CHAPTER 4

CRIMINAL RESPONSIBILITY AND FAULT ELEMENTS

4.1 This Chapter reviews the general scheme of criminal responsibility for and fault elements of offences in the Penal Codes and examines some of the key concepts through which this scheme is expressed. The specific fault elements of particular offences will be examined in subsequent chapters.

Criminal responsibility and general defences

4.2 As was noted in Chapter 1, the Penal Codes of Solomon Islands, Kiribati and Tuvalu are based on the Queensland Criminal Code of 1897, prepared by Sir Samuel Griffith. The Griffith Code was designed as a complete codification of criminal law. It was intended to make the whole of the common law of criminal responsibility redundant. Sir Samuel Griffith himself said with respect to his code: 'it is never necessary to have recourse to the old doctrine of mens rea': *Widgee Shire Council v Bonney* (1907) 4 CLR 977 at 981. The exclusion of common law principles is embodied in the Penal Codes SI/Ki/Tu s 9, second para, which state:

> Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

This means that any fault elements of offences must found in their specific wording: they cannot be implied from common law principles respecting *mens rea*.

4.3 Under the scheme of the Codes, specific fault elements are included in the definitions of some offences: see, for example, **2.10**, **4.41**. However, for offences which lack specific fault elements, many matters of criminal responsibility are handled by reference to certain general defences. The codes following the Griffith model incorporate two key general provisions which constitute the core of the general law of criminal responsibility. These provisions form ss 9-10 of the Penal Codes (SI/Ki/Tu).

- Section 9, first para, establishes the defences of lack of will and of accident and also makes the intention and motive accompanying conduct immaterial unless there is an express provision to the contrary:

> Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or

> omission which occurs independently of the exercise of his will, or for an event which occurs by accident.
>
> Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial...
>
> Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act or to form an intention is immaterial so far as regards criminal responsibility.

- Section 10 establishes the defence of reasonable mistake of fact:

> A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.
>
> The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

The defence of lack of will covers involuntary conduct: see **Chapter 3**. The defences of accident and of reasonable mistake of fact were designed to replace the common law doctrine of *mens rea* for offences lacking specific fault elements in their statutory descriptions.

4.4 Sections 9 and 10 are framed in terms of general defences. As was noted in **Chapter 2**, it is a distinctive feature of the Penal Codes, like all codes that follow the Griffith model, that general defences do much of the work of protecting morally innocent persons that under criminal statutes elsewhere is done by fault elements.

Lack of will

4.5 The Penal Codes provide that a person is not criminally responsible for 'an act or omission' occurring 'independently' of the exercise of the person's 'will': SI/Ki/Tu s 9(1). The High Court of Australia has treated the requirement for will under the Codes as being substantially the same as a common law requirement for conduct to be 'voluntary': see *R v Falconer* (1990) 171 CLR 30; 96 ALR 545.

4.6 The requirement for will or voluntariness is a requirement for the conduct to be under the mental control of the person. This means that the conscious mind of a person must have directed the conduct or, in the case of an omission, must have been able to direct the required conduct. Otherwise it cannot be said that the person could have chosen differently and therefore the person cannot be held at fault. The common law principle was explained in the New Zealand case of *Kilbride v Lake* [1962] N.Z.L.R. 590 at 593 (SC), where it was said:

> [I]t is a cardinal principle that, altogether apart from the mental element of intention or knowledge of the circumstances, a person cannot be made criminally responsible for an act or omission unless it was done or omitted in circumstances where there was some other course open to him. If this condition is absent, any act or omission must be involuntary, or unconscious, or unrelated to the forbidden event in a causal sense regarded by the law as involving responsibility….
>
> Naturally the condition that there must be freedom to take one course or another involves free and conscious exercise of will in the case of an act, or the opportunity to choose to behave differently in the case of omissions.

4.7 Unwilled or involuntary conduct can occur in various ways. One of the simplest ways is through external force or circumstances. If A pushes B against C, the assault upon C is committed by A and not B. The application of force to C is not under the mental control of B. See *Ugle v R* (2002) 211 CLR 171; 189 ALR 22; [2002] HCA 25, where a murder conviction arising from a fight was quashed because the trial judge had not directed the jury to consider a defence of lack of will, based on the possibility that the deceased had impaled himself on the knife held by the accused. See also *O'Sullivan v Fisher* [1954] SASR 33, where it was held that a person who was forcibly and unlawfully taken to a public place could not be convicted of an offence of being intoxicated in that place.

4.8 External factors can also make an omission unwilled. For example, in *Kilbride v Lake* [1962] NZLR 590, a conviction for an offence of not displaying a warrant of fitness on a vehicle was quashed. The case was decided on the basis that the appellant had displayed the warrant but it had become detached while he was away from the vehicle. The conduct element of the offence was essentially omitting to display a warrant. The omission was held to be beyond the control of the appellant since there was no opportunity for him to replace the warrant.

4.9 Reflex action has sometimes been treated as unwilled: see, for example, the observations of Kirby J in *Murray v R* (2002) 211 CLR 193; [2002] HCA 26 at [89]; see also *R v Falconer* (1990) 171 CLR 30 at 43; 96 ALR 54, where reflex action was offered as an 'obvious' example of lack of will. However, reflex action must be distinguished from spontaneous action. Action is not unwilled merely because it is directed by a

mind working quickly and impulsively: see *Ryan v R* (1967) 121 CLR 205 at 246 per Windeyer J, discussed by Gaudron J in *Murray* at [11].

4.10 A third way in which unwilled conduct can occur is where some mental disorder produces a state of 'automatism' under which the accused's conduct is directed by the mind but not by the conscious mind: see, for example, *Cooper v McKenna* [1960] Qd R 406, where the automatism was caused by a conduct blow and concussion, and *Falconer*, where it was alleged to have been caused by a psychological blow.

