CHAPTER 702
GENERAL PRINCIPLES OF PENAL LIABILITY

Section

Note

L 2001, c 91, §4 purports to amend this chapter.

" **§702-200 Requirement of voluntary act or voluntary omission.** (1) In any prosecution it is a defense that the conduct alleged does not include a voluntary act or the voluntary omission to perform an act of which the defendant is physically capable.

(2) Where the defense provided in subsection (1) is based on a physical or mental disease, disorder, or defect which precludes or impairs a voluntary act or a voluntary omission, the defense shall be treated exclusively according to chapter 704, except that a defense based on intoxication which is pathological or not self-induced which precludes or impairs a voluntary act or a voluntary omission shall be treated exclusively according to this chapter. [L 1972, c 9, pt of §1; am L 1986, c 325, §1]

Cross References

Physical or mental disease, disorder, or defect excluding penal responsibility, see §704-400.

COMMENTARY ON §702-200

The effect of this section is to require, as a minimum basis for the imposition of penal liability, conduct which includes a voluntary act or voluntary omission. In most penal cases the issue of whether the defendant's conduct includes a voluntary act or a voluntary omission will not be separately litigated. The voluntariness of relevant acts or omissions will be evident. The Code, by making the issue of involuntariness a defense, accordingly puts the ultimate burden on the defendant to inject that issue into the case. The burden, of course, can be met by the prosecutor if he raises the issue. Once the question of voluntariness has been raised, the prosecution has the burden of proving that issue beyond a reasonable doubt.

A voluntary act or omission will not, of course, be sufficient alone to impose penal liability. If, however, the issue of voluntariness is raised, such an act or omission must be established if penal liability is to obtain. Statutory law cannot hope to command or deter acts over which the accused has no control. Moreover, any attempt at moral condemnation of involuntary acts or omissions through the use of the penal sanction would ultimately disserve the integrity of the penal law.

The direct effect of this section is to preclude "status crimes"--the most obvious of which is vagrancy. Since the impoverished condition of the accused would not, without more, constitute or include a voluntary act or omission, conviction would be precluded.

The formulation of this section is intended to permit liability in those cases where liability is not predicated on a voluntary act or omission but on a course of conduct initiated by a voluntary act. Thus, an automobile driver who suddenly loses consciousness and kills a pedestrian would not have performed a voluntary act giving rise to liability. However, if the driver had disregarded a known risk that consciousness might be lost and had commenced or continued driving, that included a voluntary act might be sufficient to impose penal liability.

The prior Hawaii statutory law[1] is similar to this section but its logical implication with regard to status crimes has not been examined as carefully as might have been hoped. While being a vagrant was unlawful, being a leper was not.[2]

§702-200 Commentary:

1. H.R.S. §701-1 ("doing what a penal law forbids to be done, or omitting to do what it commands").

2. Segregation of Lepers, 5 Haw. 162 (1884).

" **§702-201 "Voluntary act" defined.** "Voluntary act" means a bodily movement performed consciously or habitually as the result of the effort or determination of the defendant. [L 1972, c 9, pt of §1]

COMMENTARY ON §702-201

This section defines "voluntary act" in general terms relying chiefly on the characteristic of voluntariness--the effort and determination of the defendant. The Code's formulation is intended to exclude from the category of voluntary action such bodily movements as (a) reflex or convulsions, (b) bodily movements during unconsciousness and sleep, (c) conduct during hypnosis or resulting from hypnotic suggestion, and (d) any other bodily movement that is not a product of the effort and determination of the defendant, either conscious or habitual.

The exclusion of involuntary action from the scope of penal liability must be viewed in the light of the provisions of chapter 704 on physical disease, disorder, and defect which exclude penal responsibility. In that chapter acquittal is

conditioned on submission to treatment or commitment tailored to the condition which excludes responsibility. The Code attempts to provide "therapy or ... custodial commitment"[1] for those dangerous individuals who are unable to conform their conduct to the requirements of the law because of some condition which would be difficult to regard as a "mental disease or defect" under orthodox treatment of penal irresponsibility. At the same time, because treatment is flexible and tailored to the condition in question, it does not bear "harshly on the individual whose condition is nonrecurrent."[2]

No prior Hawaii statutory provision dealt with the issue of voluntariness of acts (other than in its relation to duress or mental disease, disorder, or defect), however, a recent case tends to support the position of the Code.[3]

§702-201 Commentary:

1. M.P.C., Tentative Draft No. 4, comments at 119 (1955).

2. Id. at 121.

3. See State v. Matsuda, 50 Haw. 128, 432 P.2d 888 (1967).

" **§702-202 Voluntary act includes possession.** Possession is a voluntary act if the defendant knowingly procured or received the thing possessed or if the defendant was aware of the defendant's control of it for a sufficient period to have been able to terminate the defendant's possession. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §702-202

Offenses of possession are pervasive in the law, but possession per se is not a bodily movement or an omission, although the course of conduct leading to or continuing possession might include a voluntary act or omission. Therefore, this section makes it explicit that possession is an act, within the meaning of §§702-200 and 201, if the possessor knowingly procured or received the thing possessed or was aware of control thereof for a sufficient period to have been able to terminate possession. The "thing possessed" refers to the physical object per se, knowledge of particular qualities or properties of the physical object possessed is dealt with as a mens rea problem in subsequent sections.

Hawaii law has had many statutes making various kinds of possession illegal.[1] When considered with the previous

statutory requirement that penal liability must be based on "doing what the penal law forbids"[2] the logical implication of such statutes was that possession is an act within the penal law. This section merely states that position with greater clarity.

Case Notes

For purposes of §134-6(e), "carry" must be analyzed employing a two-pronged analysis: (1) the voluntary act of "carrying" an object is, by way of this section, established when an individual acts knowingly with respect to that conduct; and (2) the requisite state of mind with respect to the circumstances attendant to "carrying" that object, i.e., the object's particular attributes rendering its carrying a criminal offense--the quality of being a firearm--is, by way of §702-204, established by proof of a reckless state of mind. 93 H. 87, 997 P.2d 13 (2000).

For the purposes of §134-7(b), "possession" must be analyzed using a two-pronged analysis: (1) the voluntary act of "possession" of an object "itself" is, by way of this section, satisfied where an individual acts knowingly with respect to his or her conduct; and (2) the requisite state of mind with respect to the attendant circumstances--i.e., the particular qualities of the object that make it illegal to possess it--is, by way of §702-204, satisfied by a reckless state of mind. 93 H. 87, 997 P.2d 13 (2000).

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§702-202 Commentary:

1. E.g., H.R.S. §134-51 (concealed deadly weapon); H.R.S. §134-52 (switchblade knife).

2. H.R.S. §701-1.

" **§702-203 Penal liability based on an omission.** Penal liability may not be based on an omission unaccompanied by action unless:

(1) The omission is expressly made a sufficient basis for penal liability by the law defining the offense; or

(2) A duty to perform the omitted act is otherwise imposed by law. [L 1972, c 9, pt of §1]

COMMENTARY ON §702-203

Penal liability based on an omission unaccompanied by action is fraught with dangers unless it is limited, as this section

does, to those failures to perform a duty imposed by law--civil or penal. A voluntary omission under such circumstances will not alone suffice to establish penal liability, other elements will have to be identified and established according to the definition of, and other laws relating to, the offense charged.

Previous Hawaii law recognized a limitation more severe than that contained in this section. Liability predicated on omission only resulted from failing to do what a penal law commanded.[1] Such a limitation does not seem wise. Few duties of affirmative action are imposed by penal law. It should be sufficient for penal liability that a defendant, with the requisite culpability, failed to discharge a duty of affirmative performance imposed by civil law.

The Code is in accord with decisions in other states. For example, the owner of premises owes a duty to business invitees to maintain the premises in a reasonably safe condition. An owner who recklessly failed to provide adequate fire exits was held guilty of manslaughter when the omission caused the death of the owner's invitees.[2] Similarly, a parent, under civil law, owes a duty to provide food and shelter for his or her infant child. The intentional or reckless omission to perform the duty may result in a conviction for murder or manslaughter, respectively, if the omission causes the death of the child.[3]

Case Notes

Section contemplates possibility of penal liability based on an omission accompanied by, i.e., in combination with, action, as well as an omission unaccompanied by action. 73 H. 236, 831 P.2d 924 (1992).

Where evidence that child was a victim of battered child syndrome was relevant to show that child's death was not an accident, but the result of an intentional, knowing or reckless criminal act, giving rise to a duty on defendant's part to obtain medical care for child pursuant to §663-1.6, trial court did not err in admitting expert testimony that child was a victim of battered child syndrome. 101 H. 332, 68 P.3d 606 (2003).

In describing the elements of an offense based on the omission to perform a duty imposed by law under paragraph (2), the circuit court shall indicate in its instructions that the harm was caused "by" the omission to perform the relevant duty, although the question of whether the failure to do so constitutes reversible error necessarily depends, in any particular case, on an evaluation of the instructions as a whole. 77 H. 216 (App.), 883 P.2d 638 (1994).

Where jury could have reasonably found that defendant care home operator knew of the risks of infection and failed to provide resident with the care that was within defendant's capabilities, which care would have prevented the progression of the infection that caused resident's death, and defendant had a duty to take resident to follow-up appointment with doctor and consciously disregarded a substantial and unjustifiable risk that failure to perform this duty would cause resident's death, sufficient evidence to support jury's finding that State proved manslaughter by omission, including the requisite state of mind. 104 H. 387 (App.), 90 P.3d 1256 (2004).

§702-203 Commentary:

1. H.R.S. §701-1.

2. Commonwealth v. Welansky, 316 Mass. 383, 55 N.E.2d 902 (1944).

3. See Biddle v. Commonwealth, 206 Va. 14, 141 S.E.2d 710 (1965).

" **§702-204 State of mind required.** Except as provided in section 702-212, a person is not guilty of an offense unless the person acted intentionally, knowingly, recklessly, or negligently, as the law specifies, with respect to each element of the offense. When the state of mind required to establish an element of an offense is not specified by the law, that element is established if, with respect thereto, a person acts intentionally, knowingly, or recklessly. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §702-204

This section commences the Penal Code's consideration of the mental aspect or state of mind which will, in most instances, be required for the imposition of penal liability. It must, of course, be read in conjunction with the following section defining "element" of an offense and in conjunction with §702-212 which provides for those relatively few instances when absolute or strict penal liability will be recognized.

Clear analysis requires that the various distinct ingredients of an offense be separately recognized and that culpability be required as to each. These distinct ingredients are (1) the conduct, (2) the attendant circumstances, and (3) the results of conduct, which are specified in the definition of an offense and

which negative a defense on the merits. Section 702-205 denominates these ingredients as "elements." The analytical effect of requiring a culpable state of mind with respect to each element should be obvious. For example, one who intends sexual intercourse with a female whom he has no reason to suspect is not qualified to consent to the behavior should not be held to have committed an offense because he intends the act.[1]

The distinct punitive nature of the penal law dictates that its sanction be reserved for those individuals who can be morally condemned. The penal law does not, in most instances, condemn a person's conduct alone. Rather, it condemns the individual whose state of mind with regard to the individual's conduct, attendant circumstances, and the result of the individual's conduct, exhibits an intent to harm, an indifference to harming, or a gross deviation from reasonable care for protected social values. Thus we have limited penal liability to those individuals who act intentionally, knowingly, recklessly, or negligently contrary to values protected by the Code.

The four types of mental states which the Code recognizes as sufficient for penal liability (intent, knowledge, recklessness, and negligence) are defined in subsequent sections.

When a particular state of mind is required to establish the elements of an offense, it will usually be specified in the definition of the offense, however it may be separately specified by another provision of law. In the absence of any such specification, intent, knowledge or recklessness will suffice. Negligence with respect to the element of an offense will not establish that element unless specifically so provided.

The previous Hawaii law runs the gamut of what has been called, "the variety, disparity and confusion" of attempts to state "the requisite but elusive mental element" of penal offenses.[2] For example, assault required that the defendant act intentionally and maliciously, whereas battery required that the defendant act unlawfully and intentionally. Crimes involving bribery of officials or influencing of jurors required that the defendant act "corruptly." Child stealing required that the defendant act "maliciously by fraud, force or deception." Murder in the first degree required that the defendant act "with deliberate premeditated malice aforethought." Negligent homicide, which was limited to causing death by operation of a vehicle, required "grossly negligent" operation for a first degree (felony) conviction, but only "negligent" operation for a second degree (misdemeanor) conviction.[3] When the courts have dealt with the requisite state of mind, their suggestions have not always been helpful.

In a case of extortion where the statutory language read "wilfully and corruptly extorts," the court suggested that a correct indictment should read "unlawfully, wilfully, corruptly, feloniously and extorsively did extort..."[4]

It is safe to say that, for the purpose of the penal law, there are no subtleties of meaning in the language used in the prior law which cannot be achieved in a clear, lucid fashion by limiting the relevant states of mind to intent, knowledge, recklessness, and negligence.

SUPPLEMENTAL COMMENTARY ON §702-204

The legislature adopted §702-204 of the Proposed Draft without change. However, the reader should carefully analyze the changes which the legislature made to part V of chapter 707, dealing with sex offenses, to determine whether the legislature intended to create an exception to the general principle expressed in §702-204. See also, Supplemental Commentaries on §§702-206 and 702-213, and 707-704 and the commentaries thereon.

Law Journals and Reviews

Agonizing Over Aganon: A New Approach to Drafting Jury Instructions in Criminal Cases. 10 HBJ, no. 13, at 73 (2007).

Case Notes

Section applies to §15-26.3 of the City and County Traffic Code and furnishes the state of mind required. 58 H. 314, 568 P.2d 507 (1977).

For purposes of §134-6(e), "carry" must be analyzed employing a two-pronged analysis: (1) the voluntary act of "carrying" an object is, by way of §702-202, established when an individual acts knowingly with respect to that conduct; and (2) the requisite state of mind with respect to the circumstances attendant to "carrying" that object, i.e., the object's particular attributes rendering its carrying a criminal offense--the quality of being a firearm--is, by way of this section, established by proof of a reckless state of mind. 93 H. 87, 997 P.2d 13 (2000).

For the purposes of §134-7(b), "possession" must be analyzed using a two-pronged analysis: (1) the voluntary act of "possession" of an object "itself" is, by way of §702-202, satisfied where an individual acts knowingly with respect to his or her conduct; and (2) the requisite state of mind with respect to the attendant circumstances--i.e., the particular qualities of the object that make it illegal to possess it--is, by way of

this section, satisfied by a reckless state of mind. 93 H. 87, 997 P.2d 13 (2000).

As there is no state of mind element for the offenses designated under §291-4.4 or 291-4.5, pursuant to this section, these offenses are committed if the defendant acted with an intentional, knowing, or reckless state of mind. 95 H. 94, 19 P.3d 42 (2001).

In order to convict under §291-12, the prosecution has the burden of proving beyond a reasonable doubt that defendant (1) operated a vehicle "without due care or in a manner", (conduct) (2) "as to cause a collision with, or injury or damage to, as the case may be, any person, vehicle or other property" (result of conduct), and that defendant did so (3) intentionally, knowingly, or recklessly. 118 H. 1, 185 P.3d 186 (2008).

Complaints filed by the State against defendants for the offense of entrance into the Kahoʻolawe island reserve dismissed without prejudice because the complaints did not allege the requisite state of mind of intentionally, knowingly, or recklessly. 132 H. 36, 319 P.3d 1044 (2014).

