1. Constitutional Principles

1.1. Principle of Legal Certainty

Shum Kwok Sher v HKSAR [2002 CFA]

It was alleged that the offence of misconduct in public office was too vague and uncertain to comply with the Basic Law, BoRO and ICCPR as applied to HK. The essential elements are:

1) A public official;
2) Who in relation to his public office;
3) Wilfully *and* intentionally;
4) Culpably, seriously misconducts himself in public office.

HELD: The law must be adequately accessible – the citizen must be able to know in the circumstances of the applicable rules. The law must be precisely defined so to enable the citizen to regulate his conduct, by which he can foresee to some degree reasonable in the circumstances, the consequences which a given action may entail.

Absolute certainty is impossible. The degree of precision depends on the context of the law, and status of those to whom it is addressed. In fields governed by public policy, a detailed enactment may not provide the required flexibility to govern changing circumstances. The mere nature of the activity may be adequate rather than the methods to committing it since it would lead to undesirable rigidity (net may not catch all misconduct). Conduct that the law may want to describe as criminal may best be referred to by nature of the activity rather than precise forms of conduct. Where fundamental freedoms are involved, more certainty is required, but that is not the issue here.

A public officer, familiar with his powers and duties should have no problem in appreciating that neglecting his duties with wilful intent and dishonesty, corruptly or maliciously exercising his discretions constitute misconduct that is criminally culpable.

1.2. Presumption of Innocence

1.2.1. The Golden Thread

DPP v Woolmington [1935 HoL]

The argument concerned a jury direction by the judge shifting the onus to the defendant to prove he was not guilty of intentional murder after the prosecution had established his case.

HELD: The common thread is that it is generally for the prosecution to prove the prisoner's guilt. This presumption of innocence is part of the common law.

COMMENT: If the defendant had to prove his innocence on the balance of probabilities, the judge may be bound to convict despite reasonable doubt as to the basic elements of the offence.

R v Fung Mui Lee [1996 CA]

The trial judge had directed the jury that there is a presumption that a person intends the natural and probable consequences of his acts.

HELD: That direction was contrary to the presumption of innocence, and contrary to s65A(1) of the CPO. And contrary to *Woolmington* since it was held that it is for the prosecution to prove every element of an offence.

Tse Mui Chun v HKSAR [2004 CFA]

HELD: that the prosecution has the onus to prove every element of the offence. The making of 'infringing copies' was an express and therefore essential ingredient in the offence. The absence of the requisite copyright consent is not an "exemption from the operation of the law creating the offence" it is an ingredient of the offence itself. It was not just up to the defendant to show a license or permission.

1.2.2. Reverse Burdens and Constitutional Implications

R v Sin Yau Ming [1991]

ISSUE: Dangerous Drugs Ordinance s46(d) presumed that when a person was carrying more than 0.5 grams, he was trafficking drugs; DDO s46(c) presumed that a person carrying more than 5 packets was carrying for the purpose of trafficking; DDO s47(1)(c), (d) presumed that any person proved to have in possession the keys to which any drugs were found had them in his possession; and DDO s47(3) presumed a person in actual or presumed possession of a drug knew the nature of a drug.

THE LAW: for such **presumptions of fact** to be legitimate, the presumptions must be first: **rationally connected** to the facts proved, and second: **proportional** so the presumed fact goes no further than the facts proved.

ANALYSIS: Carrying more than 0.5g cannot possibly lead to a presumption that the person was trafficking because it was far below the daily consumption rate – s46(d) was not legitimate.

The trigger of 5 packets is arbitrary and not rationally connected to trafficking, because users usually buy in bulk and the 5 packets do not specify what levels of drugs have to be found – s46(c) fails.

The presumption that the possessor of keys to a place wherein drugs are found possesses the drugs is flawed because there may be multiple key holders and none may have known to know of the drug – s47(1)(c) and (d) fail.

A person who is presumed to possess a drug cannot be also presumed to know the nature of the drug – s47(3) fails.

HELD: all those sections are inconsistent with the presumption of innocence enshrined in Article 11 of the Bill of Rights. They are repealed from the law. (Note that the case was decided before the relevant repealing powers of the Court was removed by the NPCSC).

*AG v Lee Kwong-kut & Lo [1993 CA] #1 * OVERRULED: Lee Kwong Kut #2*

Lee was charged for having in his possession some money which authorities reasonably suspected of having been unlawfully procured and he did not give account to the satisfaction of the magistrate of how he came by the same – s30, Summary Offences Ordinance. The elements of the offence were: possession; reasonable suspicion by the authorities; and inability of the defendant to explain.

HELD: That third element is most important since it establishes the 'criminality' and 'culpable behaviour' of the offence. E.g. what if D held the bag which he did not know was the subject of substantial suspicion? The provision was inconsistent since the accused was required to prove some fact on the balance of probabilities and it permitted a conviction despite reasonable doubt in the mind of the judge.

The CA adopted this more rigorous approach – that any inroad is unconstitutional.

AG v Lee Kwong-kut [1993 PC] #2

Lo challenged s25(1) and (4) of the Drug Trafficking (recovery of proceeds) Ordinance. S25(1) made it an offence to enter into an arrangement 'knowing or having reasonable grounds to believe' that the person trafficked drugs, and subsection (4) made it a defence to prove that D did not know that the arrangements involved drug trafficking.

The PC effectively dismissed the 'rigorous approach' and Lord Woolf suggested that it should be more simply a matter of examining the substance of the statutory provision, approving *Sin Yau Ming*.

> "Some exceptions are justifiable, others are not. Whether they are justifiable will depend on whether:
>
> 1) it remains primarily the responsibility of the prosecution to prove the guilt; and
> 2) whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle that art. 11(1) enshrines.
>
> If P retains responsibility for proving the essential elements of the offence, the less likely it is that an exception would be regarded as unacceptable. Essential ingredients will be gleaned from the language, substance and reality of the provision, not its form.
>
> Where the prosecution is required to prove the elements of the offence and the defendant is reasonably given the burden of establishing a proviso or exemption or the like indicated in *Edwards*, art. 11(1) is not contravened."

S30, in Lee's case above (#1) contravened this principle. The defendant had to prove his own innocence but the prosecution did not need to prove many elements of the offence.

