

Physical Element

1a	Conduct - Act	Act (most common) – a positive doing which constitutes the physical element
1b	Conduct - Omission	Omission (where statutory or common law duty exists) – where you've failed to act when required to do so e.g. advising Centrelink when you've had a change situation Note: there aren't many obligations to act in criminal law
1c	Conduct – State of affairs	State of affairs (e.g. possession, unlawful on premises, being a member of an illegal organisation) – most controversial Sometimes referred to as 'status offences' as the element criminalises the status of the D
2	Circumstance	External to accused – not always required <ul style="list-style-type: none"> - Sex with an adult – lawful; sex with a 10-year-old – not lawful - Sometimes something about the circumstance will make the offence more serious - e.g. which deaths must be reported
3	Result (or consequence)	Not always required <ul style="list-style-type: none"> - For murder: someone actually dying - irrelevant what conduct was undertaken which caused the death

+ statutory defence: within the wording of the statute, is there a defence.

+ strict liability and mental impairment defences

DIFFERENCE BETWEEN CIRCUMSTANCE AND RESULT

- Circumstance elements will pre-date or coexist with the conduct involved in the offence
- Result elements will postdate the conduct
- Conduct performed in a particular circumstance may amount to an offence, as may conduct which produces a particular result

Distinguishing between physical elements

R v Falconer (1990) 171 CLR 30 - Shot and killed her husband

The HCA asked what is the act?

- Muscular movement of A's body – ie contraction of trigger finger, or
- Discharging of the loaded gun, or
- entirety which commences with the contraction of the trigger finger and ends with the fatal wounding of the deceased

Decision

- 'In one sense, it can be said that the discharge of a gun is the consequence of a bodily movement of contracting the trigger finger. In our opinion, however, a consequence which the bodily movement is apt to effect and is inevitable and which occurs contemporaneously with the bodily movement is more appropriately regarded as a circumstance that identifies the character of the "act" which is done by making the bodily movement'
- 'the act with which we are concerned in this case is the discharge by Mrs Falconer of the loaded gun; it is neither restricted to the mere contraction of the trigger finger nor does it extend to the fatal wounding of Mr Falconer'
- Muscular movement of pulling trigger (**act**)

Conclusion

- Discharging the loaded gun (**contemporaneous and inevitable consequence of it the act = circumstance**)
- Fatal wounding of husband (**result**)
- **Main point – bodily action** is different to the **consequence caused by it**

Fault element

Remember, there is no exhaustive list of fault elements.

Subjective

INTENTION – English language meaning <u>Zaburoni v The Queen</u> [2016] HCA 12 <ul style="list-style-type: none">- Passing on HIV (knew that there was the risk)- = not the same as intending the result (of infection)	Proved by <ul style="list-style-type: none">• Words• Conduct• Inferences from words and conduct• Forensic• Context and history
RECKLESSNESS – technical legal meaning	<ul style="list-style-type: none">• Turn mind to the consequences and act anyway• Foresee consequences and act anyway• Aware of risk and act anyway [remember = subjective, not 'you should have known' (= objective)]
KNOWLEDGE – English language meaning	<ul style="list-style-type: none">• Rarely meaningful difference to intention• Must be consciously aware at the relevant time• Uncompromising definition - certainty
BELIEF - English language meaning	<ul style="list-style-type: none">• Less than knowledge• More than suspicion• 'The D acted (or omitted to act) with the belief that certain facts were true, albeit with some doubt or doubts as to their existence' – Bagaric and Arenson• The use of 'belief' can convict someone who think they are committing an offence, but are in fact acting lawfully

+ some additional possible FEs: purpose, carelessness, wilful (generally imported to mean reckless) etc.

