# Cliffnotes | Criminal Law 2005-6

# Presumption of Innocence

## *Introduction*

This is a product of common law. The prosecution is to prove the suspect's guilt (*actus reus* and *mens rea* elements) beyond reasonable doubt. If issues are provided that raise reasonable doubt, the prosecution must deal with it or the suspect must be acquitted.

*Woolmington v DPP* [1935 HoL]

The burden to prove beyond reasonable doubt is far higher than to prove on the balance of probabilities – this is part of the common law in Hong Kong.

*Kwan Ping-Bong* [1979 PC]

This presumption also has a statutory foundation in the BoRO, which reads: "anyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to the law".

Bill of Rights, art. 11(1)

Legal/persuasive burden

The general rule therefore, is that the prosecution is to prove the accused person's guilt beyond reasonable doubt. This persuasive burden means that the prosecution has to prove all the elements of the offence and disprove all defences beyond reasonable doubt.

Proof beyond reasonable doubt

If the legal burden is placed on the defendant, e.g. in statutory exceptions to the presumption of innocence, the burden, subject to anything contrary, is on the balance of probabilities.

Proof on the balance of probabilities

Evidential burden

There is also the evidential burden. It refers to the need to produce some evidence to raise an issue at trial. This burden can rest with either party, but usually relates to raising defences, e.g. an epileptic seizure resulting in involuntary battery. Once the issue is raised, the mens rea is put into doubt and the prosecution will need to negative that issue by proving it beyond reasonable doubt. If it is not raised, the prosecution need not deal with it – a matter of convenience as the prosecution should not need to disprove all imaginable defences..

## *Exceptions – reversing the burden of proof*

When the legal burden is placed on the defendant, the standard of proof is generally on the balance of probabilities.

### Common Law

Insanity

**Insanity**: the legal burden of proving that a defendant is not sane (or was not sane at the material time) lies on the defendant himself.

Negative averments

S94A, Criminal Procedure Ordinance

**Negative Averments**: This category generally relates to statutory offences and has been codified in s94A of the CPO. An example follows:

1) No person shall have in his possession any firearms unless:
    a) He holds a license for possession of such arms or a dealer's license…

Positive averment

When a charge is laid as per the above example, the prosecution has two assertions/averments. The first is that the accused possessed arms – a positive averment. The second is that the accused did not have a license – a negative averment.

Essential element of offence

The legislation prohibits the possession of firearms and paragraph (a) specifies the means of avoiding liability. That is not an essential element of an offence.

Common law rule

Proving the affirmative of a negative averment by defendant on balance

The prosecution has, of course, to prove the positive assertion beyond reasonable doubt and at common law, since it was held easier for the defendant to prove that he had a license than for the prosecution to prove that he did not, the burden of proof in relation to the negative averment should vest with the defendant on the balance of probabilities.

This common law exception applies whenever a statute contains language amounting to a negative averment.

Section 94A, Criminal Procedures Ordinance

Section 94A CPO:

2) For the avoidance of doubt, it is hereby declared that in criminal proceedings:
    a) It is not necessary for the prosecution to negative (disprove) by evidence any matter to which this subsection applies; and
    b) The burden of proving the same lies on the person seeking to avail himself thereof.

…

4) The matters for which subsection (2) applies are any license, permit, certificate, authorization, permission, authority, purpose, cause, excuse, exception, exemption, qualification or other similar matter.

**Consistency with art. 11(1), BoRO**

In *Lee Kwong-kut*, it was held that some exceptions are justifiable whereas some are not. The prosecution should not shoulder the impossible task of establishing that a defendant does not have a license when it is so simple for the defendant to show that he does.

*Lee Kwong-kut* [1993 PC]

The key issue is to show that the negative averment is not an essential element of the crime, but instead some sort of defence.

Essential element

## Statute

A statutory provision may expressly state that the burden of proving a particular matter lies on the defendant. On the charge of murder and the defence of diminished responsibility:

> It shall be for the defence to prove that the person charged is, by virtue of diminished responsibility, not liable to be convicted of murder.

Where it states "to prove" in the legislation

There are also rebuttable presumptions of fact:

1) Any person proved to have in his physical possession:
   a) Anything containing arms or ammunition;
   b) The keys to any container containing arms or ammunition,

   Shall, until the contrary is proved, be presumed to have had the offending items in his possession.
2) Any person proved or presumed to have had arms or ammunition in his possession shall, until the contrary is proved, be presumed to have known the nature of such arms or ammunition as the case may be.
3) The presumptions provided in this section shall not be rebutted by proof that D never had physical possession of the arms or ammunition.

The double presumption

This section allows the prosecution to obtain a conviction merely by proving beyond reasonable doubt that the accused had the offending item in his physical possession. The remaining elements can be presumed unless rebutted.

Consistency of reverse burdens with art 11(1) BoRO

Because these presumptions deny the presumption of innocence, they may be challenged pursuant to art. 11(1) of the BoRO.

**Introduction to the Bill of Rights Ordinance**

The BoRO preserves the right to the presumption of innocence and places emphasis on legal certainty.

The common law presumption of innocence has to give way to statutory exceptions in accordance with legislative superiority. The Bill of Rights, however, is already a statute.

Sections 3(1)(2) and 4 of the BoRO, before being repealed on 1 July 1997, empowered courts to consider all legislation previous for consistency with provisions in the BoRO and subsequent legislation for consistency with the International Convention on Civil and Political Rights (ICCPR). When a statutory provision was found inconsistent, courts could blue-pencil or repeal it.

The repealing of sections 3 and 4 of the BoRO does not make any significant difference because at common law, statutory interpretation mandates that between inconsistent provisions, the later in time prevail (i.e. between past provisions and the BoRO). The second rule would require that legislation passed after the BoRO need to be construed consistently with the ICCPR.

## Cases on Presumption of Innocence

*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 Sin Yau-ming* [1992 CA]: Defendant charged under Dangerous Drugs Ordinance with 2 counts of possession of dangerous drugs for the purpose of trafficking. The prosecution sought to use the *double-presumptions* in the ordinance: The fact was that D had possession of the keys to the container, so the DDO purported that P could presume the defendant had the drugs in her actual possession and once that was assumed, it could be further assumed that the defendant knew the nature of the drugs.

Were these statutory provisions consistent with the presumption of innocence enshrined in section 3(2) of the BoRO?

The Court of Appeal HELD that the provisions were inconsistent and could not be justified thus they repealed the sections.

Mandatory presumptions of fact are prima facie inconsistent with art. 11(1) because they allow conviction despite reasonable doubt but may be justified upon proof by the prosecution that:

1) There is a rational connection between the fact(s) proved and the fact(s) presumed; and
2) That the presumption is proportionate (does not go beyond the aims sought). Would an evidential burden do the same thing?

Negative averments remain consistent with the Bill of Rights since provisions are only in breach of the presumption of innocence if they place the burden of proving 'essential elements of an offence' on the defendant.

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

> "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.

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

## Cases on 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.

## Unconstitutional Statutes

Statutes that presume facts, e.g. the double presumption of fact in the Dangerous Drugs Ordinance.

Statutes that tell the accused to prove some material element of the offence on the balance of probabilities, e.g. imitation firearms ordinances and summary offences ordinance.

# *Summary of Constitutionality*

## What Makes It Unconstitutional?

- Legal uncertainty.
- Making it the burden for the accused to prove a material or essential element of the offence. This can arise from a 'special defence' which is not, in reality, a defence at all, but a request for the accuse to prove his own innocence.
- Presuming an essential fact or element of the offence unless the contrary is proved.
- The general question is whether the facts may lead to a conviction despite the existence of a reasonable doubt (perhaps not on the balance of probabilities) on some element of the offence.