As the requisite state of mind for the value element of the insurance fraud offense is not specifically mentioned in §431:10C-307.7(b)(2), pursuant to this section, the state of mind for the value element of insurance fraud is "intentionally, knowingly, or recklessly". 117 H. 26 (App.), 175 P.3d 136 (2007).

Under §702-206, the term "intentional", as applied to the value-attendant-circumstance element of the insurance fraud offense under §431:10C-307.7, means "believes"; also, §708-801(4) indicates that either a defendant's "belief" or "knowledge" is sufficient to establish an intentional or knowing state of mind as to the value element; thus, pursuant to this section, as a "reckless" state of mind was applicable to the value element of the insurance fraud offense, defendant was not exposed to a conviction based on a state of mind lower than what was required. 117 H. 26 (App.), 175 P.3d 136 (2007).

§702-204 Commentary:

1. Present Hawaii law on contributing to the delinquency of a minor is the opposite. See Territory v. Delos Santos, 42 Haw. 102 (1957).
2. Morissette v. United States, 342 U.S. 246, 252 (1952).
3. H.R.S. §748-9.
4. Territory v. Wills, 25 Haw. 747, 761 (1921).

" **§702-205 Elements of an offense.** The elements of an offense are such (1) conduct, (2) attendant circumstances, and (3) results of conduct, as:

(a) Are specified by the definition of the offense, and

(b) Negative a defense (other than a defense based on the statute of limitations, lack of venue, or lack of jurisdiction). [L 1972, c 9, pt of §1]

COMMENTARY ON §702-205

As explained in the commentary to §702-204, a clear analysis requires that the various distinct ingredients of an offense be separately recognized. The ingredients, denominated "elements" in §702-205, are the conduct, the circumstances attendant to conduct, and the results of conduct, which are specified in the definition of an offense and which negative a defense on the merits.

The effect of including within the definition of "element" facts (conduct, attendant circumstances, results) which negative a defense on the merits (a defense other than one based on the statute of limitations, lack of venue, or lack of jurisdiction) is to postulate an equivalence of the state of mind required to establish a particular offense regardless of the diverse circumstances giving rise to the charge. Thus, if the crime of murder requires that the defendant act intentionally or knowingly with respect to each element, one who intentionally kills another, recklessly mistaken that the other's conduct threatens one's life, would not be guilty of murder, although one might be guilty of a crime requiring only recklessness. Since the defendant must act intentionally or knowingly with respect to attendant circumstances which negative the defense of self-defense, conviction for murder would fail unless it could be proven that defendant knew or believed that the defendant's assailant's conduct did not in fact threaten serious bodily harm or death.

Prior Hawaii law did not deal directly with the problem of defining "element" of an offense; however, the question has been treated tangentially in cases involving sufficient corroboration of extrajudicial confessions. A footnote in one case has provided the following comment and definition:

> Proof of the commission of a crime consists of three elements, each of which must be proved beyond a reasonable doubt: (1) the basic injury, such as the death in murder, the burning in arson, or the missing property in theft, (2) the fact that the basic injury was the result of a criminal, rather than a natural or accidental cause, and (3) the identification of the defendant as the perpetrator

> of the crime. The first two of these elements constitute the corpus delicti or body of the crime, which is proved when the prosecution has shown that a crime has been committed by someone.[1]

However, the same opinion, which involved a charge of burglary, also referred to that requirement, under the prior law, that the entry be accompanied by an intent to commit a felony, as an "essential element".[2]

The Code seeks to eliminate the somewhat inconsistent use of the word "element" and to provide a less abstract and more meaningful definition.

SUPPLEMENTAL COMMENTARY ON §702-205

The legislature enacted §702-205 of the Proposed Draft of the Code without change; however, in chapter 703, dealing with defenses of justification, the legislature departed from the Proposed Draft and required an objective assessment of the defendant's state of mind, or a "reasonable belief" on the defendant's part, respecting the attendant circumstances which justify conduct otherwise deemed unlawful. Therefore, the example set forth in the second paragraph of the above commentary is no longer applicable.

Law Journals and Reviews

Agonizing Over Aganon: A New Approach to Drafting Jury Instructions in Criminal Cases. 10 HBJ, no. 13, at 73 (2007).

Case Notes

Section not inconsistent with entrapment provisions of §701-115. 58 H. 479, 572 P.2d 159 (1977).

Pursuant to the definition of "element" set forth in this section, the prior conviction reference in §709-906(7) constitutes an element of the offense of the felony abuse charge. 116 H. 3, 169 P.3d 955 (2007).

Mentioned: 75 H. 152, 857 P.2d 579 (1993).

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§702-205 Commentary:

1. State v. Hale, 45 Haw. 269, 277n, 367 P.2d 81, 86n (1961).

2. Id.

" **§702-206 Definitions of states of mind.** (1) "Intentionally."

(a) A person acts intentionally with respect to his conduct when it is his conscious object to engage in such conduct.

(b) A person acts intentionally with respect to attendant circumstances when he is aware of the existence of such circumstances or believes or hopes that they exist.

(c) A person acts intentionally with respect to a result of his conduct when it is his conscious object to cause such a result.

(2) "Knowingly."

(a) A person acts knowingly with respect to his conduct when he is aware that his conduct is of that nature.

(b) A person acts knowingly with respect to attendant circumstances when he is aware that such circumstances exist.

(c) A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

(3) "Recklessly."

(a) A person acts recklessly with respect to his conduct when he consciously disregards a substantial and unjustifiable risk that the person's conduct is of the specified nature.

(b) A person acts recklessly with respect to attendant circumstances when he consciously disregards a substantial and unjustifiable risk that such circumstances exist.

(c) A person acts recklessly with respect to a result of his conduct when he consciously disregards a substantial and unjustifiable risk that his conduct will cause such a result.

(d) A risk is substantial and unjustifiable within the meaning of this section if, considering the nature and purpose of the person's conduct and the circumstances known to him, the disregard of the risk involves a gross deviation from the standard of conduct that a law-abiding person would observe in the same situation.

(4) "Negligently."

(a) A person acts negligently with respect to his conduct when he should be aware of a substantial and unjustifiable risk taken that the person's conduct is of the specified nature.

(b) A person acts negligently with respect to attendant circumstances when he should be aware of a substantial and unjustifiable risk that such circumstances exist.
(c) A person acts negligently with respect to a result of his conduct when he should be aware of a substantial and unjustifiable risk that his conduct will cause such a result.
(d) A risk is substantial and unjustifiable within the meaning of this subsection if the person's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a law-abiding person would observe in the same situation. [L 1972, c 9, pt of §1; am L 1983, c 132, §1; am L 1986, c 314, §4]

COMMENTARY ON §702-206

This section attempts to define the four states of mind which the Code recognizes as sufficient to establish penal liability and to indicate by definition the manner in which each state of mind is related to conduct, attendant circumstances, and the results of conduct.

The difference between acting intentionally, according to subsection (1), and knowingly, according to subsection (2), is narrow but nonetheless distinct. The distinction lies in the fact that intent is characterized by a conscious object to engage in certain conduct or cause a certain result whereas knowledge is characterized by an awareness that conduct is of a certain type or that a certain result will almost certainly obtain. While knowledge will in most instances suffice to establish penal liability, there are a limited number of offenses which require an intent to effect a particular result.

Recklessness in subsection (3) deals not with the conscious object of conduct or the relative certainty of conduct but rather with disregard of certain probabilities. Recklessness is the conscious disregard of a known risk. It goes without saying that the conscious disregard of every risk of harm to a protected social interest should not, in every instance, be sufficient to impose penal liability for an untoward eventuality. Precision in defining which risks the penal law will not let a defendant ignore is impossible. Following the lead of the Model Penal Code, the Code has labeled the relevant risks as "substantial and unjustifiable" and in subsection (3)(d) states the factors which ought to be considered in determining whether the disregard of the risk should be

condemned. The Reporter to the Model Penal Code has stated the issue concisely:

> The draft requires, however, that the risk thus consciously disregarded by the actor be "substantial" and "unjustifiable"; even substantial risks may be created without recklessness when the actor seeks to serve a proper purpose, as when a surgeon performs an operation which he knows is very likely to be fatal but reasonably thinks the patient has no other, safer chance. Accordingly, to aid the ultimate determination, the draft points expressly to the factors to be weighed in judgment: the nature and degree of the risk disregarded by the actor, the nature and purpose of his conduct and the circumstances known to him in acting.
>
> Some principle must be articulated, however, to indicate what final judgment is demanded after everything is weighed. There is no way to state this value judgment that does not beg the question in the last analysis; the point is that the jury must evaluate the conduct and determine whether it should be condemned.[1]

The fourth type of culpability which the Code recognizes is negligence. It is distinguished from the other three types of culpability (intent, knowledge, and recklessness) in that it does not involve a state of awareness on the part of the defendant. Rather, negligence involves the inadvertent creation by the defendant of a risk of which the defendant would have been aware had the defendant not deviated grossly from the standard of care that a law-abiding person would have observed in the same situation. As in the case of recklessness, the risk which the negligent defendant failed to perceive must be "substantial and unjustifiable." In the final analysis the jury will have to address themselves to the factors listed in subsection (4)(d)--i.e., the nature and degree of the risk, the defendant's purpose, the circumstances known to the defendant, and the degree of deviation from a standard of ordinary care, and determine whether the behavior of the defendant should be condemned.

Of the four states of mind which this Code recognizes as sufficient for penal liability, negligence is the least condemnable because, by hypothesis, the defendant was inadvertent.[2] It has been argued that negligence is not a proper subject of penal--as opposed to civil--law.[3] The Code, however, adopts the position that:

> Knowledge that conviction and sentence, not to speak of punishment, may follow conduct that inadvertently creates improper risk supplies men with an additional motive to take care before acting, to use their faculties and draw on

> their experience in gauging the potentialities of contemplated conduct. To some extent, at least, this motive may promote awareness and thus be effective as a measure of control.... Accordingly, we think that negligence, as here defined, cannot be wholly rejected as a ground of culpability which may suffice for purposes of penal law, though we agree that it should not be generally deemed sufficient in the definition of specific crimes, and that it often will be right to differentiate such conduct for the purposes of sentence.[4]

In the definitions of "recklessly" and "negligently" the Code refers to the "standard of conduct" or "standard of care that a law-abiding person would observe in the same situation." The reference to the defendant's situation is not entirely clear. If the actor received a blow to the head or was blind, certainly these factors would be considered in assessing the actor's situation. On the other hand, factors such as "heredity, intelligence or temperament" could not be considered "without depriving the criterion of all of its objectivity."[5] Further discriminations of this sort must, of necessity, be left to the courts.

Previous Hawaii statutory law did not define any mental state except "malice," which was so imprecisely defined as to run the gamut of culpability and be meaningless.[6]

Although "intent," "knowledge," "recklessness," and "negligence" are used extensively in the present Penal Code, these terms have not been judicially defined in a penal context.[7] This section of the Code will supply the needed definitions.

SUPPLEMENTAL COMMENTARY ON §702-206

The legislature adopted §206 as contained in the Proposed Draft of the Code; however, the legislature also added to the Code the offense of negligent homicide in the second degree, set forth in §707-704, which introduces a less culpable state of mind called "simple negligence"--essentially a civil standard of negligence. (Cf. §§702-204, 213, and 707-704, and the commentaries thereon.)

In a prosecution under Hawaii trespass law prior to the enactment of the Code, the defendants sought to attack the statute in question on the grounds of vagueness, indefiniteness, and overbreadth for failure to require knowledge as "an element of the offense." In disposing of this contention, the court said:

> Moreover, however, [sic] "knowledge" be defined, the failure of a statute to provide for knowledge as an element

> of a crime does not ipso facto render a statute unconstitutional. For not only are there statutory crimes without any requirement of intention or knowledge, but, as we noted in State v. Taylor, 49 Haw. 624, 636-7, 425 P.2d 1014, 1022 (1967), the applicable test for vagueness and overbreadth, which we adopted from Boyce Motor Lines v. United States, 342 U.S. 337, 340-1 (1952), is not a checklist of requirements but is far more general.

State v. Marley, 54 Haw. 450, 459-460, 509 P.2d 1095, 1102-1103 (1973). The court cited, as examples of offenses which do not require that the actor act intentionally or knowingly, §712-1217 (open lewdness), §708-871 (reckless false advertising), and §707-741 (incest).

Act 314, Session Laws 1986, amended the definitions of "recklessly" and "negligently" in subsections (3) and (4). Amendments to these definitions in 1985 had the unintended effect of changing the definitions from "requiring a conscious disregard of a risk that the actor engages in a type of conduct to a conscious disregard of a risk created by the actor's conduct". The amendments made by Act 314 changed the definitions back to their original meaning. Conference Committee Report No. 51-86.

Case Notes

Instruction on killing "recklessly" discussed. 60 H. 17, 586 P.2d 1028 (1978).

Substantial evidence in record supported trial court's conclusion that parent "knowingly" caused son's death. 73 H. 236, 831 P.2d 924 (1992).

There was sufficient evidence that minor acted knowingly where trial court could infer from the amount of force minor used to punch victim in the face, that minor was aware that it was practically certain that minor's conduct would cause the result of substantial bodily injury. 107 H. 12, 108 P.3d 966 (2005).

The reckless state of mind definition under subsection (3) (1993) applies to the reckless driving statute §291-2; in determining whether an identified risk is substantial and unjustifiable under subsection (3), the nature and degree of the risk disregarded by the actor, the nature and purpose of the actor's conduct, and the circumstances known to the actor in acting must be weighed. 113 H. 321, 151 P.3d 802 (2007).

There was overwhelming and compelling evidence tending to show defendant guilty beyond a reasonable doubt of kidnapping, where defendant restrained victim intentionally or knowingly, with intent to inflict bodily injury upon victim or subject victim to a sexual offense or terrorize victim, by, inter alia, striking

victim in the face and back of the head several times specifically in response to victim's request to let victim go and victim's attempts to escape. 126 H. 267, 270 P.3d 997 (2011).

There was overwhelming and compelling evidence tending to show defendant guilty beyond a reasonable doubt of two counts of sexual assault in the third degree, where defendant subjected victim to sexual contact by placing defendant's hand and mouth on victim's breast, respectively, by strong compulsion, and did so knowingly as to each element of the offense. 126 H. 267, 270 P.3d 997 (2011).

There was overwhelming evidence tending to show defendant guilty beyond a reasonable doubt of two counts of sexual assault in the first degree, where defendant subjected victim to acts of sexual penetration by inserting defendant's penis into victim's mouth and genital openings, respectively, by strong compulsion, and did so knowingly as to each element of the offense. 126 H. 267, 270 P.3d 997 (2011).

Where jury could have reasonably found that defendant care home operator knew of the risks of infection and failed to provide resident with the care that was within defendant's capabilities, which care would have prevented the progression of the infection that caused resident's death, and defendant had a duty to take resident to follow-up appointment with doctor and consciously disregarded a substantial and unjustifiable risk that failure to perform this duty would cause resident's death, sufficient evidence to support jury's finding that State proved manslaughter by omission, including the requisite state of mind. 104 H. 387 (App.), 90 P.3d 1256 (2004).

State produced sufficient evidence to show that defendant acted with reckless mens rea with respect to the attendant circumstances of the driving while license suspended or revoked for driving under the influence offense; defendant's conscious disregard of the risk that defendant's license remained revoked or suspended for DUI-alcohol was a gross deviation from the standard of conduct that a law-abiding person would observe in the same situation. 106 H. 123 (App.), 102 P.3d 367 (2004).