Objective

NEGLIGENCE	<ul style="list-style-type: none">• Reasonable person test or reasonable sober person test (depending on offence)• Focus on manslaughter in this course• Usually the negligence FE is express
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****REMEMBER – the physical and fault elements must be present at the same time****

Process for element analysis problem

The law

Element Analysis

- Identify physical element
 - e.g. is it omission, circumstance, result, etc
 - Make a note of what the statute indicates – every part
- Identify fault element
 - e.g. awareness, belief, knowledge, etc – did they turn their mind to it?
 - Remember, P has burden of proving the fault element
- Identify inherent statutory defences
 - e.g. 'Unless the person believes on reasonable grounds the death has already been reported
 - Objective = reasonable grounds
 - Subjective = actual belief

The client

Assessing liability

- Clarify definitions
- Voluntariness
 - Very high threshold – subconscious impairment
- Apply facts to elements
 - Has there been e.g. an omission?
 - Identify the facts from the case file which support this, are any more needed?
 - What parts of the case file indicate the FE e.g. awareness?
 - Witness statements, coroner's reports [timing of death is important], is more information needed?
- Apply facts to statutory defence
 - Witness statements, psych reports [although these can be general so be careful] etc
 - If it's a death, did A do anything to the body?
 - e.g. check pulse, look after them thinking they're alive?
- Look at what type of offence it is – is it summary, minor indictable, major indictable

Strategy – Consider

- Seriousness of the offence (classification on the Information, or penalty/*Summary Procedure Act 1921* (SA))
- Burden of proof of the statutory defence
 - Defendant has the evidential burden, P must disprove
- Other defences
- Evidential issues affecting proof
 - Have to line up the PE and FE
 - It is specific to the D, e.g. general domestic violence info is not enough
- Alternative charges
- Whether to plead guilty, plead not guilty (explain grounds), negotiate alternative with police, other action

He Kaw Teh Analysis

If, in the exam, there is a problem question with a statute which does not have a defined fault element, then utilise the following analysis.

The HKT Case

- In 1982, HKT was charged with possessing and importing a large quantity of heroin from Kuala Lumpur to Melbourne after customs officials found him in possession of a bag with a false bottom that contained heroin.
- There was no doubt that he transported the drugs – but he said he didn't know they were there.
- Did it matter – as a matter of law - if HKT didn't know the drugs were in his bag?
 - [separate issue of whether a court would believe he didn't know they were there – think Schappelle Corby]

The relevant legislation

Customs Act 1901 (Cth) s 233B(1)

[THE IMPORTATION OFFENCE]

Any person who -

(b) imports, or attempts to import, into Australia any prohibited imports to which this section applies or exports, or attempts to export, from Australia any prohibited exports to which this section applies; or

[THE POSSESSION OFFENCE]

(c) without reasonable excuse (proof whereof shall lie upon him) has in his possession, or attempts to obtain possession of, any prohibited imports to which this section applies which have been imported contravention of this Act;

shall be guilty of an offence.

Court decisions

Lower Court

- [15] Wilson J 'the trial judge directed the jury that it was for the applicant to satisfy the jury on the balance of probabilities that he honestly and reasonably believed in the existence of a state of facts which if they had really existed would make his act innocent. That direction was upheld by the Court of Criminal Appeal'.
 - Put burden of proof on the applicant [balance of probabilities] → made it a strict liability offence and put burden on defendant where we wouldn't usually

High Court

- HKT appealed – arguing *mens rea* was required
- HCA considered whether it was an offence of strict liability or full fault
- The case (Brennan J) established a process that is still used when a statutory offence does not specify or imply whether or not a fault element is required. The process starts from the presumption of *mens rea* and then works through various issues to see if the presumption is rebutted and the offence is actually one of SL or AL. This process is the HKT analysis or method, based on HKT presumptions that apply when the words of the statute are inconclusive as to the requirement of proof of fault.

The findings

Both importation and possession offences were full fault because:

- Quasi fault element inherent in concepts of importation and possession
- Nature of the offence – truly criminal, high stigma, life imprisonment
- No particular difficulties in proving fault (i.e. enforcement)

[32] Gibbs J

- under 's.233B(1) the prosecution bears the onus of proving that the accused knew of the existence of the goods which he brought into Australia, or which were in a

suitcase or other container over which he had exclusive physical control, as the case may be. The proper direction on the first charge was that the prosecution had to prove that the applicant brought the suitcase into Australia, **knowing** that the heroin was in the case. On the second charge the jury should have been told that they could not find that the applicant had the heroin in his possession, unless they were satisfied that he knew that it was in the suitcase. ‘

HKT analysis is only needed where:

- A statutory offence does not specify or imply whether or not a fault element is required i.e. the words of the statute are inconclusive as to the requirement of proof of fault.