## Justifications

Exceptions to the presumption of innocence can be justified if:

- They only compel the accused to show some license or similar authorization that is easily and reasonably done. The prosecution will have to have a much harder time trying to disprove or prove the same. These are called negative averments and are codified in s94A of the CPO.
- The offending provision still requires P to prove the substantial elements of the offence. If the provision requires D to disprove his guilt on balance, that is prima facie unconstitutional.
- The provision is rationally connected with the aims (cannot be drafted too wide). Are the facts proved rationally connected to the facts presumed?
- The provision is proportional to the aims sought to be achieved (would an evidential burden suffice, could the same effect come by something else?).
- The exception reasonably imposed.

## Remedy

The provision may either be:

- Read down to an evidential burden; or
- Struck out for being unconstitutional.

# Criminal Responsibility

*'Actus reus'* is the act of the crime without any associated mental element.

It consists of 4Cs: conduct, causation, consequence, and the circumstances surrounding conduct.

It must coincide with *'mens rea'* to form criminal liability. *Mens rea* is the mental element comprised of fault (intention, knowledge, recklessness, etc.).

## *Capacity*

Anyone who lacks the capacity to choose between good and evil may lead us to say that she was not morally responsible for the crime and may negate criminal liability. This follows the philosophy that men are responsible for their own actions and have the capacity to make their own choices.

### Children

**Under 10 years of age**

No child under the age of 10 years can be guilty of an offence.

S3 Juvenile Offenders Ordinance

**10 – 14 years of age**

There is a rebuttable common law presumption against capacity *(doli incapax)* for the prosecution to prove – *Chan Chi Wah*. The most common form of evidence used to rebut the presumption is what the child says when interviewed by the police. It is also possible, but not necessary, to call an expert witness to give evidence on the child's developmental state. Aside from direct evidence, inferences about the child's understanding can be drawn from other factors such as: the normal level of understanding of a child of that age, conduct surrounding the act, home background, appearance in court and past criminal record.

*Chan Chi Wah v The Queen* [1967 CA]

The closer the child is to the age of 15, the easier it should be to rebut this presumption.

**Justifying Doli Incapax**

This rebuttable presumption should not be abolished by statute or otherwise because it protects children who are exposed to the menaces of society and reinforces our institution of presumption of innocence. Although it introduces some uncertainty into the law and runs contrary to some emotionally charged cases involving juveniles and serious cases, it is justified.

Compulsory education does not necessarily mean that a child will more quickly sense what is right from what is wrong, since many criminal acts are conducted by children who don't go to school because of truancy, etc. new media technology has arguably put criminal actions in a new light – see TV, movies and internet. Previously, children began to assume adult responsibilities at an earlier age. Today's children can be said to mature later as they are kept in dependency for much longer.

It is in complex cultures, characterized by rapid social change with an emphasis on individuality with great freedom of choice, and little explicit institutionalization of progressive readjustments of authority as between parents and children, that adolescents are liable to experience serious psychological difficulties that reduce responsibility. These developments do not warrant legal reform but more social reform.

There is no single age where mental development reaches 'maturity'. The circumstances that affect one's understanding between right and wrong are ever-changing and this lends an element of necessity to the *doli incapax* presumption, which in itself, is flexible and can adapt to different circumstances for children aged between 10 and 14.

## Involuntariness

Those who commit offences involuntarily cannot be said to be criminally responsible for it. This will be dealt with mens rea later, but in *AG's Reference No. 2 1992* [1993 CA], it was held that total loss of control of bodily function was necessary to avail a defendant of criminal responsibility. The defendant in the case was charged with reckless driving causing death and at the time, he had partially lost control of the vehicle – sleep-driving and was *largely unaware* of what was happening on the road. For a defence of automatism, only a total destruction of voluntary control will suffice.

# Actus Reus

## *Harmful Conduct / Acts*

### Assault and Battery

#### The Ordinance and Its Provisions

Offences Against the Person Ordinance

S19: Any person who unlawfully and maliciously wounds or inflicts any GBH upon any other person shall be guilty…

S36(b): Any person who assaults a policeman in the dues execution of his duty, or assaults any person with intent to resist or prevent the lawful apprehension of himself shall be guilty…

S39: Assault occasioning ABH.

S40: Common assault. Common assault is not defined by the Offences Against the Person Ordinance. The common law definition is composed of assault and battery – *R v Burstow,* per Lord Steyn.

**'Assault'**

Apprehension of immediate unlawful force, as defined in *Collins v Wilcock* [1984]. Fear is not a necessary element. The force apprehended must be immediate, but that term of time is flexible – *Smith v SWPS* [1983]. Even silence and words unaccompanied by physical gestures can constitute assault – *R v Ireland* [1997 HoL].

**'Battery'**

Personal violence as light as a finger touch suffices – *Collins v Wilcock* [1984].

What is 'lawful' force? Consent is the seed of lawful force. Ordinary social contact is 'consented' to by virtue of yourself choosing to live in society. Necessity is another. Lawful correction and disciplining and self-defence/crime prevention are others. A friendly slap on the back does not amount to a battery – *Tuberville v Savage*. *Collins* is authority that a false arrest (grabbing an arm) exceeding one's duty cannot be generally acceptable and so, is a battery.

**'Bodily Harm'**

*Section 39* refers to assault occasioning actual bodily harm and section 19 refers to grievous bodily harm. This has been interpreted to include recognized forms of psychiatric harm affecting the central nervous system as well but is to be distinguished from mere fear and stress from everyday life – *R v Ireland*.

This is also the proposition for interpreting statutes in everyday light. Words' inclusions of things will change as societal circumstances change.

**'Inflict'**

To 'inflict' does not strictly mean physical contact, but is to be taken to include any form of causation – *R v Burstow*.

**'Indecent Assault'** s122, Crimes Ordinance

What is indecent is to be construed according to a reasonable man's (in his locality) opinion – objective indecency. For indecent assault, assault; objective indecency; and intention, need to be proven by the prosecution – *R v Court* [1988 HoL].

Where the circumstances appear so that an assault cannot possibly be regarded to offend contemporary standards of modesty and privacy by right-minded persons, even the undisclosed intention of the accused cannot make the assault indecent – relying on *R v George* [1956].

Where the circumstances give rise to inherent indecency, there is an irresistible inference that the defendant intended to assault the victim in a manner which right-minded persons would clearly think was indecent.

For indecent assault, the legislation is silent as to mens rea. Parliament cannot possibly have intended that the offence be strict with the stigma and penalty that the punishment carries. As such, the prosecution must prove indecent intent for the offence to stand.

Lord Goff's dissenting judgment in *Court* intends to say that indecency is an objective standard to be objectively assessed on a case by case basis and rarely will any intention be relevant.

If the majority (or minority?) reasoning stands, a forced kiss may not be regarded as indecent assault since a kiss is not objectively indecent and cannot possibly offend contemporary standards of modesty and privacy by right-minded persons.

## Cases

*Collins v Wilcock* [1984]: A police officer grabbed a person's hand for questioning.

THE LAW: An assault is an act which causes another person to apprehend the infliction of immediate, unlawful force on himself. A battery is the actual infliction of the unlawful force.

The law cannot draw a line between varying degrees of violence.

Violence may be lawful if used to reasonably punish children, arrest criminals, self defence and crime prevention. It is also lawful where consented to, e.g. in sports. Implied consent, otherwise a broad category of general social circumstances also makes general social contact lawful. It depends, of course, on what is reasonably necessary for the purpose.

ANALYSIS: The police officer was not in the due execution of her duty. The defendant was entitled to ignore the policewoman. The grabbing of the arm went beyond socially acceptable conduct.