S25(4), however was acceptable since the defendant just needed to show that he took the steps necessary to ensure he does not have the knowledge referred to. This was reasonable on the defendant and the prosecution could not possibly try to show that he did not do that. This 'defence' was not an element of the offence and the onus to prove 'knowledge', the main element, was on the prosecution.

HKSAR v Lam Kwong Wai [2005 CA]

Evidential burdens do not breach the presumption of innocence and are constitutional.

Special defence provisions, although requiring the defence to prove something on the balance of probabilities, do not require them to prove an essential element of an offence and as such – may or may not be constitutional – *Lee Kwong Kut*.

Persuasive burdens are dangerous, as they require the defendant to prove their innocence, and may lead to a conviction despite reasonable doubt of an essential element of the offence. Whether or not such provisions make true inroads into the presumption of innocence is not clear.

The true nature of the offence is to be studied. There are cases where 'defences' are so closely linked with the mens rea and moral blameworthiness that it would derogate from the presumption of innocence.

If it appears that the legislation intended to criminalize conduct on the basis of mens rea, etc. but nonetheless imposed upon the accused the burden of showing the absence of such intent, the danger of convicting with reasonable doubt is apparent.

> ANALYSIS: The subject of the offence is possession of an imitation firearm for some culpable purpose. Although it is a defence for D to prove that he did not possess for illegitimate purpose, it does not detract from the substance of the offence.

There was evidence to show that such an inroad into the presumption was necessary – by way of serious crimes being committed by possessors of imitation firearms. If the objective of the ordinance was to stop these crimes, was it proportional? It cannot be that the possession of an imitation firearm in a private place is rationally connected to the aim to prevent crime (the ordinance was indeed broadly drafted, if it confined it to a public place properly defined, it may not have suffered total destruction). Imprisonment is a serious penalty.

It is not difficult for P to circumstantially prove intent to cause illegitimate purposes.

But why would an evidential burden not suffice? Such makes it disproportionate.

HKSAR v Hung Chan Wa and Asano Atsushi [2005 CA]

A person proved or presumed to have in his possession a dangerous drug is presumed unless the contrary is proven, to have known the nature of the drug.

ANALYSIS: Why would an evidential burden not suffice? The provision is thus not proportionate. It is also directed at a central element of the offence.

The courts need not take the least intrusive route to protect the presumption of innocence as it is compelled to take many factors into account.

HELD: it is possible to read down "to prove" to "prove on an evidential basis".

2. Actus Reus

2.1. Capacity

2.1.1. Children

Chan Chi Wah v The Queen [1967]

A case on the capacity of children between 10 and 14 – *doli incapax*.

The lower the child is between the scale of 10 and 14, the stronger the evidence necessary to rebut that presumption (the reverse being true). There must be strong and repugnant evidence that he understood what he did.

2.1.2. Involuntary Persons

AG's reference #2 1992 [CA]

Driving without awareness – involuntary?

D was in a state of 'driving without awareness'. Expert said that he was "largely unaware" of the road. Unfortunately, only **total loss of control** can constitute automatism. The phrase cannot loosen anymore. Being attacked by a swarm of bees, for example, destroys all sense of voluntary control of a vehicle. Going to sleep, however, is different since before going to sleep, you neglected your duty to stay awake.

2.2. Conduct Elements

2.2.1. Harmful Acts

Assault and Battery

Collins v Wilcock [1984]

Assault defined: an act that causes another to apprehend the infliction of immediate, unlawful force on him.

Battery: action inflicting unlawful force on the person. The law cannot draw a line between varying degrees of violence, hence the slightest touch can constitute battery. Consent is generally a defense and people in society are deemed to have consented to reasonable force being inflicted on them – this now being transformed into a broad exception. The test falls to what is generally acceptable – this now being transformed into a broad exception.

In this case, the policewoman, not in the course of duty, proceeded to use force that was less than generally acceptable to engage another's attention. She was charged with battery.

R v Ireland | R v Burstow [1998 HoL]

In *R v Ireland*, the issue was whether psychiatric illness constitutes bodily harm and whether telephone calls involving silence can amount to an assault.

In *R v Burstow*, the issue was whether psychiatric damage can amount to bodily harm and whether in the absence of physical contact, 'inflicts' harm under s19, OAP Ordinance.

Victims suffered neurotic disorders, distinguished from states of fear and stress. Modern medicine treats neuroses as a form of psychiatric illness. In civil law, there had been for a long time, no distinction between body and mind. In *R v Chan-Fook*, it had been held by the Court of Appeal that since a 'body' includes everything in a body, i.e. organs, brain and nervous system, bodily harm includes psychiatric injury. States of mind not themselves evidence of an identifiable clinical condition are not included.

> Although the legislation at the time of writing did not foresee psychiatric injury to be a problem, legislation that does not address a specific problem only should be deemed 'always speaking' and be interpreted in every-day light. Statute and common law reconciled, bodily harm now includes psychiatric harm.
>
> 'Inflict' and 'cause' mean the same thing in the OAP Ordinance since they were consolidated from different acts and it would be absurd to differentiate between a coherent body of law.
>
> A telephone call cannot be widened to include a battery. However, an assault could be if it determined to cause an apprehension of immediate, unlawful force. An assault can be committed by words – see the dark alley metaphor, therefore, a telephone call involving the use of words can constitute an assault. What about silence? If the caller intends to cause fear and is so understood, it may constitute an assault. A victim fearing the possibility of immediate physical harm may also claim assault. Such cases depend on the facts.

Indecent Assault

R v Court [1988 HoL]

In indecent assault, must the prosecution prove: an intention to assault; awareness of the indecent circumstances; and intention to cause indecency?

In indecent assault, the first stage is to prove an assault.

Then, the matter is to decide whether right-minded persons could consider the acts indecent or not.

If the circumstances of the assault are incapable of being regarded as indecent, the undisclosed intention of the accused cannot make the assault indecent – *R v George* [1956]. In that case, the assault of the removal of shoes from the victim could not be regarded as indecent.

