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# Criminal Law Week 3 Notes: Dishonesty Offences

## Lecture:

### Part 1:

- Part five of the CLCA. No need for He Kaw Teh because the elements are settled.
- Larceny is that from which the current SA offence of Theft was developed.
- Peppercorn can be the subject of a theft charge.
- When discussing larceny, ensure you specify all of the things that could be the subject of a count.
  - The charge is theft but there could be more than one count of theft.
    - Money and bottles could be two counts – two separate acts/conduct
- Section 330: no defence to a charge under crime A that you should have been charged under crime B.
  - Charge in the alternative as generally the only difference in crimes as you go down is the fault element.
- Analyse whether it will sustain a conviction of theft, then deception, then a further satellite offence.
  - Have to measure the strength of the case on each charge. Key to plea bargaining, advising client.
  - Shows which cases are likely to stick **(Do this in exam)**.
- Theft can be made out with or without success.
  - With exception of deception where a detriment or benefit must be caused.
  - Trying to criminalise dishonest conduct in the community.
- Start: Theft (134): most serious offence, most elements. Having done 134, most of the following sections will be complete (refer back to this).
  - Then: 139, 141, 142, 143, 144. (major to minor by sanction).
- Dishonesty: the central principle: 131(1):
  - A person's conduct is dishonest if:
    - First Limb: The person acts dishonestly according to the standards of ordinary people
      - Objective.
      - (does the ordinary person consider this dishonest?), and
    - Second Limb: The person knows that their conduct is dishonest according to those standards
      - Subjective.
      - (does the accused know that the ordinary person would consider this to be dishonest).
        - Whether the accused is subjectively aware of the objective standard. Generally requires some planning (unlike stabbing someone when on drugs/drunk/fit of rage) and so not difficult to prove.
          - No reason to think that the D didn't think he was being dishonest
        - Test is for prosecution to disprove beyond reasonable doubt that the act was believed to be dishonest.
  - 131(2): Dishonesty a Question of Fact
  - 131(3): Payment is not a bar to dishonesty.
    - Elements of theft still there. Mere fact that payment was given does not affect the charge (impacts sentencing).
  - Unless:
    - Exceptions: ss131(4)-(6)
  - Doesn't matter whether the detriment or benefit arises or not. Having put them in the position is the causation. Exposure = completion.
    - Leave dishonesty for last because if it is an issue, it is a big issue. Go through the easier ones first.
- If there is more than one piece of property being dealt with, there is more than likely more than one count of the charge.

- Why the court should place no reliance on a case: From another jurisdiction, That case no longer accords with parliament's intent under the law.
  - Even though there is an authority to the contrary (Oxford v Moss) information should be considered property under the law as it stands now.
- Theft depends on the conduct:
  - Serious encroachment: If you say that the person has obtained a benefit for themselves.
  - He has diminished the value of the paper based on the way he has treated it (Don stealing the exam paper)
- Deception: 139
  - Be specific as to where anything said to be dishonest occurred
  - Can have both a benefit and detriment.
    - Benefit of obtaining someone else's money, and then losing their money (detriment).
  - Not concerned with property (that's theft)
- Always start with 134 and 139
- There are civil remedies to recover funds.
  - Or set aside.
- Defences: Evidential on the D to raise them; legal on the prosecution to negative them beyond reasonable doubt.
  - 131(4)-(6)
  - 5: means/conduct
  - 6: assertion of rights
    - Depends on what the police are told (on the facts)
- Only difference between robbery and theft is that robbery involves force.

## Part 2:

- Almost guaranteed to have to do a question on 134 and 139 (theft and dishonesty)
- Robbery: using force (punching someone); aggravated robbery: weapons
  - Amount can aggravate
  - Committing the crime with others makes it aggravated.
- Cannot be theft if you cannot find the owner.
- Consent: didn't seek consent, didn't get consent – no consent.
- Do you hesitate to do things that you know to be right?
- Attempted: can't make out a physical element.

