CHAPTER FOUR: *ACTUS REUS*

INTRODUCTION

As the textbook states, culpability requires at minimum a voluntary act or omission to act. New York follows the same principle. It does not criminalize involuntary acts except those that may result from voluntary intoxication.

Voluntary acts thus exclude reflex actions and bodily movements during unconsciousness or hypnosis. In one recent case, the court determined that a defendant could not have voluntarily violated the law due to his state of unconsciousness from taking medication. His charge of failure to stop at a stop sign was dismissed.[1]

This chapter discusses different classifications of the *actus reus.* First, the principle of general culpability, which is the blameworthiness of an act, will be discussed. This concept will be followed by discussions about acts based on status, omission, and possession.

CULPABILITY

Article 15 of the Penal Law includes sections of the elements in a criminal act. The *mens rea,* as well as *actus reus,* are included in this article. Section 15.00 defines the terms related to the *actus reus*, and §15.10 includes the minimum element that the Penal Law requires for mental culpability and strict liability (to be discussed in Chapter 5): "the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is physically capable of performing."

Section 15.00, Culpability; definition of terms, states:

1. "Act" means a bodily movement.
2. "Voluntary act" means a bodily movement performed consciously as a result of effort or determination, and includes the possession of property if the actor was aware of his physical possession or control thereof for a sufficient period to have been able to terminate it.
3. "Omission" means a failure to perform an act as to which a duty of performance is imposed by law.
4. "Conduct" means an act or omission and its accompanying mental state.
5. "To act" means either to perform an act or to omit to perform an act.

The following case constitutes a crime where an affirmative act, shaking an infant, resulted in the infant's death. This case also includes a court ruling regarding an omission to act. Omissions will be discussed in more detail later.

People v. Eugene Wong
People v. Mary Wong
Court of Appeals of New York
81 N.Y. 2d 600 (1993)

Opinion By: Titone, J.

The issue in this case concerns whether a sufficient factual basis for holding a "passive" defendant who had not contributed to the death of an infant, as culpable for the infant's death as an "active" defendant who had committed the fatal act.

The defendants had been retained to care for a three-month old infant, Kwok-Wei, as a result of an advertisement they placed in a Chinese-language newspaper. The infant's parents both worked 12 hours per day from Monday through Saturday and felt that the Wongs could provide the 24-hour care that they were offering.

On the evening of July 6, 1988, the infant had been crying for an extended period of time. The following morning, when the baby could not be awakened, defendant Mary Wong called the baby's father to inform him that the baby was dead. Defendant told him that the baby had cried continually from about midnight to 2:00 a.m. on the previous night, had been given a remedy, and when they awoke in the morning, the baby had 'turned black.'

After the baby was found unconscious in the morning, Mr. Wong called 911. After the police arrived, the Wongs gave slightly inconsistent statements. Mr. Wong told paramedics at the hospital that the baby had not been sick and had quieted down after he and his wife had fed him at 1:00 or 2:00 a.m. Mrs. Wong told the baby's mother that at about 2:00 or 3:00 a.m., after crying for two hours and having refused milk and water, the baby had gone to sleep.

An autopsy performed on Kwok-Wei revealed that he had died as a result of internal brain injuries that could only be attributed to "shaken baby syndrome." This condition occurs when an infant under the age of one is subjected to violent shaking causing the baby's head to snap back and forth.

The prosecution's case rested on the theory that each defendant was independently liable for Kwok-Wei's death because one of them had shaken the baby while the other had stood by and failed to intervene. The defendant who had not actually shaken the infant, the "passive" defendant, was equally culpable because of his or her omission in failing to fulfill a duty that was imposed by law. The jury agreed and returned a guilty verdict on all counts: first degree manslaughter, second degree manslaughter, and endangering the welfare of a child.

The Appellate Division dismissed the convictions for first degree manslaughter on the ground that the weight of the evidence failed to prove that defendants had acted, or failed to act, with the "intent to cause serious physical injury." The convictions for second degree manslaughter and endangering the welfare of a child were sustained since sufficient evidence existed to support a finding that the "passive" defendant had failed to perform a duty imposed by law.

The Court of Appeals concluded, however, that the evidence at trial did not provide a sufficient factual basis for finding that the "passive" defendant was guilty of committing second degree manslaughter by an act of omission. Also, although one of the defendants could properly have been found guilty of second degree manslaughter by shaking Kwok-Wei to death, there was no evidence which showed which of the two was the abuser. The evidence against defendants is "wholly circumstantial." The "passive" defendant's "mere presence" in the Wong's apartment at the time of the crime is insufficient to support a finding of criminal liability. The court further argued that the prosecution's contention of the "passive" defendant required, at the very least, a showing both that the "passive" defendant was personally aware that the shaking had occurred and that such abusive conduct created a risk that the infant would die without prompt medical treatment.