If the circumstances are capable of being indecent, a decision whether or not right minded persons might think that assault was indecent would need to rely on factors such as: the relationship between the victims, how D came to do this act and his reasons for doing so. For D to be convicted without P being obliged to prove both assault and indecency would be "quite unacceptable" and "not what parliament intended". One can then decide whether one is sure that D not only intended to assault V, but an assault which can not be regarded as decent.

HOWEVER, what happens when D strips off V's clothing not to derive indecent pleasure but because he is a misogynist? Does that avail him of indecent assault? See Lord Goff's dissenting judgment. A better approach may be to limit the ingredients of the offence to an assault and objective indecency, or to recognize a level of indecency which would offend the public above which would invalidate D's intention.

Theft

Chan Man Sin v AG [1988 PC]

A bank is not entitled to debit a customer's account with the amount of any cheque which the bank has not, in fact, any authority to honor. It was said that a transaction honoring a forged check was a nullity because on discovering the unauthorized debit, the customer is entitle to insist on its reversal. There is therefore, no appropriation since the customer was deprived of nothing.

> This was promptly rejected by the court. The person who negotiates a check on a particular bank is assuming the rights of the owner of the credit in the account. In s4(1), Theft Ordinance, any assumption of the rights of an owner amounts to an appropriation. See also *HKSAR v Cheng Lap Sun* [2001 CA]. In that case, it was further suggested that dishonesty is an ingredient separate from appropriation. The consent of taking the checks did not negate a finding of appropriation.

DPP v Gomez [1993 HoL]

When an item passes to the defendant with the consent, obtained by a false representation to the owner, an appropriation has taken place and may take place without an adverse interference or usurpation of the owner's rights.

> Affirmed *R v Lawrence* [1972 HoL] that positive consent is no longer relevant in the crime of theft and that **appropriation can occur even with the consent** of the owner. In that case, it was said that parliament, by the omission of the words "without the consent of the owner" (concerning appropriation) means that consent is no longer an ingredient of the offence.
>
> "Dishonest" is an adjective describing the act of "appropriation" and so an appropriation may be in itself, neutrally honest. In the context of company theft, the directing mind giving consent is often the thief himself. If *Morris* is followed, the accused thief may get away, but if *Lawrence* is affirmed, the thief in so doing, appropriates and dishonestly does so. That is the policy behind this decision.

Regina v Hinks [2001 HoL]

The question is whether one can appropriate property belonging to another when the other person had made him a gift of property, retaining no proprietary interest and waiving all rights to resume or recover any proprietary interest in the property.

The house held that the **neutral word of appropriation meant <u>any</u> assumption of any rights of the owner**. The circumstances surrounding the appropriation would determine dishonesty.

Hobhouse, dissenting, said that the gift was not property "belonging to another" and since appropriation must relate to property "belonging to another", receipt of a gift could not amount to a theft. The only way to allege theft is to prove the gift's invalidity – see also *R v Mazo* [1997].

In addition, if D says he knew that his actions were legitimate in civil law, it may bring people to reasonably doubt his dishonesty and avail him of the crime.

2.2.2. Harmful Omissions

R v Miller [1983 HoL]

D lit a cigarette and fell asleep. He woke up, saw his mattress smouldering and went to another room to continue his sleep. The house burned down and he was charged with criminal damage.

There were 2 approaches:

1) That D had started a fire without the requisite mens rea. When he awoke and was presented with an **obvious risk**, he became under a **duty to do what he reasonably could do** and put it out. This is analogous to discarding a cigarette and realizing that it had ignited some material. If the consequence is manageable, he should be construed as being under a duty to, within his capability, minimise the risk posed by his actions. If he does nothing, he breaches this duty of care.
2) That the series of events was a **continuous act** and anytime when the state of mind of the accused, when he fails to minimise the damage which will result from his initial act, he is being reckless. Did he start the fire? – Yes. Was he reckless as to whether the house would burn down? – Yes.

Both would have led to the same consequence although the House preferred the 1st duty approach. By the ignition of the train of events, D's realization of it gave him a duty to act if it was within his powers.

R v Khan and Khan [19998 CA]

D had done nothing apart from having supplied heroin to the deceased. P also claimed that D failed to summon medical assistance and that was the actus reus of gross negligence manslaughter.

Reliance on *Miller* was rejected. Certainly, the supply of drugs would not inevitably lead to someone's death. It was not a dangerous act.

In cases of gross negligence, it had to be shown that there was some type of relationship between the defendant and the victim. In this case, there was none.

2.2.3. Role of Consent in Assault and Homicide | 199

R v Oligboja [1982 CA]

Consent (in this case, to sexual intercourse) can be vitiated by force, threats of force and other forms of intmidation.

Chan Wai Hung v HKSAR [2000 CFA]

Consent procured through deceit or victim's ignorance. The mistake must be due either to the identity of the defendant or the nature of the act involved. The purpose of the act is not relevant. Such consent is deemed vitiated. Acts different in nature

include: a medical procedure and sexual intercourse; medical procedure and fondling, etc. Acts not different in nature include: medical examinations with spectatorship where the spectator's identity was falsified; and sexual intercourse with a man who may or may not be her husband.

Airedale Trust v Bland [1993 HoL]

Person in vegetative state / brain-stem death – whether pulling the plug.

One cannot take active measures to cut short the life of a terminally ill patient. However, it was held that a doctor's conduct in discontinuing life support can properly be categorized as an omission since discontinuation is the same as no initiation of life support in the first place. No omission may be criminalized without a prior duty to act. That prior duty, in this case, is one owed by a doctor to a patient. If the patient cannot give consent, it is up to the doctor to decide what is in the best interests of the patient. whether it is in the best interests of the patient that his life should be prolonged by the continuance of this form of medical treatment.

Although feeding is an essential duty owed by anyone in a position to care, the patient in this case cannot eat without invasive medical assistance. This is akin to life support.

Medical treatment in this case is futile – there is of chance of recovery. Since it is not in the **best interests of the patient** that treatment should continue, the court held that there was no longer any duty upon the doctors to continue with this form of medical treatment. Subsequently, cutting the line cannot be unlawful. A lethal injection, however, is a positive act and cannot be legally administered.

R v Brown (Anthony) [1994 HoL]

D charged with assaults occasioning bodily harm and unlawful wounding. Issue was whether D could be availed when his victim consented to it.

