

See: Minutes of Subcommittee No. 1  
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Tape #29

CRIMINAL LAW REVISION COMMISSION  
309 Capitol Building  
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ARTICLE 2 . PRELIMINARY

General Principles of Liability -- Culpability

Preliminary Draft No. 1; December 1968

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Section 1. Culpability. Except as provided in section 5, a person is not guilty of a crime unless he acts intentionally, knowingly, recklessly or with criminal negligence, as the law may require, with respect to the conduct, the result thereof or the attendant circumstances which constitute the material elements of the crime.

Section 2. Culpable mental states; definitions.

(1) A person acts intentionally, or with intent, with respect to his conduct, or to a result thereof when it is his conscious purpose to engage in the conduct or cause the result.

(2) A person acts knowingly, or with knowledge, with respect to his conduct or to attendant circumstances when he is aware of the nature of his conduct or that those 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 practically certain to cause the result.

(3) A person acts recklessly, or is reckless, with respect to attendant circumstances or the result of his conduct when he acts in awareness of a substantial risk that the circumstances exist or that his conduct will cause the result and his disregard is unjustifiable and constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation.

Existing  
Law

ORS  
161.010

Intention:  
161.010 (1)  
163.010  
et seq.  
166.220

Knowingly:  
161.010 (7)

Reckless:  
483.992 (1)  
163.020 (2)

Negligent:  
161.010 (2)  
30.115 (2)

(4) A person acts with criminal negligence, or is criminally negligent with respect to attendant circumstances or the result of his conduct when he should be aware of a substantial and unjustifiable risk that the circumstances exist or that his conduct will cause the result and his failure to be aware of the risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation.

Section 3. Culpable mental states; application. (1) If the definition of an offense prescribes a culpable mental state but does not specify the conduct, attendant circumstances or result to which it applies, the prescribed culpable mental state shall apply to each such material element.

(2) If the definition of a crime prescribes criminal negligence as the culpable mental state, it is also established if a person acts intentionally, knowingly or recklessly. When recklessness suffices to establish a culpable mental state, it is also established if a person acts intentionally or knowingly. When acting knowingly suffices to establish a culpable mental state, it is also established if a person acts intentionally.

(3) Knowledge that conduct constitutes an offense, or knowledge of the existence, meaning, or application of the statute defining an offense, is not an element of an offense unless the statute<sup>ute</sup> clearly so provides.

Section 4. Culpable mental state required. Except as provided in section 5, if the definition of a crime does not expressly prescribe a culpable mental state, a culpable mental state is nonetheless required and is established only if a person acts intentionally, knowingly or recklessly.

Section 5. Culpable mental states; when inapplicable. The culpable mental state requirements of section 1 and section 5 do not apply if the offense is a violation or if the law defining the offense clearly indicates a purpose to dispense with any culpable mental state requirement.

COMMENTARY - PRELIMINARY:  
GENERAL PRINCIPLES OF LIABILITY -- CULPABILITY

A. Summary

These sections attempt to set out the blameworthy mental states or mens rea required for the establishment of criminal liability and attempt to do so in a way that is simpler, more understandable and more accurate than the present law.

B. Derivation

These sections are taken practically verbatim from California Penal Code Revision Project Tentative Draft No. 1, Sections 403 - 407, slightly changed to reflect proposed Oregon terminology by using "violation" rather than "infraction" in section 5 of this draft. The material is based on Section 2.02 of the Model Penal Code and is similar to Sections 15.05 to 15.15 of the New York Penal Law which became effective September 1, 1967.

Both the Model Penal Code and the California draft in effect provide that negligence (inadvertent conduct) is not a basis of criminal liability unless specifically so provided in the definition of the offense. New York and Michigan do not so provide.

C. Relationship to Existing Law

The articulation of culpability requirements is of major importance in the development of a penal code. The draft here presented is in no sense original, but it is presented with the hope and the expectation that consideration of the problem will require a basic look at the law we now have and will point toward the law we ought to have.