Where defendant punched and kicked another so ferociously in the face that the lip was split clean through, four teeth were bashed in, the eye was hemorrhaged and pushed inward, and the orbital floor was fractured causing blurred and diplopic vision lasting almost eleven months, there was substantial evidence that the defendant was, at the very least, aware that it was practically certain that defendant's conduct would cause the result required, "serious bodily injury", for conviction of first degree assault. 106 H. 530 (App.), 107 P.3d 1203 (2005).

State failed to adduce substantial evidence that defendant "consciously disregarded" any risk to "the safety of persons or property"; even viewed "in the strongest light for the prosecution", the evidence that defendant disregarded a stop sign was not "of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion" that defendant's driving "involved a gross deviation from the standard of conduct that a law-abiding person would observe in the same situation". 112 H. 233 (App.), 145 P.3d 776 (2006).

Under this section, the term "intentional", as applied to the value-attendant-circumstance element of the insurance fraud offense under §431:10C-307.7, means "believes"; also, §708-801(4) indicates that either a defendant's "belief" or "knowledge" is sufficient to establish an intentional or knowing state of mind as to the value element; thus, pursuant to §702-204, as a "reckless" state of mind was applicable to the value element of the insurance fraud offense, defendant was not exposed to a conviction based on a state of mind lower than what was required. 117 H. 26 (App.), 175 P.3d 136 (2007).

Discussed: 724 F. 3d 1133 (2013).

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§702-206 Commentary:

1. M.P.C., Tentative Draft No. 4, comments at 125 (1955).

2. Id. at 126.

3. Williams, The Criminal Law - The General Part 122-124 (1961); Hall, Negligent Behavior Should Be Excluded From Penal Liability, 63 Colum. L. Rev. 632 (1963).

4. M.P.C., Tentative Draft No. 4, comments at 126-127 (1955).

5. Id. at 126.

6. H.R.S. §701-4.

7. But cf. State v. Tamanaha, 46 Haw. 245, 377 P.2d 688 (1962), deciding that "ordinary negligence" was sufficient for conviction of the traffic offense of careless and heedless driving.

" **§702-207 Specified state of mind applies to all elements.** When the definition of an offense specifies the state of mind sufficient for the commission of that offense, without distinguishing among the elements thereof, the specified state

of mind shall apply to all elements of the offense, unless a contrary purpose plainly appears. [L 1972, c 9, pt of §1]

COMMENTARY ON §702-207

This section makes it clear that the specified state of mind requirement applies to all elements of an offense. This resolves a latent ambiguity found in many penal statutes. If, for example, a statute were to make it an offense to intentionally or knowingly break and enter the dwelling of another, it is probably clear that the specified state of mind applies to entering as well as breaking, however it should also be made clear that it applies to the attendant circumstances "dwelling of another."

The phrase "unless a contrary purpose plainly appears" is intended to allow the courts to avoid an improper result when the language of a statute fails to indicate that the specified state of mind applies to less than all elements and legislative history indicates that this was intended.

Prior Hawaii law did not recognize the principle that culpability must be proven as to each element of an offense. This stems in part from the fact that the concept of "elements of an offense" had not been fully explored. A case involving a charge of contributing to the delinquency of a minor stated by way of dictum that culpability with respect to the age of the victim did not have to be proven.[1] To the extent that this section modifies the previous law, it merely rejects those few instances where absolute penal liability was imposed indirectly.

§702-207 Commentary:

1. Territory v. Delos Santos, 42 Haw. 102 (1957).

" **§702-208 Substitutes for negligence, recklessness, and knowledge.** When the law provides that negligence is sufficient to establish an element of an offense, that element also is established if, with respect thereto, a person acts intentionally, knowingly, or recklessly. When the law provides that recklessness is sufficient to establish an element of an offense, that element also is established if, with respect thereto, a person acts intentionally or knowingly. When the law provides that acting knowingly is sufficient to establish an element of an offense, that element also is established if, with respect thereto, a person acts intentionally. [L 1972, c 9, pt of §1]

COMMENTARY ON §702-208

Since intent, knowledge, recklessness, and negligence are in a descending order of culpability, this section establishes that "it is only necessary to articulate the minimal basis of liability for the more serious bases to be implied."[1] The proposition is essentially axiomatic.

§702-208 Commentary:

1. M.P.C., Tentative Draft No. 4, comments at 129 (1955).

" **§702-209 Conditional intent.** When a particular intent is necessary to establish an element of an offense, it is immaterial that such intent was conditional unless the condition negatives the harm or evil sought to be prevented by the law prohibiting the offense. [L 1972, c 9, pt of §1]

COMMENTARY ON §702-209

This section provides that when the law requires that a particular intent is necessary to establish an element of an offense, that intent is established notwithstanding its conditional nature, unless the condition negatives the harm or evil sought to be prevented. The section provides for a common sense result, and the cases in which the condition negatives the harm or evil sought to be prevented will not be many; nevertheless the distinction should be stated.

The section can best be illustrated by example. A person accused of burglary would not be excused because the person intended to steal only if no one else was in the building, whereas a person charged with attempted rape, predicated on a preliminary assault, would be excused of that offense if the person intended to effect sexual intercourse only if the mature victim consented. In the latter case, however, the person would, most likely, be guilty of an assault.

" **§702-210 Requirement of wilfulness satisfied by acting knowingly.** A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the elements of the offense, unless a purpose to impose further requirements appears. [L 1972, c 9, pt of §1]

COMMENTARY ON §702-210

Many regulatory penal offenses appear in statutes other than the Penal Code. These regulatory statutes often employ different words to designate the state of mind or culpability requirement needed to establish various regulatory offenses. In this respect the penal statutes dealing with regulatory offenses are much the same as those appearing in the previous Title on crimes.[1] While no attempt will be made to correlate the present culpability requirements of regulatory offenses with the four states of mind which the Code recognizes as sufficient to establish culpability with respect to the elements of an offense, an exception is made for the word "wilful" or "wilfully."

That term is used pervasively in penal statutes to describe the requisite culpability or state of mind. However, the phrase has been defined differently in similar contexts. For example, it has been held that the felony of wilfully failing to account for and to pay over tax monies requires "bad purpose and evil motive," whereas, the misdemeanor of wilfully failing to file an income tax return requires that the defendant acted "with bad purpose or without grounds for believing that one's act is lawful or without reasonable cause, or capriciously or with careless disregard whether one has the right to so act."[2] With respect to the same misdemeanor, it has been said that "[m]ere voluntary and purposeful, as distinguished from accidental, omission to make timely return might meet the test of wilfulness."[3]

In a Hawaii case, involving a disputed labor contract, the court, in discussing the penal remedies afforded to the employer by then existing law, said that a wilful absence was "one without sufficient legal excuse"[4]--a rather transparent definition at best.

To eliminate distinctions of this type, the Code equates acting wilfully with acting knowingly. This equation reaches a result in accord with most decisions. The Code recognizes, however, that in some situations the courts have construed "wilful" to impose an additional requirement of culpability. In such situations the "perception of such a ... [legislative] purpose [to impose additional culpability requirements] normally derives, of course, from judicial appraisal of the consequences of the enactment if its scope is not limited by construction."[5] To allow for situations of this kind, the final clause provides that the section is not applicable if a purpose to impose further culpability requirements appears.

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§702-210 Commentary:

1. Cf. Commentary on §702-204.

2. Abdul v. United States, 254 F.2d 292, 294 (1958); Martin v. United States, 317 F.2d 753 (1963).

3. Spies v. United States, 317 U.S. 492, 498, 63 S.Ct. 364, 367, 87 L.Ed. 418 (1943).

4. Rickard v. Couto, 5 Haw. 507, 513 (1885).

5. M.P.C., Tentative Draft No. 4, comments at 130 (1955). See Screws v. United States, 325 U.S. 91 (1945) (holding that a statute making it an offense to wilfully deprive a person of rights secured by the Constitution required, when applied to rights secured through the due process clause, a specific intent to deprive the person of a right which has been made specific by the express terms of Constitution, the laws of the United States, or by a decision interpreting them), and United States v. Murdock, 290 U.S. 389 (1933) (holding that a tax statute making it an offense to wilfully fail to supply information to the government regarding income tax returns did not make criminal the bona fide, albeit intentional and erroneous, refusal to answer on the ground of self-incrimination).

" **§702-211 State of mind as determinant of grade or class of a particular offense.** When the grade or class of a particular offense depends on whether it is committed intentionally, knowingly, recklessly, or negligently, its grade or class shall be the lowest for which the determinative state of mind is established with respect to any element of the offense. [L 1972, c 9, pt of §1]

COMMENTARY ON §702-211

In many statutes the grade (felony, misdemeanor, or violation) or class (e.g., class A or class B felony) of an offense turns on whether the defendant acted intentionally, knowingly, recklessly, or negligently. Since a defendant may have differing states of mind with respect to the defendant's conduct, circumstances attendant thereto, and the result of the defendant's conduct, the Code makes it clear that, in those cases where distinctions are drawn on the basis of the defendant's state of mind, the conviction ought to be the lowest for which the determinative state of mind is established with respect to any element of the offense. As it has been put, "it is the lowest common denominator that indicates the quality of the defendant's conduct."[1]

The law of homicide provides a ready illustration of the application of the above principle. Intentional killing is usually treated as crime of higher class than reckless killing. If a defendant intentionally killed another, recklessly mistaken that the other's conduct threatened the defendant with serious bodily harm or death, the homicide ought to be viewed as reckless killing because that is all that is established with respect to attendant circumstances negativing the defense of self defense.

§702-211 Commentary:

1. M.P.C., Tentative Draft No. 4, comments at 131 (1955).

" **§702-212 When state of mind requirements are inapplicable to violations and to crimes defined by statutes other than this Code.** The state of mind requirements prescribed by sections 702-204 and 702-207 through 702-211 do not apply to:

(1) An offense which constitutes a violation, unless the state of mind requirement involved is included in the definition of the violation or a legislative purpose to impose such a requirement plainly appears; or

(2) A crime defined by statute other than this Code, insofar as a legislative purpose to impose absolute liability for such offense or with respect to any element thereof plainly appears. [L 1972, c 9, pt of §1]

COMMENTARY ON §702-212

This section provides for those instances when the culpability provisions of §§702-204 and 207 through 211 are not applicable.

Subsection (1) provides that the requirements of culpability are not generally applicable to violations. (Violations are the lowest grade of penal offenses and for which conviction can only result, according to §701-107 and chapter 706 in a fine, forfeiture or other "civil" penalty.) An exception is made in two cases: (1) for violations which by definition require culpable commission; and (2) for violations with respect to which a legislative purpose to impose one or more culpability requirements plainly appears. Subsection (1) applies whether the violation is defined in the Penal Code or in some other Title.

The assumption is that, with respect to violations, if culpable commission is required, the relevant state of mind will be stated in the definition of the violation whether the offense

appears in the Penal Code or in some other statute. If the law is silent, the court must make an affirmative determination that the application of state of mind requirements with respect to the violation is within the legislature's purpose. In the absence of such a determination the liability is absolute or strict.

Subsection (2) provides for an extremely limited situation. The Code takes the general position that absolute or strict liability in the penal law is indefensible in principle if conviction results in the possibility of imprisonment and condemnation. Therefore, within the immediate context of the Penal Code, criminal liability must be based on culpability. However, it is recognized that the scope of the Penal Code is finite. In other codes or Titles penal statutes exist which prima facie impose absolute criminal liability.[1] Subsection (2) allows for the imposition of such criminal liability in the case of crimes defined by statutes other than the Penal Code--when and only when--"a legislative purpose to impose absolute liability for such offense or with respect to any element thereof plainly appears." "That such a purpose should not be discerned lightly by the courts seems very clear."[2] Often regulatory penal statutes are absolute on their face when it is doubtful that absolute criminal liability was intended.[3] The limited recognition which subsection (2) affords absolute criminal liability is more of a limitation than a recognition, and within the context of the Penal Code this limitation is as far as the Code can wisely go in imposing its standards on the spectrum of penal regulations.

Prior Hawaii law recognized absolute criminal liability.[4] The effect of subsection (1) is to withdraw the criminal sanction (imprisonment or its equivalent) when liability is imposed absolutely within the Penal Code. Subsection (2) severely limits the situations which will allow the imposition of absolute criminal liability by statutes outside of the Penal Code.

Case Notes

Legislative purpose to impose absolute liability should not be discerned lightly. 62 H. 102, 612 P.2d 103 (1980).

Subsection (a) cited. 62 H. 222, 615 P.2d 730 (1980).

Cited: 132 H. 36, 319 P.3d 1044 (2014).

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§702-212 Commentary:

1. See, e.g., H.R.S. §453-14 (reporting knife, bullet and other wounds within twenty-four hours).

2. M.P.C., Tentative Draft No. 4, comments at 145 (1955).

3. Compare H.R.S. §§403-141, 403-142, and 403-147 with H.R.S. §403-146 (relating to the regulation of banks).

4. Territory v. Yamamoto, 39 Haw. 556 (1952) (possession of enemy flag during wartime).

" **§702-213 Effect of absolute liability in reducing grade of offense to violation.** Notwithstanding any other provisions of existing law and unless a subsequent statute otherwise provides:

(1) When absolute liability is imposed with respect to any element of an offense defined by a statute other than this Code and a conviction is based upon such liability, the offense constitutes a violation except as provided in section 702-212(2); and

(2) Although absolute liability is imposed by law with respect to one or more of the elements of an offense defined by a statute other than this Code, the culpable commission of the offense may be charged and proved, in which event negligence with respect to such elements constitutes a sufficient state of mind and the classification of the offense and the sentence that may be imposed therefor upon conviction are determined by section 701-107 and chapter 706. [L 1972, c 9, pt of §1]

Cross References

Disposition of convicted defendants, see chapter 706.
Grades and classes of offenses, see §701-107.

COMMENTARY ON §702-213

As explained in prior commentary, the Code takes the position that penal law is primarily concerned with the culpable commission of offenses. Absent a minimal degree of culpability - i.e., negligence as defined in the Code - the penal law should not impose sanctions (e.g., imprisonment) which import moral condemnation. In such situations "the law has neither a deterrent nor corrective nor an incapacitative function to perform."[1] Accordingly, §702-204 requires, subject to §702-212, culpability with respect to the elements of penal offenses. Section 702-212 provides that the culpability provisions are not

applicable to violations - the lowest grade of penal offense - which result in a fine, forfeiture or other "civil" penalty, but not in imprisonment or its equivalent. Because of the limited scope of the Penal Code and because of the pervasive use of penal sanction in regulatory statutes, §702-212 also provides that the culpability requirements are not applicable to offenses defined by statutes other than the Penal Code when a legislative purpose to impose absolute liability plainly appears.

Section 702-213 is a necessary concomitant to §702-212(2). It provides that, with the limited exception of §702-212(2), when absolute liability is imposed by a statute other than the Penal Code, the offense shall constitute a violation and not a crime. Subsection (1) of this section thus superimposes, as far as possible, the standards of the Penal Code on all penal statutes.

Subsection (2) provides, on the other hand, that, with respect to penal statutes outside the Code, although absolute liability is imposed, reducing the offenses to the status of a violation, the culpable commission of such offenses may be charged and proved. In such cases, the reduction of the offense to a violation does not occur. Negligence is treated as sufficient culpability in cases of this kind. Since most penal statutes which are not a part of the Penal Code are regulatory legislation, providing that a criminal conviction may be based on negligence does not seem overly severe given the aims of such legislation.

SUPPLEMENTAL COMMENTARY ON §702-213

Part V of chapter 707 of the Code, dealing with sex offenses, should be reviewed in light of §702-213 to determine whether the legislature, in not requiring knowledge on the actor's part of the victim's age (when age is a relevant attendant circumstance), intended to create an exception to the general principle enunciated in this section. (Cf. Supplemental Commentary on §702-204.)

