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CHAPTER ONE

INTRODUCTION

The Latin maxim *actus non facit reum, nisi mens sit rea*, has been in use in criminal law since the sixteenth century, it was coined to refer to a state of mind required for criminal liability. There is no doubt that the maxim serves an important purpose in criminal law, in that it reminds us that save in exceptional offences where no *mens rea* is required. For example, in traffic offences under the Roads and Road Traffic Act\(^1\) ss.211, 198 and 201 and also offences of strict liability, as was the case in R v Prince\(^2\) were the charge was one of taking an unmarried girl under the age of 16 out of the possession of her father out of his will, contrary to the Offences Against the Person Act. In that case Prince knew that the girl was in the custody of her father, but he believed, on reasonable grounds, that she was 18. He was held by the Court for Crown cases to have been rightly convicted since knowledge that the girl was under 16 was not required. The commission of the *actus reus* is not in itself criminal but only becomes so if committed with the requisite *mens rea*. Which Lord Hailsham LC stated that;

"...the phrase means “an act does not make a man guilty of a crime, unless his mind is also guilty”. He continued; ‘It is thus not the *actus* which is *reus* (i.e guilty) but the man and his mind respectively...it is as well to record this as it has frequently led to confusion.”

In order to understand the meaning of the said maxim, it is important to observe various areas of criminal law, such as criminal responsibility of the accused, thus the state of mind at the material time (*mens rea*) and the conduct of the accused (*actus reus*); here it is also important to discuss the literal meaning of the Latin maxim as interpreted and to determine whether s.204 of the penal code\(^5\) does encapsulate a similar concept of the literal meaning of the translation of the said maxim and also to determine what state of mind and act is necessarily required for criminal liability.

\(^1\) Chapter 464 of the Laws of Zambia.
\(^2\) (1875) LR 2 CCR 154.
\(^4\) Card, Cross and Jones, *Criminal Law*, p 39
\(^5\) Chapter 87 of the laws of Zambia
In this research it is proposed to deal generally with what is or ought to be proved in order to secure a conviction in criminal matters, although it may be that the defendant can avoid conviction by relying on a defense. Two points are involved: first the outward conduct which must be proved against the defendant (which is customarily known as the *actus reus*); and secondly, the state of mind which must be proved to have had at the time of the relevant conduct (customarily known as the *mens rea*).

There are many instances where the courts have expressed several deviant utterances which have created confusion as to what exactly is a correct translation of the meaning of the maxim. Whatever meaning is given to it or it carries, whether it does reflect a true picture of stressing the two requirements needed for criminal liability. For example, Lord Morris stated that;

“.....it has frequently been affirmed and should unhesitantly be recognized that it is a cardinal principle of our law that *mens rea*, an evil intention or knowledge of the wrongfulness of the act, is in all ordinary cases an essential ingredient of guilt of criminal offence”.

On the other hand, in Yip Chin-cheung v R it was stated that “the fact that the defendant was not morally at fault is not in itself a defense”. It is against this background that this research paper is centered on, to analyze the possible obscurity of the maxim and find a possible solution to this effect.

The research paper shall first begin with a few general observations, thus, the meaning of malice aforethought and the Latin maxim itself before analyzing the expressions *actus reus* and *mens rea*. The statement of the problem of this study is the obscurity of the Latin maxim *actus non facit reum, nisi mens sit rea*. Although the significance of the maxim has been stressed in a number of judgments, where it has been held by the House of Lords and other courts that, unless a statute either by clear words or necessary implication rules out *mens rea* as a constituent element of the crime, a court should not find a person guilty of an offence against the criminal law unless he has a guilty mind.

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6 Card, Cross and Jones, *Criminal Law*. p 39
7 Sweet v Parsley (1970) AC 132
8 (1995) 1 AC 111
9 Card, Cross and Jones, *Criminal Law*. p 40
However, the problem is in the way the maxim has been interpreted or rather translated literally with a short sight. In a mass of cases mens rea involved moral ‘blame’, and the result is that people have got into the habit of translating the words mens rea as meaning guilty or evil mind\(^\text{10}\), (not only does it involve ‘evil mind’, but also includes other states of mind such as, intention, knowledge, negligence and recklessness with respect to all elements of the offence\(^\text{11}\), and thinking that a person is not guilty of a penal act unless in doing what he aid he had a wicked mind. Lord Diplock also pronounced these words on the subject in Trency v DPP\(^\text{12}\) that;

".....criminal law is about the right of the state to punish persons for their conduct, generally when that conduct is undertaken with a wicked intent or without justification cause.”

The argument by Lord Morris in Sweet v Parsley\(^\text{13}\) that mens rea, an evil intention or knowledge of the wrongfulness of the act, is in all ordinary cases an essential ingredient of guilty of criminal offence. That to my mind is wrong, because if that will be the test then many crimes will go undetected, for mens rea or the state of mind differs from crime to crime. They are acts that are termed as criminal where one might be convicted for the said crime not because they had an evil intention to bring about the result but rather because penal law designates such to be a crime\(^\text{14}\), for example, mercy killing. It has been held in many cases that the commission of the actus reus is not in itself criminal but only becomes so if committed with the request mens rea (either evil or not).

These examples will be subjected to critical analysis so as to establish a comprehensive conclusion of the repercussions of the obscurity that has been or is likely to be caused by the translation of the said maxim when it comes to stressing the tow basic requirements of criminal liability, if any.

\(^{10}\) Sweet v Parsley (1970) AC 132, p 18
\(^{11}\) Smith and Hogan, Criminal Law, 10\textsuperscript{th} ed, Butterworth: London, 2002. P 88
\(^{12}\) (1971) AC 537
\(^{13}\) (1970) AC 132
\(^{14}\) R v Miller (1983) 2 AC 161
The scope of this study has confined itself to the implication of the literal meaning of the interpretation (translation) of the Latin maxim *actus non facit reum, nisi mens sit rea*. At the centre of this study is the discussion of the obscenity of the Latin term *mens rea* (intention, recklessness, and negligence) and *actus reus*, regard has also been hard to the meaning of malice aforethought under s.204\(^5\) of the penal code. Thus, the study had proposed generally to try and find out whether there is need to prove an “evil intention” in every criminal offence charged in order for the accused to be convicted; and also, find out to what extent is the Latin maxim part of the law, or the law in action in Zambia. The study further endeavored to find out whether the Latin Maxim *actus non facit reum, nisi mens sit rea* is sufficient enough to bring out the useful framework for analysis of the definition of offences; thus to find out whether it is possible that one might escape the conviction of murder or manslaughter if he has killed without an evil mind.

The rationale of this study is to point out a useful framework for the analysis of the definition of specific offence and the two basic requirements of criminal liability. Because time is sometimes wasted in court by the consideration of pointless questions concerning the heading under which certain undeniable requisite of criminal liability should be discussed by the accused and the prosecution. Thus, there is no doubt that, in many offences a person can be convicted despite the fact that he is blameless as to a particular element of the *actus reus*, and in some despite his blamelessness as to all such elements\(^6\) (here is said to be under strict liability). If this is the case, then the question to be answered is what is meant by evil intention or guilty mind? For if this is the meaning of the maxim the prosecution will fail unless it can satisfy the court that the defendant at the material time had an evil intention.

This research will thus show this emerging interpretation of the maxim and suggest a useful framework or interpretation of the maxim for the analysis of the definition of specific offences, without losing sight of the effects of such an interpretation on criminal liability.

\(^5\)Penal code, Cap 87 of the Laws of Zambia.
\(^6\) Card, Cross and Jones, *Criminal Law*. P 111
The main objective of this study is to critically analyze the meaning of the literal interpretation of the Latin maxim *actus non facit, nisi mens sit rea*. The following are the specific objectives: To find out whether there is a particular state of mind the prosecution needs to prove in each and every criminal offence charged in order to secure a conviction; to find out to what extent the Latin maxim is part of the law, or the law in action in Zambia; further, analyze whether the Latin Maxim *actus non facit reum, nisi mens sit rea* is sufficient enough to bring out the useful framework for analysis of the definition of the offences; and finally identify whether it is possible that one might escape the conviction of murder or manslaughter if he/she has killed without an evil mind.