For common assault without injury, consent avails the defendant. Even where violence is intended and results in some wounding or GBH, the accused is to be acquitted if the injury was a foreseeable incident of a lawful activity in which the person injured was participating.

However, it had previously been held that infliction of harm **injurious to the public** as well as to the person injured must be unlawful. Prize fighting participants were successfully prosecuted in *R v Coney*. No man has the right to consent to something that amounts to or has a direct tendency to create a breach of the peace. There is a difference between violence which is incidental and violence which is **inflicted for indulgence or cruelty**. Such violence is injurious to the participants and **unpredictably dangerous**.

A list of accepted conduct involving violence includes: properly conducted sports and games; lawful chastisement; reasonable surgical interference; dangerous exhibitions, etc. Sado masochistic encounters cannot be said to be conducive to the welfare of society. It is counter to public interest that risks should be run.

Dissenting judges chose that the bedroom is a private place and the law ought not criminalize private behaviour which do not result in GBH. And that it ought to be the responsibility of the legislature to decide.

R v Dica [2004 CA]

Issue as to whether consent to risk of getting HIV is valid consent.

Held that it was and distinguished from *Brown* in that the **consent is to a risk** and that risk is **not similar to the wanton damage** seen in *Brown*. The problems of criminalizing this conduct includes the sheer impracticability of enforcement and haphazard impact. And if adults were liable for the consequences of taking known risks with their health, it would be strange that it should be confined to risks taken in sexual intercourse while they are permitted to take risks inherent in so many other aspects of life.

2.3. Consequence Elements

2.3.1. Harmful Consequences

Murder and Manslaughter

AG's Reference #3 [1998 HoL]

A case on the acuts reus of murder and manslaughter.

Established Rules

1. A prima facie case of murder arises when D does act causing death intending to kill or cause grievous bodily harm to the victim.
2. If D does an act intending to harm X but instead harms Y, the intent to harm X may be directed to Y – Transferred Malice.
3. Violence to a fetus causing its death in the uterus does not result in murder since it is not a reasonable creature in being - Sir Edward Coke (Institutes of the Laws of England, 1797).
4. The existence of an interval of time between the act and the death does not prevent the act from becoming murder so long as there is an unbroken causal connection between the act and the death.
5. Acts done to a fetus which results in death after birth can give rise to criminal liability. In *R v West* [1848], an assault caused death by causing the child to be born immaturely. In *R v Senior* [1832], death resulting from gross negligence by a midwife before the child was fully born gave rise to manslaughter. In those cases, there was intent against the creature that would be formed after birth.

Crown Arguments 1

That the fetus was part of the mother and so an intention calculated to cause serious bodily harm to the mother was equivalent to the same directed towards the fetus.

This argument was rejected. The mother and fetus are two separate organisms living symbiotically. Not a single person with two aspects. The mother had her leg and the fetus his. Neither does an argument for single personality stand.

Crown Arguments 2

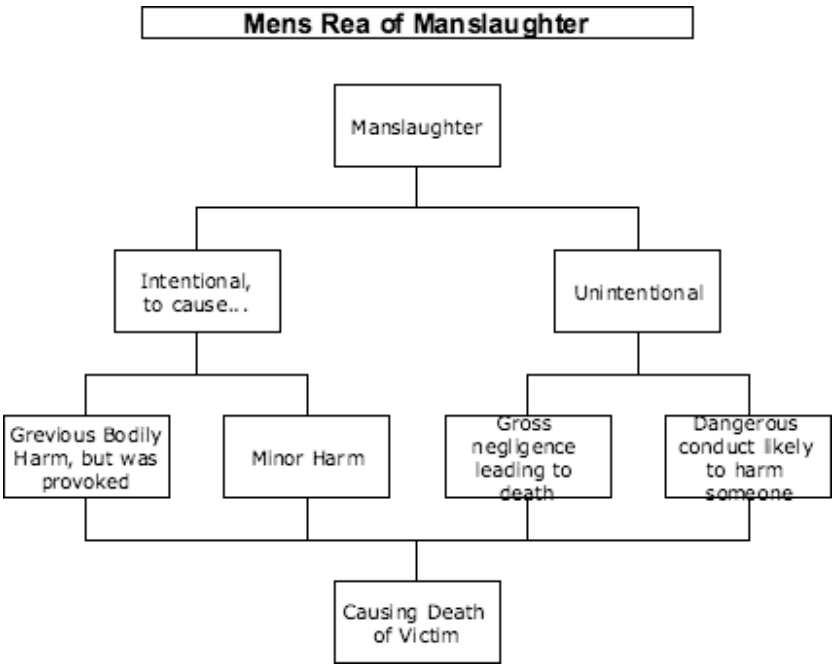
Malice directed towards the mother started a train of events leading to the baby's death after birth: the actus reus and mens rea are complete and there is murder. Transferred Malice…

For this to be valid, it means an extension of rule 5 to where D acts without intent to injure either the fetus or child. It cannot, as it would require a transfer of malice first to the fetus from the mother then to the newborn from the fetus. This is serious fiction. D here intended and did indeed harm M but did not intend to harm the fetus or newborn – there should be some compatibility between the original intention and the actual occurrence.

Actus Reus

The actus reus was satisfied in this case. D had caused premature birth and as a result, the newborn, after birth, had died – see principle 5 above.

Mens Rea



This was a case of unintentional manslaughter. The act was dangerous conduct likely to harm someone. Dangerousness in this context is not a high standard, only requiring an act which was likely to injure someone. That someone must be a reasonable creature in being that is alive. A dead person cannot be harmed, but a fetus' life lies in the future, not in the past. It also carries with it effects of things done to it before birth which after birth, may prove harmful. The act which caused the death and the mental state need not coincide in point in time, they only need to be in the same sequence of events. It is not needed to show that he intended to harm V specifically. On grounds of public policy, this reasoning shall stand.

Drug Overdose Cases

R v Cato [1976 CA]

Victim dictated the strength of his drug injection. Partner injected the serum.

> Causation need not be the sole cause. It need not be substantial either. What it needs to be is that it is not *de minimis*.

R v Dalby [1982 CA]

D supplied drugs to V.

> In unlawful act manslaughter, the act must be direct. A supply of drugs is not direct, it only increases the probability that harm may occur.