4.11 The requirement for 'will' in s 9(1) of the Codes must be read together with the sections relating to insanity: Codes SI/Ki/Tu s 12. Cases of alleged automatism will only be determined under s 9, and thus provide a complete defence, if the condition is caused by an external factor rather than an abnormal mind. Where lack of will is caused by a mental abnormality, the person will receive the special verdict of not guilty on account of unsoundness of mind and be liable to detention: see **Chapter 11**.

4.12 The requirement for voluntariness is distinct from any requirement for fault elements of an offence such as intention or recklessness. A person may act voluntarily without appreciating the nature or consequences of the conduct. Suppose someone shot and killed a person having deliberately pulled the trigger but believing the gun was unloaded. The action would be voluntary but the shooter would not be guilty of murder because the fault element of the offence would be lacking: the shooter would not have any of the states of mind constituting 'malice aforethought' as required by the Penal Codes SI ss 200, 202; Ki/Tu ss 193, 195. The shooter might, however, be guilty of manslaughter by criminal negligence, depending on the circumstances.

4.13 Nevertheless, a person who acts involuntarily will not act with any subjective fault elements of an offence such as intention or recklessness. An accused who acted involuntarily may therefore be entitled to a defence on more than one mental ground: lack of will and lack of a fault element. The High Court of Australia has held, in relation to offences with fault elements, that both grounds must be considered separately: see *Murray v R* [2002] HCA 26; (2002) 211 CLR 193

4.14 The requirement for will or voluntariness has traditionally been treated as part of the conduct elements of an offence. Thus the Fiji Crimes Act s 16(1) states: 'Conduct can only be a conduct element if it is voluntary.' This categorisation has significance in some jurisdictions. However, whether the exercise of will is treated as part of the conduct elements or the fault elements makes no difference under the scheme of criminal responsibility of the Penal Codes.

4.15 Criminal law recognises a presumption of normal mental capacity, including the capacity to control one's actions: see, for example, *Bratty v A-G for Northern Ireland*

[1963] AC 386 at 407, 413-14, [1961] 3 All ER 523. The effect of this presumption is that an accused who bases a defence of lack of will on some mental disorder carries an evidential burden to put his or her mental capacity in issue: see, for example *R v Falconer* [1990] HCA 49; (1990) 171 CLR 30. The prosecution ultimately carries the persuasive burden to prove voluntariness (with the exception of cases of mental insanity, where the burden of proof is reversed). Yet, the persuasive burden need only be discharged if the accused has first discharged the evidential burden.

Accident

4.16 The Penal Codes SI/Ki/Tu s 9 include a provision stating that a person is not criminally responsible for an event that occurs 'by accident'. This provision mainly applies to intentional violence that unintentionally causes death or injury. In the leading case of *Kaporonovski v R* (1973) 133 CLR 209 at 231–2; 1 ALR 296, Gibbs J said that an accident is an event 'which was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person'. Therefore, liability for events which are foreseen or foreseeable is not excused. Events which are subjectively foreseen are usually objectively foreseeable. Objective foreseeability therefore constitutes the general threshold of criminal responsibility for an event. In effect, this makes negligence the fault element for causation of death or injury in the offences to which s 9 applies: unjustifiably risking foreseeable harms is negligent conduct. In the context of intentional violence, however, the special standard of a 'criminal' degree of negligence (see below, **4.71-4.72**) has not been applied.

4.17 To establish liability for the causation of death or injury, an event need only be foreseen or foreseeable as a *possible* outcome, but excluding possibilities 'that are no more than remote and speculative': see *R v Taiters* [1997] 1 QdR 333 at 338. Moreover, foreseeability is assessed in light of the pressures of the situation faced by the accused. In *Taiters*, the question was said to be 'what would be in the mind of an ordinary person acting in the circumstances with the usual limited time for assessing probabilities'.

4.18 The original intention behind the statement in *Kaporonovski* was to deny any suggestion that a defence of accident could be available merely because the event was not subjectively foreseen by the accused. Gibbs J insisted upon the additional requirement that the event not be objectively foreseeable. There is no express statement in *Kaporonovski* that the test was unqualified so that all unforeseen and unforeseeable events are to be classified as accidents. Subsequently, there has been some controversy about 'eggshell skull' cases. These are cases in which the victim suffered from some unusual condition which contributed to the death. The death was

unforeseeable, not because some complex chain of events brought it about, but simply because the pre-existing condition of the victim could not have been anticipated. Examples from the cases include enlarged spleens and weak blood vessels in the head as well as thin skulls. Such pre-existing conditions of the victim have generally been excluded from calculations of foreseeability, on the ground that the accused must take the victim as found. This 'eggshell skull' rule has been traditionally favoured by the courts of Queensland and Western Australia, and also by the High Court of Australia in some appeals from Papua New Guinea: see, especially, *R v Martyr* [1962] Qd R 398; *Mamote-Kulang v R* (1964) 111 CLR 62; ALR 1046; *Ward v R* [1972] WAR 36; *Hubert v R* (1993) 67 A Crim R 181.

4.19 Various attempts have been made to derive the 'eggshell skull' rule from the meaning of the words 'event' and 'accident' in the Codes. None of these attempts has much current support. The 'eggshell skull' rule is perhaps best regarded simply as a policy-based exception to the general principle that there is no criminal responsibility for an unforeseen and unforeseeable event.

Mistake or ignorance of fact

4.20 In the history of the common law of crime, there has been some debate about whether mistake of fact should be treated as simply as an aspect of the general law of fault elements or whether it should constitute a separate defence, perhaps with a condition that the mistake should have been a reasonable one. Under the Penal Codes, mistake of fact can be treated in either of these ways depending on the offence in issue.

