ELEMENTS OF CRIMINAL LIABILITY

BURDENS AND STANDARDS OF PROOF

Presumption of innocence: a person accused of crime is presumption to be innocent. To rebut this presumption, guilt must be proved beyond reasonable doubt.

**Standards of Proof:**
Where D bears the legal (persuasive) burden: balance of probabilities (civil standard).

Where P bears the legal (persuasive) burden: beyond reasonable doubt (higher threshold).

**Burdens:**

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<thead>
<tr>
<th>Evidential Burden</th>
<th>Legal (Persuasive) Burden</th>
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<tbody>
<tr>
<td>Offences</td>
<td>Prosecution bears evidential burden.</td>
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<td>Prosecution produces sufficient relevant and admissible evidence in order to support the charges brought against the defendant and to establish that an offence should be tried.</td>
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<td></td>
<td>Prosecution bears legal burden.</td>
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<td>Prosecution must persuade the judge or jury, beyond reasonable doubt, that the accused committed the offence. Must prove each element of the offence beyond reasonable doubt.</td>
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<tr>
<td>Defences (Including defence of RMF)</td>
<td>Defence bears evidential burden.</td>
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<td>Prosecution bears legal burden of disproving the defence beyond reasonable doubt.</td>
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Note: exceptionally the legislature may impose the legal burden on the defendant (for both offences and defences) – D would have to prove on the balance of probabilities.

**Provisos – rule in R v Jarvis:**
Any exception (proviso) excluding liability must be proved on the balance of probabilities by D. A proviso is a denial of liability by reason of additional special facts.

E.g. ‘no person can drive a truck except the holder of the appropriate license’ – D has to prove that they hold the appropriate license.

**Example:**
Donald is charged with the murder of his wife, Vera.

**Elements of the offence:**
The prosecution bears both the evidential and the legal (persuasive) burden on the physical and fault elements.

**Defence:**
Donald (defence) bears the evidential burden on the defence of provocation. Prosecution bears the legal burden.

If there is evidence, which could possibly satisfy the requirements of the partial defence, the issue must go to the jury and the prosecution must disprove provocation beyond reasonable doubt.
GENERALLY, CRIMINAL OFFENCES HAVE THE FOLLOWING 3 CONSTITUENT PARTS:

1. A requirement of voluntariness
2. Physical elements (actus reus)
3. Fault elements (mens rea)

**Voluntariness**

Only voluntary conduct can give rise to criminal liability – *He Kow Teh v The Queen*. In line with the classic model of criminal responsibility, D must be a rational actor: he must be proved to have had ability to control his conduct at the time of the offence.

Involuntariness is a defence to *any* crime: whether fault, strict or absolute liability.

Conduct is involuntary when:

- Criminal act was accidental i.e. without intention. Recklessness or criminal negligence
- Criminal act was caused by reflex action (external cause): *Ryan v The Queen*; *Kay v Butterworth* (attacked by swarm of bees, car went out of control and killed a pedestrian)
- Act was performed while D was in state of impaired consciousness (or mental impairment)

Examples: heart attack, attack by wildlife, asleep, sneezing

**Physical Elements**

<table>
<thead>
<tr>
<th>Conduct</th>
<th>(a) Act</th>
<th>(b) Omission (failure to act)</th>
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<tbody>
<tr>
<td>Most offences will involve at least one physical element of conduct.</td>
<td>There is no duty to prevent a crime – <em>R v Instan</em>.</td>
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Failure to act will only give rise to criminal liability where a duty arises at common law or by statute.

At common law a duty to act may arise:

- Family relationships –
  *R v Russel*: D saw wife drowning their kids and did not assist or move to prevent the drowning. D was liable for manslaughter. Parents have a duty to protect their children.
- Carers

<table>
<thead>
<tr>
<th>Circumstance</th>
<th>Specified conduct may not be a crime unless it is performed in certain circumstances. External to the accused. Describe features in which conduct takes place.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not always required. Usually supplementary to conduct.</td>
<td>Circumstance elements <em>pre-date</em> or happen <em>at the same time</em> as the conduct involved in offence.</td>
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</tbody>
</table>

Prosecution must prove that conduct caused the consequence.
E.g. rape is defined as sexual penetration (conduct), which occurs without the other’s consent (circumstance).

