

- Approximately 60 percent of offences were not reported to the police. Reasons given for not reporting included the insignificance of the incident, the impotence of the police, and the decision to deal with the incident in another way. Victims who reported crimes to police commonly did so because they believed it was their duty.
- Women reported the fear of crime more often than men. Twice as many women as men reported feeling worried while waiting for or using public transportation alone after dark. Three times as many women as men felt unsafe while walking alone in their neighbourhood after dark.

CHECK YOUR UNDERSTANDING

1. Describe the differing rates of victimization for young people and for seniors. Can you suggest reasons for the difference, using facts derived from the Statistics Canada survey?
2. Did reading the statistics change your ideas about your personal safety strategies? Explain your answer.
3. Examine the reasons given for not reporting offences. Which do you believe is the most valid? Why? What other reasons might people have?

Elements of an Offence

To obtain a conviction, the Crown must prove beyond a reasonable doubt that each and every element of the offence with which the accused is charged was in fact committed by the accused. Criminal offences are made up of two basic elements: a prohibited act, known as the *actus reus*, and a criminal intent, known as the *mens rea*.

Actus Reus

The *actus reus* of a *Criminal Code* offence is the act or omission (failure to act) that has been identified by Parliament as sufficiently harmful to warrant state intervention. It is usually simple to identify the *actus reus* of a crime by reading the definition of the offence set out in the Code. Consider, for example, s. 222(1), which provides that “a person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.” The *actus reus* of homicide is causing the death of a human being.

Now consider s. 90(1), a more complicated prohibition. Section 90(1) provides that “[e]very person commits an offence who carries a weapon ... concealed, unless the person is authorized under the *Firearms Act* to carry it concealed.” The *actus reus* for s. 90(1) has several components: *carrying a weapon* that is *concealed* without *authorization*. Each of these four elements of the *actus reus* may raise questions of interpretation. Is an accused “carrying” a weapon when the weapon is in the trunk of a car being driven by the accused? Is an ice pick a weapon? What about a nail file or a tire iron? What constitutes concealment? What counts as an authorization under the *Firearms Act*? Must the accused have physical possession of the

authorization? The answers to these interpretive questions are found in the decisions of judges who have applied s. 90(1).

Generally speaking, most criminal offences require that the accused take some action, such as possessing, applying force, causing death, taking, stealing, shouting, or harassing. Some provisions, however, make it a criminal offence to fail to act in circumstances where a duty to act exists. Parents, for example, have a duty to provide the “necessaries of life” for their dependent children. Failure to provide such necessaries may lead to criminal liability.

It is understood, but not explicitly written into the *Criminal Code*, that the *actus reus* must be committed voluntarily—that is, it must be the conscious choice of an operating mind. Our criminal law does not hold people criminally responsible for actions that they cannot control. Take, for example, the driver of a motor vehicle who is stung by a bee, has an allergic reaction, and as a result drives into another vehicle. While the manner of driving may be dangerous, the accused has not committed that *actus reus* voluntarily. The Crown, in these circumstances, cannot prove the *actus reus* of the offence of dangerous driving. More complex questions arise when one considers the impact of mental illness or the consumption of alcohol or drugs on a person’s ability to act voluntarily. You will examine these questions in Chapter 10: The Criminal Trial.

Mens Rea

The *mens rea* of a criminal offence is the mental element that accompanies the commission of the *actus reus*. A famous Latin maxim, “*actus non facit reum nisi mens sit rea*” (an act does not become guilty unless the mind is guilty), summarizes the fundamental idea that mere commission of the prohibited act is insufficient for criminal liability. The act must be done with a “guilty mind.” *Mens rea* is the technical term for the blameworthy state of mind that must be proven, beyond a reasonable doubt, by the Crown.

Sometimes the offence-creating provisions in the *Criminal Code* state the specific *mens rea* that must be established in order to convict an accused. For example, s. 319(2) makes it an offence to “wilfully” promote hatred “by communicating statements, other than in private conversation.” The word establishing the *mens rea* in s. 319 is “wilfully.” The accused will be convicted only if the Crown can prove that the accused promoted hatred “wilfully.” It is not enough for the Crown to prove that the accused behaved “carelessly” or “knowingly” or “recklessly.”

Clues to the technical meaning of the word “wilfully” are found in cases interpreting s. 319(2). Other provisions use words such as “intentionally,” “negligently,” or “fraudulently.” Some provisions use no *mens rea* words at all. As a result, much of the law on *mens rea* is found in the decisions of judges interpreting the language of the *Criminal Code*. The best place to start any *mens rea* analysis is in the case law interpreting a particular offence.

mens rea: the blameworthy mental element in a criminal offence

actus reus: the wrongful act or omission in a criminal offence

Analyzing a Criminal Offence

You have already encountered the offence of assault in discussing the case of *R v. Cuerrier*. Here, you will analyze the *actus reus* and *mens rea* of that offence. Section 265(1)(a) of the *Criminal Code* states, “A person commits an assault when ... without the consent of another person, he applies force intentionally to that other person, directly or indirectly.”