2.3.2. Causation

R v Roberts [1972 CA]

D tried to take V's clothes off, she jumped off the car moving at high speed.

> A defendant charged with either inflicting or assault occasioning GBH or ABH does not need D to foresee the actions of the victim which result in the bodily harm.

The test is: whether it was the natural result of what the defendant said or did and it was reasonably foreseeable that the victim's actions could occur.

R v Pagett [1983 CA]

Police shot hostage when D opened fire. D charged with murder.

A reasonable act performed for the purpose of self preservation caused by the accused's own act does not operate as a *novus actus interveniens*.

But/for test used and affirmed.

R v Blaue [1975 CA]

V was opposed to blood transfusion. She died because of not receiving blood after sustaining a stab wound from D. This is a causation issue.

Those who use violence on others must take their victims as they find them. The fact that a victim does not save himself does not break the causal connection between the act and his death. This, however, will reduce damages in tort since a person is expected to reasonably mitigate his damage. The criminal law is concerned with the maintenance of law and order and the protection of the public. Only if the second cause can be said to be so overwhelming as to make the original wound merely part of history can it be said that causation is broken – *R v Smith* [1959].

R v McKechnie [1992 CA]

V was stabbed by D. Doctors decided not to operate on V's ulcer because of the stab wound. This decision was doubted by expert witnesses. V's ulcer burst and he died. Was D criminally liable?

It is only necessary that the wounds D inflicted were a significant cause of V's death. It need not be the sole or even major cause of death. The doctor's decision need only be reasonable and not 'correct'. It is not admissible evidence that other doctors may have decided differently.

R v Cheshire [1991 CA]

D shot V who was put on food-support. He died of infections to his throat later. Those infections should have been discovered by the doctors and he would not have died had they been discovered earlier.

The defendants acts need not be the sole cause or even the main cause of death, it being sufficient that his acts contributed significantly to that result. Even if negligence was the immediate cause of death, one should not disregard the responsibility of D unless the negligent treatment was so independent of his acts and so potent in causing his death. One should not evaluate competing causes of death to choose a dominant one so long as D's acts are significant. Significant conveys more substance to a contribution made to the death which is more than negligible.

Environment Agency v Empress Car Co. [1998 HoL]

D charged with polluting waters. They had a precarious diesel tank. It was operated by some unknown person and caused pollution to the river nearby. Could the unknown person's actions be said to be *novus actus interveniens* since the operation of the tank caused the offence, not the keeping of the tank itself.

HELD: the keeping of the tank was a positive act and the escape was caused by the way the company maintained the tank. 'Causing' should be given a common sense meaning. If D did something which produced a situation whereby the matter could escape but a necessary condition of the actual escape which happened was also the act of a third party or natural event, the justices should consider whether that act or event should be regarded as an ordinary aspect of life or something extraordinary.

If the act or event was ordinary, it will not negative the causal effect of the defendant's acts. If it were extraordinary, it might do. The distinction is on fact and degree to which justices shall apply their common sense.

3. Mens Rea

3.1. Identifying Mental Elements in an Offence

3.1.1. Presumption of the Mens Rea Requirement

Sweet v Parsley [1970 HoL]:

Where a statutory provision is silent as to mens rea, there is a presumption that, in order to give effect to the will of parliament, we must read in words appropriate to require men rea. It shall be an essential ingredient of every offence. Even if other provisions in the same statute provide for mens rea, that does not justify a departure from the general rule. The more serious a criminal offence, with its implications on stigma and penalty, the stronger the presumption for the requirement of mens rea.

Justification to depart from the general presumption include: provisions for a public interest;

As a general rule, an honest and reasonable belief in a state of facts, which, if they existed, would make the defendant's acts innocent, would afford an excuse for doing what would otherwise be an offence.

B (a minor) v DPP [2000 HoL]

It is an offence for a man to commit an act of gross indecency towards a child under the age of 14 or to incite a child to do such an act.

As regards the age element, does a presumption apply?

Although the reasonable and honest belief approach was used in *Sweet v Parsley* and others, the common law has been developing towards subjective belief.

Is the mens rea requirement negatived by necessary implication? This will be gleaned from parliamentary intent, wording and nature of the offence. Meanwhile, the more serious the offence (stigma, penalties), the greater the weight attached to the presumption of the mens rea requirement. The intention was to protect children, and a strict liability would not go to punish the culpable minds of offenders.

Although other provisions provide mens rea requirements, the absence of these here is insignificant as the ordinance itself is not coherent.

The prosecution has to prove the absence of D's genuine belief that V was 14 years of age or older – UK Law.

R v K [2002 HoL]

Indecent assault committed by D on V who was under 16. D thought V was over 16.

Same analysis as in *B v DPP* applies. A mistake, however unreasonable on the part of D will avail him until disproved by P.

3.1.2. Implicit Mental Element in 'Possession'

HKSAR v Hung Chan Wa and Asano Atsushi [2005 CA]

Possession denotes some **physical control** or custody of a thing plus **knowledge that you have it in our custody** or control. Knowledge of the nature of the item is also required.

Possession = (control | custody) + knowledge (control | custody)

Rarely is possession in itself an offence since some evil mind is essential in every offence. In the present case, additional knowledge of the nature of the thing he controls is necessary to constitute an offence.

3.1.3. Strict Liability

Gammon Ltd. v AG [1985 PC]

Construction firm deviated from building plans – the relevant provisions did not indicate mens rea,

> There is a **presumption in law** that mens rea is required before a person can be held guilty of a criminal offence;
>
> Justification to exclude the presumption of the mens rea requirement include: regulation of **public welfare** (to ensure those in charge of the relevant activities are made responsible for seeing that regulations are complied with).
>
> **Truly criminal** acts reinforce the need for the presumption of the requirement because innocent people should not suffer injustice through heavy penalties and related stigmatization.
>
> The presumption applies to **statutory offences** and can only be displaced if the legislative **aims can only be furthered** by imposition of a strict liability.
>
> The only situation in which the presumption can be displaced is where the statute is concerned with an issue of **social concern**; Where the citizen has a **choice to participate** in the activity entailing public health, morals and safety, the court may see Parliament as imposing a higher standard of care on those who choose to participate. The presumption is not easily rebutted and will not be so rebutted unless it can be shown that the imposition of strict liability will enhance his vigilance of the law (of other's safety). E.g. if he has control or influence over the matter in question.

