|  |  |  |  |
| --- | --- | --- | --- |
| **Standard of Proof** |  |  |  |
|  | BARD | Doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence (***Lifchus***1997). Important to contrast BARD with civil standard and explain proximity to absolute certainty (***Starr***2000). Crown has burden to prove every element of the offence, lack of credibility must not be considered proof of guilt (***JHS***2008*; WD framework*). |  |
|  | Reverse Onus and the Charter | Imposing a legal burden (“to establish”=BOP) violates s. 11(d), must be justified under s. 1 (***Oakes***test 1986). Imposing an evidentiary burden (“absence of evidence to contrary”) violates s. 11(d), but may well be saved by s. 1 (***Downey***1992). If a reverse onus clause leaves open a possibility of conviction despite the existence of a reasonable doubt, s. 11(d) is violated (***St.-Onge Lamoreaux***2012). \*Dissent: no violation if inexorable link between proven fact and presumed fact (Roth.) | Rational connection shifts in *Downey*. *St. Onge*: Analysis result is proof of BAC. |
| **Elements of the Offence** |  |  |  |
|  | Creating offences | Only Parliament shall develop new criminal offences (***Frey*** 1950). Common law offences abolished (s. 9); defences retained (s. 8(3)). | No law against peep. |
|  | Drunk driving | “Care and control” requires a “realistic risk of danger to persons or property”; drunk behind wheel not enough, but threshold low (***Boudreault***2012) Dissent: risk of danger is not an element of the offence. |  |
|  | Omissions (3) | 1. Statute criminalizes omission 2. Duty to act imposed by statute 3. Duty to act imposed by common law |  |
|  | Omissions (cases) | MR and AR must overlap. Ongoing act may become criminal by way of omission (***Fagan***ER 1968). Police officer’s duty to identify gives rise to reciprocal duty to cooperate (***Moore***1978). Strong dissent: duty must be independently grounded in statute or common law (Dickson). Common law duty to refrain from conduct that could foreseeably injure another person in a serious manner (***Thornton***1991 ONCA). SCC found no such duty. | Creation of common law duty same as creating offence? |
|  | Voluntariness | AR must be voluntary for criminal liability. Acts committed while asleep at the wheel cannot form the AR (***Jiang***2007 BCCA). |  |
| **Causation** |  |  |  |
|  | General | If consequences must be prove, the Crown must prove BARD that D’s actions caused those consequences. Both factual (“but for”) and legal (moral blameworthiness) causation are required for conviction. | **ss. 224-226** address causation for murder |
|  | Cases | Poor or improper medical treatment will not sever the chain of causation. (***Smith***1959 ER; s. 225). Following an assault, unreasonable actions by a victim will not sever causation. Victim refused blood transfusion / thin skull principle (***Blaue***1975 ER*;* s. 224). |  |
|  | Causation of death for murder (*Nette* 2001) | Must prove both factual and legal causation. 1) *Smithers* test for legal causation of death (“significant cause”) 2) *Harbottle* test to determine whether 1st degree (“substantial and integral cause”). Second degree murder is any murder not falling into first degree.  Engaging in a dangerous joint enterprise that causes death could be sufficient for both factual and legal causation; physical causation not required for legal causation (***JSR***2008 ONCA). | *Smithers*: any “not insignificant” cause. *Nette:* old woman |
|  | Intervening acts | Causation severed if original would is “merely the setting” for subsequent causes (***Smith***1959 ER). Objectively foreseeable intervening acts, which do not overwhelm the accused’s actions, will not sever chain of causation (*Maybin* 2012). |  |
| ***Mens Rea*** |  |  |  |
|  | General | i) conduct must be **intentional**; ii) there must be **knowledge** of the circumstances; iii) the consequences must have been intended or subjectively foreseen. |  |
|  | Subjective MR | Presumption that true crimes require subjective MR (***Sault Ste. Marie***1978). Possession requires knowledge (***Beaver***1957). “Intent” is subjective purpose or subjective foresight (*Buzzanga*). |  |
|  | Intent and Recklessness | Requirement for subjective intent typically satisfied by recklessness. “Wilfully” requires subjective intent (***Buzzanga*** 1980 ONCA). Recklessness is consciousness of a risk and proceeding in the face of that risk; may suffice for knowledge (***Schepannek***2012) | “wilful promotion of hatred”/satire posters |