HELD: the Policewoman's conduct amounted to battery.

*R v Ireland* [1998 HoL]: Silent telephone calls – assault occasioning ABH.

THE LAW: Harassment law is too lenient with respect to the damage such conduct can cause. There are two forms of assault that can take place. One being battery, the other being assault.

An assault, being an apprehension of some immediate unlawful force, however, should be able to include a telephone call, having in mind the advances of technology – so, perhaps, can instant online chat. The man calling on another in a dark alley is an example of words causing apprehension of force.

Silence can cause itself to be understood in like manner.

Immediacy is doubted, but depending on the facts, it is easily established. 2 minutes or some 'imminent' arrival of the caller.

ANALYSIS: Battery will not be widened any more to include telephone calls. A silent telephone call can amount to assault if the caller is understood to convey a violent message, and if it appears that his message may be implemented 'imminently'.

HELD: Silent telephone calls constitute assault

*R v Burstow* [1998 HoL]: Psychiatric harm – maliciously inflicting GBH.

THE LAW: the Act was inconsistent in the use of 'inflict' and 'cause'. Therefore, the terms should be used interchangeably. It would be absurd otherwise.

The law should be interpreted to be 'always speaking' wherever possible to take into account societal changes. In the context of the Act, it must be that 'inflict' must be able to extend to the infliction of psychiatric harm. It must also be, that bodily harm is taken to encompass recognized forms of psychiatric illnesses.

ANALYSIS: psychiatric injury was caused by the defendant. As such, in the context of the 'always speaking' act, bodily harm was inflicted upon the defendant.

HELD: the defendant should be so charged.

*R v Court* [[1988 HoL]: Butt slapping – indecent assault.

THE LAW: The law is silent as to intent (indecent intention). Parliament could not possibly have intended that an assault by mere accident, can be converted into indecent assault. Therefore, the prosecution must prove indecent intent.

Where the circumstances appear so that an assault cannot possibly be regarded to offend contemporary standards of modesty and privacy by right-minded persons, even the undisclosed intention of the accused cannot make the assault indecent – relying on *R v George* [1956].

Where the circumstances give rise to inherent indecency, there is an irresistible inference that the defendant intended to assault the victim in a manner which right-minded persons would clearly think was indecent. (This is rebuttable on raising reasonable doubt by D on an evidential burden).

For indecent assault, the legislation is silent as to mens rea. Parliament cannot possibly have intended that the offence be strict with the stigma and penalty that the punishment carries. As such, the prosecution must prove indecent intent for the offence to stand.

Lord Goff's dissenting judgment in *Court* intends to say that indecency is an objective standard to be objectively assessed on a case-by-case basis and rarely will any intention be relevant. The offence will become strict!

If the minority reasoning stands, a forced kiss may not be regarded as indecent assault since a kiss is not objectively indecent and cannot possibly offend contemporary standards of modesty and privacy by right-minded persons.

ANALYSIS: the case involved uncertain indecent circumstances. Evidence of intent should be provided for the courts to assess whether the offence was actually committed.

## Offences Against Property - Theft

S2 Theft Ordinance: A person commits theft if he

Dishonestly – qualified by s3
Appropriates – qualified by s4
Property – qualified by s5
Belonging to another – qualified by s6
With the intention of permanently depriving the other of it.

**'Property'**

Means any property including choses in action (your money in a bank) etc. The bank has a legal obligation to give you hard cash on request. Intangible property including export quotas are also included – *AG v Daniel Chan* [1987 PC].

**'Appropriation'** has been contested

s3(1): Any assumption by a person of the rights of an owner amounts to appropriation. This includes where he has come by the property (innocently or not) and assumed the rights of an owner later by so keeping or dealing with it.

In *Chan Man-Sin v AG* [1988 PC], it was held that trying to draw on another's credit by use of a forged cheque amounts to appropriation. Only the owner of the credit can draw on it. Doing otherwise is assuming the rights of the owner. It is appropriation even though the transaction is a nullity as the customer is entitled to insist the bank to restore the money charged from the forged cheque. Also similarly in *HKSAR v Cheng Lap Sun* [2001 CA], although forged cheques can be restored, it was said that recognizing that the bank has something to restore is to recognize that there was something to restore.

*Lawrence v MPC* [1972 HoL] was, prior to *R v Gomez*, the main authority for the proposition that one can appropriate property even where the owner consents to the taking of it. Intention is separate under 'dishonesty'.

*R v Morris* [1984 HoL]: assumption of *any* of the owner's rights amounts to appropriation. The dicta that implied or express consent negates possibility of an assumption has been overruled.

*DPP v Gomez* [1993 HoL]: Property can be appropriated by even authorized acts if they are dishonest.

*R v Hinks* [2001 HoL]: reinforces *Gomez* in that the acquisition of an outright gift amounts to appropriation. 'Appropriation' is a neutral word given flesh by preceding dishonesty. In *Hinks*, dishonesty was present through the evidence of coersion and the circumstances surrounding the case. However, the 'gift' cases cannot be reconciled with the civil law concept of gift. Under civil law, a person who makes a gift divests himself of any proprietary rights to the property gifted. So by the time a person 'appropriated' the money, it belonged to him already. One cannot steal from himself! This inability to reconcile is strange as theft is a crime against property. See dissenting judgment of Lord Hobhouse. The 'thief' of the gift may be entitled to the property in civil law. The result is that you can appropriate something that belongs absolutely to you, however under s3, one is not dishonest (not guilty of theft) if one appropriates in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps (re picking up things in the street).

## *Harmful Omissions*

*R v Miller* [1983 HoL]: Squatter and mattress fire – Criminal Damage?

FACTS: D lit a cigarette and fell asleep. He woke up seeing the mattress smouldering, and he walked to another room to continue his slumber.

THE LAW: The actus reus was to destroy property, and the mens rea was either intending to destroy or reckless as to whether such property would be destroyed.

ANALYSIS: Recklessness in this context means recognizing the existence of a risk and not doing anything about it or continues nonetheless. In seeing the smouldering mattress, he recognizes the risk posed by his own actions. If he does not do anything within his capability to reduce or negate the risk, he should be liable for the consequences thereafter. We can treat the scenario as one long continuous act also.

PROBLEMATIC CASE

## *Harmful Results*

### Murder and Manslaughter

Although the penalty is established in the OAP Ordinance s2 and s7. These are defined in common law.

Murder has been defined as: "the unlawful causing of death (killing) of a reasonable creature in being by another".

According to *R v Khan and Khan* [1998 CA], manslaughter by omission/gross negligence can only occur if there is a pre-existing relationship between the defendant and the deceased.

**"Reasonable creature in being"**

What is a reasonable creature in being?

Such a creature is capable of living on its own. Life being the ability to breathe and having a heartbeat on its own. Therefore, a 'fetus' relying on its mother to respire is not a reasonable creature in being. The attachment of the umbilical may not be significant since the child thus born may be able to breathe and have its own heartbeat without the cord. A fetus therefore, cannot be the victim of manslaughter or murder. One that is dependant on life support for respiratory functions (brain-dead/brain stem death) may similarly not be eligible as a victim.

Fetus

independent survival

HOWEVER, if assault to the mother caused premature birth, that caused death to the newborn after birth, the actus reus of murder is satisfied.

*AG's Reference #3* [1998 HoL]

Since a fetus is not under the protection of the common law, statute has stepped in as s46 and s47A, B and C. One cannot cause or procure abortion if not an informed medical person.