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<thead>
<tr>
<th>Result</th>
<th>The physical element of an offence may refer to the results of the conduct rather than the conduct itself.</th>
</tr>
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<tbody>
<tr>
<td>Not always required. Usually supplementary to conduct.</td>
<td>Result elements <em>post-date</em> the conduct involved in the offence.</td>
</tr>
<tr>
<td></td>
<td>Prosecution must prove that conduct caused the result.</td>
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<td></td>
<td>Result elements are typical of homicide and serious assault offences, which require a result such as death or serious injury.</td>
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<td></td>
<td>E.g. murder: what is prohibited is the death of the victim rather than the conduct, which caused the death (the conduct alone would likely just constitute serious assault, but not murder); conduct of the accused must result in the death of the victim.</td>
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</tbody>
</table>

### Fault Elements

The mental elements accompany the commission of the physical elements of the offence, thereby making the behaviour criminal.

<table>
<thead>
<tr>
<th><strong>Subjective Fault Elements</strong> – the state of mind D actually personally had</th>
<th></th>
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<tbody>
<tr>
<td><strong>Intention</strong>&lt;br&gt;English language meaning</td>
<td>A person intends to do something when they mean to do it. The D acts or fails to act with the actual subjective intention of bringing about the physical elements.</td>
</tr>
<tr>
<td><strong>Recklessness</strong>&lt;br&gt;Technical legal meaning which exists at common law, and is sometimes modified for particular legislative provisions [e.g. div 7A CLCA]</td>
<td>D, aware of the risk, proceeds to act with awareness of that risk. Thus D turns their mind to the consequences of their act or omission, and appreciates the risk, but acts anyway. D must be <em>subjectively</em> aware of the risk.</td>
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<td><strong>Knowledge</strong>&lt;br&gt;English language meaning</td>
<td>Knowledge: D acts (or fails to act) while holding certain facts to be true; synonymous to ‘awareness’ and ‘foresight’ Where one knows something, they are certain of it. It is necessary to prove that D was certain of certain facts. E.g. where receiving goods known to be stolen, it must be proved that D was certain they were stolen.</td>
</tr>
<tr>
<td><strong>Belief</strong>&lt;br&gt;English language meaning</td>
<td>Belief: D acts (or fails to act) with the belief that certain facts were true. Belief is weaker than knowledge – belief requires less conviction that one is right. For belief, it is not necessary to prove that D was</td>
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</tbody>
</table>
Absent an admission or confession, a subjective state of mind can never be known for certain. Surrounding evidence is thus crucial to providing the requisite fault element on a subjective basis. Subjective state of mind can be determined by objective measures:

- Words
- Conduct
- Inferences from words and conduct
- Forensics
- Context and history

### Objective Fault Element

**Negligence**

D should have appreciated the risk because a reasonable person would have appreciated the risk — no concern as to whether D subjectively appreciated the risk.

A gross departure from the standard of care that a reasonable person would have exercised in the circumstances.

The criminal standard of negligence requires a lower standard of care than that sufficient to support a tortious action.

E.g. manslaughter can be committed by an offender who is merely negligent.

### STRICT & ABSOLUTE LIABILITY

Strict and absolute liability offences do not require proof of fault with respect to one or more of their physical elements.

The subject matter of such offences extends to:

- Health and safety violations
- Environmental pollution
- Offences for unlawful sexual intercourse
- Sexual exploitation
- Child pornography

Strict and absolute liability offences are distinguished from fault liability offences, which require proof of fault (intention, recklessness, knowledge, belief or negligence).

Fault liability offences are the usual criminal offences in line with the classic model of criminal responsibility. Strict and absolute liability offences depart from this classic model.
Prosecution is not required to prove fault with respect to one or more of the physical elements of the offence. The mere doing of the act is sufficient.

However the mere doing of the act (physical element) does not render the accused guilty. To be guilty of an offence of strict liability the accused’s conduct must be voluntary. The usual defences also apply: self-defence, necessity, and duress.

Importantly, for crimes of strict liability, the defence of reasonable mistake of fact is available. Reasonable mistake of fact provides a defence to strict liability offences only. It is not available to absolute liability offences.