The significance of this study is carried out because of the growing concern of the rise in crime due to the growth and complexity of society and human activity which has impacted on the criminal justice system. These human activities have resulted in act or conducts that might be termed criminal, but the question now to be addressed is whether the basic requirements for criminal liability are the same in all the offences, and if not, then to find a possible solution to the confusion or rather the misunderstanding created by the Latin maxim *actus non facit reum, nisi mens sit rea*, so as to give a clear meaning of the two basic requirements of criminal liability which the prosecution needs to prove in criminal cases without losing sight of the two necessary requirements thus (*mens rea* and *actus reus*), and also to assist judges with a useful framework for the analysis of the definition of specific offences before them, in which they would find it easy to analyze the evidence before the court in criminal matters. Further more, it would assist lay people more especially the accused that in order to be convicted of a criminal offence it does not necessarily mean that there must be an evil intention. It might either be recklessness\textsuperscript{17}, knowledge\textsuperscript{18} or any wrongful act designated by the statute.

The methodology of data collection in this study was qualitative and was collected by two methods; thus, primary and secondary sources. The secondary source thus research desk, and includes obtaining data from several literatures written on the subject in form of books, journals, scholarly articles as well as the internet was consulted with a view to

\textsuperscript{17} The people v Lawrence Mumanga (1985) ZR 35  
disseminating current information, regard was also hard to relevant case and statutory authorities. While primary source includes field investigation in form of interviews with person with know how on the subject matter from the Zambia police Service, Road Traffic Commission and the Drug enforcement Commission.

GENERAL SUMMARY OF THE RESEARCH PAPER

This research paper was set out to critically analyze the literal interpretation of the Latin maxim, *actus non facit reum, mens nisi sit rea*, and its constituent elements thus, *actus reus* and *mens rea*. In Chapter 1, the essay discussed the basic aspects of the research and gave a prelude to the subject. It also highlighted the salient features, the character and content of Chapters 2, 3, 4 and 5 respectively.

In Chapter 2, the essay discussed the meaning of the said Latin maxim, *acuts non facit reum, mens nisi sit rea*. Its importance in criminal law and possible short falls, the essay went on to discuss how, or whether s. 204 of the Penal Code does encapsulate the said maxim. The essay further addressed the questions as to what extent the said maxim is part of law or the law in action in Zambia.

Chapter 3 main focus was on the constituent element of *mens rea*, thus, intention, recklessness, as is negligence. The essay analyzed these elements in great detail with a close eye in light of the interpretation of the maxim, and how or whether in practice the courts have given effect to it. The essay went further to discuss the question whether there is need to prove an element of ‘evil or wicked’ intention in all criminal offences, and also to establish what state of mind is required to be proved by the prosecution in order to prove an offence beyond reasonable doubt. Lastly, to establish whether, the maxim adequately and clearly brings out the constituent element of the crime.

In Chapter 4, the essay had focused on the meaning of *actus reus* and its constituent elements, thus, commission, omission, possession and voluntariness. The essay went on to analyze what constitutes an *actus reus* in various offences in light of the literal interpretation of the maxim. Whereas, Chapter 5 which is the last chapter, gave the
conclusion and proposed recommendations regarding the findings of the paper on the issue at hand, so as to cure the mischief created by the said maxim.

In conclusion, this Chapter has dealt with the essential aspects of the research conducted and given an overture to the area under discussion. It has given the statement of the problem, the scope, rational, justification, significance, objectives and methodology of the study. The following chapter shall deal with the Latin maxim 'actus non facit reum, nisi mens sit rea' and malice aforethought as provided in s.204 of the penal code.
CHAPTER TWO

THE MEANING OF THE LATIN MAXIM ACTUS NON FACIT REUM, NISI MENS SIT REA VIS-VIS MALICE AFORETHOUGHT UNDER s.204 OF THE PENAL CODE.

The subject matter of this chapter is to establish the extent to which this Latin maxim is part of the law or the law in action in Zambia. In order to achieve that, the chapter shall endeavor to analyze in detail the meaning of the phrase actus non facit reum, nisi mens sits rea and malice aforethought under s.204\(^\text{19}\) of the penal code. This chapter shall explain in detail the meaning of the maxim as interpreted by the courts its usefulness and shortcomings if any and its constituent elements, thus mens rea and actus reus though briefly, (for mens rea and actus reus shall be discussed in great detail in chapter three and four respectively). The chapter shall further endeavor to explain what is meant by malice aforethought and how it has been interpreted by the courts in Zambia and show whether the maxim is well encapsulated there under.

To begin with, it is most significant to make mention of the fact that the standard common law test of criminal liability is usually expressed in the Latin phrase, actus non facit reum, nisi mens sit rea, which means the “the act does not make a person guilty unless the mind be also guilty.”\(^\text{20}\)

Thus, in jurisdictions with due process, there must be an actus reus accompanied by some level of mens rea to constitute the crime with which the defendant is charged. The interpretation of this actually means that his mind should also be faulty. The maxim therefore contains two basic elements which determine the criminal responsibility of the accused;\(^\text{21}\) these are (1) actus reus and (2) mens rea. The practical effect of these two elements is that if one has to be convicted of a crime the prosecution has to prove both of them equally beyond reasonable doubt\(^\text{22}\). The exception is offences of strict liability were the defendant can be convicted even though his conduct was not intentional, knowing, reckless or negligent with reference to a requisite element of the offence charged\(^\text{23}\).

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\(^{19}\) Penal code Act, Cap 87 of the Laws of Zambia


\(^{21}\) S Kulusika, Criminal Law in Zambia, p. 33

\(^{22}\) Woolmington v DPP (1935) AC 462

\(^{23}\) Card, Cross and Jones, Criminal Law, P 142
The maxim however has not escaped criticism. When commenting on a similar phrase, *non est reus nisi mens sit rea*, Stephen J said:

"...though this phrase is in common use, I think it most unfortunate, and not only likely to mislead, but actually misleading, on the following grounds. It naturally suggest that, apart from all particular definitions of crimes, such a thing exist as a "mens rea", or "guilty mind", which is always expressly or by implication involved in every definition. This is obviously not the case, for the mental elements of different crimes differ widely."

This remains true today. *Mens rea* in murder means an intention unlawfully to kill or cause grievous bodily harm; in theft that the defendant acted ‘fraudulently’ and with the intention to permanently deprive the general or special owner anything capable of being stolen. In some cases, such as manslaughter, *mens rea* can denote mere blameworthy inattention.

The maxim can also be criticized in that *mens rea* is not always required for every criminal liability; in many offences a person can be convicted despite the fact of his blameless inadvertences as to a particular element of the *actus reus*, such as offences of strict liability, and in some despite his blameless inadventerence as to all elements. For example, are offences under the Roads and Road Traffic Act such as s. 201. In fact it is possible that one can be convicted despite his motive or clear conscious so long as the act committed is one designated as a crime by the statute as such.

Notwithstanding these strictures, the significance of the maxim has been stressed in a number of judgments, where it has been held particularly by the House of Lords and other courts for example, as was the case in *Brend v Wood*, where Lord Goadard. C.J stated,

"...it is of utmost importance for the protection of the liberty of the subject that a court should always bear in mind that unless a statute, either by clear words or by necessary implication rules out *mens rea* as a constituent part of a crime, the court should not find a person guilty of an offence against the criminal law unless he has a faulty mind."

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24 Card, Cross and Jones, *Criminal Law*, p 40
25 Penal Code Act, Cap. 87, s. 204 (a)
26 Penal Code Act, s. 265 (1)
27 R v Nicholls (1874) 13 Cox CC 75
28 Stone and Dobinson, (1977) QB 354
29 Chapter 464 of the Laws of Zambia
30 S Kulusika, *Criminal Law in Zambia*, P 55-56
31 (1946) 175 LT 306
Most people would agree that, as a general rule, the infliction of punishment is only justified when the defendant was at fault. The requirement of mens rea is thus designed to give effect to the idea of just punishment.

