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## The Elements of Criminal Offences

### Burdens and standards of proof in a criminal trial

	<u>Crown</u>	<u>Accused</u>
<u>Evidential burden</u>	Never	Any defence (self defence, extreme provocation, insanity)
<u>Legal burden</u>	All offences in this course	Defence of insanity

1. **Does the accused have an evidential burden in respect of [the defence]?**

- a. Yes.
- b. [Fill in with defences and authorities as the course progresses](#)

2. **If so, has the accused met the evidential burden?**

- a. Where the legal burden is on the Crown and the evidential burden is on the accused (i.e. all defences except for insanity):
  - i. The accused meets his/her evidential burden if there is Evidence which, taken at its highest in favour of the accused, could lead a reasonable jury, properly instructed, to have a reasonable doubt that the Crown had failed to disprove the defence: *BRAYSICH*
- b. Where the legal burden and the evidential burden rest on the accused (i.e. insanity):
  - i. The accused meets his/her evidential burden if there is evidence which, taken at its highest in favour of the accused, could lead a reasonable jury, properly instructed, to conclude on the balance of probabilities that the defence has been established: *BRAYSICH*

3. **What is the consequence of the accused meeting/ not meeting the evidential burden?**

- a. If the accused meets the evidential burden, the trial judge may submit the defence to the jury (fact finder): *Braysich*
- b. If the accused does not meet the evidential burden, the trial judge will not submit defence to the fact finder: *Braysich*
- c. Who bears the legal burden and has that party met it?

4. **For all offences and defences except insanity:**

- a. The Crown bears the legal burden, which means that the Crown must prove the elements of the offence and disprove any defence beyond reasonable doubt: *Woolmington*.

5. **Meaning of reasonable doubt**

- a. A reasonable doubt is what a reasonable jury considers to be a reasonable doubt: *Dookheea*.

6. **What the trial judge can tell the jury about reasonable doubt**

- a. It is generally undesirable for a trial judge to explain reasonable doubt to a jury beyond observed what the expression means what it says and that it is for the jury to decide whether it is left with a reasonable doubt: *Dookheea*.
- b. The high court has encouraged a trial judges to contrast the standard of proof beyond reasonable doubt with the standard of proof on the balance of probabilities: *Dookheea*
- c. If there is a reasonable possibility of a matter, then there is a reasonable doubt as to that matter: *Moore*. Trial judges can sparingly use the language of "reasonable possibility" during their directions, so long as this language does not convey the false impression that there is a legal burden on the accused to show a "reasonable possibility" of any matter: *Hadchitir; Moore, Lane, Towney*.
- d. Contrasting "reasonable doubt" and "any doubt":

- i. It is generally undesirable for a trial judge to contrast reasonable doubt with any doubt, but is not necessarily erroneous to do so: *Dookheea*.
- ii. If a trial judge mentions this distinction, the question is whether the words spoken in the directions are such that the jury would have derived a false perception for deciding whether the crown has driven its case: *Dookheea*.
- iii. Based on the high court's explanation of "reasonable doubt", a false perception is any conception of reasonable doubt inconsistent with what a reasonable jury considers to be a reasonable doubt: *Dookheea*

## 7. For the defence of insanity:

The accused bears the legal burden, which means that the accused must prove the defence of insanity on the balance of probabilities: [insert authority later in course](#)

## Mens rea element in offences created by statutes

Subjective liability --? Offence with a subjective mens rea element like knowledge or intention

Strict liability → no mens rea other than a defence of honest and reasonable mistake of fact

Absolute liability → offence whereby commission of actus reus is guilt of offence (rare)

**Trigger:** an offence in a statute silent on the mens rea

Whether X can be convicted of the offence created by S Y of Z statute depends on the mens rea element created by the offence (if any). That question is determined by reference to the presumptions articulated by Gibbs CJ in *He Kaw Teh*, approved by the NSW Court of Criminal Appeal in *Wampfler*.

[Specify actus reus elements and work out using the below what mens rea (if any) applies to each actus reus].

### 1. Is there an original obligation on the Crown to prove the mens rea element?

- a. The first question is whether there is the presumption that there is an original obligation on the Crown to prove mens rea: *He Kaw Teh* (Gibbs CJ).
- b. **Factors:**
  - i. The seriousness of the offence, as judged by the penalty attaching to the offence, scales with the likelihood that Parliament intended a mens rea in the sense of 'guilty intention' or 'guilty knowledge' *He Kaw Teh* (Gibbs CJ)
  - ii. The stigma attaching to the offence is a relevant factor, based on the High Court's statement in *CTM* that the words "sexual predator" are not apt to describe children above the age of consent who have sex with similarly aged children below the age of consent.
- c. **Example:**
  - i. Gibbs CJ took from the life imprisonment penalty for the drug importation offence at issue in *He Kaw Teh* that the offence imposed a mens rea requirement that the accused *knew* he was importing a narcotic substance.

### 2. If not, does the offence create a defence of honest and reasonable mistake of fact?

- a. The next question is whether second presumption in *He Kaw Teh* has been rebutted. If it has not, the offence is one of strict liability, such that a defence of honest and reasonable mistake of fact must be negated by the Crown beyond reasonable doubt if the accused meets his/her evidential burden to raise the defence: *He Kaw Teh*.
- b. Only express language or necessary implication can rebut this presumption: *CTM*
- c. **Example:**
  - i. The repeal of a limited defence under the legislation in question that resembled the defence of honest and reasonable mistake of fact was not sufficient to rebut the interpretation of an offence of having consensual sexual intercourse with a child aged between 14 and 15 as imposing a defence of honest and reasonable mistake of fact: *CTM*.

