CRIMINAL LAW
CHAPTER 1) SOURCES OF CRIMINAL LAW ................................................................. 8

DIVISION OF POWERS ....................................................................................... 8

Switzman v Ebling ......................................................................................... 8
R v Morgenthaler ......................................................................................... 8
Reference re Firearms Act ......................................................................... 8

COMMON LAW DEFENCES ............................................................................... 8

Amato v the Queen SCC 1982 (p.19) ......................................................... 8

COMMON LAW OFFENSES ........................................................................... 8

Frey v Fedoruk SCC 1950 (p. 21) ................................................................. 8
United Nurses of Alberta v AG Alberta ...................................................... 8
R v Jobidon SCC 1991 (p. 24) .................................................................... 8

CODIFICATION + CERTainty IN CRIMINAL LAW ..................................... 9

R v Heywood SCC 1994 (p. 34) ............................................................... 9
Canadian Foundation for Children, Youth, and the Law v Canada SCC 2004 (p. 36) ........................................................................................................... 9

CONSTRUCTION OR INTERPRETATION OF THE CRIMINAL CODE .... 9

R v Pare SCC 1987 (p. 43) ........................................................................... 9

CHAPTER 2) LIMITS ON CRIMINAL LAW ....................................................... 9

DEBATING THE HARM PRINCIPLE ................................................................. 9

R v Malmo-Levine; R v Caine SCC 2003 (p. 63) ..................................... 9
R v Labaye SCC 2005 (p. 76) ................................................................... 9

PROSTITUTION/SEX WORK ........................................................................ 9

Canada (Attorney General) v Bedford SCC 2013 (p. 97) ....................... 10

HATE SPEECH ............................................................................................... 10

R v Keegstra SCC [1990] p. 113 ................................................................. 10
R v Zundel SCC (1992) p. 120 ............................................................... 10

CHAPTER 3) POLICE POWERS ...................................................................... 10

CONFessions/RIGHT TO Counsel (S. 24(2)) ......................................... 10

R v Manninen SCC 1987 (p. 136) ............................................................... 10
R v Brydges SCC 1990 (p. 141) ................................................................. 11
R v Sinclair SCC 2010 (p. 143) ................................................................. 11

CONFessions/RIGHT TO SILENCE ............................................................. 11

R v Hebert SCC 1990 (p. 148) [statements made to uncover officers] .......................................................... 11
R v Singh SCC 2007 (p. 152) [scope of pre-trial right to silence] .......... 11

ENTRAPMENT ................................................................................................. 11

R v Mack SCC 1988 (p. 165) .................................................................... 11

SEARCH AND SEIZURE ............................................................................. 11


REASONABLE EXPECTATION OF PRIVACY ........................................ 12

R v Wong SCC 1990 (p. 177) ................................................................. 12
R v Spencer SCC 2014 (p. 183) [have a RE of P over internet usage] ... 12

DETENTION AND ARREST .......................................................................... 12

R v Grant SCC 2009 (p. 196) The Admission of Evidence Rule (s. 24(2)) [when a right has been infringed upon] .......................................................................................... 12
R v Mann SCC 2004 (p. 203) [search incidental to investigative detention] ........................................................................................................... 13

POWERS INCIDENTAL TO ARREST .......................................................... 13

Cloutier v Langlois 1990 SCC (p. 210) ....................................................... 13
R v Golden SCC 2001 (p. 212) ............................................................... 13

CHAPTER 4) THE TRIAL PROCESS ................................................................. 13

THE WRONGFUL CONVICTION OF DONALD MARSHALL JR.............. 14

R v Marshall Nova Scotia Supreme Court (1972) (p. 234) ..................... 14
Marshall II (1983) (p. 231) ..................................................................... 14
R v S (RD) 1997 SCC (p. 250) ............................................................... 14

THE ROLE OF PROSECUTOR AND THE DEFENCE COUNSEL .......... 14

Boucher v The Queen SCC 1955 (p. 271) [Role of Crown] .................... 14
<table>
<thead>
<tr>
<th>Reference</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>R v Anderson 2014 SCC (p. 274)</td>
<td>14</td>
</tr>
<tr>
<td>DISCLOSURE</td>
<td>15</td>
</tr>
<tr>
<td>R v Stinchcombe SCC 1991 (p. 281) [Crown’s obligation to make disclosure of all relevant information]</td>
<td>15</td>
</tr>
<tr>
<td>PRE-TRIAL RELEASE AND BAIL</td>
<td>15</td>
</tr>
<tr>
<td>R v Bray Ontario Court of Appeal (1983) (p. 294)</td>
<td>15</td>
</tr>
<tr>
<td>R v Pugsley Nova Scotia CA (1982) (p. 295)</td>
<td>15</td>
</tr>
<tr>
<td>BAIL</td>
<td>15</td>
</tr>
<tr>
<td>R v Pearson SCC 1992 (p. 296) [Whether the reverse onus is unconstitutional?]</td>
<td>15</td>
</tr>
<tr>
<td>R v Morales SCC 1992 (p. 298) [public interest = too vague a factor for denying bail]</td>
<td>15</td>
</tr>
<tr>
<td>R v Hall SCC 2002 (p. 300)</td>
<td>15</td>
</tr>
<tr>
<td>THE JURY</td>
<td>15</td>
</tr>
<tr>
<td>R v Parks Ontario CA 1993 (p. 306)</td>
<td>16</td>
</tr>
<tr>
<td>R v Williams SCC 1998 (p. 308)</td>
<td>16</td>
</tr>
<tr>
<td>QUANTUM + BURDEN OF PROOF</td>
<td>16</td>
</tr>
<tr>
<td>Woolmington v DPP House of Lords [1935] AC 462 (p. 313)</td>
<td>16</td>
</tr>
<tr>
<td>R v Oakes SCC 1986 (p. 316) [reverse onus for possession of narcotic for trafficking – violating s. 11(d) [presumption of innocence]</td>
<td>16</td>
</tr>
<tr>
<td>Presumption of Innocence Applies to Defence + to Elements of Offence</td>
<td>16</td>
</tr>
<tr>
<td>R v Keegstra SCC 1990 (p. 322)</td>
<td>16</td>
</tr>
<tr>
<td>Quantum of Proof</td>
<td>16</td>
</tr>
<tr>
<td>R v Lifchus SCC 1997 (p. 325)</td>
<td>16</td>
</tr>
<tr>
<td>R v Starr SCC 2000 (p. 326)</td>
<td>16</td>
</tr>
<tr>
<td>CHAPTER 5) CONDUCT OR ACTUS REUS</td>
<td>16</td>
</tr>
<tr>
<td>1) VOLUNTARINESS</td>
<td>17</td>
</tr>
<tr>
<td>R v Larsonneur Court of Criminal Appeal England 1933 (p. 335)</td>
<td>17</td>
</tr>
<tr>
<td>Killbride v Lake New Zealand Supreme Court 1962 (p. 336)</td>
<td>17</td>
</tr>
<tr>
<td>2) ACTS, OMISSIONS, AND STATUS</td>
<td>17</td>
</tr>
<tr>
<td>R v Brown Ontario Court of Appeal 1997 (p. 343) [criminal negligence causing death =&gt; ss. 219, 220]</td>
<td>17</td>
</tr>
<tr>
<td>R v Thornton Ontario Court of Appeal 1991 (p. 347) [s. 180 – common nuisance]</td>
<td>17</td>
</tr>
<tr>
<td>3) CIRCUMSTANCES</td>
<td>17</td>
</tr>
<tr>
<td>4) CONSEQUENCES AND CAUSATION</td>
<td>17</td>
</tr>
<tr>
<td>R v Winning Ontario Court of Appeal 1973 (p. 360)</td>
<td>18</td>
</tr>
<tr>
<td>Smithers v The Queen SCC 1978 (p. 361) [sets a low threshold for causation/pre-Charter – in Cribbin it was repealed]</td>
<td>18</td>
</tr>
<tr>
<td>R v Harbottle SCC 1993 (p. 367) [First Degree Murder]</td>
<td>18</td>
</tr>
<tr>
<td>R v Nette 2001 SCC (p. 372) [issue of causation for murder]</td>
<td>18</td>
</tr>
<tr>
<td>Pagett v The Queen Court of Criminal Appeal England 1983 (p. 383)</td>
<td>18</td>
</tr>
<tr>
<td>R v Maybin 2012 SCC (p. 387) [intervening causes to break chain of causation]</td>
<td>18</td>
</tr>
<tr>
<td>THE PRINCIPLE OF CONTEMPORANEOITY</td>
<td>18</td>
</tr>
<tr>
<td>Fagan v Commissioner of Metropolitan Police; CA, Criminal Division England 1961 (p. 396)</td>
<td>19</td>
</tr>
<tr>
<td>R v Miller Court of Appeal, Criminal Division, England 1982 (p. 399)</td>
<td>19</td>
</tr>
<tr>
<td>CHAPTER SIX – ABSOLUTE AND STRICT LIABILITY</td>
<td>19</td>
</tr>
<tr>
<td>1) PUBLIC WELFARE OR TRUE CRIMINAL OFFENCES</td>
<td>19</td>
</tr>
<tr>
<td>Beaver v The Queen SCC [1957] SCR 531</td>
<td>19</td>
</tr>
<tr>
<td>R v Pierce Fisheries Ltd. SCC [1971] SCR 5 [Regulatory Issue]</td>
<td>20</td>
</tr>
<tr>
<td>2) THE EMERGENCE OF STRICT LIABILITY</td>
<td>21</td>
</tr>
<tr>
<td>R v Sault Ste Marie SCC [1978] 2 SCR 1299</td>
<td>21</td>
</tr>
<tr>
<td>3) CONSTITUTIONAL CONSIDERATIONS (P. 425)</td>
<td>22</td>
</tr>
<tr>
<td>R v Wholesale Travel Group Inc. SCC [1991] 3 SCR 154</td>
<td>23</td>
</tr>
<tr>
<td>CHAPTER SEVEN – FAULT OR MENS REA</td>
<td>24</td>
</tr>
<tr>
<td>I. LEGISLATIVE DEFINITIONS OF FAULT</td>
<td>24</td>
</tr>
<tr>
<td>II. THE CHOICE BETWEEN A SUBJECTIVE AND AN OBJECTIVE STANDARD</td>
<td>24</td>
</tr>
<tr>
<td>R v ADH SCC 2013 SCC 28, [2013] 2 SCR 269</td>
<td>24</td>
</tr>
<tr>
<td>III. SUBJECTIVE STANDARDS OF FAULT</td>
<td>24</td>
</tr>
<tr>
<td>R v Buzzanga and Durocher [Ontario Court of Appeal 1979]</td>
<td>25</td>
</tr>
<tr>
<td>R v Tennant and Naccarato [Ontario Court of Appeal 1975]</td>
<td>25</td>
</tr>
</tbody>
</table>
CHAPTER ELEVEN – CORPORATE LIABILITY

I. THE OLD COMMON LAW OF DIRECTING MINDS

- R v Waterloo Mercury Sales Ltd. Alberta District Court (1974)
- Canadian Dredge & Dock Co v The Queen SCC 1985
- R v Safety-Kleen Canada Inc (1997) Ontario Court of Appeal

II. THE NEW STATUTORY PROVISIONS FOR ORGANIZATIONAL LIABILITY

- R v Metron Construction Corporation (2013) Ontario Court of Appeal

CHAPTER TWELVE – SEXUAL ASSAULT

THE LEGAL ELEMENTS OF SEXUAL ASSAULT

- R v Ewanchuk SCC 1999 [Leading Decision on Elements of Sexual Assault]

THE ACTUS REUS OF SEXUAL ASSAULT

- R v Chase SCC 1987 [Objective Test]
- R v JA SCC 2011 [Consciousness]
- R v Mabior 2012 SCC 47

THE MENTAL ELEMENT

- Pappajohn v The Queen SCC 1980
- Sansregret v The Queen SCC 1985

CHAPTER THIRTEEN – HOMICIDE

I. MANSLAUGHTER

II. SECOND DEGREE MURDER

- Section 229(a) – Intentional or Reckless Killing
- R v Simpson Ontario Court of Appeal 1981
- R v Cooper SCC 1993

- Section 229 (b): Transferred Intent
- R v Fontaine 2002 Manitoba Court of Appeal

- Section 229(c): Unlawful Object
- R v Shand (Ontario Court of Appeal 2011)

CONSTITUTIONAL CONSIDERATIONS

- Vaillancourt v The Queen SCC 1987
- R v Martinuex SCC 1990

FIRST-DEGREE MURDER

- Section 231(2): “Planned and Deliberate”
- R v More SCC 1963

- Section 231(4): Murder of Police Officer, Etc.
- R v Collins (Ontario Court of Appeal 1989)

- Section 231(5): “While Committing”
- R v Russell SCC 2001

INFANTICIDE [SECTION 233]

- R v LB (Ontario Court of Appeal 2011)

CHAPTER FOURTEEN – PROVOCATION [SECTION 232]

INTRODUCTION

INTERPRETING AND APPLYING THE PROVISIONS

- R v Hill SCC 1986
R v Thibert SCC 1996 ........................................................................................................ 72
R v Tran SCC 2010 [The leading case on the defence of provocation]........................................... 73
R v Mayuran SCC 2012 [Air of Reality] ...................................................................................... 75

PROVOCATION AND INTENT ......................................................................................... 75
R v Cameron (Ontario Court of Appeal) 1992 ............................................................................. 75
R v Parent SCC 2001 ............................................................................................................ 76

CHAPTER FIFTEEN – MENTAL DISORDER AND AUTOMATISM ............................................. 76
PROCEDURAL ELEMENTS OF THE MENTAL DISORDER DEFENCE ........................................ 77
Fitness to Stand Trial ............................................................................................................... 77
R v Whittle SCC 1994 ............................................................................................................ 77
Who Can Raise the Mental Disorder Issue? ............................................................................. 77
R v Swain SCC 1991 .............................................................................................................. 77
Burden of Proof ....................................................................................................................... 78
R v Chaulk SCC 1990 ............................................................................................................. 78
Consequences of Mental Disorder as a Defence ....................................................................... 78
Winko v British Columbia (Forensic Psychiatric Institute) SCC 1999 ....................................... 78

MENTAL DISORDER AS A DEFENCE ................................................................................ 79
Mental Disorder or Disease of the Mind .................................................................................... 79
Cooper v The Queen SCC 1980 Analysis: (Dickson J) ................................................................. 79
R v Bouchard-Lebrun SCC 2011 [Intoxication/Drugs] ................................................................ 79
Appreciating the Nature and Quality of the Act ...................................................................... 81
Cooper v The Queen SCC 1980 Analysis: (Dickson J) ................................................................. 81
R v Abbey SCC 1982 .............................................................................................................. 81
Knowing That the Act is Wrong ............................................................................................... 82
R v Chaulk SCC 1990 [Morally vs. Legally Wrong] .................................................................. 82
R v Oomen SCC 1994 [Applying Knowledge to Case at Hand] .................................................. 82
MENTAL DISORDER AND NON-MENTAL DISORDER AUTOMATISM ......................... 83
R v Parks SCC 1992 [Non-Mental Disorder Automatism] ............................................................ 83
R v Stone SCC 1999 .............................................................................................................. 84
R v Luedecke (Ontario Court of Appeal) 2008 ......................................................................... 85

CHAPTER SIXTEEN – INTOXICATION ............................................................................... 85
I. THE COMMON LAW DEFENCE OF INTOXICATION .......................................................... 85
DPP v Beard (House of Lords) 1920 AC 479 ............................................................................. 85
R v Bouchard-Lebrun SCC 2011 SCC 58 Analysis: (Lebel J) ...................................................... 86
II. INTOXICATION AND SPECIFIC INTENT ...................................................................... 86
R v George SCC 1960 ............................................................................................................. 86
R v Bernard SCC 1988 [Sexual Assault] .................................................................................. 87
III. EXTREME INTOXICATION AND GENERAL INTENT ................................................. 88
R v Daviault SCC 1994 [Overturns Leary] ................................................................................ 88
Bill C-72.................................................................................................................................... 89
R v SN (2012) NUCJ .................................................................................................................. 89
IV. INVOLUNTARY INTOXICATION ...................................................................................... 89
R v Chaulk 2007 (NS CA) [Test for Self-Induced Intoxication] ..................................................... 89

CHAPTER SEVENTEEN – SELF-DEFENCE ......................................................................... 90
I. INTRODUCTION .................................................................................................................. 90
II. INTERPRETING AND APPLYING THE SELF-DEFENCE PROVISIONS ....................... 90
Subjectivity and Objectivity in Self-Defence ......................................................................... 90
III. GENDERED VIOLENCE, “BATTERED WOMEN” AND SELF DEFENCE ..................... 91
R v Lavallee SCC 1990 ........................................................................................................... 91
R v Petel SCC 1994 [Past Conduct] ......................................................................................... 92
R v Malott SCC 1998 (Relevance of Expert Advice) ................................................................. 93
IV. DEFENCE OF PROPERTY .............................................................................................. 93

CHAPTER EIGHTEEN – DURESS .................................................................................... 94
I. RELATIONSHIP BETWEEN THE COMMON LAW AND STATUTORY DEFENSES OF DURESS .................................................................................................................................................. 94
Paquette v R (SCC 1977) ......................................................................................................... 94
Chapter 1) Sources of Criminal Law

Principles of criminal liability:
- **Subjective fault elements**: (mental elements) what was in the accused’s mind at the time the act was committed
- **Objective fault elements**: what a reasonable person in the circumstances would have known or done
- **Strict liability offences**: after the state has proved the prohibited act beyond a reasonable doubt, the accused must establish a defence of lack of due diligence or lack of negligence
- **Absolute liability offences**: only require proof of the prohibited act and do not allow any defence of lack of due diligence or require proof of any fault

Constitution

Division of Powers

ML Friedland ‘Criminal Justice + Division of Power in Canada’ (p.9)
- Federal government has exclusive power to prosecute federal offences; can be directed to Attorney-General [section 2 of the Criminal code offences]

Switzman v Ebling
- Criminal code type legislations can only be legislated by federal government. Quebec not allowed to have legislation to make propagating communism illegal.

R v Morgentaler
- Unconstitutional invasion of federal criminal law power – NS cannot enact legislation making it an offence to perform an abortion outside of a hospital

Reference re Firearms Act
- Gun control is a criminal matter, not property + civil rights – falls under Federal criminal law

Criminal Law as a Statute

History

AW Mewett ‘The Criminal Law, 1867-1967’ (p. 17)
- 1953 – all common law offences (judge made law – as opposed to statute) abolished in Canada
- Aside from contempt of court [historically = anything from disrespecting the court, now = defies authority of the court]

Common Law Defences

Amato v the Queen SCC 1982 (p.19)
- [Still use common law defences under s. 8(3)]
- S. 8(3) of the Code can be interpreted to allow the judicial development of a defence of entrapment
- CL defences preserved in cases not expressly provided for – judge consider changing circumstances/times
- SCC has adverted to CL defenses of duress, necessity, and due diligence

Common Law Offenses

Frey v Fedoruk SCC 1950 (p. 21)
- No common law crimes = except contempt of court
- Being a ‘peeping Tom’ does not constitute a criminal offence

United Nurses of Alberta v AG Alberta
- Contempt of court example – disobeyed court directives not to go on strike → fined + found liable of contempt of court for choosing to defy court orders [could predict this would constitute as a crime]

R v Jobidon SCC 1991 (p. 24)
- [Court applied the provision so it extends to the offence at hand + applied it retroactively – s. 265(1) + (3)]
- An adult cannot consent to serious hurt or non-trivial bodily harm; serious harm both intended/cause for consent to be vitiated [cannot consent to breach of peace – only relevant if social productive (sports)]
- See s. 14 [not enacted at the time of Jobidon]
- **Consent to death**: No person is entitled to consent to have death inflicted on them, and such consent does not affect the criminal responsibility of any person who inflicts death on the person who gave consent.

### Codification + Certainty in Criminal Law

- SCC affirmed a void for vagueness – fair notice to citizens + enforcement of discretion [when laws are so vague, individuals do not know what they are doing]; not an excuse for ‘I do not understand the rules’

**R v Heywood SCC 1994 (p. 34)**
- [One of the first cases striking down a criminal offence of the basis of over-breadth under s. 7 of the Charter]
  - Section was overbroad → if the state uses broader means than necessary to reach objective, then the person’s individual rights are limited for no reason [law is capturing what it should not be]
  - Too broad w/ respect to time/place/who the previous assault was against

### Canadian Foundation for Children, Youth, and the Law v Canada SCC 2004 (p. 36)
- A law is unconstitutionally vague if it does not provide an adequate basis for legal debate + analysis, does not sufficiently describe any area of risk, or is not comprehensible [prevents citizens from realizing crime]
- Reasonable corrective force against children is legal; vagueness is when people are unsure when approaching boundaries of criminal sanctions [here it serves as a guidance, not a direction]

### Problems with vagueness
- no fair notice to citizens; too much law enforcement discretion
- Overbreadth + vagueness → are related in that both are the result of a lack of sufficient precision by a legislature; v = means are not clearly defined; o = means are too sweeping in relation to the objective [Heywood]

### Construction or Interpretation of the Criminal Code
- **Doctrine of strict construction**: the criminal code has historically been interpreted in a ‘strict’ manner designed to give the benefit of the doubt of any textual ambiguity to the accused

**R v Pare SCC 1987 (p. 43)**
- Issue with the phrase ‘while committing’ in s. 231(5) for a charge of first-degree murder
- Here, assault + the murder seen as a ‘single transaction’ fulfilling the ‘while committing’ requirement

### Chapter 2) Limits on Criminal Law

#### Debating the Harm Principle
- The ‘harm principle’ distinguishes between the use of government power to achieve moral ends and the use of such coercive power to prevent harm [the only permissible use of such force] → to only punish conduct that harms an individual [not harm to the rights/interest of others]

**R v Malmo-Levine; R v Caine SCC 2003 (p. 63)**
- The ‘harm principle’ is not a fundamental aspect of our justice system + is not needed to be included in crimes for them to be constitutionally valid
- Just because possession marijuana does not cause harm to others does not mean it cannot be prohibited
- [Dissent = imprisonment can only be used to punish conduct that is harmful to others]

**R v Labaye SCC 2005 (p. 76)**
- Starting to adopt the idea in Malmo-Levine dissent – shifts rationale for criminalizing indecent acts towards harm standard
- **Harm-based steps (Butler) → [Objective test]**
  - 1) Conduct is harmful/presents risk of harm/threatens to undermine value reflected in constitution, either by a) physically or psychologically harming those participating, b) by threatening liberty or autonomy with the conduct [number of people exposed is critical], or c) predisposing others to anti-social conduct
  - 2) Harm/risk of harm must be formally recognized as incompatible w/ society’s proper functioning

#### Difference between Malmo and Labaye
- in M Court was asked to invalidate a provision with the HP; in L to interpret a provision using the HP [whether indecency should send people to jail]

### Prostitution/Sex Work
- The criminal code does not directly prohibit prostitution but prohibits a host of activities relating to it
Canada (Attorney General) v Bedford SCC 2013 (p. 97)

- Determined that the provisions of keeping a common bawdy house, living on the avails of prostitution, and communicating in a public place violated s. 7 rights + not saved by s. 1
- Used overbreadth (law goes too far – interferes with conduct that bears no connection to its objective) + gross disproportionality (harm to victim is greater than deterrence to offenders) to strike down laws
  - [Response to this was Bill C-36 – focus = decriminalize activities of sex workers + focus on those who purchase the services]

Hate Speech
R v Keegstra SCC [1990] p. 113

- S. 319(2) [wilful promotion of hatred against an identifiable group] infringes freedom of expression [guaranteed in Charter s 2(b)] because it restricts freedom of thought/opinion/expression/belief by prohibiting communication intended to promote hatred against an identifiable group; and violates s. 11(d) [presumption of innocence] BUT is justified under s. 1 [reasonable limits] because of the need to protect larger groups
- Defences under s. 319(2) – defendant needs to prove [reverse onus]

R v Zundel SCC (1992) p. 120

- S. 181 [spreading false news] is unconstitutional [inoperative] since it catches a broad range of expression + is combined with criminality/imprisonment – there is the ability to criminalize a vast # of statements that merely constitute a mischief to a public interest
- Violated s. 2(b) and not saved under 1

Chapter 3) Police Powers

Models of the Criminal Process

- Crime control model – resembling a high-speed assembly-line conveyor belt operated by police and prosecutors, with the end product being a guilty plea; concerned with efficiency [keep evidence if police conduct is unlawful in obtaining it]
- Due-process model – resembling an obstacle course where defense lawyers argue before judges that the prosecution should be rejected because the accused’s rights have been violated; concerned with fairness and quality control
- [Prior to the Charter/due-process revolution, the formal law of the Canadian CJS embraced crime-control values]
- Old rule was that confession be voluntary

Questioning Subjects

Confessions/Right to Counsel (S. 24(2))

S. 24(2) - Where, in proceedings under subsection 1 [whose rights have been infringed or denied]), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

- S. 24(2) is a response to US ‘exclusionary rule’ – if it is something inadvertent will likely allow [US = all or nothing]
- S. 10(b)– everyone has the right on arrest/detention to retain/instruct counsel w/o delay + be informed of the right

R v Manninen SCC 1987 (p. 136)

[One of the first + seminal decisions interpreting s. 10(b) of the Charter]

- In addition to the ‘right to be informed’ police have two additional responsibilities – 1) Police must provide the detainee with a reasonable opportunity to exercise the right to retain and instruct counsel without delay and 2) to cease questioning/attempt to elicit evidence until there has been a reasonable opportunity to do so
- Trying to establish a precedent – the s. 10(b) rights were enacted in 1982 [looking out for the vulnerable population who would not capable of understanding rights/requesting a lawyer]
- Clarkson v The Queen (1986) determined the standard for one to waive his rights under s. 10(b) is very high [clear, unequivocal, and informed – ‘Informed’ meaning that the waiver must be premised on a true appreciation of the consequences of giving up the right]

Notes:

- The unanimous decision in R v Taylor (2014) emphasized that the right to counsel arises immediately upon arrest or detention (as long as there is not an urgent/dangerous situation)
R v Brydges SCC 1990 (p. 141)
- As part of the 'informed' component of s. 10(b) a detainee should be informed of the existence/availability of systems of duty counsel + Legal Aid; the accused must also properly understand the consequences of waiving right to counsel
- Standard for waiving rights to retain and instruct counsel is high
- Exclude the evidence [prejudicial statements] under s. 24(2) obtained after he was not told about legal aid/duty counsel

R v Sinclair SCC 2010 (p. 143)
- In order to retrigger the right to counsel there must be a change in circumstances that suggests the choice faced by the accused has significantly changed and that this situation requires new advice [not merely a simple request]
- The rights of s. 10(b) and the right to silence under s. 7 ensure the choice to speak is free + informed → does not guarantee the decision is wise/guard against factors that influence the decision/demand the continued presence of counsel
- Dissent – 10(b) favors an ongoing right to assistance of counsel