**"Causing the Death of"**

Brain-stem death

This is usually given, but death should be clearly defined. Death has been traditionally confined to the stoppage of heart and lung movement – the cardio-respiratory test. However, more recently, brain-stem death (stopping reflex respiratory functions and often kept alive by life support) has also been held to be a form of death. Questions also arise as to causation and intervening acts.

Life support machines

*AG's Reference #3* [1998 HoL]

Often, questions arise as to whether stopping life support/feeding/ventilation can constitute killing. An interloper switching off life support without doctors' consent can be regarded as killing – it is an active act that caused death. However, where doctors are concerned, their act is identified as an omission. Unless they breached a duty in their omission, they are not liable. The duty is to do things in the best interest of the patient. If they consider the cessation of life support to be in the best interest of the patient, their omission is not an offence.

Omissions without duty to prolong life.
or
active acts to end life

If, however, the person is brain dead, can the person be killed? Is the cardio-respiratory test valid? Even if brain death is considered a form of death, the defendant may still be charged of intended murder.

Causation and *novus actus interveniens*

If D supplied dangerous drugs to V and V died as a result of taking those drugs, there is no *actus reus* because there was no immediate harm caused by the actual 'supply' and V took the drugs herself – *R v Dalby*. Apparently, V's independent act broke the chain of causation as it essentially overtook the act of supplying the drugs.

Causation can be linked from the start to finish through quite some time, say for example, D stabbed M who prematurely gave birth to V and V, through premature birth complications dies a few days later. D, however, is not liable for murder, but manslaughter. This is because at the time of the stabbing, V was not a reasonable creature in being. Transferred malice is not a valid mechanism and a double transfer (from mother to fetus and from fetus to newborn) is not feasible.

It is to be noted that death is inevitable, especially in the case of terminally ill patients, so causing death means to shorten the life of another person. A doctor is allowed to subscribe painkilling drugs to a patient knowing that the incidental effects would be to shorten the life of the patient marginally. However, a super dose of pain-relief drug is probably murder, since a doctor would know that such a dose would be lethal and the side effects of

shortening the life of V is just too large and conspicuous. It is not the administration of a reasonable dose of drug for medicinal or purposes.

Transferred malice: both targets are reasonable creatures in being. If one is a mother and one is a fetus, there is no reasonable creature in being to target. Malice cannot transfer singly. There must be a double transfer. Transfer to the fetus and then transfer to the reasonable creature in being.

# Consent of Offences Against the Person

Consent is vitiated by force, threats of force, intimidation, etc – *R v Olugboja* [1982 CA]: Efforts made to procure sexual intercourse – Rape? Yes.

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 – *R v Chan Wai Hung* [2000 CFA]. 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.

# Mens Rea

There are 3 states of mind which separately or together constitute the *mens rea* for a criminal offence – Intention, recklessness and negligence. There exist different levels to accommodate different levels of seriousness, social stigma and deterrence.

The principle, stated by Lord Scarman in *Taaffe* is: "that a man must be judged upon the facts as he believes them to be … when the state of his mind and his knowledge are ingredients of the offence with which he is charged.

## *Subjective Standards*

### Intention

There are two types of intention: direct intent and oblique intent. Direct intent is where the consequences of a person's actions are desired. Oblique intent is where a consequence foreseen by the defendant is virtually certain yet not desired but the defendant goes ahead anyway.

> An airplane owner decides to make a fraudulent insurance claim on one of his planes…
>
> i) He plants a bomb on it knowing that when it explodes, some passengers will certainly die but he does not mind and wants this to happen as it will

make his claim more realistic. This is **direct intention** - the consequences of his actions (the deaths of the passengers) are desired.

ii) Alternatively, he knows that some passengers will certainly die, although he can honestly say that he does not want them to die, and would be delighted if they all survived! This is **oblique intention** - the consequences (the deaths of the passengers) were not what he planned, but he nevertheless knew that they would inevitably follow from his actions in blowing up the plane.

(See *R v Moloney* (1985) for examples given by Lord Bridge.)

### Murder

In *R v Woollin* [1998 HoL], the House of Lords noted two steps for murder cases:

1. Whether the defendant had intended to kill or cause GBH; and
2. If D intended neither, they could find intention (they could also find otherwise) if they found that D appreciated that death or GBH was a virtual certainty.

In *HKSAR v Lau Cheong* [2002 CFA], the constitutionality of the GBH rule in murder was challenged for being arbitrary. Because it was a matter of common sense that it was impossible to predict the consequences of an intentional infliction of GBH, the challenge was dismissed.

### Theft

In *R v Lloyd* [1985 CA], D took the film reel from the cinema to make pirated copies and returned the reel in time for showing. Did he steal the reel? The CA held that he did not "have the intention of permanently depriving the other of it". It was also noted that that intent may still be found if D had borrowed the item treating it as his own regardless of the other's rights. The court held that mere borrowing could never amount to theft unless the intention was to return the thing in such a changed state that it can be said all its goodness is gone, e.g. torch batteries, movie tickets.

## Maliciousness / Recklessness

### Cunningham Recklessness

In *R v Cunningham* [1957 CA], it was held that 'malicious' in a statutory offence could not mean 'wicked' and instead should mean an actual intention to do the particular harm; or recklessness as to whether harm should occur (foresee risk yet goes ahead – subjective test as whether he actually foresees).

### Caldwell Recklessness

In *R v Caldwell* [1982 HoL], 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.

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 been very persuasive.

### Couldn't Care Less

The prosecution can prove either that D knew V did not consent; or was reckless to whether she wanted to or not. Mistaken belief may avail D. Reckless **rape** in *R v Satnam* [1984 CA] was defined to mean subjective foreseeability of D's state of mind. Where D couldn't care less about whether she wanted intercourse or not and pressed on nonetheless, he would be reckless.

### R v G Recklessness

*R v G* [2004 HoL] 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.

### Assault

In *R v Venna* [1976 CA], it was said that the dividing line between intention and recklessness was almost invisible and recklessness was applied to assault and battery cases.

In *Savage and Parmenter* [1991 HoL], the House of Lords was asked whether the mens rea of assault occasioning bodily harm need encompass some intention to cause BH. The House held that 'occasioning' was a matter of causation and intention need not touch bodily harm. S19 of the Offences Against the Person Ordinance OAPO is to be construed as not requiring intent to cause nor foreseeability of a wound or GBH.

## Wilful

Wilful encompasses intentional conduct and reckless conduct in the form of Cunningham Recklessness and 'Couldn't Care Less' Recklessness.

### The Origin of the Test

In *R v Sheppard* [1981 HoL], the house formulated the *mens rea* of recklessness as: not arranging for medical examination when the parent was aware that the child's health might be at risk if he did not so arrange (intentional conduct), or that the parent's ignorance of that fact was due to his not caring whether his child's health was at risk or not (reckless conduct).

The stronger the objective facts of negligence, the harder it is to dispel the conclusion that the defendant had indeed known the plight of the child or that they were reckless to his needs.

Such a formulation would not encourage parents to neglect their children nor would it reduce the deterrent to child neglect. It would not afford a defense to parents who did not bother to observe their child's health, or if having done so, did not care whether their children received medical treatment. It would only acquit those parents who only thorough ignorance or lack of intelligence are genuinely unaware that their child's health may be at risk if not examined.

2 dissenting judges citing legislative intent (mischief rule) noted that criminal law has a deterrence effect and that it would sharpen the minds of men and women. They were unable to accept that for the sake of others, these stupid defendants would be let go by virtue of their stupidity. Unfortunately, Parliament has not made this a strict offence and until it is done, respect must be had to the concept of culpability.

From *Sheppard*, one can deduce the following rule for wilfulness:

> One is reckless if: he does not (do what he is supposed to do to absolve himself of liability (negligence) or does what he does) when he is aware of (the risk of the consequences); or that his ignorance of (the consequences) was due to his not caring of (the consequences).