Defence of Reasonable Mistake of Fact:
‘An honest and reasonable belief in a state of facts which, if they existed, would render the act of the accused innocent’: Proudman v Dayman

D must adduce evidence of a reasonable mistake. Once D satisfies this evidential burden, the legal (persuasive) burden falls on P to disprove the defence – perhaps by proving there was no mistake or that the mistake was not reasonable.

The defence offers a ‘humane protection for persons who unwittingly engage in prohibited conduct’: He Kaw The v The Queen

Innocence:
The action had to have been innocent if the state of affairs were indeed as D thought they were. So, D would have been guilty of no offence at all, had the mistaken belief been true.

- E.g. if you assault a Police Officer and say you thought it was civilian this does not render the act innocent as you have still assaulted someone.

R v Reynhoudt:
D assaulted (punched) police officer, thinking he was a commoner. His conduct wasn’t innocent (punching a normal person is common assault), so this defence wasn’t available to D. Liability is strict with respect to status of victim – knowledge/awareness/belief that the victim is an officer is not an element of the offence.

Mere ignorance (however reasonable) is not enough – Proudman v Dayman.

- E.g. Dick owns a motor vehicle service centre lends customers a courtesy vehicle. Client has accident in courtesy vehicle. Dick gets charged with permitting a person not being the holder of a licence to drive the vehicle. Dick was ignorant, not mistaken, because he ought to have asked the client for a copy of his licence.

An honest mistake is no excuse unless it was a reasonable mistake to make in the circumstances.

- E.g. say producing child porn was strict liability so the defence of reasonable mistake of fact was available. Accused would say they honestly believed the child was of age. Honest belief is not enough, must be reasonable. If they had met the child in a bar and the child had a fake ID this would render the belief reasonable.

DPP v Bone:
- Drink spiking – defence available because V drank the 3 beers not knowing that his friend had asked the bar man to put a shot of vodka in each beer.
• Not guilty of drink driving because RMF.
• If facts had been as V reasonably believed them to be, he wouldn’t have committed an offence.

Mistake must be one of fact, not law – Ostrowski v Palmer
• Mistake of law: ‘I thought the appropriate age was 15’, ‘I thought were allowed to grow one marijuana plant’,
• Mistake of fact: ‘I thought it was a tomato plant’ (this would be a reasonable mistake of fact if you purchased the plant from Bunning’s but not if you bought it from Bikies)

### Absolute Liability

Prosecution is not required to prove fault with respect to one or more of the physical elements of the offence. The mere doing of the act is sufficient.

However the mere doing of the act (physical element) does not render the accused guilty. To be guilty of an offence of strict liability the accused’s conduct must be voluntary. The usual defences also apply: self-defence, necessity, and duress.

Reasonable mistake of fact is NOT available – it is no answer to the charge.

Courts are hesitant to deem absolute liability without clear intention of legislature to do so. Courts are reluctant to punish the accused on the basis of the physical elements alone. However the subject matter being regulated may be such that the benefit to the community of imposing absolute liability outweighs the detriment suffered by the accused.

The intention behind absolute liability is to ensure that individuals operating in certain environments are under an obligation of extreme, rather than reasonable, care.

### Fault Liability, Strict Liability & Absolute Liability Compared

<table>
<thead>
<tr>
<th>Voluntariness</th>
<th>Physical Element</th>
<th>Fault Element</th>
<th>Usual Defences (S-D, Duress, Necessity)</th>
<th>Defence of RMF</th>
</tr>
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<tbody>
<tr>
<td><strong>Full Fault Offence</strong></td>
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<td>Examples: Rape</td>
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<td>Murder</td>
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<td>Assault</td>
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<td>Theft</td>
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<tr>
<td><strong>Strict Liability Offence</strong></td>
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<td>Examples: Driving under disqualification</td>
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### Absolute Liability Offence

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<th>Examples:</th>
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</table>
| Producing child pornography  
Polluting waters  
Parking  
Speeding |

### CRIMINAL ELEMENT ANALYSIS: HE KAW TEH

Where the fault elements are not expressly specified in legislation, it is necessary to undertake a *He Kaw Teh* analysis.