4.21 If the offence is one requiring some subjective mental state such as intention, knowledge or recklessness, mistake or ignorance of fact can negate that element. A mistake of fact may be inconsistent with these specific states of mind. A person who believes that a suitcase is empty does not 'possess' drugs which are found within it. A person who pulls the trigger of a gun, mistakenly believing it to be unloaded, does not have an intention to kill or cause grievous bodily harm. A person who picks up a mobile telephone belonging to someone else, mistakenly believing that it is their own, does not have an intention to deprive the owner of it. In these instances, it makes no difference whether the mistake is reasonable or unreasonable. In either case, the mistake is inconsistent with the state of mind which is required to be proved to establish the offence. In deciding whether there was a mistake or ignorance, a court may consider its reasonableness. However, reasonableness is not a condition for the negation of responsibility. A foolish mistake or ignorance may still provide a good defence.

4.22 For many offences against the person, the prosecution must either:

- exclude a defence of accident under the Penal Codes s 9 by proving that the injury inflicted was foreseeable (see above, **4.16**); or
- prove that there was a criminally negligent breach of one of the duty-imposing provisions in the Penal Codes SI ss 210-214; Ki/Tu ss 203-207.

An objectively reasonable mistake of fact may be inconsistent with the assertion that injury was foreseeable or that there was criminal negligence. For example, if there was a reasonable belief that a gun was unloaded, it would not be foreseeable that pulling the trigger would cause injury to anyone. Moreover, pulling the trigger might not be a criminally negligent act. Ordinarily, unreasonable mistakes will be immaterial in relation to liability for offences subject to these provisions. Nevertheless, a mistake that is unreasonable may not necessarily be so wildly unreasonable as to amount to criminal negligence. For criminal negligence, the mistake must be grossly negligent: see **4.71-4.72**.

4.23 Where a mistake of fact cannot be addressed in any other way, a defence may be provided by the Penal Codes s 10:

> A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.

First, the accused must positively hold an honest belief in the existence of a state of things. Secondly that belief must be objectively reasonable. This provision establishes the test for excusing criminal responsibility in relation to several serious offences: see, for example, **Chapter 7** respecting mistaken beliefs in consent to sexual interaction in Kiribati and Tuvalu (though no longer in Solomon Islands) and **Chapter 9** respecting mistaken beliefs about substances that happen to be prohibited drugs. Section 10 also establishes the test for criminal responsibility in relation to a host of minor offences in governmental regulatory schemes.

4.24 If the evidential burden to raise a defence under s 10 is discharged, the prosecution carries the persuasive burden to disprove the defence: see *McPherson v Cairn* [1977] WAR 28. If there is evidence of an honest and reasonable but mistaken belief, the prosecution must negative either the existence of the belief or its reasonableness beyond reasonable doubt.

4.25 A successful claim under s 10 will not always result in a complete acquittal. Section 10 only provides that the person who makes an honest and reasonable mistake is to be treated as if the facts had been as they were believed to be. This may mean that a person who makes a mistake still commits a less serious offence or is perhaps exposed to a lesser range of penalties. If someone possesses a prohibited

substance specified in a category attracting a high scale of penalties, reasonably believing that the substance is one which would fall within a different category attracting a lower scale of penalties, the effect of s 10 may be that the lower scale applies: see **Chapter 9**.

4.26 An unreasonable mistake is a negligent mistake. Thus, offences to which s 10 might apply can be committed negligently. The restrictive wording of s 10, however, also allows some persons to be convicted who were not negligent. Unless a mistake is made, it is immaterial that reasonable care or due diligence may have been exercised to prevent the offence occurring: see *G J Coles & Coy Ltd v Goldsworthy* [1985] WAR 183. This is an unfortunate feature of the Penal Codes of Solomon islands, Kiribati and Tuvalu along with other Griffith-model codes. It can be contrasted with the law of Canada, which recognises a general defence of due diligence to observe the law: *R v City of Sault Ste. Marie* [1978] 2 SCR 1299.

4.27 In *G J Coles & Coy Ltd v Goldsworthy*, the Queensland equivalent of the Penal Codes s 10 was held to require an honest belief in the sense of a 'positive' belief. This seems to exclude any state of mere inadvertence or ignorance no matter how reasonable the state of mind might be. If this view is correct then s 10 would be available to a person who possesses a prohibited drug honestly and reasonably believing that it is aspirin, but not to a person who possesses a prohibited drug having no idea what the substance is but, quite reasonably, never contemplating the possibility that it might be a prohibited drug. It is difficult to see why such a sharp distinction should be made between mistake and ignorance.

4.28 The phrase 'belief in the existence of any state of things' in s 10 has sometimes been said to cover only matters of present fact and to exclude any belief about the consequences or potential consequences of acts. In *Gould & Barnes* [1960] Qd R 283 at 291–2, it was said that the defence would be available for a mistaken belief about the contents of a bottle, or about the chemical properties of the contents, but not for a mistaken belief that a particular usage of the contents would be safe: see also *Gould & Barnes* at 297–8. Nevertheless, the question should be regarded as still open. *Gould & Barnes* can be contrasted with *Pacino*, above. In *Pacino*, a mistaken belief that some dogs were not dangerous was treated as a mistake about 'a state of things'.

4.29 The second paragraph of s 10 allows for the exclusion of the defence of reasonable mistake.

> The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

Examples of both express and implied exclusions are found in the Penal Codes of Kiribati and Tuvalu ss 134-135 which govern certain offences relating to sexual intercourse with children.

- Section 135(1), concerning sexual intercourse with a girl aged 13 or 14,

provides that that it is a defence 'if it shall be made to appear to the court' that the defendant had 'reasonable cause to believe and in fact believe' that the girl was 15 or over. This expressly excludes the operation of s 10 by inserting a new defence, also based on reasonable mistake but with a reversed onus of proof.

- Section 134, concerning sexual intercourse with a girl under 13 years of age, impliedly excludes s 10 because it makes no provision for a defence based on a mistake about a girl's age. Taken in isolation, this might not exclude a s 10 defence. However, in light of the provision of a mistake defence in s 135, its absence in s 134 carries the clear implication that a defence of mistake in any form is excluded.

