McKinney's Penal Law § 15.00

§ 15.00 Culpability; definitions of terms

Currentness

The following definitions are applicable to this chapter:

1. "Act" means a bodily movement.

2. "Voluntary act" means a bodily movement performed consciously as a result of effort or determination, and includes the possession of property if the actor was aware of his physical possession or control thereof for a sufficient period to have been able to terminate it.

3. "Omission" means a failure to perform an act as to which a duty of performance is imposed by law.

4. "Conduct" means an act or omission and its accompanying mental state.

5. "To act" means either to perform an act or to omit to perform an act.

6. "Culpable mental state" means "intentionally" or "knowingly" or "recklessly" or with "criminal negligence," as these terms are defined in section 15.05.

Credits

(L.1965, c. 1030.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARY

by William C. Donnino

Culpability in general

A defense of involuntary possession [Penal Law § 15.00(2)] of a firearm (i.e. that it was not in the defendant's possession for a sufficient period for the defendant to have been able to terminate possession) may be pleaded with a defense of lack of constructive possession (i.e. that the defendant did not exercise a level of control over the area in which the property is found sufficient to give the defendant the ability to use or dispose of that property). *People v J.L.*, 36 N.Y.3d 112, 113-32, 139 N.Y.S.3d 103, 163 N.E.3d 34 (2020). When the record, viewed most favorably to the defendant, presents a reasonable view of the evidence that may support both defenses, inconsistent though they may be, the court must instruct the jury separately on both defenses; a "construction possession" charge alone is insufficient. *Id. See* CJI[NY] General Applicability, Possession, Voluntary; and Possession, Physical and Constructive.

Culpable Mental States

Intentionally

A defendant who shot into a crowd and thereby caused the death of a person in the crowd, though acquitted of murder premised on an intent to cause death, was properly found guilty of first degree manslaughter premised on an intent to cause serious physical injury [Penal Law § 125.20(1)]. *People v. Ramos*, 19 N.Y.3d 133, 946 N.Y.S.2d 83, 969 N.E.2d 199 (2012). "There is no contradiction," the Court explained, "in saying that a defendant intended serious physical injury, and was reckless as to whether or not death occurred." *Id*. at 136

Recklessly

The culpable mental state of "recklessly" requires that the jury "consider what risk defendant actually perceived and disregarded, not what she should have perceived." *People v. Lewie*, 17 N.Y.3d 348, 363, 929 N.Y.S.2d 522, 953 N.E.2d 760 (2011).

Intent to Deceive

The term "deceive" refers to deliberately causing another "to believe something that is not true." Oxford Dictionary, (https://www.lexico.com/en/definition/deceive).

In a concurring opinion in *People v Briggins*, 50 N.Y.2d 302, 309, 428 N.Y.S.2d 909, 406 N.E.2d 766 (1980), two judges stated that the term "deceive" in the context of a statutory requirement of "intent to deceive" "must ...

be read to connote a fraudulent or injurious purpose."

In *Golb v. Attorney General of the State of New York*, 870 F.3d 89 (2d Cir 2017), the Second Circuit via a writ of habeas corpus reviewed the decision in *People v. Golb*, 23 N.Y.3d 455, 991 N.Y.S.2d 792, 15 N.E.3d 805 (2014), which held that the unauthorized use of a person's email account to send a false email message to a third party with the "intent to deceive," constituted forgery. In its review, the Second Circuit interpreted the Court of Appeals decision as relying on the common definition of "deceive," namely, "to make another believe something that is false, regardless of whether there was intent to cause any possible harm." *Golb v. Attorney General of the State of New York*, 870 F.3d 89, 103-04 (2d Cir 2017). The Second Circuit noted that the alternative mental states in a forgery prosecution ("intent to defraud" and "intent to injure") "entail harm," and the omission of "harm" as part of an "intent to deceive" rendered that mental state unconstitutionally overbroad, infringing on protected First Amendment rights. *See* CJI [NY] Penal Law § 170.05 ("An intent to defraud, deceive, or injure another must include an intent to cause harm to that person").

