CONTENTS

Do criminals need a criminal mind? ..................................................... 3
The elements of crime ................................................................. 3
Physical elements ........................................................................... 3
Conduct ......................................................................................... 3
Act ................................................................................................. 3
Omission ......................................................................................... 3
State of affairs ............................................................................... 3
Circumstances ............................................................................... 4
Result .............................................................................................. 4
Fault elements ............................................................................... 4
Proof ............................................................................................... 4
Protection of victims ..................................................................... 5

Checks and balances - The interplay between the legislature and the judiciary . 7
The mischief rule v. a literal approach ............................................ 8
DO CRIMINALS NEED A ‘CRIMINAL’ MIND?

A crime is a behaviour that the government prohibits by statute or common law. People who ignore the prohibition, or ‘break the law’, face public stigma and serious penalties including prison sentences. While reports on crime and criminals appear in the media every day, what it really means to commit a crime is not always clear. This article outlines the ‘elements’ of criminal offences, and discusses whether a criminal needs a particular state of mind to be found guilty of a criminal offence.

THE ELEMENTS OF CRIME

Physical elements

All crimes must have a defined physical element or ‘actus reas’, which is the actual conduct that the state prohibits, prosecutes and punishes. For example, the physical element for murder is causing the death of a human being, and for rape it is having sexual intercourse with someone without their consent. However, minor offences also have a physical element, such as driving at more than 60 km on certain stretches of road, or parking in certain locations at certain times.

The rule of law requires that parliament or the courts make the physical elements of crime clear to the whole community. If police could decide on a given day to arrest and charge people who, for example, wore t-shirts displaying political slogans, no one would know when they dressed in the morning whether they could be committing a crime later in the day. That would be unjust to individuals, undermine the community’s faith in the law, and give police arbitrary powers that would be open to abuse.

A defendant would not use legal terminology to deny the completion of the physical element, but might plead not guilty and say ‘I didn’t do it’ or ‘you’ve got the wrong guy’. If the prosecution cannot prove beyond reasonable doubt that a defendant completed the physical element of an offence, the defendant cannot be found guilty.

The physical element can be straightforward or complicated, and can comprise just prohibited conduct, or a combination of conduct, circumstances and results. Descriptions and examples of the components of the physical element are provided below, and a table later in the article summarises them.

Conduct

A key aspect of the physical element of a criminal offence is conduct, which can, itself, be divided into the components of act, omission, and state of affairs.

Act

A physical element may consist of just conduct, such as in the example of threatening to kill another person. This physical element does not require anyone to fear or even to know about the threat, and so the conduct itself constitutes the physical element without any particular result being required. A later section on circumstances discusses some additional factors that combine with conduct to create a physical element.

Omission

The criminal law does not impose general obligations to ‘rescue’ others. If you walk past a person who is drowning and they die, you are not liable for murder. However, obligations may be imposed by parliament, through statutes, such as the requirement to lodge a tax return. The courts may also impose obligations through case law. For example, if you assaulted a person on a beach and failed to move them away from the rising tide, that omission could constitute the physical element for a homicide offence if the person drowned. The creating of the risk to the person generated an obligation to save them.

State of affairs

The final possible component of the physical element is a state of affairs. Even though someone is not doing an act, and not failing to do what the law requires of them, they could fulfil the physical element of a criminal offence by, for example, possessing illegal drugs, being unlawfully on premises, or joining an ‘outlaw’ motor cycle gang.
Circumstances

Some offences may involve conduct that is not criminal itself, but becomes criminal in certain circumstances. For example, sexual intercourse is legal, but lack of consent makes the lawful act unlawful. Urinating and swearing are lawful in private but unlawful in public. Driving is lawful where drivers have a valid licence, but unlawful where they do not. Other circumstances make criminal offences more serious. For example, it is unlawful to assault any person, but it is considered worse to assault a police officer.

Result

Finally, the physical element of some offences requires a particular result. Murder is the classic example, as the physical element is only made out if the defendant causes the death of a human being. This compares, for example, to the offence of threatening to kill, where a result is not required as the conduct itself constitutes the physical element.

The following table summarises the components of physical elements.