Confessions/Right to Silence

- The charter contains no explicit guarantee of a right to silence – however relying on s. 7 of the Charter, the SCC has recognized such a right, subjective to some limitations [Implicitly understood this is an ancient common law right]

R v Hebert SCC 1990 (p. 148) [statements made to uncover officers]
- After a refusal to speak, subterfuge [deception] that actively elicits information violates the accused’s right to silence by depriving him of the choice of whether to speak to the police
- 1) Police can question accused in absence of counsel (after retaining counsel) + police persuasion does not breach the right [Sinclair]; 2) Rule against undercover only applies after detention [prior to detention, the individual is not in control of the state]; 3) The right to remain silent does not affect voluntary statements made to cellmates; 4) Must be a distinction between uncover agents observing the subject vs. actively eliciting information in violation of choice to remain silent

R v Singh SCC 2007 (p. 152) [scope of pre-trial right to silence]
- Asserted his right to silence 18 times before identifying himself (therefore, admitting to the crime)] – statements are admissible
- Main question asked is whether the confession was voluntary → did the accused exercise free will by choosing to make the statement
- Voir dire: preliminary examination of jurors/witnesses [here the police officer] often by judge/counsel, who makes the decision based on the facts → judge determined the Crown proved beyond a reasonable doubt the statements were voluntary [this type of ‘finding of fact’ has legal implications – only judge does this, not jury]

Entrapment
- ‘Where a law enforcement agent induces someone to commit a crime they otherwise would have been unlikely to commit [Generally, tends to be for ‘victimless’ crimes]
- Not duress + not necessity → those apply against all actor; not just the state
- The defence is hard to use

R v Mack SCC 1988 (p. 165)
- Entrapment occurs when [articulated in Amato]: 1) the authorities provide a person with an opportunity to commit an offence w/o acting on a reasonable suspicion that the person is already engaged in criminal activity or pursuant to a bona fide inquiry; 2) If have reasonable suspicion/acting on a BF inquiry, they go beyond providing an opportunity + induce the commission of an offence
- Reasonable person standard (objective) – what would an average person do in this situation → judge decides
- Onus of proof is on the accused [burden of proof: balance of probabilities]

Search and Seizure
- S. 8 of the Charter – everyone has the right to be secure against unreasonable search or seizure

Hunter v Southam Inc SCC (1984) (p. 173) [Establishes principles of reasonable search + seizure]
- There must be reasonable + probable grounds established upon oath that there is evidence in the place to be searched
- NOW need a warrant – must be issued by a neutral arbiter (usually a judge), who must be satisfied on reasonable grounds to believe there is evidence of an offence
• The guarantee from unreasonable search/seizure only protects a reasonable expectation [an assessment must be made whether public’s interest to be left alone must give way for the gov’t to advance its goals (law enforcement)]

Reasonable Expectation of Privacy
• The SCC has struggled to provide clear + consistent guidance for assessing whether an intrusion, where a reasonable expectation of privacy is encroached on, has taken place

R v Wong SCC 1990 (p. 177)
• We have a reasonable expectation not to be recorded, even if okay talking to others [here, in hotel room]
• The question as to the grounds of a reasonable expectation of privacy should be broad and should ask whether people in a society such as ours would expect to have privacy in certain situations [privacy against the state]
• However, just because s. 8 has been violated the evidence obtained can still be admissible in court under s. 24 if it does not bring the administration of justice into disrepute

R v Spencer SCC 2014 (p. 183) [have a RE of P over internet usage]
• The factors used to constitute whether there is a reasonable expectation of privacy include: 1) subjective matter of the search; 2) the claimant’s interest in the subject matter; 3) the claimant’s subjective expectation of privacy in the subject matter; 4) Whether this subjective expectation of privacy was objectively reasonable having regard to the totality of the circumstances
• Note: Tessling – infrared search by police helicopters – do not need a warrant for this; do not have a reasonable expectation of privacy of the heat coming out of your house; judges define what the reasonable expectation is

Permissible Departure from Hunter v Southam
• In R v Collins it was held in order to be reasonable under s. 8 a search or seizure must satisfy three essential preconditions
  o 1) must be authorized by law
  o 2) the law itself must be reasonable
  o 3) must be carried out in a reasonable manner

Detention and Arrest
Constitutional Protection
• S. 9 of the Charter – ‘everyone has the right not to be arbitrarily detained or imprisoned’ serves the goal of protecting individuals from unjustified state interference with their liberty in 2 ways:
  o 1) provides a constitutional mechanism for scrutinizing the decision to detain or arrest in individual cases [s. 9 is violated if there are no grounds for doing so and if it is done based on bias/personal prejudice toward a person]
  o 2) S. 9 also provides a means for scrutinizing legislation that authorizes detention/imprisonment

R v Grant SCC 2009 (p. 196) The Admission of Evidence Rule (s. 24(2)) [when a right has been infringed upon]
• To determine whether the reasonable person would understand he had been deprived of the liberty of choice, these factors may be considered: [WHEN DETAINED]
  o 1. The circumstances giving rise to the encounter; 2. The nature of the police conduct; 3. The characteristics or circumstances of the individual where relevant

• Grant Factors
  1) The seriousness of the Charter-infringing state conduct [what right was being infringed upon/how bad was it] – would admission bring the Administration of Justice into disrepute
  2) The impact of the breach on the Charter-protected interests of the accused [how much did the breach actually undermine the interests protected by the right infringed] ex. what level of privacy was expected; to what degree what the liberty of the accused limited
  3) Society’s interest in the adjudication of the case on its merits would the truth-seeking function of the criminal trial be better served by the admission or the exclusion of the evidence [importance of evidence, seriousness of offence, discoverability (would it have been found regardless of breach)]
  General rule = where reliable evidence is discovered as a result of a good faith infringement that did not greatly undermine the accused’s protected interests, admissibility is favored
  Grant factors apply to all 24(2) analysis – not just for arrests/detention but for search/seizure, etc.

Detention Powers
Prior to R v Simpson (1993) the police had no power to detain short of carrying out a formal arrest; in Simpson the court recognized a police power to briefly detain an individual where police have articulable cause that the person is involved in criminal activity.

R v Mann SCC 2004 (p. 203) [search incidental to investigative detention]

- Police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all circumstances that the individual is connected to a particular crime + that such detention is necessary.
- Where an officer has reasonable grounds to believe his safety/other is at risk he may engage in a protective pat-down search – pat down for objects/weapons [*distinguished from an arrest]
- Reaching into someone’s pocket [after not feeling objects/weapons] is a violation of the reasonable expectation of privacy.
- Waterfield (1963) [Test for Common Law Police Powers] allowed for a two-pronged analysis to determine if an officer’s conduct is an unlawful interference with an individual’s liberty.
  - 1) First, the courts must consider whether the police conduct falls within the general scope of any duty imposed on the officer by statute or at common law
  - 2) If this is met, then they must consider whether such conduct involved an unjustifiable use of powers associated with the duty – requiring a balance between the interests of police duty and the liberty interests at stake

Powers Incidental to Arrest

Cloutier v Langlois 1990 SCC (p. 210)

- After an arrest police can engage in a frisk search without needing reasonable + probable grounds to do so [although powers are not unlimited] → 1) the power does not impose a duty [must assess each case to determine if a search meets underlying objectives]; 2) must be for a valid objective in pursuit of the ends of criminal justice [ex. search for a weapon; not to ridicule, pressure, intimidate]; 3) must not be conducted in an abusive fashion

*In R v Stillman [1997] a majority of the SCC held that the taking of bodily samples for DNA testing w/o accused’s consent + w/o a warning infringed ss. 7+8 of the Charter and should be excluded under s. 24(2) [these are in no danger of disappearing]

R v Golden SCC 2001 (p. 212)

[now need a warrant or reasonable + probable grounds to engage in a strip-search]

- Strip searches are only justifiable where they are conducted as an incident to a lawful arrest for the purpose of discovering weapons in the detainee’s possession or evidence related to the reason for the arrest [necessity + urgency]
- Must establish reasonable + probable grounds for justifying the strip-search in addition to the reasonable + probable grounds to arrest [requires a high degree of justification]
- Absent extenuating circumstances, strip searches must be done at the police station.

When arrest under RPG can [along w/ frisk search] also:

- Search accused’s car; conduct a search 6 hours after arrest; can search a smartphone [do not need warrant; but not incidental to every arrest]

Sources of Police Powers + The Ancillary Powers Debate

- The ancillary powers doctrine enables courts to recognize new police powers at ‘common law’ – this was the doctrine applied in Mann (from Waterfield) to recognize investigative detention power.
- The ancillary powers doctrine allows for the recognition of police powers through a cost-benefit analysis – there are two parts to the law-making device
  1. Begins with a query into whether the impugned actions of police fall within the scope of his or her broader duties
  2. Then there is a weighing of apparent benefits, usually for law enforcement and public safety as against any resulting interference with individual liberty interests; and if the benefits are characterized as outweighing the costs then the action is said to be justifiable and a new police power is born

Chapter 4) The Trial Process

- Opening statement by the Crown; defense then makes a statement and rebuts the Crown statement
- Onus of proof (who has the responsibility to make the case) – Crown has this responsibility
  - Crown builds the case - burden of proof (beyond a reasonable doubt)
  - Typically done by testimony – either witness or experts
- Then, defense – cross-examine each witness
The Wrongful Conviction of Donald Marshall Jr

R v Marshall Nova Scotia Supreme Court (1972) (p. 234)

- How a trial takes place + where so many errors occur → jury instructions [prejudicial]; bad instructions on reasonable doubt [burden of proof is beyond a reasonable doubt]; witnesses taking oath [did they understand the oath (minors)]; adverse witnesses [not cooperating]; error in presenting no additional charge when there was enough to present that

Marshall II (1983) (p. 231)

- Ethical duties of the Crown → – have 2 roles: 1) that of an advocate [pursue a legitimate result to the best of its ability] and 2) that of 'minister of justice' [not concerned with winning or losing]
- Ethical duties of judges → 1) recuse themselves in any case they cannot judge impartially; and 2) disqualify themselves in any case of conflict between personal interests + their duty


- Things went wrong → police [sought out evidence to support his theory]; trial process; crown [CP did not make an effort to find out why witnesses gave inconsistent statements/did not disclose to defence]; defense [did not carry out independent investigation, did not interview witnesses for crown, did not ask for disclosure/evidence of innocence] trial judge [refused new evidence, did not allow complete cross-examination about why witness lied]; appeal [did not take seriously, put blame on Marshall]

R v S (RD) 1997 SCC (p. 250)

- The test for reasonable apprehension of bias established in the jurisprudence is reflective of the reality that while judges can never be neutral, they can and must strive for impartiality (objective test)
- The judge was open to take into account the well-known presence of racism in that community and to evaluate the evidence against that background

Wrongful Convictions and the Death Penalty

United States of America v Burns and Rafay 2001 SCC (p. 261)

- Canvassing wrongful convictions in Canada, UK, US

The Questions of Factual Innocence

- Cases referred to the courts of appeal are under the regular appeal provisions under s 686 of the criminal code
- Reference re Mullins-Johnson (2007) → There are not two kinds of acquittals – those where the Crown failed to prove beyond a reasonable doubt and those where the accused has been shown of being factually innocent
  - A criminal trial does not address factual innocence – it is to determine whether the Crown has proven beyond a reasonable doubt; In an Appeal – cannot make a legal declaration of factual innocence
- Cannot have a ‘factually innocent’ verdict because of the impact it would have on people found ‘not guilty’

The Role of Prosecutor and the Defence Counsel

Boucher v The Queen SCC 1955 (p. 271) [Role of Crown]

- If Crown determines accused is not guilty/there is a reasonable doubt, then it is the duty of the Crown to say so or not make the arrest → there is a public interest role [public duty, dignity, seriousness, justness]
- Duty of the Crown is not to win or lose, but to present proper facts/credible evidence in a fair manner
- [A lot of these issues have been dampened by the Stinchcombe rule]

R v Anderson 2014 SCC (p. 274)

- Prosecutorial discretion is (almost) absolute and can only be reviewed for abuse of process
- Examples → whether to bring the prosecution of a charge laid by police, whether to accept a guilty plea to a lesser charge, whether to withdraw from criminal proceedings altogether, whether to enter into a stay of proceedings in either a private or public prosecution, and whether to take control of a private prosecution; decision to pursue a dangerous offender application
- Must be distinguished from constitutional obligations – discretion does not shield a CP who fails obligations (such as duty to provide proper disclosure)
Disclosure

R v Stinchcombe SCC 1991 (p. 281) [Crown’s obligation to make disclosure of all relevant information]
- All relevant information must be disclosed subject to the reviewable discretion of the Crown [this includes not only what the Crown intends to introduce but also what it does not]
- All statements obtained from persons who have provided relevant information must be produced
- In s. 7 of the Charter the right to make full answer and defence is one of the pillars of criminal justice which we depend on to ensure innocent are not convicted – this is obstructed by a failure to disclose

Pre-Trial Release and Bail
- Under s 11(e) of the Charter, those charged with an offence have the right not to be denied 1) reasonable bail, 2) without just cause
- Because Marshall was charged with murder, he could not be released under s. 522(2) unless he was able to show cause why his continued detention was not justified
  - 522(2) → [if committed offence under s. 469] must be detained in custody unless the accused can show why his detention is not justified under 515(10)
  - 469 → treason, alarming her Majesty, intimidating Parliament or legislature, inciting to mutiny [rebellion], serious offences, piracy, piratical acts, murder

R v Bray Ontario Court of Appeal (1983) (p. 294)
- The reverse onus (s. 515(10)) on an accused charged with murder to justify why detention is not justified, does not violate s. 11(e) [primary grounds = accused’s attendance at trial + secondary grounds = necessary to public interest or for protection of protection or safety of the public]
- Must satisfy this by a balance of probabilities + do not have to disprove the offence or implication in it

- Factors for release → 1) risk of flight (attendance in court); 2) risk to public safety; 3) maintaining confidence in the administration of justice
- Notes: 1) does reverse onus matter [essentially changing the order the parties go in]; criminal code 515(6) + 522; 3) presumption is detention unless cause is made

Bail
- Section 469 crimes are those who the court of criminal jurisdiction cannot try [ex. treason, murder, drugs, etc.]
- Presumptively these are denied bail
- 515(10)(c) → circumstances for denying bail = strength of prosecution’s case; gravity of the offence; circumstances surrounding offence/whether a firearm was used; liable for a minimum punishment of 3 of more years

R v Pearson SCC 1992 (p. 296) [Whether the reverse onus is unconstitutional?]
- No → just cause under 11(e) = 1) denial of bail must only occur in a narrow set of circumstances; 2) it must be to promote the proper functioning of the bail system; and must not be undertaken for any purpose extraneous to the bail system
- 515(6)(d) → if accused charged under the Narcotics Control Act, the justice is to order the accused’s detention, however accused is given an opportunity to show why detention is not justified [on primary/secondary grounds]
- Dissent → should distinguish between large scale vs. small scale trafficking

R v Morales SCC 1992 (p. 298) [public interest = too vague a factor for denying bail]
- Challenged the secondary ground under 515(10) (b) [necessary for public interest/protection or safety of public]
- ‘Public interest’ – violates section 11(e) because authorizes detention in vague/imprecise terms [no just cause needed]
- ‘Public safety grounds’ – does not violate 11(e) – fits Pearson’s criteria for just cause

R v Hall SCC 2002 (p. 300)
- 515(10) (c) → can deny bail for any other just cause being shown and, without limiting the generality of the foregoing, where necessary to maintain confidence of CJS... [these first two phrase are unconstitutional + therefore, void]
- Unconstitutional as Parliament cannot confer broad discretion on judges to deny bail but must lay out precise + narrow circumstances in which bail must be denied

The Jury
- Under s. 473 of Code, a person accused of murder can obtain a non-jury trial if both accused + Attorney General consent
- [Crown can insist on a jury trial]
- 3 factors determine who sits on a jury → 1) summon a cross-section of the population [made under provincial leg.]; 2) peremptory challenges [both accused + prosecutor can challenge jurors w/o need for any stated reason [amount depends
on crime – s. 634); 3) challenge for cause procedure [s. 638] allows both to challenge an unlimited number of potential jurors on various grounds – [most common is that the juror is not indifferent between the accused and the Queen]

**Challenges for Cause**

*R v Parks Ontario CA 1993 (p. 306)*

- The ‘Parks Question’ is accepted throughout Canada – ‘that the accused is black and the victim is white’
- Here, determined that asking jury if they can be impartial with regard to race, drugs, immigration is essential to a fair trial [racism is a relevant consideration + the accused should be able to ask potential jurors about their attitudes on race]

*R v Williams SCC 1998 (p. 308)*

- Judge should allow challenges for cause where there is a realistic potential of the existence of partiality – this applies to all requests for challenges based on bias [regardless of the origin of the apprehension of partiality]
- S. 638 1st stage) inquiry before judge to determine if challenges for cause should be allowed [test = whether there is a realistic potential/possibility for partiality]; 2nd stage) occurs on the challenge itself [defence may question potential jurors as to whether they harbor prejudices against accused’s race + if able to set aside those prejudices + act impartially]

**Quantum + Burden of Proof**

**Burden of proof**

- The burden of proof on the Crown to prove the guilt of an accused beyond a reasonable doubt is one of the most important safeguards in the CJS

*Woolmington v DPP House of Lords [1935] AC 462 (p. 313)*

- It is the duty of the prosecution to prove the prisoner’s guilt beyond a reasonable doubt + if there is reasonable doubt as to whether he killed w/ malicious intent then the prosecution has not made out the case + prisoner entitled to acquittal
- ‘Golden thread’ of English criminal law is that the Crown has to prove each case beyond a reasonable doubt

*R v Oakes SCC 1986 (p. 316) [reverse onus for possession of narcotic for trafficking – violating s. 11(d) [presumption of innocence]*

- *Oakes Test [foundation test for s.1]*:
  1) Must be a social objective that is so important that it is pressing + substantial objective for interfering w/ Charter right
  2) Law must be proportional with the objective – a) must be rational connection between the proven + presumed facts (between the two-part test in this case); b) impair as little as possible; c) measures must be proportional to objectives

**Presumption of Innocence Applies to Defence + to Elements of Offence**

*R v Keegstra SCC 1990 (p. 322)*

- Reverse onus is okay with respect to proving the truth (s. 319(3)(a) [it is a minimal impairment of the presumption of innocence] – having accused prove truthfulness on balance of probabilities is understandable + valuable precaution against too easily justifying harm
- Wilful promotion of hatred is hostile to Parliament’s aims therefore placing a burden of reverse onus on accused is rationally connected to a valid s.1 objective

**Quantum of Proof**

*R v Lifchus SCC 1997 (p. 325)*

- Explaining how ‘beyond a reasonable doubt’ should be explained to the jury
- Example definition: ‘Based upon the evidence before the court, if you are sure that the accused committed the offence you should convict since this demonstrates you are satisfied of his guilt beyond a reasonable doubt’

*R v Starr SCC 2000 (p. 326)*

- If fail to instruct a jury according to Lifchus, it can result in a new trial/case will be overturned
- Must instruct that ‘beyond a reasonable doubt’ has special legal significance + requires significantly higher quantum of proof than the balance of probabilities

**Chapter 5) Conduct or Actus Reus**

- *Actus non facit rum nisi mens sit rea:* an act is not guilty unless there is also a guilty mind
  - There can be no criminally culpable act unless it is performed with a guilty mind
- *Actus reus* refers to more than simply a prohibited action – it is a bundle of components and requires a:
• 1) Physically voluntary, 2) act or omission, 3) sometimes in certain prescribed circumstances, 4) sometimes causing certain consequences

- Crown must prove each beyond a reasonable doubt

1) Voluntariness

- A requirement for every offence [conduct = a product of will of the accused]; put aside intent aspect

R v Larsonneur Court of Criminal Appeal England 1933 (p. 335)
- Defendant was convicted of crime even without a voluntary act
- [Now regarded as a case that improperly ignores the voluntariness component of actus reus \( \rightarrow \) this is social control (regulation) not worried about protecting people from (mala in se) crimes]

Killbride v Lake New Zealand Supreme Court 1962 (p. 336)
- Apart from the mental element, a person cannot be made criminally responsible for an act or omission unless it was done or omitted in circumstances where there was some other course open to him – must be voluntary [need act + intent]

2) Acts, Omissions, and Status

Acts

- Most offences require a positive act – positive in the sense that the person is actively doing something
- Complications related to the ‘act’ tend to be definitional in nature – do not pose many problems for criminal law

Omissions

- The law will only find someone criminally liable for an omission when that person was subject to a legal duty to act
- **Specific omission offences** – knowing a person is about to commit high treason and does not inform; omits to assist a public officer in an arrest after having reasonable notice to do so; fails to stop, identify self, and give assistance after being involved in an accident where someone appears to be injured
- **General omission offences** – crime of common nuisance (endangers lives, safety, health; causes injury) and of criminal negligence (shows reckless disregard for lives/safety of others) – can include failure to provide necessities of life for children in care under 16, for spouse, person under his charge; must administer medical treatment with knowledge/skill; do an act if an omission to do it may be dangerous to life (all say ‘undertakes’ an act)

R v Brown Ontario Court of Appeal 1997 (p. 343) [criminal negligence causing death \( \rightarrow \) ss. 219, 220]
- S. 217 – everyone who undertakes to do an act is under a legal duty to do it if an omission to do the act is or more be dangerous to life
- For a s. 217 charge \( \rightarrow \) Must be a finding of an undertaking [there is no pre-existing legal duty from the relationship of the parties]; must be an undertaking before a legal duty is introduced
- Criminal standard for an ‘undertaking’ must be higher than civil negligence \( \rightarrow \) here, must have been clearly made w/a binding intent

R v Thornton Ontario Court of Appeal 1991 (p. 347) [s. 180 – common nuisance]
- Aspects of the 3 grounds for appeal \( \rightarrow \) conduct did not violate law; conduct did not endanger lives of others; defendant did not have mens rea
- [On further appeal to SCC] – s. 216 imposes a duty of care in giving blood to the Red Cross \( \rightarrow \) breached if do not disclose blood contained HIV antibodies; common nuisance endangered life, safety, health of persons

Status

- Status offences – punish in the absence of either an or omission are problematic, however rare
- Punish a state of being rather than what an individual did not did not do – punishment for who he/she is
- P. 355-356

3) Circumstances

- It is common to include specific circumstances among the elements of an offence – when there are these elements they are given the same weight as the element of voluntary conduct [p. 357-359]

4) Consequences and Causation

- Many offences are defined in a way that the existence of a voluntary act or omission (perhaps in certain circumstances) completes the actus reus; other include a specific outcome/consequence [causing death/bodily harm]
- The Criminal Code contains no general provisions governing the test for legal causation – there are some provisions dealing with certain causation problems when the consequence is death; otherwise must turn to the common law for the rest/rules for legal causation
• **Factual causation**: how the victim died + with the contribution of the accused to that result; ‘but for’ the action(s) would the death have occurred (Maybin)

• **Legal causation**: (imputable causation) whether the accused person should be held responsible in law for the death → an assessment of legal causation should focus on whether the accused should be held legally responsible for the consequences of his actions, or whether doing so would amount to punishing a moral innocent (Maybin)

**R v Winning Ontario Court of Appeal 1973 (p. 360)**

- A conviction cannot stand if the false information given was not relied upon → the action done has to cause the outcome
- ‘But for’ test – establishes factual causation

**CAUSATION FOR ALL FORMS OF HOMICIDE**

**Smithers v The Queen SCC 1978 (p. 361)** [sets a low threshold for causation/pre-Charter – in Cribbin it was repealed]

- The Smithers test requires that the accused’s act be a ‘contributing cause’ of death beyond something trifling or minor [not trivial or insignificant]

- Sufficient causation existed where the actions of the accused were a ‘contributing cause of death, outside the de minimis range → low threshold (akin to the ‘thin skull’ rule)

- All jury has to find is beyond a reasonable doubt that the accused’s action led to the death of the victim [manslaughter]

**CAUSATION IN FIRST DEGREE MURDER**

**R v Harbottle SCC 1993 (p. 367)** [First Degree Murder]

[s. 231(5) → murder is 1st degree regardless if planned/deliberate if done [during a crime of domination] while committing/attempting to commit hijacking aircraft, sexual assault, kidnapping/forcible confinement, hostage taking]

- Substantial cause of death test:
  1) Accused was guilty if underlying crime was of domination or of attempting to commit that crime
  2) Accused was guilty of the murder of the victim
  3) Accused participated in murder in a manner that he was a substantial cause of the death
  4) There was no intervening act of another that resulted in accused no longer being substantially connected to death
  5) Crimes of domination/murder were part of the same transaction; death caused ‘while committing’ offence

- Higher test than Smithers → must be a ‘substantial cause’ to be guilty of 1st degree murder

**MODIFY SMITHERS TEST [beyond de minimis to significant contributing cause]**

**R v Nette 2001 SCC (p. 372)** [issue of causation for murder]

- Determining first or second degree murder – determine whether murder has been committed pursuant to s. 229 or 230 [culpable homicide – mean to cause death/harm]; then how it should be classified (s. 231); if rely on s. 231(5) then the jury must find the accused guilty of murder before determining a first-degree conviction

- Smithers test is still valid for all forms of homicide → changed wording to ‘significant contributing cause’ [slightly higher]; and ‘substantial, essential, integral’ for 1st degree murder

**Pagett v The Queen Court of Criminal Appeal England 1983 (p. 383)**

- The question of whether an accused person can be held guilty of homicide (either murder or manslaughter) of a victim whose immediate cause of death is the act of another person must be determined on the ordinary principles of causation

- Can there be a conviction if the immediate cause of death was caused by another person → yes, all have to show for manslaughter is more than a non-trivial cause

**R v Maybin 2012 SCC (p. 387)** [intervening causes to break chain of causation]

- The doctrine of intervening acts is used to reduce the scope of acts that generate criminal liability → other acts may intervene to break the chain of causation to relieve the offender of legal responsibility [novus actus interveniens] = event must be extraordinary or unusual; an event that is reasonably foreseeable will not usually break the chain

- However just because an event was not reasonably foreseeable does not mean the chain of causation should be broken → intervening acts + ensuing non-trivial harm must be reasonably foreseeable in the sense that the acts and the harm that actually happened flowed reasonably from the conduct of the appellants [if so, acts may remain a significant contributing cause of death]

**The Principle of Contemporaneity**

- This principle holds that with regard to all offences that require proof of fault, the offence cannot be proven unless the element of fault – the mens rea – and the actus reus coincide
• Courts tend to prefer a more flexible application of the principle’