Intent to Defraud

Although a significant number of penal statutes require an "intent to defraud," there is no Penal Law definition of that culpable mental state. It has been suggested that an intent to defraud should be "for the purpose of leading another into error or to disadvantage." *People v. Briggins*, 50 N.Y.2d 302, 309, 428 N.Y.S.2d 909, 406 N.E.2d 766 (1980) (concurring opinion) (Jones, J.). *See also* Black's Law Dictionary (6th ed. 1990) ("*Intent to defraud* means an intention to deceive another person, and to induce such other person, in reliance upon such deception, to assume, create, transfer, alter or terminate a right, obligation or power ..."); *Carpenter v. United States*, 484 U.S. 19, 27, 108 S.Ct. 316, 321, 98 L.Ed.2d 275 (1987) (finding that the words "to defraud" meant "wronging one in his property rights by dishonest methods or schemes, and usually signifying the deprivation of something of value by trick, deceit, chicane or overreacting").

While an "intent to defraud" is often directed at gaining property or a pecuniary benefit, it need not be so limited. *See People v. Kase*, 53 N.Y.2d 989, 441 N.Y.S.2d 671, 424 N.E.2d 558 (1981), *affirming* for reasons stated at 76 A.D.2d 532. In *Kase*, a prosecution for the filing of a false instrument, an intent to defraud was found where a person intentionally filed a false statement with a public office for the purpose of frustrating the State's power to fulfill its responsibility to faithfully carry out its own law.

In *People v. Taylor*, 14 N.Y.3d 727, 900 N.Y.S.2d 237, 926 N.E.2d 591 (2010), the defendant law firm was prosecuted for having illegally solicited automobile accident victims and ultimately submitting inflated insurance claims on their behalf. With respect to the charge of "offering a false instrument for filing in the first degree" [Penal Law § 175.35], the defendant's intent to defraud was evidenced by the filing of retainer statements with court officials which contained "false representations as to the source of client referrals." *See also People v. Garrett*, 39 A.D.3d 431, 835 N.Y.S.2d 105 (1st Dept. 2007) ("Defendant's larcenous and fraudulent intent can be inferred from the fact that he made false statements on his tax returns"); *People v. Stumbrice*, 194 A.D.2d 931, 599 N.Y.S.2d 325 (3rd Dept. 1993) ("Defendant's intent to defraud ... is readily inferable from her [false] affirmation ... that [her husband] lived outside the household and by her omission of his name from the list of the members of the household, and by her failure during the relevant time period to report him as a member of her household despite her knowledge of the continuing obligation to do so"). *Compare People v. Tyler*, 46 N.Y.2d 264, 267-69, 413 N.Y.S.2d 302, 385 N.E.2d 1231 (1978) (the statement in an application for bail that the application was made by a named attorney on behalf of the defendant was false but did not by itself evidence an intent to defraud, deceive or injure another person).

Willfully (or Wilfully)

"Willfully" (sometimes spelled "wilfully") is not a defined culpable mental state. The history of the term is that it does not have a single meaning; rather, its meaning must be discerned by the context of the statute in which it is used. *People v. Washington*, 18 N.Y.2d 366, 369, 275 N.Y.S.2d 508, 222 N.E.2d 378 (1966) ("The interpretation of the statutory words 'wilful' and 'wilfully' has long troubled the courts and no comprehensive or all-sufficient definition is available (*see People v. Broady*, 5 N.Y.2d 500 [186 N.Y.S.2d 230, 158 N.E.2d 817 (1959)]).") *See generally* Note: Criminal Culpability's Wild Mens Rea: Use and Misuse of "Willful" in the Laws of New York, 4 Alb. Gov't L. Rev. 779 (2011) ("Willful ... is perhaps the most conflated, confusing, and confounding of all criminal mental states"). For those reasons, it was deliberately omitted from the current Penal Law as a defined culpable mental state when the law was initially revised: "One of the main defects of the existing New York statutes defining offenses involving culpability is their use of a host of largely undefined and frequently hazy adverbial terms, such as ... 'wilfully' ...." Staff Notes of the Commission on Revision of the Penal Law, Proposed New York Penal Law, McKinney's Spec. Pamph. (1964), p. 312.