Applied to the offence of misconduct in public office, it would mean that one is reckless if one does not disclose one's purchase of the car shortly before the tax implementation when one was aware that he may commit misconduct; or that one's ignorance of his possible misconduct is due to one's not caring of whether his actions may amount to misconduct or not.

**Applications of the Test**

In *HKSAR v Barnes* [2000 CFA], the Hong Kong courts accepted the formulation of wilfully in Sheppard. It also said where a risk was foreseen, precautions taken may not avail the defendant especially if the precautions were found to be inadequate; relying on *CC of Avon v Shimmen* [1987].

The case of *Shun Kwok Sher* [2002 CFA] discussed misconduct in public office. On the topic of 'wilfully and intentionally', the CFA said that 'wilfully' signifies knowledge or advertence to the consequences as well as intent to do or refrain from doing an act.

## Knowledge

**Actual Knowledge**

In *R v Taaffe* [1984 HoL], the house held "knowingly concerned" in the context of customs law meant knowledge not only of the existence of a smuggling operation, but also that the substance being smuggled was one the importation of which was prohibited. Knowledge was held to be actual. Since D thought he was importing currency, the courts could not say he was committing a criminal offence. He only *believed* he was importing prohibited goods. This belief was false. False belief cannot constitute knowledge.

# *Objective Standards*

## Unlawful Act Manslaughter

*R v Mitchell* [1983 CA] stated that to establish this type of manslaughter it had to be shown:

1. that the accused had committed an unlawful act;
2. that the act was dangerous in the sense that a sober and reasonable person would inevitably recognize that it carried some risk of harm;
3. that the act was a substantial cause of death; and
4. that the accused intended to commit the act (including recklessness if the act's mens rea was that) as distinct from intending its consequence.

**Unlawful Act**

The act leading to death must be unlawful in the criminal sense. In *R v Lamb*, the defendant accidentally shot his friend in the course of playing with a revolver he did not know how to operate. There was no criminal act of assault since his friend did not anticipate any harm. In *R v Arobieke*, the defendant of whom the victim was

terrified of did not give chase and merely appeared. His appearance caused V to run across the tracks and be electrocuted. There was no criminal act to base a charge of manslaughter on.

Consent to suffer actual bodily harm may not relieve D of liability – see *R v Cato* (consent to inject heroin), *Chan Wai Hung* (consent to different nature of act) and *R v Brown* (ABH sustained from consensual masochistic encounters).

### Dangerous Act

The act must be dangerous in that a reasonable, sober person may recognize that it might cause harm (has a risk of causing harm) physical harm to another person.

In *R v Church*, D committed battery against V and wrongfully thinking he had killed her, threw her unconscious body into a river, where she drowned. The defendant was convicted of manslaughter. He had acted unlawfully towards the victim in a way that sober and reasonable people would appreciate involved risk of injury to the victim.

Edmund-Davies provided a definition of dangerousness when he stated: "… the unlawful act must be such as all sober and reasonable people would inevitably recognize must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm…".

In *R v Dawson*, it was held by Watkins LJ, that the reasonable person was to have the same knowledge of the man attempting to rob. There, since the robbers did not know of V's heart condition, it could not be said that D's actions were dangerous in any way.

In *R v Watson*, D committed the unlawful act of burglary but as to whether it was a dangerous act, Watkins LJ held that the reasonable person was to be imbued with all the knowledge gained by D throughout his burglarious trespass. Since by then D would have learnt of the frailty of V, his actions became dangerous.

However in *R v Ball*, it was said that the reasonable person could not be endowed with any mistaken belief held by the defendant. This holding is dangerous because potentially, any non-belief, e.g. that the victim was not of frail status cannot be endowed upon the reasonable person. It is better to say that this case is an abrupt and unnecessary deviation from the trend of subjective culpability. Unnecessary since the facts can be interpreted using the normal process – D knew that live ammo was mixed with blanks and this knowledge, combined with the thinking process of a reasonable person, is sufficient to make his firing of the gun a dangerous act.

## *Hybrid Standards*

## Dishonesty

### The Ghosh Test in Thievery

In *R v Ghosh* [1982 CA], the court struggled between competing schools of subjective and objective thought, coming up with the Ghosh Test which allowed the man who

has never taken paid public transport before to board without paying to be absolved of criminal liability, but disallowed a Robin Hood character to escape:

> An objective test to characterize the conduct objectively; and then a subjective test to see if the defendant knew or was aware that his conduct was dishonest, not by his standards, but by those of reasonable men.

Therefore, the man who did not pay for the bus did not know normal men paid and therefore cannot be said to be dishonest; but Robin Hood knew that normal men did not steal from the rich so he would be dishonest if he did.

## Having Reasonable Grounds to Believe

In *HKSAR v Shing Siu Ming* [1999 CA], a test slightly different to the Ghosh Test was used in the context of money laundering. In essence, the grounds relied upon to believe whatever belief of the defendant must be deemed reasonably able to induce such a belief by the common sense of right-thinking members of the community (objective test). Then the defendant must be proved to have known those aforesaid grounds.

Grounds reasonably able to induce belief?

Defendant knew of those grounds?

### Substantial Cause of Death

Relating closely to assault occasioning bodily harm, the unlawful, dangerous act must be directed at the victim and likely to cause immediate harm – *R v Dalby*. The case concerned a supply of drugs to the victim who died from overdose. The defendant did nothing that directly harmed the victim.

In *R v Mitchell* [1983], V died from a direct and immediate consequence of D's actions. D had pushed a man who fell on a woman who died. The actions were entirely predictable so nothing broke the chain of causation. An act calculated to harm A may be manslaughter if it kills B.

### Mens Rea

The mens rea mentioned related to the act itself. If the unlawful act was done without the mens rea of the defendant, he cannot be liable for manslaughter – see *DPP v Newbury and Jones* [1976 HoL]. Ignorance of the fact that an act was unlawful and dangerous does not avail the defendant. D in this case committed a battery.

## Policy Implications

The requirements of manslaughter then points to the fact that even a minor unlawful act that may be objectively perceived as dangerous causing death may amount to manslaughter.

# Mistake

## *Mistakes of Law*

Mistake as to criminal law is no defence even if reasonable in the circumstances. – *R v Reid* [1973].

However, mistake as to civil law can be a defence in criminal prosecutions – *R v Smith* [1974 CA].

## *Mistakes of Fact*

**Steps in analyzing a mistake**

1. Look at elements of offence.
2. What is the nature of the mistake alleged
3. Does that mistake remove:
    i. *Actus reus*;
    ii. *Mens rea*, foresight, etc.?

### Mistake of fact and *actus reus*

Mistake of fact can cause one to fail to commit the actus reus of a specific offence, but it does not absolve him of *all* crime.

D stabbed V intending to kill him. In fact, he had died already.

D had the necessary mens rea, but did not commit the actus reus of killing him. D cannot be guilty for murder. Perhaps attempted murder.

D shot at V intending to kill him but missed.

That was an attempted murder. There need not be true actus reus for attempts. If the gun is loaded with blanks, D can still be charged with attempted murder.

If V died before the shooting, there is no difference.

In all cases, there is mens rea but a failed attempt of actus reus.

D takes an umbrella from a box believing it to be someone else's. It was, in fact, his own, having left it there yesterday.

This is a mistake as to fact. D has not committed theft.

### Mistake of fact and *mens rea*

More importantly, a mistake of fact can cause one to lack the *mens rea*.

D is in a movie cast. He shoots V thinking he used blank ammunition, in fact, it was live and D killed V.