**Fagan v Commissioner of Metropolitan Police; CA, Criminal Division England 1961 (p. 396)**
- Not always necessary for the guilty act + intent to be completely concurrent; intent can occur while the guilty act is happening
- If the initial act is an accident, the actus reus [guilty act] can be fulfilled if there is a failure to stop doing the act

**R v Miller Court of Appeal, Criminal Division, England 1982 (p. 399)**
- An unintentional act followed by an intentional omission to rectify that act or its consequences; or a reckless omission to do when recklessness is a sufficient mens rea for the particular case, should only be regarded as an intentional or reckless act when reality and common sense so require
- Here, the failure to extinguish a fire was seen as an actus reus

**Chapter Six – Absolute and Strict Liability**
- The criminal law (especially since the enactment of the Charter) has required something more than proof of the criminal act in order to justify punishment → there must be proof of some guilty state of mind
- The law presumes the requirement of some mental state with respect to ‘true criminal offences’ [requiring a presumption of full mens rea], however with respect to other offences (regulatory or public welfare offences) such a high standard is not required
- Liability for regulatory or public welfare offences [permitting no additional fault requirement at all] may be satisfied by proof of the act requirement, accompanied by no further fault requirement (‘absolute liability’) or a much-reduced fault-requirement (‘strict liability’)
- In R v Sault Ste Marie 1978 the Court created the presumption that all public welfare or regulatory offences would require the prosecution to prove the prohibited act, but would then allow the accused to prove a defense of due diligence (or lack of negligence) or a reasonable mistake of fact on a balance of probabilities

**1) Public Welfare or True Criminal Offences**

**Beaver v The Queen SCC [1957] SCR 531**

**Facts:**
- Max Beaver sold to an undercover officer a package containing diacetylmorphine, Louis Beaver [appellant] was a party to the sale, while the appellant did not have physical possession of the package he and Max were acting jointly so that the package was in possession of both, the appellant had no knowledge of the substance contained in the package and believed it to be sugar of milk
- The trial judge charged the jury that if they were satisfied that the appellant had in his possession a package and sold it, then if the substance in the package was the drug, he was guilty on both counts → also that whether he had any knowledge of what the substance was or whether he believed the substance was harmless was irrelevant
- The trial judge found both the accused guilty on both counts of unlawfully selling a drug without the authority of a license and have a drug in their possession without the authority of a license, and also found them to be habitual criminals and sentenced to 7 years’ imprisonment on each count to run concurrently
- The appellant [Louis Beaver – Max Beaver died] appealed to the Ontario Court of Appeal on both convictions and against being a habitual criminal – the appeals were dismissed
- 2 years later, the appellant was given leave to appeal to the SCC

**Issues:**
- Should Beaver be convicted of possession and selling of a drug and sentenced to imprisonment?

**Decision:**
- Conviction for possession of drug quashed; conviction for selling of the drug affirmed
- Finding of habitual criminal stands – as it was conditional on appeal of the convictions being successful and only one appeal succeeded

**Ratio:**
- **A criminal offence [the offence of possession] requires mens rea [knowledge of the nature of the substance possessed] – mens rea is essential in guilt for a criminal offence**
- The essence of the crime is the possession of the forbidden substance and in a criminal case there is in law no possession without knowledge of the character of the forbidden substance

**Analysis:** (Cartwright J)
- When examining the Opium and Narcotic Drug Act, the two main reasons for holding that mens rea is not an essential ingredient of an offence – 1) the subject matter deals with the kind of cases referred to as ‘public welfare cases’ and 2) the
implication of the wording of s. 17 [if in someone’s possession/occupation then deemed to be in possession unless can prove the drug was there without his authority/knowledge/consent]

- S. 17 does not compel the Court to construe s. 4 as not requiring mens rea
- In s. 4(1)(d) – by the circumstance that on conviction a minimum sentence of 6 months’ imprisonment plus a fine must be imposed could lead to the conclusion that Parliament did not intend to enact that mens rea should not be an essential ingredient of the offence created
- No other statutory provision has been found that has been held to create a crime of strict responsibility (where the necessity for mens rea is excluded) on conviction for which a sentence of imprisonment is mandatory → the Parliament has the power to do so, however it is likely that this is not the case unless the words of the statute were clear and of no other interpretation [for absolute liability Legislation must be a clear and obvious]

Fauteux J (dissenting in part)
- The principle of the underlying Act is that possession of drugs covered by it is unlawful and where any exception is made to the principle, the exceptions themselves are attended with particular controlling provisions and conditions
- If the purpose of the Act is subject to the strict construction proposed by the appellant, it would defeat the object of the Act → it creates an absolute prohibition
- If it is argued that knowledge is of the essence of unlawful possession, then it is hard to understand why a defense for lack of knowledge would be provided for in the Act
- Here, the charges did not require proof of knowledge of the substance – would uphold all convictions

Note: Three levels of mens rea requirements:
- Normal: Crown must show mens rea (guilty mind)
  These are usually for mala in se crimes, or evil in themselves (murder, theft, arson etc.)
- Strict Liability: Crown only proves act took place and then defendant can prove compliance or due diligence. (usually for mala prohibitum evil because it is prohibited – regulatory crimes)
- Absolute liability: Crown need not prove mens rea and defense cannot show defense. The act is sufficient for conviction. (rare but for regulatory crimes)

R v Pierce Fisheries Ltd. SCC [1971] SCR 5 [Regulatory Issue]
Facts:
- The accused was charged with having undersized lobsters in its possession contrary to the Lobster Fishery Regulations made pursuant to the Fisheries Act
- The company brought back to its plant 50 000 – 60 000 pounds of lobsters, and among these a fishery officer found 26 undersized lobsters
- The SCC allowed an appeal from an acquittal
Issues:
- Was a new crime added to criminal law by prohibiting a person from having undersized lobsters?
Decision:
- No – appeal from acquittal allowed
Ratio:
- There is a distinction between true crimes and regulatory offences
- Regulatory offences [a wide range of offences created by statutes enacted for regulation of individual conduct in interests of health, convenience, safety, and general welfare of the public] are not subject to the common law presumption of mens rea as an essential element to be proven by the Crown
Analysis: (Ritchie J)
- The intention of the Act is to protect lobster beds from depletion and therefore conserve the source of supply for an important fishing industry
- A new crime was not added to criminal by having undersized lobsters in one’s possession, nor is a stigma of having been convicted of a criminal offence attach to a person found to have violated these regulations
- Beaver v The Queen affords an example of a federal statute which created a truly criminal offence – here, there is little similarity between a statute designed by forbidding the possession of undersized lobsters to protect the industry, and a statute making it a serious crime to possess or deal narcotics
- The regulation should be construed in accordance with the language in which it was enacted, free from any presumption as to the requirement of mens rea – in the Regulations it contains no words/phrases such as ‘knowingly’ ‘willfully’ etc. that would indicate mens rea is an essential ingredient; as in other sections of the Regulations these phrases/words were included

Cartwright CJ (dissenting)
• In Beaver it was determined that knowledge (mens rea) of the substance is a requirement for possession of a forbidden substance – by applying this principle, the express finding of fact that the respondent had no knowledge that any of the lobsters on the premise were undersized leads to a finding of not guilty
• No intention can be implied from the words which have been used unless Parliament included that it is an offence even if there was no knowledge the lobsters were undersized

Regulatory Offences and Strict Liability
• Today prohibited acts are generally classified as either crimes or regulatory offences
• The distinction was recognized before the Charter [in R v Pierce Fisheries Ltd.]
• The distinction was reaffirmed in R v Sault Ste. Marie 1978 SCC where public welfare offences were seen as a distinct class – here, the new category of strict liability was recognized as a middle ground between full mens rea and absolute liability in strict liability the Crown is required to prove neither mens rea nor negligence (conviction may follow merely upon proof beyond a reasonable doubt), however it is open to the defendant to avoid liability by proving on a balance of probabilities that all due care was taken → the defense of due diligence

The Rationale for the Distinction
• Regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care
• The concept of fault in regulatory offences is based upon a reasonable care standard and, as such, does not imply moral blameworthiness in the same manner as criminal fault
• Regulatory measures are the primary mechanisms employed by governments in Canada to implement public policy objectives

2) The Emergence of Strict Liability (p. 418)
R v Sault Ste Marie SCC [1978] 2 SCR 1299
[pre-Charter case]
Facts:
• The Court is concerned with offences referred to as ‘statutory’ ‘public welfare’ ‘regulatory’ ‘absolute liability’ or ‘strict responsibility’ which are not criminal in any real sense but are prohibited in the public interest
• The issue here is pollution
• The city of Sault Ste Marie was charged that it did discharge, or cause to be discharged, or allowed to be discharged, or deposited materials into Cannon Creek and Root River in such a place that might impair the quality of the water in Canon Creek or Root River – this charge was laid under the Ontario Water Resources Act [says they are guilty of an offence – first conviction fine of not more than $5000 and on subsequent of not more than $10 000 or to a term of not more than 1 year, or both]
• City hired the contractor therefore was criminally liable – the City was not the one who dumped the waste

Issues:
• Is this an offence of absolute liability where no mens rea needs to be proven?

Decision:
• No - Since s. 32(1) of the Act creates a public welfare offence without clear indication that the liability is absolute and without any words such as ‘knowingly’ ‘intentionally’ ‘willingly’ etc., this is placed into strict liability
• Appeal dismissed and a new trial necessary

Ratio:
• There should be a recognition of 3 categories of offences, rather than 2:
  1) Offences in which mens rea must be proved – criminal offences
  2) Offences of strict liability [public welfare offences]– in which there is no necessity to prove the existence of mens rea [no presumption of a full mens rea] – but it is left open to the accused [onus of proof on accused] to avoid liability by proving he took all reasonable care [burden of proof is beyond a reasonable doubt – balance of probabilities] involves consideration of what a reasonable man would have done in the circumstances
    a. This defense is available if the accused reasonably believed in a mistaken set of facts – or he took all reasonable steps to avoid the particular event
    b. If in the statutory provision creating the offence words such as ‘willfully’ ‘knowingly’ ‘intentionally’ are included, then this type of offence would fall under criminal offences
  3) Offences of absolute liability – open to the accused to exculpate himself by showing that he was free of fault
    a. Importance of penalty, precision of language used, will be primary considerations in determining whether offences fall into this category

Analysis: (Dickson J)
• Criminal offence – the Crown must establish a mental element [the accused committed the act intentionally or recklessly w/ knowledge of the facts constituting the offence] – mere negligence is excluded from the concept of the mental element required for conviction
• Absolute liability – entails conviction on proof merely that the defendant committed the prohibited act constituting the actus reus of the offense – there is no relevant mental element and it is not defense that the accused was entirely without fault – can be morally innocent
• Public welfare offences – [justification of absolute liability] – involve a shift from the protection of the individual to the protection of social and public interests
  1) The protection of social interests requires a high standard of care and attention on the part of those who follow certain pursuits and such persons are more likely to be stimulated to maintain those standards if they know that ignorance or mistake will not excuse them
  2) Administrative efficiency → it is difficult to provide mental culpability and the number of petty cases which come before the court therefore proof of fault is too great a burden in time and money to place upon the prosecution – absolute liability is the most efficient and effective way of ensuring compliance with minor regulatory legislation and the social ends to be achieved are so important as to override the unfortunate by-product of punishing those who may be free or moral turpitude
• Punishments are usually slight + stigma not often carried as that of a criminal offence
• Arguments against AL
  o Violates fundamental principles of penal liability – and rests upon assumptions that have not been empirically established
• In Pierce Fisheries – 1) held that the offence was one in which the Crown did not have to prove mens rea in order to obtain conviction; 2) Ritchie J did not foreclose the possibility of a defense [a defense of reasonable care may have been open to the accused]
• There is nothing wrong w/ rejecting absolute liability and admitting the defense of reasonable care – it is not up the prosecution to prove negligence; instead, it is open to the defendant to prove that all due care has been taken
• While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on the balance of probabilities he acted with reasonable care
• Pollution offences are undoubtedly public welfare offences enacted in the interests of public health – there is no presumption of a full mens rea
• The presumption of mens rea also only applies to offences which are ‘criminal in the true sense’ – if it is valid provincial legislation then it cannot possibly create an offence which is criminal in the true sense
• The words “cause” and ‘permit’ fit much better into an offence of strict liability than either full mens rea or absolute liability
• Since s. 32(1) of the Act creates a public welfare offence without clear indication that the liability is absolute and without any words such as ‘knowingly’ ‘willingly’ etc., this is placed into strict liability
• There is a generally held revulsion against punishment of the morally innocent

Class Notes:
• Too stringent of restrictions/penalty too extreme can lead to over-deterrence
  o People not taking care in their line of work as they know there is no way around getting caught
• Stricter restrictions do not necessarily reduce the amount or the seriousness of crimes
• Over-deterrence increases costs
• Can also generate the reverse it wanted to
• Offenses of strict liability → Burden is now put on the defendant – compliance costs are still going up

3) Constitutional Considerations (p. 425)

Facts:
• S. 94(2) = the offence created by this section creates an absolute liability offence in which guilt is established by proof of driving, whether or not the defendant knew of the prohibition of suspension
  o If a person who drives a motor vehicle while he or she is prohibited from driving or while license is suspended commits an offense and is liable on first conviction to a fine and to imprisonment of not less than 7 days and not more than 6 months
  o BC CA – answered the question in the negative – this violated s. 7 of the Charter

Issues:
Is s. 94(2) of the Motor Vehicle Act consistent with the Charter of Rights and Freedoms? Can absolute liability offences have imprisonment as their punishment?

**Decision:**
- No – appeal dismissed
- S. 94(2) violates s. 7 of the Charter and is not saved by s. 1

**Ratio:**
- Absolute liability offences that have imprisonment as a punishment violate section 7 of the Charter
- Imprisonment without a chance of defense is contrary to the rules of fundamental justice

**Analysis** (Lamer J)
- A law that can convict a person who has not really done anything wrong offends the principles of fundamental justice and if imprisonment is available as
- Absolute liability + imprisonment cannot be combined – as it violates s. 7 of the Charter and can only be salvaged if the authorities demonstrate that under s. 1 that such a deprivation of liberty in breach of those principles of fundamental justice is in a free and democratic society, under the circumstances, a justified reasonable limit to one’s rights under s. 7
- S. 8-14 are illustrations of deprivations of those rights to life, liberty, and security of the person in breach of the principles of fundamental justice – they provide an invaluable key to the meaning of principles of fundamental justice
- The term ‘fundamental justice’ is not a right but a qualifier of the right not to be deprived of life, liberty, security of the person – its function is to set the parameters of that right
- S. 8-14 describe specific deprivations of the ‘right’ the life, liberty, and security in breach of principles of fundamental justice
- A law enacting an absolute liability offence will violate s. 7 of the Charter only if and to the extent that it has the potential of depriving life, liberty, and security of the person – obviously imprisonment (including probation) deprives a person of their liberty
- S. 94(2) enacts in the clearest of terms an absolute liability offense – the conviction for which a person would be deprived of their liberty
- It creates an absolute liability offence which effects a deprivation of liberty for a limited number of persons – this is sufficient for it to be in violation of s. 7

**Section 1**
- Having found s. 94(2) offends s. 7 of the Charter – can it be salvaged by s. 1
- Has BC justified the imprisonment of a few innocent given the desirability of ridding the roads of bad drivers as a reasonable limit in a free and democratic society → this is to be measured against the defense of strict liability [allowing a defense of due diligence] – this demonstration has not been satisfied [agree w/ CA]

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**R v Wholesale Travel Group Inc. SCC [1991] 3 SCR 154**

**Facts:**
- The accused corporation was charged with several accounts of false or misleading advertising contrary to s. 36(1)(a) of the Competition Act on the basis that it wrongly advertised that its travel packages were ‘wholesale’ – these offences could be punished by up to 1 year’s imprisonment as they were prosecuted
- At trial – the court held that s. 36 + s. 37(3) which creates a statutory due diligence defense were inconsistent with ss. 7 and 11(d) of the Charter and therefore of no force and effect
- [Under Competition Act – Misleading + price fixing are criminal offences – not in the criminal code]
- Objection = balance of probabilities is unconstitutional – there is a presumption of innocence

**Issues:**
- Whether the provisions of the Act could be challenged under s. 7 and 11(d) of the Charter?

**Decision:**
- No – The result was 5:4 that the reverse onus provision should be upheld

**Ratio:**
- Proof of negligence or allowing a due diligence defense is sufficient to comply with s. 7
- Strict liability that has the possibility of imprisonment does not violate the Charter if a due diligence defense is provided to the accused

**Analysis** (Lamer CJ)
- The majority held that the reverse onus infringed s. 11(d) of the Charter, however only 4 of 7 held that it could be saved under s. 1
- Justifications for reverse onus?

**Notes:**
- Balance between fundamental rights + public values
Conscious parallelism

In regulatory offences – to find definition of mens rea – examples s. 45(1) of Competition Act [conspire – hard to conspire w/o intent]; s. 194(1) + (2) of the Alberta Securities Act
  o Sault Ste. Marie defense statutorily built in here in the Alberta Securities Act

Chapter Seven – Fault or Mens Rea

Mens rea is the second essential element for criminal liability – can be described as ‘guilty mind’ ‘mental element’ ‘mental state’ and most recently as ‘fault’

I. Legislative Definitions of Fault

In Canada, there is no uniform definition of the fault requirements that apply to offences

- The Criminal Code does not include a comprehensive part that provides definitions of commonly used fault related terms
- The following explore the issue and provide examples of attempts to codify general concepts (p. 448-452)

II. The Choice Between a Subjective and an Objective Standard

There are different ways of classifying fault requirement for particular crimes – one distinction is between those aspects of fault that focus on what passed through the mind of the accused at the relevant time (subjective fault) and those that are only concerned with whether the accused measured up to some normative objective standard (objective fault)

R v ADH SCC 2013 SCC 28, [2013] 2 SCR 269

Issues:
- Whether the fault element for the offence of child abandonment found in s. 218 of the Criminal Code was to be assessed subjectively or objectively
- ‘Everyone who unlawfully abandons or exposes a child who is under 10 years of age, so that its life is or is likely to be endangered or its health is or is likely to be permanently injured’ is guilty of an offence

Decision:
- A subjective standard applies – appeal dismissed

Ratio:
- There is nothing in the text/context of the child abandonment offence to suggest that Parliament intended to depart from requiring subjective fault
- Must intend both the act + the consequence of the Act (A \(\rightarrow\) B)

Analysis: (Cromwell J)
- Parliament intends crimes to have a subjective fault element – the Court has relied on this interpretive principle in many cases
- Courts below believe this standard should be objective \(\rightarrow\) There is a model code for everyone – a ‘reasonable person’
- Sault Ste. Marie \(\rightarrow\) ‘where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with willful blindness toward them’
- Presumptions of legislative intent are principles of interpretation – not self-applying rules – they set out broad principles that are to inform it
- The presumption of the subjective fault in assessing competing interpretations sets out an important value underlying our criminal law and has been aptly termed one of the ‘presumptive principles of criminal justice’ – this presumption incorporates an important value in our criminal law – that the morally innocent should not be punished
- Subject to exceptions (such as Parliament creating criminal offences for which a guilty intention is not an essential ingredient) mens rea, consisting of some positive states of mind, such as evil intention, or knowledge of the wrongfulness of the act, or reckless disregard of the consequences must be proved by the prosecution

Notes:
- Default rule is that mens rea is subjective

III. Subjective Standards of Fault

Subjective fault standards dominate in Canadian criminal law – however, this does not mean that objective fault considerations are irrelevant
- What a reasonable person would have realized or known may be of value in the determination of what the accused actually thought
R v Buzzanga and Durocher [Ontario Court of Appeal 1979]

Analysis: (Martin JA)

- Since people are usually able to foresee the consequences of their acts, if a person does an act likely to produce certain consequences it is, in general, reasonable to assume that the accused also foresaw the probable consequences of his act and if he still acted to produce those consequences then he intended them
- The greater the likelihood of the relevant consequences ensuing from the accused’s act, the easier it is to draw the inference that he intended those consequences
- The purpose of the process is to determine what the particular accused intended – not to fix him with the intention that a reasonable person might be assumed to have in the circumstances
- If the accused testified as to what was in his own mind and the jury thought he might be telling the truth, they would have the best evidence available on what was in his own mind
- **Part of subjective mens rea = must intend consequences of actions to take place; not enough that consequences merely took place [must intend both act + consequence of act]**

R v Tennant and Naccarato [Ontario Court of Appeal (1975]

Analysis: (The Court)

- Where liability is imposed on a subjective basis, what a reasonable man ought to have anticipated is merely one piece of evidence from which a conclusion may be drawn that the accused anticipated the same consequences
- On the other hand, where the test is objective, what a reasonable man should have anticipated constitutes the basis of liability

Notes:

- If test is subjective, reasonable person is one piece of evidence, as opposed to objective evidence where it is the evidence.
- The ‘common sense inference’ – a sane and sober person can usually be taken to intend the natural and probable consequences of his or her actions
- In the Model Jury Instructions, trial judges are advised to explain to jurors – ‘You may infer, as a matter of common sense, that a person usually knows what the predictable consequences of his or her actions are, and means to bring them about’

A. Intention and Motive

- The difference between intention and motive [R v Lewis]
  - In most criminal trials, the mental element (mens rea) relates to ‘intent’ [the exercise of a free will to use particular means to produce a particular result], rather than with *motive* [that which precedes and induces the exercise of the will]
  - The mental element of a crime ordinarily involves no reference to motive
  - Motive maybe = ‘ulterior (hidden) intention’
  - Motive is always relevant and evidence of motive is admissible
- Although motive is not usually a required element of criminal fault, Parliament has required proof of a religious or political objective or motive in addition to other intent requirements in its definition of terrorist activities in s. 83.01 of the Criminal Code

R v Steane (Court of Criminal Appeal, England 1947)

Facts:

- Steane (a British subject), was an actor who had been employed in Germany prior to the outbreak of WWII
- Steane gave a statement to an officer of the British Intelligence Service where he admitted to working for the German broadcasting service during the war – he read the news on German radio and assisted with the production of films at the order of the Nazi regime
- Based on this admission he was charged with doing acts likely to assist the enemy with intent to assist the enemy contrary to the Defense Regulations = would make him liable for penal servitude for life
- Steane testified that he was threatened to cooperate by the propaganda minister for the Nazi regime and was ordered to read the news – when he refused to cooperate further, he was told his wife and children would be placed in a concentration camp and was beaten and part of his ear torn off, therefore he agreed to work and helped in producing some of the films
- He insisted that the only reason he aided the Germans was because of fear for his wife + children and that he never had the slightest idea or intention of assisting the enemy
- He was tried and convicted and sentenced to three years’ penal servitude

Issues:

- Whether these acts were done with the intention of assisting the enemy?
Decision:
- No – appeal allowed; conviction quashed

Ratio:
- If a crime includes a specific intention in its wording, this must be proven beyond a reasonable doubt in order for a conviction to be entered - you cannot presume this specific intention from the prohibited action

Analysis: (Lord Goddard CJ)
- The wording of the regulation itself shows that it is not enough to merely charge a prisoner with doing an act that is likely to assist the enemy – he must do it with the intent specified in the regulation
- Duress is a matter of defense where the prisoner is forced by fear of violence to do an act which in itself is criminal
- Before any question of duress arises, a jury must be satisfied that the prisoner had the intention which is laid in the indictment
- The jury should only convict if satisfied by the evidence that the act complained of was in fact done to assist the enemy, and if there was doubt about the matter, the prisoner was entitled to be acquitted

R v Hibbert SCC 1995

Facts:
- At his trial for attempted murder, the accused relied on the defense of duress – the victim of the offence was the accused’s friend
- The accused testified that he was forced by the principal offender to accompany him to the victim’s apartment building and to lure the victim down the lobby – the accused stood by while the principal offender shot the victim
- In the charge to the jury, the trial judge instructed the jury that if the accused joined in the common plot to shoot the victim under threats of death or grievous bodily harm that this would negate him having a common intention with the principal offender and he must be found not guilty
- The trial judge also charged the jury saying that he could not rely on the defense of duress if there was a safe avenue of escape
- The accused was acquitted of attempted murder but was convicted of the included offense of aggravated assault

Issues:
- Can the accused be liable of aggravated assault if he was coerced into doing it?

Decision:
- No – must prove it. Appeal allowed – new trial ordered

Ratio:
- The holding here is based on s. 21(1)(b) and (2) – the presence of coercion is relevant to the existence of mens rea
- A person who commits an offence under threats of death or bodily harm may also be able to invoke an excuse-based defense of duress depending on whether the accused is charged as a principle or a party

Analysis: (Lamer CJ for the Court)
- It is apparent that a person who carries out the actus reus of a criminal offence in response to threats of death or serious bodily harm will not necessarily lack the mens rea for that offence
- Situations where duress will operate to negate mens rea will be exceptional
- A person who performs an action in response to a threat will know what he or she is doing, and will be aware of the probable consequences of his or her actions – however, whether the consequences are desired will depend on the particular circumstances
- The existence of threats clearly has a bearing on the motive underlying each actor’s respective decision – however there will likely be knowledge of the consequences of the actions
- Purpose in s. 21(1)(b) of the Code – creates liability for a person who ‘does or omits to do anything for the purpose of aiding any person to commit’ an offence
- Parliament’s use of the term ‘purpose’ should not be seen as incorporating the notion of ‘desire’ into the mental state for party liability, and that the word should instead be understood as being essentially synonymous with ‘intention’
- The mens rea for aiding under s. 21(1)(b) is not susceptible of being ‘negated’ by duress
- 1. If an offence is one where duress is of potential relevance to the existence of mens rea – the accused is entitled to point to the presence of threats when arguing that the Crown has not proven beyond a reasonable doubt that he or she possessed the mental state required for liability
- 2. A person who commits an offence under threats of death or bodily harm may also be able to invoke an excuse-based defense of duress depending on whether the accused is charged as a principle or a party
- 3. The mental states specified in s. 21(1)(b) are not susceptible to being ‘negated’ by duress

Notes:
- Can see the problem if use the objective standard in this case
• But duress does not negate mens rea.