Since then, unfortunately, the undefined term "willfully" has crept back into some defined Penal Law crimes. *See, e.g.*, "health care fraud" [*see* Penal Law § 177.05]; "making a false statement of credit terms" [Penal Law § 190.55]; "misrepresentation by a child day care provider" [Penal Law § 260.31].

It should be noted, however, that a few Penal Law weapon statutes enacted in the revised Penal Law did include the undefined term "wilfully." *See* "manufacture, transport, disposition and defacement of weapons" [Penal Law § 265.10 (6)]; "prohibited use of weapons" [Penal Law § 265.35(2) and (3)]. The reason is that in 1963, two years before the revised Penal Law was enacted, as a result of years of study and the recommendations of the Joint Legislative Committee on Firearms and Ammunition, the provisions of the former Penal Law dealing with weapons were revised. L.1963, c. 136; former Penal Law §§ 1896-1904. The revisers of the Penal Law made a strategic decision designed to aid in the passage of the revised Penal Law to incorporate without revision those 1963 statutes defining weapon crimes, including those few which used the term "wilfully."

Also, in enacting the current Penal Law, the revisers excised from the former Penal Law more than three hundred offenses which were narrow, specialized, or regulatory in character, and were related to other bodies of the consolidated laws. Those offenses were transferred to the appropriate consolidated law. Thus, those offenses became more readily identifiable to a person concerned with the particular subject matter of each consolidated law, and the Penal Law was more effectively organized to define the offenses of general application. *See* Legislative Memoranda, "The Proposed Penal Law," McKinney's Sessions Laws, 1964, pp. 2024-26. In doing so, however, no revisions were made in those statutes, and a fair number of those statutes use the term "willfully."

Black's Law Dictionary (6th edition 1990 at 1599) defines "willful" in accord with the general meaning of "intentional." However, in *People v. Coe*, 71 N.Y.2d 852, 527 N.Y.S.2d 741, 522 N.E.2d 1039 (1988), the Court was faced with a penal statute that defined a misdemeanor and that used only the term "wilfully" to define the mens rea. There, the Court found "wilfully" to be the equivalent of the term "knowingly." The Court rejected the defendant's assertion that "wilfully" in that statute required "proof of an evil motive or intent to injure," noting such were "higher culpable mental states appropriate for intentional crimes classified as felonies." *Id*. at 855.

PRACTICE COMMENTARY

by William C. Donnino

Culpability; in General

This article is designed to set forth the basic requirements of criminal liability, with an emphasis on defining the several culpable mental states, more traditionally referred to as the mens rea of criminal conduct. The article borrows from Model Penal Code §§ 2.01, 2.02, and 2.04.

"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" [Penal Law § 15.10].

Excluded from a "voluntary act" [Penal Law § 15.00(2)] and thus from criminal liability are "reflex actions, bodily movements during unconsciousness, hypnosis, epileptic fugue, and the like." Staff Notes of the Commission on Revision of the Penal Law. Proposed New York Penal Law. McKinney's Spec. Pamph. (1964), p. 312. However, "[d]efendant's drinking was not involuntary in the sense intended by the Penal Law merely because it was the result of chronic alcoholism or post-traumatic stress disorder." *People v. Starowicz*, 207 A.D.2d 994, 617 N.Y.S.2d 100 (4th Dept., 1994).

Excluded from an "omission" is the failure to perform an act as to which no duty of performance is imposed by law [Penal Law § 15.00(3)]. Parents "have a nondelegable affirmative duty to provide their children with adequate medical care" and thus, the failure to perform that duty can form the basis of a criminal charge. *People v. Steinberg*, 79 N.Y.2d 673, 680, 584 N.Y.S.2d 770, 595 N.E.2d 845 (1992).

