

PROOF – BARD

R v Lifchus 1997: BARD not based on sympathy/prejudice, not absolute certainty, not imaginary/frivolous doubt; reason & common sense, well beyond BoP

R v Starr 2000: affirmed *Lifchus*, not everyday/ordinary meaning, much closer to absolute certainty than BoP; Dissent – no magic incantation, >BoP OK

R v JHS 2008: CREDIBILITY – jury instruction – not a credibility contest, affirms W(D) – unless you are sure BARD, must acquit; decide if A has raised a RD

PRESUMPTION/REVERSE ONUS

**R v Oakes* 1986: (drugs) “fails to establish” = BoP burden on accused; violates s 11(d), more than raising a RD, can be convicted even if there is a RD of guilt

**R v Downey* 1992: (prostitution) violates 11(d) but saved by s 1 – reasonable limit; “in the absence of evidence to the contrary” evidentiary burden, raise RD

R v St-Onge Lamoureux 2012: (BAC) no violation of 11(d) if it would be unreasonable not to conclude the presumed fact is true in light of the proven fact

ACTUS REUS

Frey v Fedoruk 1950: no new CL OFFENCES, must be “known to the law”, principle of legality, cannot apply law retroactively, must be offence when act done

R v Boudreault 2012: statutory interpretation of AR – care & control = use of vehicle & realistic danger, court looks at provision to determine intention of parliament

Fagan v Commissioner of Metropolitan Police 1968 EngCA: OMISSION – leaving car on foot deemed a continuing act, not omission; AR & MR must be concurrent

R v Moore 1978: OMISSION; failure to identify yourself to police/peace officer = breach of CL duty; legal duty to arrest – reciprocal duty to identify; Charter (?)

R v Thornton 1991 ONCA: OMISSION; duty to disclose disease? Statutory duty (medical treatment, endanger life s 216); cautious about imposing CL duties

R v Jiang 2007 BCCA: VOLUNTARINESS; dangerous driving, falling asleep at the wheel = involuntary, no AR; not acting of own volition

R v Lucki 1995 SKPC: accidents may be “involuntary”, no voluntary action, caused by road condition; no guilt if involuntary

CAUSATION

R v Smith 1959 EngCA: poor medical care does not break chain of causation, CC s 225; intervening act must overwhelm the previous act (high threshold)

R v Blaue 1975 EngCA: refusal of treatment does not break chain of causation; take victim as you find them CC s 224 thin skull rule

R v Smithers 1978: manslaughter – causation = “contributing cause of death outside the *de minimis* range” (reworded/replaced by *Nette*)

**R v Harbottle* 1993: first-degree murder – causation = “substantial and integral cause of death”, higher standard b/c of seriousness of crime

**R v Nette* 2001: manslaughter/2nd degree – “significant contributing cause of death”

R v JSR 2008 ONCA: dangerous joint enterprise caused death; don’t need physical causation, still a party to the offence; but for, beyond *de minimis*

R v Maybin 2012: intervening act reasonably foreseeable? Connected in time place circumstance nature & effect? Still significant contributing cause? Merely set stage?

MENS REA

**R v Beaver* 1957: true crimes presumed to have subjective mens rea – intent, recklessness, knowledge, willful blindness (not negligence)

**R v City of Sault Ste Marie* 1978: public welfare/regulatory offences presumed to be strict liability (not absolute)

R v Buzzanga & Durocher 1980 ONCA: WILLFULY; signals intention, strong requirement, attached to what? Recklessness not enough

R v Theroux 1993: FRAUD; honest belief it will work out not OK, just need intention/recklessness of the act; MR can be sometimes be inferred from AR

R v Kingsbury 2012 BCCA: honest belief of entitlement does not negate MR, mistake of law; thinking conduct is not dishonest/wrong = irrelevant, still intended

R v Briscoe 2010: WILLFUL BLINDNESS; can substitute for actual knowledge; suspicious, choose not to find out, narrow scope, deliberate avoidance

R v Scheppanek 2012 BCCA: RECKLESSNESS; can fulfill knowledge requirement (unless intent specified), aware of danger/risk, proceed anyways

R v Lewis 1979: MOTIVE; does not need to be proved, may be important but not a required element to prove MR

R v Gordon 2009 ONCA: TRANSFERRED INTENT; murder, kill wrong person by accident/mistake still guilty; applies to any offence if harm intended = harm caused