The Solomon Islands Penal Code was originally in the same form as those of Kiribati and Tuvalu. However, neither of the two equivalent offences now make any special provision on a defence of mistake of fact, so that a s 10 defence has not been excluded.

Mistake or ignorance of Law

4.30 Ignorance or mistake of law will not provide a defence unless there is an express provision making a defence available. The Penal Codes SI/Ki/Tu s 7 provide:

> Ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence unless knowledge of the law by the offender is expressly declared to be an element of the offence.

A similar principle is also recognised at common law, where it is common to use the Latin expression *ignorantia juris non excusat*. The principle is often expressed in terms of 'ignorance' of the law rather than 'mistake' though it is well established that the principle applies to positively mistaken beliefs as well as to states of ignorance.

4.31 The principle that mistake or ignorance of the law is no excuse applies in two somewhat different kinds of cases:

- A person may commit the physical elements of an offence, fully aware of what he or she is doing, but without appreciating that the conduct is legally prohibited. For example, someone may not appreciate that a permit is required in order to run a commercial operation or to make alterations to a building. In such cases, the principle that mistake or ignorance of the law is no excuse operates to deny any special exculpatory defence: see **Chapter 10** on defences that justify or excuse commission of the physical elements of an offence.
- A person may commit the conduct elements of an offence, not being aware of

what they are doing because of a mistake or ignorance about some matter of law which is part of the offence description. For example, a person may possess a substance, knowing what it is but without realising that possession of it is prohibited under the Dangerous Drugs legislation. The classification of the substance is a matter of law and part of the definitional elements for the offence of possession of a dangerous drug. Another example may be provided by the offence of bigamy: Penal Codes SI s 170; KI/Tu s 163. The offence involves a person going through a ceremony of marriage while being already married to someone else. Suppose a person mistakenly believes that they are not married. The belief may result from either a mistake of fact or a mistake of law. A mistake of fact may provide a defence: see, for example, *R v Tolson* (1889) 23 QBD 168; [1886-90] All ER 26, where there was a mistaken belief in the death of an earlier spouse. In contrast, a mistake of law provides no defence: see, for example, *R v Kennedy* [1923] SASR 183, where there was a mistaken belief that an earlier marriage was invalid because it was with a first cousin. In this second category of cases, the rule that ignorance of the law is no excuse does not exclude a special exculpatory defence for having committed the elements of the offence. Instead, it prevents an accused claiming lack of responsibility with respect to one of the definitional elements of the offence.

4.32 Various rationales have been offered to explain why ignorance of the law should not operate as a defence. A justification is easiest to find for offences that are moral or social wrongs (*mala in se*). In such cases, a person should already know that he or she ought not to do the act or make the omission, quite independently of its specific legal prohibition. Ignorance of the legal prohibition is considered immaterial to an assessment of the person's culpability. The principle is however, more difficult to justify for those offences that are essentially contraventions of schemes of governmental social and economic regulation (*mala prohibita*). However, the purpose of denying a defence for such offences is presumably to encourage people to check the legal status of their conduct before they engage in it.

4.33 Traditionally, little allowance has been made for the difficulties that even the most careful person may encounter in trying to ascertain what is actually required by the law. In *Ostrowski v Palmer* [2004] HCA 30; (2004) 218 CLR 493, the defendant was convicted of fishing for rock lobster in a prohibited area. He had made enquiries of the Fisheries authorities and had been given information which did not identify the area proposed to be fished as one where fishing for rock lobster was prohibited. The High Court of Australia nonetheless affirmed the conviction because the defendant had made a mistake of law rather than a mistake of fact. Officially-induced error of law has been accepted as a defence in some jurisdictions, but not yet in jurisdictions with versions of the Griffith code.

4.34 The Penal Codes, like the common law, accept that mistake or ignorance of the

law can negative criminal responsibility for property offences where it gives rise to a 'claim of right' to the property. Section 8 provides:

> A person is not criminally responsible in respect of an offence relating to property, if the act done or omitted to be done by him with respect to the property was done in the exercise of an honest claim of right and without intention to defraud.

A claim of right may be a claim to take or use or have access to property as well as a claim of ownership. The claim need not necessarily be a reasonable one. Moreover, it need not have any foundation in accepted legal doctrine: see *Walden v Hensler* (1987) 163 CLR 561; 75 ALR 173. However, it must be a claim of a legal right, not just of a moral right.

4.35 It is not ignorance of the criminal law that founds a claim of right, but ignorance of the law of property rights. A claim of right is not a claim to act in a particular manner but a claim to an entitlement in or with respect to property: *Walden v Hensler* [1987] HCA 57; (1987) 163 CLR 561. This exception to the general principle that ignorance of the law is no excuse mainly operates to negative criminal responsibility for offences such as stealing, where a person acts under a mistaken belief in having a legal entitlement to the property. It has sometimes been suggested that, at common law, the exception for claims of right may extend beyond property offences and cover any claim made as a matter of private or civil law. Under the Penal Codes, however, the exception is expressly limited to property offences.

Distinguishing mistakes of fact and of law

4.36 The general principle that mistake or ignorance of the law is no excuse applies only to the general law and not to mistake or ignorance about the exercise of powers affecting the legal position of particular individuals. An example of the former would be a mistaken belief that heritage buildings could be demolished without a permit; an example of the latter would be a mistaken belief that the requisite permit to demolish a particular heritage building had actually been issued. The classic statement of this position at common law occurred in *Cooper v Phibbs* (1867) LR2HL 149 at 170, where Lord Westbury said:

> It is said, '*Ignorantia jus haud excusat*'; but in that maxim the word '*jus*' is used in the sense of denoting general law, the ordinary law of the country.