## Readings:

### Chapter 3: Dishonesty Offences

- Law of theft:
  - There is no need to strain at the limits of the concept of property in an attempt to prosecute for theft, if one of the satellite offences can be charged.
  - Without the owner's consent:
    - It seems that the Act only requires the property to belong to the victim before the defendant 'deals' with it.
      - Conduct can amount to theft even though it prompted the victim to transfer ownership of the property in question to the thief.
    - An apparent consent is disregarded if it is induced by deception – D is 'taken to act without consent': s 132(3).

- D steals the money if he takes dishonest advantage of the bookmaker's mistake and if (and only if) that mistake can be characterised as 'fundamental': s 132(3).
    - Fundamental: where the owner is mistaken in some fundamental respect about the nature of the deal: *Taylor v Johnson*.
    - Apparent consent is vitiated by 'dishonest deception'.
  - Intention to deprive permanently or seriously encroach on proprietary rights:
  - However, is it so broad as to cover conduct which involves no physical interaction with the property the subject of the offence at all? The fact that property may include intangible property must mean that 'dealing' can extend beyond a physical dealing with the property to include other kinds of dealing. Is the definition so broad as to include any act which would amount to an exercise of a right or power of ownership? If defined in this way, then 'dealing' is intimately connected with the requirement in s 134 (1)(c) that a person who commits theft intend to permanently deprive the owner of property or make a serious encroachment on the owner's proprietary rights.
- Consent:
  - An apparent consent is disregarded if it is induced by deception: in that case a defendant is 'taken to act without consent' when an overpayment is made
  - In the absence of any deception, it is likely that courts will continue to hold that there is no consent to a 'dealing' with property if the owner is mistaken in some fundamental respect about the nature of the dealing. What is to count as a 'fundamental' mistake?
    - Apparent consent is vitiated when there is a mistake as to the identity of the person to whom property is transferred or when there is a mistake as to the essential nature of the property.
      - Equity recognizes that contractual consent is vitiated by a 'serious' mistake about a central term of the contract, such as the price, or the subject matter of the contract or its value. Mistakes of this nature are now described, in contract law, as 'fundamental' and a person who knows that the other party to the contract is mistaken in this way cannot resist rescission of the contract: *Taylor v Johnson*
  - When property is obtained by deception, the offender is also liable for theft. This is a consequence of s 132 (consent of the owner) which states that consent obtained by dishonest deception is no consent at all.
- Deception:
  - When property is obtained by deception, the offender is also liable for theft. This is a consequence of s 132 (consent of the owner) which states that consent obtained by dishonest deception is no consent at all.
  - Deception includes misrepresentations about the past, present or future, misrepresentations of intention and misrepresentations of law: s 130
- Benefit or detriment:
  - Financial benefit includes receiving services. It is always a financial advantage to obtain a service on credit, rather than paying cash.
  - Possible to gain an advantage as relief from the importunities of a creditor by deception, for a post dated cheque is a promise that D knew would not be honoured.
- Section 140: dishonest dealing with documents:
  - Unnecessary to prove that D obtained or even attempted to obtain a benefit or cause a detriment by means of a deception involving a document.
    - Mere possession of the incriminating false document is sufficient, if D is dishonest and intends to deceive and obtain a benefit or cause a detriment.
    - Nor if it was for some reason quite impossible for D's intended fraud to succeed, since s 140 is about guilty intentions, not forbidden results.