R v Buzzanga and Durocher (Ontario Court of Appeal 1979) [Wilfully Promoting Hatred]

Facts:
• The accused were charged with willfully promoting hatred against Francophones – they were both sympathetic to the French community in which they lived + had published a pamphlet that was a satire of those who opposed bilingualism
• [It was essentially a hoax – want to get the people to build the school – believed this to be the best way to generate support for building the school]

Issues:
• The meaning of ‘willfully’ in the term ‘willfully promotes hatred’ in s. 319(2) of the Code

Decision:
• Appeal allowed – new trial ordered

Ratio:
• The appellants ‘willfully’ (intentionally) promoted hatred only if a) their conscious purpose in distributing the document was to promote hatred against that group; or b) they foresaw that the promotion of hatred against that group was certain or morally certain to result from the distribution of the pamphlet but distributed it as a means of achieving their purpose of obtaining the French-language high school

Analysis: (Martin JA)
• The word ‘willfully’ does not have a fixed meaning but in the context of s. 319(2) it means with the intention of promoting hatred and does not include recklessness – it is a subjective test
• S. 319 is restricted to the incitement of hatred by communicating statements in a public place where such incitement is likely to lead to a breach of the peace
• Mens rea is required since the inclusion of an offence in the Code must be taken to import mens rea in the absence of a clear intention to dispense with it
• The word ‘intentionally’ was not necessary to import mens rea since that requirement would be implied in any event because of the serious nature of the offence
• It is likely that Parliament intended to limit the offence to the intentional promotion of hatred
• The use of ‘willfully’ in s. 319(1) and not in s. 319(2) reflects Parliament’s policy to strike a balance in protecting the competing social interests of freedom of expression on the one hand, and public order and group reputation on the other hand

S. 319(1) – public incitement of hatred
S. 319(2) – willful promotion of hatred

R v Theroux SCC 1993 ['actual knowledge' is a slightly lesser form of subjective fault than intentional or willful conduct]

Facts:
• The accused was convicted of fraud for accepting deposits from investors in a building project, having told them that he had purchased deposit insurance when he did not
• S. 380(1) – ‘Everyone who, by deceit, falsehood, or other fraudulent means, whether or not it is a false pretense within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money, or valuable security… is guilty of an indictable offence… or … an offence punishable on summary conviction’

Issues:
• What is the mens rea of fraud?
• Whether honest belief in lack in need for insurance negate existence of mens rea for fraud?

Decision:
• No – Found guilty

Mens rea of fraud = there is 1) subjective knowledge of the prohibited act; and 2) subjective knowledge that the prohibited act could have as a consequence the deprivation of another

Ratio:
• To ask whether the accused intentionally committed the prohibited acts knowing or desiring the consequences proscribed by the offence
• Fraud = deliberately practiced fraudulent acts which, in the knowledge of the accused, put the property of others at risk

Analysis: (McLachlin J)
• In applying the subjective test for mens rea the court looks to the accused’s intention and the facts as the accused believed them to be
• 1) This has nothing to do with the accused’s system of values – a person is not saved from conviction because he or she believes there is nothing wrong with what he or she is doing
• 2) The Crown need not show precisely what thought was in the accused’s mind at the time of the criminal act – subjective awareness of the consequences can be inferred from the act itself, barring some explanation casting doubt on such inference
• The mens rea for fraud would consist in the subjective awareness that one was undertaking a prohibited act which could cause deprivation in the sense of depriving another of property or putting that property at risk – the fact that the accused may have hoped the deprivation would not happen or may felt there was nothing wrong with what he or she was doing, provides no defense
• **Actus reus of the offence of fraud** will be established by proof of 1) the prohibited act, be it an act of deceit, falsehood, or some other fraudulent means; and 2) deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim’s pecuniary interests at risk
• **Mens rea of fraud** is established by 1) subjective knowledge of the prohibited act; and 2) subjective knowledge that the prohibited act could have as a consequence the deprivation of another
• Where conduct and knowledge required by these definitions are established the accused is guilty whether he actually intended the prohibited consequences or was reckless as to whether it would occur
• A negligent misstatement or a sharp business practice will suffice because in neither case will the required intent to deprive by fraudulent means be present

Notes:
• Willfully is read higher than recklessly

B. Willful Blindness
*R v Briscoe SCC 2010*

Facts:
• The accused was charged with first-degree murder, kidnapping, and sexual assault
• The Crown’s theory was that the accused assisted in the crimes by driving a group to the crime scene, providing a weapon, and holding the victim and telling her to shut up
• The trial judge acquitted on the basis that the accused did not know that the crimes would occur
• A new trial was ordered on the basis that the trial judge erred by not considering willful blindness

Issues:
• Was an analysis on willful blindness warranted in this case?

Decision:
• Agree that the trial judge erred in law by failing to consider willful blindness – he deliberately chose not to inquire about what the members of the group intended to do because he did not want to know
• Appeal dismissed – new trial ordered

Ratio:
• **Willful blindness** = when suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries
• **Mens rea has two purposes here** – intent + purpose [intent does not mean desire]

Analysis: (Charron J)
• Willful blindness does not define the mens rea required for particular offences – rather, it can substitute for actual knowledge whenever knowledge is a component of the mens rea
• The doctrine of willful blindness imputes knowledge to an accused whose suspicious is aroused to the point where he or she sees the need for further inquiries, but deliberately chose not to make those inquiries
• “Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge”

Notes:
• Intent – has many elements – one is “why am I doing this” = motivation
• Knowledge = what am I doing + what do my actions lead to
• Willful blindness – if you do not ask, they will presume you knew

C. Recklessness
*R v Sansregret SCC 1985*

Issues:
• What is the difference between willful blindness and recklessness?

Analysis: (McIntyre J)
The concept of recklessness as a basis for criminal liability has been the subject of much discussion. Negligence [the failure to take reasonable care] is a create of the civil law + is generally not a concept having a place in determining criminal liability – however, it is confused w/ recklessness and should be separated

For recklessness to form a part of the criminal mens rea, it must have an element of the subjective – it is found in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk AKA the conduct of one who sees the risk and who takes the chance

Willful blindness has been considered an aspect of reckless, however it is wise to keep the concepts separate because they result from different mental attitudes and lead to different legal results

Here, because of the reckless conduct of the appellant, it could not be said that such a belief was unreasonable but [as held in Pappajohn] the mere honesty of the belief will support the ‘mistake of fact’ defense, even where it is unreasonable

HOWEVER, a finding of willful blindness applied to the facts about which the honest belief is now asserted would not leave any room for the application of the defense because where willful blindness is shown, the law presumes knowledge on the part of the accused, in this case knowledge that consent had been induced by threats

Recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, however, willful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry he does not wish to know the truth and would prefer to remain ignorant

The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in willful blindness it is justified by the accused’s fault in deliberately failing to inquire when he knows there is reason for inquiry

Ratio:

Recklessness not the same as willful blindness.
In recklessness, you know the risk, while in willful blindness you choose not to know.
Mistake of fact can negate mens rea, but not if mistake is result of willful blindness.

Notes:

Mistake of fact – he should have known that she did not consent [this defense can negate mens rea but it cannot negate it if it was done out of willful blindness]
Recklessness – know the risk; WB – going out of way not to know

IV. Objective Standards of Fault

R v Creighton SCC 1993

Facts:

The accused [an experienced drug user] was charged with manslaughter by means of the unlawful act of trafficking drugs when he injected cocaine into a friend who then died as a result of an overdose

Issues:

What is the reasonable person standard in determining objective fault?
Whether the use of objective as opposed to subjective fault was consistent with s. 7 of the Charter and whether s. 7 required that the fault element relate to all aspects of the actus reus including the causing of death

Decision:

No – four had an objective approach; three had a subjective approach
Affirmed the manslaughter conviction on the basis that a reasonable person in the circumstances would have been aware of the risk of non-trivial bodily harm

Ratio:

There is no support in criminal theory for the conclusion that the protection of the morally innocent requires a general consideration of individual excusing conditions – this only comes into play when the person has shown the lack of capacity to appreciate the nature and quality or the consequences of his or her acts

Incapacity may be the ability appreciate the nature and quality of one’s conduct in the context of intentional crimes, or the incapacity to appreciate the risk involved in one’s conduct in the context of crimes of manslaughter or penal negligence

Under s. 222(5)(a) – requires only the requisite mens rea for the underlying unlawful act and reasonable foreseeability of the risk of bodily harm that is neither trivial nor transitory – manslaughter is constitutional even though subjective fault is not required

Analysis:

[ Dissent - Lamer Cj ]

The Objective Test

An accused can only be held to the standard of a reasonable person if the accused was capable, in the circumstances of the offence, of attaining that standard
• The trier of fact must pay attention to any frailties of the accused which may have rendered him incapable of having foreseen what a reasonable person would have foreseen
• The reasonable person will be invested with any enhanced foresight the accused may have enjoyed by virtue of his or membership in a group with special experience or knowledge [here, the reasonable person should be deemed to possess Creighton’s experience in drug use]

• ‘Human frailties’
  o [do not include intoxication or impairment through drug use which occurs as a result of voluntary consumption – this cannot vitiate liability for negligence conduct of the accused]
  o Encompass personal characteristics habitually affecting an accused’s awareness of the circumstances which create risk and such characteristics must be relevant to the ability to perceive the particular risk
  o The relevant characteristics must be traits that the accused cannot control or otherwise manage in circumstances – the reasonable person is expected to compensate for his/her frailties to the extent he/she is conscious of them and able to do so

• Would consider that the accused is an experienced drug user in applying reasonable person test, and held that an application of an objective standard was not necessary because the trial judge found that the accused subjectively appreciated the risk of death when injecting the deceased w/ cocaine

[Majority – McLachlin J]

The Nature of the Objective Test
• The approach advocated above personalizes the objective test to the point where it devolves into a subjective test, therefore diminishing the minimum standard of care that Parliament has laid down by the enactment of offences of manslaughter and penal negligence
• The mens rea of a criminal offence can be either subjective or objective – subject to the principle of fundamental justice that the moral fault of the offence must be proportionate to its gravity and penalty
• **Subjective mens rea** = requires the accused to have intended the consequences of his/her acts, or knowing that the probable consequences of those acts, and proceeding in the face of the risk
• **Objective mens rea** = not concerned w/ what the accused intended or knew – the mental fault lies in the failure to direct the mind to a risk which the reasonable person would have appreciated [not concerned w/ what was actually in the persons’ mind, but with *what should have been in there*]
• It is now established that a person can be held criminally responsible for negligent conduct on the objective test [it is appropriate that those who cause harm intentionally should be punished more severely than those who cause harm inadvertently]
• In an offence based on unlawful conduct, a predicate offence involving carelessness or negligence must also be read as requiring a ‘marked departure’ from the standard of the reasonable person – the underlying offence must be constitutionally sound
• **Agree** with CJ that the morally innocent not be punished – cannot hold a person criminally responsible if not able to appreciate the risk
• **Differ** in the sort of educational, experiential, and ‘habitual’ factors that can be taken in account
• Considerations of principle + policy dictate the maintenance of a single, uniform legal standard of care for such offences – **subject to one exception → the incapacity** to appreciate the nature of the risk which the activity in question entails
• Without a constant minimum standard, the duty imposed by law would be eroded and the criminal sanction trivialized

Cases of Penal Negligence
• 1) Whether actus reus is established – this requires that the negligence constituted a marked departure from the standards of the reasonable person in all the circumstances of the case
• 2) Whether mens rea is established – the mens rea for objective foresight of risking harm is normally inferred from the facts – the standard is that of the reasonable person in the circumstances of the accused
  o A normal inference may be negated by evidence raising a reasonable doubt as to the lack of capacity to appreciate the risks
• 3) [if both actus rea and mens rea are made out] Did the accused possess the requisite capacity to appreciate the risk flowing from his conduct?
  o If this is answered yes, then the necessary moral fault is established and the accused is properly convicted – if not, acquitted

Notes:
• Here, would likely be the same result from either an objective or a subjective standard
• Creighton, Smithers, Thereoux – similar result
R v Beatty SCC 2008 [Negligence Based Offences]

Facts:
- The accused’s pickup truck, for no apparent reason, crossed the solid center line into the path of an oncoming vehicle, killing all three occupants. Witnesses observed the truck driving in a proper manner before the incident. There was no mechanical failure + intoxicants were not a factor
- The accused’s is unsure what happened + said he must have lost consciousness or fallen asleep and collided with the other vehicle
- The accused was charged with 3 counts of dangerous driving causing death
- The trial judge acquitted the accused + the BC CA allowed the appeal

Issues:
- Whether this momentary act of negligence was sufficient to constitute dangerous operation of a motor vehicle causing death [within the meaning of s. 249(4) of the Criminal Code]

Decision:
- No – allow appeal and restore acquittals

Ratio:
- **A modified objective test is appropriate to determine the mens rea for negligence based offences**
- If have a ‘marked departure’ and in the circumstances of the accused at the time [and do not take into account personal characteristics – unless there is an incapacity]

Analysis: (Charron J)
- **Civil negligence** = concerned with the apportionment of loss; **penal negligence** = aimed at punishing blameworthy conduct
  [fundamental principles of CJ require that the law of PN concern itself not only w/ conduct that deviates from the norm [actus reus] but also the offender’s mental state] – onus on Crown to prove both
- The **modified objective test** is used for negligence-based criminal offences – modified in two parts – 1) there must be a ‘marked departure’ from the civil norm in the circumstances of the case; 2) this test is now concerned with the mental state of the accused [allows for defenses such as incapacity and mistake of fact]

**Hundal Decision**
- The standard against which conduct must be measured is always the same – it is the conduct expected of the reasonably prudent person in the **circumstances** [the reasonable person must be put in the circumstances that the accused found himself in]
- Trier of fact should be satisfied that the conduct amounted to a marked departure from the standard of care a reasonable person would observe in the accused’s situation
- If an explanation is offered by the accused – then the trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and the danger involved in the conduct manifested by the accused
- 2 common difficulties w/ this approach → 1) confused on “objectively dangerous driving” and “marked departure from the standard of care” 2) there is much less certainty in the case law on how to deal w/ evidence of the accused’s mental state

**Re-Statement of the Test**

A) The **Actus Reus**
- The trier of fact must be satisfied beyond a reasonable doubt that [viewed objectively] the accused was driving in a manner that was ‘dangerous to the public, having regard to all circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at the place’
- If the court is satisfied beyond a RD that the manner of driving was dangerous to the public within the meaning of s. 249 the AR has been made out
- At issue is the manner in which the vehicle was operated, not the consequences of the driving – this consequence may make the offence more serious, however is not important for whether the offence has been made out

B) The **Mens Rea**
- The trier of fact must also be satisfied beyond a RD that the accused’s objectively dangerous conduct was accompanied by the required mens rea – should be satisfied on the basis of all evidence, including evidence of the accused’s actual state of mind, that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused’s circumstances
- If an explanation is offered by the accused, then the trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused
- It is not necessary for the Crown to prove that the accused had a positive state of mind, such as intent, recklessness, or willful blindness – however state of mind is not irrelevant
• The subjective mens rea of intentionally creating a danger for others on the highway w/in the meaning of s. 249 will constitute a ‘marked departure’ from the standard expected [while subjective MR will suffice, it is not essential]

• Objective MR = assessing the dangerous conduct as against the standard expected of a reasonably prudent driver – if there is a ‘marked departure’ from that norm, the offence is made out [this is a matter of degree] – must be serious enough to merit punishment

• If the trier of fact is convinced beyond a RD that there is a marked departure, they must consider evidence about the actual state of mind of the accused to determine whether it raises a RD about whether the reasonable person in the accused’s position would have been aware of the risk created by this conduct

Application to the Case
• Agree with that CA that in all circumstances, Beatty’s failure to confine his vehicle to his own lane of traffic was dangerous to other users of the highway [this only answers the actus reus]

• Mens rea
  o No evidence of any deliberate intention to create a danger for other users of the highway
  o Then – whether B’s manner of driving [viewed objectively] constitutes a marked departure from the norm
  o Trial judge – appropriately considered the totality of the evidence in finding that the only reasonable interference was that he experienced a loss of awareness – this momentary lapse of attention was insufficient to found criminal culpability – insufficient evidence to support a finding of a marked departure from the standard of care of a prudent driver [see no reason to interfere w/ this assessment]

[McLachlin J + 2 Analysis - Concurring]

The Test for the Offence of Dangerous Driving
• Disagrees that by adding the words of s. 249 nothing is added to the actus reus – believes that a clear understanding of what is required to fulfill both the actus reus and mens rea is important [if have a marked departure in actus rea then that is it – do need to look at them separately]

• This Court confirms how mens and actus rea should be described w/ regard to dangerous driving – and that the characterization of a ‘marked departure’ from the norm applies to the actus reus of the offence and that the mens rea flows from that finding

• If conduct not representing a marked departure is allowed to satisfy the actus reus requirement for dangerous driving, then it becomes unclear how the Criminal code dangerous driving is to be distinguished from a wide variety of provincial motor vehicle offences at the level of actus reus

• The ‘marked departure’ requirement provides a standard for determining what is objectively dangerous in the context of s. 249(1)(a) – allowing relatively minor violations of provincial motor vehicle acts to fall clearly outside of the scope

The correct statement of law
1) The actus reus requires a marked departure from the normal manner of driving
2) The mens rea is generally inferred from the marked departure in the nature of driving – based on the finding of marked departure, it is inferred that the accused lacked the requisite mental state of care of a reasonable person
3) The evidence in a particular case may negate or cast reasonable doubt on this inference of mens rea

The problem of momentary lapse of attention
• Without more, a momentary lapse of attention cannot establish AR and MR of dangerous driving [can if it is due to drinking alcohol, or doing an activity incompatible w/ maintaining proper control – must consider the total driving pattern in all circumstances]

• A momentary lapse does not establish the marked departure from the standard of care of a reasonably prudent driver required for the actus reus of the offence – must consider the entire manner of driving of the accused in all circumstances + a moment of lapse of attention in the context of totally normal driving is insufficient to establish the marked departure required

Application/Conclusion
• The Crown did not succeed in proving that the accused’s manner of driving [viewed as a whole] constituted a marked departure from the standard of care of a reasonably prudent driver
• Would allow appeal and restore acquittal

Fish J – Concurring
• Anyone who commits the actus reus with the requisite mens rea is guilty of dangerous driving
• The fault element is not the marked departure from the norm of a reasonably prudent driver but the fact that a reasonably prudent driver in the accused’s circumstances would have been aware of the risk and if able to do so, acted to avert it
• Allow appeal + restore acquittals
R v Roy SCC 2012

Facts:
- The accused brought his vehicle to a halt at a stop sign on a relatively steep, unpaved back road, which was snow covered and slippery [Visibility was very poor due to fog]
- After stopping, he proceeded to make a left turn onto the highway and by doing so his vehicle came into the direct path of an oncoming tractor-trailer [which had the right-of-way] when the two vehicles collided, killing a passenger in his vehicle
- The accused had no memory of the accident and could not explain why he pulled out to make the turn when he did
- The accused was convicted of dangerous driving causing death [prior to SCC judgment in Beatty]

Issues:
- Whether this momentary of act of negligence was sufficient to constitute dangerous operation of a motor vehicle causing death [within the meaning of s. 249(4) of the Criminal Code]

Decision:
- Allow the appeal and set aside the conviction for dangerous driving
- The evidence does not support a reasonable inference that the appellant exhibited a marked departure from the standard of care that a reasonable person would have exhibited in the circumstances

Ratio:
- **Proof of actus reus (w/o more) does not support a reasonable inference that the required fault element was present – only driving that constitutes a marked departure from the norm may reasonably support the inference**
- Must look at all of the circumstances and whether the actions of the accused was a marked departure from the standard of care expected of a reasonable person

Analysis: (Cromwell J)
- Dangerous driving causing death consists of two components:
  - 1) prohibited conduct and
  - 2) a required degree of fault [a marked departure from the standard of care that a reasonable person would observe in all circumstances]
- A **mere departure** = justifying imposing civil liability; a marked departure = justifies the fault requirement for this serious criminal offence
- **Rationale (Beatty)** = if every departure from the civil norm is to be criminalized regardless of degree, we risk casting the net too widely and branding people who are in reality not morally blameworthy as criminals
- The trial judge made a serious legal error in relation to the fault element – he simply inferred from the fact that the appellant had committed a dangerous act while driving that his conduct displayed a marked departure from the standard of care expected of a reasonable person in the circumstances
- Focus on **mens rea** of dangerous driving –
  - 1) whether in light of all the relevant evidence, a reasonable person would have foreseen the risk and taken steps to avoid it if possible; if so
  - 2) whether the accused’s failure to foresee the risk and take steps to avoid it, is possible, is a marked departure from the standard of care expected of a reasonable person in the accused’s circumstances
- The **modified objective standard** means that, while the reasonable person is placed in the accused’s circumstances, evidence of the accused’s personal attributes (age, experience, and education) is irrelevant unless it goes to the accused’s incapacity to appreciate or to avoid risk

Application to the facts
- Agree that the driving [objectively viewed] was dangerous – but there was no evidence that the driving leading up to the pulling into the path of oncoming traffic was other than normal and prudent driving – therefore the focus is on the momentary decision to pull onto the highway when it was not safe
- The appellant’s decision to pull onto the highway is consistent with simple misjudgment of speed and distance in difficult conditions and poor visibility – this was a single + momentary error in judgment + does not support a reasonable inference that the appellant displayed a marked departure from the standard of care expected of a reasonable person in the same circumstances to justify a conviction for the serious criminal offence of dangerous driving causing death

R v Finta SCC 1994

Facts:
- The accused was charged under s. 7(3.71) of the Criminal Code with committing unlawful confinement, robbery, kidnapping, and manslaughter that constituted war crimes and crimes against humanity as a result of his activities as a senior officer at a concentration camp in Hungary
• The trial judge ruled that the jury must determine that the accused was aware of the circumstances that would his actions within the definition of war crimes or crimes against humanity + the accused was acquitted

Issues:
• Whether the accused must have known his conduct would have brought him within the definition of crimes against humanity and war crimes

Decision:
• YES – appeal dismissed

Ratio:
• The degree of moral turpitude that attaches to crimes against humanity and war crimes must exceed that of the domestic offences of manslaughter or robbery – the accused must be aware of the conditions which render his or her actions more blameworthy than the domestic offence
• [Moral turpitude = conduct that is considered contrary to community standards of justice, honesty, or good morals]

Analysis: (Cory J)
• Appellant (Crown) argument – under s. 7(3.71) the accused can be found guilty of ‘war crimes’ or ‘crimes against humanity’ but also of ‘ordinary’ Code offences such as manslaughter, confinement, robbery + proof of MR w/ respect to domestic offences provides the element of personal fault required for offences under this section – therefore, proof of further moral culpability is not required since once the necessary mens rea to confine forcibly, rob, or commit manslaughter has been proved, it becomes impossible to maintain that the accused was morally innocent
• SCC – do not agree – what distinguishes CAH is that they are cruel and terrible actions which were undertaken in pursuance of a policy of discrimination or persecution of an identifiable group or race – therefore these are very different and more grievous than any of the underlying offences
• Parliament has added a further measure of blameworthiness by requiring that the act or omission constitute a crime against humanity or a war crime – and if the jury is not satisfied that this additional element of culpability is not established beyond a reasonable doubt, then the accused cannot be found guilty of a war crime or a CAH
• For crimes w/ unavoidable penalties or the stigma attached to a conviction – the question that must be answered is not whether the accused is morally innocent, but whether the conduct is sufficiently blameworthy to merit the punishment and stigma that will ensue upon conviction for that particular offence
• Here, it must be taken into account both the stigma + punishment for a domestic offence, but also the additional stigma and opprobrium that will be suffered by an individual whose conduct has been held to constitute crimes against humanity or war crimes
• It cannot be inferred that someone who robs civilians of their valuables during a war has thereby committed a crime against humanity
• The mental element of a crime against humanity must involve an awareness of the facts or circumstances which would bring the acts within the definition of a crime against humanity
• ALTERNATIVELY – the mens rea requirement would be met for CAH and war crimes if it were established that the accused was willfully blind to the facts or circumstances that would bring his or her actions within the provisions of these offences

VI. Mistake of Fact
• Mistake of fact is a defense but it is not affirmative in nature
• Successfully raising this defense involves a negation of mens rea

Honest and Reasonable Mistake
• Whether a defense based on honest yet mistaken belief in consent must be based on reasonable grounds – likely no
• Professor Keedy – an act is reasonable in law when it is such as a man of ordinary care would do under similar circumstances; to require that the mistake be reasonable means that, if the accused is to have a defense, he must have acted up to the standard of an average man
• Pappajohn = controversial – Parliament intervened – legislating a requirement that in order to rely on a mistaken belief in consent, an accused person must have taken ‘reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting’
• With negligence based offences – mistake of fact is available but subject to a reasonableness requirement – [Sault Ste. Marie – ‘the defense will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, if he took all reasonable step to avoid the particular event’]

Chapter Eight – Ignorance of the Law

34
I. Mistaken Beliefs About the Law and Particular Fault Elements (p. 506)

R v Howson (Ontario Court of Appeal 1966)

Facts:
- An employee of a towing service was charged with theft of a car when he refused to give the towed car back to its owner until the owner paid certain expenses – he was convicted at trial and appealed

Issues:
- Whether the accused had a color of right that was sufficient to justify his refusal to release the vehicle, and if not to make him guilty of theft?

Decision:
- Yes – Appeal allowed – conviction quashed

Ratio:
- If there is a color of right stated in the section, then the Crown must prove there was no color of right (good faith assertion/belief of right to a thing) in order to convict the accused

Analysis (Porter CJ):
- The relevant sections of the Criminal Code [s. 322] → everyone commits theft who fraudulently and without color of right takes, or fraudulently and without color of right converts to his use or to the use of another person, anything whether animate or inanimate, with intent ...
- The word “right” should be construed broadly – s. 19 [ignorance of the law is not an excuse] does not affect this section [s. 19 only applies when there is an offence] – there is no offence if there is a color of right
- [Color of right = a good faith assertion/belief of a possessory right to a thing]
- If upon all evidence, it may fairly be inferred that the accused acted under a genuine misconception of fact or law, there would be no offence of theft committed
- The accused acted upon instructions from his brother [owner of the towing company] and he believed he had a right to retain the car until the towing charges were paid
- Magistrate misdirected himself by failing to consider the question of color of right – he said he did not believe the accused was trying or intended to steal the car [under these circumstances he should have acquitted the accused]

Why did the magistrate convict?
- Magistrate convicted because the accused was asked to give up the car and refused to do so, therefore he was wrongly withholding the car since the company had no lien upon it

Notes:
- R v Docherty SCC 1989 – an accused cannot willfully breach his probation order through the commission of an offence unless he knew what he did constituted a criminal offence – where knowledge is itself a component of the requisite mens rea, the absence of knowledge provides a good defense
- Color of right – context specific definition → a plausible, even if mistaken argument that you have a right to that property

Jones and Pamajewon v The Queen SCC 1991

Facts:
- The accused were charged with operating an unlawful bingo contrary to s. 206 of the Criminal code – they were members of an Indian band and were operating a bingo on an Indian reserve
- They were informed by police that the Criminal Code prohibits lottery schemes unless operated under the auspices of a provincial license – however, the accused rejected the jurisdiction of the federal and provincial governments in relation to gaming on reserves and to issue their own licenses for operating bingos
- The accused were convicted at trial and their appeal to the ON CA was dismissed

Issues:
- Is mistake of fact a valid defense in this case?