Note that D has no mens rea though he did commit the actus reus. He may not be guilty of murder.

D takes the umbrella from the stand thinking it was his. In fact, it was taken in my management earlier on. He is not guilty of theft, which requires dishonesty.

**DPP v Morgan*: Morgan invited the three defendants to have sex with his wife. He warned them she might resist and that was how she was turned on. She was dragged

to a double bed. According to V, she was raped. According to D, she was an enthusiastic participant by way of resistance.

> The trial judge directed that if D believed that V indeed consented, there is no rape. That belief had to be reasonable (and honestly held). Reasonable by objective terms – that a reasonable man would entertain if he thought about the matter.

D appealed against the trial judge's direction by way of a reasonable belief to excuse them from the crime.

The House of Lords, by a majority of three to two, held that a defendant was to be judged on the facts as he honestly believed them to be, and thus a mistake of fact would afford a defence no matter how unreasonable it might be provided that it was honestly made. However, the House of Lords applied the proviso to s2(1) of the Criminal Appeals Act 1968 and dismissed the appeals as the jury obviously considered that the defendants' evidence as to the part played by V was a pack of lies (per Lord Cross).

There is a limiting factor to this defence. Lord Hailsham stated: "Since honest belief clearly negatives intent, the reasonableness of that belief can only be evidence determining whether the intent was actually held…"

POLICY ISSUES by Lord Simon, dissenting:

> "It would hardly seem just to dismiss a victim of a savage assault with such comfort as he could derive from knowing that his injury was caused by a belief, however absurd, that he was about to attack the accused. A respectable woman who has been ravaged would hardly feel that she was vindicated by being told that her assailant must go unpunished because he believed, quite unreasonably, that she was consenting to sexual intercourse with him."

He also agreed with Bridge J in the CA, who had said that:

> "The rationale of requiring reasonable grounds for the mistaken belief must lie in the law's consideration that a bald assertion of a belief for which the accused can indicate no reasonable ground is evidence of insufficient substance to raise any issue requiring the jury's consideration."

Nonetheless, *Morgan* is now good law.

It has been confirmed (through obiter) in *Williams (Gladstone)* [1984 CA] and in *Beckford v R* [1987 PC]: D was police claiming to have sent by his superior to deal with an armed man threatening members of his family. There were conflicting statements to the facts. P claimed D shot and killed an unarmed man who surrendered after he first tried to escape – Murderous execution. D claimed that V was running away, he was armed and was shooting other officers – he shot him in self defence.

(Q) Would an honest belief that D was in danger would amount to self defence, even if it was unreasonable?

(a) It is an essential element of all crimes of violence that the violence or threat of violence should be unlawful. It was for the prosecution to show that the defendant's actions were unlawful;

(b) Accordingly, a claim of self defence must be disproved by the prosecution;

(c) If a genuine belief can be a defence to rape because it negatives the necessary intention, so also must a genuine belief in facts which, if

true, would justify self defence: again, such belief negatives the intent to act unlawfully – *Morgan*.

(d) Whether the plea is self defence or defence of another, if the defendant may have been labouring under a mistake as to the facts, he must be judged according to his mistaken belief of the facts: that is to be so whether the mistake was, on an objective view, a reasonable mistake or not;

(e) "Where there were no reasonable grounds to hold a belief it would surely be only in exceptional circumstances that a jury would conclude that such a belief was or might have been held." per Lord Griffiths.

## The Rule

Whether D had the requisite mens rea is determined according to the facts as D believed them to be. Objective standards are only evidence that can infer him to hold those beliefs.

In *B v DPP* [2000 HoL], D was charged with inciting a girl under the age of 14 to commit an act of gross indecency (oral sex) with him contrary to s1(1) Indecency with Children Act 1960. He said he honestly believed V to be over 14.

Lord Nicholls:

> "I would reject the contention that there is a special rule of construction in respect of age-based sexual offences which is untouched by the presumption as explained in *Sweet v Parsley*. Moreover, *Prince's case* is out of line with the modern trend in criminal law which is that a defendant should be judged on the facts as he believes them to be: [*Morgan*; *Williams (Gladstone)*; *Beckford v R*]."
>
> "There has been a general shift from objectivism to subjectivism in this branch of the law. It is now settled as a matter of general principle that mistake, whether reasonable or not, is a defence where it prevents the defendant from having the mens rea which the law requires for the crime with which he is charged. It would be in disharmony with this development now to rule that in respect of a defence under section 1(1) of the Act of 1960 the belief must be based on reasonable grounds."

Lord Hutton:

> "Section 1(1)of the Act of 1960 does not clearly rule out mens rea as a constituent part of an offence, and therefore the crucial question is whether it rules it out by necessary implication …"
>
> "I consider that it would be reasonable to infer that it was the intention of Parliament that liability under section 1(1) of the Act of 1960 should be strict so that an honest belief as to the age of the child would not be a defence. But the test is not whether it is a reasonable implication that the statute rules out mens rea as a constituent part of the crime – the test is whether it is a necessary implication. Applying this test, I am of opinion that there are considerations which point to the conclusion that it is not a necessary implication."

## Mistake, Negligence, and Statute

If the relevant crime is committed by proof of negligence, an unreasonable mistake is no defence and only a reasonably made mistake can avail the defendant. This is

because the mistake is made negligently and that fits in as an ingredient of the offence.

Thus for gross negligence manslaughter, even negligent/reasonable mistakes can avail the defendant but *grossly* negligent mistakes cannot, since that would be part of the crime itself.

Furthermore, statutory terms may state that only reasonable beliefs will excise otherwise lawful conduct.

# *Intoxication*

## Definitions

A person is regarded as being intoxicated if they consume alcohol (*Majewski*) or drugs (*Lipman*) which are capable of:

> "altering mood, perception or consciousness, loosening inhibitions and self-control, impairing movement, reactions, or judgment, or ability to foresee consequences," Card Cross & Jones p148.

### Voluntary Intoxication

A person is voluntarily intoxicated where they have knowingly taken the alcohol, drugs etc, and an error as to the nature or strength of the substance is not relevant:

> *Allen* [1988 CA], where the accused had committed buggery and indecent assault. He argued that he was so drunk that he did not know what he was doing, and that the drunkenness had resulted from an error as to the strength of the drink consumed.
>
> HELD, his appeal would be dismissed. He knew that he was drinking alcohol, and that action did not become involuntary simply because of his mistake.

### Involuntary Intoxication

A person is involuntarily intoxicated where the consumption is not deliberate, or where it is pursuant to a doctor's orders, or caused by a non-dangerous drug:

> *Hardie* [1984 CA], where the accused took Valium following a relationship breakdown. they belonged to his ex-, who had said: "take as many as you like. they are old stock and will do you no harm". He started a fire in the flat where the ex- and her daughter lived, and was charged under s1 (2) CDA 1971.
>
> HELD, allowing his appeal, that intoxication through a non-dangerous drug which prevented the accused from foreseeing the risk involved in an otherwise criminal course of conduct was capable of amounting to a defence.

If the defendant subjectively realized that the drug may cause unpredictable or aggressive behaviour at the time he took the drugs or when he felt the effects, he may be taken to have voluntarily intoxicated himself.

### Basic Intent Offence

A crime is one of basic intent if the mens rea does not go beyond the actus reus of the crime. Involuntary manslaughter is a crime of basic intent as the death of the victim may be caused inadvertently i.e. without intending to kill or cause GBH. In *DPP v Morgan* [1975 HoL], Lord Simon described such offences as:

> "… those crimes whose definition expresses (or, more often implies) a mens rea which does not go beyond the actus reus"

These include offences that can be committed recklessly such as: unlawful wounding, causing ABH, GBH, assault, battery, rape, criminal damage, etc.