- A document will include a credit card, USB, compact disk, hard drive of a computer or electronic information recorded within it.
  - Overlap with 'machines' in s 141.
  - It does not matter whether or not someone was deceived, it is sufficient that D signed with the intention of deceiving him.
- The documentary offences have no application unless the document is 'false'
- Fault elements:
  - Dishonest conduct; and
    - Dishonesty is attached to the offender's conduct, rather than their objective of causing a benefit or detriment.
  - Intention to deceive, exploit ignorance, or manipulate a machine; and
  - Intention to cause someone to benefit or suffer a detriment
- The documentary offences will catch offenders who cannot be convicted of either a completed offence or an attempt to commit an offence of manipulation contrary to s 141 because they have not yet gone beyond conduct that is merely preparatory to manipulation of a machine.
- Dishonest manipulation of machines: 141
  - It is sufficient that the offender manipulated a machine **with the intention** of securing a benefit or causing a detriment. **Success is not necessary.**
  - Requirement of dishonesty is not linked to the benefit or detriment – the manipulation must be dishonest.
  - The physical elements of the offence are:
    - Manipulates or takes advantage of the malfunction of a machine; and
    - Ordinary people would consider this manipulation or taking advantage dishonest
  - The fault elements are:
    - Intention to manipulate or take advantage of the malfunction of a machine; and
    - Intention to benefit or cause a detriment; and
    - Knowledge that ordinary people would consider this dishonest
  - Includes those offenders who take advantage of a malfunction of a machine (141(2)).
    - In cases of taking advantage of a malfunction, as distinct from manipulating a machine, it will be necessary to prove that a benefit was secured or a detriment inflicted.
  - Suppose Donald types a fraudulent email on his laptop with the object of deceiving Cynthia and obtaining money. He seeks to obtain a benefit dishonestly. But he does not manipulate ('s 130 = 'use') his laptop computer dishonestly. The requirement that the *manipulation* be dishonest appears to limit the offence to conduct that subverts the operation of a machine or takes advantage of a machine malfunction
  - Applications of the offence: includes dishonest use of another's credit card or other identifying device to obtain money from an ATM or a service or privilege controlled by an electronic access system.
  - The odometer is a 'machine'. Moreover it is a machine that stores information in 'electronic, magnetic or other form'. Donald has clearly manipulated the machine. If he sells the car, he is guilty of deception. But long before he obtains or even attempts to obtain his price for the car, he is guilty of the offence of dishonest manipulation of a machine. It makes no difference to liability that the machine belongs to Donald, rather than another person.
- Section 142: dishonest exploitation:
  - Extends to conduct that will not amount to either theft or deception. Liability is incurred because the means employed to secure the benefit or impose the detriment were dishonest. The offence of deception, by comparison, requires proof that the benefit or detriment was obtained or imposed dishonestly.



- Conduct that results in delaying an obligation to repay a debt may amount to dishonest exploitation though the debt was originally incurred honestly.
  - Consent by the person exploited is no barrier to conviction.
    - Consent, unless obtained by deception, does bar liability for theft: ss 134(1)(b), 132.
  - Does not require proof that the offender gained any benefit or imposed any detriment on another.
    - It is sufficient that the exploitative conduct was undertaken with that intention.
  - Applications:
    - (English Case Law):
      - *Lawrence*: Taxi driver bilked (obtained unfairly) from a client who was unfamiliar with English currency and London geography of theft of the excess fare.
        - Disparity in knowledge (eg. of local conditions).
      - *Hinks*: offender took advantage of her relationship with a naive and gullible man of limited intelligence who gave her large amounts of money.
        - Exploitation of an advantage
  - Consent not obtained by deception means D is not liable for theft, nor deception.
  - Elements:
    - Physical:
      - Did D hold an advantage over the victim because of his youth, gullibility and limited intelligence?
      - Did D exploit that advantage?
      - Would ordinary people consider D's conduct dishonest?
    - Fault:
      - Did D intend to gain a benefit or cause a detriment?
      - Did D know that ordinary people would consider his conduct dishonest?
- Minor offences of dishonesty:
  - Dishonest interference with merchandise: s 143
    - Interfering with merchandise or its label so that the person or another can get it at a reduced price. Ordinary people would think it dishonest.
    - Likely to be captured under theft (arguably equivalent to intention to make a serious encroachment on the owner's proprietary rights).
    - Fault elements: Interference is dishonest; and intention to obtain merchandise at reduced price.
  - Making off without payment: s 144
    - Person dishonestly makes off intending to avoid payment. EG restaurant.
      - Does not apply to unlawful or unenforceable as contrary to public policy transactions.
    - Physical Elements:
      - Payment for goods or services is required or expected; person makes off without payment; ordinary people would think this dishonest
    - Fault Elements:
      - Knowledge that payment is expected or required; intention to avoid payment; awareness that ordinary people would regard this as dishonest
- Dishonesty:
  - Must be proved beyond reasonable doubt in each of the preceding offences.
- Defences:
  - 134(4) – honest acquisition.
    - The bona fide purchaser for value without notice's criminal liability is barred.
    - It extends to property gifted or honestly obtained in some other way without payment.
  - 131(4) – finder's exception:

- A person who finds property and resolves to keep it because they believe that the owner cannot be discovered by taking reasonable steps does not commit theft.
      - Assuming that the person is later identified, it may be considered dishonest to keep the property – however, it is possible that s 134(4) (honest acquisition) may apply so that D is not guilty of theft.
      - Section 131(4) is supplemented by the honest acquisition rule of 134(4) which excludes application of the test. Since the finder obtained the property honestly, any later dealing with it cannot amount to theft of that property.
  - 131(6) honest belief in a right to property:
    - A person who believes, no matter how unreasonably, that they have a legal or equitable right to property cannot be guilty of stealing it.
    - Nor can a person who holds such a belief be guilty of obtaining the property by deception, for s 139 requires proof that the person gained a benefit or imposed a detriment dishonestly.
  - 131(5) honest but mistaken belief that conduct is lawful:
    - A person who believes that they have a legal or equitable right to act in a particular way cannot be convicted of an offence of dishonesty based on that conduct.
    - The example of D enlisting the services of a prostitute and then refusing to pay for those services since he does not believe that he had to pay 'as the contract is unenforceable'.
      - What Donald asserts here is a claim pursuant to s 131 (5) that he believed he had a legal right to act that way.
  - The distinction between s 131 (5) & (6) is this: subs (5) concerns a belief that conduct is lawful, that is, that the person has a legal or equitable right to act in that way. Subsection (6) concerns a belief that the person has a legal or equitable right to the property. The former belief concerns conduct, the latter a property right.
    - The effect of subss 5 and 6 is confined to offences that require proof of dishonesty. It won't excuse threats of violence or the infliction of injury. A person who uses force to acquire property to which they are not entitled will escape conviction for an offence of dishonesty if they honestly believed that they were entitled to the property. The defence does not, however, confer immunity from conviction for an offence against the person, for those offences do not require proof of dishonesty.
- Robbery:
  - The physical elements of the offence are:
    - Deals with property;
    - Owned by another;
    - Without consent;
    - Dealing is dishonest according to standards of ordinary people;
    - Force or threat of force against another in order to deal with the property
  - The fault elements are:
    - Intention to deal with the property;
    - Intention to permanently deprive or make a serious encroachment on the owner's proprietary rights;
    - Awareness that ordinary people would regard conduct as dishonest;
    - Intention to use force or make threat
  - Where a person charged with robbery has a defence pursuant to s 131 (5) or (6), that defence will only defeat the theft element of the robbery charge. That is because the defences contained in s 131 (5) and (6) are specific to Part 5 of the CLCA, which governs offences of dishonesty. Therefore, a person charged with robbery, who genuinely believed that he or she had a legal right to the property cannot be

convicted of that offence, as that genuine belief will defeat the theft aspect. However, such a person could still be convicted of an offence against the person, be it assault, threatening harm/life or some other offence, as s 131 (5) and (6) do not apply to those offences.

- It is sufficient if the victim was led to believe that the person making the threat may make good the threat