|  | Fraud | Fraud: **AR**: 1) objectively dishonest act (deceit, falsehood, etc.); 2) That causes economic deprivation (or risk of) to another; **MR**: 1) subjective knowledge of prohibited act; 2) subjective foresight that economic deprivation could occur; sharp business practices do not suffice (***Theroux*** 1993). Subjective belief that acts are not deceitful is irrelevant, sufficient that accused has awareness of situation causing deprivation (***Kingsbury*** 2012 BCCA). |  |
|  | Wilful blindness | When knowledge is a component of the MR, wilful blindness will suffice (***Briscoe***2010) |  |
|  | Motive | Motive is irrelevant to findings of criminal liability, though it may speak to intent or the likelihood of guilt (***Lewis***1979) | Kettle bomb, motive? |
|  | Transferred intent | **s. 229(b)** allows for transferred intent in homicide crimes. Can be used in other offences so long as intended harm and actual harm are the same. Transferred intent does not apply to attempted murder of other crimes of attempt (***Gordon*** 2009) |  |
| **Absolute and Strict Liability** |  |  |  |
|  | General | AL offences do not require the Crown to prove a mental element. Once AR is established, no defence. SL offences are similar, but the defence of due diligence is available, to be established on a balance of probabilities. |  |
|  | Presumptions | Criminal offences presumptively require MR; public welfare offences are presumptively strict liability. Clear language required to create an absolute liability offence (***Sault Ste. Marie***1978). No absolute liability + imprisonment (***Re MVA*** 1986)Public welfare: seek to protect public and social interests. Criminal: prohibit and punish social evil. |  |
|  | Due diligence | D absolved of strict liability if they can prove, on a balance of probabilities, that they were “no way negligent” (i.e. took all reasonable steps to avoid the offence or had a reasonable belief in a justifying set of facts) (***Chapin*** 1979). Neither objective fault element nor reverse onus violate Charter (***Wholesale Travel Group*** 1991; false advertising). | Not checking for bait was reasonable |
| **Crimes of Objective Fault** |  |  |  |
|  | Criminal negligence  (**s. 220)** | Conduct which reveals a “marked and significant departure” from the standard expected of a reasonably prudent person in the circumstances. Objective test, but sensitive to circumstances and accused’s perceptions (***Tutton*** 1989) | Diabetic son, God cure |
|  | Failing to provide necessaries of life | Conduct which reveals a “marked departure” from the conduct of a reasonably prudent person (***JF*** 2008). |  |
|  | Dangerous driving/  Marked Departure  **S. 249** | **AR**: viewed objectively, is the manner of driving dangerous? (***Beatty***2008)**MR:** Modified objective fault requirement. Conduct that amounts to a marked departure from the standard of care that a reasonable person would observe in the circumstances (***Hundal***1993: dump truck). Actual mental state of accused cannot be ignored, circumstances are relevant (***Beatty***2008: momentary lapse not marked departure). Fatal misjudgements are not necessarily marked departures from the reasonableness standard (***Roy***2012: motorhome). MR cannot simply be inferred from the AR. |  |
|  | Determining fault | Factors: language and purpose of offence, comparison to other sections, presumption of SMR. 5 categories of objective fault: “dangerous”, “careless”, “predicate offences”, criminal negligence, duty-based offences (***ADH***2013) | Child abandonment req. subjective fault. |
|  |  |  |  |
| **Mens Rea and the Charter** |  |  |  |
|  | Section 7 | Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice |  |
|  | Absolute liability and imprisonment | Combination of absolute liability and imprisonment violates s. 7. **Principle of fundamental justice** that morally innocent not be punished (***Re MVA***1986). Not saved by s. 1. | Proof of prohibited driving is proof guilt |
|  | Interpretation | Preference to interpret legislation in a manner that preserves constitutionality. If a due diligence defence could ever be raised then preference for strict liability (***Raham***2010 ONCA) | Stunt driving strict or absolute liability? |