ORS 161.010 expressly defines the following mental states: "Wilfully," "Neglect," "Corruptly," "Malice," "Wrongfully," "Wantonly," and "Knowingly." The definitions are not

clear, and have been difficult to interpret and apply. See Hans A. Linde's article "Criminal Law - 1959 Oregon Survey," 39 Or. Law Rev. 161. "Malice" and "Maliciously" are defined as importing a wish to vex, annoy or injure another person, established either by proof or presumption of law. The definition is either very much too narrow, or it requires reference to the entire historical development of murder, and other crimes which require malice, for any sort of understanding. Criminal Law, Perkins (1957) 31, 173, 676. The definitions set out in ORS 161.010 are not useful tools for meaningful instruction of juries. Intent, intention and recklessness are not defined.

Jerome Hall in Chapter IV of his General Principles of Criminal Law, 2nd ed., condenses the mental element required for criminal liability into three mental states: intention, recklessness, and negligence. The Model Penal Code (and the New York and Illinois law and the California and Michigan drafts) adds knowledge.

The draft here submitted would change Oregon law in one significant area, that of the treatment of negligence and recklessness. The blameworthy mental state now required for guilt of negligent homicide under ORS 163.091 is gross negligence. In State v. Hodgdon, 244 Or. 219 (1966) the Oregon Supreme Court held: (1) that gross negligence is the same when applied to civil law (guest passenger statute, ORS 30.115 (2)) as when used to define an ingredient of crime; (2) that the guest passenger statute definition of gross negligence may properly be used in instructing the jury in a negligent homicide case; and (3) that "in gross negligence, we find not simply an inadvertent breach of duty or imprudent conduct (as in ordinary negligence), but the violation of the duty to others is so flagrant as to evidence an indifference to or reckless disregard of the rights of others." (Emphasis supplied). State v. Hodgdon, 244 Or. 219 at 223.

The court in Hodgdon thus adopted Mr. Justice O'Connell's conclusion in Williamson v. McKenna, 223 Or. 366, at 387-88 (1960) that: "Gross negligence thus becomes identical with recklessness."

And finally, the court in State v. Hodgdon, supra, at page 228 said: ". . . 'recklessness' may be found in circumstances where defendant did not appreciate the extreme risk, but where any reasonable man would appreciate it."

To summarize, Oregon now equates gross negligence with recklessness, and in Oregon one may be found to have been reckless on the basis of an objective test, without an actual subjective appreciation of risk.

The Model Penal Code, and Illinois and New York law, and the California and Michigan drafts and the draft proposed here, on the other hand, distinguish between recklessness and gross negligence, characterize an act as negligent when the actor should be aware of the risk, and characterize an act as reckless when the actor consciously disregards the risk.

The comments to the new penal codes and to the various drafts indicate that negligence will rarely be used as the mental state required for guilt. To that extent the draft proposed here makes somewhat less change in the law than appears at first blush. Since gross negligence in Oregon is now equated with recklessness, the only substantial change is in using a subjective test for awareness of risk, rather than an objective one. Ordinary negligence will not be an adequate basis for criminal liability under proposed Section 2 (4). This is of course true in present Oregon law as far as negligent homicide is concerned. State v. Wilcox, 216 Or. 110, 124 (1959); ORS 163.091 (1).

The draft will do away with the problem that now often arises when a statute defining a crime fails to prescribe a required culpable state of mind. In that case the draft will require that intention, knowledge or recklessness shall have existed in order to find the defendant guilty, except in cases of violations (which are not punished by imprisonment) or if the law defining the offense clearly indicates a purpose to dispense with any culpable mental state requirement.

It would seem that uniformity of basic criminal law throughout the various states is a highly desirable goal. Perhaps the single most basic part of the code is the culpability part of it. It would seem, therefore, that the culpability provisions should be matched to those of New York, California, Illinois and Michigan if that is possible. It would hardly seem possible that Oregon could have local conditions that would dictate major differences.

It should be noted that both New York, in Penal Law Section 15.05 (3), and Michigan, in proposed Criminal Code Section 305, provide that a person who creates a substantial risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto. The following alternative draft of Section 2 (3) is submitted for consideration:

(3) A person acts recklessly, or is reckless, with respect to attendant circumstances or the result of his conduct when he acts in awareness of a substantial risk that the circumstances exist or that his conduct will cause the result and his disregard is unjustifiable and constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation. A person who creates such a substantial risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.

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TEXT OF OREGON REVISED STATUTES

161.010. Definitions. As used in the statutes relating to crimes and criminal procedure, unless the context requires otherwise:

(1) "Wilfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or omission referred to, and does not require any intent to violate law, to injure another or to acquire any advantage.

