rely on the doctrine of transferred intent.

One of the appellant's arguments was that, if he intended to shoot the child's adult uncle (as he claimed in his statement to police), under the doctrine of transferred intent the evidence would not prove that he intended to injure a child. The court of appeals held that the injury-to-a-child statute did not require proof of intent to injure a child. *Zubia v. State*, No. 08-96-00096- CR, slip op. at 6-7 (Tex.App.--El Paso March 19, 1998) (not designated for publication):

One sister court has said that the statute does not specifically require scienter with respect to the victim's age, and held that the State need not prove knowledge or intent. *Huff v. State*, 660 S.W.2d 635, 638 (Tex.App.-- Corpus Christi 1983, pet. ref'd). Likewise, other criminal statutes focusing on child victims tend not to require scienter as to age. Knowledge or intent with respect to the complainant's age is not an element of indecency with a child. Tex.Pen.Code Ann. § 21.11(a) (Vernon 1994); *Roof v. State*, 665 S.W.2d 490, 491 (Tex.Crim.App.1984). Where sexual assaults or aggravated sexual assaults ordinarily require the complainant's lack of consent, but if the complainant is a child, consent is not required. Tex.Pen.Code Ann. §§ 22.011(a)(1) (sexual assault); 22.021(a)(1)(A) (aggravated sexual assault); compare to §§ 22.011(a)(2) (sexual assault); 22.021(a)(1)(B) (aggravated sexual assault). Mistake of fact with respect to the complainant's age is likewise not a defense. See *Vasquez v. State*, 622 S.W.2d 864, 865 (Tex.Crim.App.1981). Although murder can become capital murder if the actor kills an individual under the age of six, Tex.Pen.Code Ann. § 19.03(a)(8), we have found no case addressing knowledge or intent as to the victim's age.

In contrast, where the Legislature has acted to protect other classes of victims, i.e. public servants, it acted differently. Punishment for simple assault or an aggravated assault can be enhanced if the actor knows the victim is a public servant. Tex.Pen.Code Ann. § 22.01 (assault); Tex.Pen.Code Ann. § 22.02 (aggravated assault). The capital murder statute also requires knowledge where the victim is a police officer or fireman. Section 19.03(a)(1).

We, thus, conclude that the statute does not require the State to prove Zubia had intent or knowledge in connection with the victim's age. The State can prove its case relying on transferred intent. 998 S.W.2d at 227.

### EXERCISE

Charles Thompson and Denise Hayslip began dating in 1997 and Thompson eventually moved into Hayslip's home. Over time Thompson became physically abusive. Thompson moved out but later shot Hayslip in the right cheek. She had a great amount of blood gushing from her mouth. A police officer immediately had her transported to a hospital. During surgery, the surgeons were unable to secure an airway and Hayslip fell into a coma. A few days later the doctor's concluded she had suffered brain



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death. Her family agree to remove her from life support systems and she died shortly thereafter. Thompson was ultimately convicted of capital murder.

In one of his arguments to the CCA, Thompson argued that his shooting was not the cause of death. He contended the cause of death was the failure of the surgeons to secure an airway. The failure to secure the airway resulted in a loss of oxygen to the brain which resulted in the coma, brain death and removal of the victim from life support. Assume that the failure to secure the airway was the result of incompetent medical treatment. However, without medical treatment Hayslip would surely have died. Apply TPC 6.04 to the facts and determine whether or not you think Thompson caused Hayslip's death. Then compare your conclusion to that of the CCA at

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=tx&vol=app/73431a&invol=1>

Do you agree or disagree with the CCA? Why do you agree or disagree?

### REVIEW QUESTIONS

1. Which of the following is not a type of *mens rea* in the Texas Penal Code?
  - a. purposely
  - b. intentionally
  - c. knowingly
  - d. criminal negligence
  - e. reckless
  
2. Which of the following is the only totally objective form of culpability in the Texas Penal Code?
  - a. purposely
  - b. intentionally
  - c. knowingly
  - d. criminal negligence
  - e. reckless
  
3. Which of the following is the only form of culpability in the Texas Penal Code that contains both objective and subjective components?
  - a. purposely
  - b. intentionally
  - c. knowingly
  - d. criminal negligence
  - e. reckless
  
4. What form of culpability in the Texas Penal Code involves conscious risk creation?
  - a. purposely
  - b. intentionally
  - c. knowingly
  - d. criminal negligence
  - e. reckless

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5. The Texas rule for causation of harm involves the \_\_\_\_\_ test.
  - a. but for
  - b. notwithstanding
  - c. contingency
  - d. conditional
  - e. as with
  
6. A person shoots at Mr. A but wounds Mr. B. He argues he is not guilty of intentionally assaulting B because his intent was to harm A. The legal doctrine that disposes of this argument is the doctrine of \_\_\_\_\_ intent.
  - a. analogous
  - b. symmetrical
  - c. transferred
  - d. concomitant
  - e. unequivocal

**REFERENCES AND RESOURCES**

Belbow, B. A. (1999). *A Guide to Criminal Law for Texas*. Belmont, CA: West/Wadsworth, ch 3

Teague, M.O. & Helft, B. P. (2006). *Texas Criminal Practice Guide*. San Francisco: Matthew Bender, Ch 121

Texas Jurisprudence 3rd (2006). *Criminal Law*, sec. 140-147

**ANWER KEY - CH. 5: *MENS REA*, CONCURRENCE AND CAUSATION**

1. a
2. d
3. e
4. e
5. a
6. c