There are two aspects to the *actus reus* of assault: the direct or indirect application of force to a person and the lack of that person’s consent. If either of these elements is absent, a conviction is impossible because the *actus reus* cannot be established. Therefore, if force is directly applied to a person who has consented to the application of force, as in a hockey game, the *actus reus* is missing. If force is applied directly to an animal, the *actus reus* is missing as well. In neither case can the person who directly applied the force be convicted of assault.

Assuming that the *actus reus* can be proven, what *mens rea* is required in order to convict for assault? Section 265(1)(a) tells you that the application of force must be intentional; however, it says nothing about the lack of consent. There are a number of conclusions that can be drawn from the ambiguity of the provision. You could interpret the failure to specify a *mens rea* with respect to non-consent as an indication that no *mens rea* is required. In this case, the Crown would not have to establish anything about the accused’s knowledge of the victim’s lack of consent. However, general principles of criminal liability developed at common law suggest that such an approach is wrong. There is an **interpretive presumption** when dealing with *Criminal Code* offences that *mens rea* is required with respect to each and every element of the *actus reus*.

Assuming that some *mens rea* with respect to consent is required, there are still a number of options. You could insist that the prosecution prove that the accused actually knew that there was no consent at the time that force was applied. This is a subjective assessment of **culpability** because it focuses on the actual knowledge of the individual accused. Alternatively, you could interpret the provision as requiring the Crown to establish that a reasonable person would have realized that there was no consent at the time that force was applied. This standard of culpability is objective because it is less concerned with the actual knowledge of the accused. The objective standard reflects the belief that those who apply force should act reasonably.

Subjective or Objective?

At various times in the history of criminal law, courts have preferred one approach over the other. In the late 19th century, questions about *mens rea* were straightforwardly objective. People were presumed to intend the natural consequences of their acts. A natural consequence was defined as a consequence that a reasonable person would foresee. Therefore, if a reasonable person would foresee an *actus reus*, that *actus reus* was intended. If

a reasonable person would foresee the *actus reus* that the accused committed, the accused was guilty as charged. No one worried about what was in the mind of the accused person at the time of the offence. Blame was based on the accused’s failure to live up to the standard of the reasonable person, an “objective” standard that was external to the accused.

More recently, courts in Canada have developed a preference for the subjective standard. Subjective theory requires the Crown to prove that the accused himself or herself had the **requisite intention** at the time the offence was committed. Many judges and criminal theorists believe that subjective theory is the fairest way to allocate blame since it links fault to the accused’s own choices. These advocates of the subjective approach believe that criminal liability should be reserved for those who consciously choose to behave criminally.

Whether culpability is based on objective or subjective *mens rea* is a question of law that must be addressed with respect to each criminal offence. Once it has been authoritatively decided that the *mens rea* for a certain offence is objective or subjective, that decision governs all trials of that offence. In other words, it cannot be argued that *mens rea* should be subjectively (or objectively) measured for a particular accused. Any argument must be directed toward whether *mens rea* should be subjectively (or objectively) measured for the particular offence with which the accused is charged.

The following facts, based on the English case of *R v. Lamb*, demonstrate why the choice between subjective and objective standards is important. Larry Lamb was a young man who owned a revolver that had a five-chambered cylinder that rotated clockwise each time the trigger was pulled. As a joke and with no intention of doing harm, Lamb pointed the revolver at his best friend. There were two bullets in the chambers, but neither bullet was in the chamber opposite the barrel. Lamb did not intend to fire the gun, but when he pulled the trigger, the cylinder rotated and placed a bullet opposite the barrel so that it was struck by the striking pin. Lamb killed his best friend.

Assume that Lamb is charged with a homicide offence, the *actus reus* of which is causing death. Clearly Lamb has committed the *actus reus*. His culpability depends on an assessment of *mens rea*.

Did Lamb subjectively intend to cause death? If your answer is no, does that mean that Lamb is blameless with respect to his friend’s death?

Was Lamb’s behaviour reasonable—that is, would a reasonable person have pointed a loaded gun at the head of his best friend? If you conclude that Lamb behaved unreasonably, do you believe that his unreasonableness is sufficiently culpable to find him criminally responsible for the death?

Would it matter if Lamb were to convince you (perhaps by calling expert evidence) that the mistake he made was a reasonable mistake for anyone unacquainted with guns? If your answer is yes, why is the reasonableness of Lamb’s mistake significant? If your answer is no, what is it about Lamb’s behaviour that you believe is blameworthy?

requisite intention: the *mens rea* that the Crown is required to establish in order to convict an accused of an offence

interpretive presumption: inference that must accompany the interpretation of a law

culpability: guilt



For the outcome of *R v. Lamb*, see www.emp.ca/dimensionsoflaw