Decision:
- No – appeal dismissed

Ratio:
- Mistake of fact can only apply to the facts which constitute the offence; this is a mistake of law, which is no defence

Analysis (Stevenson J):
- The appellants must be taken to acknowledge that they were mistaken in their belief that the Criminal Code did not apply to their activities on the reserve – they have no taken any proceedings to challenge the authority of Canada to enact laws applicable to those activities and have not made any such challenge here
- There are 2 barriers to their defense – 1) it is not a defense to this crime, and 2) any mistake is a mistake of law
The appellants cited no authority for the proposition that color of right is relevant to any crime which does not embrace the concept within its definition
Mistake of fact can only apply to the facts which constitute the offence – and there is no suggestion of any mistake relating to those facts here, the mistake is in believing that the law does not apply because it is inoperative on reserves
The argument here is that the legal mistake should be characterized as a mistake of fact and it is impossible to characterize the mistaken belief put forward as embracing any mistake of fact

Notes:

Should have challenged the law first – saying the law was not constitutional and breaches their rights

II. Mistake of Fact and Mistake of Law (p. 509)

In R v Prue 1979 SCC –

- The majority held the accused’s lack of knowledge that his license had been automatically suspended under provincial law after a driving offence was a ‘question of fact’ and not of law when the accused was charged under s. 238 with driving while his license was suspended [was a mistake of fact – he did not know his license was suspended]

In R v MacDougall 1982 SCC –

- [Decided before the Charter – criticized]
- Mistake of law is no defense – a mistake of law does not afford the respondent a defense having regard to s. 19 of the Code

III. The Defence of Officially Induced Error (p. 510)

Levis (City) v Tetreault; Levis (City) v 2629-4470 Quebec Inc. (SCC 2006) [Officially Induced Error]

Facts:

- [The Court recognized for the first time that officially induced error is available as a defence in Canadian criminal law]
- In Levis, a numbered company was charged with operating a vehicle for which registration fees had not been paid, contrary to s. 31 of the Highway Safety Code – the company relied on the defence of officially induced error, arguing that it had been advised by an employee of the provincial insurance agency that a renewal notice would be mailed 30 days before the expiry of registration + that this renewal notice never arrived
- The company was acquitted in municipal court, which found the offence was a strict liability offence and the company had exercised due diligence – the Supreme Court dismissed the appeal and accepted the officially induced error defence; Court of Appeal dismissed application for leave to appeal in each case

Issues:

- Does the respondent’s conduct meet the standards of the defence of an officially induced error in order to acquit it?

Decision:

- No – appeal allowed

Ratio:

- For the defence of an officially induced error – one must meet all 6 conditions that were established in the Jorgensen test

Analysis: (LeBel J)

LeBel adopted the framework for the defence of officially induced error as set out by Lamer CJ in R v Jorgensen – in Levis the offences were regulatory + in Jorgensen were criminal [offence of selling obscene material]

This defence is an exception to the rule that ignorance of the law cannot excuse the commission of a criminal offence

Lamer equated this defence with an excuse that has an effect similar to entrapment – the wrongfulness of the act is established, however because of the circumstances leading up to the act, the person who committed it is not held liable for the act in criminal law – the accused is therefore entitled to a stay of proceedings, rather than an acquittal

Lamer CJ defined the elements of the defence of officially induced error:

1) That an error of law or of mixed law and fact was made
2) That the person who committed the act considered the legal consequences of his or her actions
3) That the advice obtained came from an appropriate official
4) That the advice was reasonable
5) That the advice was erroneous (mistaken)
6) That the person relied on the advice in committing the act

It is important to establish the objective reasonableness not only of the advice, but also of the reliance on the advice

Various factors will be taken into consideration in the course of the assessment – efforts made by the accused to obtain information, the clarity or obscurity of the law, the position and role of the official who gave the information or opinion, and the clarity, definitiveness and reasonableness of the information or opinion
• Not sufficient to conduct a purely subjective analysis of the reasonableness of the information [must be assessed from the perspective of the reasonable person in the situation similar to that of the accused]

• Here, the respondent’s allegations of fact do not show conduct that meets the standard of due diligence – it had a duty to do more and should have been concerned when it failed to receive the notice

• R could not have considered the legal consequences of its conduct on the basis of advice from the official in question, nor could it have acted in reliance on that opinion since no information regarding the nature and effects of the relevant legal obligations had been requested or obtained

Notes:
• Mistake of law – because believed it would not expire until received notice in the mail
• Not a mistake of fact [would have been if they thought they were supposed to renew at a different time]
• It is very hard to bring the defence of officially induced error – [perhaps if it was some unique law that one agency administered + asked all – and gave a clear answer as to what is right/wrong]

IV. A More General Defence of Reasonable Mistake of Law? (p. 513)

• In Molis v The Queen 1980 SCC – the SCC stated that the defence of due diligence that was referred to in Sault Ste. Marie is that of due diligence in relation to the fulfillment of a duty imposed by law and not in relation to the ascertainment of the existence of a prohibition or its interpretation

La Souveraine, Compagnie d’assurance generale v Autorite des marches financiers SCC 2013 [Defence of Due Diligence]
Facts:
• The accused argued that a reasonable mistake of law should be a defence at least for strict liability regulatory offence subject to a defence of due diligence

Issues:
• Whether reasonable mistake of law can be used as a defence for strict liability regulatory offences?

Decision:
• No – There is no need for an exception to the ignorance of the law principle

Ratio:
• The defence of due diligence will not be available if the defendant relies solely on mistake of law to explain the commission of the offence [unless an officially induced error] – and cannot be a defence if show that one made a reasonable effort to know the law or acted in good faith in ignorance of the law

Analysis: (Wagner J)
• The due diligence offence is available if the defendant reasonable believed in a mistaken set of facts, that if true would have rendered his or her act or omission innocent
• A defendant can also avoid liability by showing he or she took all reasonable steps to avoid the particular event – the defence of due diligence is based on an objective standard [what would a reasonable person do in similar circumstances]
• HOWEVER, this defence will not be available if the defendant relies solely on mistake of law to explain the commission of the offence [unless an officially induced error] – cannot be a defence if show that one made a reasonable effort to know the law or acted in good faith in ignorance of the law
• The objective of public protection that underlies the creation of regulatory offences militates strongly against accepting a general defence of reasonable mistake of law in this context

Dissent: (Abella J)
• There is no principled basis for excluding conduct of a more passive character from using the defence of officially induced error. Sees in these facts all of the requisite elements for officially induced error – La Souveraine took reasonable steps to satisfy itself that it was not violating the law – it based its conduct on a legal opinion from Flanders’ lawyers
• Would have stayed the proceedings on the basis of officially induced error

V. Mistake of Law and Constitutional Considerations

R v Pontes SCC 1995
Facts:
• After Re BC Motor Vehicle Act, BC legislature deleted s. 94(2) (the offence of driving w/ a suspended license was an absolute liability offence)
• Here, Pontes was charged with driving a car at a time when he was prohibited from driving due to s. 92 of the Motor Vehicle Act

Issues:
• Whether either facet of the defence of due diligence is available in this case?
• Whether this is an absolute or a strict liability offence?

Decision:
• This is an offence of absolute liability therefore the defence of due diligence cannot be raised
• Appeal dismissed

Ratio:
• This is an absolute liability offence because the only defenses available are those of mistake of law [which is not a defence] and since there is no defence it becomes an absolute liability offence
• When there is no defence of due diligence available to the person, the offence becomes one of absolute liability and not strict liability

Analysis: (Cory J)
• Because the prohibition to drive in s. 92 is automatic and w/out notice, s. 94 effectively prevents an accused who is unaware of the prohibition from raising a defence of due diligence
• If the offence is one of absolute liability – the defence of due diligence cannot be used
• Two facets of the defence of due diligence [for strict liability]
  o 1) An honest, but mistaken belief in the facts, that if true, would render the act innocent
  o 2) That he exercises all reasonable care to avoid committing the offence
• An application of the principle [s. 19 – a mistake of law is no defence] leads to the conclusion that an accused cannot put forward as a defence that he made diligent inquires as to the legality of his actions or status
  o The application leads to the conclusion that an accused cannot put forward as a defence that he made diligent inquiries as to the legality of his actions or status
• The defence of due diligence [as referred to in Sault Ste. Marie] was one of due diligence in relation to the fulfilment of a duty imposed by law and not in relation to the determination of the existence of a prohibition or its interpretation
• The defence of due diligence must be available to defend a strict liability offence – if it is removed, the offence can no longer be classified as one of strict liability
• If the only possible defence is one of ignorance that the license had been suspended by the provisions of the provincial statute [a mistake of law], then the accused is denied the defence, and the offence should be characterized as one of absolute liability
• The statute [s. 92 + 94] of the BC Motor Vehicle Act do not allow for the defence of due diligence

Dissent (Gonthier J)
• Disagree that the defence of due diligence is not available in relation to the impugned offence
• Cory J comes to this conclusion because he says that the only defence available to the accused is his ignorance of the fact that his license had been suspended – but since this is mistake/ignorance of law = no excuse

VI. Statutory Reform
• Mistake of law in general is no defence HOWEVER no one can be fairly punished for breaking a law which he has no reasonable chance of making sure of – therefore, there are 2 exceptions to the general rule:
  o 1) Ignorance of law owing to non-publication of regulations is a defence
  o 2) Mistake of law resulting from officially induced error may also be a defence
• Clause 3(7)(b) of the Law Reform Commission of Canada, Re-codifying Criminal Law codifies these exceptions [extends 1) to non-publication of any law and adds an exception in the case of a mistake resulting from reliance on the law as stated by the court of appeal in the province where the charge is tried]
• There are also certain crimes (ex. theft + fraud) where honest but erroneous belief in a claim of right negatives criminal liability

Chapter Nine – Participation

• There are 5 modes of participation identified in ss. 21 + 22 of the Criminal Code
  1) Parties to Offence - 21(1)
    o Everyone is a party to an offence who
    o A) actually commits it; B) does or omits to anything for the purpose of aiding any person to commit it; or c) abets [assists] any person in committing it
  2) Common Intention - 21(2)
    o Where 2 or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence
3) Person Counselling Offence – 22(1)
   o Where a person counsels another person to be a party to an offence and that other person is afterwards a party to
     that offence, the person who counselled is a party to the offence, notwithstanding that the offence was committed
     in a different way than was counselled

4) Idem – 22(2)
   o Everyone who counsels another person to be a party to an offence is a party to every offence that the other
     commits in consequence of the counselling that the person who counselled knew or ought to have known was
     likely to be committed in consequence of the counselling

5) Definition of ‘counsel’ – 22(3)
   o ‘Counsel’ includes procure, solicit or incite
     [Procure = persuade/cause someone to do something; solicit = urge/entice to commit the act; incite = provoke]

I. Modes of Participation
   • 21(1)(A) – actually commits → called ‘principal’
   • R v Thatcher – held that a jury can convict an accused if every member of the jury is satisfied beyond a reasonable doubt
     that the accused was either a principal or an aider or an abettor [do not have to reach unanimity about which mode
     applies]

R v Thatcher SCC 1987 [s. 21(1)]
Facts:
   • Wife in kitchen, bullet shot through her window – wounded + in hospital for 3 weeks [no one was charged]
   • 2 years later, wife came home was beaten + shot and killed
   • Witness heard screams/the shot – saw a man leave + described his relative age, relative height, and build – the sketch did
     not fit that of Thatcher
   • T was charged w/ causing death of his ex-wife – convicted of first-degree murder, upheld by CA
   • Position of Crown = T either murdered her, or caused someone else to do so and was guilty as a party pursuant to s. 21

Issues:
   • Did the trial judge err in failing to instruct the jury that a verdict of guilty must be unanimous in relation to one or other of
     the alternative means of committing the offence of murder

Decision:
   • Appeal dismissed – judge did not err

Ratio:
   • A jury can convict an accused if every member of the jury is satisfied beyond a reasonable doubt that the accused was
     either a principal or an aider or an abettor [do not have to reach unanimity about which mode applies]

Analysis: (Dickson CJ)
   • Trial referred to s. 21(1) saying – “Thatcher is charged w/ committing the offence of murder, if you do not find he did the
     act himself, he is equally guilty if you find and are satisfied that he either aided or abetted another in its commission”
   • Trial judge also said – just because the Crown cannot adduce evidence another individual actually did it, does not prevent
     the finding that the killing was done on behalf of Thatcher
   • 21(2) – aiding/abetting = intentional encouragement or assistance in commission of the offence [actual perpetrator does
     not have to be identified]
   • The Crown is not under a duty to separate the different forms of participation into different counts
   • There is no legal difference between personally killing or aided/abetted someone else to do so

R v Pickton SCC 2010
Facts:
   • On P’s property – remains of the missing women were found, some in buckets in a freezer, some in a garbage pail, and
     elsewhere on the property
   • Charged w/ 27 counts – pre-trial quashed 1 and severed 20 others – proceeded w/ 6 counts
   • Trial judge gave instructions that if find Pickton shot the victim, then the identity of the killer is proven; if find he did not [or
     reasonable doubt], then to find a verdict of not guilty [‘actual shooter’]
   • On 6th day of deliberations, trial judge instructed jury they could also find he was a killer if he was otherwise an active
     participant in the killings
   • Jury returned w/ a not guilty of 1st degree murder, but guilty of 2nd degree

Issue:
   • Was the trial judge’s instruction to the jury that P could be guilty if he was an active participant a miscarriage of justice? Did
     his instructions adequately convey the law on the potential routes of criminal liability?
Decision:
• Instructions were not a miscarriage of justice; they adequately conveyed the law – appeal dismissed
• Trial judge did not adversely impact the fairness of the trial

Analysis (Charron J)
• The Crown took + maintained the position throughout the trial that Pickton was the sole perpetrator of all 6 murders; the defence approach urged the jury to consider that others may have actually killed the victims
• Trial judge advised counsel of intention then re-instructed the jury by changing the ‘actual shooter’ instruction so it was consistent w/ the other instructions → if find Pickton shot, or was otherwise an active participant in the killing then the Crown has proven the element of guilty

Lebel J
• Forms of liability codified in s. 21 → 1) primary or principal liability (actually or personally committing the offence) and 2) secondary liability (party liability)
  o Both have the same result in law [accused convicted of the substantive offence]
  o Regardless of whether actually killed the victim, can be held liable for the murder
• 3 principles from Thatcher are relevant here:
  o 1) If there is evidence admitted at trial which properly supports an alternate mode of liability under s. 21, an instruction on that selection should be left with the jury, even though the identity of the other party is unknown, and precise part played by each is unknown
  o 2) Not necessary for trial judge to relate the law to the evidence which could support the alternate theory where Crown evidence relates to either mode/defence is either mode
  o 3) A jury does not need to be unanimous on the nature of the accused’s participation in the offence, so long as satisfied that accused either committed personally or aided/abetted another to commit the offence
• Necessary for trier of fact to decide Pickton either was liable for the murders as actual shooter, or liable through assistance to an unknown third party who was the actual shooter
• Thinks the trial judge’s instructions were wrong but applies “curative proviso” See Criminal Code 686(1)(b)-(iv)

II. Aiding and Abetting (s. 21(1)(b) + (c))
• S. 21(1)(b) and 21(1)(c) – those who aid or abet the commission of an offence will be convicted of the primary offence
  • Aiding = usually associated w/ some form of material assistance in the commission an offence
  • Abetting = usually associated w/ verbal encouragement or comparable forms of incitement

R v Greyeyes SCC 1997 [S. 21(1)]
Facts:
• Undercover RCMP buys 5 joints from G, then asks if he could find him cocaine. G stated he knew a source, go to an apartment, undercover pays $40 for 2/20 gram of cocaine
• At trial G was acquitted of trafficking on basis that his actions did not amount to aiding and abetting – on appeal, overturned acquittal and entered into a conviction

Issue:
• Can someone either acting as an agent for a purchase of narcotics or assisting a purchaser to buy narcotics be found to be a party to the offence of trafficking under s. 21(1)

Decision:
• Appeal dismissed + conviction for trafficking upheld

Ratio:
• An agent for a purchaser or one who assists the purchaser to buy the drugs can properly be found guilty as a party to the offence of trafficking under s. 21(1)

Analysis: (Cory J)
• To aid = to assist or help the actor
• To abet = encouraging, instigating, promoting, or procuring the crime to be committed
• The activities of an agent for a purchaser or one who assists a purchaser to buy narcotics certainly come within the definition of aiding or abetting under s. 21(1) – bring together the source of supply + the prospective purchaser – therefore, assisting in the sale of narcotics
• Aided here because – brought customer to seller, connection between them, escorted buyer and negotiated between buyer and seller, accepted 10 from buyer for the facilitating the deal
• Facts are sufficient to establish aided within meaning of s. 21(1)(b) and encouraged within meaning of s. 21(1)(c)
• Requisite mens rea → purpose equated w/ intention [not desire]
To satisfy purpose under s. 21(1)(b) – Crown is required to prove the accused intended the consequences that flowed from the aid [not the desire/approval of consequences]

For s. 21(1)(c) – Crown must prove that the accused encouraged the principal with words/act and that the accused intended to do so

L’Heureux-Dube J:
- Cory J’s interpretation of s. 21 leads to a broad scope of liability which is unwarranted
- Cannot be charged w/ trafficking simply by purchasing. May lead to situations of trafficking that were never intended to come within the definition. Proper charge should be aiding or abetting the possession of a narcotic, not trafficking
- BUT, Here, the accused did more than acted as a purchaser – it is clear the appellant aided the traffic of narcotics

R v Briscoe SCC 2010 [Willful Blindness]
Facts:
- B drove the car from the mall to the golf course, handed a weapon to one principal, and at one point held the victim and told her to shut up or be quiet
- He gave a statement to the police that he was fearful for himself and his girlfriend and that he ‘didn’t want to know’ what the others had planned to do with the victim
- Crown argued that he either had actual knowledge or was wilfully blind to the plan
- Crown submitted that even apart from his acts of assistance, his presence coupled w/ knowledge of the plan made him an abettor – his presence could lend courage to the attackers, discourage rescue
- Trial = found he had requisite actus reus; not mens rea though – acquitted on all charges
- Appeal = set aside the acquittals and ordered a new trial on all charges

Issues:
- Whether the accused was involved, and what criminal liability flowed from this involvement

Decision:
- Trial judge failed to consider willful blindness, therefore due to the legal error a new trial is needed

Ratio:
- Willful blindness can substitute as knowledge when knowledge is a required component of mens rea

Analysis: (Charron J)
- Canadian criminal law does not distinguish between the principal offender and parties to an offence in determining criminal liability
- Actus/mens rea are different for aiding/abetting than for those of the principal offence
- Actus reus of aiding/abetting = doing something that assists or encourages the perpetrator to commit the offence [not at issue here – was determined he was both an aider and abettor]
- Mens rea = for the purpose of aiding the principal offender to commit the crime
  - Purpose = 1) intent and 2) knowledge
  - Intent [Hilbert] → purpose should be understood as synonymous w/ intention [not desire]
  - Knowledge → in order to have intention, must know that the perpetrator intends to commit the crime [does not need to know how it will be committed]
  - Sufficient if the aider is armed with knowledge of the perpetrator’s intention to commit the crime and acts with the intention of assisting in its commission
- Trial judge failed to consider willful blindness → he had an idea of what would happen + chose not to inquire about what others intended to do

Dunlop and Sylvester v The Queen SCC 1979
Facts:
- Appellants were tried + convicted by a judge and jury of rape for their part in a mass rape of a 16-year old by members of a motorcycle gang
- Complainant testifies the appellants raped her – they denied this

Issues:
- Can the accused be liable for aiding or abetting in the commission of the offence by being present when the offence occurred?

Decision:
- No – appeals allowed and appellants acquitted
Ratio:
- A person cannot be convicted of aiding or abetting in the commission of acts which he does not know may be or are intended – one must be able to infer that the accused had prior knowledge that an offence of the type committed was planned
- If there is no evidence of encouragement – mere presence cannot render one liable as an aider and abettor

Analysis: (Dickson CJ)
- **Abets** [from s. 21(1)(c) abets any person in committing it] = encourages, supports, upholds
- Everyone who aids + encourages the person in the commission of the offence is as guilty as the person who commit the actual criminal act
- To find that an accused is guilty of aiding/abetting it is only necessary to show he understood what was being done and by some act on his part assisted or encouraged the attainment of that act
- Here, there is difficulty in finding any evidence of anything more than mere presence and passive acquiescence
- Presence at the commission of an offence can be evidence of aiding and abetting if accompanied by other factors, such as prior knowledge of principal offender’ intention to commit the offence or attendance for the purpose of encouragement
- A person cannot be convicted of aiding or abetting in the commission of acts which he does not know may be or are intended – one must be able to infer that the accused had prior knowledge that an offence of the type committed was planned
- Even if the accused were aware of the rape taking place and did not prevent it, they are not considered an accomplice

Dissent: (Martland J)
- The evidence that the appellants were merely present and were observers was up for the jury to decide on whether to accept or not – jury was entitled to consider all evidence
  - Including that the appellants saw the complainant before with the members, she was brought over to the dump, then they saw intercourse taking place with other men watching nearby
- There was evidence on which the jury could conclude that the appellants had aided and abetted the commission of the offence

III. Common Intention (s. 21(2))
- For s. 21(2) to apply, the accused must form a common intention w/ another person or persons to carry out an unlawful purpose and to assist them with that purpose
- If the common intention is found, the accused will be held responsible for criminal acts that are a probable consequence of the common intention if the accused knew or ought to have known that the criminal acts were a probable consequence

**R v Kirkness SCC 1990**

Facts:
- The appellant (Kirkland) and his friend (Snowbird) robbed the victim’s house based on the suggestion of Snowbird
- Snowbird sexually assaulted the victim while K sat outside the bedroom and stole various things from her house/placed a chair against the front door of the house, then Snowbird dragged the victim into the hall and proceeded to choke her [K told him to stop], then S put a bag over her head and put her into the bath and turned on the hot water
- In all of K’s statements he denies ever touching the victim or that he participated in the sexual assault, the choking, or the suffocation
- Both were charged with first degree murder, Snowbird was convicted, K was acquitted

Issue:
- Was Kirkland guilty of first degree murder due to a common intention with Snowbird/being a party to the offence via s. 21(2)

Decision:
- No – acquittal upheld

Ratio:
- To have a common intention/be a party to an offence must have knowledge that death would occur

Analysis: (Cory J)
- It cannot be said that the appellant, who formed an intent in common w/ S to carry out the breaking and entering, knew before entering that S would either commit a sexually assault or kill the victim
- There is no indication he knew that death or bodily harm would result from the sexual assault – this death also occurred from strangulation, after the sexual assault
- K told S not to strangle the victim – this makes it clear he was not aiding or abetting S in the strangulation [there is sufficient evidence to raise a reasonable doubt – do not necessarily believe he is innocent]
K had no reason to believe the death would result from the sexual assault – nor did it – he was not a party to the suffering or strangulation of the victim [since he told S to stop, if he had ever been a party from that point on – he had removed himself from any joint enterprise w/ S that involved the killing

Dissent (Wilson J): [arguing for an objective mens rea]

1) Establishing liability under s. 21(2) → first must show that the accused formed an intention in common w/ others to carry out an unlawful purpose and to assist them in achieving that purpose [this does not have to be pre-planned – it is sufficient that the intention arise just prior to/at the commission of the offence]

   ○ Here, there was a common purpose shared – he broke into the house/pried open the door

2) S. 21(2) deems a party criminally liable for acts of the principal offender when the accused knew or ought to have known of the probable commission of the acts which constitute the offence

   ○ 1) The commission of the ultimate offence has to be probable
   ○ 2) The accused must know or ought to have known of this probability

Issue of abandonment

○ K took no steps to remove the chair or to otherwise intervene in S’s domination of the victim

S. 21(2) – is plainly intended to provide liability in the case of consequential offences which were not committed or aided or abetted by the accused, but which resulted from the prosecution of the original offence

It is sufficient under s 21(2) that manslaughter was a probable consequence of the offence in which the accused aided or abetted

Question should not have been whether the sexual assault caused the death, but rather whether K aided or abetted S in a crime which was of the type which could have caused bodily harm or whether bodily harm could have resulted as a consequence of carrying out the sexual assault

Notes:

• Aiding + abetting makes someone a party to the crime
• Wilson’s Argument: Issue – trial judge seems to have instructed the jury on the first part of 21 [21(1)] → Should have focused on 21(2)
• This is an application of the Pare case – if murder while committing sexual assault then liable for first degree murder [231(5)(b)]
• This case also signifies the sanctity of jury verdicts
• Old common law rule → felony murder [230] (It is now unconstitutional)

R v Gauthier SCC 2013 [defence of abandonment]

Facts:

• The accused entered into a pact w/ her husband to murder their children then commit suicide
• After supplying her husband w/ the pills to kill the children, she communicated to him they should not go through with their plan
• She was convicted of aiding and abetting in the murder of her three children

Issues:

• Was there sufficient evidence of abandonment to discharge the accused from the conviction of aiding and abetting in the murder of her children

Decision:

• No – the defence of abandonment did not meet the air of reality test and the trial judge was not required to put the defence to the jury

Ratio:

• The defence of abandonment should be put to the jury only if there is evidence in the record that is capable of supporting a finding that a person who was initially a party subsequently took reasonable steps either to neutralize the effects of his participation or to prevent the commission of offence

Analysis: (Wagner J)

• There are two policy reasons for recognizing the defence of abandonment:
   ○ 1) There is a need to ensure that only morally culpable persons are punished
   ○ 2) There is a benefit to society in encouraging individuals involved in criminal activities to withdraw from them and report them

• TEST FOR DEFENCE OF ABANDONMENT for aiding/abetting if evidence shows that:
   ○ 1) There was an intention to abandon/withdraw from the unlawful purpose
   ○ 2) There was timely communication of this abandonment/withdrawal from the person in question to those who wished to continue
   ○ 3) That the communication served equivocal notice upon those who wished to continue
4) That the accused took, in a manner proportional to his or her participation in the commission of the planned offence, **reasonable steps in the circumstances either to neutralize or otherwise cancel out the effects** of his or her participation or to prevent the commission of the offence

- There was no air of reality to the defence – the appellant did more than promise to take apart in the murder-suicide, she supplied her spouse w/ the pulls he used to cause their death → she had to do more to neutralize the effects of her participation or to prevent the commission of the offence [destroyed medication, taken children, called authorities]

**Dissent:** (Fish J)

- The trial judge was bound to put the abandonment defence to the jury if 1) the appellant had changed or abandoned her earlier intention to aid/abet the murder and 2) had adequately communicated to her husband that she had withdrawn from their pact. The authorities all make it clear that the defence of abandonment does not require that the accused take steps to neutralize prior participation or prevent the commission of the offence + if this new requirement is to be added, it should only take a prospective effect