He Kaw Teh analyses are applied ONLY when there is a **NEW legislative offence** (it DOES NOT apply for murder, rape, theft or assault).

<table>
<thead>
<tr>
<th><strong>STEP 1: ELEMENT ANALYSIS</strong></th>
<th>a) What are the physical elements of the offence?</th>
</tr>
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</table>
|  | • Conduct (act or omission)  
• Circumstance  
• Result |
|  | Note: strict or absolute liability might only attach to *some* of the physical elements of the offence |
| b) What are the fault elements of the offence? | i. **Express fault elements:** does the statutory prohibition expressly state that intention, recklessness, knowledge, belief or negligence is required? |
|  | ⇒ **YES:** FAULT LIABILITY – P must prove fault [no need to move on]  
⇒ **NO:** See implied fault elements |
|  | ii. **Implied fault elements:** does the statutory prohibition imply a fault requirement i.e. is a fault element implicit in the conduct?  
[E.g. in a prohibition against making a donation to a terrorist organisation, making a donation is necessarily intentional] |
|  | ⇒ **YES:** FAULT LIABILITY – P must prove fault [no need to move on]  
⇒ **NO:** Step 2 [also consider Step 2 if implied fault is not obvious or is weak] |

| **STEP 2: FIRST PRESUMPTION** | Presumption that the offence is mens rea, and thus requires proof of fault. |
**STEP 3: SECOND PRESUMPTION**

Presumption that the offence is one of strict liability, and thus defence of RMF is available.

[Most relevant factors to consider for displacing this presumption: subject matter, severity of penalty, purpose of statutory provision, enforcement of the statute]

**STEP 4: PRESUMPTION DISPLACEMENT**

Presumptions liable to be displaced by the following factors:

- **Words of the statute:**
  Where one or more other sections of the statute refer to fault elements, but the section under which D is being prosecuted does not:
  
  - = Stronger case for rebutting presumption (and offence being SL or AL)

  **HKT:**
  The sub-sections under which D was being prosecuted contained no clear indication of Parliament's intention. However the other sub-sections, all of which dealt with the possession of prohibited imports in certain circumstances, all contained the words ‘without reasonable excuse’. The absence of those words from the sub-section under which D was being prosecuted suggests that no reasonable excuse would avail D.

  **R v Clarke:**
  There was a requirement for proof of knowledge of the pornographic nature of the material for an offence against s 63. There were mental elements required to be proved for an offence against s 63B. Thus the absence of any reference in s 63 to ‘knowingly’ producing child pornography or, in s 63B(1), to ‘knowingly’ inciting or procuring was telling [i.e. had to know it was pornographic material but didn’t have to know it was a child].

- **Subject matter of the statute**
  Where the subject matter being regulated is a ‘grave social evil’ requiring rigorous suppression:
  
  - = Stronger case for rebutting presumption (and offence being SL or AL)

  **R v Clarke:**
  Child pornography is a ‘serious social problem’ that exploits children and exposes them to the risk of harm. The matter to be a grave social evil of the kind that justifies a stringent approach by
Parliament (Al not SL)
[Note: for Doyle CJ, these considerations did not necessarily point to a conclusion that Parliament would have intended to punish a person who was reasonably mistaken]

HKT:
Although importation of heroin in commercial quantities was involved was ‘truly criminal’, it was unlikely that the Parliament intended that the consequences of committing an offence so serious should be visited on a person who had no intention to do anything wrong and no knowledge that he was doing so [SL not AL]

Severity of the penalty
Where penalty is severe i.e. imprisonment:
  = Stronger case for maintaining presumption
    (and offence being FL)

Where penalty is less significant i.e. fine, loss of demerit points, community service:
  = Stronger case for rebutting presumption
    (and offence being SL or AL)

Where penalty is less significant and frequency of prosecution is high:
  = Stronger case for rebutting presumption
    (and offence being AL)

[Since generally agreed that only morally culpable crimes should be imprisoned due to loss of liberty]

HKT
Penalty was the highest imposed under the law: life imprisonment.