There were no external bruises on the baby, and the symptoms of the internal injuries he sustained could have been mistaken for ordinary sleep. Thus, defendants could have reasonably believed that the baby was behaving normally. Neither defendant indicated in his or her pretrial statements that the two adults had been continuously together during the entire 2 ½ hour interval where the injuries allegedly occurred. It seems more likely than not that at least one of them would have left the room where the baby was located at some point during the relevant period. The apartment in which defendants lived was small, but there were three other rooms: a living room, kitchen, and bathroom.

The Court of Appeals concluded that the convictions of both defendants should be reversed even though "that conclusion means that one clearly guilty party will go free."

Corporate Liability

New York State recognizes corporations as theoretical "persons" which can make corporations

liable in certain instances. According to §10.00(7), a person is, in addition to a human being, "a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality." Corporate liability is found in Article 20 which defines parties to offenses. As "persons," corporations can be charged with virtually any crime, from business-related offenses, which are usually economic crimes such as fraud, larceny, offering false instruments for filing, and falsifying business records, to environmental crimes such as possession of hazardous wastes or endangering public health or safety. Furthermore, corporations can be liable for reckless or negligent homicides or assaults when industrial accidents occur or the corporation engages in grossly negligent conduct.

Section 20.20 "eliminates the possibility that a culpable defendant might evade criminal responsibility simply because he was acting in a corporate capacity or in the interests of a corporation. The corporate veil can be pierced…[and a wrongdoer] can no longer hide behind a corporate curtain."[2]

According to **Section 20.20(2)** subsections **(a)**, **(b)**, and **(c)**, Criminal liability of corporations: A corporation is guilty of an offense when:

(a) The conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or

(b) the conduct constituting the offense is engaged in, authorized, solicited, requested, commanded, or recklessly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and in behalf of the corporation; or

(c) The conduct constituting the offense is engaged in by an agent of the corporation while acting within the scope of his employment and in behalf of the corporation, and the offense is (i) a misdemeanor or a violation, (ii) one defined by a statute which clearly indicates a legislative intent to impose such criminal liability on a corporation, or (iii) any offense set forth in…the environmental conservation law.

Causation

New York State is consistent with the textbook in that the criminal act must have caused the resulting harm. In the murder case *People v. Matos*,[1] the Court of Appeals stated that "[i]t is well established that in order for criminal responsibility to attach, a defendant's actions must have been an actual contributory cause of death." But, "it must [also] be shown that the defendant sets in motion the events which ultimately result in the victim's death…However, the defendant's acts need not be the sole cause of death." The Court further recognized that "but for" causation, while necessary for attaching a murder charge, was not sufficient. The prosecution must also prove beyond a reasonable doubt that defendant's conduct was a sufficiently direct cause of death. "The defendant's conduct qualifies as a sufficiently direct cause when the ultimate harm should have been reasonably foreseen."

In *People v. DaCosta*[2] Police Officer McLellan died while pursuing the defendant across a six-lane highway, Kensington Expressway, in Buffalo, New York, during morning rush hour. Defendant was convicted of second degree (reckless) manslaughter and sentenced to an indeterminate term of 4 ½ to 13 ½ years imprisonment. On appeal, defendant relied on the causal principles from corporate liability and contended that the legal cause of death was not his conduct but rather the deceased's decision to climb over a chain-link fence in the middle of a major highway. Defendant also asserted that there was insufficient evidence that his decision to climb the fence and run across the highway while being pursued by the police was reckless. The Court of Appeals disagreed with both arguments. In addressing the corporate liability defense, the Court claimed, "The case before us…involves neither commercial nor manufacturing processes. Instead, it is more appropriately categorized with cases that address the foreseeable dangers inherent in police pursuits of fleeing felons or actions that cause a person to be on or

in the vicinity of a major highway."

STATUS OFFENSES

Following the lead of *Robinson v. California*[3] and *Powell v. Texas*[4] which were described in the textbook, New York State has considered the question of the extent to which federal and state constitutional prohibitions against cruel and unusual punishment affect criminal penalties for a narcotic addict who possesses narcotics and paraphernalia associated with personal use.