|  | Murder conviction | Conviction for murder requires subjective foresight of death. **Principles of fundamental justice** require proportionality between stigma and punishment of an offence and moral blameworthiness of offender (***Martineau***1991). Martineau’s accomplice killed occupants of trailer; D did not know this was going to happen. | Subjective MR not always required (see *DeSousa* & *Creighton*) |
|  | Unlawful object murder | “Ought to know” struck from 220(c) (***Martineau***1991). In ***Vasil***(1981), a man set fire to furniture while children were sleeping in a nearby room. The court said 229(c) requires: i) intent to carry out an indictable offence ii) dangerous act that a reasonable person would know is likely to cause death iii) intent to commit the dangerous act, knowing it is likely to cause death. Can be found guilty under 229(c) even if they don’t intend to harm victim (***JSR*** 2008 ONCA). |  |
|  | Unlawfully causing bodily harm (269) | AR: predicate offence + causation of harm. MR of predicate + objective foresight of bodily harm. “Unlawful act” is any violation of federal or provincial statute that is not of absolute liability (***DeSousa***1992). Subjective MR not required. | Threw bottle at wall. |
|  | Manslaughter | Conviction for manslaughter requires the MR of the underlying offence (unlawful act or negligence) + objective foresight of bodily harm. Objective test is context-dependant but does not take personal characteristics into account, with the exception of “incapacity to appreciate the nature of the risk” (***Creighton*** 1993). | Cocaine injection |
| **Mistake** |  |  |  |
|  | General | Mistake of fact is available when knowledge is a part of the offence and when D holds an honest belief in a set of circumstances that, if true, would entitle D to an acquittal. It may result in an acquittal or in conviction of a lesser offence. |  |
|  | AR/MR must match | Laskin Dissent: AR and MR must be for the same offence. Cannot mix/match (***Kundeus***1976) | Mescaline/LSD |
|  | Mistaken belief in consent | Mistake is a defence when it prevents accused from having requisite MR, though AR may have been committed. Mistaken beliefs do not have to be reasonable, only honestly held (***Papajohn***1980). But see 273.1 and 273.2. Consent requires subjective intent. Mistake of fact requires that accused took reasonable steps to ascertain consent, and that belief was based on words or conduct of victim (***Ewanchuck***). | E: Van “interviews”; no implied consent  P: Real estate |
|  | Mistake of Law  (***Levis***2006) | **S. 19**: ignorance of the law is no excuse. Officially induced error of law: i) error of law made ii) person who committed the act considered the legal consequences of his or her actions iii) the advice obtained came from an official iv) advice was reasonable v) advice was erroneous vi) person relied on the advice in committing the act. Stay of proceedings if successful. See ***Khanna***(2009) (citizenship). | Insurance company failed to deliver, but D should have known |
| **Intoxication** |  |  |  |
|  | ***Leary***rule | Can be raised for general intent but not specific. Murder is specific intent offence, intoxication will reduce to manslaughter. |  |
|  | Specific vs. General | General: only relevant intent is that to do the act. Specific: In addition to general, there must be intended purpose for the act. Sexual assault is a crime of general intent. Voluntary intoxication may be proxy for proof of guilty mind (***Bernard***1988) | But see *Daviault* |
|  | Extreme intoxication | Only if the accused is in a state akin to automatism or insanity could there be a reasonable doubt as to the minimal intent or voluntariness required for a general intent offence. Must be proven on BOP with expert evidence (***Daviault***1994).  **S. 33.1**: Self-induced intoxication cannot disprove general intent or voluntariness. Applies to offences of assault or bodily harm. | Alcoholic blackout. 33.1 Constitutional? Substitution/ *Martineau* |
|  | Levels of drunk | 1) relaxed inhibitions 2) impaired ability to foresee consequences (specific intent) 3) automatism/extreme intoxication/involuntary | (***Drader*** ABPC) |
| **Provocation** |  |  |  |
|  | General | Found in **s. 232**. Only applies to reduce murder to manslaughter. Partial excuse for those who acted with intention to kill. |  |
|  | Elements | 1) Ordinary person deprived of self-control by act or insult 2) D acted in response to insult 3) Response was sudden and before there was time for passions to cool. First question is modified objective; second two are questions of fact (***Hill***1985). | 16 yr, unwanted sexual advances. |