The fact that the requirement that an actus reus should always be proved is even more important than the requirement of mens rea. Evil intentions only become sufficiently dangerous to society to merit punishment when the agent has gone a considerable distance towards carrying them out. Even the most diehard believers in punishment concede that even less satisfactory than one which punished deeds without considering the mental state of the doer. As Stephen, J put it:

".....the reasons for imposing this great restriction upon the law are obvious. If it were not so restricted it would be utterly intolerable; all mankind would be criminals and most of their lives would be passed in trying and punishing each other for offences which could never be proved."[32]

According to 'Maluti'[33] in his obligatory essay gives an example of a situation were X intending to frighten Z and not to harm him as a result of an involuntary action presses the trigger honestly believing that the gun is unloaded, but to his surprise a bullet comes out and he kills his friend. According to ‘Maluti’

".....he argues that surely you cannot say that he is directly responsible of the act although he has killed a person because he had no intention to do so, because he lacked the criminal intent.”

Personally I have a problem with this analysis because in as much as one did not intend to kill or do harm what so ever was contemplated, the mere fact that the act in question is one designated by the statute as criminal one cannot go unpunished despite of his blameless mind.[34]

For example, in the case of Senior[35] X neglected to summon medical assistance for his sick child. He belonged to a religious sect and believed that God would cure the child. The child died and X was convicted of manslaughter, ‘no matter what is motive was’. While in Chandler v DPP[36], X and others tried to enter an air faired to protest against nuclear weapons carried by aircraft flying from the base. They intended to prevent aircraft from taking off by obstructing the

[32] Card, Cross and Jones, Criminal Law, p 41
[34] Sweet v Parsley (1970) AC 132 at 42
[35] (1889) 1 QB 283
[36] (1962) 3 All ER 314
runway. X’s appeal against conviction was dismissed because their intention to obstruct the runway was prejudicial to aircraft safety and state security. X’s motive of getting rid of nuclear weapons was treated as irrelevant.

It is for this reason that in other jurisdictions the term mens rea and actus reus have been superseded by alternative terminology. In Australia for example the elements of all federal offences are now designated as “fault element” (mens rea) and “physical element” (actus reus). This terminology was adopted in order to replace the obscurity of the Latin terms with simple and accurate phrasing.37

I now turn and look at the constituent element of the said maxim actus non facit reum nisi mens sit rea, thus actus reus and mens rea separately and briefly. Actus reus refers not only to an ‘act’ in the usual sense of the that term, it has a much wider meaning. It involves the conduct of the accused person, its result and those surrounding circumstances which are included in the definition of the offence38. The actus reus comprises, therefore, all the elements of the definition of the offence, save those which concern the condition of the mind of the accused should any element of the actus reus not be present, then the offence has not been committed39.

As for mens rea, the translation of the phrase a ‘guilty or wicked mind’ is inadequate, since mens rea may exist even though a person acts in good faith and with a clear conscience40. A more accurate meaning of the phrase would be;

“.....a mental element necessary for a particular crime, and this mental element may either be intention or recklessness as to such act or consequence.”41

While Lord Simon, in DPP v Majewski42 said that mens rea is;

“...the state of mind stigmatised as wrongful by the criminal law which, when compounded with the relevant prohibited conduct, constitutes a particular offence.”

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38 S Kulusuika, Criminal Law in Zambia . p 34
39 Card, Cross and Jones, Criminal Law. p 41
40 Attorney-General’s Reference (No. 1 of 1995)
42 (1977) AC 443
Or recklessness as to the consequence of the act, Shearman J. said in Allard v Selfridge\textsuperscript{43} that the true translation of that phrase (\textit{mens rea}) is criminal intention, or an intention to do the act which is made penal by statute or by common law.

The decisive question to be determined here is the extent to which Latin maxim is part of the law, or the law in action in Zambia. It must be mentioned here that under the Zambian penal law\textsuperscript{44} malice aforethought has been defined as the intention on the part of the accused person to kill or to cause grievous bodily harm to another person. Furthermore, grievous bodily harm was defined to mean, some harm which is sufficiently serious to interfere with the victims health or comfort\textsuperscript{45}. More recently in DPP v Smith\textsuperscript{46}, it was stated that there existed;

"...no warrants for giving the words grievous bodily harm a meaning other than that which the words convey in their ordinary sense. Bodily harm means no more no less than really serious."

In Zambia, malice aforethought is provided for in the penal code. The statute defines malice aforethought in clause (a)\textsuperscript{47} as, 'an intention to cause death of or to do grievous bodily harm to any person, whether such a person is the one killed or not.' In order to understand this clause one should ask himself a question, supposing you want to kill X by stabbing him, but then X duck's and you kill Y standing by X instead, are you liable for murder? According to this clause you are, due to the fact that you have the necessary factors required for the offence. Thus the intention to kill found in the objective test.

Clause (b)\textsuperscript{48} defines malice aforethought as;

"...knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such knowledge is accompanied by indifference whether death or grievous harm is caused or not, or by a wish that it may not be caused."

This happiness when one does an act or omission which may cause death or grievous harm of another under these circumstances one will be guilty of murder. This is found in objective test.

\textsuperscript{43} (1925) 1 KB 125
\textsuperscript{44} Chapter 464 of the Laws of Zambia
\textsuperscript{45} R v Vickers (1957) 2 QB 664
\textsuperscript{46} (1982) Crim. LR 531
\textsuperscript{47} Chapter 87 of the Laws of Zambia s. 204
\textsuperscript{48} Chapter 87
Clause (c)\textsuperscript{49} covers an intention to commit a felony in this case killing in the course of committing a felony, one cannot plead in defense that he did not intend to kill\textsuperscript{50} but only to steal. When one kills so as to achieve the same then he is guilty of murder according to this clause.

Clause (d)\textsuperscript{51} deals with an intention to facilitate escape. ‘Maluti’\textsuperscript{52} give an example of where X goes to steal with Y while running away from Z, Y comes along grabs Z by the throat where upon Z dies. When such a situation occur malice aforethought shall be deemed to be present.

The courts are always extra careful in judging cases involving malice aforethought. It is very difficult if not impossible to know of a person’s thoughts, as per Lord Atkin\textsuperscript{53} stated that,

> “a man’s state of mind is just like his digestive system, even a devil cannot know of a man’s state of mind.” following this therefore we can only tell of a persons thoughts by the acts they do.”

A point to note when looking at the word malice aforethought is the word malice. Malice is categorized in three parts, express, implied and constructive malice\textsuperscript{54}. Express malice which has been said to consist of an intention to kill. While constructive malice is intent to commit a felony. Implied malice on the other hand is an intention to cause grievous bodily harm.\textsuperscript{55}

In the case of DPP v Smith\textsuperscript{56}, the accused was ordered by a police officer to halt the car he was driving, which was loaded with stolen goods. In an attempt to stop the car, the police officer jumped on it and was shaken off as a result of the accused driving. The police officer fell under another car and sustained injuries from which he subsequently died. The accused was found guilty of murder; on appeal to the criminal court of appeal which altered this to manslaughter, but the House of Lords restored the original conviction. Judgment of the House of Lords, per Viscount Kilmer, was that;

> “...it matters not what the accused in fact contemplated as the probable result or whether he ever contemplated at all, provided there was a law responsible and mountable for his...”

\textsuperscript{49} Chapter 87 of the Laws of Zambia
\textsuperscript{50} R v Vickers at 7
\textsuperscript{51} R v Vickers at 7
\textsuperscript{52} K Maluti. Malice aforethought (1977-1978), p 3
\textsuperscript{53} Woolmington v DPP (1935) AC 462
\textsuperscript{54} S Kulusika, Criminal Law, p 453
\textsuperscript{55} S Kulusika, Criminal Law, p 453
\textsuperscript{56} (1982) Crim. LR 531
actions, that is, was a man capable of forming an intent, not insane within the M‘Naghten Rules on the assumption that he is so accountable for his actions, the sole question is whether the lawful and voluntary act was such a kind that grievous bodily harm was the natural and probable result. The only test available for this is what the ordinary responsible man would, in the circumstance of the case ever contemplated as the natural and probable result. That, indeed, has always been the law...."