In *People v. Davis*[5], defendant was arrested for criminal possession of a dangerous drug (heroin) and criminal possession of a hypodermic instrument. He was arrested in his apartment as he was about to inject himself with a syringe. When the officer approached him, he pleaded with the officer to allow him to take the injection. At trial, defendant argued that it is cruel and unusual punishment to impose a criminal penalty upon an addict who possesses narcotics and associated paraphernalia for his own use. The Court of Appeals determined that, in line with previous United States Supreme Court decisions, the defendant's status as an addict does not violate the law. However, the court recognized that in the previous federal cases, there is no definitive holding for defendant's position that an act incident to addiction (i.e., possession of drug paraphernalia) may not be punished. The difficulty in this case for the Court of Appeals was in determining where to stop. "The danger is that the defense will be extended to other crimes such as robberies or burglaries arising from the compulsive craving for drugs."

Further, the Court of Appeals stated, "[A]ny attempted limitation on the availability of the drug dependence defense to those acts such as purchase, possession or receipt of narcotics for the addict's personal use, finds little justification in the cruel and unusual punishment clause with which it intertwines." The Court also added that to allow the defense would hinder defendants' efforts at rehabilitation as well as law enforcement efforts to control drug use. Penalties for these offenses "enable law enforcement to enlist addict informers in ferreting out the wholesalers of illicit drugs, thereby facilitating the policy of elimination of the drug traffic. Then, too, punishment may persuade some addicts to undertake rehabilitation through various State or private programs." The Court thus upheld the conviction.

OMISSIONS

Various sections of the New York Penal Law explicitly criminalize behavior in which the individual has a duty to act but failed to do so. The statutes related to omissions are found on Buffalo Law School's website and include:

- refusal to aid a peace or police officer (§195.10)
- permitting prostitution (§230.40)
- failure to report wiretapping (§250.15)
- failure to report wounds from gunshots or sharp instruments (§265.25)
- certain convictions to be reported (§265.30)
- creating a hazard (§270.10).

The Penal Law also places responsibility on parents or caretakers to provide for the basic needs of children under their care. Criminalized omissions are found in Sections 260.05, 260.06, and 260.10 of the Penal Law, and they criminalize non-support of a child in the second degree, non-support of a child in the first degree, and endangering the welfare of a child, respectively.

Section 260.10(2) provides that a "parent, guardian or other person legally charged with the care or custody of a child less than eighteen years old…[who] fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming an 'abused child,' a 'neglected child,' a 'juvenile delinquent' or a 'person in need of supervision'" can be subjected to a charge of

endangering the welfare of that child. Endangering the welfare of a child is a class A misdemeanor.

The following case illustrates the power of the state to impose serious penalties for parents who are viewed as failing to provide for their children. In this case, the parents of a malnourished child were convicted of first degree assault, first degree reckless endangerment, and endangering the welfare of the child. The facts at issue were reported by *The New York Times*. The parents, Joseph and Silva Swinton,
had a daughter, named Iice, whom they were raising on a strict vegan diet. After 15 months, the baby was found toothless, half the weight of a normal 15-month old, and had rickets, broken bones, and internal injuries. The parents, both vegans themselves, admittedly fed Iice a diet with no dairy products or infant formula.[6]

On the defendants' appeal, the Supreme Court of New York vacated the reckless endangerment conviction, but maintained the first degree assault and endangering the welfare of a child convictions based on the sufficiency of the evidence. The dissent, however, acknowledged that the defendants were naïve and misguided, but did not evince criminal recklessness. The dissent asserted that the parents
thought that they were adequately providing for Iice's nutritional needs. "The weight of the evidence…did not prove that [the parents] consciously disregarded known risks, and their assault convictions should be reversed as contrary to the weight of the evidence." Nevertheless, the dissent did concur that the evidence proved defendants' guilt of endangering the welfare of a child beyond a reasonable doubt.[7]

According to **Section 260.10(1)**, a person is guilty of endangering the welfare of a child when "he knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old or directs or authorizes such child to engage in an occupation involving a substantial risk of danger to his life or health." The following case concerns the issue of child endangerment when an adult has a sexual relationship with a minor.

In the case In the Matter of Feola v. Carroll,[8] et al., Donald Feola, a police officer in New Rochelle in Westchester County, was convicted of endangering the welfare of a minor after engaging in a sexual affair with a 16-year old girl in 2002. After his convictions, The Deputy Police Commissioner of the City of New Rochelle, Patrick Carroll, terminated Feola's employment in accordance with Public Officers Law §30(1)(e). Feola applealed the decision to the Supreme Court, Westchester County, which denied his petition. Feola then appealed to the Supreme Court of New York, Appellate Division, Second Department[9] which reversed the previous judgment, granted the petition, and reinstated the officer with back pay and interest. The court held that Public Officers Law §30 vacated an officer's position upon conviction of a felony, but that a misdemeanor caused an automatic dismissal only where the misdemeanor entailed an absence of moral integrity. The court concluded that endangering the welfare of a child chould occur in the absence of any lack of moral integrity. Therefore, a due process hearing would first need to be held pursuant to N.Y. Civil Service Law §75.