|  | Objective/subjective | Contextual factors affecting the degree of provocation are relevant (***Thibert***1996). However, “ordinary person” standard must be informed by contemporary standards and Charter values. No antiquated beliefs or individualization beyond context (***Tran***2010). Retreating from a confrontation and then returning does not bar a claim for provocation (***Gill***2009, ONCA) | Parking lot; estranged wife’s bedroom. |
|  | Rolled up Charge | In Ontario, juries should be instructed to consider the cumulative effects of intoxication and provocation, even if neither defence has an air of reality on its own (***Nealy*** 1986 ONCA) | Drinking, insult, fight |
| **Mental Disorder** |  |  |  |
|  | **Section 16** | Not responsible for acts committed while suffering from mental disorder that rendered person 1) incapable of appreciating the nature and quality of the act or 2) knowing that the act was wrong. **S. 2:** “mental disorder” means disease of the mind (Defined broadly in ***Cooper***as illness, disorder, or abnormal condition which impairs the human mind and its functioning, excluding self-induced states. Must be proven on the BOP, by the party raising the issue. If found, verdict of NCRMD, appear before panel. |  |
|  | Interpretation | First branch: question is whether the accused had the ability to perceive the consequences and results of the physical acts. Second branch: question is not whether the accused knew that the act was against the law but whether he knew it was “morally wrong” according to society’s understanding of right/wrong (***Chaulk*** 1990) | Reverse onus upheld under s. 1. |
| **Automatism** |  |  |  |
|  | General | State of impaired consciousness, no voluntary control of actions. Two kinds, non-mental disorder will result in acquittal. |  |
|  | Test (***Stone*** 1999) | 1) Sufficient evidence for state of automatism (must disprove voluntariness on BOP. Considerations include shocking trigger, motive, past events, bystander evidence) 2) determine whether mental disorder or non-mental disorder (disease of mind is starting point, internal cause and continuing danger are two considerations) | Degrading wife, 47 stabs |
|  | Interpretations | Policy approaches to “disease of the mind”: 1) continuing dangers should be treated as insanity 2) Internal defects should be considered insanity. Sleepwalking meets neither approach (***Parks***1992). Stresses and disappointments of life do not give rise to non-insane dissociative state (***Rabey***1977 ONCA). Automatism that results from self-induced intoxication cannot be considered a disease of the mind, consider under intoxication (***Bouchard****-****Lebrun*** 2011) | Disease of mind can be raised if unrelated to effects of intoxication |
| **Self-Defence** |  |  |  |
|  | Code **Section 34** (2011) | 1) Reasonable belief that force or threat of force is being used against them or another person 2) The offence is committed for the purpose of defending themselves or others 3) Act committed is reasonable in the circumstances. **34(2)**: list of factors re: reasonableness | Unclear if previous case law applies |
|  | Old test | Old test: 1) Was D under a reasonable apprehension of death or serious bodily harm? 2) Was the accused’s belief that she could not otherwise preserve her life a reasonable belief? When considering whether a belief is “reasonable” the court must look at the circumstances and perceptions of the accused and the history of the relationship between D and attacker. (***Lavalee***1990) | Shot BF while leaving room |
|  | Reasonableness | Expert evidence of the reasonableness of a battered woman’s belief is relevant to self-defence, provocation, duress, and other reasonableness defences (***Mallott***1998) |  |
|  | **Air of Reality** | Sufficient evidence upon which a properly instructed jury acting reasonably could acquit, if it believed the evidence (***Cinous***2002) | Gas station, pre-emptive |
|  | New cases | Allowing old self-defence provisions to linger would promote uncertainty, new law applied (***Caswell***2013 SKPC). Applied both old and new provisions, considers proportionality (***Urquhart***2013 BCPC) | Television, Coast Guard Leader |
| **Necessity** |  |  |  |
|  | General | Excuses criminal liability in situations where no reasonable person could have refrained from committing criminal conduct |  |
