

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)**

BETWEEN:

CHAYCEN MICHAEL ZORA

APPELLANT

and

HER MAJESTY THE QUEEN

RESPONDENT

and

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TABLE OF CONTENTS

PART I:	OVERVIEW OF ARGUMENT AND STATEMENT OF FACTS	1
PART II:	POSITION ON THE QUESTIONS IN ISSUE	1
PART III:	STATEMENT OF ARGUMENT	1
PART IV:	SUBMISSIONS REGARDING COSTS	10
PART V:	REQUEST FOR ORAL ARGUMENT AND POSITION.....	10
PART VI:	SUBMISSIONS ON CASE SENSITIVITY	11
PART VII:	TABLE OF AUTHORITIES	12

PART I: OVERVIEW OF ARGUMENT AND STATEMENT OF FACTS

A. OVERVIEW

1. Section 145(3) of the *Criminal Code*¹ is a truly criminal offence that does not displace the statutory presumption of subjective *mens rea* for such crimes. The default subjective standard has been identified as an “important value underlying our criminal law”: the morally innocent should not be punished absent “clear expressions of a different legislative intent”.²

2. Legislative intent was inferred by the British Columbia Court of Appeal in large part by categorizing the provision as a duty-based offence. Yet not all duty-based offences attract an objective *mens rea*. Section 145(3) does not exhibit the characteristics of other duty-based offences where the subjective *mens rea* presumption has been rebutted. The distinction is primarily due to the absence of either (a) any conduct that would be illegal but for the conditions imposed; or (b) an identifiable relationship giving rise to a clear community standard of behaviour.

3. The Court of Appeal also acknowledged that determining legislative intent required a contextual analysis having regard to the scheme of the statute, its objective and the intention of Parliament. The presumption of innocence must be considered in this analysis. The provision in question applies to individuals who have yet to be tried and convicted. To impose an objective standard of *mens rea* in such circumstances runs afoul of that fundamental principle.

PART II: POSITION ON THE QUESTIONS IN ISSUE

4. The British Columbia Civil Liberties Association (“**BCCLA**”) submits that the *mens rea* standard for breach of section 145(3) of the *Criminal Code* ought to be subjective.

PART III: STATEMENT OF ARGUMENT

A. STATUTORY PRESUMPTION OF SUBJECTIVE *MENS REA* AND MORAL CULPABILITY

5. The statutory presumption of subjective *mens rea* ensures that only the morally culpable are punished.³ The presumption dictates that a person should not be held liable for the

¹ *Criminal Code*, R.S.C. 1985, c. C-46, s. 145(3).

² *R. v. A.D.H.*, 2013 SCC 28, [2013] 2 S.C.R. 269 at para. 27 [*A.D.H.*].

³ *Ibid.*

wrongfulness of their act absent the requisite mental element.⁴

6. By contrast, an objective *mens rea* permits – indeed, in some cases will inevitably result in – punishment that is disproportionate to the moral fault of the accused. An objective *mens rea* will punish persons who lack awareness of their wrongdoing and who thereby have no capacity to decide whether to comply.

7. This runs contrary to principles of criminal law that are predicated on autonomy, voluntariness and the capacity to choose, as stated by LeBel J in *R. c. Bouchard-Lebrun*:

The moral dimension of the voluntary act [...] reflects the idea that the criminal law views individuals as autonomous and rational beings. Indeed, this idea can be seen as the cornerstone of the principles governing the attribution of criminal responsibility [...]. [H]uman behavior will trigger criminal responsibility only if it results from a “true choice” or from the person’s “free will”. [...] As the Court noted in *R. v. Ruzic*, 2001 SCC 24:

[...] Like voluntariness, the requirement of a guilty mind is rooted in respect for individual autonomy and free will and acknowledges the importance of those values to a free and democratic society. [...] Criminal liability depends on the capacity to choose, -- the ability to reason right from wrong.⁵ (emphasis and citations omitted)