Moral stigma surrounding conviction
Where offence is truly criminal, with high stigma attached (offender exposed to obloquy and disgrace):
  = Stronger case for maintaining presumption
    (and offence being FL)

The purpose or policy of the statutory provision
Environmental i.e. pollution; Public health i.e. disease prevention; Public safety:
  = Stronger case for rebutting presumption
    (and offence being SL or AL)

The greater the social problem posed by D’s
conduct, the more likely presumption will be rebutted to be SL or AL – in hope of preventing the social problem.

**Enforcement of the legislative scheme**
Where construction of absolute liability would promote observance of the legislative scheme:
- Stronger case for rebutting presumption (and offence being AL)

[Where it would become difficult to enforce the act (i.e. obtain a conviction) without imposing absolute liability (or where recognition of the defence of RMF would make it difficult to secure a conviction), there is a stronger case for SL].

But where mens rea does not substantially increase the difficulty of obtaining conviction, then this is better option.

Ultimately, this turns on whether there would be any real purpose in punishing a person ‘who honestly and reasonably believed in circumstances that, if true, would mean that the relevant conduct was not in breach of the relevant provision’

*R v Clarke*
It would become difficult to enforce the Act without imposing absolute liability. Given the likelihood of forming an honest and reasonable belief that a post-pubertal child is aged over 16, ‘recognition of the defence [would] make it difficult to secure a conviction.’
Their Honours also emphasised the feasibility in taking precautions and obtaining appropriate proof. According to Bleby J, ‘further steps than merely relying on what the offender was told or observed can be taken’ for verification.

**Statute provides statutory defence**
Would imposition of SL/AL be unjust because there’s nothing D could do to safeguard themselves from liability?

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<tr>
<th><strong>STEP 5: FIRST PRESUMPTION APPLIES = FL OFFENCE</strong></th>
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<tr>
<td>If the first presumption applies, the offence is mens rea, and thus requires proof of fault.</td>
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<tr>
<td>What is the fault element?</td>
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<tr>
<td>- Intention</td>
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<td>- Recklessness</td>
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<td>- Knowledge</td>
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<tr>
<td><strong>STEP 6: FIRST PRESUMPTION DISPLACED = SL OR AL OFFENCE</strong></td>
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<td>Are there any defences?</td>
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<tr>
<th><strong>STEP 8: SECOND PRESUMPTION DISPLACED = AL OFFENCE</strong></th>
<th><strong>P need only prove:</strong></th>
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<tr>
<td></td>
<td>D committed the act/caused the conduct; and</td>
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<td></td>
<td>No defences created by the terms of the statute are available</td>
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<td></td>
<td>However, D can still argue intervening act, duress, necessity, or involuntary conduct.</td>
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</table>
INTRODUCTION

Do NOT do a HKT analysis with dishonesty offences – the physical and fault elements are already outlined by statute and common law.

Go through each satellite offence in exam: start with s 134 THEFT because it is the most serious. When looking through offences, after you’ve considered 134, consider 139 (as first supplementary) and then the other satellites as appropriate on your facts → always leave dishonesty until last

Remember:
- A charge of theft can be made whether or not D managed to take the object.
- Dishonesty is the central principle, and is what is being criminalised in dishonesty offences [s 131(1) CLCA]

THEFT: S 134 CLCA

134—Theft (and receiving)
(1) A person is guilty of theft if the person deals with property—
   (a) Dishonestly; and
   (b) Without the owner's consent; and
   (c) Intending either:
      (i) To deprive the owner permanently of the property; or
      (ii) To make a serious encroachment on the owner's proprietary rights.

<table>
<thead>
<tr>
<th>Physical Elements</th>
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</table>
| **134(1)**        | **Deals with** | Defined in s 130 – **Deal**—a person deals with property if the person—
|                   |                | a) Takes, obtains or receives the property; or
|                   |                | b) Retains the property; or
|                   |                | c) Converts or disposes of the property; or
|                   |                | d) Deals with the property in any other way;
|                   | **Property**   | Defined in s 130 – **Property** means real or personal property and includes—
|                   |                | a) Money;
|                   |                | b) Intangible property (including things in action);
|                   |                | c) Electricity;
|                   |                | d) A wild creature that is tamed or ordinarily kept in captivity or is reduced (or in the course of being reduced) into someone's possession;
|                   |                | [Tame or captive wild creatures; and wild creatures in the course of capture]. |
| 134(1)(b) | Owned by another | Defined in s 130 – | Owner of property means—
| | | | – Entitlement to possession or control;
| | | | – A proprietary interest in property; and
| | | | – Certain legal or equitable rights with respect to the property.