The judgment was interpreted as laying down that, for the accused to be found guilty of murder, it was not necessary to prove either an intention to kill or to cause grievous bodily harm, but that the accused could be convicted if the prosecution could show that death or grievous bodily harm was probable through an objective assessment, by the natural and probable consequence of the accused acts. In this sense therefore, the law is very much interested and indeed very concerned into knowing the accused conduct and his intention when and at the time he was committing the act. Any reasonable man is said to be in a position to appreciate the natural and probable consequences of his act. This therefore puts into question the literal interpretation or translation of the maxim, which connotes a ‘wicked’ mind or ‘evil’ intention as occasionally interpreted by the courts. For the prosecution does not always need to prove these requirements in order to secure a conviction for the accused. For even in hilarious crimes such as murder one needs not necessarily to have the ‘evil’ intention to kill or the ‘wicked’ mind as occasionally interpreted by the courts to the contrary.

From the analysis of s. 204 of the penal code it follows therefore, that the extent to which the said maxim is the part of the law or the law in action in Zambia, really, is to a lesser extent. Because in most offences, it is clear from the application in the courts that the prosecution do not necessarily needs to prove notions of an evil mind, moral fault, or knowledge of the wrongfulness of the conduct. The fact that the defendant was ignorant that his conduct constituted an offence is not in itself a defense. Moreover, it is generally irrelevant to liability whether the defendant acted in a ‘good’ or ‘bad’ motive.

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57 R v Cunningham (1957) 2 ALL ER 863
58 Sweet v Parsley (1970) AC 132
59 Vickers.
60 Penal Code Act, s. 204 (b)
61 See, for example, Sherras v de Rutzen (1895) 1 QB 918 at 921, per Wright J; also Sweet v Parsley (1970) AC 132 at 152, per Lord Morris.
62 Yip Chiu-Cheung (1994) 2 All ER924
In conclusion, it must be mentioned here that the importance of the maxim cannot be doubted, but even then the said maxim should not be allowed to become the master rather than the tool of the criminal lawyer. A perfectly coherent account of the criminal law could be given without it. Sometimes, as in the case of conspiracy which has been defined as “an agreement by two or more to do an unlawful act or do a lawful act in an unlawful way,” it is not easy to split an offence into its actus reus and mens rea, for an agreement is sufficient element of actus reus and the mens rea is the intention to play a role in the concluded agreement. The next chapter shall endeavor to analyze in great detail the meaning of the maxim mens rea.
CHAPTER THREE
THE MEANING OF MENS REA, MENTAL ELEMENT REQUIRED FOR CRIMINAL LIABILITY.

This chapter will endeavor to analyze in great detail the meaning of the maxim *mens rea*. The chapter shall endeavor to establish whether there is need to prove an “evil intention” in every criminal offence charged in order for the prosecution to secure a conviction and whether it is possible that one might escape the conviction of murder if he/has killed without an ‘evil’ mind or ‘wicked’ intention. In order to achieve this, the chapter shall analyze what is meant by the term *mens rea* and its constituent element, thus intention, recklessness and knowledge. These will be explained in this chapter, as is negligence. Thereafter, a conclusion of the chapter shall be followed.

According to Card, Cross and Jones,63 The expression ‘*mens rea*’ refers to the state of mind expressly or impliedly required by the definition of the offence charged. ‘Kulusika’ defined *mens rea* as whatever state of mind X must be proved to have as required by the definition of the offence charged.64 Whereas Smith and Hogan,65 defined *mens rea* as ‘intention, knowledge or recklessness with respect to all elements of the offence.’ This varies from offence to offence; typical instances are intention, recklessness and knowledge. Notably of the definitions given by these writers is that *mens rea* is the state of mind the accused must have had at the material time. In the course of examination of typical states of mind it will be necessary to refer to negligence, although it can hardly be said to be a state of mind because it is concerned with whether a reasonable person would have realized the risk in question.

In modern times, the courts particularly the House of Lords, have indicated a preference for judging a defendant on the basis of what he intended or knew and so on, rather than on the basis of what a reasonable person would have realized.66

63 Card, Cross and Jones, *Criminal Law*. p 76
64 S Kulusika, *Criminal Law*. p 52
66 For example, in DPP v Morgan (1976) AC 182
Criminal law does not usually apply to a person who acted with the absence of mental fault,\(^{67}\) this is the general rule. The exception is strict liability crimes (in civil law, it is not usually necessary to prove a subjective mental element to establish liability, say for breach of contract or a tort\(^{68}\), although if intentionally committed, this may increase the measure of damages payable to compensate the plaintiff as well as the scope of liability). In these offences the actus reus involves proof of a 'state of affairs'.\(^{69}\) Offences of strict liability are offences which require no blameworthiness on the part of X. That is, the court will not require the prosecution to prove X’s mens rea or negligence beyond reasonable doubt\(^70\). Quite simply therefore mens rea refers to the mental element of the offence that accompanies the actus reus.

They are four types of mens rea; intention, recklessness and knowledge so is negligence. Intention in criminal law requires the highest degree of fault of all the levels of mens rea. A person, who intends to commit a crime, can generally be said to be more culpable than one who acts recklessly. Intention differs from motive or desire Per Lord Bridge in Moloney\(^71\). Thus,

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“……a person who kills a loved one dying from a terminal illness, in order to relieve pain and suffering may well act out of good motives. Nevertheless, this does not prevent them having the necessary intention to kill and cannot go unpunished.”
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If this is the correct position of the law, which of course is supported by this paper then it can be argued that the prosecution needs not to prove a ‘wicked’ or an ‘evil intention’ in every offence in order to secure a conviction for the accused. So long as it can be satisfied that the act don, is a prohibited act or crime designated as such by the statute. For example, in Chitenge v The People\(^72\), the appellant was found guilty as charged despite the fact that he had no ‘evil’ intention or ‘wicked’ mind. The appellant did not know the deceased and had no intention of injuring him, nor did he know that he was staying at Njemba’s house though he had seen him and Njemba eating together. He was found guilty of murder because he caused the death of deceased by unlawful and

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\(^{67}\) S Kulusika, Criminal Law in Zambia. p 33
\(^{68}\) Patel’s Bazaar Limited v The People (1965) 10 SJZ 27 Court of Appeal
\(^{69}\) S Kulusika, Criminal Law in Zambia. p 127
\(^{70}\) S Kulusika, Criminal Law in Zambia. p 127
\(^{71}\) (1985) AC 905
\(^{72}\) (1966) ZR 37
dangerous act. The state needed not to prove a wicked mind or evil intention to secure a conviction, it was sufficient that the act which caused the death of the deceased was unlawful and dangerous in the circumstance.

This decision leaves much to be desired, for it ultimately confirms the fact that the Latin maxim does not adequately explain the necessary criminal element required for the offence. In fact, it can safely be argued that the said maxim in question is somehow, in fact it is misleading and hence superfluous.

It has been said that a person intends a consequence of his act (or omission) if he acted (or failed to act) with the aim or purpose of, thereby bringing about that consequence. In addition, if a person foresees that a consequence is virtually certain to result from his conduct, although it is not his aim or purpose to achieve it, he can be found to have intended that consequence. Where the definition of the actus reus of the offence charged requires the defendant’s conduct to produce a particular consequence, he has a sufficient mental state as to that consequence if he intended his act (or omission) to produce that consequence. In many offences where the defendant’s conduct is required to produce a particular consequence, liability can be based on either intention or recklessness as to that consequence being produced by his act (or omission). However, in the definition of some offences, liability can be based only on intention and it is in these offences that the question of what is meant in law by intention is of crucial importance.