NON-SUBJECTIVE MENS REA

R v City of Sault Ste Marie 1978: strict liability; defence of due diligence (BoP), took all reasonable steps to avoid, not objectively negligent, reasonable mistake

R v Chapin 1979: no “willfully/with intent”; not absolute (subject, penalty); presumption not rebutted

R v Tutton 1989: OBJECTIVE FAULT – crim negligence = marked and significant departure from standard of reasonably prudent person, knowledge of circs is relevant

R v JF 2008: failure to provide necessities = marked departure, crim negligence = marked & substantial, wanton/reckless disregard for life or safety (higher)

R v Hundal 1993: dangerous driving causing death – marked departure from standard of care; modified – applied in context of surrounding events

**R v Beatty* 2008: dangerous driving – objective MR – momentary lapse not marked departure from standard of reasonably prudent driver in circumstances

R v Roy 2012: single/momentary error in judgment not marked departure; focus on risks – reasonable person sees risks and acts accordingly

R v ADH 2013: subjective/objective? Legislative intent & wording; “willful” = subjective; objective for dangerous/careless conduct, negligence, duties

MR & THE CHARTER Ref Re MVA 1986: **PoFJ** morally innocent cannot be punished. Can’t combine AL w/imprisonment (s 1 save possible, but rare) s7

R v Raham 2010 ONCA: court will presume intent to comply w/constitution; interpret as strict liability if possible, can read in MR if not consistent w/ Charter; penal liability requires proof of fault

R v Vaillancourt 1987: for murder need at least objective foresight of death s 7 *Martineau* – no more constructive murder, no more “ought to know”

R v Martineau 1991: s 7 demands at least subjective foresight of death for murder; **PoFJ** proportionality between moral blameworthiness & stigma/punishment

R v Vasil 1981: e.g. of unlawful object murder, look at all circs to determine if sub foresight of death *Shand* don’t need intent

R v De Sousa 1992: not PoFJ that all elements of AR have MR; don’t need intention for consequences. Unlawfully cause bodily harm s 269 objective foresight OK

R v Creighton 1993: MR for manslaughter = obj foresight of bodily harm, not trivial/transient. Same as *De Sousa*, thin skull justification, act is objectively dangerous. No modification of obj test short of incapacity to appreciate risks. 1 standard for all, only 1 RP, don’t take into account characteristics of A

MISTAKE OF FACT

R v Kundeus 1976: dissent: **PoFJ** that you need AR&MR of same crime; mistake is measured in subjective terms, does not have to be reasonable

R v Pappajohn 1980: rape, MR = subjective intent, need air of reality, consent = voluntary agreement, s 265(4) jury instructions, s 273.2(b) reasonable steps

R v Ewanchuk 1999: crown must prove non-consent as element of AR, A must point to words/conduct as basis for honest belief in consent, show he took reasonable steps

MISTAKE OF LAW s 19 OIEL – accused must prove BoP, like due diligence; rarely successful; stay of proceedings

R v Campbell & Mlynarchuk 1973 ABDC: not sufficient to rely on previous trial decision; not authoritative law; but granted discharge

Levis v Tetreault 2006: 6 factors for OIEL; error made, person who did it considered legal consequences, advice came from an official, was reasonable, erroneous, relied on

R v Khanna 2009 ONCJ: immigration, successful w/ OIEL on advice from immigration officials, depends on how definitive the advice is, A should determine if reliable

INTOXICATION *Leary* rule – defence allowed for specific intent crimes “w/ intent to” “for the purpose of”; air of reality, CL w/ statutory qualification

R v Bernard 1988: sexual assault causing bodily harm = general intent. s 33.1 limit on extreme intoxic defence, equates w/ crim neg (Charter, s 1??)