8. An objective *mens rea* standard can only align with these fundamental principles where there is a clear community standard of conduct. This is borne out in previous jurisprudence. For example, an individual may understand that driving at excessive speed in bad weather is risky because of, amongst other things: (a) the mandatory driver training required to operate a vehicle; (b) visible street signs; and (c) observing other drivers. As such, an objective fault element has been upheld in respect of dangerous driving, where the offence imposes a “minimum uniform standard of care.”⁶

9. Such background information is not as readily available to assist a person subject to bail conditions in order to comprehend the precautions they must take to comply. Bail conditions

⁴ *Ibid* at para. 23.

⁵ *R. c. Bouchard-Lebrun*, 2011 SCC 58, [2013] 2 S.C.R. 269 at para. 48 citing *R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687 at para. 45.

⁶ *A.D.H.*, *supra* note 2 at para. 57 citing *R. v. Hundal*, [1993] 1 S.C.R. 867, [1993] S.C.J. No. 29.

are specific to the accused and are imposed by a justice or judge, rather than being well-established community standards.

10. The need to abide by bail conditions imposed by a justice or judge is undoubtedly an important principle. However, it cannot be said that an identifiable community standard will exist with respect to each specific condition imposed on any given individual.

11. Absent an immediate reference point for an individual to measure the steps they must take to reasonably comply with personal bail conditions, it is inappropriate to apply an objective *mens rea* standard to section 145(3). Doing so places the onus on the accused to identify the applicable standard (a) absent clear guidance of what that standard should be; and (b) where the conduct itself would otherwise not have been illegal absent the imposition of conditions on the accused. Where the accused fails to do so, they may not be choosing to abide by such standard but rather failed to appropriately identify such standard, which is understandable given such lack of clear guidance. This failure should not amount to moral blameworthiness within the principles of criminal law.

B. DUTY-BASED OFFENCES

12. To displace the important statutory presumption of subjective *mens rea* in favour of an objective standard, the court below relied heavily on its characterization of section 145(3) as a duty-based offence. The majority considered section 145(3) to be “an objective fault duty-based offence” because Parliament based that provision “on a violation of a duty”.⁷

13. Not all so-called duty-based offences are subject to an objective *mens rea* standard. This Court has applied both objective and subjective *mens rea* to different duty-based offences.⁸

14. An examination of the genesis of the concept of duty-based offences demonstrates that despite the imposition of a “duty” in section 145(3), a standard of objective *mens rea* should not be applied. Section 145(3) does not share important attributes of duty-based offences carrying an objective *mens rea*. In particular, there is no relationship created by section 145(3) that lends

⁷ *R. v. Zora*, 2019 BCCA 9, 370 C.C.C. (3d) 111 at para 51.

⁸ Compare *R. v. Naglik*, [1993] 3 S.C.R. 122, 1993 CarswellOnt 116 [*Naglik*] and *A.D.H.*, *supra* note 2.

itself to a clear standard of conduct or inherent vulnerability.

(1) Origin and Development of the Concept of Duty-Based Offence

15. The category of duty-based offences originated in legal texts as a tool to understand the *actus reus* of omission offences.⁹ As a general rule, the criminal law punishes acts rather than omissions – an omission to act will only give rise to criminal liability where a duty to act arises at common law or is imposed by statute.¹⁰

16. The concept of duty-based offences evolved following this Court's decision in *R. v. Naglik*.¹¹ In that case (summarized below), the Court held that the existence of a duty indicates that the accused's conduct in a particular circumstance is to be determined on an objective, or community, standard. The offence at issue in *Naglik* required the accused to meet a standard prescribed by a defined role (in that case, the relationship between parent and child).