| 134(1)(b) | Without consent | Defined in s 132(1) – | A reference to the consent of the owner of property extends to—
| | | | a) The implied consent of the owner (or owners); or
| | | | b) The actual or implied consent of a person who has actual or implied authority to consent on behalf of the owner (or owners).

| 134(1)(b) | Without consent | Defined in s 132(2) – | A person is taken to have the implied consent of another if the person honestly believes, from the words or conduct of the other, that he or she has the other's consent.

| 134(1)(b) | Without consent | Defined in s 132(3) – | However, a person who knows that another's consent was obtained by dishonest deception is taken to act without consent.

| | | | Consent is presumed where there is: implied consent by owner or actual or implied consent by person with actual or implied authority to consent on owner’s behalf

| | | | Consent is presumed where there is: honest (mistaken) belief in consent

| | | | Consent is presumed to be absent where: apparent consent is obtained by dishonest deception

| **Fault Elements** |
|---|---|---|
| **Implied** | Intention to deal | Not defined | Not defined – implied.

| **134(1)(c)(i)** | Intention to deprive permanently | Not defined | Not defined. [When someone takes something with intent of keeping it for themselves]

| **134(1)(c)(ii)** | Intention to seriously encroach on proprietary rights | Defined in s 134(2) – | A person intends to make a serious encroachment on an owner's proprietary rights if the person intends—
| | | | a) To treat the property as his or her own to dispose of regardless of the owner's rights; or

b) To deal with the property in a way that creates a substantial risk (of which the person is aware)—
   i) That the owner will not get it back; or
   ii) That, when the owner gets it back, its value will be substantially impaired.

### Dishonesty

<table>
<thead>
<tr>
<th>134(1)(a)</th>
<th>Deals dishonestly</th>
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</table>
| Defined in s 131(1) — | A person’s conduct is dishonest if the person acts:  
  – Dishonestly according to the standards of ordinary people; and  
  – Person knows it is dishonest by that standard. |

<table>
<thead>
<tr>
<th>134(1)(a)</th>
<th>Deals dishonestly</th>
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</table>
| Defined in s 131(4) — | A person does not act dishonestly if the person—  
  a) Finds property; and  
  b) 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  
  c) Is not under a legal or equitable obligation with which the retention of the property is inconsistent. |

Finder’s exemption (property): a finder who deals with property is not dishonest if—
  • They act in the belief that the owner cannot be found by taking reasonable steps; and  
  • There is no legal or equitable obligation to return or give up the property.

<table>
<thead>
<tr>
<th>134(1)(a)</th>
<th>Deals dishonestly</th>
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<tbody>
<tr>
<td>Defined in s 131(5) —</td>
<td>A person is not dishonest if they honestly but mistakenly believe they have a legal or equitable right to act in that way.</td>
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<thead>
<tr>
<th>134(1)(a)</th>
<th>Deals dishonestly</th>
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<tbody>
<tr>
<td>Defined in s 131(6) —</td>
<td>A person who asserts a legal or equitable right to property that they honestly believe exists, does not deal dishonestly with the property.</td>
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### Defence of Initially Honest Acquisition

<table>
<thead>
<tr>
<th>134(4)</th>
<th>Elements of theft established</th>
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<tbody>
<tr>
<td>Defined in s 134(4) —</td>
<td>But D has a defence; 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.</td>
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Honest acquisition of property: a person who acquires property in the honest (but mistaken) belief that they acquired good title cannot be guilty of theft as a consequence of any subsequent dealing with the property. [If D received the property in the honest but mistaken belief that ownership had passed to D].

<table>
<thead>
<tr>
<th>Maximum Penalty</th>
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<tr>
<td><strong>Basic offence</strong></td>
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<tr>
<td><strong>Aggravated offence</strong></td>
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**DID THE DEFENDANT DEAL WITH ‘PROPERTY’?**
The offence of theft is limited to dishonest conduct involving property.