**Specific Intent Offence**

Specific Intent: a crime is one of specific intent if the mens rea required goes beyond the actus reus. Murder is a crime of specific intent, as it requires proof of an intention to kill or cause grievous bodily harm in addition to proof of the killing. In *DPP v Majewski* [1976 HoL], Lord Simon noted that:

> "The mens rea in a crime of specific intent requires proof of a purposive element …"

offences that cannot be committed recklessly including: murder, theft, burglary, handling stolen goods, fraud, and attempts of such.

In the light of conflicting decisions, however, it is probably best to record that whether a crime is one of specific or basic intent will depend in large measure on the judicial view as to which of the classifications serves the public interest.

> *Cole* [1993 CA]: the inquiry is not whether the accused was capable of forming the specific intent, but whether he did actually have that intent.

**Recklessness as a basis to say a crime is of basic intent**

(An argument put forward by Lord Elwyn-Jones LC in *Majewski:*

> *R v Richardson* [1999 CA]: V and D were university students who were voluntarily intoxicated and were indulging in horseplay when V was lifted over the edge of a balcony, allegedly by the appellants, and dropped. He fell and was injured. The prosecution case was that the appellants had acted both unlawfully and recklessly, in the sense that D foresaw dropping the complainant would or might cause harm and that they nevertheless took the risk of doing so. The appellants' case was that the complainant had consented to the horseplay and that his fall was an accident.
>
> The recorder directed the jury that they had to consider each appellant's intention on the basis of a reasonable man (i.e. not under the influence of drink) and not under the influence of drink. The appellants were convicted of inflicting grievous bodily harm (basic intent), contrary to s20 OaPa 1861, the mens rea for which requires proof "either that the defendant intended or that he actually foresaw that his act would cause harm" (Lord Ackner in *R v Parmenter* [1992 HoL], and harm meant "some physical harm to some person, albeit of a minor nature, might result". They appealed against conviction on the grounds that the recorder misdirected the jury.
>
> HELD, allowing the appeal, that the jury should have been directed to decide not whether the reasonable sober man would have realised that injury might result, but whether these particular appellants would have foreseen, had they not been drinking, that their actions might cause injury, and that, accordingly, the convictions were unsafe and would be quashed.

**A Test for voluntary intoxication and basic intent offences**

The difference is minor. The questionable direction was whether a reasonable man would have foreseen a risk of injury. The normal question without intoxication is whether the defendant would have foreseen. In the case of (¿voluntary?) intoxication, the question is whether the defendant, had he not drunk, would have foreseen a risk.

## Involuntary Intoxication

Involuntary intoxication may be a defence where the accused does not form the necessary mens rea for the offence. However, where the defendant does possess the necessary mens rea, liability to conviction is not affected:

*AG N. Ireland v Gallagher* [1961]: D wanted to kill his wife. He drank copious amounts of whisky to give him the courage to do the act. He killed her with a knife he bought together with the whisky.

HELD, he obviously had the intent in the first place and a drunken intent is an intent nonetheless.

*Sheehan* [1975 CA]: "a drunken intent is still an intent."

*Kingston* [1994 HoL], where the accused had been drugged by a third party (involuntarily intoxicated), following which he sexually abused a child. The trial judge told the jury that if the accused was so intoxicated through the drugs that he did not form the required intention for the crime, they could acquit him; but if he intended to commit the offences, albeit in an intoxicated state, they could convict. Having heard his admission as to homosexual, paedophiliac tendencies, the jury convicted.

The CA quashed the conviction holding that if the intention would not have been formed but for the intoxication, he was not morally to blame.

HELD: The House of Lords restored the conviction. Lord Mustill said that '*rea*' in '*mens rea*' meant criminally, not morally wrong. Blame related to sentence, not liability to conviction. *Sheehan* was approved: a drunken intent is still an intent.

## Voluntary Intoxication

Where a defendant is voluntarily intoxicated, he may have a <u>defence to a crime of specific intent</u>:

*DPP v Majewski* [1976 HoL], The drunken Majewski caused several injuries with a piece of glass following a pub brawl. He then assaulted the police constable who arrested him. He was charged with ABH and assaulting a constable. He claimed that, as a result of a mixture of drugs and alcohol, he had no recollection of what went on until he awoke handcuffed in a police cell. He was convicted of both offences, and the convictions were upheld by the CA.

HELD by the House, dismissing his appeal, that:

a) there was a rule of substantive law that a person who was voluntarily intoxicated could not rely on that intoxication as an excuse for otherwise criminal conduct.

<u>Evidence of voluntary intoxication cannot negative mens rea in a crime of basic intent</u>;

b) however, where proof of a crime involved proof of an intention to bring about a particular consequence – e.g. causing GBH with intent (<u>s18 OAPA, specific intent offence</u>) – the prosecution has to prove that the defendant had formed that intention, and voluntary intoxication may be argued to show that such intention was absent; but

c) the appellant's offences required only basic intent – a mens rea co-extensive with actus reus – and the rule of substantive law in (a) above applied.

This is a rule in policy and is not logically reconcilable. Those who take drugs that they know can cause violent or unpredictable behaviour should realize the possible consequences (should have foreseen the risk). In a loose sense, they could be said to be reckless – sufficing for the mens rea of basic intent offences.

| INTOXICATION | | | |
|---|---|---|---|
| Involuntary | | Voluntary | |
| Specific Intent | Basic Intent | Specific Intent | Basic Intent |
| *Gallagher* | *Hardie* | *DPP v Majewski* | *DPP v Majewski* |
| If the intent to murder was formed prior to the drink, He is still liable for the crime committed during intoxication since a drunken intent is still an intent. | The accused may rely on involuntary intoxication to show he lacked the mens rea for the crime.<br>If, however, he did actually have the mens rea, he will still be liable since a drunken intent is still an intent – *Gallagher*, *Sheehan* and *Kingston*. | Voluntary intoxication can negative specific intent by preventing D from forming the intent.<br>The prosecution has to prove that the defendant had formed that intention, and voluntary intoxication may be argued to show that such intention was absent | Evidence of voluntary intoxication cannot negative mens rea in a crime of basic intent.<br>TEST: would D, if he were sober, have had the necessary mens rea for the crime in question?; or: would the sober D have foreseen the risk? |

Figure 1: Intoxication and mens rea

## Intoxication and Defences

It is important to balance the duty to direct on intoxication with the existence of other defences where such a direction might be inappropriate:-

*R v Groark* [1999]: D was voluntarily intoxicated. He stole a wallet and set off down the street, searching through the contents. He had been seen by a man called Howell, who alerted V, the man ultimately wounded in the struggle that followed. The evidence of V and a man called Graves differed a little, but it is clear that the jury accepted that those two approached the appellant in what was a lawful attempt to stop the appellant. They forced him to the floor innocuously. While on the ground, the D managed to get out his knuckle-duster and struck V several times in the face and on the head, causing serious cuts. He was then caught, after falling through a roof. Waller LJ, having summarised the facts, presenting the issues in this way:

"The issue of self-induced intoxication was raised in the case initially by the appellant in interview. It was considered to be an issue which merited direction by the learned judge in relation to self-defence. Wounding with intent is a crime, as it is called, of specific intent. Voluntary intoxication is a relevant consideration for the jury when considering specific intent.

Voluntary intoxication does not provide a defence in cases of basic intent or reckless/negligent offences although it would be relevant where the fundamental question was whether the accused had formed a necessary *specific* intent – *Pordage* [1975]. In *Caldwell* [1982] the House held that D's voluntary intoxication was irrelevant in that his failure to advert to the obvious risk of damage to property and danger to life was 'reckless', and that the cause was drink-induced was irrelevant.