AG v Fong Chin Yue [1995 CA]

Recognises that in places of 'strict' liability, a halfway house defence is permissible in that the defendant can prove on the balance of probabilities he believed that the law was complied with.

A defence is permissible where it would **do the legislation no harm** (vigilance maintained), for it to be a defence if the accused proves on the balance of probabilities that the law had been complied with.

Where a provision is cast in terms which appear to impose strict liability, they should merely be understood to impose responsibility for negligence. This negligence can be rebutted by proof on balance of a reasonable mistake upon the defendant. The mistake has to be objectively reasonable to rebut what seems to be a breach of duty.

HKSAR v So Wai Lun [2005 CA]

It was held that it is no defence for the defendant to say that he believed the girl to be over 16 when charged with unlawful sexual intercourse with a girl under 16.

The reason was that **legislative history**, having dealt with such a defence for years, decided to omit it. This removal of the defence was clear indication that the legislature did not intend the defence to stand today.

3.2. Culpable Mental States

3.2.1. Intention

Murder

R v Woollin [1999 HoL]

In murder, there must be a **subjective intention** to either kill or cause at least GBH.

A result in death that can be foreseen as **virtually certain is an intended result** – *Nedrick*.

Where the defendant did not desire death, the jury shall only find intention if they felt sure that death was a virtual certainty and that the defendant knew that.

HKSAR v Lau Cheong [2002 CFA]

It was argued that there is a lack of symmetry between the mens rea of murder and the actus reus causing death.

> It was held that notwithstanding these criticisms, the GBH rule is settled law and in light of the balance between opposing factors, no further narrowing of the rules is permissible.
>
> The GBH rule does not give rise to any presumption of guilt. All elements of the offence need to be proved.
>
> Arbitrariness is not excluded merely because detention is pursuant to lawful procedure. A person who kills another in such circumstances brings to realisation the risk which is inherent in his conduct. As a matter of common sense, it is impossible to predict what the consequences of inflicting GBH may be.

Theft

R v Lloyd [1985 CA]

Defendants 'borrowed' film from the cinema they worked in, made copies, and returned the film.

The issue was the intention to permanently deprive others of it. Of course, it is apparent that they were not intending to deprive others of it – they returned it every time to avoid detection. However, another section provided that such an intention can be deemed if D treats the thing as his own regardless of others' rights. A borrowing or lending can amount to such if it is for a period and in circumstances making it equivalent to an outright taking or disposal.

> It was held that that provision was to clear 'borrowing' unless the intention was to return the thing in such a changed state that it can truly be said that its **goodness had all gone** – e.g. batteries, tickets, etc.

3.2.2. Maliciously/Recklessly

R v Cunningham [1957 CA]

Malicious in the statutory context does not mean wicked, but **foreseeability of some risk of harm**, but proceeding nonetheless.

Assault

R v Venna [1976 CA]

Mens rea in the offence of battery is satisfied by proof that the defendant **intentionally or recklessly applied force** to another.

Criminal Damage

*R v Caldwell [1982 HoL] *OVERRULED by R v G*

Lord Diplock for the majority held that recklessness meant: failing to give thought to possible risks in circumstances where reasonable people would say there was (objective test). In other words, he said that people who ought to have given thought to possible risks were reckless if they did not. His conflicting statements gave the impression that he was struggling with the injustice of the matter but was unable to find a better legal solution.

Lord Edmund Davies approached the matter without touching on the element of recklessness as it stood, but added that a defendant "closing his mind" to a particular risk could prove fatal because one cannot close his mind without first realizing that a risk existed (don't care test).

This is a bad case because justice in the facts required that the drunk defendant be charged. Even Edmund Davies' interpretation of closing his mind may not have rectified the situation either.

Since the offence was one of basic intent, voluntary intoxication could not negative mens rea. As such, a quasi-objective standard applies. That is probably the only way this case can be reconciled since recklessness should not be able to become an objective standard.

R v G [2004]

The court **overruled Caldwell recklessness** in favour of Cunningham Recklessness. In this case, the defendants were children who unintentionally burned down a building and were charged with manslaughter. It was hard to say that they could appreciate any risk from their actions although reasonable men could. An objective standard was not desired because the mind of the defendant itself may not be culpable despite objective standards.

Refining Caldwell Recklessness to take into account reasonable standards of children would widen the door to contentious standards that would be uncertain and ever changing.

Children have special positions in the criminal justice system. As such, the trend to subjectivity gains further legitimacy.

Misconduct in Public Office

Sin Kam Wah v HKSAR [2005 CFA]

Cunningham model taken in Hong Kong

Driving Offences

*R v Lawrence (Stephen) [1982 HoL] *OVERRULED by Adomako*

Reckless driving

1) That D was driving in such a manner as to create an obvious and serious risk of causing physical injury to others on the road (objective test); and
2) In so driving, D did so without having given any thought to the possibility of such a risk, or, having recognised the existence of some risk, nonetheless proceeded to do so (subjective test + don't care test).

Manslaughter

*R v Kong Cheuk Kwan [1986 PC] *OVERRULED by Adomako* Recklessness no longer applied to manslaughter.

A case involving the crashing of two hydrofoils.

It was held that cases of motor manslaughter require:

1) Proof that the vehicle was in fact driven in such a manner as to create an obvious and serious risk of causing physical injury to another; and
2) That the defendant so drove without having given any though to the possibility of there being such a risk, or having recognised the existence of such a risk, nevertheless took it.

Aggravated Assault

R v Savage and DPP v Parmenter [1991 HoL]

D threw a beer glass at V by accident.

It was clear that assault requires intention, did this intent extend to bodily harm as well? The charge was one of assault occasioning actual bodily harm. It was held that the **intention need only extend to the assault**. The 'occasioning' of ABH or GBH should be a causative matter only.

Rape

R v Satnam and Kewal [1984 CA]

In the case of rape, 'recklessness' involves a different concept in its use in relation to offences against the person and in relation with malicious damage. It involves the foreseeability as to the state of mind of the victim – whether she consented or not.