17. This concept was developed in *A.D.H.*, where a subjective *mens rea* was held to apply where the duty in a particular offence could apply to everyone.¹² In other words, the duty at issue in that case was “not restricted to persons in particular relationships or under specified, statutorily created legal duties.”¹³

18. The majority in *A.D.H.* noted that the provision in *Naglik* involved “the failure to perform specified legal duties” which arose “out of specified relationships between the person owing the duty and the person to whom the duty is owed.”¹⁴ The accused's conduct in a particular circumstance was to be determined on an objective, or community, standard or a societal minimum established for conduct in the context of a specific legal relationship outlined by the statute.¹⁵

⁹ Roach, Kent, *Criminal Law*, 5th ed (Toronto: Irwin Law, 2012) at pp. 115 – 119.

¹⁰ *R. v. Moore*, [1979] 1 S.C.R. 195, 1978 CarswellBC 500 (WL Can) at para. 25; *A.D.H.*, *supra* note 2 at para. 59 which specifically addresses predicate offences which have been found to require the mental element for the underlying offence but only objective foresight of harm flowing from it, as recently discussed in *See R. v. Javanmardi*, 2019 SCC 54.

¹¹ *Naglik*, *supra* note 8.

¹² *A.D.H.*, *supra* note 2 at para. 73.

¹³ *Ibid* at para. 68.

¹⁴ *Ibid* at para. 66.

¹⁵ *Naglik*, *supra* note 8 at para. 42.

(2) **Application to Other Criminal Code Provisions**

19. Three key features characterize duty-based offences that have been interpreted as requiring proof of *mens rea* on an objective standard: a specific legal relationship involving an imbalance of power; reliance by the weaker party on the stronger; and severe consequences for the risk created by the powerful party. Fundamentally, the importance of upholding these duties in the community make it appropriate to use an objective standard that establishes right from wrong in the criminal context. The existence of specific relationships provides important social context to delineate what standard is required by the community.

(a) **Duties Tending to Preservation of Life**

20. Most of the duty-based offences that have been interpreted to require proof of *mens rea* on an objective standard are within the “Duties Tending to Preservation of Life” contained under Part VIII of the *Criminal Code*:

- (a) Section 215 gave rise to Chief Justice Lamer’s statement in *Naglik* that duty-based offences tend to imply an objective *mens rea* standard.¹⁶ The offence requires parents to provide the necessities of life to their children. Failure to do so could lead to punishment if it was foreseeable that the failure could lead to a risk to life. There is a clear relationship between parent and child involving the vulnerability of the child and the power of the duty-owing parent. The vulnerable child is in a position of reliance on the parent.
- (b) Section 216 prohibits those undertaking to administer medical treatment and other lawful acts that may endanger life from doing so without reasonable knowledge, skill and care.¹⁷ This offence involves a relationship between a health-care provider who (i) owes a duty and possesses relative power; and (ii) an individual seeking medical attention, who entrusts the health-care provider to exercise reasonable knowledge, skill and care. The patient seeking medical attention is reliant on the

¹⁶ *Criminal Code*, R.S.C. 1985, c. C-46, s. 215; *Naglik*, *supra* note 8 at para. 42.

¹⁷ *Criminal Code*, R.S.C. 1985, c. C-46, s. 216; *R. v. Swanney*, 2006 BCSC 1766, [2006] B.C.J. No. 3074 at para. 53; see also: *R. v. Thornton*, [1993] 2 S.C.R. 445, [1993] S.C.J. No. 62.

health-care provider.

- (c) Section 217.1 prohibits anyone who is responsible for directing work from failing to take reasonable steps to prevent bodily harm arising from that work. This offence is aimed at the employer-employee relationship.¹⁸ There is a clear relationship between employees and their employers involving the relative power of employers and vulnerability of employees. The offence is intended to prevent bodily harm to employees arising from their work or task.

21. In contrast, section 218 prohibits abandonment or exposure of children.¹⁹ In *A.D.H.*, this Court distinguished section 218 from other duty-based offences on the basis that “[t]he child abandonment offence may be committed by ‘[e]very one’; it is not restricted to persons in particular relationships or under specified, statutorily created legal duties”.²⁰ In the absence of a defined relationship, a subjective *mens rea* was held to apply.

