|  |  |  |
| --- | --- | --- |
| Type | Burden of Proof | Applicability |
| **Subjective Fault**  (accused was aware of risk but proceeded anyway)  (*Beaver*, ’57, SCC) | **Crown must prove BARD**  Wilful blindness = knowledge (*Briscoe*, ’10 SCC) Threshold test: if you have subjective belief an offence will occur there is a duty placed on you to inquire  Wilfully=intent to promote harm  (*Buzzanga*, ’79 CCC)  Recklessness is sufficient knowledge (except when ‘wilful’ is required) (*Schepannek*, ’12 BCCA) | All true and serious crimes (provinces cannot create true crimes) and also  criminal negligence (not related to death) |
| **Objective Fault**  (What a reasonable person believes is correct) | **Crown must prove BARD**  Objective test: was there a “marked and significant departure” from what a reasonable person would do?  Wanton or reckless disregard for safety of others (*Tutton*, ’89, SCC)  “marked departure” for failing to provide necessities of life and driving cases (*JF*, ’08, SCC) | Criminal negligence causing death i.e. reckless driving causing death  Manslaughter |
| **Strict Liability**  Absolute with objective standard allowed to prove on BOP by accused  (*Sault Ste Marie,* ’78 SCC) | **Crown must prove AR BARD, not MR**  Accused can prove the defence of due diligence on BOP, that they took all reasonable steps to avoid negligence | Public welfare accusations that affect communities’ health or safety. Generally provincial offences.  Eg. Duck Hunting *Chapin*, ’79 SCC |
| **Absolute Liability** | **Crown must prove AR BARD**  No need to prove MR, mental state of accused is irrelevant | Speeding etc. |

**#1 READ ENTIRE SECTION**

**Check for definitions and presumptions violating *Charter***

**Crown must prove BARD**

**Actus reus** (i.e. impaired driving causing death)**:**

1. Conduct (operating a motor vehicle)
2. Circumstances (to be impaired)
3. Consequences, if any (operating a motor vehicle impaired **caused** death of another person)

If there is a consequence as part of AR, causation must be proven

**#2 Mens Rea** (for each element of the offense)

1. Intent (use ‘willfully’ if stated)
2. Intent, knowledge, or recklessness (if Subj. M.R.) of consequences
3. Reverse Onus? (save for proof of M.R.)

**#3** **Proof of AR**

1. Look at definitions
2. Based on facts, can crown prove A.R.?
3. Can defense bring up arguments showing other factor caused consequences?
4. Crown must prove that accused was **“significant contributing cause” (*Nette* ’01 SCC).** Show how it was/wasn’t a cause, if there was consequence.
5. **1st deg. murder-** cause  **“substantial and integral”** (*Harbottle*, ’93 SCC)(don’t have to kill)

**#4 Proof of MR-** decide which MR it is

1. Look at language (wilful, intentionally, knowingly – full MR)
2. True crime v Public Welfare (prov/reg.)
3. Negligence causing death? Driving?

**Reverse Onus (Oakes Test)**

Presumption that violates s.11(d) (“will be presumed innocent)

Or where MR/lack of MR violates s.7 (“right to life, liberty…)

*Oakes*, ’86 SCC –L Burden, *Downey*, ’92 SCC – E Burden

1. Substantial and pressing objective- is it difficult for the crown to prove instead?
2. Rational connection test: is there a reasonable (*Downey*) connection between presumed fact and substituted fact (i.e. trafficking and possession), and coherence with the offence and the statute intent
3. Minimal impairment- how impaired is the freedom in question to other social, educational, and economic programs
4. Proportionality- between the effects of the measures which limit the Charter freedom and the important objective

Legal Burden- must rebut the presumption on **BoP**

Evidentiary Burden- must provide evidence that raises **RD**

**Word ‘establish’ means on BoP** (*Boudreault*, ’12 SCC)

**DEFINITIONS**

Wilful Blindness : he or she sees the need for further inquiries, but *deliberately chooses* not to make those inquiries (did A shut eyes because if open would gain knowledge?) (*Briscoe*, ’10, SCC)

Recklessness: less than actual intention - being in a situation where there's a risk of action happening and you proceed in the face of it anyway

Motive: before and not intent - not element of offense- can be used as evidence (*Lewis*, ’79, SCC)

Transferred Intent: does not work well with ‘attempted crimes’, when intent gets misplaced onto another

(*Gordon*, ’09, OCA)

Omissions: The law does not punish a failure to act Except:

* 1. Where the code specifically criminalizes an omission
  2. Where there is a duty to act law places a positive obligation to act)
     + Duty can come from statute and common law

(see ommissions back page)

There can be no finding of guilt in criminal law unless the offence was committed **voluntarily**.