### 3. If not mens rea plays no part and guilt is established by commission of the actus reus offence

- a. BE CAREFUL ABOUT ENDING UP HERE

## Defence of Honest and Reasonable Mistake of Fact

### 1. Evidential Burden Met?

- a. The accused must point to evidence from which it could be inferred that the accused had an honest and reasonable belief in a mistaken state of affairs, which if they existed, would make the accused's act innocent: *Proudman v Dayman*; *He Kaw Teh* (Gibbs CJ). If the accused is successful, the crown has the legal burden of negating the defence beyond reasonable doubt. *He Kaw Teh* (Gibbs CJ).

### 2. Belief

- a. The state of mind required to meet the 'belief' element depends on the interpretation of the state in question: *State Rail Authority*
- b. **Types of Belief**
  - i. A positive belief in the requisite state of affairs: *State Rail Authority*. Gleeson CJ said this belief would satisfy the element on the facts of *SRA*.
  - ii. After consideration of the matter in a general way, a view that there is no reason to doubt the existence of the requisite state of affairs: *State Rail Authority*. Gleeson CJ said this might satisfy the belief element depending on the facts of the particular case: *SRA*.
  - iii. No thought about the subject at all: *SRA*. Gleeson CJ said this belief would not satisfy the element on the facts of *SRA*.
- c. **Factors that go to choosing the type of state of belief required**
  - i. Parliament's purpose for enacting the offence: *State Rail Authority*
    1. In *SRA*, Gleeson CJ considered that a pollution offence which imposed criminal liability on a corporation required a positive belief in the requisite state of affairs because of the statute's pollution prevention purpose.
    2. The seriousness of the offence in *He Kae Teh* was used by both Gibbs CJ and Brennan J to determine the mental element applicable to the drug importation offence. There is no reason in principle why the same reasoning cannot be used to distinguish between the type of belief required to discharge a defence of honest and reasonable mistake of fact.

### 3. Honest Belief?

- a. [Unless there are facts indicating otherwise, say something like "there is no suggestion that the accused's belief was not genuinely held, so it appears difficult for the Crown to disprove this element beyond reasonable doubt."}]

### 4. Reasonable Belief?

- a. [Consider the facts of the case to determine whether the belief was reasonable]

### 5. Belief in a state of affairs that, if they existed, would make the defendant's act innocent

- a. The belief must be such that, if true, the accused would not be guilty of a criminal offence: *CTM*.
- b. **Principle:** The belief must be in one of *fact*, not of *law*. Ignorance is no excuse: *CTM*.

# Homicide: Murder

## Murder

The accused is guilty of murder if the Crown proves beyond reasonable doubt that the accused, without lawful justification, committed an act or omission causing the death of another, with intent to cause death or grievous bodily harm, or with reckless indifference to human life: *Crimes Act s 18(1)(a)*.

The victim is dead if there is irreversible cessation of all function of the victim's brain or irreversible cessation of blood in the person's body: *Human Tissue Act 1982* (NSW) s33.

### 1. Act or Omission Causing Death

Act: Where there are two or more acts/omissions that are capable of being regarded as the one causing death, the fact-finder (usually, the jury) is responsible for deciding which of the acts is the relevant one: *Ryan* (Barwick CJ); *Royall v R*

Omission: X's omission can only found liability for murder if X owed a duty to the deceased: *R v BW & SW*

#### *R v BW & SW – Omission Causing Death*

- **Facts**: The accused parents failed to provide adequate nourishment and medical attention to seven year old child, and at least for a few weeks, watched her deteriorate. Trial judge refused application for directed acquittal.
- **Held**: Accused parents convicted. Conviction upheld on appeal

### 2. Causation of Death

If causation is straightforward and no intervening conduct: The accused [did some act/omission to the deceased] and the deceased died. The jury would have no difficulty in concluding beyond reasonable doubt that the accused's act/omissions was a "substantial cause" of death; *Smith*; *Hallett*; *Bingapore*.

If causation is not straightforward and there is possible intervening conduct: The generally accepted test for causation is whether the accused's act was a "substantial or significant cause of death"; *Royall* (Deane and Dawson JJ); *Swan v R* [2018] NSWCCA 260 at [90]. Only if it can be said that the original act is merely the setting in which another cause operates can it be said that the death does not result from the accused's act: *Smith*; *Hallett*; *Bingapore*.

#### Where the alleged intervening conduct is the act of a third party

- a. Point out subsequent treatment of *R v Jordan*
- b. Point out [English Court of Appeal] said in *Cheshire* that only "in the most extraordinary and unusual case" will medical treatment break chain of causation
- c. Say substantial and operating cause test, citing authority below
- d. Try to bring facts of the question within the scope of *Smith*, *Evans*, *Gardiner* and/or *Cheshire*

#### *R v Jordan* -

- **Facts**: Stab wound penetrated intestine, but was mainly healed at time of death, Victim showed himself to be intolerant to a drug given to him by doctors. More drug injected in a way that two medical experts said was palpably wrong. Chain of causation broken.
- **Held**: Stab wound not operating cause of death.

#### *R v Smith*

- **Facts**: Soldier stabbed other soldier (victim) in fights. Victim dropped twice while being carried to medical reception station, Given wrong treatment at reception and had he been given the right treatment (blood transfusion), a medical expert concluded his chances of recovery were as high as 75%.
- **Held**: Court said that at time of death since the original wound was "an operating and substantial cause", the wound could properly be said to cause death, albeit that some other cause operated. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that death does not result from the wound. In other words, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound.