

BASICS

Criminal Liability

1. **AR** - harmful conduct: A/O/SOA + consequences
2. Person is **responsible** for the AR
3. **MR** - person has a state of mind that makes them at fault: intent, reck, negligence
4. **Contemporaneity**: connection between AR and MR
5. No Defence

Criminal Procedure

- (1) Apprehended/charged, (2) Trial, (3) Evidence, (4) Jury directed on legal position,
- (5) Jury decides on facts: considers evidence (infers state of mind from behaviour)

Serious offence: imprisonment, trial rights, stigma, moral transgression

1. L(true crimes) = AR + MR + lack D *Elements of the offence*
2. L(negligence) = AR + neg + lack D *proved by P - BRD*
3. L(strict liability) = AR + lack of 'no fault' D [D-BOP]
4. L(absolute liability) = AR

THEORY – MENS REA

Definition: A blameworthy state of mind of an offender (intention, recklessness, negligence) that warrants punishment.

Orthodox view: distinguishes between accidents / deliberate wrongs

Blackstone: an unwarrantable act without vicious will is not a crime

Requires material awareness and the choice to continue

Seeks to discourage moral harms: universal morality [Marc D Hauser]

Motive: liability concerned with intention/conduct, motive → sentencing
- [Wootton] 1. Achieves deterrence, 2. CL prevents harm not wickedness

Views of liability

1. Blameworthiness

MR in its special sense: MR required in the offence; AR done with the purpose that crime be committed (avoids liability for honest actors)

MR orthodox: material awareness/choice (req for serious offences)

2. Subjective v Objective

Subjective: no punishment without individual deliberate choice

→ consider statements, demeanour, behaviour

Objective: ORP standard: what would they have known and how would they have acted in the circumstances? (manslaughter/sexual)

3. Harms v Wrongs

The same AR harm (damage) can be converted into a different wrong with accompanied by malicious intent to reflect types of fault/culpability

a. [Wootton] 1. Responsible for AR= liable, 2. MR at sentencing

= Aligns with: 1. CCR-Maori, 2. Public policy-deterrence, BUT narrow view culpability (no distinction between accidents and deliberate acts)

b. [Kadish] Consider deliberate intention at liability; MR crucial to deterrence, otherwise damaging to run counter to human orientation towards morality/social life, not proven: reinforcing habits = √ regulation

4. Individual v Collective

Individual: basis for orthodox view as justification for sanctions

→ one AR = different bands of culpability

Collective: criminal law concerns correction/prevention of harm so look to social balance and take communal responsibility (guilt less relevant)

→ Maori: strict liability, focus on healing, sphere of responsibility

Critiques of liability [Clarkson & Keating]

1. **Dualism**: supports MR- distinction: mind (thinking)/body (doing) = punish deliberate actor who has made choice to cause harm (aware risk/consequences) ± inference un/observed – inherently unreliable correlation - personal link reasoning [assume or = strict liability only]

2. **Determinism**: ≠ support MR - humans no free will, governed by genetics/background, predisposed to explain/understand causally to predict/control → advanced in **State v Sikora** (lost head = murder) but rejected by court: humans have free will, but factors can be relevant at sentencing as a mitigating factor ± CL should express the way we live = accountable for what we do, free will support = environment does not fully account for actions: humans are liberal and self-determining

INTENTION

I. ISSUE: whether X is liable for Y where facts.

II. PROVISION BREAKDOWN: a) AR: , b) LRC: , c) MR: ? (+ result?)

Silent: Is offence serious? Why? = can read in MR (**Howe**)

III. ACTUS REUS: a) **Conduct** (act/omission), b) **Voluntariness** (control /fault), c) **Causation** (operating cause: factual, legal, intervening)

IV. MENS REA= intent = ↑ culpability: serious, blameworthy [S/Chan]

1. **Direct Intention – Chandler**: intended to stop planes

Was the AR the D ultimate purpose/goal/desire?

a. Intends when: wants to do it the action

b. Behaves behaves of that desire

Despite laudable motive, immediate goal=apprehend (**Chandler**)

2. **Means to an End – Smith**: immediate goal was fraudulent

Was the AR D's immediate purpose? Even if reason: another goal?