(*Lucki*, 1955, Police Ct. Sask)

**Duties and Ommissions(s.215-217)**

The Crown may apply a duty arising out of common law, or provincial statute, if such a duty exists (*Thornton*, ’91, Ont. CA)

*Fagan*, ’68 CA UK- Use when MR and AR do not overlap

Generally AR and MR must overlap BUT can be shown if the AR is a continuing one. MR does not need to exist at inception of AR, can be imposed upon it.

**BARD**

*Lifchus*, ’97 SCC

Concept of reasonable doubt connected on a presumption of innocence, based on common sense. Not an ordinary concept but a legal concept. Does not amount to absolute certainty, though closer to it than BOP. Is not equal to “moral certainty”, and is logically onnected to evidence.

*JHS*, ’08 SCC- used WD test to determine cred. and RD

Instructions where credible evidence is at issue (i.e. 2 witness)

1. If you believe the evidence of accused then acquit
2. If you don’t believe then evidence of accused but are left in RD, you must acquit
3. Even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

**Offences** – *Fedoruk*, 1950 SCC- no common law offenses

**Summary Conviction**

* Takes place in provincial court
* No Jury, no preliminary enquiry
* Max penalty is 6 months in jail and $2000

**Indictable**

* Only the fed can create, fall under 3 types

1. s.553 (eg. Theft under $5000)
   * Prov. Court, no jury or PE
2. s. 469 (eg. Murder)
   * Superior Court, PE (if evidentiary burden not met then they are *discharged*)
   * Jury (unless mutual consent not to)
3. All other indictable offenses
   * May elect mode of trial (If superior court then PE happens in provincial court)

**Hybrid-** offence involves both summary can indictable, choice rests with crown counsel.

**Causation**

*R v. Blaue Eng CA Crim Div (1975)*: use Thin Skull rule in religious context; reasonableness of belief, take victim as found

*R v. Smith Eng CA (1959):* Intervening act must overwhelm prev. cause/make mere part of history (poor treatment not break in chain)

*R v. Smithers SCC (1978):* Cana. Stnd. gor cause of homicide = contributing cause of death (de minimus)

*R v. JSR SCC (2008):* use when accused is a 3rd party in OVERALL dangerous act causing death/bodily harm

* Participating in an overall dangerous activity are said to cause the dangerously foreseeable results of their conduct (e.g., car race, gun shootout)

*R v. Maybin SCC (2012):* use when potential intervening cause was foreseeable at time of initial act

* If there is **reasonable foreseeability** of an intervening cause (including independent action of 3rd party actors) the causal connection is not severed (e.g., bouncer in bar fight; Smither’s test)
* Allows for multiple causes

224-226 shows how intermediaries do not affect primary cause liability

**Principle of Legality:** If you are charged with a crime for something occurring years ago, you are charged under today’s guidelines

**Transferred intent-** allowed if the harm matches the intent, doesn’t have to be to ideal subject- usually only for murder

**Fraud**- (*R v Théroux*) AR must have 1) Dishonest act and 2) Deprivation caused by dishonest act

MR must have 1) Subjective knowledge of the prohibited act 2)That this act could deprive

s.269 Unlawful Bodily Harm/Manslaughter

AR- Unlawful act, causing bodily harm

MR- O foresight of bodily harm

(*Creighton* SCC 1993)

s.229 Murder (*Martineau* SCC 1991)

AR- Unlawful act, death

MR- intend to cause harm with subj. foresight of death

- Was reckless whether death ensues or not

s.220 Crim. Neg. Causing death

AR- doing an act, or omission with duty, death

MR- marked and substantial departure from reasonable person

**Objective MR**

*R v Tutton SCC 1989*: use when applying obj test for Crim Negl; assessing mistake of fact defence