<table>
<thead>
<tr>
<th>Physical elements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conduct</td>
</tr>
<tr>
<td>Act</td>
</tr>
<tr>
<td>Omission</td>
</tr>
<tr>
<td>State of Affairs</td>
</tr>
<tr>
<td>Circumstance</td>
</tr>
<tr>
<td>Result</td>
</tr>
</tbody>
</table>

Fault elements

If a defendant completed the physical element of a crime, the question remains whether the prosecution must prove that the defendant had any particular mental state or fault element at that time. To put it another way, does a criminal always, or ever, need a ‘guilty’ or a ‘criminal’ mind?

Fault elements are of two types:

Subjective fault – is the mental state of the defendant when they completed the physical element. The main fault elements are intention, knowledge, belief and recklessness. Recklessness means turning one’s mind to the possibility or probability of the physical element resulting, and acting anyway. The other fault elements have their regular English language meaning.

Objective fault – is not concerned with the mind of the defendant, but assesses their actions according to what a reasonable or ordinary person would have foreseen or thought at the time of the completion of the physical element. Manslaughter is the main example of a serious criminal offence involving an objective state of mind.

Sir Edward Coke, an English lawyer, judge and, politician, stated in 1797 that ‘an act does not make a person guilty unless the mind is also guilty’. This principle means that the prosecution must prove subjective fault before any person can be found guilty of any crime.

The principle was influential for centuries, and serious offences, such as murder, rape, theft and assault, still require proof of subjective fault. This means the prosecution has to prove that a defendant intended or was reckless as to causing death, or having sexual intercourse with a person without their consent, or using force against another person without their consent, or taking something that belonged to someone else. These physical elements of these offences are not criminal without the required mental state being present at the time the physical element is completed.

Proof of the mental element is not, however, required for most modern offences. Many offences now only require proof of the physical element for a defendant to be found guilty.

There are two main reasons for this.

Proof

Proving of subjective fault is very difficult. It requires persuading the court, beyond reasonable doubt, of the mind-set of a defendant at a particular time. Take the example of a husband fatally shooting his wife on their farm, where the prosecution says he murdered in cold blood and he says it was a hunting accident. There are no witnesses, no security footage, and no confessions, so the prosecution has to rely on circumstantial evidence. Witnesses may have heard the defendant making threats toward his wife, or heard her saying she was leaving him. If he phoned an ambulance straight away and seemed devastated after her death, the accident argument may be strong. If he married his girlfriend a week after the funeral, the murder argument might be strengthened.

A ballistics report might show whether the gun shot was at close range, or from a distance and at an unexpected angle. It might be necessary to show details about whether the relationship of the accused with the dead person seemed happy, or if there was domestic violence. These details could be used to support either the defence or prosecution case, respectively. However, the availability and strength of circumstantial evidence varies, and it is always a painstaking process to prove a mental element.

In cases like murder, rape and robbery, which attract life sentences of prison and serious stigma, the proof of the mental state is critical, even though it will certainly mean that some guilty people will escape conviction. As the English jurist, William Blackstone, wrote in the 1760s: ‘it is better that ten guilty persons escape than that one innocent suffers.’
For minor offences, like driving matters, the stigma and penalty are low, and even if circumstantial evidence existed, the resources needed to investigate and present it to court would be out of proportion to the offending. To take the example of speeding, it would be impossible to prove that a defendant intended to drive at 100km per hour in a 60km zone unless a witness heard them say they intended to speed. If proof of fault were required, drivers could exceed the speed limit and then escape liability by claiming they were unaware of how fast they were driving. Prosecutors would be constantly occupied in court trying to prove the mental state of drivers; the roads would be full of dangerous drivers; and no fines would be collected to fund the maintenance of roads. Such offences only require the physical element to be proved. By not requiring proof of fault, prosecutors only have to show that the driver drove above the legal speed limit (the physical element), evidence of which is readily achieved through speeding cameras or police patrols. Offenders generally do not even need to appear in court, but can pay a fine to expiate the offence. The result is that drivers have to take responsibility for knowing how fast they are travelling. These processes deviate from principles of criminal responsibility, but are effective public policy, and the personal consequences for speeding drivers are minimal.