§702-213 Commentary:

1. M.P.C., Tentative Draft No. 4, comments at 140 (1955).

" **§702-214 Causal relationship between conduct and result.** Conduct is the cause of a result when it is an antecedent but for which the result in question would not have occurred. [L 1972, c 9, pt of §1]

COMMENTARY ON §702-214

This section and the following three sections deal with the problem of causation, which is of critical importance in those offenses in which a particular result of conduct is an element. The difficulty of the problem of causation does not lie in making a determination of actual causation, but rather in setting the appropriate standard for determining those instances in which the defendant will not be held liable for the result of the defendant's conduct because the defendant did not intend or contemplate the result or was unaware of the risk that it would obtain. The law has in some cases, under the inarticulate phrase "proximate cause," divorced the result of the defendant's conduct from the conduct because the defendant's state of mind with respect to the result would not allow the just imposition of liability. The four sections commencing here attempt a rational articulation of the factors which ought properly to be considered.

The section states the definition of actual causation. It is commonly called the "but-for" test. Once it is established that the defendant's conduct was the antecedent but for which the prohibited result would not have occurred, consideration of causality in its strict sense is finished and attention must then shift to §§702-215 and 216 which deal with the defendant's culpability with respect to the result. Section 702-217 deals with causation in offenses of absolute liability.

Hawaii law has previously not dealt directly with the problem of causation in the penal law context. However, in a case of murder, where the defendant claimed lack of intent on the basis that the victim was accidently killed when the victim stepped between the defendant and the intended victim, the court held that the defendant's intent was sufficient culpability.[1] A more sound rationale for the decision is supplied by §702-215; actual causation of the result having been established, the defendant will not be relieved of liability for an unintended result merely because another person, rather than the intended victim, was injured.

§702-214 Commentary:

1. Territory v. Alcantara, 24 Haw. 197 (1918).

" **§702-215 Intentional or knowing causation; different result from that intended or contemplated.** In the following instances intentionally or knowingly causing a particular result shall be deemed to be established even though the actual result

caused by the defendant may not have been within the defendant's intention or contemplation:

(1) The actual result differs from that intended or contemplated, as the case may be, only in the respect that a different person or different property is injured or affected or that the injury or harm intended or contemplated would have been more serious or more extensive than that caused; or

(2) The actual result involves the same kind of injury or harm as the intended or contemplated result and is not too remote or accidental in its occurrence or too dependent on another's volitional conduct to have a bearing on the defendant's liability or on the gravity of the defendant's offense. [L 1972, c 9, pt of §1; am L 1975, c 163, §1; gen ch 1993]

COMMENTARY ON §702-215

As indicated in the commentary to §702-214 this section departs from the common-law concept of "proximate cause" (at best a poor label for a host of largely unarticulated considerations) and analyzes the question of whether a defendant will be held liable for having caused a particular result not in terms of factual or "scientific" causation (which has to be resolved according to the test set forth in §702-214) but in terms of those factors which properly bear on the defendant's culpability with respect to a result other than one which the defendant intended or contemplated. The factors to be considered are, as stated, whether the actual result is more serious or extensive than the intended or contemplated result and whether the actual result is too remote or accidental in its occurrence or too dependent on another's volitional conduct to have a bearing on defendant's liability (or the gravity of the defendant's offense).

The Code follows the Model Penal Code[1] as supplemented by the suggestion of Hart and Honore that provisions regarding liability for unintended or uncontemplated results must be separately stated for those instances when the difference in result is due to natural events and those instances when it is due to the volitional conduct of another.[2] Although the commentary to the Model Penal Code would suggest that volitional conduct of another is adequately covered as a factor which might make the actual result "too remote or accidental," greater clarity is achieved by the language of this Code.

SUPPLEMENTAL COMMENTARY ON §702-215

Act 163, Session Laws 1975, amended this section in order to phrase the propositions in positive rather than negative language. It was felt that this change would make these propositions clearer when included in jury instructions. This amendment was not intended to change the section in substance but only in form. Conference Committee Report No. 19.

§702-215 Commentary:

1. M.P.C. §2.03(2).

2. Hart & Honore, Causation in the Law 357 (1959).

" **§702-216 Reckless or negligent causation; different result from that within the risk.** In the following instances, recklessly or negligently causing a particular result shall be deemed to be established even though the actual result caused by the defendant may not have been within the risk of which the defendant was or, in the case of negligence, should have been aware:

(1) The actual result differs from the probable result only in the respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused; or

(2) The actual result involves the same kind of injury or harm as the probable result and is not too remote or accidental in its occurrence or too dependent on another's volitional conduct to have a bearing on the defendant's liability or on the gravity of the defendant's offense. [L 1972, c 9, pt of §1; am L 1973, c 136, §3(a); am L 1975, c 163, §2; gen ch 1993]

COMMENTARY ON §702-216

Much of what has been said in the commentary on §§702-214 and 215 applies with equal force to this section. The only difference is that this section deals with reckless and negligent causation. Here the Code is concerned with results which differ from those within the risk of which the defendant was aware or of which the defendant should have been aware. However, the factors which are to be considered are the same: whether the actual harm is more extensive or serious than the probable result and whether the actual result is too remote or accidental in its occurrence or too dependent on another's

volitional conduct. For a fuller discussion, the reader is referred to the commentary on §§702-214 and 215.

SUPPLEMENTAL COMMENTARY ON §702-216

Act 136, Session Laws 1973, amended paragraph (1) by deleting the words "intended or contemplated" which followed the word "harm" and amended paragraph (2) by substituting the phrase "probable result" for the phrase "intended or contemplated result." References to the words "intended or contemplated" were eliminated since they "connote an intentional act on the part of the accused which is inconsistent with 'reckless' or 'negligent' as defined in §702-206." Senate Standing Committee Report No. 858, House Standing Committee Report No. 726.

Act 163, Session Laws 1975, amended this section in order to phrase the propositions in positive rather than negative language. It was felt that this change would make these propositions clearer when included in jury instructions. This amendment was not intended to change the section in substance but only in form. Conference Committee Report No. 19.

" **§702-217 Causation in offenses of absolute liability.** When causing a particular result is an element of an offense for which absolute liability is imposed by law, the element is not established unless the actual result is a probable consequence of the defendant's conduct. [L 1972, c 9, pt of §1]

COMMENTARY ON §702-217

The elimination of mens rea or culpability requirements from a penal offense should not make the accused liable for improbable consequences of the accused's conduct. The specter of such liability would be too precarious and capricious to induce an actor to make rational adjustments in the actor's behavior in order to avoid the sanction. The futility of an attempt to impose penal liability for the improbable consequences of conduct has been succinctly expressed by Hart and Honore:

> ... [S]urely, the elimination of mens rea as... [a requisite for penal] liability does not mean that the accused is to be liable for harm, even if it only occurred through the conjunction of his act with the deliberate act of some independent person or with some quite extraordinary event. The plain man's protest would be that in such cases the accused 'did not do it', even though the harm would not have occurred without what he did.[1]

This section is not repetitive of §702-216 (dealing with negligent causation). There will undoubtedly be situations

where a person will fail to perceive a risk of a probable consequence although the person's failure of perception did not involve a "gross deviation from the standard of care that a law-abiding person would observe in the same situation."

§702-217 Commentary:

1. Hart & Honore, Causation in the Law 361 (1959).

" **§702-218 Ignorance or mistake as a defense.** In any prosecution for an offense, it is a defense that the accused engaged in the prohibited conduct under ignorance or mistake of fact if:

(1) The ignorance or mistake negatives the state of mind required to establish an element of the offense; or

(2) The law defining the offense or a law related thereto provides that the state of mind established by such ignorance or mistake constitutes a defense. [L 1972, c 9, pt of §1]

COMMENTARY ON §702-218

[Section 218, as contained in the Proposed Draft of the Code provided that ignorance or mistake of fact or law was a defense under the conditions stated above. The following commentary is based on this initial proposal for §218.]

This section states the logical concomitant of the requirement that to establish each element of an offense a certain state of mind with respect thereto must be proven. Thus, if a person is ignorant or mistaken as to a matter of fact or law, the person's ignorance or mistake will, in appropriate circumstances, prevent the person from having the requisite culpability with respect to the fact or law as it actually exists. For example, a person who is mistaken (either reasonably, negligently, or recklessly) as to which one of a number of similar umbrellas on a rack is the person's and who takes another's umbrella should be afforded a defense to a charge of theft predicated on either intentionally or knowingly taking the property of another. Also, a person, mistaken as to the effect of a divorce decree erroneously purporting to sever the marital ties of his wife, who marries another woman should not be convicted of bigamy if bigamy requires knowledge by the defendant of the defendant's existing marital status. A reckless mistake would afford a defense to a charge requiring intent or knowledge--but not to an offense which required only recklessness or negligence. Similarly, a negligent mistake would afford a defense to a

charge predicated on intent, knowledge, or recklessness--but not to an offense based on negligence.

This section of the Code deals with ignorance or mistake of fact or law, but it is not intended to deal with the limited problem of the defense afforded a person who engaged in conduct under the mistaken belief that the conduct itself was not legally prohibited. That problem is dealt with exclusively by §702-220.

Previous Hawaii law recognized a defense based on ignorance or mistake of fact[1] or law,[2] but usually the law required that the ignorance or mistake be reasonable.[3] The Code correlates the culpability required for commission of the offense with the culpability which will deprive ignorance or mistake of effect as a defense.

SUPPLEMENTAL COMMENTARY ON §702-218

The legislature in dealing with §702-218 deleted a defense based on mistake of law. The legislature said that it was "thereby avoiding a major dilemma with respect to enforcement of the provisions of this Code. The defenses of ignorance of the law afforded by §§702-218 and 220 would have been available, to a degree, under any given set of circumstances and as such would have constituted a major encumbrance to enforcement of the substance and spirit of the Code." See Conference Committee Report No. 2 (1972).

Although the legislature did not provide for a defense based on mistake of law, the State Supreme Court has recognized that, in some instances, there must exist, as a necessary corollary to the definition to certain offenses, a defense based on this type of mistake. See State v. Marley, 54 Haw. 450, 476-477, 509 P.2d 1095, 1111-1112 (1973). The court cited §702-220 of the Hawaii Penal Code as providing a defense to a state trespass prosecution in the case of honest and reasonable belief ("no matter how incorrect such a belief might be") that another law (American treaty law) afforded a defense to the trespass.

Case Notes

Where a defendant has adduced evidence at trial supporting an instruction on the statutory defense of ignorance or mistake of fact, the trial court must, at the defendant's request, separately instruct as to the defense, notwithstanding that the trial court has also instructed regarding the state of mind requisite to the charged offense. 100 H. 195, 58 P.3d 1242 (2002).

Trial courts must specifically instruct juries, where the record so warrants, that the burden is upon the prosecution to prove beyond a reasonable doubt that the defendant was not ignorant or mistaken as to a fact that negates the state of mind required to establish an element of the charged offense or offenses. 107 H. 239, 112 P.3d 725 (2005).

Because §708-836 does not "plainly appear" to render its specified state of mind inapplicable to the authorization element, the intentional or knowing states of mind apply to the authorization element; thus, a defendant prosecuted under §708-836 may assert the mistake-of-fact defense under this section with respect to the authorization element, where defendant claims that defendant mistakenly believed that the person who authorized defendant's operation of the vehicle was the vehicle's registered owner, because such a belief would potentially negative the state of mind required to establish the authorization element of the offense. 117 H. 235, 178 P.3d 1 (2008).

Where, based on the evidence presented, petitioner provided some basis for the jury to believe that (1) petitioner was mistaken as to the reporting requirements associated with receiving public assistance and/or (2) petitioner was mistaken as to certain factual matters regarding petitioner's personal situation which caused petitioner to misreport, there was a reasonable possibility that the jury, if provided with a separate mistake of fact instruction, could have found that petitioner did not knowingly deceive the human services department; thus appellate court erred in concluding that petitioner was not entitled to a mistake of fact instruction. 122 H. 271, 226 P.3d 441 (2010).

§702-218 Commentary:

1. The King v. Grieve, 6 Haw. 740 (1883) (ignorance of Hawaiian language precluded "knowing" publication in that language); Territory v. Hall, 17 Haw. 536 (1906).

2. Territory v. Lo Kam, 13 Haw. 14 (1900) (mistake as to lawful authority to remain on premises was a defense to a charge of vagrancy).

3. Territory v. Hall, supra; State v. Dizon, 47 Haw. 444, 461, 390 P.2d 759, 769 (1964).

" **§702-219 Ignorance or mistake; reduction in grade and class of the offense.** Although ignorance or mistake would

otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as the defendant supposed. In such case, however, the ignorance or mistake of the defendant shall reduce the grade and class of the offense of which the defendant may be convicted to those of the offense of which the defendant would be guilty had the situation been as the defendant supposed. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §702-219

This section is addressed to a limited problem. A defendant intending to commit a certain offense, may, because of reasonable ignorance or mistake on the defendant's part, engage in conduct which (if the requisite state of mind were present) would be sufficient for conviction of a graver offense. It would not be fair to convict the defendant of the graver offense (unless some reduction in penalty were made to reflect the defendant's actual culpability) and it would not be fair to allow a complete acquittal because the defendant intended some other offense than the one with which the defendant is charged.

The problem may be stated by borrowing an example from the Model Penal Code commentary:

> Burglary of a dwelling house may, for example, reasonably be treated as an offense of greater gravity than burglary of a store; and it is not unreasonable to require knowledge that the structure is a dwelling or at least recklessness that such may be the case. If we conceive of a defendant who had every ground to think that it was a store, although it actually was a dwelling, it may not be right to hold him for the graver crime. The doctrine that when one intends a lesser crime he may be convicted of a graver offense committed inadvertently leads to anomalous results if it is generally applied in the penal law....
>
> If the defendant in the circumstances supposed is exculpated of the graver crime, it seems clear, however, that he should not be acquitted.[1]

The Code, following the suggestion of the Model Penal Code, resolves the dilemma by authorizing conviction for the graver offense while limiting the sentence (the grade and class) to that authorized for the offense which the defendant would have committed had the situation been as the defendant supposed. This limitation reflects the defendant's limited culpability.

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§702-219 Commentary:

1. M.P.C., Tentative Draft No. 4, comments at 137 (1955).

" **§702-220 Ignorance or mistake of law; belief that conduct not legally prohibited.** In any prosecution, it shall be an affirmative defense that the defendant engaged in the conduct or caused the result alleged under the belief that the conduct or result was not legally prohibited when the defendant acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in:

(1) A statute or other enactment;
(2) A judicial decision, opinion, or judgment;
(3) An administrative order or administrative grant of permission; or
(4) An official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration, or enforcement of the law defining the offense. [L 1972, c 9, pt of §1; am L 1973, c 136, §3(b); gen ch 1993]

COMMENTARY ON §702-220

This section deals with a special type of ignorance or mistake of law--mistaken belief by the defendant that the defendant's conduct is not legally prohibited by the penal law. It must, in most instances, be held that such a mistaken belief will afford no excuse because recognition of this defense would allow each individual to define the limits of application of a penal statute by claiming that, because of the individual's ignorance or mistake, the proscription of the statute is not applicable to the individual.