A key aspect of the definition of "voluntary act" is that it includes possession of property "if the actor was aware of his physical possession or control thereof for a sufficient period to have been able to terminate it" [Penal Law § 15.00(2)]. Thus, in defining the actus reus of possession, the law has seemingly included the equivalent of the mens rea of "knowingly," irrespective of whether the operative statute defining the offense includes that mens rea. *See* Penal Law § 15.15(2). However, there is, technically, a distinction between the actus reus and the mens rea. A person may be knowingly in possession of property (fulfilling the mens rea requirement and part one of the actus reus), but not have possession of the property for such a sufficient period of time as to have been able to terminate that possession (not fulfilling the second part of the actus reus). That second part of the actus reus requirement is rarely in issue.

Mental Culpability

If conduct or an omission, divorced from a culpable mental state, is all that is required for criminal liability, then the offense is one of "strict liability" [Penal Law § 15.10]. The Penal Law, however, does not favor offenses of strict liability, and "unless clearly indicating a legislative intent to impose strict liability, [a statute defining a crime] should be construed as defining a crime of mental culpability" [Penal Law § 15.15(2)]. Thus, for example, although forcible rape is not defined to include a culpable mental state, intent is an element of that crime. *People v. Williams*, 81 N.Y.2d 303, 316-17, 598 N.Y.S.2d 167, 614 N.E.2d 730 (1993).

If a culpable mental state is required with respect to every material element of an offense, the offense is one of "mental culpability." The culpable mental states are: "intentionally", "knowingly", "recklessly", "with criminal negligence" [Penal Law §§ 15.05, 15.15(1)], and "depraved indifference to human life" [*People v. Feingold*, 7 N.Y.3d 288, 819 N.Y.S.2d 691, 852 N.E.2d 1163 (2006)].

When only one mentally culpable state appears in the definition of an offense, "it is presumed to apply to every

element of the offense unless an intent to limit its application clearly appears" [Penal Law § 15.15(1)]. Pursuant to that presumption, to knowingly enter or remain unlawfully in a dwelling [Penal Law § 140.15], "the intruder must know not only that the building which he enters is a dwelling but also that his entry is unlawful. Similarly, in order to 'knowingly possess stolen property' [Penal Law § 165.40], one must know both that he is in possession of the property involved and that it is stolen. On the other hand, one 'knowingly and unlawfully possesses a dangerous drug' [Penal Law § 220.05] when without authorization he is in possession of a drug which he knows to be cocaine, regardless of whether he knows his possession thereof to be unlawful [*People v. Georgens*, 107 A.D.2d 820, 484 N.Y.S.2d 657 (1985)]." Denzer and McQuillan, Practice Commentary to Penal Law § 15.15, McKinney's Penal Law (1967). *See also People v. Foley*, 94 N.Y.2d 668, 709 N.Y.S.2d 467, 731 N.E.2d 123 (2000) (placement of "intentionally" in Penal Law § 235.22 ("Dissemination of indecent material to minors") requires, pursuant to Penal Law § 15.15(1), that the defendant both intend to initiate the communication with the minor and to "importune, invite or induce" the minor to engage in the requisite sexual conduct.)

The presumption in Penal Law § 15.15(1) emerged from obscurity when the Court of Appeals relied upon it in *People v. Ryan*, 82 N.Y.2d 497, 605 N.Y.S.2d 235, 626 N.E.2d 51 (1993), to hold that where the definition of a controlled-substance crime required that the defendant "knowingly" possess or sell a controlled substance of a specified weight, there must be proof that the defendant knew the weight of the substance as well as the nature of the substance. While the *Ryan* opinion remains a guideline to the Court's future application of this statute, the Legislature chose to overrule the result of *Ryan* by amending the controlled-substance statutes to make the weight of the controlled substance an element of strict liability. L.1995, c. 75, effective June 10, 1995.