Protection of victims

There is a much more controversial trend to not require proof of fault for serious offences, particularly those of sexual intercourse and pornography involving children. Proof of the physical element will result in the finding of guilt, and a serious penalty for the defendant. The benefit of this approach is that it avoids all of the difficulties of proof of mental state, which would prevent many convictions being secured for these serious crimes. This provides additional safety to the community, justice to victims, and sends a strong message about how seriously child sexual offenders will be treated. Importantly, it also means that adults have obligations to take positive care about their conduct when it comes to dealing with children. If a guilty mind had to be proven, the smart criminal would not make inquiries about the age of people with whom they were sexually involved. This would be bad public policy and a perverse effect of the law, as it is clearly preferable to have people take active steps to ensure they do not undertake any sexual activities with children.

However, this approach risks injustice to defendants where, for example, the young person has lied that they are 18 years or older. Because proof of fault is not required, the offender may be guilty of a very serious crime, even though they took steps to follow the law and were relying on the incorrect information from the victim. Here, competing interests are resolved in favour of child victims, at the expense of the protection of defendants.

The following table summarises the fault elements of criminal offences.

<table>
<thead>
<tr>
<th>Fault Elements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Subjective fault</td>
</tr>
<tr>
<td>Intention</td>
</tr>
<tr>
<td>Recklessness</td>
</tr>
<tr>
<td>Knowledge</td>
</tr>
<tr>
<td>Belief</td>
</tr>
<tr>
<td>Objective fault</td>
</tr>
<tr>
<td>Negligence</td>
</tr>
</tbody>
</table>

Law-making is a complex balancing act. Defendants, victims and the whole community have the right to be safe, but also to have their legal rights protected if they are charged with a crime. It can be difficult to uphold both of these values at any one time. The decision on whether to require proof of fault in criminal prosecutions is one example of trying to balance these competing interests. The trend of parliaments over recent decades is that the role of the ‘guilty’ or ‘criminal’ mind has been reduced in favour of securing more convictions, more efficiently.

Student activities

1. Explain the term actus reus.
2. What is the actus reus of robbery, give an example.
3. Explain how a law stating that it was a crime to wear a t-shirt displaying a particular political slogan would provide the police with the power to abuse their powers.
4. If the police find you drinking in a public bar under age, is it a crime if you didn’t know what the age limit was. Explain.
5. Why could you be charged with a homicide offence, if you left a person on the beach below the high tide line, after you had assaulted him and that person died?
6. Explain the difference between subjective fault and objective fault.
7. Why can subjective fault be difficult to prove?
8. Explain the origins of the ‘criminal mind’.
Student activities

9. Make a list of the offences you think should require proof of the existence of a ‘criminal mind’. Explain why.

10. Make a list of the offences you think should not require proof of the existence of a ‘criminal mind’. Explain why.

11. Compare your lists to the examples in the article of offences that do and do not require the proof of fault, and assess how your view differs from that of your local parliament.

12. Describe the ways that a prosecutor could prove the state of mind of a defendant charged with murder.

13. Explain the difference between a subjective and an objective state of mind.

14. Consider whether you agree that it is better for ten people to be wrongly found not guilty than one person to be wrongly found guilty. Discuss.

15. Make a list of the circumstances that can make a lawful activity into an unlawful one.

Further reading


CHECKS AND BALANCES – THE INTERPLAY BETWEEN THE LEGISLATURE AND THE JUDICIARY

David Hamper – International Grammar School

The common law system creates a deliberate and constant tension between the various arms of government. Each has a degree of power and authority over the other with the Constitution resting as the ultimate authority. This tension is a cornerstone of balancing power across the system and ensuring that no one arm of government becomes too powerful. This so-called ‘separation of powers’ is often tested and the relationship between the legislature (the parliament) and the judiciary (the courts) is the key.

It is in Chapter 1 of the Australian Constitution that the separation of powers is most explicitly outlined, in particular s.51, which outlines the role of the Executive Council and s.71 that establishes the role of the High Court and allows for the creation of other federal courts. We find a similar process of separating powers between the arms of government replicated in the individual Australian states as well as in other common law countries, such as New Zealand, the United Kingdom, Canada and the United States.

Figure 1: The Separation of Powers

It is worthwhile here to pause and consider the function of a constitution. Allott provides a useful definition in stating that a constitution is ‘... a higher law in relation to everyday adjective law and substantive law. It is higher in the sense that its existence and validity are a precondition the validity of the adjective and substantive law’ (1979, p.79). In this sense all law - common and statute - derives its validity from the fact it was made within a constitutional framework.