a. Believes something can be achieved

b. Behaves because of that belief

Side effect: not liable for outcome not a MTAE/ultimate goal (**Hyam**)

Criminal law not interested in **motive** (sentencing) (**Smith**)

(2A – **Ausiliary Test: test of failure**: would the D consider she had failed if the AR had not resulted **Duff?** – be cautious)

3. **Oblique/Indirect/Woollin Intent – Woollin**

Where the charge is murder and normal test for intention ≠ apply (minority of cases) the jury should be direct: no intention unless...

a. Factual virtual certainty death/SBH occur (barring some unforeseen intervention) as a result of D actions = **objective**

b. Appreciation by D of this = **subjective**

c. Not a substantive test (a+b =necessary, ≠sufficient) = **moral leeway**, decision is for jury on consideration of all evidence

→ if D foresaw the risk but thought it was only slight may ≠ intent

V. CONCLUSION: liable where AR + MR + absence of defence

a. **Critique Woollin**: always 1. Moral leeway, 2. Level FVC

b. **Motive**: accounted for at sentencing not liability (**Smith**)

Woollin 1998 HOL: crystallised uncertain law: model jury direction regarding foreseeable consequences on the border of M/M

- Issue of foresight/intent: person cannot intend something unless contemplate their acts will cause consequences

→ **HLA Hart**: foreseen outcome intended when the suggestion the outcome would not have occurred would be absurd

- Intent required for murder: 1. Moral stigma, 2. Imprisonment

Facts: father threw 3m old son – fractured skull = death

Case: Nedrick settled the law? But judge deviated to "substantive risk"

Held: Nedrick at right level of foresight and the deviation enlarged the scope of MR = material misdirection blurring intention/recklessness

1. **Moral leeway**: unprincipled/impracticable/elusive as FVC ≠intent

2. **F V certainty**: requires FVC + D know this: shouldn't it be subjective? culpability lies with acting with foresight + degree required unclear

3. **Unforeseen intervention**: inconsistent; removes liability- beyond control

4. **Test frame negative**: lacks clarity

Motive → sentencing not liability (**Chandler**)

Norris Critique: CL not interested in reason: AR/MR = technical analysis

Two contexts underlying the CL's view of motive... (not consideration of MR)

1. **Social morality**: acting on the basis of need would dismantle social structures (common excuse + undermines private property)

2. **Political morality**: courts reluctant to extend role (**Chandler**)

→ Critique of this position: we don't allow motive to be accounted for in liability but open to considering at sentencing; risk as unelected judges (not the majority) reduce the harshness of the criminal law

RECKLESSNESS

I. ISSUE: whether X is liable for Y where facts.

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Silent: Is offence serious? Why? = can read in MR (**Howe**)

III. ACTUS REUS: a) **Conduct** (act/omission), b) **Voluntariness** (control /fault), c) **Causation** (operating cause: factual, legal, intervening)

IV. MENS REA= R extends, concern: awareness risk circumstances will occur

a. Confirm not intent: direct, MTAE, oblique

b. Consider recklessness

i) **New Zealand Position**

Subjective approach, prevailing view is **Stephenson (Harney, Tipple)**

1. D foresees or **appreciates** his conduct will create a risk of harm (or prohibited consequences) → temper insufficient

- Obviousness: risk =relevant ≠ determinative for the jury to find SR (**Stph**)

2. It is **unreasonable** for D to run the risk he has foreseen

- There is an **objective** element: unreasonable to run risk (**Tipple**)

• Almost always unreasonable to carry on once aware

• Degree of **likelihood, nature, social utility** of the risk

Objective if Parliament intends (open door) (**Howe**)

- Include: sexual violation (reasonable belief) + manslaughter (neg.)

ii) **English Position**

Objective Caldwell under **Elliot**: reverted back to **Stephenson (R v G)**

1. D deliberately takes an **unreasonable** risk (ORP standard)

2. Gave **no thought** to the possibility of consequences or **recognised** them and continued regardless

- **Wider**: catches **Stephenson** offenders + those who do not think

- **Issue: Elliot** recognised that some could never meet ORP standard

- **Lacuna**: turned mind: eliminated or no and continued regardless

→ could excuse a genuine/negligent mistake maker; not yet successfully argued

iii) **Burden of Proof**

a. P must prove the MR BRD, (**W**: golden thread, presumption of innocence)

b. Limited: D evidential burden to suggest a reasonable explanation for why they did not foresee an obvious risk (make D live issue)