(b) Other Duty-Based Offences

22. Offences in other areas of the *Criminal Code* have been described as duty-based,²¹ and have been interpreted as requiring proof of *mens rea* on an objective standard. Such offences contain other features that indicate a Parliamentary intent to displace the presumption requiring proof of subjective *mens rea*. For example, section 263 prohibits the failure to safeguard an opening in ice or excavation on land.²² Notably, the language of section 263 contains an express reference to an objective standard of care through the use of the word “adequate”, by making it an offence to fail to “guard [the opening or excavation] in a manner that is adequate to prevent persons from falling in” and “adequate to warn them” about the opening or excavation.²³

¹⁸ *Criminal Code*, R.S.C. 1985, c. C-46, s. 217.1; *R. v. Hoyeck*, 2019 NSSC 7, 153 W.C.B. (2d) 505 at paras. 64-66; *R. v. Kazenelson*, 2015 ONSC 3639, [2015] O.J. No. 3370 at para. 120, aff’d *R. v. Kazenelson*, 2018 ONCA 77, 139 O.R. (3d) 241.

¹⁹ *Criminal Code*, R.S.C. 1985, c. C-46, s. 218.

²⁰ *A.D.H.*, *supra* note 2 at para. 68.

²¹ Roach, Kent, *Criminal Law*, 5th ed at p. 116.

²² *Criminal Code*, R.S.C. 1985, c. C-46, s. 263.

²³ *R. v. Aldergrove Competition Motorcycle Assn.* (1983), 5 C.C.C. (3d) 114, 1983 CarswellBC 776 (B.C. C.A.) at paras. 5 and 6.

(3) Application to Section 145(3)

23. Accordingly, the structure of the *Criminal Code* and applicable jurisprudence demonstrate that where the following attributes are present in an offence, an objective *mens rea* will generally be intended by Parliament and justified:

- (a) a relationship involving the relative power of one party and vulnerability of the other;
- (b) the vulnerable party is in a position of reliance on the powerful party; and
- (c) a risk created by the powerful party can have severe consequences for the vulnerable.

24. These three conditions are generally met where an individual is in a prescribed voluntary role, such as a parent, doctor or employer.

25. An objective *mens rea* is sensible for offences carrying these attributes and involving such a role. The nature of the role prescribes the standard. Fault arises from exercising power or undertaking an activity that causes a serious risk to a subset of vulnerable people to which that person in power owes a duty. A failure to foresee the risk of certain conduct against a communally accepted standard is morally culpable.

26. Section 145(3) does not share the characteristics common to other objective *mens rea* duty-based offences discussed above.

27. While a duty is imposed on the accused to comply with certain bail conditions, that duty does not originate from a specific relationship that gives rise to an overarching community standard. There is no relationship resulting in reliance.

28. The specific duties will differ depending on the particular conditions imposed upon the individual in question. Bail conditions are tailored to the circumstances of each individual accused, making it next to impossible to apply a universal community standard of compliance.

29. Finally, the duty of the accused originates from the imposition of legal conditions in circumstances where the alternative is imprisonment. The accused is not in a position of power

vis-à-vis the court. Rather, the accused is the vulnerable person who is at peril of state power. Conditions have been imposed upon that person (absent a trial or conviction, as discussed further below). The court retains the power to strip the liberty of the person who failed to comply. Such power can be exercised on a lower standard than is required for the purpose of the main offence for which that person was ultimately placed in a position of having such conditions imposed upon them.