(2) "Neglect," "negligence," "negligent" and "negligently" import a want of such attention to the nature or probable consequences of the act or omission referred to as a prudent man ordinarily bestows in acting in his own concerns.

(3) "Corruptly" imports a wrongful design to acquire some pecuniary or other advantage to the person guilty of the act or omission referred to.

(4) "Malice" and "maliciously" import a wish to vex, annoy or injure another person, established either by proof or presumption of law.

(5) "Wrongfully" when applied to the commission of an act, implies simply that the act was done in violation of right or without authority of law.

(6) "Wantonly," when applied to the commission of an act, implies that the act was done with a purpose to injure or destroy without cause and without reference to any particular person.

(7) "Knowingly" imports only a knowledge that the facts exist, which bring the act or omission within the provisions of the criminal statutes, and does not require any knowledge of the unlawfulness of the act or omission.

(8) "Signature" includes any name, mark or sign written with intent to authenticate any instrument or writing.

(9) "Writing" includes printing.

(10) "Property" includes both real and personal property.

(11) "Person" includes corporations as well as natural persons. Where "person" is used to designate the party whose property may be the subject of a crime, it includes this state, any other state, government or country which may lawfully own any property in this state, and all municipal, public or private corporations, as well as individuals.

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Text of Oregon Revised Statutes (Cont'd)

30.115. Motor vehicle, aircraft and watercraft guest passengers; definitions.

(2) "Gross negligence" refers to negligence which is materially greater than the mere absence of reasonable care under the circumstances, and which is characterized by conscious indifference to or reckless disregard of the rights of others.

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TEXT OF REVISIONS OF OTHER STATES

Text of New York Penal Law

§ 15.05. Culpability; definitions of culpable mental states

The following definitions are applicable to this chapter:

1. "Intentionally." 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.

2. "Knowingly." 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.

3. "Recklessly." 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.

4. "Criminal negligence." 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.

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Text of New York Penal Law (Cont'd)

§ 15.10 Requirements for criminal liability in general and for offenses of strict liability and mental culpability

The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is physically capable of performing. If such conduct is all that is required for commission of a particular offense, or if an offense or some material element thereof does not require a culpable mental state on the part of the actor, such offense is one of "strict liability." If a culpable mental state on the part of the actor is required with respect to every material element of an offense, such offense is one of "mental culpability."

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§ 15.15 Construction of statutes with respect to culpability requirements

1. When the commission of an offense defined in this chapter, or some element of an offense, requires a particular culpable mental state, such mental state is ordinarily designated in the statute defining the offense by use of the terms "intentionally," "knowingly," "recklessly" or "criminal negligence," or by use of terms, such as "with intent to defraud" and "knowing it to be false," describing a specific kind of intent or knowledge. When one and only one of such terms appears in a statute defining an offense, it is presumed to apply to every element of the offense unless an intent to limit its application clearly appears.

2. Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of such offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such culpable mental state. A statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as defining a crime of mental culpability. This subdivision applies to offenses defined both in and outside this chapter.

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Text of Model Penal Code

Section 2.02. General Requirements of Culpability.

(1) Minimum Requirements of Culpability. Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.

(2) Kinds of Culpability Defined.

(a) Purposely.

A person acts purposely with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

(b) Knowingly.

A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

(c) Recklessly.

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

(d) Negligently.

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will

Text of Model Penal Code (cont'd)

result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

(3) Culpability Required Unless Otherwise Provided. When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.

(4) Prescribed Culpability Requirement Applies to All Material Elements. When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

(5) Substitutes for Negligence, Recklessness and Knowledge. When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.

(6) Requirement of Purpose Satisfied if Purpose Is Conditional. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense.

(7) Requirement of Knowledge Satisfied by Knowledge of High Probability. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

(8) Requirement of Wilfulness Satisfied by Acting Knowingly. A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears.

(9) Culpability as to Illegality of Conduct. Neither knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense, unless the definition of the offense or the Code so provides.

Text of Model Penal Code (Cont'd)

(10) Culpability as Determinant of Grade of Offense. When the grade or degree of an offense depends on whether the offense is committed purposely, knowingly, recklessly or negligently, its grade or degree shall be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense.

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