In recklessly disregarding whether she consented or not, D **did not care less** whether she wanted to or not.

3.2.3. Wilful

R v Sheppard [1981 HoL]

In cases of wilfully neglecting the child, P must prove:

1) that the child did in fact need medical aid at the time at which the parent is charged with having failed to provide it; and
2) either that the parent was aware at that time that the child's health might be at risk if it were not providing it with medical aid (Cunningham recklessness) (and subsequently making a conscious decision to refrain from arranging medical examination), or that the parent's unawareness of this fact was due to his not caring whether the child's health were at risk or not (Didn't care recklessness).

Ignorant parents are not prosecuted. Parents are not encouraged in anyway to neglect their children. Parents who don't bother are caught.

HKSAR v Barnes [2000 CFA]

An unqualified person was representing himself as / pretending to be a lawyer.

It is an offence to wilfully pretend to be a solicitor.

Wilful can properly apply to all forms of the actus reus, including 'pretend'.

Also, where D recognises the risks posed by his conduct and takes some **precautions** to avoid those risks, it does not necessarily avail him. Particularly where the precautions are inadequate.

Shum Kwok Sher v HKSAR [2002 CFA]

As discussed before, the offence of misconduct in public office involves a public official who in the course of his office, wilfully and intentionally culpably misconducts himself.

The mens rea is as to wilfully, signifying **knowledge or advertence to the consequences**. As well as an intent to do an act or refrain from doing an act.

3.2.4. Knowingly, Dishonestly

R v Taaffe [1984 HoL]

D smuggled an illegal drug into UK. He had mistakenly believed his cargo to be currency and that currency was an illegal import. He intended to evade an import prohibition. The charge was 'knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug'.

Currency was actually not a prohibited import.

Actual knowledge of not only the smuggling operation, but also that the substance was prohibited was necessary. A mere **knowledge/belief of false facts does not amount to 'knowledge'** so construed in the ordinance.

Theft

R v Ghosh [1982 CA]

The test for dishonesty in theft has been held to be:

1) That the **act could objectively be said to be dishonest**; and
2) That **D must have subjectively realised** that what he was doing was, by those standards, dishonest.

This way, an innocent person who does not pay bus fees because she never had to is not caught, whereas a Robin Hood, subjectively knowing what he does is, by objective standards, dishonest, is caught.

3.2.5. Reasonable Grounds to Believe

HKSAR v Shing Siu Ming [1999 CA]

Receiving money knowing or having reasonable grounds to believe that the relevant person is a drug trafficker, etc.

P must prove that D **subjectively knew of some grounds that common sense, right thinking members of the community would objectively say were sufficient** to establish such a belief.

3.2.6. Negligence

Unlawful Act Manslaughter (dangerous act)

R v Church [1966 CA]

D tossed V into a river thinking she was dead. She died from the tossing.

Proof that an unlawful act was committed and a cause of death is insufficient. **The unlawful act must also be (dangerous) such that all sober and reasonable people would inevitably recognise to be able to cause harm to the victim**, albeit not serious harm.

R v Dawson [1985 CA]

D robbed the premises of V who died of a heart attack.

The proper direction would have been that the requisite harm is caused if the unlawful act so shocks the victim so to cause him physical injury.

The test can only be undertaken upon the basis of a reasonable man with **knowledge to the extent of the defendants** (who knew of the imitation firearm) and not the victim (who knew of his heart condition).

R v Ball [1989 CA]

D assaulted V with a gun, accidentally mixing live and blank shot and subsequently caused death.

Indeed, the assault was unlawful. It was also dangerous in that reasonable men would know that choosing ammo from a mix of live and blank ammunition could potentially cause harm.

R v Watson [1989 CA]

How much knowledge does one attribute to the reasonable person? In Dawson, it was said that the knowledge of the defendant should be attributed. In the present case, the **knowledge of the defendant throughout the entire process** (from the commission of the offence to exit) should be attributed. As such, the defendant should have known that the victim was frail and susceptible to shock.

Gross Negligence Manslaughter

Andrews v DPP [1937 HoL]

Dangerous driving. Negligence shall be interpreted to mean reckless.

A very high degree of negligence is necessary before the felony is established.

R v Adomako [1995 HoL]

D, an anaesthetist, failed to respond to signs that a pipe connection he created had disconnected and his patient had ceased to breathe.

There were two prevailing schools of thought as to what test suited cases of gross negligence manslaughter – the negligence test formulated in *Andrews v DPP*, or the recklessness test formulated in *Lawrence (Stephen)*.

Overrules recklessness as an element in gross negligence manslaughter.

The House thought that *Andrews* had the most authority and proceeded that the ordinary principles of negligence applied to ascertain whether:

1) the defendant had been in breach of a duty of care towards the deceased;
2) the breach caused the death of the victim;
3) that breach should be characterized as gross negligence creating a risk of death and adjudged criminal.

The circularity lies in the process, that the jury has to decide whether a crime is criminal.

4. Problems in Establishing Guilt

4.1. Special Circumstances Negating Mens Rea

4.1.1. Mistaken Beliefs

R v Lamb [1967 CA]

D was mistaken as to whether the gun would fire. He thought the gun was empty and would not discharge a bullet when he pulled the trigger and killed his friend.

Since there was no assault and not unlawful, dangerous act, he could not be charged with manslaughter – the mens rea was absent.

DPP v Morgan [1976 HoL]

The defendants were mistaken as to whether the victim had consented to sexual intercourse. The question was whether such mistaken belief had to be reasonable or not. Recall that in *R v Satnam and Kewal*, the court held that rape can be committed recklessly – without caring whether V had consented or realizing the risks and continuing nonetheless.

On this basis, the majority (3/2) differentiated the case from *Tolson* and said that **reasonableness in belief is not necessary in a defendant's defence**. The mens rea is intent/recklessness to commit non-consensual sexual intercourse. The prosecution must thus prove that the intent went to the 'non-consensual' aspect of the act, and belief whether reasonable or not would raise reasonable doubt as to that matter.

The only part in which reasonableness might play is in the credibility of that belief.