4.37 Mistakes about the exercise of legal powers in respect of individuals have generally been treated as mistakes of fact. For example, consider the contrast between

the bigamy cases of *R v Kennedy* [1923] SASR 183 and *Thomas v R* (1937) 59 CLR 279; [1938] ALR 37. In both of those cases, the accused claimed to have believed that he was unmarried at the time when he underwent a second marriage ceremony. In *Kennedy*, a mistake about the degrees of consanguinity which would have invalidated the earlier marriage was held to be no defence. In *Thomas*, however, a mistake about whether the earlier marriage had actually been terminated by a divorce decree was held to be a good defence.

4.38 The law is sometimes expressed in terms of loose general standards that require the exercise of judgment when applied to particular facts. See, for example, the offences under the Penal Codes SI ss 173-174; KI/Tu ss 166-167 relating to trafficking in or possession of obscene materials. The meaning of 'obscenity' is a matter of law. The test for obscenity is whether the material has a tendency to 'deprave or corrupt': *R v Hicklin* (1868) LR 3 QB 360 at 371.This requires a judgment to be made about how such a loose and general test applies to particular material. Moreover, a person may correctly understand the general law and yet be mistaken about how it would apply to particular material. There are conflicting Australian authorities on the way in which the latter kind of mistakes should be classified. In *Sancoff v Holford* [1973] Qd R 25, the Queensland Court of Criminal Appeal held that a mistake about whether a publication was obscene was a mistake of law. In *R v Wampfler* (1987) 11 NSWLR 541, however, the New South Wales Court of Criminal Appeal treated a mistake about whether an article was indecent as a mistake of fact.

4.39 Mistakes about how general standards apply to particular facts fall on the borderline between mistakes of law and mistakes of fact. They are similar to mistakes of law in that they are mistakes about what the general standard means; but they are also similar to mistakes of fact in that the answer to how the law applies will depend on an assessment of the facts themselves, by a tribunal of fact whose decisions may be difficult to predict. The answers are not expressly stated in print, readily available to be discovered by the diligent person who is anxious to conform to the law. Nevertheless, the weight of authority favours the view that such mistakes are mistakes of law.

Criminal responsibility and fault elements

4.40 In Solomon Islands, Kiribati and Tuvalu, any fault elements of an offence are dictated by the terms of specific offences rather than by reference to common law principles or to general provisions of the Penal Codes: see **4.2-4.3**.

4.41 In some instances, fault elements are specified in the provisions establishing offences. For example:

- murder requires one person to cause the death of another by an unlawful act or omission with 'malice aforethought': SI s 200; KI/Tu s 193;
- theft requires property to be taken or converted 'with intent…permanently to deprive the owner thereof': SI s 258(1); KI/Tu s 251(1).

4.42 However, the differences between the approaches of the common law and the Penal Codes are more a matter of drafting style than of substance. This is because fault elements can sometimes be inferred for particular offences from the general defences. For example, the Queensland Court of Appeal has held that, in order to exclude a defence of accident for the offence of manslaughter, the prosecution must prove that the death was either subjectively foreseen or objectively foreseeable: *R v Taiters* [1997] 1 Qd R 333. This effectively makes foresight or foreseeability the fault elements of the offence.

Types and principles of fault

4.43 The pivotal concepts in the law of fault elements are intention, recklessness and inadvertent negligence (commonly abbreviated to simply 'negligence'). These are the states of mind which are most commonly in issue. Intention is the most serious or 'worst' state of mind. It involves choosing to commit the offence whereas recklessness merely involves choosing to run a risk of committing it. Inadvertent negligence, the least culpable state of mind, involves a failure to notice a risk under circumstances where a reasonable person would have noticed it and taken action to avert it.

4.44 It is commonly said that intention and recklessness are subjective forms of fault whereas negligence is objective. Describing a test of criminal responsibility as 'subjective' means that liability is determined by reference to the blameworthiness of a person's own state of mind. The alternative, 'objective' approach to assessing criminal responsibility involves measuring the state of mind and conduct of an accused against that of some hypothetical person, such as an 'ordinary' or 'reasonable' person, placed in a similar situation. This approach to assessing criminal responsibility is 'objective' because it does not depend on any finding that the accused's state of mind was blameworthy in itself. For example, the conduct elements of the offence might have been committed inadvertently. Nevertheless, the accused can be blamed because of a failure to direct attention to the risk of harm and choose a different course of action.

4.45 Negligence is the base-line for criminal responsibility under the Penal Codes and other versions of the Griffith Code. The general tests for criminal responsibility under

the Griffith Code are objective in character. These general tests are contained in the provisions relating to the defence of accident in relation to consequences and the defence of mistake of fact in relation to circumstances: Penal Codes SI/Ki/Tu ss 9-10. When either of these provisions apply, the accused is usually held responsible, not because of a state of mind which is blameworthy in itself, but rather because of a blameworthy failure to live up to an objective standard of thought and behaviour. Thus, a mistake of fact must be reasonable if it is to provide a defence under s 10, even for a serious offence. In addition, the test for a defence of accident under s 9 is that the event must have been not only unforeseen but also objectively unforeseeable: K*aporonovski v The Queen* (1975) 133 CLR 209, 231. In positive terms, an accused can be held responsible for events that were either subjectively foreseen or objectively foreseeable; *R v Taiters* [1997] 1 Qd R 333 at 338. The general threshold of criminal responsibility is therefore negligence: unreasonable mistakes are negligent mistakes and unjustifiably risking foreseeable harms is negligent conduct. Intention to commit an offence is said to be required only where it is expressly declared to be an element: s 9, second para. The same is true by implication for subjective recklessness.

4.46 In contrast to the approach of the Griffith Codes, it has become an axiom of the common law of crime that responsibility for serious offences is to be determined subjectively rather than objectively. There is strong modern authority in support of a principle of subjective awareness for *mens rea*, that is, a principle that the accused must have appreciated the nature of what was done, including any circumstances, consequences or risks forming part of the definition of the offence. As it was put in a leading Canadian case, *mens rea* consists of 'some positive state of mind such as intent, knowledge or recklessness': *R v City of Sault Ste. Marie* [1978] 2 SCR 1299, 1325 (Dickson J). See also *R v Morgan* [1976] AC 182 (HL); *He Kaw Teh v R* (1985) 157 CLR 523; [1985] HCA 43. Recklessness in this context means the unjustifiable taking of a *known* risk. Contemporary common law principles reject general liability for negligence.