The case was then appealed to the Court of Appeal, which reversed the decision of the Supreme Court. The Court held, "A facial review of the lements of the crime of endangering the welfare of a child under Penal Law §260.10(1) indicates clearly that it is a 'crime involving a violation of [an officer's] oath of office.'" Also, "Feola knew that his conduct could potentially cause injury to a child and that, notwithstanding the likelihood of such injury, he opted to engage in the prohibited conduct…When a public officer's interest in employment is weighed against the nterest of the state's citizens in having public officers possessed of moral integrity, 'the balance must be struck in favor of the public.'"

The following case also serves as an example of the state's power to enforce the criminal law against public employees who fail to perform their job in violation of the law.

People v. Vizzini, O'Sullivan and Gentiluomo
Supreme Court of New York, Trial Term, New York County
359 N.Y.S. 2d 143 (1974)

Opinion By: Roberts, J.

The issue in this case concerns whether the defendants can properly and constitutionally be indicted for reckless endangerment, conspiracy to commit reckless endangerment, and coercing others to commit criminal conduct in the context of a public employee strike. The indictment alleged that defendants had recklessly engaged in conduct which created a substantial risk of serious physical injury by causing the residents of New York City to be deprived of firefighting services for 5 ½ hours.

Defendants are the president and two members of the executive board of the Uniformed Firefighters Association in New York City. They were indicted for calling the first strike of firemen in New York City history. They moved to dismiss the indictment.

Prior to the strike, defendants had negotiated with the city for a new collective bargaining agreement. During these negotiations, the union's executive board conducted a secret ballot for the membership to determine whether the board should be enabled to call a strike of the firefighters. A private firm was hired to conduct the poll, and the results showed that the firefighters voted not to strike.

The defendants concealed the outcome of the poll from the membership and falsely announced publicly that the membership had voted "overwhelmingly in favor" of a total strike. On November 6, 1973, the defendants called a strike. Their purpose was to coerce the city into accepting their contract terms, and as a result, they were indicted.

According to the Supreme Court, "When human lives are placed in immediate peril by the strike of a vital government service…there is no…process swiftly enforceable enough to forestall the possible immediate and irreparable harm to lives and property."

Defendants argued that reckless endangerment was not intended to apply to conduct that doesn't involve the performance of a physical act. The court, however, noted that the Penal Law defined "conduct" in section 15.00(3) as "an act or omission" and "omission" as "a failure to perform an act as to which a duty of performance is imposed by law." The court admitted that there has never been a prosecution similar to this case, but neither has there been such a strike. "[W]hile the reckless endangerment statutes are new sections with little in the way of decisional law to interpret them, the concept of imposing criminal liability for harm caused by the willful omission to perform a legal duty to protect another is not without precedent in the case law of this State."

The court held that the defendants may be prosecuted for reckless endangerment crimes. As a supplemental note to the above case, one issue that the union pressed at the bargaining table was for a $2,000 raise in firefighters' yearly base salary of $14,300. Also, the secret ballot that the defendants had collected revealed that 4,119 firemen voted against the strike while 3,827 voted for the strike. During the course of the 5 ½ hour strike, 338 alarms were sounded throughout the city. Under the post-strike contract that the union later signed, the firemen's salaries were raised by $950 per year. The three union leaders plead guilty to reckless endangerment and each received three years of probation. Vizzini, the union president, served the rest of his term of presidency and was re-elected to a second term in 1977. After the firemen returned to work, the firemen who crossed the picket lines in an effort to fight the neglected fires during the strike were ostracized by their fellow striking firemen.[9]

POSSESSION

The New York Penal Law provides a strict reading of possession. To possess something is defined in **Section 10.00(8)** as "to have physical possession or otherwise to exercise dominion or control over tangible property." Possession can be actual, i.e., the person is holding the item, or constructive.