A couple of years before *Ryan*, the Court had decided in *People v. Mitchell*, 77 N.Y.2d 624, 569 N.Y.S.2d 393, 571 N.E.2d 701 (1991), that for the crime of criminal possession of stolen property in the fourth degree [Penal Law § 165.45(2)], while a person must know that he or she possesses stolen property, it was a matter of strict liability that the stolen property, a wallet, contained a credit card. That decision did not discuss the applicability of the presumption in Penal Law § 15.15(1), and then, *Ryan* did not cite or discuss *Mitchell*. Albeit not by itself determinative of the outcome in *Mitchell*, the format of the statutory language in that case that resulted in the strict liability ruling was to first specify the basic elements of the crime of criminal possession of stolen property, and then to add: "... and when: 2. The property consists of a credit card ..." [Penal Law § 165.45(2)]. In seeking to overrule *Ryan*, the Legislature borrowed that statutory language format by first prohibiting the possession or sale of a particular drug and then adding: "and" the drug was of a specified weight. As a result, it would now "clearly appear" that the use of that language format is designed to rebut the presumption established by Penal Law § 15.15(1).

Culpable Mental States

Intentionally

"Intentionally" is a familiar concept; it requires a "conscious objective" [Penal Law § 15.05(1)] or "purpose" [CJI2d [NY], *e.g.*, Penal Law § 120.00(1)] to cause a particular result, or to engage in particular conduct [Penal Law § 15.05(1)]. Thus, for example, "a person acts with intent to cause ... injury to another when that person's conscious objective or purpose is to cause ... injury to another" [CJI2d [NY] Penal Law § 120.00(1)].

While intent is a subjective state of mind, it may be proved by circumstantial evidence, and the objective evidence of the surrounding circumstances may be examined to determine a person's "conscious objective or purpose." *See* CJI2d [NY] Culpable Mental States-Intent ("... you may consider the person's conduct and all of the circumstances surrounding that conduct, including, but not limited to, the following: what, if anything, did the person do or say; what result, if any, followed the person's conduct; and was that result the natural, necessary and probable consequence of that conduct").

In a prosecution, for example, for an intentional assault, the motive for the assault, the nature of the violent act, whether a weapon was used, what part of the body was assaulted, and what type of injury resulted are factors which the trier of facts may consider in determining the intent of the person who committed the act. *See* *People v. Agron*, 10 N.Y.2d 130, 218 N.Y.S.2d 625, 176 N.E.2d 556 (1961); *People v. Horton*, 18 N.Y.2d 355, 275 N.Y.S.2d 377, 221 N.E.2d 909 *remittitur amended* 19 N.Y.2d 600, 278 N.Y.S.2d 388, 224 N.E.2d 884 (1966); *People v. Ozarowski*, 38 N.Y.2d 481, 381 N.Y.S.2d 438, 344 N.E.2d 370 (1976).

Knowingly

"Knowingly" requires that a person be "aware" that his or her conduct is of the nature described by the offense or that a circumstance described by the offense exists [Penal Law § 15.05(2)]. Notably, the term "knowingly," unlike the Model Penal Code definition [§ 2.02(2)(b)(ii)], does not also include an awareness that it is practically certain that the actor's conduct will cause a result defined by an offense. The distinction between "intentionally" and "knowingly" under such a definition was considered "highly technical or semantic"; thus, "knowingly" was not so defined and is not used in the Penal Law to define a "result" offense. Denzer and McQuillan, Practice Commentary to Penal Law § 15.05, McKinney's Penal Law (1967).

As with "intent," to determine whether a defendant acted "knowingly," a jury "may consider the person's conduct and all of the circumstances surrounding that conduct, including, but not limited to, what, if anything, did that person do or say." *See* CJI2d [NY] Culpable Mental States--Knowingly.

With respect to whether a person "knowingly" possesses property, the act of "possession suffices to permit the inference that the possessor knows what he possesses, especially, but not exclusively, if it is in his hands, on his person, in his vehicle, or on his premises." *People v. Reisman*, 29 N.Y.2d 278, 285, 327 N.Y.S.2d 342, 277 N.E.2d 396 (1971); *People v. Kirkpatrick*, 32 N.Y.2d 17, 343 N.Y.S.2d 70, 295 N.E.2d 753, *appeal dismissed for want of substantial federal question* 414 U.S. 948, 94 S.Ct. 283, 38 L.Ed.2d 204 (1973). Further, the nature of some criminal conduct can give rise to an inference of knowledge of what one possesses. *People v. Green*, 35 N.Y.2d 437, 442-43, 363 N.Y.S.2d 910, 914, 323 N.E.2d 160 (1974) ("because of the nature of narcotics traffic and high monetary value attached to illicit drugs, ignorance of one's possession of narcotics or knowledge of their nature or value is highly unlikely").