> Just as a judgment of criminality cannot be imposed unless the conduct in question has been defined as criminal, so, once the conduct has been so defined, one cannot usurp the lawmaking function by pleading that his ignorance must mean that the conduct is not criminal as to him. That doctrine is just, so long as the behavior content of the criminal law is coterminous with the knowledge that a member of the community may be expected to have about the limits of tolerable behavior. But, in fact, the criminal law has been indiscriminately employed to proscribe conduct that does not carry its own warning of illegality....
> Nonetheless, ... [the first offender] has no defense under prevailing law. Therein resides a major dilemma.[1]

In order to avoid manifest injustice, the Code allows a limited affirmative defense in certain cases.

The defense is afforded where the defendant acts in reasonable reliance on an official statement of the law afterwards

determined to be erroneous. In such cases the defendant's conduct is consistent with law-abidingness. Moreover, notwithstanding the fact that official statements of the law must sometime be overruled, no social purpose would be served by discouraging reasonable reliance on them while they stand. Certainly penal liability for such reasonable reliance is inconsistent with the concept of culpability which permeates this Code.

Hawaii has recognized the doctrine that the defendant will not be afforded a defense based on the defendant's ignorance that the defendant's conduct is prohibited by the penal law.[2] The limited defense afforded by this section of the Code has not previously been available; it has however been adopted or proposed in other states.[3]

SUPPLEMENTAL COMMENTARY ON §702-220

Section 220 of the Proposed Draft of the Code had provided for an affirmative defense when "the statute or other enactment defining the offense is not known to the defendant and has not been reasonably made available to him, by publication or otherwise, prior to the conduct or result alleged." This affirmative defense, based on obscure publication or unavailability of the content of the penal law, was deleted by the legislature for the reasons set forth in Conference Committee Report No. 2 (1972), the relevant portion of which is quoted in the Supplemental Commentary on §702-218.

Case Notes

In State v. Marley, 54 H. 450, 476-477, 509 P.2d 1095, 1111-1112 (1973), the court recognized mistake of law as a defense. The court said: "It is true that reasonable mistake of law is often a complete defense to the charge of criminality for an act when the mistake of law negatives a mental state which must be shown to establish a material element of the crime.... Therefore, defendants' 'honest' and 'reasonable' belief that they had a right or duty to be present on Honeywell property, in that they had a defense assertable under American treaty law--no matter how incorrect such a belief might be--would have exonerated defendants by negativing the mental state that is an essential element of the crime. Instruction 24, supra, given by the court enunciated the gist of this defense. The jury could have acquitted the defendants on this instruction, even though defendants disclaimed any reliance on a 'mistake' of law justification defense. The jury chose not to do so".

As 911 telephone operator not the public officer or body charged by law with responsibility for interpretation, administration, or enforcement of the law defining the offense, paragraph (4) affirmative defense not applicable. 81 H. 147 (App.), 913 P.2d 558 (1996).

§702-220 Commentary:

1. Packer, The Model Penal Code and Beyond, 63 Colum. L. Rev. 594, 596-597 (1963); see also Hall, General Principles of Criminal Law 382-387 (2d ed. 1960).

2. Republic v. Akau, 11 Haw. 363 (1898).

3. Ill. Cr. Code §4-8; Prop. Del. Cr. Code §251.

" **§702-221 Liability for conduct of another.** (1) A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.

(2) A person is legally accountable for the conduct of another person when:

(a) Acting with the state of mind that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct;

(b) He is made accountable for the conduct of such other person by this Code or by the law defining the offense; or

(c) He is an accomplice of such other person in the commission of the offense. [L 1972, c 9, pt of §1]

Revision Note

In subsection (2)(a), "or" deleted pursuant to §23G-15.

COMMENTARY ON §702-221

Subsection (1) of this section states the general principle that penal liability, in the first analysis, rests on conduct; the conduct in most instances is that of the accused but, as the Code states, the relevant conduct may be that of a person for whose conduct the accused is legally accountable. Distinctions between principals and accessories are dispensed with and a defendant may be convicted directly of an offense committed by another for whose conduct the defendant is accountable.

Subsection (2) states those instances when a defendant will be held legally accountable for another's conduct.

Subsection (2)(a) deals with the problem of the innocent or irresponsible agent. When the defendant intentionally or knowingly causes an innocent person to engage in prohibited conduct, there is little difficulty in holding the defendant accountable for such conduct. Where the commission of an offense requires recklessness or negligence on the part of the defendant, it is sufficient that the defendant recklessly or negligently caused an innocent or irresponsible person to engage in the conduct prohibited by the offense. In short, the Code couples the state of mind of the defendant with the conduct the defendant has caused another to perform and determines the defendant's liability accordingly.

Subsection (2)(b) is intended to leave undisturbed those pieces of legislation either within or outside of this Code which impose a special measure of accountability for the behavior of another. This type of legislation usually involves the liability of a principal for acts of an agent. Thus, for example, the legislature may deem it appropriate to impose on a liquor licensee an absolute duty not to sell liquor to a minor. If the duty is nondelegable, a sale by an employee would result in the licensee's penal liability. Similarly, where strict liability is imposed it is "no more unjust to hold the innocent master than his innocent servant, acting in the course of his employment."[1]

Subsection (2)(b) does not support the concept of strict penal liability. As this chapter makes clear, such liability is rejected as a matter of general principle. However, in extraordinary cases, especially in the regulatory area, the legislature may deem such liability necessary. Subsection (2)(b) is intended only to accommodate that determination.

Subsection (2)(c) provides for legal accountability for penal complicity. The term "accomplice" is developed in following sections. Prior Hawaii law did not deal with the problem posed by subsection (2)(a). The court has held that a breach of a legal duty by an employee renders the master liable. The court said: "The delegation of the duty of supervising [publication of a newspaper], by the master to the servant, does not free the master. He is to be holden for the neglect or indiscretion of the servant."[2] What the court in effect did was to make the duty nondelegable by case law. Subsection (2)(b) would recognize such decisions if predicated on legislation which either specifically or by construction imposed this measure of accountability. The subsection would also cover accountability based on strict penal liability. The previous Hawaii provisions with respect to complicity, as they related to subsection (2)(c)

and following sections, are explained in the commentary on following sections.

Case Notes

Instruction on law of principals and accomplices was not erroneous. 59 H. 625, 586 P.2d 250 (1978).

Liability as accomplice in commission of sexual abuse. 61 H. 475, 605 P.2d 75 (1980).

Officer had probable cause to believe defendant was an accomplice where: (1) car's license plate and "punched" ignition were located in such places that would suggest defendant knew vehicle was stolen; and (2) defendant and car driver were parked at a house whose owner knew defendant but not the driver, suggesting that defendant assisted in the decision to park at the house, thereby aiding or attempting to aid driver's commission of an unauthorized control of a propelled vehicle (UCPV) violation; thus evidence was sufficient to provide more than a mere suspicion that defendant committed the offense of UCPV either as a principal or accomplice. 109 H. 84, 123 P.3d 679 (2005).

Cited: 9 H. App. 551, 851 P.2d 926 (1993).

§702-221 Commentary:

1. M.P.C., Tentative Draft No. 1, comments at 19 (1953).

2. In re Lyons, 6 Haw. 452, 454 (1884).

" **§702-222 Liability for conduct of another; complicity.** A person is an accomplice of another person in the commission of an offense if:

(1) With the intention of promoting or facilitating the commission of the offense, the person:
   (a) Solicits the other person to commit it;
   (b) Aids or agrees or attempts to aid the other person in planning or committing it; or
   (c) Having a legal duty to prevent the commission of the offense, fails to make reasonable effort so to do; or

(2) The person's conduct is expressly declared by law to establish the person's complicity. [L 1972, c 9, pt of §1; gen ch 1993]

Revision Note

In paragraph (1)(a), "or" deleted pursuant to §23G-15.

COMMENTARY ON §702-222

This section sets forth the types and extent of complicity in the penal conduct of another. In subsection (1) the Code sets forth the state of mind that is required--"intention of promoting or facilitating the commission of the offense"--and the nature of action or omission on the part of the defendant which is sufficient to establish complicity in and liability for the conduct of another. The Code avoids the vague concept of conspiracy in basing penal liability on the conduct of another, and focuses instead on the conduct of the accused which is sufficient to establish the accused's complicity.

The Code includes solicitation, aid, agreement and attempt to aid, and the failure to make a proper effort to exercise a legal duty to prevent commission of the offense. Since the intent to promote or facilitate the commission of the offense is present, there is no risk of innocence. Given the intent specified, the inclusion of attempts to aid seems entirely proper. Acquittal should not be had upon a showing of ineffective aid. "Where complicity is based upon agreement or encouragement, one does not ask for evidence that they were actually operative psychologically on the person who committed the offense; there ought to be no difference in the case of aid."[1]

It should be pointed out that approval of the conduct of another is not to be implied from the phrase "with intention of promoting or facilitating the commission of the offense." For example, a landlord who leases premises with intent to facilitate another's establishing an illegal gambling casino or narcotics den would be liable regardless of the landlord's personal predilections.

Subsection (2) preserves the concept that special legislation may declare specific conduct of the accused sufficient to establish the accused's complicity in the conduct of another. Such legislation is an analogue to that declaring particular acts of assistance independent offenses. Thus, for example, being a member of a mob may suffice to establish complicity in a riot or looting or lynching.

Previous Hawaii law on complicity was more simplified and "modern" than that found in most states which have not undertaken a recent revision of their penal laws, and to a substantial degree was similar in effect to the Code provision. However, the prior statute did draw distinctions based on (1) presence at the offense (which has been liberally interpreted), and (2) participation (as opposed to aid, command, or encouragement).[2] These verbal distinctions, however, were

apparently without legal consequence; under the prior statute every person who aids in the commission of a crime or who "abets..., procures, counsels, incites, commands or hires another to commit the same"[3] "is guilty of such offense."[4] Although the statutory law did not resort to the term "conspiracy" to establish complicity, the court has.[5] This should be avoided because in some instances, where the chain of conspirators has become attenuated, imposition of liability, on the basis of complicity, for acts of remote conspirators might be of questionable wisdom.

Subsections (1)(a) and (1)(b) rationalize the prior law, delete archaic phrases, and achieve greater clarity. Subsection (1)(c), which establishes complicity for failure to exercise a legal duty to prevent the offense, is an addition to the law.

Case Notes

Evidence held sufficient to prove defendant was an accomplice in the commission of burglary. 58 H. 404, 570 P.2d 844 (1977).

Instruction on law of principals and accomplices was not erroneous. 59 H. 625, 586 P.2d 250 (1978).

Statute provides for liability where an accomplice simply aids the perpetrator in committing an offense. 61 H. 475, 605 P.2d 75 (1980).

Accomplice jury instruction did not contain mens rea element. 72 H. 278, 815 P.2d 428 (1991).

Where defendant argued that the evidence was insufficient to prove defendant was an accomplice to an assault in any degree, and evidence was adduced that defendant pushed a person who was involved in a motor vehicle accident, causing the person to fall to the ground, and defendant held the person on the ground before the driver of a car involved in the accident jumped onto the person, substantial evidence supported the jury's conclusion. 132 H. 97, 319 P.3d 1105 (2014).

Plain language of section imposes no requirement that a joint legal duty exist before accomplice liability is imposed. 10 H. App. 73, 861 P.2d 37 (1993).

Cited: 9 H. App. 551, 851 P.2d 926 (1993); 78 H. 488 (App.), 896 P.2d 944 (1995).

§702-222 Commentary:

1. M.P.C., Tentative Draft No. 1, comments at 27 (1953).

2. H.R.S. §§704-1, 704-3.

3. Id. §704-3.

4. Id. §704-4.

5. State v. Yoshino, 45 Haw. 640, 372 P.2d 208 (1962); State v. Yoshida, 45 Haw. 50, 361 P.2d 1032 (1961).

" **§702-223 Liability for conduct of another; complicity with respect to the result.** When causing a particular result is an element of an offense, an accomplice in the conduct causing the result is an accomplice in the commission of that offense, if the accomplice acts, with respect to that result, with the state of mind that is sufficient for the commission of the offense. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §702-223

This section is intended to make clear that a defendant charged, on the basis of the defendant's complicity in the conduct of another, with causing a particular result will not be allowed to escape accountability for the result because the defendant solicited or aided, etc., a different or more limited result if the defendant had the requisite state of mind with respect to the actual result.

Thus, for example, one who urges a driver to increase the speed of an automobile, disregarding known risks to pedestrians, would stand in the same position as the driver on a charge of reckless homicide and would not be allowed to defend on the ground that one solicited the violation of the traffic law and not the homicide law.

Case Notes

Instruction on law of principals and accomplices was not erroneous. 59 H. 625, 586 P.2d 250 (1978).

Accomplice in commission of robbery. 62 H. 25, 608 P.2d 855 (1980).

" **§702-224 Liability for conduct of another; exemption from complicity.** Unless otherwise provided by this Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if:

(1) He is a victim of that offense;

(2) The offense is so defined that his conduct is inevitably incident to its commission; or

(3) He terminates his complicity prior to the commission of the offense and:

(a) Wholly deprives his complicity of effectiveness in the commission of the offense; or
(b) Gives timely warning to the law enforcement authorities or otherwise makes reasonable effort to prevent the commission of the offense. [L 1972, c 9, pt of §1]

Revision Note

In paragraph (1), "or" deleted pursuant to §23G-15.

COMMENTARY ON §702-224

This section sets forth obvious exceptions which must be made to the provisions relating to complicity.

Even though a victim of an offense in a limited sense assists its commission, it seems clear that the victim ought not to be regarded as an accomplice. For example, the business person who yields to extortion ought not be regarded as an accomplice of the extortionist. Similarly it would be unwise to regard parents who yield to the threat of kidnappers and clandestinely pay a ransom as accomplices in the commission of the crime.

Other parties who participate in the commission of an offense and who cannot logically be called victims of the crime raise problems which call for exclusion from the category of "accomplice." In those cases where the commission of an offense necessarily involves the conduct of two persons, it is questionable wisdom to push the concept of complicity to its outer limits. In the case of an illegal abortion, it is questionable whether a woman ought to be deemed the accomplice of the abortionist when an abortion is performed upon her. Similar questions might be raised about the complicity of a patron of a prostitute or the complicity of the purchaser in an illegal sale. In such cases, if general rules hitherto stated were to control, prosecutorial rather than legislative discretion would determine how diverse situations should be handled and the treatment the individuals involved should receive. The exemption established by subsection (2) will leave to the legislature the determination of what distinctions, if any, ought to be made.

Subsection (3) seeks to relieve a person of liability based on the person's complicity if the reason for its imposition no longer obtains. Thus, if the accomplice deprives the accomplice's action of effectiveness before the offense is committed, the accomplice should not be accountable for the conduct of another. What the erstwhile accomplice must do to relieve the accomplice of potential liability will vary

depending on the conduct that establishes the accomplice's complicity. More will be required of one who distributes arms than one who offers verbal encouragement.

Hawaii has recognized in at least one case that the victim of a crime will not be regarded as an accomplice of the defendant.[1] Although two cases in Hawaii have referred to apparent partners in acts of sodomy as "accomplices,"[2] which would be contrary to subsection (2) of the Code, the result is without significance because each "accomplice" would have been liable for the same offense on the basis of the accomplice's own conduct. Subsection (3) is substantially in accord with prior law.[3]

§702-224 Commentary:

1. Re Habeas Corpus, Balucan, 44 Haw. 271, 353 P.2d 631 (1960) (victim in a case involving a charge of sexual intercourse with a female under the age of sixteen may not refuse to testify concerning the incident on the basis of self-incrimination because she cannot be prosecuted on the charge).