But, the question to be determined is whether the test of culpability is based on a purely subjective measure of what is in a person’s mind or whether the court measure the degree of fault by using objective tools. The example given is that, suppose “A, a jealous wife, discovers that her husband is having a sexual affair with B. wishing only to drive B away from the neighborhood, she goes and set’s fire to the front door. B dies in the resulting fire. A is shocked and horrified. It did not occur to her that that B might be physically in danger and there was no conscious plan in her mind to injure B when the

73 Card, Cross and Jones, Criminal Law. p 77
74 Card, Cross and Jones, Criminal Law. p 77
fire began. But when A's behavior is analyzed, B's death must be intentional. That if A had genuinely wished to avoid any possibility of injury to B, she would not have stated the fire, or, if verbally warning B was not an option, she should have waited until B was seen to leave the house before starting the fire. As it was, she waited until night when it was more likely that B would be at home and be fewer people around to raise the alarm.\(^75\)

It has been argued that on a purely subjective basis, A intended to render B's house uninhabitable, so a reasonably substantial fire was required. The reasonable person would have foreseen a probability that people would be exposed to the risk of injury. Anyone in the house, neighborhood, people passing by, and members of the public fire service would be all in danger. The court therefore assesses the degree of probability that B or any other person might be in the house at that time of the night. The more certain the reasonable person would have been, the more justifiable it is to impute sufficient desire to convert what would otherwise only have been reckless into intention to constitute the offence of murder. But if the degree of probability is lower, the court will finally conclude that only recklessness is proved.\(^76\) Even then, the accused will still be punished for such a crime since it has been made criminal by penal law.

For example, a defendant who is on trial for murder must be shown to have not only caused the death of another, but also shown to have intended to commit an unlawful act. Notice that the state does not have to prove that the defendant intended to cause a person's death, but that the intent was to do something that was against the law. This means that if someone's death resulted from a defendant's actions while in the act of committing a robbery,\(^77\) the intent to break the law for a robbery is carried over to the death of the victim. It follow therefore, that the requirement of 'evil' intention or 'wicked' mind as enunciated by the literal translation of the maxim is incorrect for it does not reflect the actual application of the law by the courts, to require the proof of an 'evil' intention or 'wicked' mind in order to secure conviction. It can therefore be safely argued

\(^{75}\) Lancy, \textit{A Clear Concept of Intention}, (1993) 56 MLR 624
\(^{76}\) Lancy, \textit{A Clear Concept of Intention}, p 621
\(^{77}\) R v Vickers (1957) 2 QB 664
that the maxim leads to confusion and somehow misleading. For it seems to suggest that
an act can only be criminal and warranting punishment if it is committed with an ‘evil’ or
‘wicked’ intention as interpreted by Lord Hailsham in Sweet v Parsley\textsuperscript{78} and many more
other Judges and writers, but to my mind this is wrong.

It must be born in mind that intention can be divided into ‘direct’ and ‘oblique’ intention.
A person directly intends a consequence if he decided to achieve it and a person
obliquely intends to achieve it if he realizes that it is likely to result as a side-effect of
achieving his aim of some other consequence.\textsuperscript{79}

Direct intention; is undoubtedly ‘intention’ for the purposes of the criminal law.
‘Intention’ was defined by the Court of Appeal in Mohan\textsuperscript{80} as:

“……a decision to bring about, insofar as it lies within the accused’s power, (a particular
consequence), no matter whether the accused desired that consequence of his act or not”.

As the court recognized, this can be described more briefly as the defendant’s ‘aim’ or
‘purpose’. The definition in Mohan, which refers, of course, to direct intention, could be
described as a commonsense definition, since it probably accords with most people’s idea
of what constitutes intention, as well as being the relevant meaning given by the
dictionaries.\textsuperscript{81} As the Court of Appeal stated in walker and Hayles,\textsuperscript{82}

“It has never been suggested that a man does not intend what he is trying to achieve.’
 Provided that he has decided to bring about a particular consequence, insofar as it lies
within his power, a person acts with a direct intention in relation to it even though he
believes he is unlikely to succeed in bringing it about.”

For example, a person has a direct intention to kill if he fires at someone whom he
believes to be outside the normal range of his gun in an endeavor to kill him. It follows,
in reference to the definition in Mohan to the fact that it is irrelevant that the defendant
did not desire a consequence which he had decided to bring about, that a person can be
said to act with a direct intention to cause a particular consequences, even though it is not
desired in itself, if it is the means (for example, a condition precedent) to the achievement

\textsuperscript{78} (1970) AC 132, HL.
\textsuperscript{79} Lancy, A Clear Concept of Intention. p. 78
\textsuperscript{80} (1976) QB 1 at 11. This statement in Mohan was endorsed in Pearman (1984) 80 Cr App Rep 259 and
was approved by Lord Hailsham in Hyam v DPP (1975) AC 55 at 74.
\textsuperscript{81} Card, Cross and Jones, Criminal Law. p 78
\textsuperscript{82} (1989) 90 Cr App Rep 226 at 230
of a desired objective and he decides to cause that consequence, insofar as it lies within his power.\textsuperscript{83} Not only is this implicit in the definition, but also support for it can be found in the speech of Lord Hailsham in *Hyam v DDP*,\textsuperscript{84} decided by the House of Lords a year before Mohan. Lord Hailsham, adopting a definition of intention very similar to that in Mohan, stated that it should be held to include ‘the means as well as the end’ (for example, that a person who has decided to bring about a consequence). Likewise if X shoots at, and kills, an attacker with the objective of saving his (X’s) life, he will directly intend the attacker’s death if he has decided to bring it about in order to save his own life.\textsuperscript{85} But will be excused from liability if at all he satisfies the requirements of self defense.\textsuperscript{86}

When it comes to oblique intention, before the House of Lords decision in Moloney,\textsuperscript{87} the general understanding from the case was that, for the purposes of most offences, a person would intend a consequence of his conduct which he did not aim to achieve if he obliquely intended it, in that he foresaw that that consequence was virtually certain to result as a side-effect from achieving something which he did aim to achieve.\textsuperscript{88} Thus, for example, if F, who wished to collect the insurance money on an air cargo, put a time bomb on an aircraft to blow it up in flight, realizing that it was almost inevitable that those on board would be killed by the explosion, he was regarded as having intended those deaths, even though he wished those on board no harm and would have been delighted if they had survived.\textsuperscript{89}

Interestingly, the House of Lords in Moloney decided, and affirmed in Hancock and Shankland,\textsuperscript{90} that foresight, even of virtual certainty, is not intention in a legal sense or the equivalent of it, the authority to the contrary was impliedly overruled. In Moloney, the House of Lords held that the *mens rea* for murder was an intention to kill or do

\textsuperscript{83} Card, Cross and Jones, *Criminal Law*. p 79
\textsuperscript{84} (1975) AC 55 at 74
\textsuperscript{85} Card, Cross and Jones, *Criminal Law*. p 79
\textsuperscript{86} The People v Mudewa (1973) ZR 147
\textsuperscript{87} (1985) AC 905, HL.
\textsuperscript{88} Eg Williams v Bayley (1866) LR 1 HL 200 at 221.
\textsuperscript{89} See Hyam v DPP (1975) AC 55 at 74, per Lord Hailsham, LC.
\textsuperscript{90} (1986) AC 455, HL

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serious bodily harm, and that foresight of death or serious bodily harm was neither intention as to such a consequence nor the equivalent of intention. On the other hand, the House of Lords held that, the jury should be told that, if it proved that the defendant intended it. Thus, although foresight was not itself intention, intention could be inferred from it. This raised the question of degree of the risk of consequence which had to be foreseen before it could be inferred that the defendant intended it. Lord Bridge, giving the lead judgment (with which the other Lords agreed), was ambiguous, speaking at different points in terms of ‘moral certainty’ (for example virtual certainty), of ‘probability little short of overwhelming’ (which is not different, if at all) and of what appears to be high probability (which is different).\(^9\)

According to Williams\(^9\) he says that the courts have struggled to find an appropriate test to apply in cases of oblique intent. In particular the questions which have vexed the courts are:

1. Should the test be subjective or objective?

2. What degree of probability is required before it can be said that the defendant intended the results?

3. Whether the degree of probability should be equal to intention from which the jury may infer intention.

The decisive question which the courts have been able to determine is which test is to apply, whether a subjective or objective.\(^9\) A subjective test is concerned with the defendants respectively in relation to oblique intent whether the defendant did foresee the degree of probability of the result occurring from his actions. An objective test looks at the perspective of a reasonable person. For example, would a reasonable person have foreseen the degree of probability of the result occurring from the defendant’s actions? It is arguable, that since intention requires the highest degree of fault (take note: needs not necessarily be evil or wicked), it should be solely be concerned with the defendant’s perception. In addition, intention seems to be a concept which naturally requires a

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\(^9\) Card, Cross and Jones, *Criminal Law*, p 80
\(^9\) G Williams, *Oblique Intention*, p 16
subjective inquiry. It seems somehow wrong to decide that the defendant’s intention was by reference to what a reasonable person would have contemplated. However, originally an objective test was applied to decide oblique intent. In Nedrick\(^4\) Lord Lane C.J said:

‘……the jury should be directed that they are not entitled to infer the necessary intention, unless they feel that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant’s actions and that the defendant appreciated that such was the case’.