V. CONCLUSION: 1. **Liability** = AR + MR + absence of defence 2. **Critique**

R v Stephenson 1979 UKCA = subjective

Facts: arson charge, schizophrenic, lit fire to keep warm in hay-shed → spread

Case: subjective test applied; D not aware of risk of damage = not reckless

Held: liable unless D provide reasonable explanation + abnormality ≠ always affect foresight

R v Caldwell 1982 HOL = objective [Diplock]

Facts: aggravated arson, set fire to Hotel after fired – claimed ≠ consider risk to guests

Held: objective test applied; a failure to think is equally morally culpable- social rspbn. ± some cannot meet ORP standard; not orthodox choice ± **Crosby** could apply only where capable?

Elliot v C 1983 UKCA = standard: ordinary, prudent adult

Facts: 14yr, remedial, foster family, sleep deprived, match upon spirits= burnt shed

Case: initial trial applied **Caldwell** with added subjectivity – what is correct test?

Held: reluctantly must apply ORP **Caldwell** standard: can be unjust (goes to sentence)

R v Howe 1982 NZCA = NZ subjective, MR, objective

Facts: Springbok protesters damaged unmarked police car

Held: (1) strong conservation of MR; if silent can read in intention/recklessness,

(2) **Subjective** liability (choice, proceed), but where Parliament intends= **objective**

R v Harney 1987 NZCA (murder from a street brawl) = subjective

Held: Confirms NZ as subjective view of recklessness: returns to pre-**Caldwell** test, confined

Howe to statutory context (statute changed so ration obsolete)

R v Tipple 2005 NZCA = subjective/objective: degree, nature, utility

Facts: target close to road, long range gun, nearly killed people on road

Case: D contended (1) NZ test completely subjective, (2) risk must be dangerous risk

Held: Predominantly subjective, Not dangerous: related to statute; aware + carry on

R v G 2003 HOL = UK subjective

Facts: 11/12 yr olds set fire to newspaper under two bins which spread - \$1M

Held: Return **Stephenson** 1. Academic critique, 2. Orthodox theory, 3. Offends sense of justice (cannot meet standard) → D has persuasive burden: show no understanding

MISTAKE OF FACT

I. ISSUE: whether X is liable for Y where facts.

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III. ACTUS REUS: a) Conduct (act/omission), b) Voluntariness (control/fault), c) Causation (operating cause: factual, legal, intervening)

IV. MENS REA requires D have material awareness, can be negated by MOF

a. Did the D have intent or recklessness? Why?

b. Is the MR negated by mistake of fact?

i) Mistake of fact not law

ii) Relevant to the MR: not a true defence (LRC)

iii) Honestly held belief (Wood)

→ Reasonableness of honestly held belief

1. **NZ:** MOF for serious crimes (except sexual violation) need only be honest, reasonableness goes to if belief genuinely held (credible)

→ sexual violation: require reasonable grounds for belief in consent

Strawbridge: intro. req. belief must be on reasonable grounds

Wood: back to orthodox view; reasonableness does not go to legal test but credibility (confirmed separation in Metauriki)

2. **UK:** If MOF negates MR, D cannot be held liable, reasonableness of belief doesn't matter (orthodox principles- DPP v Morgan)

→ if jury believe D's honest belief in V consent – strike out MR but in practice reasonableness relevant to credibility of genuineness

c. **Burden:** element relevant to MR so must be disproved by P BRD

- in practice only where there is some evidence of MOF will P required to negate it, common sense D point to evidence of reasonableness (M)

V. CONCLUSION: liable where AR + MR + absence of defence

INTOXICATION

I. ISSUE: whether X is liable for Y where facts.

II. PROVISION BREAKDOWN: a) AR: , b) LRC: , c) MR: ? (+ result?)

Silent: Is offence serious? Why? = can read in MR (**Howe**)

III. ACTUS REUS: a) Conduct (act/omission), b) Voluntariness (control/fault), c) Causation (operating cause: factual, legal, intervening)