R v Daviault 1994: extreme intox is defence to SI crimes. Can’t sub guilt/voluntariness of intox for that of the crime, **PoFJ** need AR&MR of same crime, 5-4 decision

R v Drader 2009 ABPC: same act can result in 2 charges, 1 SI & 1 GI; SI = obj further to immediate one at hand; need to be very drunk to succeed w/ normal intox defence

R v Penno 1990: intox is no defence if Crown has to prove intox as part of offence; if involuntary, might be defence

PROVOCATION s 232

Reduces murder to manslaughter, air of reality, mod objective – wrongful insult would cause ordinary person to lose self-control, subjective – A in fact acted on the sudden

R v Hill 1985: can take into account A’s age, sex, race, etc. May be essential to analysis depending on the insult. Contextualize the wrongful act. Not an error for TJ not to instruct on age/sex/race; jury will naturally think about it in terms of A’s personal characteristics

R v Thibert 1996: subjective element – take into account past history, entire context; wrongful act doesn’t need to be “illegal”; dissent – policy reasons against this

R v Tran 2010: law fixes 1 standard for all; ordinary person informed by contemporary norms of behavior, Charter values. Not OK to be homophobic, OK to factor in race

R v Gill 2009: for air of reality, need evidence capable of supporting inference that A acted in heat of passion

R v Nealy 1986: rolled up charge, prov, SD, intox. Might lower threshold? Did A have MR? Take all circs into account, cumulative view of evidence, depends on ct/case

MENTAL DISORDER s 16 NCR can be raised by A before/after guilt, by Crown if A puts mental state in issue or after guilt before convic; prove on BoP *Swain* 1991

Presumption that A does not have MD. If MD proved, presumption of discharge, Crown must show need to detain. Any illness that impairs the mind/its functioning

R v Chaulk 1990: incapable of appreciating nature/quality of the act or knowing it was legal/moral wrong; Negates MR/AR (automatism) or is excuse. Reverse onus OK s 1

AUTOMATISM Was there dissociative state? Was it MD or not?

R v Rabey 1977 ONCA: psychological blow not non-insane automatism; ordinary stress/strain of life do not cause dissociative state; if real cause is internal flaw, it is MD

R v Parks 1992: sleepwalking, non-mental (need evidence); continuing danger theory is a factor but not whole test, holistic/contextual approach

R v Stone 1999: MD or not? Legal Q. Nature of trigger, likelihood of recurrence, BoP std, severity of trigger, corroboration, medical history, motive, if trigger is also victim

R v Bouchard-Lebrun 2011: toxic psychosis not MD, deal w/ under intox. MD can’t be caused by alcohol/drugs

SELF-DEFENCE s 34

R v Lavalee 1990: battered woman, imminence not always req’d, look at all circs to determine if response was reasonable, unable to see possibility of leaving

R v Malott 1998: broad principle, look at what is reasonable in the circumstances, not about fitting into stereotype of battered woman

R v Cinous 2002: subjective & objective, actual belief that was reasonable, need evidence of each element, limited weighing of sufficiency by TJ. Now: consider all circs.

Air of Reality – evidence that jury could draw nec inferences to acquit if believed. Distinguished from *Lavalee* – criminal subculture

R v Urquhart 2013 BCPC: proportionality no longer fixed req, new provision more flexible but less predictable, TJ considers all circs

R v Caswell 2013 SKPC: defence of property, assault must be for purpose of preventing damage to property, not enough on these facts to disprove self-defence BARD

NECESSITY

R v Perka 1984: leading case, excuse not justification. Urgent/pressing peril, no legal alternative avail, proportionality harm caused/avoided, illegal enterprise not disentitle

R v Latimer 2001: no air of reality, impossible (?) to show proportionality for murder. Peril & alternative = mod obj; Proportionality = strict obj

R v Ungar 2002 ONCJ: volunteer paramedic, dangerous driving, succeeds, question of legal alternative

DURESS s 17 & CL. Party = CL. Principal=s 17 as long as offence is not excluded.

R v Hibbert 1995: (aid/abet, CL) duress rarely relevant to MR, really excuse of moral involuntariness, req no legal alternative, mod obj test of reasonableness, immediacy & presence relevant to reasonableness under CL defence, threat must be sufficiently serious; can't use if opportunity to escape

R v Ruzic 2001: **PoFJ** morally involuntary actors should not be punished (only morally voluntary conduct → crim liability), immediacy & presence req infringe PoFJ

R v Ryan 2013: duress not applicable to retaliation, CL/s 17 similar except list of excluded offences. **CL**: threat of bodily harm, reasonable belief it will happen, no safe avenue of escape mod obj, close temporal connection, proportionality btw harm/threat mod obj, not party to conspiracy. **s 17**: basically the same, supplemented by CL.