The authority of this case was questioned in Woolin.\(^5\) The House of Lords largely approved the test with some minor modifications setting the current test of oblique intent as;

‘…..where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to find the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (bearing some unforeseen intervention) as a result of the defendant’s actions and that the defendant appreciated that such was the case’.

The second constituent element of mens rea is recklessness. In criminal law, recklessness (also called unchairness) is one of the three possible classes of mental state constituting mens rea (the Latin for ‘guilt mind’). To commit an offence of ordinary as opposed to strict liability, the prosecution must be able to prove both a mens rea and an actus reus. For example, a person cannot be guilty of an offence for their actions alone. There must also be an appropriate intention, knowledge, recklessness, or criminal negligence at the relevant time. ‘Card’\(^6\) says

‘…..a person may be reckless as to a consequence or circumstance. That a person is reckless as to a consequence if he is aware of the risk that it will occur, and as to a circumstance if he is aware of the risk that it exist, and in either case, in the circumstances known to him, it is unreasonable to take the risk’.

Black’s law Dictionary defines recklessness in American law as

‘…..conduct whereby the actor does not desire harmful consequences but...foresee the possibility and consequences of his act in which a person does not care about the consequences of his or her actions’.

\(^4\) (1986) 1 WLR 1025
\(^5\) (1999) AC 82
\(^6\) Card, Cross and Jones. Criminal Law. p 91
\(^7\) A Bryan Gardner, Black’s Law Dictionary, 8th ed, br, 2005. p 43
Whereas, in R v G and Another,98 Lord Bingham, giving the principle speech in the House of Lords, said that a person acts ‘recklessly’ with respect to:

(i) A circumstance when he is aware of a risk that it exists or will exist;

(ii) A result when he is aware of a risk that it will occur, and it is in the circumstance known to him that, unreasonable to take the risk.

In such cases, there is always clear subjective evidence that the accused foresaw but did not desire the particular outcome. When the accused failed to stop the given behavior he took the risk of causing the given loss or damage. There is always some degree of intention subsumed within recklessness. During the course of the conduct, the accused foresees that he may be putting another at risk of injury.99 A choice must be made at that point in time by deciding to proceed. The greater the probability of that risk maturing into foreseen injury, the greater the degree of recklessness and, subsequently, sentence rendered. For example, at common law, an unlawful homicide committed recklessly would ordinarily constitute the crime of voluntary manslaughter.100 One committed with ‘extreme’ or ‘gross’ recklessness as to disregard human life would constitute murder.101

There is no doubt that recklessness shows less culpability than intention, but more culpability than criminal negligence. The test of any mens rea element is always based on an assessment of whether the accused had foresight of the prohibited consequences and desired to cause those consequences to occur, the three types of test are:

1. Subjective where the court attempts to establish what the accused was actually thinking at the time the actus reus was created;

2. Objective where the court impute mens rea elements on the basis that a reasonable person with the same general knowledge and abilities as the accused would have had those elements; or

3. Hybrid, the test is both subjective and objective.

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99 Dickson Sembauke Changwe and Ifellow Hamuchanje v The People (1989) ZR 144
100 The People v Lawrence Mumanga (1985) ZR 35
101 Dickson Sembauke and Another.
The most culpable *mens rea* elements will have both foresight and desire on a subjective basis. Recklessness usually arises when an accused is actually aware of the potentially adverse consequences to the planned actions, but has gone ahead anyway, exposing a particular individual or unknown victim to the risk of suffering foreseen harm but not actually desiring that the victim be hurt (thereby not having any evil or wicked intention so to speak). However, the accused is a social danger because they gamble with the safety of others, and the fact that they might act to try to avoid the injury from occurring is relevant only to mitigate the sentence.

In Caldwell,\textsuperscript{102} a disgruntled former hotel employee who had been recently fired by his boss, got very drunk one night in late 1979 and decided to set fire to his former employer’s hotel, intending to damage the property. At the time he set the blaze, however, there were ten guests asleep inside the hotel, and though the fire was extinguished quickly, Caldwell was charged not with arson (to which he pleaded guilty), but with more serious charge with intent to endanger human life. In English law, the offence of ‘arson’ was abolished in the Criminal Damage Act 1971, although the use of the words was retained to express the particular ‘horror’ with which the public views offences involving the deliberate use of fire, Caldwell was convicted.

The House of Lords was mainly concerned with the extent to which self-induced drunkenness could be a defense to such, it was ultimately ruled that self-induced intoxication could be a defense to specific intent, but not to basic intent, for example, recklessness. Although the discussion of recklessness tends to be largely obiter dicta, Lord Diplock’s\textsuperscript{103} discussion contains what was intended as model of direction, namely that a defendant is reckless when:

1. He commits an act that creates an obvious risk that property will be destroyed or damaged; and

2. When he does the act, he either has not given any thought to the possibility of that there was some risk involved and has nonetheless gone on to do it.

\textsuperscript{102} (1982) AC 341
\textsuperscript{103} R v Caldwell (1982) AC 341
To that extent, the test is one of obviousness, for example, if it would have been obvious to the reasonable person, the defendant will be taken to have foreseen it. But the focus of this test is the nature of the defendant’s conduct rather than his mental state and it became the subject of major criticism. For example, how was the direction to apply to the defendant who had considered the risk and only continued to act after deciding (wrongly as it would later appear) that no risk existed? In Elliot v C (a minor), a 14 year old school girl of low intelligence who was tired and hungry, inadvertently burned down a garden shed, it was accepted that she did not foresee the risk of fire, and that she had not considered the possible consequences of her action but the court reluctantly followed Caldwell.

It is also to be noted that after much criticism, the decision in R v Caldwell was overruled by the House of Lords in the case of R v G. Caldwell style of recklessness (an objective test) was phased out after the case of R v G which introduced a form of subjective recklessness to cases involving criminal damage. The majority of mens rea of recklessness is now ‘tested’ using the Cunningham test.

In R v G and Another, two boys aged 11 and 12 years, were camping without their parent’s permission when they entered the back yard of a shop in the early hours of the morning, lighting some newspapers they found in the yard, they left with the papers still burning. The newspapers set fire to nearby rubbish bins standing against the shop wall, where it spread up the wall and on to the roof of the shop. Approximately $1 million damage was caused. The children argued they expected the fire to burn out itself out and said they gave no thought to the risk of its spreading. When their appeal reached the House of Lords Bingham saw the need to modify Lord Diplock’s definition to take account of the defense of infancy, which contains the concept ‘mischievous discretion’. This rule requires the court to consider the extent to which children of eight or more years are able to understand the difference between ‘right’ and ‘wrong’. Lord Diplock test of obviousness might operate unfairly for 11 and 12 year boys if they were held to the same

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Notes:

104 (1983) 2 AER 1005
105 (1982) AC 341
106 (2003) UK HL 50
standard as reasonable adults. Bingham stated that a person acts recklessly with respect to:

1. A circumstance when he is aware of a risk that it exists or will exist,

2. A result when he is aware of a risk that it will occur, and it is in the circumstances known to him unreasonable to take the risk’.