**R v Logan SCC 1990**

**Facts:**

- The accused were charged w/ a number of offences relating to the robbery of a Becker’s convenience store and the serious wounding of the cashier
- Two of the accused were convicted of attempted murder – the CA held that the objective test in s. 21(2) is inoperative in relation to attempted murder
- CA – on a charge of attempted murder, the words ‘ought to have known’ must be held to be inoperative and cannot be resorted to by the trier of fact to determine the guilt of such an accused person – therefore, the conviction cannot stand
- The matter should be remitted to the trial judge to sentence them for the offence of armed robbery – taking into consideration the serious aggravating factors which relate to that offence

**Issue:**

- Did the CA judge err in holding that the words ‘ought to have known’ in s. 21(2) must be held to be inoperative in relation to the offence of attempted murder

**Decision:**

- No – Appeal dismissed

**Ratio:**

- The words ‘ought to have known’ [an objective standard] are inoperative when considered under s. 21(2) whether a person is a party to any offence where it is a constitutional requirement for a conviction that foresight of the consequences be subjective – which is the case for attempted murder
- [Cannot convict party to offence on objective mens rea when the principal has a lower objective MR standard]

**Analysis:** (Lamer CJ)

- The CA dealt w/ s. 21(2) in regards to the offence of attempted murder – specifically the possibility that a party to an attempted murder could be convicted upon proof of objective intent, whereas a conviction of the principal would require proof of subjective intent
- It is a principle of fundamental justice that a party to any offence cannot be found guilty of the offence based on a lower standard of requisite mens rea than that required for convicting the principal
- The objective of s. 21(2) is to deter joint criminal enterprises and to encourage persons who do not participate to ensure that their accomplices do not commit offences beyond the planned purpose – this is a legislative objective of sufficient important to override the rights of an accused under s. 7
- Because of the importance of its legislative purpose, the objective component of s. 21(2) can be justified w/ respect to most offences – however, w/ respect to the few offences for which the Constitution requires subjective intent, the stigma renders the infringement too serious and outweighs the legislative objective – therefore, cannot be justified under s. 1

**Notes:**

- In **R v Jackson 1993** – the SCC dealt w/ a combination of s. 21(2) and manslaughter
  - This court has held that manslaughter does not require that a risk of death be foreseeable – foreseeability of the risk of harm is sufficient
  - The appropriate mens rea for manslaughter under s. 21(2) is objective awareness of the risk of harm – therefore, a conviction for manslaughter under s. 21(2) does not require foreseeability of death but only foreseeability of harm

**IV. Counselling as a Form of Participation (s. 22)**

- A person found guilty under s. 22 is a party to the offence
**Facts:**  
- The appellant (O’Brien) was convicted of counselling Richard to rob a convenience store – Richard was a drug addict who bought illegal drugs from A  
- Richard confessed to robbing the convenience store to get money to buy drugs  
- Prior to the robbing, A told Ms. Richard that with only a young girl working at the store at the time, the robbery would be easy + that she did not have to worry + no one would put themselves at risk for minimum wage + agreed she should paint her face  
- The judge convicted A of counselling R – he counselled her + had a motive to do so [buy drugs from him after]  
**Issue:**  
- Did the appellant counsel R into robbing the convenient store or did the trial judge making an error?  
**Decision:**  
- Yes – the trial judge did not err in law or make an overriding and palpable error of fact when he concluded that A counselled R to commit the robbery  
- Appeal dismissed  
**Analysis:** (Hamilton JA)  
- Richard had not made up his mind to rob Elliot’s – was still in the process of deciding  
- A argued the judge erred in finding he had a motive – he did not sell drugs to her afterwards. He did not err – motive is not a factor in counselling, however it may be taken into account in making findings with respect to the element of intent  
- R was in the process of deciding whether to commit the robbery to buy drugs, A’s discussion with her was supportive + he could not have sold drugs to her following as he was picked up by the police + being questioned  

V. Accessory After the Fact (ss. 22, 23.1, 463)  
- Accessory after the fact is defined in ss. 22, 23.1, and 463  
- The accessory is not a party to the offence, but a principal party in a distinct offence that consists facilitating the escape of another person who was party to the offence  
- Convictions of an accessory is not contingent upon conviction of a party to the offence  

R v Duong (1998) Ontario Court of Appeal (s. 23(1))  
**Facts:**  
- Two people were killed – there were reports connecting Lam to the deaths  
- Lam and the appellant (Duong) had been friends for 5-6 years and L called A asking if he could stay at his apartment + indicated he was in trouble for murder and had no place else to go  
- A allowed L to hide in his apartment for about 2 weeks – the police raided the apartment and arrested both  
- L was charged w/ 2 counts of first degree murder and 3 counts of attempted murder – was convicted of 2 counts of second degree and 2 counts of attempted  
- Trial judge held the Crown had to prove A knew that L was a party to a murder when he agreed to hide him + that willful blindness would suffice to establish the necessary culpable mental state  
- The appellant was convicted of being an accessory after the fact to a murder committed by Chinh Lam  
**Issue:**  
- Did the trial judge err in convicting A as being an accessory after the fact to a murder based on willful blindness to whether L committed the murders?  
**Decision:**  
- No – being willfully blind under s. 23(1) can fulfill the mens rea required for the conviction  
**Ratio:**  
- A charge laid under s. 23(1) must allege the commission of a specific offence and the Crown must prove that the alleged accessory knew that the person assisted was a party to that offence – will meet burden if can prove the accused had actual knowledge of the offence committed. Willful blindness as to the existence of the fact will also meet the burden to establish a culpable state of mind.  
**Analysis:** (Doherty JA)  
- S. 23(1) “an accessory after the fact to an offence is one who, knowing that a person has been a party to the offence, receives, comforts, or assists that person for the purpose of enabling that person to escape”  
- This means that the person who gives aid knew that the principal committed the offence when assistance was provided  
- S. 240 – a penalty provision for those who are an accessory after the fact to murder which is more severe than the penalty provision for those who are accessories to other crimes – an indication that the Crown cannot gain a conviction based on a more generalized knowledge that the principal had committed some crime
• Statutory language is more explicit – knows the person to be guilty of the offence or some other arrestable offence
• Parliament could have enacted similar, explicit language but did not
• Willful blindness = [R v Jorgenson] deliberately choosing not to know something when given reason to believe further inquiry is necessary can satisfy the mental element of the offence
• Actual suspicion combined with a conscious decision not to make inquiries which could confirm that suspicion is equated with a conscious decision not to make inquires which could confirm that suspicion, is equated [in the eyes of the criminal law] with actual knowledge → subjective
• Where an accused chooses to make no inquiries, preferring to remain deliberately ignorant, speculation as to what the accused would have learned is not relevant to the determination of the blameworthiness of that accused’s state of mind

Chapter Ten – Inchoate Offences

• Concerned w/ criminal liability for incomplete offences → 1) Attempt, 2) Incitement [counselling], 3) Conspiracy
• Inchoate: the full offences are not completed – however, they require proof of both a prohibited act and fault
• The prohibited act in inchoate offences may not be harmful or criminal – the prohibited act gives rise to a culpable risk of criminal behavior and is coupled w/ intention on the part of the wrongdoer to engage in the criminal act

I. Attempt
• A person who tries to commit a criminal offence but does not succeed can nevertheless be found guilty of attempting the offence if his or her conduct falls within the terms of s. 24

Attempts
• 24(1) – Everyone who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence

Question of Law
• 24(2) – The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law

A) Actus Reus

R v Cline (Ontario Court of Appeal 1956) [Factors to Prove Attempt]
Issues:
• What do you need to prove an attempt? What makes an act sufficient in law to constitute an actus reus?
Analysis: (Laidlaw JA)
• There is no theory or test applicable to all cases – each case must be determined on its own facts – but there are certain features of a criminal attempt as the doctrine of that offence was developed and established in the common law
  1) There must be mens rea and also an actus reus to constitute a criminal attempt, but the criminality of misconduct lies mainly in the intention of the accused
  2) Evidence of similar acts done by the accused before the offence with which he is charged and also afterwards if such acts are not too remote in time, is admissible to establish a pattern of conduct from which the Court may properly find mens rea
  3) Such evidence may be advanced in the case for the prosecution without waiting for the defence to raise a specific issue
  4) The actus reus does not need to be a crime or a tort or even a moral wrong or social mischief
  5) The actus reus must be more than mere preparation to commit a crime
  6) When preparation to commit a crime is fully complete and ended, the next step done by the accused for the purpose and with the intention of committing a specific crime constitutes an actus reus sufficient in law to establish a criminal attempt to commit that crime

Deutsch v The Queen SCC 1986
Facts:
• The accused was charged w/ attempting to procure female persons to have illicit sexual intercourse w/ another person contrary to s. 195(1)(a) [now s. 212(1)(a)]
• The accused placed an advertisement in a newspaper for a secretary/sales assistant and the evidence of 3 women who responded to the advertisement, and of a policewoman was that during each job interview the accused indicated that as part of the job the woman would be required to have sexual intercourse with clients of the company where is appeared to be necessary to conclude a contract – also that each woman could earn up to $100 000/year
• The trial judge acquitted the accused on the basis that his acts had not gone beyond mere preparation because he had not offered the job to the women – appeal from the acquittal was allowed; SCC dismissed the subsequent appeal
Issue:
- Was the accused’s acts sufficient to establish an attempt?

Decision:
- Yes – appeal dismissed
- Holding out the large financial reward in the course of the interviews would not lose its quality as a step in the commission of the offence + therefore is an actus reus of attempt because a considerable time period might elapse before a person engage for the position had sexual w/ prospective clients

Ratio:
- The actus reus for attempt must be some step towards the actual commission of the crime that goes beyond mere acts of preparation.
- The distinction between preparation and attempt is qualitative and dependent on the relative proximity of the act (in time, location and between the acts under the control of the accused remaining to be accomplished) to the nature of the completed offence.

Analysis: (Le Dain J)
- Hard to distinguish between preparation and attempt
- The distinction between preparation + attempt is a qualitative one involving the relationship between the nature + quality of the act in question and the nature of the complete offence, although consideration must be necessarily given, in making that qualitative distinction to the relative proximity of the act in question to what would have been the completed offence, in terms of time, location, and acts under the control of the accused remaining to be accomplished
- If the appellant had the necessary intent to induce women to seek employment that would require them to have sexual intercourse with prospective clients, then holding out large financial rewards in the interviews, this could constitute the actus reus of an attempt to procure
- This would be an [important] step in the commission of the offence

B) Mens Rea

R v Ancio SCC 1984 [mens rea for attempted murder]

Facts:
- Ancio [wanted to speak w/ his estranged wife] broke into an apartment building w/ a loaded sawed-off shotgun
- Kurely [man the wife was living with] went to check on the noise – and threw the chair he was carrying at Ancio – the gun discharged, missing Kurely
- The trial judge found that Ancio had broken into the apartment building w/ the intent to use the weapon to force his wife to leave and convicted him of attempted murder by combing s. 24 and 213(d) [now 230 (d)]
- Appeal overturned conviction + ordered new trial

Issues:
- Can Ancio be charged for attempted murder?

Decision:
- No – dismiss the Crown’s appeal and confirm Appeal Court order for new trial

Ratio:
- The mens rea for attempted murder is the specific intent to kill – a mental state falling short of that level may lead to conviction for other offences [aggravated assault] but not for attempted murder. It is subjective intent (higher than murder)

Analysis: (McIntyre J – for the Court)
- There is a common law recognition of the fundamental importance of intent in the crime of attempt → since attempt may be complete w/o the actual commission of any other offence + even w/o the performance of any act unlawful in itself, it is abundantly clear that the element of attempt may lie solely in the intent
- It is impossible to conclude that a person may intend to commit the unintentional killings described in s. 212 + 213 – the mens rea for an attempted murder cannot be less than the specific intent to kill
- Lajoie should no longer be followed

R v Logan SCC 1990 [mens rea for attempted murder]

Facts:
- The accused were charged w/ a number of offences relating to the robbery of a Becker’s convenience store + serious wounding of cashier
- 2 of the accused were convicted of attempted murder + appealed to the ON Court of Appeal – set aside conviction

Issues:
- What is the mens rea for attempted murder?
• Do the principles of fundamental justice require a minimum degree of mens rea in order to convict an accused of attempted murder?

Decision:
• Appeal dismissed

Ratio:
• The mens rea for attempted murder is subjective foresight of the consequences [regardless if aiding and abetting or actually attempting]

Analysis: (Lamer CJ for the Court)
• Ancio established mens rea for attempted murder as the specific intent to kill → the constitutional question was not raised or argued in that case – did not decide whether this was a constitutional requirement
• Martineau (SCC 1990) → no one can be convicted of murder unless the Crown proves beyond a reasonable doubt that the person had subjective foresight of that fact that the death of the victim was likely to ensue – because of penal consequences + stigma the Constitution Act requires at least that degree of intent
• Vaillancourt → the principles of fundamental justice require a minimum degree of mens rea for only a few offences – depends on 1) stigma associated w/ a conviction, and 2) the penalties available
• Stigma associated w/ attempted murder is same as for murder; 2) conviction for attempted murder does not automatically result in a life sentence, the offence is punishable by life however + penalty is usually severe
• Mens rea for attempted murder cannot [w/o restricting s. 7 of Charter] require of the accused less of a mental element than that required of a murdered under s. 229(a)(i) = subjective foresight of the consequences
• Objective foresight cannot be used as being sufficient for a conviction w/o restricting s. 7

Dissent: (L’Heureux-Dube)
• An intent to murder as in Ancio should be the constitutionally required intent for attempted murder as opposed to the slightly lower knowledge requirement contemplated as a constitutional minimum by the majority

Notes:
• R v Sorrell and Bondett (SCC 1978)
  o R v Cline rejected the 'unequivocal act test' = the stage of attempt has been reached only when the acts of the accused show unequivocally on their face the criminal intent with which the acts were performed
  o Court of the view that where the accused’s intention is otherwise proved, acts which are on their face equivocal, may none the less be sufficiently proximate to constitute an attempt
  o However, if there is no extrinsic evidence of the intent w/ which accused’s acts were done, acts of the accused, which on their face are equivocal, may be insufficient to show that the acts were done with the intent to commit the crime that the accused is alleged to have attempted to commit + hence insufficient to establish the offence of attempt

C) Impossibility
• Can a person be guilty of an attempt when the completion of the offence is for some reason impossible?

United States of America v Dynar SCC [1997]

Facts:
• Dynar called Simone [a former associate + an informant working for the FBI] to seek investors for a business operation in the US – a second informant was introduced [Anthony] + was instructed to ask Dynar if he would be willing to launder large sums of money obtained as a result of illegal trafficking – Dynar agreed [it was made clear this money was “drug money”] + Dynar insisted the amounts had to be large to make it worthwhile. Dynar had an associate [“Moe” – Maurice Cohen]
• The initial plan of the US authorities was to set up the transfer of funds to Dynar in the US – however, Dynar believed he was the subject of a sealed indictment in the US charging him w/ laundering large sums of money + if he travelled there he would be arrested – Moe was sent to meet
• Moe met w/ an Agent (McCarthy) of the IRS [posing as Anthony’ associate] – conversations took place [recorded] → no money was transferred – just prior to the transfer, the FBI aborted the operation by pretending to arrest McCarthy [Moe was allowed to return to Canada]
• Dynar [a Canadian citizen] was the subject of a failed sting operation attempted by the Federal Bureau of Investigation in the US
• US indictment charged him + Moe w/ one count of laundering money in violation of Title 18 + one count of conspiracy to violate Title 18 – requested extradition
• S. 24(1) of Criminal Code → “Everyone who having an intent to commit an offence, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence”

Issues:
• Whether the respondent’s conduct in the United States would constitute a crime if carried out in this country, thereby meeting the requirement of ‘double criminality’ which is the pre-condition for the surrender of a Canadian fugitive for trial in a foreign jurisdiction?
• Does impossibility constitute a defence to a charge of attempt or conspiracy in Canada?

Decision:
• Impossibility is no defence → What Dynmar attempted to do falls squarely into the category of the factually impossible, he attempted to commit crimes known to law + was only thwarted by chance → was a criminal attempt within meaning of s. 24(1) = he is a criminal w/in Canadian law + therefore, the double criminality rule should be no bar to his extradition to the US

Ratio:
• S. 24(1) draws no distinction between attempts to do the possible but by inadequate means, attempts to do the physically impossible, and attempts to do something that turns out to be impossible ‘following completion’ = all factually impossible and all are crimes
• ONLY attempts to commit imaginary crimes fall outside of the scope
• The law of attempt is only engaged when the mens rea of the completed offence is present entirely and the actus reus of it is present in an incomplete but more-than-merely-preparatory way

Analysis: (Cory and Iacobucci JJ)
• S. 24(1) is clear – the crime of attempt consists of an intent to commit the completed offence together with some act more than merely preparatory taken in furtherance of the attempt → sufficient evidence was produced to show Dynar intended to commit the offences + took steps more than merely preparatory in order to realize his intention
• Respondent argues 24(1) did not intend to criminalize attempts that are impossible, but only those factually impossible [an attempt that runs up against some intervening obstacle + for that reason cannot be completed]
  o Legally impossible = even if completed, no crime would have been committed
• The criminal law recognizes no middle category called ‘legally impossibility’ – the only relevant distinction is between imaginary crimes + attempts to do the factually impossible
• Dynmar attempted to do the impossible but did not attempt to commit an imaginary crime = can only be factually impossible
• S. 24(1) = “an intent to commit an offence” – if smuggle sugar into the states believing sugar is illegal – this is an imaginary crime – the smuggler has no mens rea known the law
• Mens rea = subjective element of a crime; Knowledge = [partially objective] has two parts – truth + belief [only belief is subjective and truth is objective] – truth does not vary with the intention of the accused + cannot be a part of mens rea
• An accused is still guilty of an attempt if he intends to commit a crime and takes legally sufficient steps towards its commission – because an attempt is always incomplete – the actus reus will be deficient [sometimes this is due to a lacking attendant circumstance]
• Dynar would have been content to convert legal money – however, evidence is clear he believed he was embarked upon a scheme to convert ‘drug money’ [does not matter his motive – only what he intended to do]
• The only difference between attempting to do the possible + an attempt to do the impossible is chance

II. Incitement
• Criminal liability for incitement, or counselling, exists in 2 firms in Canadian law:
  o 1) Incitement of an offence that is actually committed (s. 22)
    ▪ A mode of participation in the commission of the offence because the inciter, in effect, causes the commission of an offence through another person
    ▪ Ex. O’Brien
  o 2) Incitement of an offence that is not committed (s. 464)
    ▪ Independent offence of inchoate liability
    ▪ Under s. 464 incitement of an offence that is not completed is criminalized on the theory that by inciting another, the inciter has already taken affirmative steps toward the completion of the offence

R v Hamilton SCC 2005
Facts:
• Hamilton offered for sale through the Internet, access to a credit card number generator – along with these he also offered for sale bomb recipes + information on how to commit burglaries
• He was charged under s. 464(a) of the Criminal Code w/ counselling the commission of indictable offences that were not in fact committed
• Trial judge as not satisfied he acted w/ requisite mens rea, or culpable intent so she acquitted him – Court of Appeal dismissed the appeal

Issues:
• Did the trial judge err as to the mens rea of counselling?
• Is it necessary to prove that the person who counselled the offence intended that it be committed or is recklessness sufficient?

Decision:
• Agree trial judge erred – order new trial on count for counselling fraud + dismiss the appeal w/ respect to the 3 remaining counts

Ratio:
• Recklessness is sufficient to satisfy mens rea for counselling but as defined as conscious disregard of unjustified and substantial risk inherent in the counselling. Motivation is irrelevant; recklessness is objective (it is intent that matters)

Analysis: (Fish J)
• Crown appeals saying trial judge erred in confounding ‘motive’ and ‘intent’ – SCC agrees w/ this
• Actus reus for counselling will be established where the materials or statements made or transmitted by the accused actively induce or advocate + do not merely describe the commission of an offence
  o AR = the deliberate encouragement or active inducement of the commission of a criminal offence
• Those who encourage commission of crimes are responsible for their conduct by way of secondary liability
• The trial judge acquitted Hamilton because his motivation was mercenary [greedy – money-based] as opposed to malevolent – this is an error of law [he was aware that the use of the generated numbers was illegal]
• Mens rea is focused w/ intent [not motive]

Dissent: (Charron J)
• It is not sufficient that the communication simply raises the possibility of affecting its recipient – it must actively seek to persuade that person to commit the crime
• The counsellor must at least intend to persuade the person to commit the offence – mere recklessness as to the person’s reaction to the communication is insufficient
• Agree w/ Court of Appeal that the more demanding standard of subjective mens rea should apply – the counsellor must intend that the counselled offence be committed for the offence to be made out
• Trial judge was entitled to consider motive – it is a piece of circumstantial evidence that may assist in determining an accused’s state of mind

Notes:
• Secondary liability – person who incites another to commit a crime

III. Conspiracy

• A **conspiracy** exists when two or more people agree to commit a criminal offence and the offence of conspiracy is complete upon their agreement
• The other person has to also want the other thing to happen [cannot pretend]
  o Ex. Police informant – cannot be a conspiracy [if does not want the thing to happen]

**United States of America v Dynar SCC 1997**

Issues:
• What is a criminal conspiracy? Is Impossibility a Defence to Conspiracy?

Ratio:
• Conspirators can be punished for their agreement (actus reus) and their intention to commit the offence (mens rea)
• It should make no difference if something [the police] intervened to make the commission of the offence impossible
• Legal impossibility cannot be invoked as a defence to the charge

Analysis: (Cory and Iacobucci JJ)

**What is a criminal conspiracy?**

• There must be an intention to agree, the completion of an agreement, and a common design
• R v Cotrini (SCC) – there must be proof of agreement → the important inquiry is not the acts done in pursuance of the agreement, but whether there was in fact a common agreement to which the acts are referable and to which all of the alleged offenders were privy
• **Must involve more than 1 person**, although not all have to be identified or capable of being convicted = both must have an intention at the moment of exchanging the words of agreement
• Reason for punishing conspiracy between any steps are taken towards attaining the object of the agreement is to prevent the unlawful object from being attained
• Rationale for punishing conspirators coincides with the rationale for punishing persons for attempted crimes
Is Impossibility a Defence to Conspiracy?

- Criminal liability will ensue as long as there is an agreement and a common intention
- There is no defence for legal impossibility but there is for ‘imaginary crimes’
- S. 465(1)(c) does not specifically state that criminal liability for conspiracy can ensue where the substantive offence is impossible to commit
- R v Wah [in a prosecution for conspiracy a conviction may not be registered if the operation for the commission of which the accused allegedly conspired would, if accomplished, not have made the accused guilty of the substantive offence] – Wah should only be accepted as authority for the proposition that impossibility can be a defence to a charge of conspiracy where the conspirators intend to commit an ‘imaginary crime’
- The actus reus of the offence is satisfied by the establishment of the agreement to commit the predicate offence – the goal of the agreement is part of the mental element of the offence of conspiracy
- Since conspiracy only requires an intention to commit the substantive offence, and not the commission of the offence itself, it does not matter that from an objective point of view, commission of the offence may be impossible – from a subjective point of view conspirators who intend to commit an indictable offence intend to do everything necessary to satisfy the conditions of the offence

IV. Other Forms of Inchoate Liability

A) Combing Forms of Inchoate Liability

R v Dery SCC 2006 [Criminal Law Does Not Punish Bad Thoughts]

Facts:
- An unrelated investigation resulted in the interception of discussions between Dery and others concerning the possibility of stealing the overflow liquor that had been stored outside in trailers
- Dery + Savard were charged with conspiracy to commit theft and conspiracy to possess stolen goods. Dery stands convicted of attempting to conspire to commit theft, and of attempting to conspire to unlawfully possess the proceeds
- The trial judge acquitted the accused of the conspiracies charged however, convicted both of attempting to conspire

Issues:
- Can there be criminal liability in conspiracy for discussions in contemplation of a substantive crime that is never committed nor attempted? Attempted conspiracy?

Decision:
- No – appeal allowed and convictions set aside

Ratio:
- When attempt is applied to conspiracy the justification for criminalizing attempt is lost, since an attempt to conspire amounts, at best, to a risk that a risk will materialize
- Criminal law does not punish bad thoughts that were abandoned before an agreement was reached or an attempt was made to act upon them

Analysis: (Fish J)
- Never has anyone been convicted of attempting to conspire to commit a substantive offence of any sort
- There was no evidence either took any steps to carry out the proposed theft + trial judge was not convinced they had at any point agreed to steal or possess the liquor as the object of their musings
- Recognition of an attempted conspiracy as a crime is best left to Parliament
- Evil targeted by unilateral conspiracies will normally be caught under ‘counselling an offence not committed’ [s. 464]
- Agreement to commit a crime with other enhances risk of commission – early intervention through criminalization of conspiracy is principled + practical
- Criminalization of attempt is also warranted because its purpose is to prevent harm by punishing behavior that demonstrates a substantial risk of harm – when applied to conspiracy the justification for criminalizing attempt is lost, since an attempt to conspire amounts, at best, to a risk that a risk will materialize
- Dery did not commit nor agree to commit the crimes they had discussed

B) New Statutory Forms of Inchoate Liability

R v Legare SCC 2009 [Using Computer to Lure Child for Sexual Offence; S. 172]

Facts:
- The accused was charged under s. 172.1(1)(b) with using a computer to lure a child for the purpose of facilitating a sexual offence including sexual interference and sexual touching with an underage child
The accused was told on the computer the child was 13 [she was actually 12] and subsequently phoned her to talk dirty and engage in a sexual conversation before the child hung up.

The accused did not admit he intended to commit or facilitate a sexual assault and did not make any efforts to contact her further.

The trial judge acquitted on the basis that the accused’s conduct failed to facilitate the conduct of the underlying offences and the Crown failed to prove that the accused intended to lure the girl for the purpose of one of the underlying offences – Court of Appeal allowed appeal.