* Crim Neg obj MR test: SIGNIFICANT/MARKED depart from reasonable person w/in the circum’s
  + Honest AND reasonable belief with regard to mistake of fact (defence) – don’t personalize obj test

*R v J.F. SCC (2008)*: re-affirm Tutton; use to make argument for higher/lower MR based on offence

* Two standards of objective fault—Distinguish b/t “marked” and “marked and significant”
* Criminal negligence reqs *substantial/significant* departure from reasonable person obj standard
  + VS failure to provide necessities (s. 215) - *marked* departure – statutory offence

*R v. Hundal SCC 1993* – used to establish characteristics of “marked departure” in the circumstances

* Marked departure from conduct of a reasonable person = test for obj MR in dangerous driving
  + 1. Licenced activity points to objective fault (already meets minimum standard requirement)
    2. Public policy (e.g., deaths from driving) and automatic activity = hints for obj MR
* Cory J: If you see “in regard to all the circumstances” = hint for obj MR

*R v Beatty SCC 2008* – truck swerved into other lane-

* Momentary lapse in awareness does NOT constitute marked departure from the reasonable person in the circumstances (temporal req., surrounding circumstances CAN negate momentary lapse)
  + Don’t collapse AR/MR for dangerous driving (can’t infer this from fact that people died)

*R v Roy SCC 2008* – pulled out onto the highway- must take objective viewing as taking in all of the circumstances

*R v ADH 2013 SCC*- Child Abandonment under 10, walmart store

* Words 'abandon' 'expose' and 'wilful' suggest subjective meanings
* The judge ruled that given the situation there was reason for the mom to believe the child dead (mistake of fact)
* Subjective fault is used
  + The offence is broader than 'failing to provide necessaries of life' offense

**Mistake of Law**- not really a defence, dealt with in s.19

- Could be officially induced error of law- BOP- CL

- *Campbell* 1973 CCC (gogo dancer), just affected sentencing, discharge was given

- Difficult to find a case where it has been successful

- *Tetreault* SCC 2006- six factors:

1. An error of law or mixed law and fact was made
2. The legal consequences of actions were considered
3. That the advice obtained came from an appropriate official
4. That the advice was reasonable
5. That the advice was erroneous
6. That the person relied on the advice in committing the act

**Intoxication-** CL defence, but w/ s.33.1 limits - AOR

- Struggle with boundaries on the offence

- If you are charged with murder (specific) you will be charged with manslaughter (general)

- Entitles accused to conviction or lesser acquittal

- If being intoxicated is part of the offence it is not a defence

- Involuntary consumption of intoxicants may allow complete

- “With intent to”/”for the purpose of” indicate specific intent

- Negates part of MR

General Intoxication (*Bernard* SCC 1988)

- Only for specific crimes (ie. Murder) but not general

- Sexual assault, manslaughter, assault, is general

Extreme Intoxication – proved on BoP by expert

*-* So inebriated that AR was involuntary or no MR for even the minimal intent required

- Applies to general intent offences but not assault

*Daviault* SCC 1994- dissent Sopinka argues moral blame-worthiness has become criminal negligence

Rolled Up Charge- *Nealy* Ont CA 1986

- Court rules that jury can be charged on cumulative effect of evidence on accused’s intent

- If rolled up charge for murder succeeds, would be dropped to manslaughter

**Aboriginal Problems w/ Sentencing** s.718.2(e)

- In 1997 there was a major reformation of CC to reduce jailing

- Current mood is now more sentences for longer periods of time

- Reforms recognized restorative justice and abo offenders

- *R v Gladue* SCC 1999- aboriginal woman charged with manslaughter for stabbing spouse while intoxicated and pregnant

- Sentenced to 3 years, pregnancy played a part

- Clear evidence that there is over-incarceration of abo people

- Reasons: reflection of poverty, over policemen, more likely to be sentenced to jail/deny bail than non-aboriginals

- Courts should also consider the particular nature of jails, lots of racism, culturally alienating, is the new residential school for abos

- The more serious the offence the less abo status is considered

- s.718.2(e) is not reverse discriminatory since it aims to stop a problem and is not an automatic reduction of sentence

- should be considered in light of the rest of section XXIII as well as s.718 as a whole and s.742.1

- stated judge must consider 1) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and

2)The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.