#### SCBI: Fair Labelling in Criminal Law – James Chalmers and Fiona Leverick

- Deals with the issues of taxonomy – the naming and classification of offences.
- The principle of fair labelling (Ashworth):
  - The concern of fair labelling is to see that widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signaled by the law, and that offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law-breaking.
- Paper proceeds on the basis that labelling is more than simply describing and also involves an element of categorization – of grouping like with like.
- The paper considers the micro-level – with the way in which the range of behaviour that is deemed to be criminal is divided into individual offences and the names or shorthand descriptions that are attached to these offences for recording purposes.
  - Differentiation: the box in which the offender is placed
  - Description: refers to what is written on the side of the box.
  - Ideally, descriptive labels should be intelligible on a freestanding basis.
- Given that a criminal record has a well-documented deleterious effect on employability and earning power, it would clearly be unfair to an offender for their criminal record to misrepresent their wrongdoing.
  - Employers legitimate interest in knowing whether a prospective employee has a criminal record, and at least broadly what kind of crime it was.
- Asks, could we, as Paul Robinson has suggested, define offences in the broadest of terms and leave the majority of work to be done at the sentencing stage? Or would we lose something of importance to the criminal law by doing so?
  - Ashworth: once the label is entered on the person's criminal record, the passage of time will dim recollections of the precise nature of the offence and may result in the label being taken at face value. Both out of fairness to the individual and in order to ensure accuracy in our penal system, therefore, the legal designation of an offence should fairly represent the nature of the offender's criminality.
- Ashworth suggests fair labelling is important because of 'proportionality' and 'maximum certainty':
  - Proportionality: fairness to offenders
  - Maximum certainty: legal definitions should reflect common patterns of thought in society.
    - Broad labels give too much discretion to sentencers and to officials charged with enforcing the law.
- Fair labelling acts as a check on sentencing discretion:
  - Differentiates between different types of criminal conducts
  - Fairness to the offender:
    - Fairness demands that offenders be labelled and punished in proportion to their wrongdoing
      - What matters is not just that one has been convicted, but of what one has been convicted. For the wrongdoing of the defendant, and the wrong suffered by the victim, will not have been properly represented to the public at large.
  - Communication to the public:
    - Mitchell and Tadros: a 'declaratory' function. It can symbolize the degree of condemnation that should be attributed to the offender and signals to society how that particular offender should be regarded.

- If the name of the offence does not accurately reflect the degree or nature of the wrongdoing, then the offender could be unfairly stigmatized.
- Murder v manslaughter:
  - The stigma, which in the public's mind, attaches to a conviction of murder rightly emphasises the seriousness of the offence.
  - [Merging the two] would likely be seen as a signal that the law did not regard murder as a specially significant or uniquely grave crime. It is wrong to give out such a signal.
- In order to avoid the nature of the offender's wrongdoing being misrepresented or misunderstood, it is desirable that labels should be simple, informative terms that convey the essential nature of the wrongdoing (or at least do not misrepresent it or encourage misunderstanding)
- Communication to offenders:
  - The law should make clear what sort of criminal each offender is and should communicate this to the defendant so that he may know exactly what he has done wrong and why he is being punished, in order that his punishment appears meaningful to him, not just an arbitrary harsh treatment.
    - Not particularly convincing – name not likely to be of much significance to the offender
    - The magnitude of the sentence and the explanation given by the sentencing judge as to why this was merited likely to be more effective.
  - Mitchell:
    - The need to recognise distinctions between different offences and degrees of wrongdoing is also significant to offenders in so far as it deters them from causing more harm because it might incur no greater condemnation.
    - Ashworth:
      - If offence labels are too broad, offenders might reason that they might as well be hanged for a sheep as for a lamb as it will not lead to any greater condemnation
      - There is little, if any, evidence that potential offenders are deterred even by the severity of sentences, never mind the name of the offence of which they might be convicted.
        - Only by likelihood of being caught.
  - Communication to agencies operating within the criminal justice system:
    - Sentencers are statutorily enjoined to have regard to previous convictions. Thus there is a need for criminal records to capture the essential elements of an offence.
    - Thus an argument for the importance of fair labelling is that the offence name is normally the only source of information available to sentencers who wish accurately to assess the offender's criminal record.
      - Fairness to the offender – that the information is accurate and sufficiently informative
      - Fairness to the public – sufficient information needs to be communicated by that record of the nature of any previous convictions.
    - The main consideration in representing an offence to the public is ensuring that the message conveyed by the offence name fairly and clearly represents what the offender has done in language that minimises the possibility of misreporting by the media or misunderstanding by the audience.
    - It may well not be possible to tell from the name of the offence alone whether the right to make a victim statement or the need to place the offender in the sex offenders' register is triggered.
    - It may help to minimise the need for reliance on extrinsic material or to avoid the jury being misled where no such material is obtained.