IV. MENS REA: Is D able to form MR despite ingestion of substance?

a. VOLUNTARY

i. **NZ:** fact not capacity of intent Kamipeli CA: fight

Jury mislead at trial; not a discussion of level, intoxication is another factor the jury accounts for in determining MR: can decide either way

A drunk intent is still an intent; absence of intent due to intoxication is not to be lightly reached, if no evidence of amount affect - exclude

ii. **UK:** specific / basic Majewski: police [Diplock: **public policy**]

Drunkenness is a defence to crimes of specific intent (MR extends beyond AR): murder, wounding/GBH, theft, robbery, burglary, assault with intent to resist → not a defence: basic intent (crimes that can be committed recklessly): → Heard obiter critique: no clear definition

iii. Comparison: UK open to find lack of MR due to intoxication, Diplock public policy: drinking is reckless in itself but NZ easier to follow

b. INVOLUNTARY

i. **Debate:** conditions for liability are present v conduct in circumstances attracts little moral blame and punishment serves no useful purpose → generally CL allowed involuntary state to negate MR

ii. Kingston HOL: orthodox - drugged intent still paedophile+ not automatism

- UKCA new doctrine: no prior fault (intent arose from circumstances D blameless) → overruled: at odds with principles CL, too wide application

- qualified Majewski: two category approach doesn't apply when involuntary as intent transferred from taking drink to AR not applicable

- would be difficult; easy to prove, difficult to dis, subjective, forensic

iii. Theoretical basis: disinterested in reasons for acting, absence of moral fault cannot negate MR (Chandler/Smith)

iv. English Law Com. Report 2009: recommend keep law Kingston Easy to manufacture, subjective, public policy, mitigating, irresistible impulse arguments, floodgates/practicality

V. CONCLUSION: liable where AR + MR + absence of defence

Public Policy: 30-60% of alleged O had consumed alcohol prior to the offence, 50% serious violent crimes related to alcohol, domestic violence

CONTEMPORANEITY

I. ISSUE: whether X is liable for Y where facts.

II. PROVISION BREAKDOWN: a) AR: , b) LRC: , c) MR: ? (+ result?)

Silent: Is offence serious? Why? = can read in MR (**Howe**)

III. ACTUS REUS: a) Conduct (act/omission), b) Voluntariness (control/fault), c) Causation (operating cause: factual, legal, intervening)

IV. MENS REA: Intent? Recklessness?

V. CONTEMPORANEITY: Foundation of CL: issues where disconnect AR/MR

→ **MR before AR:**

a. Indivisible series of acts (Thabo Meli – refined by Ramsay for NZ although in UK Church applied without restriction)

(1) Preconceived plan, (2) Not 167(b) → 167(a), (3) Actual act causing death part of the plan? *plans can be extended

b. Prior fault for state of automatism = responsible for AR (Lind)

c. Causation

(1) Factual 'but for' (, (2) Legal: overwhelming cause 'di minimus', (3) No intervening acts (nature Hallet, 3rd Roberts, medical Smith, victim Blau)

→ **AR before MR**

a. Continuing act (Fagan – stretch AR)

b. Omissions (Miller – omission =AR when had MR)

c. Fresh act: where MR try find act in chain that coincides with MR

Thabo Meli PC: plotted, blow to head, death from exposure (disposal) - pragmatic approach (logic): set out to kill, got the result they wanted thus impossible to divide up **series of acts** (important: clear intent)

→ not reduced from murder (reliance on preconceived plan to kill)

R v Ramsay 1967 NZCA: death: from suffocation post attack

- **partially approved Thabo:** restricted to intention not knowledge;

1) must be a 167(a) situation (know the act likely to cause, reckless to result)

→ will never apply to a reckless standard: subjective knowledge result

2) definite intention to kill (preconceived plan) (Church – expansive)

Transferred MR: malice can be transferred for the same offence

OBJECTIVE LIABILITY DEBATE

For	Against
*Provides motive to take care b4 act	*Orthodox view: lacks M aware
*Neg deterred from future neg + gross negligence warrants retribut.	* <u>Elliot</u> punish those who make morally defective choices
*Should punish failure to think (<u>Dip</u>)	* <u>John Smith:</u> not morally culpable, don't foresee =can't avoid them.
*Public protection via incapacitation	*Unfair to those can cannot meet avoided harm + temper capacity
* <u>HLA:</u> blame where care could avoided harm + temper capacity	* <u>Fine/Cohen:</u> doesn't deter, not morally rep to warrant retribution, purpose of rehab not achieved
*Routinely hold individuals liable for inadvertent daily life	*Police time better spent: true crime
*Consistency: liable for wrongs	

→ **Capacity:** HLA: D characteristics must be accounted for: D req. normal capacities + opportunity to exercise them.