While the Constitution explicitly outlines the separation of powers, the way that this is applied is somewhat vague and less prescriptive. It does in many respects come down to the fact that the judiciary interprets and implements the laws created by the legislature. It is this role in interpreting the legislation that is the source of the tension between the arms of government.

Scholars sometimes make reference the Bonham case of 1610 as the example of this tension between the judiciary and the legislature. In this historical case Sir Edward Coke, Chief Justice of the English Court of Common Pleas, noted that when parliament passes an act which ‘...is against common right or reason, or repugnant or impossible to be performed, the common law will control it...’. Put simply Coke was arguing that the judiciary has a role, and indeed a right, to review the legislation of parliament. It is worth noting though that this ruling never gained any traction in English law and in fact parliamentary statutes will always take precedent over the common law created by judges.

However, this is not to say that the judiciary has no role or indeed authority when it comes to statute law. In fact the judiciary has significant power through their role in interpreting statute law and it is this that remains the fundamental interplay between the judiciary and the legislature. It is through this interpretation of the statutes by the courts that they come to life and gain real legal meaning. We often hear that a particular part of the law is ‘yet to be tested’, in other words it has yet to go before a court to be interpreted by them in a real life scenario.

In a discussion of the UK Offences Against the Person Act 1861 (UK) Barber (2000) makes the point that judges have used their common law powers to effectively reinterpret sections of the Act to bring this old Act into line with modern standards and norms. For example, the term ‘bodily harm’ has over time come to be interpreted as including psychological harm. In this way the courts, while not actually rewriting the legislation, something they have no power to do, have instead chosen to adopt a particular interpretation of the words of the Act and in so doing are essentially broadening the intent and scope of it.
Aroney (2017) notes that it is now generally accepted that the High Court of Australia has the role of determining the power of the various institutions within the federation.

Throughout most of its history the High Court of Australia and the Commonwealth Parliament have each respected the other. However, in more recent years there has been increased tension as the High Court has struck down legislation that it sees as unconstitutional. The decisions of the High Court that typically attract criticism from governments have been those that are deemed to demonstrate judicial activism.

Decisions of the High Court have far-reaching implications. This can be seen in the following three key rulings of the High Court:

- the Engineers Case
- the Tasmanian Dam Case
- the Mabo Case.

The Engineers Case ([Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd] [1920] 28CLT 129) is often described as a landmark case in establishing federalism over state rights. In this instance the High Court ruled that the Commonwealth could use its 'corporations powers' to intervene in what was thought to be until that time a state based matter. Many legal theorists point to this case as one that began a trend towards increased power for the federal government over the states.

The Tasmanian Dam Case ([Commonwealth v. Tasmania] [1983] 136 CLR 1) was a crucial case around the Constitution. In this case the Commonwealth attempted to use its powers to stop Tasmania constructing a hydro-electric dam on the Gordon River. Tasmania argued that power generation was a state matter and that the Commonwealth had no powers. The Commonwealth argued that since the Gordon River was a World Heritage Site which was covered by an international convention they had powers to stop the dam under s.51 of the Constitution (external powers). The High Court agreed with the Commonwealth and the dam was never built. The decision of the High Court here had the outcome of elevating international law and allowing the Commonwealth to exercise powers in areas that

The mischief rule was first established in the 16th Century in Heydon’s Case and is still very much relevant today. This is the concept that a court should consider what mischief did the parliament intend the act to deal with. In essence it is the notion that the court should consider ‘what was the intent of the legislators in passing the act?’ and then use this intention rather than a literal interpretation of the act itself in applying the law.

The mischief rule is now often referred to as a purposive approach.

Lonnquist (2003) cites the words of Kirby J, of the Australian High Court, in the case [FC of T v Ryan [2000] 42 ATR 694, ‘...even to the point of reading words into the legislation in proper cases, to carry into effect an apparent legislative purpose...’ (p.2). The point here being that in the opinion of Kirby J the Court should interpret the law by considering its ‘purpose’. In this sense we can see Kirby J taking a purposive approach to the way he has interpreted the particular statute.

In contrast when the courts take a more literal interpretation of the statute they are focussing on the words rather than on the intent of the statute. Here in Australia it is the so called Engineers Case ([Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd] [1920] 28 CLT 129) that best represents this literal interpretation. In this case Higgins J outlined that the court seeks the intention of the legislature by examining the language used ‘... in its ordinary and natural sense...even if we think the result to be inconvenient...’ (cited Lonnquist, 2003, p.19).