Dangerous Offender Designation- can lead to indeterminate sentence of imprisonment, but entitled to periodic reviews

- offenders try to avoid this status, crown uses it as a bargaining chip in plea bargain

- Crown has to apply for it, need expert evidence of impossibility of supervision in community

- does not apply to murder

**Sentencing –** part XXIII of the code s.718

- Most important principle is that it is proportionate to the gravity of the offence and the blameworthiness of the offender

- Can be imprisonment, fine, probation (suspended sentence), conditional sentence (form of house arrest), conditional or absolute discharge, DNA databank order, sex offender registration order

- Look at older cases to find sentencing ranges

- If the sentence has changed you get the option of the lesser

- Consider denunciation (public condemnation), restorative justice (focuses on the needs of the victims and offenders, as well as the involved community), specific deterrence (punishment focuses on the individual as a threat, contrasted with retributivism), general deterrence (prevention), and rehabilitation (*Sweeney* BCCA 1992)

- Canada tends to treat multiple sentences concurrently as opposed to consecutively

- Limited discretion for trial judge to give credit for pre-trial detention (*Truth in Sentencing Act*)

- Jury has no role in sentencing unless 2nd degree murder when asked for opinion on parole ineligibility, judge keeps power

- No constitutional exemption for minimum sentences under s.12 (*Ferguson* 2008 SCC), could be struck down though

- Would have to say that sentence is grossly disproportionate

- police misconduct could mitigate sentence (*Nasogaluak* 2010 SCC) and personal conditions (*Draper* 2010MBCA)

- guilt does not involve foresight of consequences , why assault and assault bodily harm have identical MR (*Smith* 2013 BCCA)

Long Term Offender- something in between community supervision and dangerous offender designation

- fills in the gap between definite and indefinite detention

- can be supervised for up to ten years by the police

- breach is treated as an indictable offence, max penalty ten years

**Mistake of Fact**- negates an element of the AR- AOR- CL

- Could result in an acquittal but could also result in an “attempt”

- An honest belief (S) that a set of circumstance other than the one presented are true and would lead him to be acquit

- applies to any offence with an element of knowledge, honest belief is held subjectively (*Beaver* SCC 1957)

- AR and MR must match (*Kundeus* SCC 1976 mescaline/LSD)

Sexual Assault-

AR- Force, sexual nature, without consent

MR- Intent to apply, No MR, knowledge

- Consent is voluntary agreement (*Ewanchuk* SCC 1999)

- Reasonable steps to ascertain consent

- Cannot give AOR if accused is intoxicated, reckless, or wilful b

**Duress**: Where accused commits crime in response from 3rd party

- Codified s.17, but there is also a common law defence

- CL is less strict and ignores excluded offences in s.17

- It’s an excuse based on moral involuntariness

- Criminal conduct need not be directed by the threatener

- Person threatening does not have to be present (*Ruzic*, *Ryan*)

- Threat must be relatively immediate bodily harm(MO)

- Must have been no legal alternative (MO)

- Reasonable (MO test) that threat would be carried out

- Must have been proportionality (O)

- D must bring AOR above 4 elements (*Ryan* 2013 SCC)

- *Ruzic* (drug smuggler) posed s.7 challenge that s.17 was unconstitutional and won, can be held to 3rd party, closer to CL

- Full defence that results in acquittal

**Necessity**- acting in an emergency (not required w/ duress)

- Not very common- a legal recognition of moral involuntary

- Common law defence, not in the code

- Full defence that results in acquittal – raise on AOR

- Threat of bodily harm not required (that is duress)

- Can be for 1) the avoidance of greater harm or pursuit of some greater good or 2) Difficulty of compliance with the law under and emergency

- *Perka* 1984 SCC – drug smuggling boat- criteria:

- There is imminent peril or danger MO

- The accused must have had no reasonable legal alternative to the course of action he or she undertook MO