- In fairness both to offenders and to others with a relevant interest, there is a need for offence labels to convey sufficient information to criminal justice professionals to enable them to make fair and sensible decisions.
- Communication to agencies operating outside the criminal justice system:
  - Employment. Information provided to employers has a more specific purpose and is unlikely to suffer from the problems of media distortion.
  - Simester and Sullivan state:
    - The public record matters. While an employer may have few qualms about hiring a convicted fraudster as an orderly in a children's hospital, it would be an entirely different matter to contemplate employing someone who has been in jail for paedophilia.
  - Providing accurate information to employers matters because of fairness to the offender (who should not be denied an employment opportunity on the basis of vague, inaccurate or misleading records of previous convictions) but also because of fairness to the employer and to the public.
  - Thus there is a need for offence labels to avoid confusing legal language or broad terms such as 'breach of the peace' that cover a wide range of conduct.
- Fairness to the victim:
  - Victims may be unfairly stigmatized.
  - Victims of sexual assaults involving penetration would prefer that the offender is convicted of rape, as a conviction for sexual assault does not adequately reflect the harm that has been suffered.
    - Otherwise would do great injustice to victims as they do not reflect with sufficient moral weight the harm that has been suffered
    - More important to victims than the name of the offence is whether the offender is convicted at all and the magnitude of the sentence passed.
    - Perhaps victims do care that the legal record accords with their own perceptions of the nature and the seriousness of the harm done to them.
    - It could be equally be said that this is unfair to the offender, whose culpability is overstated.
    - Neither the defendant nor the victim has a legitimate interest to demand anything other than accurate labelling.
- The arguments assessed:
  - The sentencing discretion argument, the educative argument and the deterrence argument are unconvincing or tangential.
    - Others are insufficiently developed.
  - The interest in question is the offender's legitimate interest in protecting their reputation and on this basis the argument that insufficiently precise labels are unfair to the offender is one that has some force. This is a convincing justification for labels that are not inaccurate or potentially misleading.
  - Another strong justification is that decision-makers rely on the offence name and the information it conveys in making decisions about the offender name and the information it conveys in making decisions about the offender.
    - Both inside and outside the criminal justice system, conclusions are drawn from the labels.
  - Victim has a legitimate interest in having their suffering reflected by an offence of appropriate seriousness.
    - Unfair to the offender if the label over-represented their culpability and unfair to the public if it under-represented it.

- The most convincing argument is that offence names communicate information about the offender to a number of different bodies and that members of these groups may form opinions or make decisions about the offender that turn on the information received.
    - Descriptive sense: the use of simple, informative offence names that convey the essential nature of the wrongdoing and minimise the potential for misrepresentation or misunderstanding.
    - Labelling should fairly differentiate wrongdoing.
- Considerations in labelling offences:
  - Broad offence labels pose dangers, as do labels that are subject to particularism – the specification of offences at too high a level of detail. Complicates the law and runs the risk that novel conduct will not be covered at all.
  - Public opinion: where people generally regard two types of conduct as different, the law should try to reflect that difference.
    - It may also be legitimate for the law to seek to shape public opinion with labelling rather than be subservient to it.
- Which elements of the offence should be reflected in the description?
  - Horder: mode of responsibility (manner in which the offence is carried out), outcome and intentionality.
  - Clarkson: culpability of the defendant (intentional, reckless, negligent) and the context of killing (driving, terrorism, business operation). In context of homicide.
  - Law might adopt the language of degrees in differentiating between different forms of a crime.
  - Law might draw on the social significance of existing offence names or concepts
  - The law might track existing concepts such as different forms of mens rea and implement hierarchical structures as a means of communicating relative seriousness.
    - This may be done by sentencing structures attaching to crimes.