In more recent times the UK case [Pepper v. Hart [1993] 1 All ER, 42 HL (E) provides yet another complexity. In this case the House of Lords, in making their decision, turned to the Parliamentary Hansard to better understand the intent of the law makers. Hansard is a record of the speeches, questions and answers of members of parliament made in the parliamentary debating chamber. That is, they took into consideration what members of parliament had said during the debate of the relevant bill (in this case a matter of taxation law) to interpret the meaning of the statute, which they found to be vague and uncertain. Until this case such evidence would have been excluded by the courts in their decision making. Steyn (2001) quotes Lord Denning’s comments in the ruling ‘Why should judges grope about in the dark searching for the meaning of an act, when they can so easily switch on the light’ (p.62). In other words judges should put themselves into the shoes of the law makers in parliament in a bid to understand their intent.
normally rest with the states where there is applicable international law.

Perhaps the most famous of all cases heard before the High Court to date is the Mabo Case (*Mabo v. Queensland* (No. 2) [1992] 175 CLR1). This case followed on from the previous Mabo Case of 1988. These cases are remarkable for the impact that they had on Australia, in effect voiding the concept of *terra nullius* that Britain had declared. The Court ruled that *terra nullius* is not part of Australian law and that the historical facts did not demonstrate that Indigenous Australians lacked a legal system. Through the Mabo decision Native Title entered both the law and the vernacular of Australia and transformed the way Australia recognises its Indigenous peoples.

At a state level we also see the Courts as playing a crucial role in interpreting the law. The case *Building Construction Employees and Builders’ Labourer Federation of New South Wales v. Minister of Industrial Relations and Another* [1986] 7 NSWLR 372 is a good example of this. In this instance the Builders’ Labourers Federation had been deregistered as a union. The Parliament passed an Act to remove doubts as to whether deregistration was in fact legal. The union appealed to the full bench of the NSW Supreme Court. The appeal was dismissed 3-2 but in the minority ruling Street CJ made the point that while Parliament has sovereign powers these powers are limited by the requirement to make laws that are for the peace, welfare and good government. Street CJ and Priestly JA argued that the laws passed were not of this nature. The majority ruling took a more literal interpretation finding that it is not the place of the Court to make judgments about the law where the legislation is clear and precise which it was argued in this case it was.

2017 marked a dramatic period in the relationship between judiciary and the legislature. A little referenced section of the Commonwealth Constitution, s.44 (i) became the centre of a political storm. The so called ‘dual citizenship’ crisis had politicians, lawyers and commentators dusting off their copies of the Constitution. The section in question states:

‘Any person who –

(i) Is under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the right or privileges of a subject or citizen of a foreign power…

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.’

Never before tested before the courts, the 2017 crisis saw the High Court rule on the meaning and intent of s.44 (i). Many pointed to the fact that at the time of writing the Constitution all Australians were in fact citizens of Great Britain and therefore the Court should consider that the intent was more about treason than holding dual citizenship.

After debate and much media speculation the High Court took what may be considered a literal interpretation declaring four senators and one member of the House of Representatives, the then deputy prime minister, were invalidly elected. A number of others resigned their positions both before and after the ruling.

### Student activities

1. Explain the doctrine of the separation of powers.
2. Explain the role of the Executive Council in Australia.
3. How is the High Court a necessary element of upholding the separation of powers?
4. What is adjective law? Compare adjective law to substantive law.
5. How does the judiciary have significant power over the application of legislation passed by parliament? Can the courts change the wording of legislation? Explain.
6. Explain the mischief rule and the literal rule and use an example to show how these rules may be used in court to interpret scenarios.
7. Why might the judiciary use the Parliamentary Hansard to find the intent of parliament when passing an act?
8. Why could the Engineers Case be seen as leading to increased powers of the federal government over the states?
9. Explain the Tasmanian Dam Case. Why was external powers used in the court’s finding for the Commonwealth?
11. Why is the interpretation of s.44 of the Constitution in 2017 seen as a literal approach? What other path could the High Court have taken?
12. How does this 2017 High Court decision clearly demonstrate the separation of powers? In what way is the judiciary able to provide checks and balances on the powers of the Commonwealth Parliament?
References