This brings the test back to subjective standard so that the defendants can be judged on the basis of their age, experience and understanding rather than on the standard of a hypothetical reasonable person who might have better knowledge and understanding. Nevertheless, the test remains hybrid because the credibility of the accused derived of knowledge and understanding will always be judged against an objective standard of what you would expect a person of the same general age and abilities as the accused to have known, and not that it is evil or wicked as such.

Knowledge is also specie of *mens rea* required by some criminal act. According to Card, Cross and Jones,\(^{107}\) ‘knowledge refers to a state of mind relating to a circumstance of an act, omission, or even’. A Mental state other than ‘actual knowledge’ can suffice where the definition of an offence requires the defendant to ‘know’ something.\(^{108}\)

Knowledge of the circumstances by virtue of which an act or omission or event as criminal (for example those specified for the *actus reus*) is expressly required in the case of many statutory offences on account of the inclusion of some word as ‘knowingly’ in the definition. However, the use of ‘knowingly’ or the like is not essential since, even when no appropriate word appears in the definition, a requirement of knowledge is frequently implied by the courts. In Sweet v Parsley,\(^{109}\) for example, the House of Lords held that a person could be guilty of ‘being concerned in the management of premises used for the purpose of smoking cannabis’ (an offence that which has subsequently been modified) in the absence of proof of knowledge of such use.\(^{110}\)

\(^{107}\) Card, Cross and Jones, *Criminal Law*. p 96

\(^{108}\) Card, *Criminal Law*. p 96

\(^{109}\) (1970) AC 132, HL.

\(^{110}\) Card, *Criminal Law*. p 96
Whereas, Actual knowledge, is where a person knows that a surrounding circumstance exists if he is certain that it exists. Actual knowledge is the equivalent of intention in that if the defendant act is certain that a circumstance exist, he can be said to act intentionally in respect of it. If this is all that ‘knowledge’ meant it would often be difficult to prove it because there will be many cases where the defendant has no substantial doubt or, at least, realizes the risk that it may exist. From the point of view of the enforcement of the criminal law it is therefore a good thing that knowledge also normally includes the case where a defendant is virtually certain about a surrounding circumstance or is willfully blind about it, even where the statute uses the word ‘knowingly’. Even then it must be born in mind that it does not necessarily mean that by him having the said knowledge as defined by the statute in question has a ‘wicked’ mind or ‘evil’ intention as the literal translation of the maxim. Knowledge as in reference to a particular offence referred to as ‘knowingly’ by most statutes is in reference to the actus reus of the offence designated by that statute and has nothing necessarily to do with an evil mind or wicked intention. Therefore, it can be safely argued that in as much as knowledge may sometimes be evil or wicked it does not follow that the knowledge (knowingly) of the accused needs to be ‘evil’ or ‘wicked’ with regards to all elements of the offence committed.

On the other hand, in criminal law, criminal negligence is one of the general classes of mens rea (Latin for ‘guilty mind’) element required to constitute a conventional as opposed to strict liability offences. It is defined as; careless, inattentive, neglected what would have been reckless in any other defendant. While ‘Card’ said that;

“…..a person is negligent if his conduct in relation to a risk, of which a reasonable person would have been aware, falls below the standard which would be expected of a reasonable person in the light of that risk.”

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111 Roper v Taylor’s Central Garages (Exeter) Ltd (1951) 2 TLR at 288-289, per Devlin J.
112 Card, Criminal Law. p 97
113 Per Lord Hailsham, in Sweet v Parsley (1970) AC 132, HL.
114 See: s.318 of the Penal Code
116 Card, Criminal Law. p 100
Criminal negligence requires a greater degree of culpability than the civil standard negligence. The civil standard of negligence is defined according to a failure to follow the standard of conduct of a reasonable person in the same situation as the defendant. In order to show criminal negligence the state must prove beyond a reasonable doubt the mental state involved in criminal negligence. Proof of that mental state requires that the failure to perceive a substantial and unjustifiable risk that a result will occur must be a gross deviation from the standard of a reasonable person. Criminal negligence is conduct which is such a departure from what would be that of an ordinary prudent or careful person in the same circumstance as to be incompatible with proper regard for human life or an indifference to consequence is negligence that is aggravated, culpable or gross.\textsuperscript{117}

There is no doubt that negligence shows the least level of culpability, intention being the most serious and recklessness of intermediate seriousness, overlapping with gross negligence. The distinction between recklessness and criminal negligence lies in the presence or absence of foresight as to the prohibited consequences.\textsuperscript{118} Recklessness is usually described as a ‘malfeasance’ where the defendant knowingly exposes another to the risk injury. The fault lies in being willing to run the risk. But criminal negligence is a misfeasance or nonfeasance avoids advertising to the reality of a situation.\textsuperscript{119} The degree of culpability is determined by applying a reasonable person standard. Criminal negligence becomes ‘gross’ when the failure to foresee involves a ‘wanting disregard for human life.’\textsuperscript{120} The leading statement to describe ‘criminal negligence’ at common law for the purposes of establishing a test for manslaughter in English law, may be found in the statement by Lord Hewart CJ in the case of \textit{R v Bateman}:\textsuperscript{121}

\begin{quote}
"....in explaining to juries the test which they should apply to determine whether the negligence, in the particular case, amounted or did not amount to a crime Judges have used many epithets, such as ‘culpable’, ‘criminal’, ‘gross’, ‘wicked’, ‘clear’, ‘complete’. But, whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed
\end{quote}

\textsuperscript{117} W Simons, Kenneth, \textit{"Dimensions of Negligence in Criminal Law and Tort Law,"} Theoretical Inquiries in Law: Vol. 3: No. 2
\textsuperscript{118} Garfield, \textit{A More Principled Approach to Criminal Negligence.} p 12
\textsuperscript{119} Garfield, \textit{A More Principled Approach to Criminal Negligence.} p 13
\textsuperscript{120} \textit{R v Bateman} (1925) 19 Cr. App. R. 8
\textsuperscript{121} (1925) 28 Cox's Crim Cases 33
It must be born in mind that a reasonable person standard is not a real person but a legal fiction, an objective yardstick against which to measure the culpability of real people.\textsuperscript{122} For these purposes, the reasonable person is not an average person, this is not a democratic measure. To determine the appropriate level of responsibility, the test of reasonableness has to be directly relevant to the activities being undertaken by the accused. What the ‘average person’ thinks or might do would be irrelevant in a case where a doctor is accused of wrongfully killing a patient during treatment.\textsuperscript{123} Hence, there is a baseline of minimum competence that all are expected to aspire to. This reasonable person is appropriately informed, capable, aware of the law, and fair-minded. This standard can never go down, but it can go up to match the training and abilities of the particular accused.\textsuperscript{124} In testing whether the particular doctor has misdiagnosed a patient so incompetently that it amounts to a crime, the standard must be that of the reasonable doctor. Those who hold themselves out as having particular skills must match the level of performance expected of people with comparable skills.\textsuperscript{125} When engaged in an activity outside their expertise, such individuals revert to the ordinary person standard. This is not to deny that ordinary people might do something extraordinary in certain circumstances, but the ordinary person as an accused will not be at fault if he or she does not do that extraordinary thing so long as whatever that person does or thinks is reasonable in those circumstances.\textsuperscript{126}

The more contentious debate has surrounded the issue of whether the reasonable person should be subjectively matched to the accused in cases involving children, and persons with a physical or mental disability. Young and inexperienced individuals may very well not foresee what an adult might foresee,\textsuperscript{127} a blind person cannot see at all. Cases involving infancy and mental disorders potentially invoke excuses to criminal liability

\textsuperscript{122} R v G (2003) UK HL 50

\textsuperscript{123} Cicuto v Davidson and Oliver (1968) ZR 146

\textsuperscript{124} R v Adamko (1995) I AC 171

\textsuperscript{125} Adamko, at 9

\textsuperscript{126} Cicuto v Davidson and Oliver (1968) ZR 146

\textsuperscript{127} R v G and Another (2003) UKHL 50
because the accused lack of full capacity, and criminal systems provide an overlapping set of provisions which can either deal with such individuals outside the criminal justice system, or if a criminal trial is unavoidable, mitigate the extent of liability through the sentencing system following conviction.\textsuperscript{128} But those who have ordinary intellectual capacities are expected to act reasonably given their physical condition. For example, a court would ask whether a blind reasonable person would have set out to do what the particular blind defendant did. People with physical disabilities rightly wish to be active members of the community but, if certain types of activity would endanger others, appropriate precautions must be put in place to ensure that the risks are reasonable.