4.47 There may be a divergence of general principles between the common law tradition and codes that are based on the Griffith model. The elements of offences, however, tend to converge for two reasons.

- One reason is that codes following the Griffith model generally specify subjective fault elements for offences against property such as theft. The objective principles of responsibility under the Griffith code operate mainly in relation to offences against persons.
- The other reason is that statutes drawing upon common law principles generally include some offences against persons for which objective responsibility has been recognised. Manslaughter is an example. There is

textual support for the objective interpretation in some instances but not in all. Although it may be an axiom of the common law of crime that responsibility is to be determined subjectively, the common law tradition is more complex than that axiom might suggest.

Intention

4.48 There are several different ways in which intention can play a role in fault elements of offences:

- It can be specified as a required fault element of an offence. For example, theft under the Penal Codes SI s 258(1); Ki/Tu s 251(1) requires that property be appropriated with *the intention of* permanently depriving the other person of the property.
- It can be specified as one of several alternative fault elements. For example, murder under SI s 200; KI/Tu s 193 requires 'malice aforethought'. This is defined to include several states of mind, including 'an intention to cause the death of or grievous bodily harm to any person': SI s 202(1); Ki/Tu s 195(1).
- It can be interpreted to be a fault element when another term is used. For example, arson or damaging property has to be done 'wilfully': SI ss 319(1), 326(1); Ki/Tu ss 312, 319. The term 'wilfully' has been interpreted to mean either intentionally or recklessly: *R v Lockwood; Ex parte Attorney-General* [1981] Qd R 209.

4.49 It is well-established that intention does not require premeditation. This is expressly affirmed for murder in SI s 202(1); Ki/Tu s 195(1). Thus, an intention may be formed and executed within a moment. Moreover, intention is not the same as motive (ultimate objective). The prosecution does not have to prove any particular motive for an offence, though the existence of a motive is a fact that might be used as evidence of the intention of some action.

4.50 Two different types of intention have been recognised in the case-law of the common law world.

- First, a person is said to intend something if the purpose is to make it occur. The prospect of making it occur provides the *reason* for acting. In *Peters v R* [1998] HCA 7; (1998) 192 CLR 493, at [68], McHugh J said: 'No doubt, when a person intends to do something, ordinarily he or she acts in order to bring about the occurrence of that thing.' For example, someone who shoots at another person in order to kill that person may be said to intend to cause death. This is sometimes called 'purpose' intention or 'direct' intention.

- A person is also said to intend something when it is known or foreseen that it will be a certain or virtually certain consequence of some action, even though the action may have another purpose. In *Peters* at [68], McHugh J said: 'If a person does something that is virtually certain to result in another event occurring and knows that that event is certain or virtually certain to occur, for legal purposes at least he or she intends it to occur.' For example, a person who sets fire to a house in order to collect insurance money, knowing that people are inside and will inevitably be killed, may be said to intend to cause death. This is sometimes called 'knowledge' intention or 'oblique' intention.

The link between the two types of intention is that the person chooses to commit the physical elements of an offence rather than merely chooses to risk committing them.

4.51 there is some controversy about whether the term 'intention' in Griffith-model codes encompasses both forms of intention or is confined to intention in the form of purpose. In *Zaburoni v R* (2016) 256 CLR 482; [2016] HCA 12, a majority of the High Court of Australia adopted a narrow view of the meaning of 'intention' in the Queensland Criminal Code, effectively confining it to intention in the form of purpose. Kiefel, Bell and Keane JJ said at [14]:

> Where proof of the intention to produce a particular result is made an element of liability for an offence under the Code, the prosecution is required to establish that the accused meant to produce that result by his or her conduct … knowledge or foresight of result, whether possible, probable or certain, is not a substitute in law for proof of a specific intent under the Code. In the last-mentioned respect, the Code is distinguished from its Commonwealth counterpart, which allows that a person has intention with respect to a result if the person is aware that the result will occur in the ordinary course of events.

It was said at [15] that, where an accused has foresight that conduct is virtually certain to produce a particular result, this is of evidential significance. However, it does not, in and of itself, amount to intent.

4.52 *Zaburoni* was a case concerning the offence of 'transmitting a serious disease with intent' under the Criminal Code s 317(b) (Qld). However, the judges' remarks were clearly meant to apply generally to the concept of intention in the Queensland Code. They cited with approval a comment of Connolly J in the murder case of *Willmot (No 2)* [1985] 2 Qd 413 at 418: 'Relevant definitions in the *Shorter Oxford English Dictionary* [of intent] show that what is involved is the directing of the mind, having a purpose or design.'

4.53 If it is correct that 'intention' in the Queensland Criminal Code is confined to purpose, the same interpretation should arguably also apply to the Penal Codes of Solomon Islands, Kiribati and Tuvalu. However, the High Court of Australia provided

no justification in principle or policy for this interpretation, and no explanation of why 'intention' should carry a different meaning in the Queensland Code from elsewhere in the common law world. The High Court simply treated the matter as settled by previous Queensland authority. Yet, that previous Queensland authority was also devoid of any justification in principle or policy.

4.54 Excluding the knowledge form of intention could have unfortunate consequences for other offences in the Codes. In particular, it would drastically reduce the scope of the offence of stealing. Stealing requires an intention to deprive the owner of the property, but in almost all cases this can be proved only in the form of knowledge intention: see **Chapter 8**. It is rare for one person to steal the property of another in order to deprive the other person of it. A person who steals the property of another will usually do so simply in order to gain the benefit of the property, but with the incidental knowledge that the other person will thereby be deprived of it. It is, therefore, difficult to see how the restrictive interpretation of intention could withstand serious challenge in that, if any, context.