30. All of those circumstances indicate that the statutory presumption of subjective *mens rea* should not be displaced.

C. THE PRESUMPTION OF INNOCENCE

31. The Court below acknowledged that statutory analysis requires having regard to the principles underlying the *Criminal Code* as a whole. Few principles are so axiomatic to Canadian criminal law as the presumption of innocence. Indeed, it is specifically protected by section 11(d) of the *Charter*.²⁴

32. The presumption of innocence has been described by this Court as the “golden thread” of Canadian criminal law.²⁵ As stated by Justice Dickson in *R. v. Oakes*:

The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.²⁶

33. At the heart of fairness in Canadian criminal law is that there should be no criminal

²⁴ *Canadian Charter of Rights and Freedoms*, s. 11(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

²⁵ *Woolmington v. Director of Public Prosecutions*, [1935] UKHL 1, [1935] A.C. 462; *Manchuk v. The King*, [1938] S.C.R. 341, [1938] 3 D.L.R. 693; *R. v. Oakes*, [1986] 1 S.C.R. 103, 1986 CarswellOnt 95 at para. 30.

²⁶ *R. v. Oakes*, *supra* note 25 at para. 29.

responsibility without an act and without fault.²⁷ The “cornerstone” of the Canadian theory of criminal liability is that only those who are personally guilty of breaking the law should be punished.²⁸

(1) **Application to section 145(3)**

34. Section 145(3) is a pre-conviction offence. An interpretation that requires proof of a lower degree of fault for the offence created by section 145(3) undermines the presumption of innocence by permitting presumptively innocent individuals to be punished without true proof of fault.

35. Individuals released on bail have not been tried for any crime. These individuals remain presumptively innocent individuals awaiting trial. When released on bail they agree to abide by the conditions imposed on them for their release.

36. The bail conditions they must follow typically restrict basic liberties enjoyed by Canadians. Persons subject to bail conditions face criminal jeopardy for a wide array of actions, even if the underlying behavior (drinking alcohol, not being home at certain hours, leaving a certain municipality) is not otherwise a crime. All of this before there is any proven wrongdoing.

37. There must be a strong criminal law justification for imposing a lower standard of fault on innocent individuals who have been forbidden from enjoying basic liberties.

38. This is especially the case given the fact that these provisions disproportionately impact marginalized individuals who are often victims of violence, poverty, mental illness and discrimination with limited access to resources and support, as set out by the Appellant and other interveners.

39. Finally, it runs contrary to the presumption of innocence for the post-conviction breach of probation offence to benefit from a higher standard of subjective fault than the

²⁷ Stuart, Don, *Canadian Criminal Law*, 6th ed (Toronto: Carswell 2011), at p. 169.

²⁸ *R. v. Schwartz*, [1988] 2 S.C.R. 443, 1988 CarswellMan 170 at para. 36.

pre-conviction breach of bail offence.²⁹ This Court interpreted a previous iteration of the offence of failure to comply with a probation order as having a subjective *mens rea* in *R. v. Docherty*.³⁰

40. In *Docherty*, Wilson J. held that the offence of breach of probation called for a subjective *mens rea* requirement, in part because the goal of the offence was to achieve compliance with probation conditions. The logic of Wilson J.'s reasons applies to the offence of breach of recognizance, indeed with greater force because the breach of recognizance offence applies prior to conviction. Imposing an objective fault standard for breach of a supervisory order before the accused has faced trial and a subjective standard for breach of a supervisory order following conviction fails to protect presumptively innocent individuals from being punished without proof of fault.

PART IV: SUBMISSIONS REGARDING COSTS

41. The BCCLA seeks no costs and requests that none be awarded against it.

PART V: REQUEST FOR ORAL ARGUMENT AND POSITION

42. By Order dated November 1, 2019, the Court granted the BCCLA leave to present oral argument not exceeding five minutes at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of November, 2019.



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²⁹ *Criminal Code*, R.S.C. 1985, c. C-46, s. 733.1.

³⁰ *R. v. Docherty*, [1989] 2 S.C.R. 941, [1989] S.C.J. No. 105 (although there have been statutory amendments to what is now section 733.1 making certain portions of the analysis of the interpretation of the statute inapplicable to the existing provision).

PART VI: SUBMISSIONS ON CASE SENSITIVITY

Not applicable.

PART VII: TABLE OF AUTHORITIES

AUTHORITIES – CASE LAW		Paragraph(s) Cited
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