Issues:
- Is the accused liable for committing an offence under s. 172

Decision:
- Appeal dismissed – acquittal set aside

Ratio:
- In determining whether there is an offence under s. 172 what matters is whether the evidence as a whole establishes beyond a reasonable doubt that the accused communicated by computer w/ an underage victim for the purpose of facilitating the commission of a specified offence

Analysis: (Fish J)
- S. 172(1)(b) creates an incipient or ‘inchoate’ offence – a preparatory crime that captures otherwise legal conduct meant to culminate in the commission of a completed crime.
- It criminalizes the conduct before the commission of the sexual offences or even an attempt to commit them – the rationale is to close the cyberspace door before the predator gets in to prey
- S. 172 makes it a crime to communicate by computer w/ underage [now under 16] children for the purpose of facilitating the commission of the offences [sexual interference, invitation to touching, bestiality, exposure of genitals, abduction]
- Facilitating = helping to bring about and making easier or more probable
- The content of communication is not necessarily determinative – what matters is whether the evidence as a whole establishes beyond a reasonable doubt that the accused communicated by computer w/ an underage victim for the purpose of facilitating the commission of a specified offence – must be determined subjectively.
- Accused must be shown to have engaged in the communication w/ the specific intent of facilitating the commission of one of the offences
- S. 172 comprises 3 elements [must be established beyond a reasonable doubt]:
  - 1) An intentional communication by computer
  - 2) With a person whom the accused knows or believes to be under 14 [now 16]
  - 3) For the specific purpose of facilitating the commission of a specified secondary offence
- Determining whether each of the essential elements are all or part of the mens rea or actus reus is of no assistance

R v Khawaja SCC 2010 [Terrorism; S. 83.18]

Facts:
- Appellant became obsessed w/ Osama Bin Laden, began communicating w/ people committed to violence in the name of Islam [entered into email correspondence w/ a person guilty for providing resources to Al Qaeda + a leader of a terrorist cell based in London] – gave them support and money. He designed a remote arming device for explosives
- He travelled to Pakistan to attend a small arms training camp + made his parent home there available to these people
- The RCMP arrested the appellant and seized his arming device, electronic components, devices, and parts suitable for making more devices, documents corroborating the assembly process, instructional literature, tools, rifles/ammunition, military books, jihad-related books, and $10 300 cash. He elected to be tried alone and was convicted of 5 offences + found guilty of 2. The appellant was convicted of 5 offences under part II of the Criminal Code [the terrorism section] – he faces a life sentence and a concurrent sentence of 24-years imprisonment, with a 10-year period of parole ineligibility
- Prior to the trial, he sought a declaration that several terrorism provisions in the Code are unconstitutional – trial judge found s. 83.01(1)(b)(i)(A) [terrorist activity must be an act or omission committed in whole or in part for a political, religious, or ideological purpose, objective or cause] was a prima facie infringement of s. 2(a), (b), and (d) of the Charter therefore severed the motive clause

Issues:
- Is s. 83.18 broader than necessary, therefore violating the Charter?

Decision:
- No – the scope is reduced by the AR and MR – dismiss appeal + affirm convictions

Ratio:
• To convict under s. 83.18, the judge be satisfied beyond a reasonable doubt that the accused intended to enhance the ability of a terrorist group to facilitate or carry out a terrorist activity – there may be direct evidence of this intention or it can be inferred from evidence of the knowledge of the accused + the nature of his actions
• AR = excludes conduct a reasonable person would not view as capable of materially enhancing the abilities of a terrorist group to carry out a terrorist activity
• MR = specific intent to enhance the abilities of a terrorist group to facilitate or carry out a terrorist activity

Analysis:
• The purpose of the Anti-Terrorism Act is to provide a means by which terrorism may be prosecuted and prevented
• The act or omission must be done with the intention of causing one of the enumerated consequences, and with the intention of intimidating the public or a segment of the public, and must be done in whole or in part for a political, religious, or ideological purpose, objective, or cause
• The Act creates a number of offences – making property available for terrorist purposes, participating in or contributing to the activity of a terrorist group, facilitating a terrorist activity
• S. 83.18(1) – requires for conviction that the accused a) knowingly, b) participated in contributed to, c) directly or indirectly, d) any activity of a terrorist group, e) for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity
• Subsection 2 = the Crown does not have to prove the terrorist group actually facilitated or carried out the activity; the accused’s acts actually enhanced the ability of a terrorist group to do so; or that the accused knew the specific nature of any terrorist activity facilitated or carried out by a terrorist group
• Appellants argue s. 83 is overbroad because it captures conduct that does not contribute materially to the creation of a risk of terrorism
• This requires a high mens rea threshold → to be convicted an individual must 1) knowingly participate/contribute AND 2) the actions must also be undertaken for the purpose of enhancing the abilities of a terrorist group to facilitate or carry out an activity
• To have the subjective purpose of enhancing the ability of a terrorist group to carry out an activity, accused must specifically intend his actions to have this general effect
• This heightened mens rea exempts those who unknowingly assist terrorists or who do so for a valid reason → requires subjective intent
• “Participation in” or “contribution to” a terrorist activity = conduct that creates a risk of harm that rises beyond the de minimis threshold
• A purposive interpretation of the AR and MR excludes convictions 1) for innocent or socially useful conduct that is undertaken absent any intent to enhance the abilities of a terrorist group to carry out a terrorist activity, and 2) for conduct that a reasonable person would not view as capable of materially enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity

Chapter Eleven – Corporate Liability
• In 2003, the law concerning corporate liability was fundamentally changed by statutory amendments found in ss. 2, 22.1, and 22.2

I. The Old Common Law of Directing Minds

R v Waterloo Mercury Sales Ltd. Alberta District Court (1974)
Facts:
• Waterloo is charged with two counts of fraud under s. 338(1) of the Criminal Code
• The accused corporation through its used-car sales manager purchased 26 cars in ON and shipped them to AB
• After vehicles were unloaded but before being placed on the sales lot, the odometers of some of the vehicles were turned back so that the odometer reading showed the vehicle had been driven a smaller number of miles
• The odometers were altered by a third-party on the instructions of the used car sales manager and when the vehicles were offered for sale the reading was incorrect

Issues:
• Whether the accused corporation can be held criminally liable for the act of its used-car sales manager if such act is done within the scope of his authority

Decision:
• Yes – Accused convicted

Analysis: (Legg DCJ)
• The sales manager was not an officer or director of the accused company – he operated two lots which were close but were not a part of the main offices
• His responsibilities were to buy used cars, clean them up, do minor reconditioning on them, fix the sales price, arrange advertising and promotion, demonstrate them to and makes sales to the public
• His actions and intent were those of the accused itself and his conduct renders the company criminally liable
• It is not a defence that the president of the company did not know of the circumstances, and that he circulated written instructions to the company not to alter the odometer on vehicles

Canadian Dredge & Dock Co v The Queen SCC 1985

Facts:
• 4 corporations appealed their convictions for bid rigging after a 15-month trial – they argued that the managers in charge of the bids acted in fraud of the corporation for their own benefit, contrary to corporate instructions and outside the scope of their authority

Issues:
• Can the corporation be liable for the managers acting fraudulently for their own benefit?

Decision:
• Yes – dismiss all appeals. The directing minds did not act wholly in fraud; some benefit was gained by the appellants; instructions prohibiting unlawful acts are not a defence

Ratio:
• Where the criminal act is totally in fraud of the corporate employer and where the act is intended to and does result in benefit exclusively to the employee-manager the employee directing mind ceases to be a directing mind of the corporation therefore his acts cannot be attributed to the corporation under the identity doctrine
• The identity doctrine only operates where the Crown demonstrates that the action taken by the directing mind was 1) within the field of operation assigned to him, 2) was not totally in fraud of the corporation, and 3) was by design or result partly for the benefit of the company

Analysis: (Estey J)

Absolute Liability Offences
• Where the Legislature establishes an offence where liability arises instantly upon breach of the statutory prohibition, no particular state of mind is a requisite to guilt – a case of automatic primary responsibility
• Corporations + individual persons stand on the same footing in the face of such a statutory offence [corporation is treated the same as a natural person]

Offences of Strict Liability
• Where terminology reveals an intent that guilt should not be determined based on the automatic breach of the statute but rather upon the establishment of actus reus, subject to the defence of due diligence, strict liability arises
• Does not matter whether it is a person or a corporation – because the liability is primary and arises in the accused according to the terms of the statute in the same way as absolute offences
• Corporation + natural defendant are in the same position – in both cases liability is not vicarious but primary

Offences Requiring Mens Rea
• These are traditional criminal offences for which an accused may be convicted only if the requisite mens rea is demonstrated by the prosecution
• US federal courts – has vicarious liability on the corporation arising out of acts of employees [repondeat superior]
• US states – something akin to the identification doctrine [if the offence was authorized/requested by the board of directors or agent w/ responsibility]
• In our courts criminal responsibility has been achieved in the mens rea offences by attribution of the corporation of acts of its employees and agents on more limited basis of the doctrine
• In criminal law, a natural person is responsible only for those crimes which he is the primary actor either actually or by express or implied authorization
• However, where the defendant is corporate the common law has become pragmatic + a modified, limited ‘vicarious liability’ through the identification doctrine has emerged
• The identity doctrine merges the board of directors, the managing director, the superintendent, the manager or anyone else delegated by the board to whom is delegated the governing executive authority of the corporation, and the conduct of any merged entities is thereby attributed to the corporation

R v Safety-Kleen Canada Inc (1997) Ontario Court of Appeal

Facts:
The corporate accused was convicted of knowingly giving false information to a provincial officer contrary to s. 145 of the Environmental Protection Act

The corporation appealed on the basis that the individual driving who made the false statement was not the directing mind of the corporation

Mr. Howard was a truck driver for the appellant – he was also the appellant’s sole representative in a very large geographical area – he was responsible for collecting waste, completing necessary documentation, maintaining property in the region, billing, responding to calls + when he was on holiday the appellant did not do business in the area [he had no managerial function though]

Issues:

- Is the corporation liable for Mr. Howard’s acts?

Decision:

- No – Mr. Howard had no authority to devise or develop corporate policy or make corporate decisions which went beyond those arising out of the transfer and transportation of waste
- Mr. Howard was not a directing mind of the corporate employer

Ratio:

- Merely having extensive responsibilities and discretion is not enough if do not have the power to design and supervise the implementation of corporate policy

Analysis: (Doherty JA)

- The parties agree this offence falls into the mens rea offences category – Mr. Howard [the driver] knew the information was false [the prosecution had to prove he knew it was false]
- Absent a statutory basis for liability, corporate liability for crimes is determined by identification theory from Canadian Dredge [must determine who has been left w/ decision making power in a relevant sphere of corporate activity]
- Trial judge based her conviction on a finding that the company did not take all reasonable steps to avoid the event
- Since the offence alleged in count 2 requires proof of a culpable mental state, a finding of lack of due diligence is irrelevant
- The determinative question of whether Mr. Howard’s actual authority was sufficient to justify attributing his culpable mind to the appellant was never addressed
- Mr. Howard had a large number of responsibilities, however there is no evidence that he had the authority to devise or develop corporate policy or make corporate decisions that went beyond those arising out of the transfer or transportation of waste [he had responsibilities + discretion, but not the power to design and supervise the implementation of corporate policy]

II. The New Statutory Provisions for Organizational Liability

- 3 key definitions are now contained in s. 2 of the Criminal Code –
  - “organization” means a) a public body, body corporate society, company, firm, partnership, trade union, or municipality; b) an association of persons that is created for a common purpose, has an operational structure, and holds itself out to the public as an association of persons
  - “representative” in respect of an organization, means a director, partner, employee, member, agent or contractor of the organization
  - “senior officer” means a representative who plays an important role in the establishment of an organization’s policies or is responsible for managing an important aspect of the organization’s activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer
- S. 22.1 provides for organizational liability for negligence-based offences
- S. 22.2 provides for organizational liability for subjective intent offences
- S. 718.21 sets out sentencing principles for organizations + s. 732.1(3.1) provides for probation orders against organizations


- Bill C-45 was a response to Westray Mining explosion
- It replaces the traditional legal concept of corporate liability based on the fault of the corporation’s ‘directing minds’, the board of directors and those with the power to set corporate policy, with liability tied to the fault of all the corporation’s ‘senior officers’
  - This includes all employees, agents, or contractors who play an important role in the establishment of an organization’s policies or who have responsibility for managing an important aspect of the organization’s activities
- Bill C-45 significantly expands the net of corporate and organizational liability
- HOWEVER, the new law blurs the traditional and important distinctions between regulatory and criminal liability – a corporation can be found guilty of a subjective intent offence because its senior officers knew that a representative of a
corporation was or was about to become a party to the offence but did not take all reasonable means to stop them from being a party to the offence

- For negligence based offences, prosecutors still have the onus of proving actus reus and fault beyond a reasonable doubt
- Regulatory = prove the commission of the prohibited act or actus reus beyond a reasonable doubt

**Expanded Definition of “Organization”**

- Now includes all organizations – public body, body corporate, society, company, firm, partnership, trade union, or municipality

**Expanded Definition of “Representative”**

- Now are responsible for actions of their representatives along w/ senior officers
- R is defined broadly to include directors, members, partners, employees, AND agents or contractors

**New Definition of “Senior Officer”**

- This widens the liability of the corporation
- Can be in violation if senior managers either created policies or managed an important aspect of the organization’s activities that resulted in violations of the law

**Subjective Intent Offences**

- S. 22.2 sets out 3 separate ways that an organization can be found to have committed a crime requiring fault other than negligence
- Subjective intent is generally a requirement for crimes w/ high stigma – ex. fraud

**Negligence Offences**

- S. 22.1 allows collective action to ground corporate liability provided that senior officers have departed markedly from the standards reasonably expected to police and prevent such action

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**R v Metron Construction Corporation (2013) Ontario Court of Appeal**

**Facts:**

- R was was working on 3 small-medium sizes construction projects during the time of the accident; R hired a project manager who hired Fazilov as site supervisor
- On Christmas Eve 2009, 3 workers and a site supervisor employer by R [Metron] (along w/ 2 others) plunged to their deaths
- They had boarded a swing stage that collapsed as it descended from the exterior of the 14th floor of a high-rise construction site. A significant cause of the collapse was a defective design + inability to withstand with combined weight of 6 men + equipment – further, had 6 life lines been available + workers attached, they would have survived
- R was unsure why the men were not hooked up to lifelines
- R pleaded guilty to one count of criminal negligence causing death + was sentenced to a $200 000 fine
- Crown believes this sentence was unfit

**Issues:**

- Is R liable for criminal negligence causing death due to the actions of the site supervisor?

**Decision:**

- Yes – As a result of the acts/omissions of Fazilov [a ‘senior officer’] within the meaning of s. 2, R plead guilty to criminal negligence causing death pursuant to s. 22.1(b); s. 217.1, and s. 219
- A fine of $750 000 is fine to fit the circumstances

**Ratio:**

- Since Bill C-45, the definition of senior officer has broadened the scope of whose conduct could establish criminal liability – the serious of criminal negligence causing death is reflected in max. punishment [an unlimited fine]

**Analysis:**

- It was agreed by the parties that Fazilov failed to take reasonable steps to prevent bodily harm and death by 1) directing and or allowing 6 workers to work on the swing stage + he should have known it was unsafe; 2) allowing 6 workers to board the stage knowing only 2 lifelines were available; and 3) allowing persons under influence of a drug to work on the project
- Prior to Bill C-45, corporate criminal liability was established through actions or omissions and the state of mind of a directing mind of the corporation [had to have authority to design/supervise implementation of corporate policy, not merely carry out policies – aka decision making power [identification doctrine]]
- Definition of senior officer under s. 2 served to broaden the scope of those whose conduct could establish criminal liability of the organization
- Seriousness of criminal negligence causing death is reflected in the maximum punishment = life imprisonment OR if organization, the fine is unlimited
Chapter Twelve – Sexual Assault

273 (1) Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.”

273.1(2)(b): “No consent is obtained ... where (b) the complainant is incapable of consenting to the activity;”
273.2(b): “the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.”

The Legal Elements of Sexual Assault
R v Ewanchuk SCC 1999 [Leading Decision on Elements of Sexual Assault]
Facts:
• Accused interviewed complainant in his van for a job, told her his work was in the trailer, when they went into the trailer the accused shut the door behind him and the complainant assumed he locked it
• The accused massaged the girl, she pushed his arms away – he started to massage her again, and she was afraid to push him away as he might become violent
• He laid on top of her + the complainant did not move, she asked him to stop after a minute
• He gave her $100 for the massage and she left, and contacted the police
• During trial only the complainant testified [trial judge found her to be a credible witness, and her version of the events was not contradicted or disputed]

Judicial History:
[Court of Queen’s Bench]
• Found as facts: complainant in her mind did not consent to any sexual touching, she was fearful throughout the encounter, did not want the accused to know she was afraid – the failure to communicate her fear rendered her subjective feelings irrelevant
• Decided that the Crown failed to prove one of the components of the actus reus of the offence = characterized the defence as one of ‘implied consent’ – said C’s conduct was one that could be objectively construed as constituting consent to sexual touching
• Said Crown did not prove absence of consent beyond a reasonable doubt
• The accused was acquitted of sexual assault, the trial judge relied on implied consent

[AB Court of Appeal]
• 2 dismissed appeal on basis it was a fact-driven acquittal from which the Crown could not properly appeal
• Crown failed to prove the accused possessed the requisite criminal intent
• Dissent:
  o Trial judge erred – in his interpretation of ‘consent’; there is no defence of ‘implied consent’ independent of s. 273; erred in legal effect; error to employ an objective test to determine whether ‘consent’ was induced by fear; failed to consider wilfully blind or reckless to consent

Issues:
• Is the accused liable of sexual assault and did the trial judge err in his understanding of consent? Does a defence is ‘implied consent’ exist in Canadian law?

Decision:
• But for the trial judge’s error of law, he would have found the accused guilty therefore it is proper to enter a conviction

Analysis: (Major J)
[Components of Sexual Assault]
• Requires proof beyond a reasonable doubt of actus reus and necessary mens rea
• AR = unwanted sexual touching; MR = intention to touch, knowing of, or being reckless or wilfully blind to a lack of consent, either by words or actions from the person being touched
• 1) Actus Reus:
  o S. 265(1) – assault which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated
  o AR is established by proof of 3 elements → 1) touching; 2) the sexual nature of the contact; and 3) the absence of consent
  o It is sufficient for the Crown to prove the (first 2) actions were voluntary [determined objectively]
  o The absence of consent is subjective + determined by C’s subjective internal state of mind at the time the touching occurred
C’s statement that did not consent is to be weighed in light of all evidence including an ambiguous conduct – accused’s perception of C’s state of mind is not relevant [only in defence of honest but mistaken belief in consent during mens rea stage of inquiry]

- **“Implied Consent”**
  - The trier of fact may only come to 2 conclusions = consented or not [no 3rd option]
  - If trier accepts that C did not consent, then absence of consent is established
  - Implied consent has NOT been recognized in sexual assault

- **Effect of Complainant’s Fear:**
  - Consent must be freely given
  - S. 265(3) provides conditions under which law will deem an absent of consent in cases of assault submission by reason of force, fear, threats, fraud, exercise of authority, and under fear/duress
  - Court’s concern is whether C freely made up mind about the conduct in question
  - Question is whether believed to have only 2 choices – comply or be harmed [fear need not be reasonably nor communicated to the accused]

- **2) Mens Rea:**
  - A crime of general intent, therefore the Crown need only prove that the accused intended to touch C in order to satisfy basic MR requirement
  - MR contains 2 elements 1) intention to touch; and 2) knowing or, or being reckless of or wilfully blind to a lack of consent on the person being touched
  - S. 271 = consent means the voluntary agreement of the complainant to engage in the sexual activity in question

- **‘Honest but Mistaken Belief in Consent’:**
  - To cloak accused’s action in moral innocence, evidence must show A believed C communicated consent = must believe C effectively said ‘yes’ through words/actions
  - AR consent = C in her mind wanted the sexual touching
  - MR consent = C affirmatively communicated by words or conduct her agreement to engage

- **Limits on Honest but Mistaken Belief:**
  - A belief that silence, passivity, or ambiguous conduct constitutes consent is a mistake of law + provides no defence
  - Once says NO, then need to receive express consent and mere passage of time does not convert no to yes.

Concurrence: [L’Heureux-Dube J]
- The trial judge gave no legal effect to his conclusion that the complainant submitted to sexual activity out of fear that the accused would apply force to her
- Other courts are perpetuating myths that women are presumptively sexually accessible until they resist
- Reliance on rape myths cannot ground a defence of mistaken belief in consent

The Actus Reus of Sexual Assault
- These cases focus on interpreting ss. 265, 271, and 273.1 to establish AR

**R v Chase SCC 1987 [Objective Test]**

**Facts:**
- R [Chase] was a neighbor of C [15-year old girl]
- R entered the home of C (without permission), R seized the girl and grabbed her breasts + when she fought back he said “Come on dear, don’t hit me, I know you want it”
- He tried to grab her, and eventually C and her brother were able to call a neighbor + R left
- R was charged w/ sexual assault + found guilty in the PC, he appealed and his appeal was dismissed + a conviction of common assault was substituted

**Issues:**
- Is the accused guilty of sexual assault or common assault?

**Decision:**
- There was ample evidence before the trial judge upon which he could find that sexual assault was committed
- Appeal allowed – conviction of sexual assault restored

**Ratio:**
- Sexual assault is to be determined with an objective test – is the sexual context of the assault visible to a reasonable observer?

**Analysis:** (McIntyre J)
- Sexual assault is an assault which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated [s. 265(1)]
The test to be applied is an objective one; viewed in light of all circumstances— the part of the body touched, the nature of the contact, the situation in which it occurred, the words/gestures during the act, and all others will be relevant.

Intent/purpose of person committing will also be a factor in considering whether the conduct is sexual.

Grabbing C’s breasts constituted an assault of a sexual nature.

R v JA SCC 2011 [Consciousness]

Facts:
- During sexual intimacy, C consented to R choking her and understood she might lose consciousness—she did for approx. 3 minutes. When she regained consciousness she was on her knees and R was inserting a dildo into her anus, after this the 2 had vaginal intercourse. 2 months later, C told police she did not consent to this sexual activity—however, she later recanted her allegation and claimed she made a false statement because R threatened to seek sole custody of their son.

Issues:
- Can a person perform sexual acts on an unconscious person if the person consented to those acts in advance of being rendered unconscious?

Decision:
- No – appeal allowed and conviction restored.

Ratio:
- The code makes it clear that an individual must be conscious throughout the sexual activity in order to provide the requisite consent—must consciously consent to each + every sexual act.
- Consent of C must be an ongoing state of mind—cannot express consent in advance if subsequently become unconscious.
- Parliament requires ongoing, present, and conscious consent to ensure women + men are not victims of sexual exploitation
- To ensure individuals are able to ask their partners to stop at any point.

Analysis: (McLachlin CJ)
- It is a fundamental principle of Canadian law that a person is entitled to refuse sexual contact—sexual acts performed w/o consent + w/o an honest belief in consent constitute the crime of sexual assault.

[Framework of Sexual Assault]:
- A conviction for sexual assault under s. 271(1) requires proof beyond a reasonable doubt of the AR + MR of the offence.
- AR = if touches another person in sexual way w/o consent — subjective consent in the mind of the C at the time of the sexual activity [s. 273.1(2) limits this definition by stipulating where consent is not obtained].
- MR = if knew the C was not consenting to the act in question or was wilfully blind or reckless to absence of consent [accused may raise defence of honest but mistaken belief if believed C communicated consent to engage in the activity → ss. 273.1(2) + 273.2 limit cases where this defence can be relied upon].

[Consent in Code]
- S. 273.1(1) = “the voluntary agreement of the C to engage in the sexual activity in question” — consent of C must be specifically directed to each sexual act [not a broad advance consent] + at the time the activity occurs.
- S. 273.1(2)(b) = no consent is obtained if “the C is incapable of consenting to the activity” [can be from mental impairment or due to unconsciousness].
- S. 273.1(2)(e) establishes it is an error of law for the accused to believe that C is still consenting after she expresses a lack of agreement to continue to engage in the activity [express consent = only MR] — supports consent as being a product of a conscious mind.
- MR = consent — A must take reasonable steps to determine whether C was consenting [how can this be possible if C is unconscious?].

Dissent: (Fish J)
- The question should be whether a conscious person can freely + voluntarily consent in advance to sexual activity that will occur if she is briefly + consensually rendered unconscious.
- C freely consented while conscious—s. 273.1(2)(e) suggests C’s consent can be given in advance + remains operative unless revoked [C when regained consciousness did not revoke her consent].
- An explicit request to kiss before work when asleep would not spare the accused from conviction—would dismiss appeal.

R v Mabior 2012 SCC 47

Facts:
- Mabior had sex w/ 9 women who he did not tell he was HIV-positive beforehand – on some occasions he wore condoms, not on others.
- 8/9 women said they would not have had sex with him had they known—none contracted HIV.
- He was charged w/ 9 counts of aggravated sexual assault based on his failure to disclose that he was HIV-positive.
- His defence = he was under treatment + was not infectious/presented a low risk of infection.

59
• Trial judge convicted of 6 counts – acquitted on 3 since he wore a condom + when viral loads are undetectable it does not place a partner at significant risk of bodily harm

Issues:
• Whether an HIV positive person who engages in sexual relations w/o disclosing his condition commits aggravated sexual assault?
• When should non-disclosure of HIV amount to fraud vitiating consent under s. 265(3)(c)?

Decision:
• A person may be found guilty of aggravated sexual assault under s. 273 if he fails to disclose his HIV-positive status before intercourse + there is a realistic possibility HIV will be transmitted
• However, the combined effect of low viral load AND condom use precludes a realistic possibility of transmission

Ratio:
• The realistic possibility of HIV is negated if 1) the accused’s viral load at the time of the sexual relations was low AND 2) condom protection was used

Analysis: (McLachlin CJ)
• R v Cuerrier establishes that failure to advise a partner of one’s HIV status may constitute fraud vitiating consent – because HIV poses a risk of serious bodily harm, the operative offence is one of aggravated sexual assault attracting a maximum sentence of life imprisonment
  o Held that fraud sufficient to vitiate consent under s. 265(3)(c) has 2 elements – 1) a dishonest act [falsehoods or failure to disclose HIV-positive status] and 2) deprivation [denying C knowledge which would have caused her to refused the relations]
• Where there is a realistic possibility of transmission of HIV, a significant risk of serious bodily harm is established + the deprivation element of the Cuerrier test is met
• Significant risk depends on the degree of the harm and risk of transmission – HIV is serious + life threatening
• The realistic possibility of HIV is negated if 1) the accused’s viral load at the time of the sexual relations was low AND 2) condom protection was used
• The combined effect of low viral load + condom use precludes a realistic possibility of transmission

Class Notes:
• There has been criticism on this case by the gay community – if suspect have HIV [could be better off if do not get tested, to prevent committing a crime]

The Mental Element

Pappajohn v The Queen SCC 1980
Facts:
• The accused met with C [real estate agent] to discuss the sale of his house – after a lunch w/ liquor consumed they went to A’s house. C ran naked out the house with a bow-tie around her neck and her hands tied behind her back – she denied any form of consent. A said there had been sexual activity w/ her consent + she only became hysterical once gagged/bound
• Trial judge did not instruct jury that if the accused honestly believed C consented, he should be acquitted – the sole issue left w/ the jury was whether she consented
• Was convicted + an appeal to the CA was dismissed

Issues:
• Is the accused’s perception of consent relevant to a charge under s. 143 of the Criminal Code?
• Should the trial judge have directed the jury that the accused was entitled to an acquittal if the jury found he entertained an honest and reasonably held mistaken belief in the existence of consent?