ATTEMPTS

Sentencing rules s 463, life sentence → 14yrs; half of max for other indictable offences. AR&MR s 24 intent to commit offence, do anything for that purpose

R v Ancio 1984: essence of attempt is intent, not AR, for attempted murder, recklessness is insufficient. MR – need specific intent to kill

R v Sorrell & Bondett 1978 ONCA: in absence of extrinsic evidence re: MR (intent), equivocal acts are insufficient to prove intent, must be sufficiently proximate & related to go beyond mere prep, depends on AR of the offence; question of law.

US v Dynar 1997: impossibility is not a defence for an attempt. No real difference between factual/legal impossibility, neither negate MR. Imaginary: activity is not a crime

AIDING & ABETTING

s 21, do/omit for purpose of aiding/abetting other person; same max penalty as principal (equally culpable), sentencing takes into account degree of participation

R v Briscoe 2010: 1st deg murder; aid=assist, abet=encourage, instigate, promote, procure; low/broad AR. MR: for the purpose of aiding principal. Need to know what's happening & act for that purpose, AR&MR must overlap in time. Willful blindness sufficient. Don't have to intend the result, just know of P's intent & intend to assist them

R v Fraser 1984 BCCA: aiding/abetting is always specific intent, sophisticated MR, w/ knowledge, for the purpose of, intoxication defence is available

R v JSR 2008 ONCA: intention of other shooter was to shoot/kill JSR, can't say JSR is aiding/abetting, would be bizarre (unlawful object provision instead, s 229(c))

R v Dunlop & Sylvester 1979: don't know if jury convicted as party or principal, couldn't have been guilty as parties, need more than mere presence/simply observing

R v Thatcher 1987: 1st deg murder, unclear if jury was unanimous as to party/principal. No requirement of jury unanimity, equally culpable either way

R v Gauthier 2013: s 21(2) common intention, any defence w/ air of reality is put to jury regardless of contradictions. **Abandonment**: need intention to abandon/withdraw, timely communication, unequivocal notice; also need to take reasonable steps to neutralize effects of participation if aiding/abetting

R v Vu 2012: kidnapping, includes initial taking & ensuing confinement. Complete in law when victim apprehended, not complete in fact until released. s 21 applies to continuing offences until complete in fact

SENTENCING

s 718 Principles: **proportionality** gravity&blameworthy, denunciation, deterrence, separation, rehabilitation, reparation, promote responsibility in offender for harm done Find min/max in CC; find aggravating/mitigating factors in CC; ancillary orders in CC; guided by 718 & case law; pre-trial custody?; concurrent/consecutive? Totality Crown can apply for long term (parole)/ dangerous (psychiatric) offender designation, repeat offences/public safety s 752

R v Sweeney 1992 BCCA: drunk driving causing death, 20yo, hard life, drugs/alcohol, facial disfigurement, land lady writes support letter, 4.5 reduced to 2 less a day, focus on rehabilitation as more significant. Concurring reasons: moral culpability the same if death caused or not

R v Smith 2013 BCCA: drunk driving causing death, troubled past, abuse, homeless. TJ gave 1 day jail+probation. Error of principle, deterrence/denunciation important, shouldn't try to get around unavailability of conditional sentence. 2 less a day, cognitive abilities not relevant

R v ML 2008: sexual assault/child porn, max given, consecutive. Deference to TJ if not demonstrably unfit. Max may be appropriate in variety of circs; proportionality

R v Smith 1987: 7 yr min for importing narcotics = unconstitutional

R v Ferguson 2008: 4 yr min for manslaughter w/ firearm not unconstitutional. Can argue reasonable hypothetical (plea bargaining concerns); strike down, no exemptions

ABORIGINAL SENTENCING

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

R v Gladue 1999: always need to give consideration to aboriginal background, histories of gov't policy responsible for social problems. Result: cond sentence more likely

R v Ipeelee & Ladue 2012: breaches of long term supervision orders, SCC says ultimate goal is always rehabilitation, no different for violent offences

R v Akapew 2009 SKCA: huge crim record; max = life. 6.5 raised to 12.5 yrs. Do not compare w/ sentence of principal offender; emphasis on public safety

R v Nasogaluk 2010: police misconduct can be mitigating factor in sentencing; **proportionality** central to sentencing – match moral blameworthiness

R v Draper 2010 MBCA: prove mitigating factors BoP, aggravating factors BARD. FAS/ADHD, addiction, poor impulse ctrl = semi-mitigating, 3yrs robbery w/ a weapon