New York narrowly defines constructive possession. In *People v. Manini*[10], the Court of Appeals

defined constructive possession as "usually established by showing that a defendant exercised dominion and control over the place where contraband was seized or over the person who actually possessed the property." Constructive possession may also be established "by showing that [a defendant] retain[s] a 'continuing possessory interest' in the contraband sufficient to give [defendant] the requisite dominion and control." In New York, in order to support a charge of possession of tangible property, "the People must show that the defendant exercised 'dominion or control' over the property by a sufficient level of control over the area in which the contraband is found or over the person from whom the contraband is seized." In the instant case, the court found that the evidence is insufficient to establish the requisite level of defendant's control over one of his dealers, Paige, to support the finding that defendant was in constructive possession of drugs seized from Paige. The facts show that Paige had obtained nine ounces of cocaine from defendant "on credit" in California, flew to New York with four of those ounces, and was arrested outside of the Rochester Airport. The Court of Appeals held, "the evidence was insufficient to establish the requisite level of control or authority by Manini over Paige to support a finding that Manini was in constructive possession of the drugs seized from Paige in New York."

However, in another case in the same decision, *People v. Fuente*[11], the Court of Appeals found that defendant did have constructive possession over his contraband, even though he did not have actual possession. According to the court, "the evidence in its totality provided a sufficient basis for the Grand Jury to conclude that defendant Fuente was in constructive possession of the kilogram of cocaine seized from the van." Defendant had retained control over his drugs by a showing that his accomplices were transporting one kilo of cocaine in their van on his behalf while defendant drove his car closely behind them, both vehicles pulled into a parking area together, left that area together, and were arrested by the police together.[11]

The following case presents a difficulty the prosecution can encounter when trying to establish possession. In *People v. Velez*[12], the applicable statute, §265.15 indicates a presumption of possession of a firearm in a vehicle by all persons occupying the vehicle at the time the weapon is found unless, according to subsection (3), the weapon "is found upon the person of one of the occupants." In this case, the police chased defendant and Sanchez who were engaged in a shootout with another male. Sanchez attempted to shoot one of the officers but was prevented from firing when his pistol jammed. The defendant and Sanchez then escaped in a van but were stopped and arrested. One of the arresting officers found a .32 caliber pistol with a jammed spent bullet in the chamber on a bag between the two front seats. The court reasoned that since there was no testimony from one of the arresting officers indicating that he had observed either Sanchez or defendant in possession of the weapon immediately prior to the arrest, the exception noted by subsection (3) is inapplicable and defendant's indictment for criminal possession of a weapon was upheld.

REVIEW QUESTIONS

1. Which of the following elements of *actus reus* is **not** required?

A. causation
B. voluntariness
C. intention
D. physical capability

2. Who in the following scenarios is criminally culpable?

A. a person who drives through a storefront after having a heart attack behind the wheel
B. a baseball player who swings back his bat and hits the catcher in the head
C. a person walking down the sidewalk who bumps into another person
D. a company president who disposes of chemical waste in a nearby river

3. A mother who leaves her infant in the car while she meets her friend for lunch can be charged with which of the following offenses?

    A. possession
    B. omission
    C. status
    D. strict liability

4. A gives B a quantity of cocaine to sell on the street. While B is on the corner selling the drugs, A periodically looks outside his window to check on B. A can be charged with what type of drug possession?

    A. constructive
    B. actual
    C. presumptive
    D. full

5. A passenger in a car, who believes that the driver is headed for a public park, is arrested after the driver drives onto privately owned property.[13] At the conclusion of trial, the court:

    A. finds her guilty for trespassing.
    B. finds her guilty for unlawful entry.
    C. finds her guilty for failing to stop the driver from entering private property.
    D. finds her not guilty.

REFERENCES

[1] 83 N.Y.2d 511 (1994). In this case, defendant, after robbing a restaurant, fled from the police by escaping out the back and up to the rooftop. One officer who pursued him, fell into an open 25-foot air shaft and died. Defendant was convicted of second degree murder.
[2] 860 N.Y.S.2d 457 (2008)
[3] 82 S.Ct. 1417 (1962)
[4] 88 S. Ct. 2145 (1968)
[5] 33 N.Y. 2d 221 (1973)
[6] Kilgannon, C. (2003, March 26). Trial under way in case of vegetarians' sick child. *The New York Times.*
[7] People v. Swinton and Swinton (801 N.Y.S. 2d 403 (2005))
[8] 860 N.Y.S.2d 457 (2008)
[9] *O'Donnell, M.* (2003, November 2). City Lore; The day the firemen went on strike. *The New York Times.*
[10] 79 N.Y.2d 561 (1992)
[11] 79 N.Y.2d 561 (1992)
[12] 83 N.Y. 2d 921 (1994)

ANSWERS
1. C; 2. D; 3. B; 4. A; 5. D