2. Republic v. Luning, 11 Haw. 390 (1898) (dictum).

3. H.R.S. §702-13.

" **§702-225 Liability for conduct of another; incapacity of defendant; failure to prosecute or convict or immunity of other person.** In any prosecution for an offense in which the liability of the defendant is based on conduct of another person, it is no defense that:

(1) The offense charged, as defined, can be committed only by a particular class of persons, and the defendant, not belonging to such class, is for that reason legally incapable of committing the offense in an individual capacity, unless imposing liability on the defendant is inconsistent with the purpose of the provision establishing the defendant's incapacity;

(2) The other person has not been prosecuted for or convicted of any offense, or has been convicted of a different offense or degree of offense, based upon the conduct in question; or

(3) The other person has a legal immunity from prosecution based upon the conduct in question. [L 1972, c 9, pt of §1; gen ch 1993]

Revision Note

In paragraph (1), "or" deleted pursuant to §23G-15.

COMMENTARY ON §702-225

This section deals with certain defenses which will not be allowed in any case in which the liability of the defendant is based on the defendant's accountability for the conduct of another.

Subsection (1) deals with the limited problem posed by a person who cannot commit a particular offense in the person's individual capacity but who is accountable for conduct of another who engages in the prohibited conduct. The Code resolves the problem by providing for liability notwithstanding lack of individual capacity. Thus, for example, a woman cannot commit rape in her individual capacity, but she may nevertheless be guilty of that crime if she assists a man to commit rape upon another woman.

Subsection (2) eliminates the common-law defense based on lack of conviction of the person upon whose conduct the penal liability of the defendant is predicated. The absence of this defense does not, of course, relieve the prosecution of the requirement of proving that the offense was actually committed and the defendant's complicity therein.

Subsection (3) provides that, in the extremely rare case, where the person upon whose conduct the liability of the defendant is predicated has a legal immunity from prosecution, the defendant will not be afforded a defense on that ground.

Hawaii case law has recognized, by way of dictum, the principle in subsection (1).[1] The Supreme Court sidestepped an opportunity to rule on the issue resolved by subsection (2).[2] Subsection (3) is an addition to the law. No case has been found dealing with the effect of immunity in this context. Hawaii, unlike some other states, has not, to date, given its prosecutors statutory power to grant immunity.

§702-225 Commentary:

1. Re Habeas Corpus, Balucan, 44 Haw. 271, 353 P.2d 631 (1960) ("It of course is true that a female may be convicted as an accomplice to an act which a female is incapable of perpetrating herself.").

2. See Republic v. Ruttmann, 11 Haw. 591 (1898). In Ruttmann, the defendant was charged for a crime on the basis of the defendant's own conduct and on the basis of the conduct of

another. The court held that the prior acquittal of the other person was not a defense because the defendant had also been charged on the basis of the defendant's own conduct. The opinion indicates implied acceptance of the common-law position.

" **§702-226 Liability for conduct of another; multiple convictions; different degrees.** When, pursuant to any section from section 702-221 through section 702-223, two or more persons are liable for an offense which is divided into degrees, each person is guilty of the degree of the offense which is consistent with the person's own state of mind and with the person's own accountability for an aggravating fact or circumstance. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §702-226

This section provides that when, by reason of accountability for conduct, two or more defendants are liable for the same offense, which is divided into degrees, each defendant shall be convicted of the degree which is consistent with the defendant's own state of mind or mental culpability and the defendant's own accountability for aggravating facts and circumstances.

This section is a sorely-needed correction of Hawaii law which has been interpreted to require, in the case of an accomplice, not only that the defendant stand in the same shoes as the person for whose conduct the defendant is accountable, but that the defendant be held to think the same thoughts.[1]

§702-226 Commentary:

1. See State v. Shon, 47 Haw. 158, 385 P.2d 830 (1963), interpreting §252-4 R.L.H. (1955), subsequently H.R.S. §704-4.

" **§702-227 Penal liability of corporations and unincorporated associations.** A corporation or unincorporated association is guilty of an offense when:

(1) It omits to discharge a specific duty of affirmative performance imposed on corporations or unincorporated associations by law and the omission is prohibited by penal law;

(2) The conduct or result specified in the definition of the offense is engaged in, caused, authorized, solicited, requested, commanded, or recklessly tolerated by the board of directors of the corporation or by the executive board of the unincorporated association or by a high managerial agent acting

within the scope of the agent's office or employment and in behalf of the corporation or the unincorporated association; or

(3) The conduct or result specified in the definition of the offense is engaged in or caused by an agent of the corporation or the unincorporated association while acting within the scope of the agent's office or employment and in behalf of the corporation or the unincorporated association and:

(a) The offense is a misdemeanor, petty misdemeanor, or violation; or

(b) The offense is one defined by a statute which clearly indicates a legislative purpose to impose such criminal liability on a corporation or unincorporated association. [L 1972, c 9, pt of §1; gen ch 1993]

Revision Note

In paragraph (1), "or" deleted pursuant to §23G-15.

COMMENTARY ON §702-227

Corporations and unincorporated associations (partnerships, unions, etc.) are a powerful part of contemporary society and their conduct, like that of individuals, ought to be subject to penal sanctions when it injures substantial social values and can be morally condemned. The common law originally found it difficult to impose penal sanctions on a corporation or an unincorporated association because the former was regarded as an artificial entity and the latter as a label for an aggregate of individuals and neither could form a requisite state of mind or be imprisoned. These "philosophical" difficulties have been swept away by imputing to the corporation or association the acts and mental culpability of its directors, managers, or employees and by utilizing fines as an appropriate alternative to imprisonment.

Subsection (1) provides for penal liability of a corporation or unincorporated association which (acting through its agents) fails to discharge any affirmative duty imposed by law upon it and enforced by penal sanction (e.g., a fine). Examples would be failure to comply with health or safety laws. Since the definition of "person" includes, where relevant, corporations and unincorporated associations, a corporation or unincorporated association could not be held penally liable unless, with respect to each element of the offense, it (through its agents) acted with the requisite state of mind. Penal liability of

corporations or associations should not be imposed absolutely merely because imprisonment is not an available penalty.

Subsection (2) imposes penal liability for any prohibited conduct or result which is engaged in, caused, authorized, solicited, commanded, or recklessly tolerated by persons who represent the policy of the corporation or unincorporated association. Policy is obviously represented by the board of directors of a corporation and by the executive board (regardless of what proper name is used) of an unincorporated association. "High managerial agent" is defined in §702-229 and is used to denote those individuals whose conduct may be said to represent the policy of a corporation or an association.

Subsection (3) deals with conduct and results which are engaged in or caused by a person who is not a high managerial agent and which are not authorized by such an agent or by the board of directors or executive board. Corporate penal liability for conduct engaged in or results caused by an "agent" will result if the offense is a misdemeanor, petty misdemeanor, or violation, or if the definition of the offense shows a clear legislative purpose to impose felony liability on a corporation or unincorporated association for such conduct or results.

The phrase "in behalf of the corporation or unincorporated association" is intended to avoid imposing penal liability on a corporation or unincorporated association for the conduct of an agent who, though acting within the scope of the agent's employment, acts solely for the agent's own benefit. For example, a manager may falsify public documents to conceal the manager's own fraud on the corporation or association--certainly the corporation or association should not be held penally liable because the manager was acting within the scope of the manager's employment simpliciter.

The Code follows substantially the approach taken in New York[1] and proposed in Delaware,[2] except that the Code imposes liability on unincorporated associations along the same lines as that imposed on corporations. This treatment of unincorporated associations was suggested in part by the Model Penal Code.[3]

Although there is little law on the subject, Hawaii has recognized corporate penal liability. H.R.S. §712-3 (as codified prior to this Code) provided for collection of fines from corporations upon conviction; and at least two cases have resulted in criminal convictions of corporations for regulatory offenses.[4]

SUPPLEMENTAL COMMENTARY ON §702-227

An example of the failure of previous Hawaii penal law to cover situations involving unincorporated associations is contained in State v. Good Guys For Fasi, 56 H. 88, 528 P.2d 811 (1974). In that case, the court held that an unincorporated association, namely a political campaign committee, could not be prosecuted for failure to file certain campaign contribution reports when the statute providing the penalty for the failure related only to the candidate, an agent of the candidate, and the members of the committee acting on behalf of the candidate. The case does not preclude the possibility of an unincorporated association being held liable for a penal offense.

Section 702-227 clearly permits the imposition of penal liability on corporations and unincorporated associations but if the liability is based on the failure to discharge an affirmative duty of performance, the duty must be imposed on the corporation or association and the omission must be prohibited by penal law. See subsection (1).

§702-227 Commentary:

1. N.Y.R.P.L. §20.20.

2. Prop. Del. Cr. Code §140.

3. M.P.C. §2.07. See also Prop. Pa. Cr. Code §207.

4. Territory v. Pacific Club, 16 Haw. 507 (1905) (selling intoxicating liquor without a license), and Territory v. Hilo Mercantile Co., 23 Haw. 409 (1916) (improper storage of explosives).

" **§702-228 Liability of persons acting, or under a duty to act, in behalf of corporations or unincorporated associations.** (1) A person is legally accountable for any conduct the person performs or causes to be performed in the name of a corporation or an unincorporated association or in its behalf to the same extent as if it were performed in the person's own name or behalf.

(2) Whenever a duty to act is imposed by law upon a corporation or an unincorporated association, any agent of the corporation or the unincorporated association having primary responsibility for the discharge of the duty is legally accountable for a reckless omission to perform the required act to the same extent as if the duty were imposed by law directly upon the agent.

(3) When a person is convicted of an offense by reason of the person's legal accountability for the conduct of a corporation or of an unincorporated association, the person is subject to the sentence authorized by law when a natural person is convicted of an offense of the grade and class involved. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §702-228

Subsection (1) invokes the principle generally recognized in the law of agency that an agent does not escape personal liability merely because the agent's conduct is on behalf of a principal. The liability of a corporation or unincorporated association under §702-227 should have no bearing on the individual agent's personal liability. The defendant should not escape personal liability because the defendant's conduct was on behalf of the corporation or association which is held liable. Similarly, if the corporation or association is not held liable for the agent's conduct (because, for example, the agent is not of high managerial status and the offense is a felony which is not so defined as to indicate a legislative purpose to impose such criminal liability on corporations or associations) the agent should not, because of this, escape personal liability.

Subsection (2) permits the imposition of penal liability upon a corporate or associational agent who, having primary responsibility for the discharge of a duty imposed by law upon the corporation or association, fails to perform the required act. It is intended to avoid the ambiguity which might arise because, without this provision, it might be argued that the absence of a specific duty of performance upon the agent makes the agent's omission an insufficient basis for personal liability.

Subsection (3) is intended to avoid the problem of equating the sentence available for a corporate or associational defendant (fine, revocation of charter or license, etc.) with that which may be imposed on an individual defendant (imprisonment) accountable for the conduct of a corporation or unincorporated association.[1]

Case Notes

Personal liability of corporate officers. 62 H. 222, 615 P.2d 730 (1980).

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§702-228 Commentary:

1. See People v. Duncan, 363 Ill. 495, 2 N.E. 2d 705 (1936), where the court held that imprisonment for the individual defendant was improper because it could not be imposed on the corporate principal and, furthermore, imprisonment would be equally improper, for the same reason, to compel payment of a fine.

" **§702-229 Definitions relating to corporations and unincorporated associations.** As used in sections 702-227 and 702-228:

"Agent" means any director, officer, servant, employee or other person authorized to act in behalf of the corporation or association and, in the case of an unincorporated association, a member of such association.

"Corporation" does not include an entity organized as or by a governmental agency for the execution of a governmental program.

"High managerial agent" means an officer of a corporation or an unincorporated association, or, in the case of a partnership, a partner, or any other agent of a corporation or unincorporated association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or the unincorporated association. [L 1972, c 9, pt of §1]

Revision Note

Numeric designations deleted and definitions rearranged pursuant to §23G-15.

COMMENTARY ON §702-229

It seems clear that, in dealing with corporate penal liability, government corporations must be exempt. Penal liability in such a case is pointless.

The phrases "agent" and "high managerial agent" are broadly and inclusively defined. Given the wide variety of employment and other agency relationships, the definitions must present criteria which are very general. Further refinement or elaboration should be left to a case-by-case determination.

" **§702-230 Intoxication.** (1) Self-induced intoxication is prohibited as a defense to any offense, except as specifically provided in this section.

(2) Evidence of the nonself-induced or pathological intoxication of the defendant shall be admissible to prove or negative the conduct alleged or the state of mind sufficient to

establish an element of the offense. Evidence of self-induced intoxication of the defendant is admissible to prove or negative conduct or to prove state of mind sufficient to establish an element of an offense. Evidence of self-induced intoxication of the defendant is not admissible to negative the state of mind sufficient to establish an element of the offense.

(3) Intoxication does not, in itself, constitute a physical or mental disease, disorder, or defect within the meaning of section 704-400.

(4) Intoxication that is:

(a) Not self-induced; or

(b) Pathological,

is a defense if by reason of the intoxication the defendant at the time of the defendant's conduct lacks substantial capacity either to appreciate its wrongfulness or to conform the defendant's conduct to the requirements of law.

(5) In this section:

"Intoxication" means a disturbance of mental or physical capacities resulting from the introduction of substances into the body.

"Pathological intoxication" means intoxication grossly excessive in degree, given the amount of the intoxicant, to which the defendant does not know the defendant is susceptible and which results from a physical abnormality of the defendant.

"Self-induced intoxication" means intoxication caused by substances which the defendant knowingly introduces into the defendant's body, the tendency of which to cause intoxication the defendant knows or ought to know, unless the defendant introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of a penal offense. [L 1972, c 9, pt of §1; am L 1986, c 325, §2; gen ch 1993; am L 2015, c 35, §21]

Revision Note

In subsection (5), paragraph designations deleted and definitions rearranged pursuant to §23G-15.

Cross References

Physical or mental disease, disorder, or defect excluding penal responsibility, see §704-400.

COMMENTARY ON §702-230

The Code attempts to treat the issue of the defendant's intoxication at the time of the conduct alleged the same as any

other evidence bearing on the defendant's conduct and state of mind.

The issue of the defendant's intoxication at the time of the conduct alleged only presents difficulty when evidence of intoxication is sought to be introduced to disprove, or raise a reasonable doubt, that the defendant had the mental culpability requisite for liability for the offense charged (or for any offense at all). There is no difficulty in affording intoxication its evidentiary significance if a defendant seeks to show that because of the defendant's intoxication the defendant could not have performed the conduct alleged, e.g., struck a deadly blow, cracked a safe, or committed sexual aggression. However, if evidence of intoxication is offered to show that the defendant did not have a requisite mental state, the question of whether it should be admitted has led to confusing, unanalytical statements to the effect that intoxication will be admitted to show lack of "specific intent" but will not be admitted to show lack of "general criminal intent." This has been called "the current mumbo-jumbo" on drunkenness.[1]

The problem with the distinction between general and specific intent is that it does not adequately focus on the factors which are to be considered and leaves to an offense-by-offense determination the question of whether drunkenness or other intoxication will be admitted to rebut the requisite mental state. The problem is compounded by the wide diversity of phrases that have been used in the law to indicate the requisite culpable mental state.