Recklessly

A person acts "recklessly" when that person engages in conduct which creates or contributes to a substantial and unjustifiable risk that a result will occur or a circumstance defined by statute exists, and when that person is aware of and consciously disregards that risk. See Penal Law § 15.05(3); CJI2d [NY], *e.g.*, Penal Law § 120.00(2). *Cf.* *People v. Cabrera*, 10 N.Y.3d 370, 858 N.Y.S.2d 74, 887 N.E.2d 1132 (2008). The degree of risk must be such that a disregard of the risk constitutes a "gross deviation" from the standard of conduct that a reasonable person would observe in the situation [Penal Law § 15.05(3)].

A defendant who creates or contributes to the requisite risk cannot claim a lack of awareness of the risk solely by reason of voluntary intoxication [Penal Law § 15.05(3)]. The rationale, as applied to the drunken driver who "recklessly" causes injury or death, is that "the element of recklessness itself--defined as conscious disregard of a substantial risk--encompasses the risks created by defendant's conduct in getting drunk." *People v. Register*, 60 N.Y.2d 270, 280, 469 N.Y.S.2d 599, 457 N.E.2d 704 (1983), *overruled on other grounds* *People v. Feingold*, 7 N.Y.3d 288, 819 N.Y.S.2d 691, 852 N.E.2d 1163 (2006). *See also* Staff Notes of the Commission on Revision of

the Penal Law. Proposed New York Penal Law. McKinney's Spec. Pamph. (1964), pp. 313-14.

A "reckless" culpable mental state is included within the higher mental culpability of "intentionally" for the purpose of determining a lesser included offense. Thus, for example, depending on the facts of the case, reckless manslaughter may be a lesser included offense of intentional manslaughter [*People v. Tai*, 39 N.Y.2d 894, 386 N.Y.S.2d 395, 352 N.E.2d 582 (1976)], and assault in the second degree (*i.e.*, recklessly causing serious physical injury by means of a weapon [Penal Law § 120.05(4)]) may be a lesser included offense of assault in the first degree (*i.e.*, an intent to cause serious physical injury and causing such injury by means of a weapon [Penal Law § 120.10(1)]). *People v. Green*, 56 N.Y.2d 427, 452 N.Y.S.2d 389, 437 N.E.2d 1146 (1982).

Even if a count is not a lesser included of another count, the counts may yet have to be submitted to the jury in the alternative if the culpable mental states of the two counts are inconsistent. For example, where a person was charged with two counts of murder in the second degree for the commission of one homicide, one count of intentional murder and one count of reckless, depraved indifference murder, the counts were held to be inconsistent, i.e., "[o]ne who acts intentionally in shooting a person to death--that is, with the conscious objective of bringing about that result--cannot at the same time act recklessly--that is, with conscious disregard of a substantial and unjustifiable risk that such a result will occur." *People v. Gallagher*, 69 N.Y.2d 525, 529, 516 N.Y.S.2d 174, 508 N.E.2d 909 (1987). On the other hand, a conviction of attempted assault in the first degree predicated on intentional conduct is not inconsistent with a conviction for reckless endangerment in the first degree. "A defendant could certainly intend one result--serious physical injury--while recklessly creating a grave risk that a different, more serious result--death--would ensue from his actions." *People v. Trappier*, 87 N.Y.2d 55, 59, 637 N.Y.S.2d 352, 660 N.E.2d 352 (1995). *Suarez v. Byrne*, 10 N.Y.3d 523, 540, 860 N.Y.S.2d 439, 890 N.E.2d 201 (2008).