> " ... the fact that the respondent was unaware of the risk of endangering the lives of residents in the hotel owing to his self-induced intoxication would be no defence if that risk would have been obvious to him had he been sober", per Lord Diplock.

*Lipman* [1969 CA]: The accused killed his girlfriend after taking LSD. It was held that the claim of voluntary intoxication is not relevant to a charge of unlawful act manslaughter (basic intent), as the offence is not one requiring a specific intent.

## Intoxication and Mistake of Fact

### Voluntay Intoxication

*O'Grady* [1987 CA]: D and V drank 8 flagons of cider. The next morning he went to the police station covered in blood to "report a murder". D said "If I had not hit him, I would be dead myself". D was convicted of the manslaughter of V, and appealed, claiming that his drink-induced mistake as to either the need for, or the amount of force needed did not bar a claim of self-defence.

> HELD Lord Lane: "A sober man who mistakenly believed he was in danger of immediate death at the hands of an attacker was entitled to be acquitted of both murder and manslaughter if his reaction in killing his supposed assailant was a reasonable one".
>
> "… if one allowed a mistaken belief induced by voluntary intoxication to bring that principle into operation, an act of gross negligence (viewed objectively) might become lawful even though it resulted in the death of an innocent victim: the drunken man would be guilty of neither murder nor manslaughter… Reason recoiled from the conclusion that in such circumstances a defendant was entitled to leave the court without a stain on his character. *Majewski* and *Lipman* supported.

### Drunkenness and Rape (Basic Intent)

*Fotheringham* (1989 CA): The accused, voluntarily intoxicated, claimed that he had made a mistake that the person with whom he was having sexual intercourse was his wife, whereas it was actually a 14 year old babysitter. The trial judge directed the jury that the mistake had to be one which would be made on reasonable grounds by a reasonable man.

> HELD: where the self-induced intoxication resulted in a mistake as to identity, such mistake was only relevant if it would have afflicted a sober person - in other words, the self-induced intoxication itself was irrelevant.

*Woods* [1981 CA]: The appellant claimed to be too drunk to realise that his victim was not consenting to intercourse. Voluntary intoxication and basic intent offence – reckless as to whether she consented.

HELD, "… the use of the word 'relevant' [now in s1(2) SOA 1956] means, in this context, legally relevant. The law, as a matter of social policy, has declared that self-induced intoxication is not a legally relevant matter to be taken into account in deciding as to whether or not a woman consents to intercourse", per Griffiths LJ.

### Drunken Mistake

Where intoxication affects the defendant to the extent that he does not form all or any of the necessary mens rea for the offence, the *Majewski* rules apply.

Where intoxication causes the defendant to make a mistake which, if true, would have provided a defence:

> "The view now taken by English courts is that such a drunken mistake, however genuinely believed, is no defence to a criminal charge – not even to crimes of specific intent".

The "Urquart" problem is resolved by *O'Grady* [1987 CA]:

> "a defendant is not entitled to rely, so far as self defence is concerned, upon a mistake of fact which has been induced by voluntary intoxication".

If the same mistake could have been made whilst that person was sober, it appears that his mistake *can* be relied on so far as self defence is concerned.

## Strict Liability Offences

### *Presumption of Mens Rea Requirement*

Where a statute is silent as to mens rea, mens rea is presumed to have to be proved – *Sweet v Parsley*.

Mainly of use in interpreting statutory provisions – many do not explicitly state a mens rea requirement.

A statute may expressly impose liability without proof of mens rea, e.g. Water Pollution Control Ordinance.

### *Rebutting the Presumption of the Requirement*

In *Sherras v De Rutzen*, it was held that there were 3 principal exceptions to the presumption of the requirement, i.e. cases where mens rea did not need to be proved.

1) acts which were not criminal in any real sense, but were acts counter to the public interest and prohibited under a penalty;
2) public nuisances; and
3) cases where though criminal in form, are only a summary mode of enforcing civil rights.

In *Gammon Ltd. v AG*, it was held that the legislation must be construed to determine the legislative intention.

1) There is a presumption in law for the requirement of mens rea;
2) This presumption is strong where the offence is truly strong in character;
3) The presumption applied to statutory offences and will be displaced only by clear or necessary implication;
4) The only situation where the presumption might be displaced is where the statute is concerned with an issue of social concern and public safety;
5) Although a statute may be as (4), the presumption may not be displaced unless it can be shown that doing so will promote the objects of the statute by encouraging greater vigilance to prevent the commission of the act.

A statute usually has some express requirement of mens rea, e.g. maliciously, wilfully, permits and allows.

If there is no express indication, one needs to see if mens rea is impliedly required.

**Statutory Wording**

The presence of a mens rea requirement in other provisions in the same statute may be relevant, mut according to *Sweet v Parsley*, that is not sufficient in itself to justify the creation of an absolute offence.

**Subject matter and purpose of statute**

Statutory offences that are truly criminal in character or are not concerned with public safety, welfare and concern may rebut the presumption. Such ordinances involve construction safety, food handling, etc. rebuttal of the presumption in such statutes would make the person choosing to do these activities more careful.

Whether an offence is truly criminal in nature involves looking at the penalties, stigma and overall seriousness of the offence.

## *Constitutional Challenge*

In the district court case of *R v Hui Lan-Chak*, it was held that the Bill of Rights/ICCPR did not render strict liability unconstitutional. It did not infringe the presumption of innocence in Article 11(1) of the BoRO. More authoritatively, in *Fong Chin-Yue* it was held so because an offence of strict liability is an offence arrived to by process of construction. The human rights tendencies of a construction apply to determine what a penal provision means. As such, strict liability per se is not inconsistent with the Bill of Rights.

## *Protecting the Innocent from Strict Liability*

**Legislative Measures**

Legislation may provide for the defendant to prove various factors to prove her innocence. Such legislation is open to constitutional challenge by virtue of infringing on the presumption of innocence.

Mistaken belief and actions taken with due diligence can also be imposed as defences by legislation. Due diligence defences, though requiring proof by the defendant to prove his innocence, are no unconstitutional – *Gammon*.

**The Halfway House**

In the UK, the issue has been decided by Re B (a minor), House of Lords – the defendant cannot prove his own innocence because of the *Woolmington* principle. Once D had raised reasonable doubt (whether mistake reasonable or not), it is up to the prosecution to prove beyond reasonable doubt that D was not labouring under any mistaken belief (whether reasonable or not), that he must have known he was breaking the law or was reckless as to whether he was. As such, they have gone the whole way.

In Canada, in cases of strict liability where P does not have to prove mens rea, D may avoid liability by proving on balance that he took all reasonable care or reasonably believed in a mistaken set of facts.

The reason a provision silent as to mens rea may afford a defence in having D to say he had no *reasonable* belief to believe what he did was wrong is because strict liability offences are designed to further legislative aims to prevent negligence. If D was negligent in making his mistake, providing a defence of pure honest belief would not further the legislative aims and would not satisfy the law.

In Australia, the burden is merely evidential and once reasonable doubt is raised, P must disprove D beyond reasonable doubt that his mistake was unreasonable or he did not hold it at all.

In Hong Kong, Bokhary JA in *Gammon*, stated that the presence of such a defence (if D proves on balance that he believed honestly and reasonably the law had been complied with) would not harm the legislative aims. This defence was consistent with the Bill of Rights and met the criteria in *AG v Lee Kwong Kut* for justifying any onus placed on D.

Since these are only PC and CA decisions, it remains to be seen whether HK will follow the UK whole-way approach or affirm the halfway house approach.