4.55 Therefore, the better view is that the interpretation of 'intention' favoured by the High Court of Australia is wrong. It should not be followed in Solomon Islands, Kiribati and Tuvalu. 'Intention' in the Penal Codes should be interpreted to encompass both purpose intention and knowledge intention.

4.56 Intention can be conditional: a person can intend an outcome that is dependent on certain conditions being met. This is obviously true for intention in the form of purpose, where the person acts with the aim of achieving an outcome which may be dependent on the interaction of a variety of factors. It has also been held to apply to intention in the form of knowledge. In *Smith v R; R v Afford* (2017) 259 CLR 291; [2017] HCA 19, the defendant was convicted of importing drugs into Australia, an offence which required proof of intent to import. The defendant had claimed that he was carrying luggage for someone else and that, although he was suspicious, he had hoped the luggage did not contain drugs. He appealed the conviction on the ground that his state of mind could have amounted to recklessness but not intention. The High Court dismissed the appeal on the ground that he would intend to import drugs in the event that he was prepared to bring the luggage into Australia even if it contained drugs. The concept of conditional intent has also been acknowledged by the United Kingdom Supreme Court. In *R v Jogee* [2016] UKSC 8 at [92], it was said:

> In cases of secondary liability arising out of a prior joint criminal venture, it will also often be necessary to draw the jury's attention to the fact that the intention to assist, and indeed the intention that the crime should be committed, may be conditional. The bank robbers who attack the bank when one or more of them is armed no doubt hope that it will not be necessary to

use the guns, but it may be a perfectly proper inference that all were intending that if they met resistance the weapons should be used with the intent to do grievous bodily harm at least. The group of young men which faces down a rival group may hope that the rivals will slink quietly away, but it may well be a perfectly proper inference that all were intending that if resistance were to be met, grievous bodily harm at least should be done.

4.57 Intention can be proved through a confession or some other admission by the accused. It can also be proved by circumstantial evidence, through inferences from what happened. For example, the circumstances of a killing may be such that it is reasonable to conclude the accused's purpose must have been to kill, or alternatively that the accused must have known that death would result.

4.58 In drawing inferences, the chain of reasoning is first to analyse objectively what would have been in the mind of an ordinary person who did what the accused did and then ask whether there is any reason why the accused's state of mind might have been different. An objective test is used to analyse the accused's state of mind. However, the ultimate issue is always the accused's own state of mind and this may not be the same as that suggested by the objective test. Factors such as anger or intoxication may make it unsafe to draw that inference.

4.59 Intention in the form of purpose will usually be easier to prove for premeditated action than for impulsive action. Knowledge is the form of intention which may be easier to prove where action has been impulsive.

Knowledge

4.60 The elements of certain offences require that a person act 'knowing' some matter or matters. Thus, for receiving under SI s 313; Ki/Tu s 306, stolen property must be received 'knowing' it to have been stolen or otherwise unlawfully obtained. Similarly, for some offences relating to false or misleading representations under SI ss 307-312; KI/Tu ss 300-305, the person must act 'knowing' that a representation is false or not believing it to be true.

4.61 To make a representation knowing that it is false is to intend to make a false representation, in the broad sense of intention: see **4.50**, above. In contrast, not believing a representation to be true is a form of recklessness: see below, **4.64**.

Recklessness

4.62 The term 'reckless' is used in two senses in criminal law.

- Recklessness is viewed as the unjustifiable taking of a *known* risk with the respect to serious crimes, where recklessness is commonly treated as an alternative fault element to intention. The concept is therefore used in a special sense, referring to a subjective state of mind. The actor must be aware of the risk. It is not sufficient that the conduct is objectively dangerous.
- In some legislation, the term 'reckless' is used in a sense closer to its meaning in ordinary language, as signifying a high degree of negligence risking serious harm. Thus, offences of reckless driving have been created in some Traffic Acts: see SI ss 38-39; Tu s 21. In this context, reckless driving appears to be synonymous with dangerous driving. Both concepts refer to breach of objective standards of behavior rather than to subjective states of mind. The same meaning appears to attach to 'reckless' in the title to the Penal Codes SI s 237; Ki/Tu s 230: 'Reckless and negligent act.' The word 'reckless' does not appear in the text of the section, which appears to be concerned with objectively dangerous or negligent behavior.

The present concern is with recklessness in the former, subjective sense.

4.63 The terms reckless or recklessness were not used in the original versions of the Penal Codes of Kiribati and Tuvalu (except in the title to SI s 237; Ki/Tu s 230). They have, however, been introduced in some modern amendments, in ways which express or indicate concern with a subjective state of mind.

- The Solomon Islands Code now requires for the offences of rape and indecent act that the offender act 'knowing about or *being reckless* as to the lack of consent: ss 136F, 138. Recklessness is defined in subjective terms in s 136E:

  > For this Part, a person is reckless as to another person's lack of consent if: (a) the person is aware of a risk that the other person does not consent and it is unreasonable to take the risk; or (b) the person does not give any thought as to whether the person is consenting.

- The Kiribati Code now requires for the offence of destroying or damaging property that the offender act 'intending to destroy or damage such property, or *being reckless* as to whether such property would be destroyed or damaged': s 319; Penal Code (Amendment) Act 1999.

4.64 There are also offences which, although they do not expressly use the term 'reckless', specify states of mind that are effectively forms of recklessness. For example:

- Murder under SI s 200; Ki/Tu s 193 requires 'malice aforethought'. Malice aforethought is defined in SI s 202; Ki/Tu s 195 to be either of these states of mind:

    (a) an intention to cause the death of or grievous bodily harm to any person…; or
    (b) knowledge that the act which caused death will probably cause the death of, or grievous bodily harm to, some person…, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

    Alternative (b) is a form of recklessness because it involves awareness of a probable risk rather than a certain outcome.
- For some offences relating to false or misleading representations under SI ss 307-312; Ki/Tu ss 300-305, the person must act knowing that a representation is false or *not believing it to be true*: see above, **4.60-4.61**. To make a representation not believing it to be true involves taking the risk that it is false and is a form of recklessness.