Criminal negligence

"Criminal negligence" is a culpable mental state utilized in assault and homicide statutes. A person acts with "criminal negligence" when that person engages in conduct which creates or contributes to a substantial and unjustifiable risk that a result will occur or a circumstance defined by statute exists, and when that person "fails" to perceive that risk "in a situation where the offender has a legal duty of awareness." *See* Penal Law § 15.05(3); CJI2d [NY], *e.g.*, Penal Law § 120.00(2); *People v. Haney*, 30 N.Y.2d 328, 335, 333 N.Y.S.2d 403, 284 N.E.2d 564 (1972); *People v. Cabrera*, 10 N.Y.3d 370, 377, 858 N.Y.S.2d 74, 887 N.E.2d 1132 (2008). In *Cabrera*, the Court of Appeals added that for criminal negligence, the evidence must show that the defendant's "conduct constituted 'not only a failure to perceive a risk of death, but also some serious blameworthiness in the conduct that caused it' ". The degree of risk must be such that the failure to perceive the risk constitutes a "gross deviation" from the standard of conduct that a reasonable person would observe in the situation [Penal Law § 15.05(3)].

In the context of criminally negligent homicide cases, the Court of Appeals has also explained that criminal liability cannot be predicated upon every careless act merely because its carelessness results in another's death; that the elements of the crime preclude the condemnation of inadvertent risk creation unless the significance of the circumstances of fact would be apparent to one who shares the community's general sense of right and wrong; and in the end, the finder of fact must evaluate the actor's failure of perception and determine whether, under all the circumstances, it was serious enough to be condemned. *People v. Haney*, 30 N.Y.2d at 334-35, *supra*. *People v. Ricardo B.*, 73 N.Y.2d 228, 235-36, 538 N.Y.S.2d 796, 535 N.E.2d 1336 (1989).

Common denominators of acting recklessly and acting with criminal negligence include (1) that there be a "substantial and unjustifiable risk" that a result or circumstance specified by statute will occur or exists, as the case may be; (2) that the defendant engaged in some blameworthy conduct which created or contributed to that substantial and unjustifiable risk; and (3) that the defendant's conduct constituted a "gross deviation from the

standard of conduct that a reasonable person would observe in the situation" [Penal Law § 15.05(3)]. The difference between the two states of mental culpability is that the "reckless offender is aware of that risk and 'consciously disregards' it. The criminally negligent offender, on the other hand, is not aware of the risk created and, hence, cannot be guilty of consciously disregarding it. His liability stems from a culpable failure to perceive the risk. His culpability, though obviously less than that of the reckless offender, is appreciably greater than that required for ordinary civil negligence by virtue of the 'substantial and unjustifiable' character of the risk involved and the factor of 'gross deviation' from the ordinary standard of care." Staff Notes of the Commission on Revision of the Penal Law. Proposed New York Penal Law. McKinney's Spec. Pamph. (1964), p. 313.

A "criminally negligent" culpable mental state is included within the higher mental culpability states of "reckless" and "intentional" for the purpose of determining a lesser included offense. Thus, criminally negligent homicide may be a lesser included offense of reckless manslaughter or intentional manslaughter or murder. *See People v. Stanfield*, 36 N.Y.2d 467, 369 N.Y.S.2d 118, 330 N.E.2d 75 (1975); *People v. Green*, 56 N.Y.2d 427, 452 N.Y.S.2d 389, 437 N.E.2d 1146 (1982).

Depraved indifference to human life

Albeit not included in the statutory definitions of culpable mental states in Penal Law § 15.05, "depraved indifference to human life" has been held to be a culpable mental state. *People v. Feingold*, 7 N.Y.3d 288, 819 N.Y.S.2d 691, 852 N.E.2d 1163 (2006). For commentary on the meaning of "depraved indifference to human life," *see* Practice Commentary to Penal Law § 125.00 in the section entitled: "Reckless, with depraved indifference, murder."

Notes of Decisions (17)

McKinney's Penal Law § 15.00, NY PENAL § 15.00
Current through L.2023, chapters 1 to 49, 61 to 104. Some statute sections may be more current, see credits for details.

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