However, it must be mentioned here that negligence cannot properly be so described as a state of mind, since it can exist where there is the absence of a state of mind. For this reason, negligence cannot strictly be described as a species of \textit{mens rea}, despite the fact that it has on occasions been so described by judges.\textsuperscript{129} Nevertheless, for convenience, whenever the term ‘\textit{mens rea}’ is used in a general sense in this paper reference should be understood as including negligence, unless the context indicates to the contrary. The question of the inclusion of negligence under the head of \textit{mens rea} also raises the question of whether it should be a sufficient fault element for criminal liability. Negligence involves fault, but usually it is less blameworthy than displayed by people who intend, or who are aware of the risk of, their wrongdoing. Neither Parliament nor the courts appear to have considered fully the answer to the question: ‘when is it proper to punish a person because he has failed to match up to the standard expected of a reasonable person?’ It would be easier to accept negligence as a basis of liability if it was always the case that a defendant could only be liable on that ground if he could, given the mental ability, skill and experience, have avoided being negligent.\textsuperscript{130}

Am inclined to think that in offences of negligence the need to prove \textit{mens rea}, is not of much relevance. I say so because the test is not necessarily to prove the state of mind at the material time, but rather, whether the defendant fail below the standard which would

\textsuperscript{128} See: ss. 72 and 72 (3) of the Juvenile Act, Cap 53 of the laws of Zambia
\textsuperscript{129} Per Lord Rodger in Rimmington; Goldstein (2006) 1 AC 459, at (56)
\textsuperscript{130} Card, \textit{Criminal Law.} p 106
be expected of a competent and careful person in the defendants position. For example, in Loukes, the Court of Appeal held that in offences of dangerous driving, the offence simply consists of the commission of the *actus reus*, and *mens rea* plays in the commission of the offence. No doubt it would have held the same in respect of careless driving or any other offence whose very essence is negligence. That been the case then the maxim is of less relevance or application with regards to negligence offences since the *mens rea* is not a decisive factor except the *actus reas*.

In conclusion, this chapter endeavored to look at the meaning of *mens rea* and its constituent elements, thus, intention, recklessness, knowledge and negligence and the meaning of each of these species. it must be mentioned also that the *mens rea* required in the offence charged varies from crime to crime it follows therefore that the prosecution does not necessary need to prove ‘evil’ or ‘wicked’ intention to secure a conviction for the accused in every criminal offence charged. For it is possible that one can in fact be convicted even when they have committed an act innocently with a clear conscious or good motive so long as the act done is one designated by a statute or common law as criminal warranting punishment (with no defence to excuse liability). The next chapter will endeavor to discuss the ‘*actus reus*’ in detail and its constituent elements and whether the maxim encapsulate the meaning as occasionally interpreted (translated) by the courts.

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131 (1996) 1 Cr App Rep 444, CA.
CHAPTER FOUR

THE NECESSARY ACTUS REUS REQUIRED IN CRIMINAL OFFENCES

This chapter will endeavor to look at the meaning of actus reus in criminal law and its constituent elements, thus, commission, omission, possession and of course voluntariness. The chapter will endeavor to focus mainly on the elements required to constitute criminal, because pertinent and inescapable questions are raised which beg honest answers. Among these includes, whether it is possible that one may escape liability of an offence by mere proof of an act without the necessary mens rea (in this sense meaning evil intention or wicked mind) of the crime. Because in this paper as established so far, liability for an offence often requires that the defendant’s conduct satisfies the requirements of that offence and that he had the appropriate legally blameworthy state of mind. This chapter concentrates on the former.

Actus reus, sometimes called the external element or the objective element of a crime, is the Latin term for the "guilty act" which, when proved beyond a reasonable doubt in combination with the mens rea, "guilty mind", produces criminal liability. It has been defined as;

"Whatever act or commission or state of affairs as laid down in the definition of the particular crime charged in addition to any surrounding circumstances and any consequence of the act or omission as the definition of the particular crime requires."\(^{132}\)

Whereas Card, Cross and Jones\(^{133}\) states that the expression actus reus can be summarized as meaning an act (or sometimes an omission or other event) indicated in the definition of the offence charged together with, any consequences of that act which are indicated by that definition; and any surrounding circumstances (other than references to the mens rea required on the part of the defendant, or to any excuse).

The constituent elements of actus reus are, Voluntariness, Omissions, Possession and of course an act. It is said that in order for an actus reus to be committed there has to have

\(^{132}\) S Kulusika, Criminal Law in Zambia, p 34
\(^{133}\) S Kulusika, Criminal Law in Zambia, p 34
been an act. Various common law jurisdictions define an act differently but generally, an act is a "bodily movement whether voluntary or involuntary." In Robinson v. California, the U.S. Supreme Court ruled that a California law making it illegal to be a drug addict was unconstitutional because the mere status of being a drug addict was not an act and thus not criminal.

While, omission on the other hand, is said to be something that has been deliberately or accidently left out or not done. In the criminal law, an omission, or failure to act, will constitute an actus reus (Latin for "guilty act") and give rise to liability only when the law imposes a duty to act and the defendant is in breach of that duty. Omission involves a failure to engage in a necessary bodily movement resulting in injury. As with commission acts, omission acts can be reasoned causally using the ‘but for’ approach. But for not having acted, the injury would not have occurred. The Model Penal Code specifically outlines specifications for criminal omissions.

1. the omission is expressly made sufficient by the law defining the offense; or
2. a duty to perform the omitted act is otherwise imposed by law.

So if legislation specifically criminalizes an omission through statute; or a duty that would normally be expected was omitted and caused injury, an actus reus has occurred. It follows therefore that so long as the act termed as actus reus if committed together with whatever state of mind the accused might have had at the time he committed the offence

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134 S Kulusika, Criminal Law in Zambia. p 34
137 S Kulusika, Criminal Law in Zambia. p 35
will be sufficient to warrant punishment. This, however, does not imply that the said state of mind in question must be ‘evil’ or ‘wicked’ as such.

It must be mentioned here, that in the criminal law, at common law, there was no general duty of care owed to fellow citizens. The traditional view was encapsulated in the example of watching a person drown in shallow water and making no rescue effort, where commentators borrowed the line:

"Thou shall not kill but needst not strive, officiously, to keep another alive." (in support of the proposition that failure to act does not attract criminal liability where there is no duty).

Nevertheless, such failures might be morally indefensible and so both legislatures and the courts have imposed liability when the failure to act is sufficiently blameworthy to justify criminalization. Some statutes therefore explicitly state that the actus reus consists of any relevant "act or omission", or use a word that may include both. Hence, the word "cause" may be both positive in the sense that the accused proactively injured the victim and negative in that the accused intentionally failed to act knowing that this failure would cause the relevant injury. In the courts, the trend has been to use objective tests to determine whether, in circumstances where there would have been no risk to the accused's health or well-being, the accused should have taken action to prevent a foreseeable injury being sustained by a particular victim or one from a class of potential victims.

So, returning to the drowning example, the accused would be liable if the victim was a child in a pool with a water depth of six inches, or there was a floatation device nearby that could easily be thrown to the victim, or the accused was carrying a mobile phone that could be used to summon help. However, the law will never penalize someone for not jumping into a raging torrent of water, for example, the law does not require the potential saver to risk drowning even though the individual might be a lifeguard paid to patrol the

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139 According to C. Bilima public prosecutor at central police, said that, even where the intention to kill was a well meaning intention (to relieve pain or suffering), so long as the act that brings about the killing was an unlawful act which caused the death, the accused will be found guilty as charged. He said that however he will be convicted of manslaughter and not murder since the intention was merely to relieve pain of the victim.