HKT analysis is not needed:

- where the fault element is specified or implied in a statute e.g. rape
- where the fault element has been established by case law e.g. murder
- to answer a problem question

The decision that a HKT analysis is required (the when question) raises the issue of the nature of the HKT process (the how question).

How is the type of liability determined?

Step 1 – Element Analysis	
(1) Identify the Physical Element	<ul style="list-style-type: none"> • A PE must be specified for every offence • Look at the above table: Act, Omission, State of Affairs, Circumstance, Result • PE in the same offence may have different types of liability attaching to them so it is important to separate them • In many statutory offences the PE will be the title of the provision e.g. CLCA 32A Throwing objects at vehicles
(2) Identify any express Fault Elements	<ul style="list-style-type: none"> • An FE may not be specified for every offence (hence HKT analysis) • FEs are expressed through the words intention, recklessness, knowledge, belief
(3) Identify any implied Fault Elements	<ul style="list-style-type: none"> • Difficult • FEs may be implied by the nature of the PE – e.g. ‘possession is a concept which contains within it a mental element’: HKT • e.g. trespassing implies a knowledge that the conduct is illegal
If a fault element is identified – no further action is required.	
If a fault element is not identified – go to Step 2	
Step 2 – The First Presumption	
1 st Presumption = Prosecution must prove fault (that it is a mens rea offence) – most favourable to defendants	
Consider factors that displace or uphold the presumption	<ul style="list-style-type: none"> • Truly criminal (consider penalty and social stigma) – tends to uphold presumption • Grave social evil - tends to rebut presumption • Subject matter - public health tends to rebut presumption • Would proof of knowledge effect enforcement? [e.g. it would make it nearly impossible for P to prove BRD] if yes - tends to rebut presumption

	<ul style="list-style-type: none"> Would SL or AL be unjust because D could not safeguard self from liability? (consider importation of drugs) if yes - tends to uphold presumption
Bottom line	Should D be able to argue 'not guilty – no requisite state of mind' OR have to take precautions to prevent committing the crime (consider sex offences against children)
If presumption is upheld – it is a full fault offence and no further steps required	
If presumption is rebutted – it is not a full fault offence, go to Step 3	
Step 3 – The Second Presumption	
2 nd Presumption = liability is Strict, not Absolute - next most favourable to defendants (because gives defence of HRMF)	
Consider factors that displace or uphold the presumption	<ul style="list-style-type: none"> Purpose of statute Subject matter of statute Wording in similar legislation Safeguarding public health - if yes - tends to rebut presumption Would AL create 'luckless victims' ie punish accidental behaviour?: <u>Lim Chin Aik v The Queen</u> (1963) AC 160 - if yes - tends to uphold presumption Post HKT – South Australian case of <u>R v Clarke</u> (2008) 100 SASR 363 suggests AL will be found in sexual matters involving children
Bottom line	Should D be able to argue honest and reasonable mistake of fact?
If presumption upheld – it is an offence of strict liability, P must prove D was not honestly and reasonably mistaken - no further steps required.	
If presumption rebutted – it is an offence of absolute liability - no further steps required.	

Concluding points on HKT:

- HKT only determines what liability attaches to a particular *offence* – nothing about a particular *defendant* or a particular *case*
- After HKT analysis, we apply facts and evidence to the elements of the offence as we have determined them.
- If the statute is inconclusive, look to these questions:
 - What is the severity of the penalty?
 - What is the nature of the subject matter regulated by the statute? Food? Health? Safety?
 - Does conviction involve moral stigma?
 - What is the purpose or policy of the statutory provision?
 - Would the legislation achieve its purpose if the prosecution is either:
 - required to prove fault; or
 - must disprove a defence of reasonable mistake?
 - Would SL deny individuals a fair opportunity for compliance?
 - Does the statute provide a statutory defence that pre-empts the common law defence of reasonable mistake?
 - Is the legislation primarily directed against corporations or individuals?