## Seminar:

### Notes:

Type of offences	Explanation	Physical Element	Examples	Prove Fault Element	H&RMF
Fault Liability (Mens Rea)	Requires a particular state of mind. Can't do these accidentally.	Yes	Murder, theft, assault, rape	Yes	
Strict Liability	Prosecution does not have to prove intent. (Don't need to prove mens rea).	Yes	Driving disqualified <i>Proudman v Dayman</i> : Person gave keys to another who didn't have their license. Not many people had their license then.	No	Have the defence of honest and reasonable mistake of fact. Did you honestly believe you could act in that way? Ignorance is not a mistake. 1. Must be honest, 2. reasonable and 3. a mistake (turned your mind to it). 4. Can't be a mistake of law (Can't say didn't know was illegal). 5. Must render the conduct innocent. Five factors.
Absolute Liability		Yes	Traffic offences: Want to be able to get convictions. Child pornography: <i>Clarke</i> : took pornographic videos of children (thought they were adults). Question of whether mens rea was an element. Legal theorist view is you don't want this stigma lightly. Supreme court said: She should have been satisfied of their age – if she couldn't be sure, don't hire them. Not an enormous infringement on liberty.		RMF not available.
<b>Evidentiary Burden</b>	There is a case to be heard.		On prosecution (As defence has Presumption of innocence.) Motive, weapon, witnesses.		Evidentiary burden transfers to the defendant to be satisfied on the balance of probabilities. Prosecution still has the legal burden.
<b>Legal Burden</b>	Persuading the court the accused is guilty.		Proof beyond reasonable doubt on the prosecution. Defence bears no burdens.		Mental impairment will be on defence only in this case.

<b>Fault Elements:</b>	Intention, recklessness, knowledge, belief.	Knowledge: acting while holding certain facts to be true.	If something is an accident (truly) there is no liability. Proving intent: Accumulation of evidence important( Words, conduct, inferences from words and conduct, forensics, context and history.	Belief: plain English meaning.	Recklessness: there was an awareness of risk, and the actor proceeded with the awareness of that risk. Close to intention, a long way from carelessness. Requires a subjective appreciation of risk by the defendant.

- Physical elements:
  - Voluntary:
    - Not a seizure, accident, mental impairment.
  - Affirmative defences apply
    - Self defence, duress, necessity applies.
- Conduct:
  - Act (most common)
    - Obligation to act if you have created the risk.
  - Omission
  - State of affairs/being
- Circumstance:
  - Rape: Conduct is the sexual intercourse (not a crime) Circumstance is lack of consent. Similarly with age – turns a legal act into an illegal one.
  - Predates conduct
- Result:
  - Murder: need to cause the death.
  - Postdates conduct.
- *He Kaw Teh*:
  - Analysis for the purpose of determining whether an offence has a particular fault element.
    - Can only arise with NEW statutory offences which do not specify fault elements.
- 1. Presume intention (mens rea offence):
  - a. Rebuttable.
- 2. Presumption is rebuttable based on certain factors:
  - a. Truly criminal/Penalty – higher the penalty, more likely fault element is required.
  - b. Nature of the subject matter –
    - i. Health and public safety (environmental things, spreading diseases (STDs)) – probably strict or absolute. Because: we want people to be educated, take active steps initially.
  - c. Enforcing the law:
    - i. If you would never get a conviction with mens rea the law would be pointless and you don't want these laws.
      - 1. Points to strict/absolute liability
  - d. Is it possible for the defendant to safeguard themselves?
    - i. There must be something the D can do, directly or indirectly, which will promote the observance of the regulations – unless this is so, there is no reason in penalizing him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim.



3. Next presumption is strict.
  - a. Should the defence of strict liability be available?
4. Then absolute

- Each offence requires an element of dishonesty.
- Defence must disprove the elements – cannot argue different offence should be tried.
- Cannot be tried for the same crime twice. Duplicity.
  - Charges in the alternative – charged with both, with a plea agreement, convicted of only one.
- Where multiple offences may be made out:
  - Start with the most serious ones.
    - If all elements are made out for the most serious ones (theft, deception), those same elements are still required for the lesser ones and so can refer back instead of repetition.
  - Lesser crimes can be used as a plea bargain. Also most expedient (less elements to make out).
    - Theft made out – plead guilty to making off without payment instead – avoid trial and larger sentence.
- Deception requires a representation.
  - Not a 'misrepresentation'.
- Dishonest exploitation
  - Power imbalance.
- Robbery: theft with force.
  - Major indictable offence
  - If there are partners (in company), it is aggravated (or if individual with a weapon).
- Consider cases on consent.

#### Process:

1. Issue spotting.
2. Charge selection.
3. Element analysis (have to know what has to be proven – what is the offence comprised of?)
4. Factual analysis.
5. Evidence analysis (These are the facts, what evidence do we have to prove what was happening?)