|  | Test | 1) Pressing peril or danger 2) No legal way out 3) proportionality between harm avoided and harm done (***Perka***1984). | Drugs coast |
|  | Interpretation | First two parts of test are modified objective standard (reasonable in circumstances), third part is objective standard (***Latimer***2001). Hatzoloh ambulance driver had reasonable belief that there was no legal alternative (***Ungar***2002 ONCJ). |  |
| **Duress** |  |  |  |
|  | General | **s. 17:** Immediate threat of death or bodily harm from someone present (+ list of exclusions). Statutory defence applies to principals; parties (aider/abettor) can rely on common law defence (*Paquette*). Immediacy and presence requirements of **s. 17** severed from code for violating s. 7 Charter. **Principle of fundamental justice** that morally involuntary must not be punished (***Ruzic***2001: Airport). | Necessity arises from objective dangers, duress from humans |
|  | Interpretation | 1) Explicit or implicit threat of present or future death or bodily harm directed against accused or third party 2) Accused must have reasonable belief the threat will be carried out 3) The offence must not be an excluded offence 4) Cant be caused by criminal association or conspiracy. Common law considerations i) no safe avenue of escape 2) close temporal connection 3) proportionality. (***Ryan***2013) | Threat must be made for the purpose of compelling offence |
| **Attempts** |  |  |  |
|  | General | Attempts may be charged separately or as an included offence. Penalties are often reduced (s. 463). |  |
|  | Code (AR/MR) | **S. 24:** 1) Intent to commit an offence 2) Act or omission for the purpose of carrying out that intent (beyond mere preparation). |  |
|  | Attempted murder | MR for attempt cannot be less than MR for full offence; recklessness will not suffice as MR for attempt (***Ancio***984) | Stairwell shotgun |
|  | Evidence of intent | Evidence of acts constituting the AR of an alleged attempt do not prove the existence of intent (***Sorrell***1978 ONCA) | Fried Chicken |
|  | Impossibility | Neither factual nor legal impossibility will bar a finding of criminal attempt. However, not a crime to attempt an imaginary crime (***Dynar***1997). Dissent: Criminal consequences should not be attached to actions that could never be a crime (e.g. stealing a free sample) | Money laundering |
| **Aiding and Abetting** |  |  |  |
|  | Code | **S. 21:** All parties to an offence are equally culpable (principals, aiders, abettors). “Aid” means assist or help. “Abet” means to encourage, instigate, promote or procur (*Briscoe*). |  |
|  | Elements | A/A requires knowledge that the perpetrator intends to commit the crime and intent to assist the perpetrator in the carrying out of the crime. AR satisfied by act or omission that aids or abets (***Briscoe***2010). AR and MR must overlap: aiding w/o knowledge is not offence. |  |
|  | Specific intent | A/A are specific intent offences for which the defence of intoxication is available. Intoxication only available for “abetting” if the accused is so intoxicated as to be incapable of understanding the actions of the principal (***Fraser***1984). | Assault. How does this relate to 33.1? |
|  | Presence at crime and MR | Mere presence does not make one guilty of A/A. Encouragement of offender or act or omission that facilitates offence is required (***Dunlop***1979). If minimum MR is required for offence, that same level is required for aiding/abetting the offence (***Logan***1990). | Gang, garbage dump |
|  | Murder | Law indifferent as to whether defendant was principal or aider/abettor in terms of guilt. If jury convinced beyond a reasonable doubt that D was either, conviction founded (***Thatcher***1987). |  |
|  | Defence of Abandonment | 1) Intent to abandon unlawful purpose 2) timely communication to those who wish to continue 3) unequivocal notice. Where a person is a party under 21(1), a fourth element must be met: 4) accused took reasonable steps, in proportion to participation, to neutralize effects of participation or prevent offence (***Gauthier***2013). | Murder-suicide pact, purchased drugs |
|  | Kidnapping | Continuing offence. Those who become involved later are parties under 21(1) (***Vu***2012). |  |
| **Sentencing** |  |  |  |
|  | General | Principles found in Part XXIII and case law. Purpose of Sentencing (**718**): denunciation, deterrence, isolation, rehabilitation, and reparation. Fundamental Principle (**718.1**): Sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. **718.2** lists aggravating and mitigating factor. |  |