→ **Gross negligence:**

Turner: there are no degrees of negligence; negligence connotes absent of foresight.

OBJECTIVE LIABILITY

I. ISSUE: whether X is liable for Y where facts.

II. PROVISION BREAKDOWN: a) AR: , b) LRC: , c) MR: ? (+ result?)

1. **Express:** a. **MR (I/R)** or b. **Negligence** (normal/gross) (MacKenzie)

2. **Silent:**

a. **Strict: public welfare** offences (+ no suggestion of absolute)

- Regulatory, morally neutral, non-stigmatic, no imprisonment (Millar)

b. **Absolute:** worded so presumption against AL displaced (Millar)

c. **MR (I/R):** presumed for **true crimes** because of stigma and consequences – P prove BRD, D no legal burden (Millar)

III. ACTUS REUS: a) Conduct (act/omission), b) Voluntariness (control/fault), c) Causation (operating cause: factual, legal, intervening)

IV. FAULT: The prevalent view in NZ is subjective liability (Tipple); objective liability can be imposed where Parliament intends it (**Howe**).

Always balance: right to MR v public policy

a) Negligence

i. Negligence: D negligent if RP would have been aware of risk and have taken greater care to avoid it; personal characteristics irrelevant.

a) conduct: (Yogasak), b) legally relevant circumstances (s 128)

ii. Gross Negligence: gross deviation from ORP standard of care, "neg went beyond a mere matter of competence that showed such a disregard for the life/safety that amounts to a crime" (Bateman 1925) → manslaughter stnd NZ

Sexual violation: s 128 CA amendment: objective - whether belief in consent based on reasonable grounds (used to be subjective Morgan)

Cameron/Young: (1) rape is a major harm, not UR to demand inquiry to consent,

(2) only D should be R belief in C, (3) UR should be proportionate to capacity

Manslaughter: Yogasakaran held ordinary negligence (s 155): words of the statute, precedent, mitigated by burden, not accord with R skilful doctor in circumstances (convicted but discharged) → 1997 law reform: gross neg =

'major departure from SOC' but Hadiza exhibited need for review (Dr's confused and not good as being too cautious not good)

b) Strict liability

i. Is there anything **weighty enough** to displace presumption of MR?

ii. **Liable:** AR proved by P BRD (exonerate: D prove BOP absence of fault) (Millar)

iii. **Justification:** (1) public safety (Stevenson: protect under 18), (2) expedience, (3) corporations difficult to prove MR (being), (4) deterrence: encouraged precaution taking

→ Legislation Advisory Committee: protect public, fault excuses, regulate corporations (choice to participate), burden best placed on D: fault

c) Absolute liability stricter

i. Is there anything **weighty enough** to displace presumption of MR?

Legislation Advisory Committee: only contemplated where...

A) Overwhelming NI: CL as incentive to prevent behaviour regardless of fault

B) Cogent reason for precluding a defence of total absence of fault: rare

ii. **Liable:** upon P prove of AR BRD (Millar)

iii. **Justification:** Encourage greater vigilance to prevent the act (Gammon)

V. CONCLUSION: liable?

Civil Avtn v Mackenzie NZCA: presumed MR unless P explicit: objective liability; not absolute here: 1. Regulatory (safety), 2. Serious offence (harsh consequences), 3. Exculpates owner (fault) – should not treat pilot differently

Follows Sault St Marie: distinguish strict/absolute; public policy, not UR B

Millar v MOT NZCA: refines = absolute liability rare- requires clear P intent Affirms NZ subjective view for true crimes req. MR/ confirms distinction

Stevenson NZCA: 14yr old prostitution – different as offence had moral stigma

Strict liability in this case (protection purpose, easy burden) + presumption of innocence: sometimes burden shifted (public policy – social factors)