- Proportionality on O

- Does not matter if activity was illegal, unless you created it

**Self-Defence**- proved on AOR, common law and statutory s.34-35

- Not clear whether new provisions were intended to be retroactive

- Property (*Caswell* 2013 SKPC) or defence of a 3rd person

- Accused could make a reasonably mistake about whether she was actually being assaulted (bring it up even if she wasn’t)

1) Unlawful assault was imminent (MO)

2) Apprehension of death or grievous bodily harm (MO)

3) No legal alternative (Obj)

- **AOR**- *Cinous* 2002 SCC

- **Whether there is (1) evidence (2) upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true (can it support inferences capable to acquit)**

**-** Does not mean sufficient to acquit, just suff. to raise acquittal

*Malott* SCC 1998 – Battered woman- need to look at context

- Reasonableness must operate in context of experiences as a woman, not on her status as a battered woman

- In trial, judges should be told 1) Battered woman’s experiences are both individualized, as well as shared with other women

- Evidence should be presented in a way as to focus on the reasonableness of the woman’s actions, without relying on stereotypes of battered women

**Mental Disorder**- Plea of NCRMD s.16 – proven on BoP

- There is presumption of sanity in ss.2 until contrary proven

- Burden on party who raises the issue, results in special disposition

- Accused must be found to 1) have a mental disorder that renders him unable to appreciate the nature and quality of the act he committed OR 2) was incapable of knowing wrong

- Not exactly a defence, just proves NCR

- May negate the mens rea, or may provide excuse

- *Chaulk* 1990 SCC- moral blameworthiness under “wrong”

Non-mental disorder automatism- i.e. sleepwalking

- Can result in full acquittal

- Psychological blow can’t be from ordinary stresses and disappointments of life (*Rabey* 1980 SCR)

- If the cause is internal it is really a disorder – internal cause theory

- Sleep walking not continuous threat- continuing danger theory (*Parks* 1992 SCR)

- Drugs do not void liability, and are funneled under intoxication (*Bouchard-Lebrun*) 2011 SCC

Disposition- If found to be a threat to the public, full discharge not possible, if not threat, then possible. Court tends to favour public safety over liberty of accused.

**Provocation**- s.232, only applies to reduce murder to manslaughter

- Angry and lose self-control (fear and preservation= self-defence)

- Does not negate intent, is partial excuse

- Intoxication is not relevant in the assessment

- Race, age is included, religious beliefs aren’t (*Tran* 2010 SCC)

- Raised on AOR (*Hill* SCC 1985)

- Cannot be provocation if there was a legal right to do it, ss.3, provocative act must be illegal (*Thibert* 1996 SCC)- incl. history

- Wrongful act/insult (MO) that would cause the ordinary person to lose self-control (O) and act on sudden (S) before there was time for his passions to cool

**Attempts** – an inchoate (incomplete) offence (s.24, 463)

- Can’t stack inchoate offences (ie. attempting to conspire)

- Attempts can be charged separately

- Attempted murder has its own provision, others are general

- Usually less punishment than completed crimes

- Life punishment max becomes 14 years

- If it is less than 14 years, then it is half punishment

- Can be for acts which if completed would not be a crime (*Dynar*) – but diseent argued this point

- Threshold is “mere preparation”, question of legal proximity (*Sorrell and Bondett* 1978 CCC – fried chicken)

**Abandonment** (*Gauthier* 2013 SCC):

Policy reasons for allowing defence in that we want people to back out, but also don’t want them to back out at last minute and not be liable. Raised by air of reality.

- There must be intention to abandon or withdraw

- There must be timely communication of intent to withdraw

- The notice of abandonment must be unequivocal

- Proportion of outcome with steps taken to prevent it

**Aiding and Abetting (s.21):**

Aid- to help or assist Abet- to encourage /instigate

All of the people are guilty of committing the same offence

Degree in participation can play a role in sentencing

* Big exception is murder

Cannot just be mere bystanders (*Dunlop* 1979 SCC)

Proved BRD suffices (*Thatcher* 1987 SCC)

**AR**- Doing something or omitting that assists or encourages the perpetrator to commit the offence

* Do not have to commit parts of the offence

**MR**- The person must have rendered assistance for the purpose of aiding the principle offender to commit the crime (just to have knowledge that it might happen, do not want to charge a person for selling a rope)