**Services are NOT property:**
Thus cannot be charged with theft for not paying someone for rendered services
- E.g. receiving a manicure or hair service and not paying – these are not property.

**Information is NOT property – Oxford v Moss:**
Taking a piece of paper with exam information on it, photocopying it and returning it.
There was no intention to keep the paper and thus no intention to deprive the owner permanently.

Most one can say is that D treated the paper as ‘his own to dispose of regardless of owners rights.’ May have ‘substantially impaired’ value of exam paper.

Alternatively, this is a clear s 139 problem.

**Phone call is NOT property:**
Making a phone call from someone’s phone and having him or her charged a big bill is not theft – Akbulut v Grimshaw. May amount to electricity BUT victim does not own electricity, the phone provider does.

**WITHOUT THE OWNER’S CONSENT?**
Theft requires proof that D dealt with the property without the consent of the owner.

Where owner consents to transfer of ownership, liability for theft is usually barred. However consent may be vitiated where:
- **Owner ‘fundamentally’ mistaken:**
  - Mistake as to the identity of person to whom property was being transferred
  - Mistake as to the essential nature of the property
  - Mistake regarding terms of a contract.
  Trivial mistakes and mistakes about peripheral matters NOT enough – the mistake must be fundamental i.e. serious and significant for consent to be vitiated.
- **Consent induced by deception:** s 132(3) CLCA; s 5 CLCA
  - An apparent consent is disregarded if it is induced by deception. In this case, D is taken to act without consent.
  - Deception defined in s 130 to mean a misrepresentation by words or conduct and includes—
a) Misrepresentation about a past, present or future fact or state of affairs; or 
b) Misrepresentation about the intentions of the person making the misrepresentation 
or another person; or 
c) Misrepresentation of law;

**R v Gilks [mistake as to nature of property + deception]**

- D placed number of bets at bookmaker.
- Went to collect winnings amounting to $50.
- Bookmaker paid him $1550, mistakenly believing D to have backed winning horse.
- D pocketed the money.

Ownership of the money was passed to D, as bookmaker intended to pass the money to D. But this does not prevent D from being liable for theft. Although bookmaker consented to the dealing, apparent consent vitiated where induced by deception. Thus, D taken to have acted without consent. Bookmaker’s consent was only apparent, not real. D steals the money if he takes dishonest advantage of the bookmaker’s mistake, and that mistake is fundamental.

Consent also vitiated where:

- Owner is of low capacity: it is theft to take candy from a baby, as baby could not consent.
- Owner is under threat: in a robbery, where owner is terrified by a threat of violence and parts with their property to avoid injury, this is not consent.

**INTENTION TO ‘DEPRIVE PERMANENTLY’ OR ‘SERIOUSLY ENCROACH ON PROPRIETARY RIGHTS’?**

Borrowing is not stealing – however if no intention to replace what was taken and no consent, borrower will be guilty of theft.

Intention to seriously encroach owner’s proprietary rights is sufficient – does not matter if offender intended to return the property to the owner.

Consider:

Employee at a garage is paid by a car thief to repaint the car a different colour and attach a different set of number plates. This could amount to serious encroachment as it creates a significant risk that the car will not be returned to the owner.

**How serious must the encroachment be in order to amount to substantial impairment of value?**

A young girl breaks the plastic seal of 3 lipsticks in a department store and applies a thin smear to her lips. She purchases one of them. The department store claims that a lipstick with a broken seal is unsaleable. It is arguable that the girl substantially impaired the owner’s proprietary rights. However, if her conduct amounts to ‘substantial impairment’, still requires proof that she intended to seriously encroach: can this be proved?

**EXAMPLE:**

Victor was a dealer in used bottles. Donald cut a hole in the rear fence of the bottle yard and removed several dozen bottles. He took these to the cash desk at the front gate and sold them back to Victor for $5 cash.

**134 Theft of the bottles:** D dealt with the bottles with the intention of treating them ‘as his own to dispose of regardless of the owner’s rights’ [serious encroachment: s 134(2)(a)].

- Regardless of the fact that these bottles were actually owned by Victor, Donald treated them as his own