Lord Edmund Davies and Lord Simon dissented from the majority opinion that reasonableness has no major part to play and relied on a bunch of old authorities to restate a conservative law. They were worried in terms of policy that victims might be saddened that the defendant could get off after having inflicted such harm when they fathomed an unconceivable belief. However, this policy argument is flawed because the inconceivability of the belief would go to undermining the true existence of such a belief.

Beckford v R [1988 PC]

Announced *DPP v Morgan* as a landmark decision and applied it to a case of murder – a specific-intent offence.

Whether the plea is self defence or defence of another, if the defendant was labouring under a mistake of fact, he must be judged according to his subjective mistaken belief and not whether the mistake was objectively reasonable or not.

4.1.2. Intoxication

DPP v Majewski [1977 HoL]

D was voluntarily intoxicated and was charged with assault occasioning actual bodily harm.

If a man consciously intoxicates himself, he disables himself from taking the care he might otherwise take. If, as a result, his subsequent actions cause injury, can we say he was lacking both intention and recklessness to discharge him?

> Where a specific intent is an essential element of an offence, intoxication rendering the accused incapable of forming such an intent should be taken into

account. E.g. if he was so intoxicated that he could not form an intent to kill or cause GBH, he should not be guilty of murder.

Although the passage suggests that drunkenness may be available as a defence as long as it affected mens rea, there is much authority to say that drunkenness is no defence to crimes of basic intent. Indeed, if a man intoxicates himself voluntarily, no wrong is done to him by holding him answerable to any harm he may do in that condition. His actions in so intoxicating himself to cast off the restraints of reason and conscience supplies evidence of mens rea and recklessness sufficient for crimes of basic intent.

This is not to say that drunkenness in itself is a crime, but that it is an integral part of the crime and so forms part of a complex act of criminal recklessness.

There is a difference between a totally accidental act and a vicious assault that was caused by one intoxicated person. That intoxicated person can hardly say that what he did was a pure accident. Although strict logic dictates that mens rea is mens rea whether in basic or specific intent offences, the common law on this matter has been founded upon common sense and experience. The public should be protected from such demeaning acts of intoxicated men. We accept that there is certain illogicality here, but it is acceptable because the 'nicer' part of the rule is that removes undue harshness without imperilling safety and the tighter part of the rule preserves safety without being too harsh.

The illogicality is a consequence of policy.

The following impute voluntary intoxication as not good for D:

1) Voluntary intoxication amounts to mens rea / recklessness sufficient for crimes of basic intent. The intoxication is an integral part of the crime. (Main test)
2) If D, due to voluntary intoxication, is unaware of a risk of which he would have been aware had he been sober (objective), such unawareness is immaterial.

AG v Gallagher [1963 HoL]

D had made up his mind to kill his wife. He bought a knife and alcohol to give him Dutch courage. He carried out his intention.

Intoxication *can* prevent a specific intent from forming to constitute the mens rea in specific intent offences. Such intoxication "must render the man so stupid that he does not know what he is doing". Examples include: *R v Moore* (mistaking a baby for firewood.

In this case, D knew full well what he was doing. He was drinking to get the courage to kill his wife.

R v Hardie [1985 CA]

D had a bad relationship with V. D took pills which were not known to 'intoxicate'. D then started a fire in V's home. He was charged with the basic intent offence of criminal damage.

It was found by the court that the taking of Valium was not known by D to be able to render a person aggressive or unpredictable or could otherwise constitute any form of recklessness that would constitute the mens rea for an offence of basic intent.

As such, the defendant did not do anything that could constitute the mens rea of the basic offence and must be acquitted.

R v O'Grady [1987 CA]

D mistakenly believed he was under attack and killed his friend under this mistaken belief.

In self defence, one is allowed to use whatever reasonable force to defend himself whether he was labouring under a mistake or not. It is then up to the jury to decide whether his reaction was reasonable to the facts – whether imagined or true.

Where that mistake was caused by voluntary intoxication, D must fail.

The question of mistake should be distinguished from a question of mens rea.

R v Kingston [1995 HoL]

Majewski does not apply in cases of involuntary intoxication. This is because the defendant had no intent to intoxicate himself. He was not the perpetrator of any recklessness that could attach to offences of basic (and specific) intent (all offences). As such, since involuntary intoxication does not constitute quasi mens rea for the offence, it is a defence if it can be shown that involuntary intoxication caused a mistake or other suchlike action. Of course, if there was intention or mens rea despite the intoxication, then the defence would not stand. A drunken intent is still an intent.

4.2. Transferred Malice

R v Pemblington [1874]

D threw a stone at the people he had been fighting with intending to hit one of them. He unintentionally broke a window instead.

Held that the statute was one that deals with malicious injury to property. The statute prosecuted recklessness and intention. **Mens rea of one offence cannot be imputed to another totally different kind of offence.**

Recklessness was not found on the facts. Intention was not found either. D was acquitted.

R v Latimer [1886]

D aimed a blow at K. It missed and hit V instead. The court held that D was liable for unlawful wounding.

Carrying the case against him further, the statute enacted that: whosoever shall unlawfully and maliciously cause GBH to *any other person* shall be guilty…

The Lords termed his malice as **general malice that could be transferred to another**. His mens rea was transferred from his intended to his unintended victim. This was qualified, however, that an intention to cause GBH to one cannot constitute a charge for murder of another. There must be some compatibility between the crime intended and the crime charged. Differentiated *Pemblington*.

4.3. Coincidence Principle

Thabo Melli v R [1954 PC]

There was a preconceived plot to kill V. V was battered and fell unconscious. D thought V was dead and rolled him over a cliff, killing him. D argued that when they rolled him off the cliff, they had no intention to kill him.

The Lords could not divide up the 'transaction' into parts. They thought it was **one big transaction** which had the mens rea appear first and later, the actus reus appeared an 'coincided' within the same transaction.

The same reasoning applied in *Church* [1966].

R v Hui Yiu Fai [1993 CA]

V was strangled. He was then thrown in the sea for disposal. In fact, he had not died when he was thrown into the sea but was subsequently drowned.

The defence sought to distinguish *Thabo Meli* on the grounds that there had been no pre-conceived plan here.

The court held, following *Tara Chand v R* [1968], that provided there is a sufficiently connected series of acts, the **presence of a pre-conceived changes nothing**.