#### Checklist:

Theft – s 134: A person is guilty of theft if the person:

1. **Deals** (130) with **property** (130) **owned by another** (130).
2. **Dishonestly** (131)
3. Without the **owner's consent** (132)
4. **Intending** either:
  - a. **To deprive the owner permanently** of the property; or
  - b. **To make a serious encroachment on the owner's rights** (134(2))
5. Note: 134(4)
  - a. If a person honestly believes that he or she has acquired a good title to property but it later appears that the title is defective because of a defect in the title of the transferor or for some other reason, the later retention of the property, or any later dealing with the property, by the person cannot amount to theft.

#### Deception – s 139:

1. **Deception** of another (130) by words or conduct; so as to

2. **Dishonestly** obtain/cause (131):
  - a. **Benefit** (130) to the deceiver or another
  - b. **Detriment** (130) to the deceived or another
  - c. (The benefit/detriment is obtained/caused dishonestly).
3. Note:
  - a. Deception is not concerned with 'property' – that is theft.

#### Dishonest manipulation (or taking advantage of) machines – s 141

1. It is an offence to **dishonestly** (131):
  - a. **Manipulate** (130) a **machine** (130); or
  - b. Take advantage of machine malfunction
2. In order to (with intent to):
  - a. Obtain **benefit** (130)
  - b. Cause **detriment** (130)

#### Dishonest exploitation of an advantage – s 142

1. It is an offence to **dishonestly** (131)
2. Exploit an advantage against a person who:
  - a. Suffers a mental or physical disability (142(1)(a); or
  - b. Is ignorant of **local conditions** (130) (142(1)(b)
3. In order to (with intent to):
  - a. **Benefit** (130) the exploiter or another; or
  - b. Cause **detriment** (130) to another

#### Dishonest interference with merchandise – s 143

1. A person who **dishonestly** interferes with merchandise, or a label attached to merchandise, so that the person or someone else can get the merchandise at a reduced price is guilty of an offence.

#### Making off without payment – s 144

1. A person who, knowing that payment for goods or services is required or expected, **dishonestly** makes off intending to avoid payment is guilty of an offence.
2. Does not apply if the transaction for the supply of the goods or services is unlawful or unenforceable as contrary to public policy.

#### Dishonesty – s 131

1. A person's conduct is dishonest if:
  - a. The person acts dishonestly according to the standards of ordinary people (131(2)) (objective test – sQuestion of fact); *and*
  - b. The person knows that their conduct is dishonest according to those standards
  - c. Note:
    - i. A defendant's willingness to pay for property involved in an alleged offence of dishonesty does not necessarily preclude a finding of dishonesty (131(3)).
2. Unless the exceptions in ss131(4)-(6) apply:
  - a. (4) D is a finder who deals with the property in the belief that the owner cannot be found –
    - i. D finds property
    - ii. Keeps or otherwise deals with it in the belief that the identity or whereabouts of the owner cannot be discovered by taking reasonable steps; and
    - iii. Is not under a legal or equitable obligation with which the retention of the property is inconsistent
  - b. (5) D believes that he or she has a legal or equitable right to act in the way they did –

- c. (6) D believes that he or she has a legal or equitable right to the property.

#### Presentation Notes:

1. Scholarly – written in Modern law review; a critique of current issues in the legal climate. Lack of bias, fairly objective.
2. Jurisdiction – English, Scottish, US
  - a. Issues raised looked for an optimal approach. Issues universal.
  - b. US – specific; scott narrative
3. What is fair labelling.
  - a. Fair labelling has a descriptive and differentiating
    - i. Des: out; diff: in
    - ii. Descriptive: to society and wrongdoers
      1. Crimes must be represented fairly and accurately. We place high value on reputation.
      2. Mislabeling can be detrimental
      3. Employment records are impacted. Unfairly prejudice due to misleading labels on criminal records.
    - iii. Differentiating
      1. Not what the label describes but does the label convey sufficient info to legal practitioners so that they make appropriate decisions (sentencing)
      2. Unfair prejudice when referring to criminal history.
4. Explain/criticize/defend idea?
  - a. Explain: what is fair labelling and its importance.
    - i. Considering wide application: victim, perpetrator, legal aspect, media, society, employment
    - ii. Fairness to the above.