The Code follows the position taken by Judge Learned Hand and a minority of the Model Penal Code Advisory Committee that the fact of intoxication "should be admissible to prove or to disprove the physical conduct or mental states which the law otherwise makes material to the definition of the crime charged, whenever it is logically relevant."[2]

The Model Penal Code adopts this position, but only in part. The M.P.C. formulates a special rule with respect to recklessness. It equates the defendant's becoming drunk with the reckless disregard by the defendant of risks created by the defendant's subsequent conduct and thereby forecloses the issue. In the Model Penal Code, while evidence of self-induced intoxication is admissible to rebut intent or knowledge, it is not admissible to rebut recklessness.[3] Judge Hand "thought this special rule devoid of principle,"[4] others have found it "not persuasive,"[5] and even the Reporter for the Model Penal Code does not seem enthusiastically in its favor.[6]

If, as the Model Penal Code's commentary states, "awareness of the potential consequences of excessive drinking on the capacity

of human beings to gauge the risks incident to their conduct is by now so dispersed in our culture," then it hardly seems necessary to postulate a special rule of equivalence between intoxication and recklessness, or, as has been suggested, create a presumption of recklessness.[7] All that is wisely required is to insure that evidence of intoxication will be admissible to either prove or rebut recklessness. This the Code does.

The Code eliminates the concept of intoxication as a defense (except when the intoxication results in this type of incapacitation under subsection (3) which can be equated with a physical or mental condition which precludes penal responsibility under chapter 704). Subsection (1) makes evidence of defendant's intoxication fully admissible and accords such evidence its full significance in proving or rebutting relevant conduct or states of mind. Thus, for example, evidence of defendant's intoxication could be introduced to prove or negative recklessness if that state of mind is relevant.

Subsection (2) makes it clear that intoxication per se is not to be treated as a physical or mental disease, disorder, or defect which precludes penal responsibility. However, it should be noted that intoxication, under some circumstances, may be a symptom of a disease, disorder, or defect which would exclude responsibility.

Subsection (3) provides that intoxication which is not self-induced or is pathological will constitute an excusing condition if it results in the same type of incapacitation to appreciate the wrongfulness of conduct or to control conduct that precludes responsibility. Mere alterations in personality will not suffice.

The phrase "pathological intoxication" is defined and employed "to provide a defense in a few, extremely rare, cases in which an intoxicating substance is knowingly taken into the body and, because of a bodily abnormality, intoxication of an extreme and unusual [and unforeseen] degree results."[8]

The definition of "intoxication" in subsection (4)(a) is intended not to be limited to alcohol but to include drugs and other intoxicants. Narcotic drugs do not generally deteriorate the mental processes of an addict.[9] A narcotic addict who resorts to crime to obtain funds to support the addict's habit will in most instances be held accountable for the addict's conduct. It is only when the intoxicant prevents the requisite conduct or state of mind that it constitutes an excusing condition.

Hawaii has not, in a reported case, dealt with the problem of intoxication as it relates to the mental state required to establish the elements of a crime. H.R.S. §703-4 (as codified

prior to this Code) provided that if a "person voluntarily or heedlessly induce[d]... mental derangement by intoxication" the person would not be held irresponsible because of such intoxication. Dictum in one case has suggested that "real insanity" resulting from excessive drinking would afford a defense,[10] however, this seems inconsistent with more recent cases which have limited a defense based on mental disease to pathological conditions of the brain.[11]

SUPPLEMENTAL COMMENTARY ON §702-230

Act 325, Session Laws 1986, prohibits a defendant who willingly becomes intoxicated and then commits a crime from using that self-induced intoxication as a defense. The use of such intoxication remains permissible for the limited purposes of proving or negating conduct or proving state of mind sufficient to establish an element of an offense. House Conference Committee Report No. 36-86, Senate Conference Committee Report No. 30-86.

Act 35, Session Laws 2015, amended subsection (4) by making technical nonsubstantive amendments.

Case Notes

Instruction on intoxication discussed. 60 H. 17, 586 P.2d 1028 (1978).

Voluntary intoxication is not a constitutionally protected defense to criminal conduct; legislature was entitled to exclude evidence of voluntary intoxication to negate state of mind. 72 H. 246, 813 P.2d 1384 (1991).

Jury instruction, derived from this section, that self-induced intoxication could not be used to negate state of mind sufficient to establish the mens rea element of the offense, constitutional. 88 H. 1, 960 P.2d 729 (1998).

Defendant's drug-induced mental illness was not a defense to second degree murder under §707-701.5(1) as adoption of such a rule would be contrary to the statutory scheme and legislative intent of §704-400 and this section. 93 H. 224, 999 P.2d 230 (2000).

Cited: 62 H. 17, 608 P.2d 408 (1980).

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§702-230 Commentary:

1. Wechsler, Foreword - Symposium on the Model Penal Code, 63 Colum. L. Rev. 589, 591 (1963).

2. M.P.C., Tentative Draft No. 9, comments at 7-8 (1959).

3. M.P.C. 2.08(2). See M.P.C., Tentative Draft No. 9, comments at 8-9 (1959).

4. Wechsler, op. cit. at 591.

5. Packer, The Model Penal Code and Beyond, 63 Colum. L. Rev. 594, 600 (1963).

6. Wechsler, op. cit. at 591.

7. Packer, op. cit. at 600-601.

8. M.P.C., Tentative Draft No. 9, comments at 11-12 (1959).

9. American Medical Association Council on Mental Health (A.M.A.), Report on Narcotic Addiction 24 (1957), cited and quoted in M.P.C., Tentative Draft No. 9, comments at 12-13 (1959).

10. In re the "Mary Belle Roberts," 3 Haw. 823 (1877).

11. Territory v. Alcosiba, 36 Haw. 231 (1942); State v. Foster, 44 Haw. 403, 354 P.2d 960 (1960).

" **§702-231 Duress.** (1) It is a defense to a penal charge that the defendant engaged in the conduct or caused the result alleged because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.

(2) The defense provided by this section is unavailable if the defendant recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish the requisite state of mind for the offense charged.

(3) It is not a defense that a person acted on the command of his or her spouse, unless he or she acted under such coercion as would establish a defense under this section.

(4) When the conduct of the defendant would otherwise be justifiable under section 703-302, this section does not preclude the defense of justification.

(5) In prosecutions for any offense described in this Code, the defense asserted under this section shall constitute an affirmative defense. The defendant shall have the burden of

going forward with the evidence to prove the facts constituting such defense, unless such facts are supplied by the testimony of the prosecuting witness or circumstance in such testimony, and of proving such facts by a preponderance of the evidence pursuant to section 701-115. [L 1972, c 9, pt of §1; am L 1979, c 183, §1]

COMMENTARY ON §702-231

A narrow defense is provided in this section for the defendant who claims that the defendant's conduct resulted not from the defendant's own culpability but rather from coercion exercised upon the defendant by a third party. It cannot be said that the defendant's conduct is not "voluntary" as that term is used in the penal law, because the defendant's conduct does result from the defendant's conscious determination. Rather, the basis for permitting the defense is the rationale that the penal law ought not to condemn that which most persons would do in similar circumstances.

The defendant is afforded by this section an affirmative defense if the defendant engaged in the conduct or caused the result alleged because of the use or threatened use of unlawful force against the defendant or another and a person of reasonable firmness would have been unable to resist such duress. Although the "reasonable man" standard is employed in a limited manner, the Code has not invoked a negligence standard for penal liability in all cases of duress. The conscious decision to yield in a duress situation is distinguishable from the inadvertent disregard of unknown risks in the case of negligence.

Subsection (2) makes the defense unavailable if the defendant was culpable in placing the defendant in the position where the defendant would be subject to duress.

Subsection (3) abolishes the common-law presumption of coercion when a woman commits an offense under the direction of her husband. The defense is still available to the wife provided she can raise and prove the issue by evidence.

The prior law on this subject, H.R.S. §703-5 (as compiled prior to this Code), provided that a defendant will not be regarded as responsible for an act "to the doing of which he is compelled by force which he cannot resist, or from which he cannot escape" if the threatened or imminent danger is greater than that inflicted by the defendant. (Emphasis added.)

SUPPLEMENTAL COMMENTARY ON §702-231

Act 183, Session Laws 1979, added subsection (5) which expressly categorizes duress as an affirmative defense. Senate Standing Committee Report No. 883 states:

> If any class of defenses deserves the title of "affirmative," it is those defenses that admit the commission of the act charged with the necessary mental element, but seek to interpose the existence of facts that, if true, would provide a complete exculpation. The traditional defenses of duress, necessity and self-defense are common examples. Unless one is willing to draw the concepts of volitional act and mental element quite broadly, these defenses do not negate either concept. In that respect they are analogous to the common law of confession and avoidance; they admit the truth of the facts pleaded but offer an excuse. 36 Ohio State Law Journal 828 at 840-41.

Case Notes

Accomplice's testimony regarding other accomplice's prior bad acts was not relevant to defendant's claim of duress and was, therefore, inadmissible under HRE rule 402. 101 H. 269, 67 P.3d 768 (2003).

In a prosecution for prostitution, where defendant did not testify to any use or threat of use of unlawful force against defendant's person, and defendant acknowledged that officer did not block defendant's exit and defendant did not attempt to leave the hotel room, it could not be said that the trial court's finding that defendant failed to establish duress by a preponderance of the evidence was erroneous. 114 H. 1, 155 P.3d 1102 (2007).

The choice of evils defense under §703-302 and the duress defense under this section are not, as a matter of statutory law, inconsistent. 93 H. 399 (App.), 4 P.3d 533 (2000).

" **§702-232 Military orders.** It is an affirmative defense to a penal charge that the defendant, in engaging in the conduct or causing the result alleged, which the defendant did not know to be unlawful, did no more than execute an order of the defendant's superior in the armed services. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §702-232

This section provides an affirmative defense in the narrow case where a defendant engages in conduct because ordered to do so by the defendant's superior in the armed services. The

defense obtains only when the defendant did not know the conduct to be unlawful.

" **§702-233 Consent; general.** In any prosecution, the victim's consent to the conduct alleged, or to the result thereof, is a defense if the consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense. [L 1972, c 9, pt of §1]

COMMENTARY ON §702-233

This section states the general view that the victim's consent to the defendant's conduct, or to the result of the defendant's conduct, is a defense if it negatives an element of the offense (e.g., consent to sexual intercourse on charge of rape) or precludes the harm or evil sought to be prevented by the law defining the offense (e.g., consent by the victim to allow the defendant to demonstrate a wrestling hold or maneuver upon the victim). It is obvious that this general principle should not be extended to all types of evils or harms and therefore this section is intended to be read in conjunction with §702-234 (consent to bodily injury) and §702-235 (ineffective consent).

Although this general principle has not been previously codified in Hawaii, it has been impliedly recognized.[1]

Case Notes

Based on the facts and the charged offenses in the case, the alternative theories of absence of consent and ineffective consent did not represent separate crimes; rather, they were alternative means of proving the attendant circumstance element of a single crime. 96 H. 161, 29 P.3d 351 (2001).

In sexual assault case, jury instruction as to ineffective consent prejudicially affected defendant's rights to due process because (1) jury was instructed that it could convict defendant based on the absence of consent under this section or any of the four grounds of ineffective consent under §702-235, (2) there was a reasonable possibility that the verdict was based on at least one of the four grounds of ineffective consent, and (3) there was legally insufficient evidence to support any of the four grounds of ineffective consent presented to the jury. 96 H. 161, 29 P.3d 351 (2001).

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§702-233 Commentary:

1. Territory v. Lee, 29 Haw. 30 (1926) (where a bank teller mistakenly paid out too much money on a check, it was held that the teller's mistake was not "consent" to the taking which would afford a defense to a charge of larceny).

" **§702-234 Consent to bodily injury.** In any prosecution involving conduct which causes or threatens bodily injury, consent to such conduct or to the infliction of such injury is a defense if:

(1) The conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic event or competitive sport; or

(2) The consent establishes a justification for the conduct under chapter 703. [L 1972, c 9, pt of §1]

COMMENTARY ON §702-234

This section specifies the types of cases in which consent to conduct which threatens or causes physical injury will constitute a defense.

Where the conduct and injury are the reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport, the injury to one participant, whether it be deliberate (boxing) or fortuitous (basketball or football), should not import penal liability to the other party.

Subsection (2) permits effective consent when it is given in the context of a situation which would constitute a defense of justification under chapter 703. For example, a parent may intrust the care of a child to another person, thus, under some circumstances, consenting to the use of corporal punishment, which would be sufficient to establish justification for the use of moderate physical force. Again, an adult might submit to certain medical procedures which necessarily entail severe bodily injury.

Consent to bodily harm has not been dealt with in previous Hawaii penal law.[1]

SUPPLEMENTAL COMMENTARY ON §702-234

Section 234 in the Proposed Draft of the Code provided for a defense, in addition to the above text, where "the bodily injury consented to or threatened by the conduct consented to is not serious." The legislature, in enacting the Code in 1972, rejected this defense. Conference Committee Report No. 2 (1972) stated: "The Committee finds that the law should not permit the defense of consent to have such a broad application... and that the subsection should not permit, by consent, the type of

conduct which would result in bodily injury and disruption of our social fabric."

§702-234 Commentary:

1. But see Burrows v. Hawaiian Trust Co., 49 Haw. 351, 360, 417 P.2d 816, 821 (1966) ("Consent is a defense to assault and battery cases as well as to others, unless consent is against the policy of the law.").

" **§702-235 Ineffective consent.** Unless otherwise provided by this Code or by the law defining the offense, consent does not constitute a defense if:

(1) It is given by a person who is legally incompetent to authorize the conduct alleged;

(2) It is given by a person who by reason of youth, mental disease, disorder, or defect, or intoxication is manifestly unable or known by the defendant to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct alleged;

(3) It is given by a person whose improvident consent is sought to be prevented by the law defining the offense; or

(4) It is induced by force, duress or deception. [L 1972, c 9, pt of §1]

Revision Note

In paragraphs (1) and (2), "or" deleted pursuant to §23G-15.

COMMENTARY ON §702-235

This section deprives the defendant of a defense based on consent in those situations where the victim's apparent consent is actually meaningless.

Subsection (1) deprives consent of effectiveness if it is given by a person who is not authorized to give it. Thus, for example, consent by an unauthorized person to the taking of another's property is not effective consent.

Subsection (2) relates to persons who are manifestly unable, or known to the defendant to be unable, to make a reasonable judgment concerning the conduct consented to because of immaturity, abnormal mental capacity, or intoxication.

Subsection (3) covers those cases where the law "deliberately ignores the actual attitude on the part of the 'victim' in order to protect members of the class of which he or she is a

member."[1] For example, sexual intercourse with a female below a certain age might be prohibited.

Subsection (4) reiterates in this context the general and pervasive principle that assent induced by force, duress, or deception is not legally effective consent.

It should be noted that although the Code deprives the consent of its effectiveness in the situations stated in this section, the Code does not thereby impose absolute liability. Facts which deprive consent of its effectiveness negative a defense, thereby making them elements of the offense. With respect to each element the defendant must act with a culpable state of mind. Thus, for example, sexual intercourse with a female who because of her youth cannot give effective consent does not impose automatic penal liability upon the defendant. It must be proven that with respect to the attendant circumstance of the girl's age the defendant acted culpably. This is so whether that attendant circumstance is specified in the definition of the offense or specified in a separate statute depriving her consent of effectiveness. At the very least it would have to be proven that the defendant was reckless (or, if specially provided, negligent) with respect to the girl's age, i.e., that he ignored a known (or, in the case of negligence, foreseeable) risk that the girl was below the statutory age permitting effective consent.

In Hawaii case law, cases of ineffective consent are found in relation to various sex offenses, where the consent of the female is deprived of effectiveness because of her immaturity;[2] furthermore, liability with respect to the female's age is absolute.[3] This section of the Code, as well as the definitions of sex offenses, changes this result.