4.65 The essence of recklessness in serious offences is unjustifiably taking a known risk. The subjective character of recklessness was neatly expressed by McIntyre J of the Supreme Court of Canada in *R v Sansregret* [1985] 1 SCR 570, 45 CR (3d) 193 at 203-204.

> In accordance with well-established principles for the determination of criminal liability, recklessness, to form a part of the criminal mens rea, must have an element of the subjective. It is found in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and who takes the chance.

4.66 Awareness of a risk is a subjective state of mind but unjustifiability is an objective matter: it is immaterial that the person may have thought that taking the risk was justifiable. Whether or not it was justifiable to take a risk will depend on the interaction of several variables:

- the degree of risk;
- the magnitude of the harm if the risk materialises;
- the social value of the end for which the risk is taken; and
- the costs of avoiding or minimising the risk.

In defining recklessness for the purposes of the offences of rape and indecent act, the Solomon Islands Code s 136E uses the term 'unreasonable' rather than 'unjustifiable'. However, the relevant considerations will be the same whichever term is used.

4.67 Unjustifiability is part of the definition of recklessness because an element of risk-taking is necessary for the conduct of everyday life and indeed may sometimes be valued. Thus, in *R v Crabbe* [1985] HCA 22; (1985) 156 CLR 464 at 470, where the role of the concept of recklessness in the common law of murder was under analysis, the High Court of Australia observed: 'A surgeon who competently performs a hazardous but necessary operation is not criminally liable if the patient dies, even if the surgeon foresaw that his death was probable.' Conversely, in *Leary v R* (1977) 74 DLR (3d) 103 at 116–17 (SCC), Dickson J noted that justifiability is not a practical issue in relation to reckless rape because: 'The harm to be anticipated from acting upon the mistaken belief that the woman is consenting is very great whereas that which may be lost in failing to act is slight.'

Wilfulness

4.68 The term 'wilfully' is found in the offences of arson and damaging property: SI ss 319(1), 326(1); Ki/Tu ss 312, 319. As was noted above at 4.10, 'wilfully' has been interpreted to mean either intentionally or recklessly: *R v Lockwood; Ex parte Attorney-General* [1981] Qd R 209. The Kiribati provision on damaging property has now been amended so that, although the term 'wilfully' is still used, it is also expressly provided that the offence is to be committed 'intending or being reckless': Penal Code (Amendment) Act 1999.

Negligence and criminal negligence

4.69 Negligent conduct is conduct that fails to comply with the standards of the reasonable person for avoiding the commission of harm to others. The term 'negligent' is sometimes also used as a shorthand for 'inadvertent negligence', to describe the state of mind of an actor who does not advert to the risks of negligent conduct. Inadvertent negligence is a state of mind involving a culpable failure to appreciate risks that the reasonable person would have appreciated and taken action to avoid or minimize.

4.70 In the history of the common law, *mens rea* has often been said to include only subjective states of mind such as intention and recklessness. The offence of manslaughter, however, has always been a notable exception, with a 'gross' or

'criminal' degree of negligence being sufficient for the fault element: see below, **4.71-4.72**. Manslaughter by negligence is expressly recognised in the Penal Codes: see **Chapter 5**. The same kind of fault element has been recognised for offences such as unlawful wounding or causing grievous bodily harm: see **Chapter 6**.

4.71 To establish criminal liability, there must generally be negligence to the degree called 'criminal negligence'. Negligence sufficient for civil liability in the law of torts may not be sufficient for criminal liability. In criminal law, the departure from the standard of care of the reasonable person must be great enough to justify the kind of sanctions and stigma that follow on conviction. The negligence must therefore be 'gross'; there must be a wide departure from the standard of care that would be exercised by the reasonable person. The distinction between civil and criminal degrees of negligence has a long history. It was emphasised by Lord Atkin in *Andrews v D.P.P.* [1937] AC 576 at 583; [1937] 2 All ER 552 (HL):

> Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established.

See also *Callaghan v R* (1952) 87 CLR 115; [1952] HCA 55.

4.72 Various expressions have been used to convey the idea of criminal negligence. A common direction to jurors is taken from *R v Bateman* (1925) 19 Cr App Rep 8 at 13, where it was said that a jury must be satisfied that the negligence 'went beyond a mere matter of compensation and showed such a disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment'. Other expressions that have been used include 'a marked departure', 'a substantial departure' and 'a serious deviation' from the standard of conduct of the reasonable person. See also the definition of negligence in the Australian Criminal Code (Cth) s 5.5, which refers to 'a great falling short' of the standard of care of a reasonable person.

4.73 The standard of criminal negligence has been read into the Griffith Code for a range of offences against the person: see **5.33**=**5.34**, **6.33**. Nevertheless, the standard of criminal negligence has not been implied for the negligence-based defences of accident and reasonable mistake of fact.

Transferred fault

4.74 It sometimes happens that an assailant intends to strike one person but misses

and strikes and perhaps injures or kills another person. The contact that actually results is different from the contact which was intended. For the offence of murder, this situation is covered by the terms of the definition of 'malice aforethought' in SI s 202; Ki/Tu s195. These provide that malice aforethought is constituted by the presence of certain states of mind respecting causing death or grievous bodily harm to a person 'whether such person is the person actually killed or not': see **5.xx**. There is a general principle of common law to the same effect called the principle of 'transferred intent' or 'transferred *mens rea'*. This applies to offences such as assault and intentionally doing grievous harm: see **Chapter 6**. The intention to attack one person is transferred to the contact with or injury to another.