|  | Interpretation | Sentences must be proportionate to gravity of offence and moral blameworthiness of offender. No one objective trumps others (***Nasogaluak***2010). Trial judge cannot hand down sentence that is unreasonable in circumstances or contrary to Parliament’s intentions (***Smith***2013). |  |
|  | Mandatory minimum | If a mandatory minimum sentence is unconstitutional in any situation it must be struck down. Test for cruel and unusual punishment is “gross disproportionality.” (***Ferguson***2008). | Police jail cell, constitutional exempt? |
|  | Maximum | Maximum sentences are not only for the worst crimes committed by the worst offender. They are to be imposed when the blameworthiness of the offender warrants it (***ML***2008). Appellate courts must not interfere unless unreasonable or demonstrably unfit. |  |
| **Secondary principles of sentencing** |  |  |  |
|  | **718.2** | Non-exhaustive list of factors that a sentencing judge may consider. **718.2(e):** “All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.” |  |
|  | Interpretation | 718.2(e) applies to all and emphasizes that imprisonment should be last resort. Not an auto-discount for aboriginals; way of allowing unique circumstances and factors to be considered (***Gladue***1999). Applies equally to serious and less serious offenders; no requirement to establish causal link between background factors and commission of offence (***Ipeelee***2012). Sentences for co-accused do not have to be the same (***Akapew***2009 SKCA). Denunciation and deterrence must be weighed against rehabilitation. Mitigating factors and personal circumstances must be taken into account when assessing proportionality (***Draper***2010 MBCA). |  |

Fault flow-chart: Does the statutory provision specify a mental element or lack of mental element?

* If yes, does the mental element or lack of mental element violate the *Charter*?
  + If yes, the offence is unconstitutional and may be of no force or effect or a mental element may be read in (*Motor Vehicle Reference*)
* If no, interpret and classify the statute
  + First, look for (binding) **cases** interpreting the provision
  + If there are no cases, or if the case law is unclear, classify the statute as a **true crime** or a **public welfare** offence.
    - True crime: in the code or in federal statute with serious penalties
      * If the statute is a true crime, it is presumed to have a MR that must be proven by the Crown BARD.
        + Relate MR to AR and purpose of statute
        + Not every element of the AR necessarily has a MR attached to it
        + Presumption that true crimes require subjective fault (*Beaver*)
        + Sometimes, objective fault will displace subjective fault (*Tutton, Creighton*)
        + Provincial offences are not true crimes, but they may have a subjective MR
      * Consider which parts of the AR should have a mental element attached to them
      * Consider whether the MR is best expressed in terms of intent, recklessness, knowledge or some combination of these.
      * \*\*Your answer will be an argument. There is not necessarily a right answer to this process; highlight how the defence and the Crown would argue.
    - Public welfare offence
      * Presumed to be an offence of strict liability. This presumption is rebuttable.
        + Look at overall statutory scheme to see if this presumption should be displaced and interpreted as absolute liability or subjective fault (*Chapin, Raham*).
        + Defendants may avoid liability by establishing that the “took all reasonable care” to avoid the offence (objective), or that they had a reasonable but mistaken belief that justifies their actions.
    - Clear legislative intent is required to create an absolute liability offence
* Once you have established the mental element or lack of mental element, remember to consider whether it is consistent with the *Charter*. If not, it must be reinterpreted to conform with the *Charter* where possible, or struck down. With the exception of murder and war crimes, the court has not found that the constitution demands subjective MR for true crimes.

**Air of reality**: Mistake of fact, intoxication, provocation, self-defence, duress, and necessity **BOP**: Extreme intoxication, mental disorder, automatism, officially induced error of law.