Case Notes

Based on the facts and the charged offenses in the case, the alternative theories of absence of consent and ineffective consent did not represent separate crimes; rather, they were alternative means of proving the attendant circumstance element of a single crime. 96 H. 161, 29 P.3d 351 (2001).

In sexual assault case, jury instruction as to ineffective consent prejudicially affected defendant's rights to due process because (1) jury was instructed that it could convict defendant based on the absence of consent under §702-233 or any of the four grounds of ineffective consent under this section, (2) there was a reasonable possibility that the verdict was based on at least one of the four grounds of ineffective consent, and (3) there was legally insufficient evidence to support any of the

four grounds of ineffective consent presented to the jury. 96 H. 161, 29 P.3d 351 (2001).

"Consent" under this section applies to "mentally incapacitated" provision in §707-700. 5 H. App. 404, 696 P.2d 846 (1985).

An imprisoned person's consent to "sexual penetration" by an employee of a state correctional facility is ineffective and thus is not a defense to a charge brought under §707-731(1)(c). 86 H. 426 (App.), 949 P.2d 1047 (1997).

§702-235 Commentary:

1. Prop. Mich. Rev. Cr. Code §330, comments at 41 (1967).

2. Territory v. Delos Santos, 42 Haw. 102 (1957).

3. Territory v. Guillermo, 43 Haw. 43 (1958).

" **§702-236 De minimis infractions.** (1) The court may dismiss a prosecution if, having regard to the nature of the conduct alleged and the nature of the attendant circumstances, it finds that the defendant's conduct:

(a) Was within a customary license or tolerance, which was not expressly refused by the person whose interest was infringed and which is not inconsistent with the purpose of the law defining the offense;

(b) Did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or

(c) Presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.

(2) The court shall not dismiss a prosecution under subsection (1)(c) of this section without filing a written statement of its reasons. [L 1972, c 9, pt of §1]

Revision Note

In subsection (1)(a), "or" deleted pursuant to §23G-15.

COMMENTARY ON §702-236

Following the suggestion of the Model Penal Code,[1] this Code allows the court to dismiss de minimis infractions of the law. An obvious example of an area where such discretion might

appropriately be exercised is the field of minor sex offenses, where a rejected partner might seek revenge through the penal process.

While it has been claimed that the determination of whether the defendant's conduct is "within a customary license or tolerance," or caused harm "to an extent too trivial to warrant the condemnation of conviction," will vary not only on the merits of the case but according to the differing inclinations of judges, the answer does not lie, as it has been suggested, in requiring the prosecutor's consent.[2] The prosecutor has exercised the prosecutor's prosecutorial discretion by bringing the charge against the defendant. Furthermore, prosecutors, like judges, differ in their assessment of the same standards.

Previous Hawaii law did not have a provision permitting exercise of judicial discretion in cases of de minimis infractions.

SUPPLEMENTAL COMMENTARY ON §702-236

The Proposed Code provided that: "The court shall dismiss a prosecution" if it makes one or more of the relevant findings set forth in subsections (1)(a), (1)(b), and (1)(c). The legislature deleted the mandatory "shall" and inserted in lieu thereof the permissive "may", in order "to make the court's power to dismiss a prosecution discretionary upon the finding that the conduct constituted a de minimis infraction. It is your Committee's intent to give the courts broad discretion in this matter." Conference Committee Report No. 2 (1972).

Case Notes

Before the section can be applied, all the relevant facts bearing upon defendant's conduct and the nature of the attendant circumstances regarding commission of the offense should be shown to and considered by the judge. 55 H. 610, 525 P.2d 586 (1974).

Section is not unconstitutional on ground that it contravenes doctrine of separation of power. 55 H. 610, 525 P.2d 586 (1974).

Application to prosecution under §712-1243. 61 H. 291, 602 P.2d 933 (1979).

Traffic in narcotics not de minimis. 63 H. 77, 621 P.2d 364 (1980).

Defendant's prosecution for custodial interference in the second degree under §707-727 should have been dismissed as too trivial to warrant condemnation of conviction. 73 H. 75, 828 P.2d 269 (1992).

Where defendant's possession of .001 grams of methamphetamine did not threaten the harm sought to be prevented by §712-1243, trial court did not abuse discretion by determining that amount of methamphetamine was de minimis under this section. 92 H. 130, 988 P.2d 195 (1999).

Where prosecution adduced substantial evidence that the cocaine residue in the pipe was visible to the naked eye and could be scraped out and smoked again, trial court did not abuse its discretion in ruling that defendant's infraction of §712-1243 was not de minimis within the meaning of this section. 93 H. 279, 1 P.3d 281 (2000).

No error in court failing to dismiss count against defendant for possessing "everyday household items not intended or designed for use as drug paraphernalia" as broad definition of drug paraphernalia and multiple examples of such contraband enumerated in §329-1 weighed against defendant's contention that the ordinary nature of the containers defendant possessed did not involve the harm or evil sought to be avoided under §329-43.5 or amounted to extenuations that would not have been envisioned by the legislature. 98 H. 196, 46 P.3d 498 (2002).

Where the defense failed to adduce any evidence or present any argument with respect to the attendant circumstances, it failed to meet its burden of providing evidence to support a finding that the conduct alleged "did not actually cause or threaten the harm or evil sought to be prevented by §712-1243 or did so only to an extent too trivial to warrant the condemnation of conviction"; thus trial court did not err in finding that defendant's alleged conduct did not constitute a de minimis infraction. 99 H. 75, 53 P.3d 214 (2002).

Where defendant adduced no evidence that the amount of methamphetamine defendant was charged with possessing was incapable of producing a pharmacological or physiological effect or was not saleable, there was no evidence introduced from which the trial court could have concluded that defendant's conduct did not "cause or threaten the harm or evil sought to be prevented by the law". 99 H. 198, 53 P.3d 806 (2002).

Where trial judge lacked any cogent reason for overruling pretrial judge's denial of defendant's motion to dismiss charge of promoting a dangerous drug based on this section, trial judge abused trial judge's discretion in granting defendant's motion for reconsideration and dismissing charge. 99 H. 244, 54 P.3d 415 (2002).

In light of defendant's burden to prove that defendant's conduct constituted a de minimis infraction and trial court's finding that pipe residue contained a sufficient amount of methamphetamine to produce a pharmacological effect, which was supported by officer's testimony that amount recovered from

defendant's pipe may have been an amount sufficient to be "used" by someone, trial court did not abuse discretion in refusing to dismiss charge of promoting a dangerous drug in the third degree. 100 H. 498, 60 P.3d 899 (2002).

Where defendant failed to carry defendant's burden of establishing that defendant's conduct--of possessing ammunition in violation of §134-7(b), a class B felony involving conduct that had the potential for serious public safety consequences--was de minimis within the meaning of this section, appellate court's dismissal of trial court's granting of motion to dismiss charges as a de minimis infraction under this section affirmed. 123 H. 329, 235 P.3d 325 (2010).

Circuit court abused its discretion in granting defendant's motion to dismiss by concluding that the effect of defendant's conduct was too trivial to warrant the condemnation of conviction where: (1) circuit court did not address the harm threatened by the offense (the harm threatened by defendant's conduct was of particular relevance); and (2) defendant failed to carry defendant's burden of demonstrating that defendant's unauthorized possession of complainant's confidential personal information was trivial, because defendant failed to address the nature of the conduct alleged and the nature of the attendant circumstances. 129 H. 172, 297 P.3d 188 (2013).

As defendant's striking of husband did actually cause harm sought to be prevented by §709-906, no abuse of discretion where trial court holds that infraction not too trivial to warrant the condemnation of conviction under this section. 79 H. 419 (App.), 903 P.2d 723 (1995).

Looking at defendant's conduct and nature of attendant circumstances regarding the commission of the offense, including possession of the smoking device, smoked residue, and depleted drug contraband of 0.004 grams of methamphetamine by one engaged in shoplifting, court could not conclude that defendant's conduct "did not actually cause or threaten the harm or evil sought to be prevented by §712-1243, or did so only to an extent too trivial to warrant condemnation of conviction". 97 H. 247 (App.), 35 P.3d 764 (2001).

Although the purpose of a §586-4 temporary restraining order is to prevent domestic abuse, the plain and obvious purpose of the §586-4(d) misdemeanor is to prevent violations of a temporary restraining order; thus, although defendant's contact with complainant was brief and defendant drove off after being reminded of the temporary restraining order, the contact was not de minimis under this section. 107 H. 67 (App.), 109 P.3d 708 (2005).

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§702-236 Commentary:

1. M.P.C. §2.13.

2. See Kuh, A Prosecutor Considers the Model Penal Code, 63 Colum. L. Rev. 608, 628 (1963).

" **§702-237 Entrapment.** (1) In any prosecution, it is an affirmative defense that the defendant engaged in the prohibited conduct or caused the prohibited result because the defendant was induced or encouraged to do so by a law enforcement officer, or by a person acting in cooperation with a law enforcement officer, who, for the purpose of obtaining evidence of the commission of an offense, either:

(a) Knowingly made false representations designed to induce the belief that such conduct or result was not prohibited; or

(b) Employed methods of persuasion or inducement which created a substantial risk that the offense would be committed by persons other than those who are ready to commit it.

(2) The defense afforded by this section is unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §702-237

The rationale for providing a defense based on entrapment does not reside in the fact that entrapped defendants are less culpable or dangerous than those who formulate their intent without outside inducement. If that were the case, a defense based on similar inducement and encouragement by private citizens would have to be recognized. The real basis for the defense of entrapment is a purpose to deter improper conduct on the part of law enforcement officials. The harm done by increasing the risk of penal conduct by otherwise innocent persons, the improper utilization of police resources, the suspicion that entrapment tactics are the result of personal malice, and injury to the stature of law enforcement institutions, all contribute to condemn entrapment. Providing a defense to conduct which would otherwise be a basis for penal liability because of improper tactics of law enforcement officials is an extreme measure, but no other, more effective, method presents itself.

Consistent with the reason for the defense, the Code's formulation of the standard of conduct regarded as sufficient to establish entrapment focuses not on the predisposition of the defendant to engage in the prohibited conduct, but rather on the conduct of the law enforcement official (or person acting in cooperation with the official). This distinction is of critical importance in analyzing subsection (1)(b). Regardless of the defendant's past record or present predisposition to engage in a certain type of penal conduct, the defendant will be afforded a defense if the defendant was induced or encouraged to engage in such conduct by methods which create a substantial risk of persuading a person who was not ready to commit the offense. For example, a police informer makes extraordinary appeals of friendship to the defendant, a long-time narcotics peddler, and thereby moves the defendant to sell the informer narcotics. Notwithstanding the defendant's predisposition to peddle narcotics, the defense is available. Conversely, merely because a defendant was not predisposed to committing the offense, prior to the inducement by an official, does not automatically afford the defendant the defense of entrapment. Thus, for example, an undercover narcotics agent offers to buy, at a handsome price, all the narcotics which the defendant can obtain; the defendant, a person without any prior thought of peddling narcotics, on the basis of such inducement obtains narcotics and sells them to the undercover agent; the defense of entrapment should not be available. The offer to buy narcotics is not a method which creates a substantial risk that the offense would be committed by persons other than those ready to commit it.

Subsection (3) limits the defense of entrapment so that it does not apply to offenses causing or threatening bodily harm to a person other than the entrapper. Although "[n]o reported entrapment case has been found involving a criminal act in which great physical damage has taken place," the limitation seems wise.[1] Here, there are other factors which discourage such conduct by law enforcement officials and persons acting in cooperation with them. As the Model Penal Code commentary has pointed out,

> in cases of crimes causing or threatening bodily injury to persons other than the entrapper, much of the reason for the defense fails. Public opinion would, in all probability, demand the punishment of the conniving or cooperating officers. The injured persons would have motivation to seek civil redress. It will not seem generally unfair to punish someone who has caused or threatened bodily injury to another although he has been induced to his action by law enforcement officials. A

person who can be persuaded to cause such injury presents a danger that the public cannot safely disregard.[2]

Except for the apparent faith in the efficacy of public opinion, these factors seem relevant and persuasive.

Out of an abundance of caution it should be noted that the phrase "person acting in cooperation with a law enforcement officer" is intended to cover both public officials and private citizens.

The Code makes entrapment an affirmative defense. It is not unfair to require a defendant, who desires to escape from penal liability not on the basis of the defendant's own lack of culpability but rather on the basis of the additional culpability of law enforcement officials with respect to their official conduct, to bear the burden of proving by a preponderance of the evidence the excusing condition.

In Hawaii, the standard for entrapment has heretofore focused on whether the defendant had conceived the intent or "criminal design or purpose" to undertake the prohibited conduct or whether the defendant had been "lured" into the conduct by a law enforcement official.[3] The standard did not focus, as the Code does, on the quality of the tactics used by the official. Moreover, unlike the Code provision, previous Hawaii law did not require the defendant to carry the burden of proof on the defense of entrapment; formerly the defendant prevailed if the evidence raised a reasonable doubt on that point.

Case Notes

Instruction on entrapment and burden of proof. 58 H. 234, 566 P.2d 1370 (1977).

Provisions of this section and §701-115, requiring defendant to prove entrapment by preponderance of the evidence, do not violate due process. 58 H. 234, 566 P.2d 1370 (1977).

Unless evidence is undisputed and clear, entrapment is a jury question. 58 H. 234, 566 P.2d 1370 (1977).

Defendant has burden of proof on entrapment; no violation of due process. 58 H. 479, 572 P.2d 159 (1977).

Jury finding of no entrapment upheld. 63 H. 536, 631 P.2d 181 (1981).

No valid claim that police induced criminal actions. 67 H. 608, 699 P.2d 983 (1985).

Use of drunk decoys constituted entrapment. 68 H. 635, 726 P.2d 266 (1986).

"Reverse buy" police operation designed to detect drug-related offense was not entrapment where officer merely provided defendant an opportunity, as opposed to inducement, to commit

charged offense; objective test discussed. 73 H. 179, 830 P.2d 492 (1992).

Instruction which tracked the language of subsection (1)(b), plainly required defendant to prove by a preponderance of the evidence that defendant was entrapped, that was a correct statement of the law; there was substantial evidence to support jury's conclusion that defendant failed to prove entrapment by a preponderance of the evidence. 77 H. 72, 881 P.2d 1218 (1994).

Defendants did not prove entrapment under subsection (1)(b) by preponderance of evidence as required by §701-115(2)(b); officer's conduct merely provided defendants with opportunity to commit offense of promoting a dangerous drug in the first degree. 82 H. 499 (App.), 923 P.2d 916 (1996).

Where no evidence of any encouragement, persuasion, or inducement on the part of undercover police officer vis-a-vis defendant or any of defendant's principals, no basis for instructing jury on any kind of entrapment defense. 92 H. 98 (App.), 987 P.2d 996 (1999).

Where it was the defendant and not the law enforcement officer posing as a 14-year old girl who (1) initiated the internet chat room contact as well as the sexual aspects of the conversation, (2) after learning that the "girl" was 14 years old, repeatedly asked if she would engage in oral sex and sexual intercourse, and (3) the "girl" repeatedly expressed hesitation and gave defendant opportunities to back out of the illicit arrangements proposed by defendant, the transcripts of defendant's conversation with the "girl" provided convincing evidence that defendant was not entrapped. 120 H. 480 (App.), 210 P.3d 3 (2009).

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§702-237 Commentary:

1. M.P.C., Tentative Draft No. 9, comments at 23 (1959).

2. Id. at 23-24.

3. Territory v. Achuck, 31 Haw. 474 (1930).