Decision:
• No – appeal dismissed

Ratio:
• Defence should be available when there is an honest belief in consent, or an absence of knowledge that consent has been withheld – and only when there is sufficient evidence presented by an accused, by his testimony/circumstances in which the act occurred
• Whether the facts give rise to the threshold that allow the judge to direct the jury

Analysis: (McIntyre J)
• In this situation the only realistic issue is the simple issue of consent or no consent – the trial judge was correct in concluding that there was not sufficient evidence to justify putting the mistake of fact to the jury
• To require the putting of the defence of mistaken belief there must be some evidence beyond the mere assertion of belief in consent by counsel for the appellant
• This evidence must be supported by sources other than the appellant in order to give it any air of reality

Dissent: (Dickson J)

• Mistake is a defence where it prevents an accused from having the mens rea which the law requires for the very crime with which he is charged – must be raised as an issue by the accused
• S. 143 imports a mens rea requirement, and the mens rea of rape includes intention, or recklessness as to non-consent of the complainant, a mistake that negatives intention or recklessness entitles the accused to an acquittal
• Defence should be available when there is an honest belief in consent, or an absence of knowledge that consent has been withheld – and only when there is sufficient evidence presented by an accused, by his testimony/circumstances in which the act occurred

[Should the defence of honest but mistaken belief be based on reasonable grounds?]
• Reasonable grounds in not a precondition to the availability of a plea of honest belief in consent, however those ground determine the weight to be given to the defence
• If there was ‘some’ evidence to ‘convey a sense of reality’ to a defence of mistake as to consent, then the jury ought to have been instructed to consider that plea
• The possibility of a mistaken belief in consent in the pre-bondage phase was an issue that should have been placed before the jury - the Judge’s failure to do so makes it imperative that there be a new trial

Notes: 265(4) was added after this case

Sansregret v The Queen SCC 1985

Facts:
• The appellant and the complainant lived together for about year – relationship was violent
• C decided to end the affair + told A to leave
• A broke into her house, she was fearful + in order to calm him down they had intercourse – she made a report to the police but no proceedings were taken – A’s probation officer became involved and he told C not to press the matter
• A few weeks later, A broke into C’s house again and came into the bedroom with a butcher’s knife – he unplugged her phone, made her stand in the doorway while he fixed the window [if the police were to come], threatened to kill her, and hit her on the mouth
• C tried to calm him down + they had intercourse – she swore her consent for the intercourse was solely for the purposes of calming A down and protect herself from further violence
• Trial judge acquitted based on belief in consent expressed by the appellant

Issue:
• Was belief of consent an appropriate defence here?

Decision:
• No - the trial judge made the requisite finding of fact that the appellant was willfully blind but did not apply them according to law

Ratio:
• If willfully blind self to the facts, then using a defence of honest belief of consent will be no defence because in law he is fixed w/ actual knowledge + his belief in another state of facts is irrelevant

Analysis: (McIntyre J)
• Wilful blindness is distinct from recklessness – R involves knowledge of danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur; WR arises where a person who becomes aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth
• WB would have been difficult to apply based solely on the events of one night – however, the earlier episode + complaint of rape clearly reached the accused – no constructive test of knowledge is required
• A was aware of the likelihood of the complainant’s reaction to his threats
• Where the A is deliberately ignorant as a result of blinding himself to reality = the law presumes knowledge → there was no room for the operation of the defence here

Notes: (p. 686)
• Bill C-49 and section 273 + 276 was a response the 1983 reforms

Chapter Thirteen – Homicide

I. Manslaughter
• S. 222 defines the parameters of homicide – a person commits homicide when, directly or indirectly, he causes the death of a human being
• Read in conjunction w/ s. 229, all culpable homicides that are not murder are infanticide or manslaughter
• A homicide occurs whenever a person causes the death of another human (s. 222(1))
• However, not all homicide is culpable (s. 222(2))
• Manslaughter involves killing another human in one of the culpable ways specified by s. 222(5) [means of an unlawful act, by criminal negligence, by causing the human to do anything that causes his death, or by wilfully frightening that human (in case of child or sick person)]
• Life imprisonment is the maximum potential punishment for manslaughter; in murder life imprisonment is automatic – there is no minimum punishment for manslaughter [except where a firearm is used]

222
(1) A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.
(2) Homicide is culpable or not culpable.
(3) Homicide that is not culpable is not an offence.
(4) Culpable homicide is murder or manslaughter or infanticide.
(5) A person commits culpable homicide when he causes the death of a human being,
    (a) by means of an unlawful act;
    (b) by criminal negligence;
    (c) by causing that human being, by threats or fear of violence or by deception, to do anything that causes his death; or
    (d) by wilfully frightening that human being, in the case of a child or sick person.

229 Culpable homicide is murder
(a) where the person who causes the death of a human being
    (i) means to cause his death, or
    (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;
(b) where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being; or
(c) where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.

231
(1) Murder is first degree murder or second degree murder.
(2) Murder is first degree murder when it is planned and deliberate.

II. Second Degree Murder
• The actus reus for manslaughter and murder is exactly the same: directly or indirectly causing the death of another human being, usually be means of an unlawful act – they key differences between the two is mens rea
• S. 229 – culpable homicide is murder
  o a) where the person who causes the death of a human being i) means to cause his death, or ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;
  o b) where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being; or
  o c) where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death

Section 229(a) – Intentional or Reckless Killing

R v Simpson Ontario Court of Appeal 1981
Facts:
• The accused met one victim at a bar, had sex with her, then he strangled her to the point of unconscious
• He attacked the second victim after she left the same bar
Issues:
• The accuracy of the trial judge’s instructions to the jury on the definition of murder in the context of trying to explain the offence of attempted murder

Decision:
• The judge erred in his charge to the jury – appeal allowed

Analysis: (Martin JA)
• The trial judge charged the jury – stating what murder is defined as in s. 229 of the Code
• Either of the intents specified in s. 212(a)(i) and (ii) suffices to constitute the intent required for the offence of attempted murder [but the trial judge incorrectly summarized these]
• Liability under s. 212(a)(ii) is subjective + the requisite knowledge that the intended injury is likely to cause death must be brought home to the accused subjectively
• To substitute this as an intention to cause bodily harm that the accused knows or ought to know is likely to cause death is to impose liability on an objective basis

Class Notes:
• Explains basics of murder charges – subtle difference in jury instruction can make a difference.

R v Cooper SCC 1993
Facts:
• The accused was charged w/ murdering his female acquaintance – he had been drinking w/ her and they got into an argument
• He testified to remembering strangling the victim, but had no recollection after until he woke to find her dead
• The trial judge instructed the jury that once the accused had formed the intent to cause the victim bodily harm, which he knew would likely cause her death, he did not need to be aware of what he was doing at the moment she actually died
• Accused was convicted but the court of appeal found that this instruction was erroneous

Issues:
• Did the trial judge err in its instructions to the jury that once he formed the intent to cause bodily harm, the accused did not need to be aware of what he was doing at the moment the victim actually died?

Decision:
• No – appeal allowed; conviction restored

Ratio:
• Is it sufficient that the intent and the act of strangulation coincided at some point – it was not necessary that the requisite intent of the continue throughout the entire two minutes required to cause the death of the victim
• In order to obtain a conviction under s. 229(a)(ii) the Crown must prove that the accused caused and intended to cause bodily harm that he knew was likely to cause the death of the victim – if death resulted from a series of wrongful acts then it must be established the requisite intent coincided at some point w/ these acts

Analysis: (Cory J)
• S. 229(a)(ii) - ... and is reckless whether death ensues or not
• Reckless = is found in the attitude of one who aware that there is danger that his conduct could bring about the result prohibited by criminal law, nevertheless persists, despite the risk [aka the conduct of one who sees the risk and who takes the chance]
• It is not sufficient that the accused foresee simply a danger of death; he must also foresee a likelihood of death flowing from bodily harm that he is occasioning the victim
• The intent that must be demonstrated in order to convict under s. 229 (a)(ii) has two aspects → 1) a subjective intent to cause bodily harm; and 2) subjective knowledge that the bodily harm is of such nature that it is likely to result in death
• Concurrency between act and mens rea → the guilty mind must be concurrent w/ the impugned act
• However, it does not always need to be completely concurrent – mens rea can be superimposed on an existing act [do act first; MR after]
• This determination of concurrency depends upon the nature of the act – if all occurs in same transaction w/ mens rea then can be sufficient
• Here, the death occurred 30 seconds – 2 minutes after strangulation = it could be reasonably inferred that when the accused grabbed the victim by the neck there was the necessary coincidence of the wrongful act of strangulation + the requisite intent to do bodily harm that the accused knew was likely to cause her death

Class Notes:
• Yes – need subjective intent to cause bodily harm+ subjective knowledge that this harm is of such nature that death is likely. Intention + act must be concurrent for murder, but doesn’t mean they both start at the same time.
Section 229 (b): Transferred Intent

R v Fontaine 2002 Manitoba Court of Appeal

Facts:
  - Accused wanted to commit suicide, and during the course of a high speed chase deliberately drove his car into a parked semi-trailer in the oncoming lane – there were 3 passengers in his car, one was killed
  - The accused was convicted of one count of first-degree murder, two counts of attempted murder, one count of criminal negligence causing death, and one count of criminal negligence causing bodily harm

Issue:
  - Can s. 229 be used when the attempted murder is to commit suicide instead of killing someone else?

Decision:
  - No – appeal allowed
  - Transferred intent only applies when individual wishes to murder someone else and another person is killed.

Ratio:
  - The word of s. 229 are reasonably capable of more than one meaning + given that ambiguity, the statutory interpretation rule of strictly construing penal legislation in favor of the accused would result in a conclusion that s. 229(b) refers to the killing of another + not of oneself
  - Where one act is legal and the other act is illegal, the transfer of intent from one to another should not follow

Analysis: (Steel JA)
  - Murder is a crime of specific intent + by virtue of s. 229 a person will be deemed to have that specific intent when, intending to kill one person, he mistakenly kills another person
  - S. 229 (b) = “Culpable homicide is murder where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause death, and being reckless whether death ensues or not, by accident or mistaken causes death to another human...”
  - SCC principle’s relevant to determine the constitutionality of a mens rea requirement [Creighton]
    - 1) Stigma attached + the available penalties requiring a mens rea reflecting the nature of the crime
    - 2) Whether the punishment is proportionate to the moral blameworthiness of the offender
    - 3) Those causing harm must be punished intentionally must be punished more severely than those causing harm unintentionally
  - The guiding principle underlying the constitutional analysis of fault in criminal law is that the state cannot punish a person as morally blameworthy unless such blameworthiness has been established – must look at the gravity of the conduct + the moral blameworthiness of the offender to determine the extent of the social stigma attached to the crime
  - To accept Brown’s definition and equate the mens rea for suicide w/ murder would offend all 3 principles enumerated by the SCC

Section 229(c): Unlawful Object

- S. 229(c) = culpable murder is homicide where a person, for an unlawful object, does anything he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being
- S. 229 must now be read as though the ‘ought to know’ language is not there [R v Martineau]
- This provision is used mostly when the accused does not intent to harm the victim, but is engaged in the pursuit of an unlawful object

R v Shand (Ontario Court of Appeal 2011)

Facts:
- The appellant, along w/ 2 other individuals, attended the home of a local drug dealer in order to rob him
- At some point after the appellant entered the home he produced a loaded gun, which discharged and killed one of the occupants of the home
- The trial judge charged the jury on s. 229(C) – found him guilty of breaking and entering w/ intent to commit an indictable offence and second-degree murder

Issues:
- Is s. 229(c) unconstitutional?

Decision:
- No – when properly construed, it is constitutional – appeal dismissed
- The trial judge was right to charge the jury on s. 229(c)

Analysis: (Rouleau JA)
- The trial judge charged the jury on s. 229(c) – not necessary to prove Mr. Shand intended to kill Mr. Fraser; must have known the clubbing/discharge of gun in the presence of other people was likely to cause death to another human being
• In *R v Vallaincourt* and *R v Martineau* – the SCC found that the constructive murder provisions, which allowed conviction with objective foresight of death, were unconstitutional — therefore, both the operative portion and the context of s. 229(c) are different than when they were previously considered

• The new context dictates a narrower reading of the section — focused on the requirement that the accused subjectively foresaw that some person’s death was likely

• 2 basic components to the section:
  o 1) the perpetrator being pursuing an unlawful objective
  o 2) doing anything that the person knows is likely to cause someone’s death ("the dangerous act")

• Difference between 229 (a) and (c) is that (c) requires more than proof of an unlawful object – the Crown must also prove that, when the dangerous act was committed, the person knew that death was likely

• S. 229(a) – when the intention is causing the death of the victim or causing bodily harm to the victim knowing that death is likely [no need to carry out further analysis focusing on state of mind of the accused]

• The requirement that the dangerous act be distinct from the unlawful object is a requirement that there be an unlawful object other than the assault on the deceased, in pursuance of which the accused committed the act or acts that caused the death

• If intend to harm/kill someone will likely come within 229 (a) (i) or (ii)

• (C) requires the unlawful object be something other than the harm that is foreseen as a consequence of the dangerous act [if unlawful object was harm/death to the victim (c) will not apply]

• Here, the unlawful object and harm foreseen as a consequence of the danger act are clearly distinct

• **Requirements of s. 229(c)** –
  o 1) The accused must pursue an unlawful object other than to cause the death of the victim or bodily harm to the victim knowing death is likely
  o 2) The unlawful object must be an indictable offence requiring mens rea
  o 3) Must also be something that is done in furtherance of the unlawful object, thought it does not need to constitute an offence in itself
  o 4) The dangerous act must be distinct from the unlawful object, but only in the sense that the unlawful object must be something other than the likelihood of death, which is the harm that is foreseen as a consequence of the dangerous act
  o 5) The dangerous act must be a specific act that results in death – includes a series of closely related acts [not if it is merely loosely connected]
  o 6) Mens rea – must establish the intent to commit the dangerous act knowing that it is likely to cause death [vague realization is not sufficient] (the accused must have subjective knowledge that death is likely to result)

• **HERE** – the unlawful object was robbery + he did carry a gun to the robbery, however this was not his purpose or goal, therefore it is not an unlawful object in the sense used in s. 229(c)

• The dangerous act [must not construe too broadly] = upon entering the basement bedroom and the act of drawing and using his gun in an attempt to subdue the occupants of the room – this act was clearly done in furtherance of the unlawful object [the robbery]

• Did the appellant possess the necessary mens rea at the time he committed the act?
  o If, when he pulled out the gun and used it in the confined space of the bedroom, he knew it was likely to cause death but did so anyways, this would satisfy the MR of 229(c)
  o The determination of the accused’s state of mind is subjective – the question is not what he ought to have known, but what he actually knew + foresaw
  o In determining his state of mind – relevant facts can be considered such as: whether he knew the gun was loaded; whether the safety was on or off; whether he was using the gun to pressure others; the conduct of him as observed by others

• The dangerous act does not need to be distinct in the sense of it being unrelated to the acts carrying out the unlawful object – the DA was the choice to draw the gun in order to subdue the occupants of the room + take the bag of marijuana

Class Notes:

• Unlawful act + dangerous act.

• Unlawful object: act (similar to unlawful purpose in 21(2)) but not same.

• Need unlawful goal: robbing, assassinating etc.

• Unlawful object can be (mostly) different from dangerous act, but doesn’t always have to be. Could intend to harm but kill.

• Dangerous act must be clearly identified. Need not be offence in itself. Needs to be specific act (or series of acts). Must intend to commit dangerous act knowing that death is likely. Panic or other facts that negate knowledge of circumstances mean no mens rea. [see list on bottom 712-13]
Here: robbery unlawful objective. Dangerous act: not using gun for robbery or entering with gun BUT entering bedroom with gun to subdue victim who had fled into bedroom.

Constitutional Considerations
- The felony murder provision was deemed unconstitutional – this provision made it possible for an individual who did not necessarily foresee the subjective likelihood of death to be convicted of murder – w/ respect to s. 213(d) [at issue in Vaillancourt] the Crown was under no obligation to establish any fault requirement in relation to death
- S. 213(d)
  - Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit high treason, piratical acts, hijacking an aircraft, escape or rescue from prison, rape/attempt to commit rape, indecent assault, resisting unlawful arrest, kidnapping/forcible confinement, robbery, breaking and entering, or arson, if
  - d) He uses a weapon or has it upon his person;
    - i) during or at the time he commits or attempts to commit the offence, or
    - ii) during or at the time of his flight after committing or attempting to commit the offence

Vaillancourt v The Queen SCC 1987
Facts:
- The appellant and his accomplice committed an armed robbery in a pool-hall – the appellant was armed w/ a knife and his accomplice w/ a gun
- The appellant told the accomplice not to bring a gun, or to at least empty the bullets out of it [he believed the gun was not loaded]
- During the robbery there was a struggle between the accomplice and a client, a shot was fired and the client was killed – the accomplice escaped + has never been found
- The appellant was arrested at the scene
- V was convicted of second degree murder – he appealed to the Court of Appeal arguing the judge's charge to the jury on the combined operation ss. 213(d) and 21(2) was incorrect – his appeal was dismissed, conviction affirmed
- The appellant has argued that the principles of fundamental justice require that before Parliament can impose any criminal liability there must be some degree of subjective mens rea

Issues:
- Is s. 213(d) alone and in combination w/ s. 21(2) constitutionally valid under ss. 7 and 11(d) of the Charter?

Decision:
- No – Section 213(d) primate facie violates ss. 7 and 11(d)

Ratio:
- All crimes with significant stigma attached, such as culpable homicide and constructive murder, require that the Crown prove objective foresight of death (subjective foreseeability is only mentioned in obiter and therefore not binding).

Analysis: (Lamer J)
- S. 212(a)(i) clearly requires the accused have actual subjective foresight of the likelihood of causing death coupled w/ an intention to cause the death
- This is slightly relaxed in s. 212(a)(ii) however there must be actual subjective foresight of the likelihood of death – however, the Crown does not need to prove the he intended to cause the death, but only that he was reckless whether death ensued or not
- As a general rule – the principles of fundamental justice require proof of a subjective mens rea with respect to the prohibited act in order to avoid punishing the morally innocent
- It is a principle of FJ that a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight
- S. 213(d) does not even meet the lower threshold test of objective foreseeability – therefore, it is a principle of FJ that, absent proof beyond a reasonable doubt of at least objective foreseeability, there surely cannot be a murder conviction
- S. 213 has substituted for proof beyond a reasonable doubt of objective foreseeability, with proof beyond a reasonable doubt of certain forms of intentional dangerous conduct causing death
- S. 213 will catch an accused who performs one of the acts in paras a to d and thereby cause a death but who otherwise would have been acquitted of murder because he did not foresee and could not reasonably have foreseen that death would be likely to result – therefore, s. 213 prima facie violates s. 7 and s. 11(d)
- It is not justified under s. 1 – there is a pressing + substantial objective [deter weapon use in commission of certain offences], however it is not rationally connected to the objective [there are other ways to deter the use or carrying of weapons, but stigmatizing the crime as murder impairs the Charter right]

Dissent: (McIntyre J)
• No principle of FJ is offended only because serious criminal conduct, involving commission of a crime of violence resulting in the killing of a human being, is classified as murder and not in some other manner
• The legislation is a matter for the Parliament + not for the courts

Class Notes:
• Stigma crime (murder, theft, ...) require actual fault – need subjective intent.
• Although objective is sufficiently important (stopping deaths), cannot be saved by section 1, because other ways to achieve objective (stiffer sentences for armed robbery).

R v Martineau SCC 1990

Facts:
• The deceased were deliberately shot by Martineau’s accomplice during a robbery
• M and his accomplice, Trembley went out for the evening armed with a pellet pistol and a rifle – M thought it would be only a “break and enter”
• After robbing the trailer and its occupants, T shot and killed the McLeans – M asked why T killed them and he said they saw our faces, but M was wearing a mask so they could not see his

Issues:
• Is s. 230(a) unconstitutional, and if so can it be saved by section 1?

Decision:
• To label + punish a person as a murderer who did not intend or foresee death unnecessarily stigmatizes and punishes those whose moral blameworthiness is not that of a murderer, and thereby unnecessarily impairs the rights guaranteed by ss. 7 and 11(d) of the Charter – s. 230(a) cannot be saved by s. 1

Ratio:
• Proof of subjective foresight of death is necessary in order to sustain a conviction for murder and s. 230(a) violates the Charter since it does not embrace this requirement
• It is essential to satisfy the principles of fundamental justice that the stigma and punishment attached to a murder conviction be reserved for those who either intended to cause death or intended to cause bodily harm that they know will likely cause death

Analysis: (Lamer CJ)
• S. 230(a) defines culpable homicide as murder where a person causes the death of a human being while committing or attempting to commit a range of listed offences, whether or not the person means to cause death or whether or not he or she knows that death is likely to ensue if that person means to cause bodily harm for the purpose of facilitating the commission of the offence or flight after committing or attempting to commit the offence
• The effect of s. 230 is to violate the principle that punishment must be proportionate to the moral blameworthiness of the offender
• The stigma and punishment attached to the most serious of crimes [murder] should be reserved for those who choose to inflict bodily harm that they know is likely to cause death
• Under s. 1 – it is not necessary [to achieve the objective of deterring the infliction of bodily harm during the commission of certain offences] to convict people of murder who do not intend or foresee the death
• If Parliament wishes to deter people from causing bodily harm during certain offences, then it should punish persons for causing the bodily harm
• The more flexible sentencing scheme under manslaughter [1 day to life] is in accord with the principle that punishment be meted out w/ regard to the level of moral blameworthiness of the offender

Dissent: (L’Heureux-Dube J)
• The test of objective foreseeability is sufficient, and if the test has been met no Charter violation has taken place
• If AR and MR are not considered when assessing level of fault attributable to an offender, then we would see manslaughter as no more-worthy of condemnation than an assault + mere attempts would become as serious as full offences
• Felony murder still exists in US in all but 3 states
• Believes social stigma to be overemphasized – murder vs. manslaughter not significant; duration of imprisonment will not attenuate the stigma
• Do not believe s. 213(a) offends the Charter

Class Notes:
• Note 230(c) was also struck down in R v Sit.
• All of 230 is considered unconstitutional.
First-Degree Murder
- Both first and second degree murder carry a mandatory sentence of life imprisonment, with second the judge may set parole ineligibility between 10-25 years, whereas with first degree ineligibility must be set at 25 years

Section 231(2): “Planned and Deliberate”
- Section 231(2): Murder is first degree when it is planned and deliberate

R v More SCC 1963
Facts:
- The accused was depressed over his financial affairs – he feared this disclosure would be upsetting to his wife, so he planned to kill her and then kill himself
- He succeeded in killing his wife, however failed at his attempted suicide
- Used psychiatric evidence in an attempt to raise a reasonable doubt as to whether he meant to kill his wife + whether the murder was planned and deliberate

Issues:
- Was the killing both planned and deliberate thus warranting a first-degree charge?

Decision:
- No – it was planned, but not deliberate

Ratio:
- Deliberate has to be something more than impulsive – it must be considered, intention, and cautious

Analysis: (Cartwright J)
- The evidence that this murder was planned was very strong, however the jury could not the accused guilty of first-degree murder unless they were satisfied beyond a reasonable doubt that the murder was both planned and also deliberate
- Deliberate = considered, not impulsive
- It was open to the jury to find that the act of the accused was impulsive rather than deliberate when he pulled the trigger
- At this moment, the accused was suffering from a depressive psychosis resulting in an impairment of ability to decide inconsequential things

Class Notes:
- “Planned and deliberate” means considered and not impulsive, intentional, not hast, slow in deciding, cautious, weighing pros and cons, etc.
- Psychiatric condition (depression) could prevent that deliberate aspect.
- Read Section 231 – for first degree murder.
- Note: 229(a)(ii) plus “planned and deliberate” means that committing a crime deliberately that recklessly causes death can result in first degree murder.

Section 231(4): Murder of Police Officer, Etc.
- S. 231(4): Irrespective of whether murder is planned and deliberate on the part of any person, it is first degree when the victim is
  - A) A police officer, police constable, sheriff, deputy sheriff, sheriff’s officer, or other person employed for the preservation or maintenance of public peace, acting in the course of his duties
  - B) A warden, deputy warden, instructor, keeper, jailer, guard, or other officer or permanent employee of a prison, acting in the course of his duties, or
  - C) A person working in a prison with the permission of the prison authorities and acting in the course of his work therein

R v Collins (Ontario Court of Appeal 1989)
Facts:
- The accused was charged w/ first degree murder for killing a police officer
- The officer was on duty and in uniform at the time and was shot by the accused at a very close range
- The accused argued s. 231(4) was unconstitutional and infringed s. 7 because an accused could be convicted of first-degree murder w/o the need to prove planning and deliberation

Issues:
- Is s. 231(4) unconstitutional because it is contrary to the provisions of s. 7 of the Charter?

Decision:
- This section is open to two interpretations - If s. 231(4) is interpreted so that the accused is liable for first degree regardless of whether he knew the victim was one of the so designated persons then it is unconstitutional; however, it is not if the it is proved that the accused knew of the position of the person
• Here, there was evidence to support a finding of knowledge on the part of the appellant – appeal dismissed

Ratio:
• It is necessary that the Crown prove the accused had knowledge of the identity of the victim as one of the persons designated in the subsection and that such person was acting in the course of his duties or was reckless as to such identity and acts of the victim

Analysis: (Goodman JA)
• There can be little doubt that the rationale behind s. 231(4) is to provide additional protection to the persons so designated while acting in the course of their duties as their occupations are extremely dangerous
• Under s. 231(4) there is an onus on the Crown to establish beyond a reasonable doubt that the victim was a person who falls within the designation of the occupations set forth in that subsection to the knowledge of the accused or with recklessness on his part as to whether the victim was such a person so acting
• If the accused did not have to know whether the person was a person who falls within the designation, then there would be no rational or logical reason for imposing a heavier penalty in the case where the murderer killed the person who he did not know and had no reason to know was a police officer

Class Notes:
• If Crown does not have to prove the accused knew the victim was an officer, then this is changed into an objective standard
• Planned/deliberate is not required for a first-degree murder charge here

Section 231(5): “While Committing”
• S. 231(5): Murder is first degree when the death is caused by that person while committing or attempting to commit an offence under one of the following sections;
  o A) hijacking an aircraft; b) sexual assault; c) sexual w/ a weapon; d) aggravated sexual assault; e) kidnapping and forcible confinement; f) hostage taking

R v Russell SCC 2001
Facts:
• The accused was charged w/ first-degree murder on the basis that he caused the death of the victim while forcibly confining another individual, contrary so s. 231(5)(d)
• The accused tied + gagged his girlfriend in her bed, forced her to have sexual intercourse, left her in the bedroom and then went to the basement to beat and stab the deceased to death

Issues:
• Does the deceased have to be the victim of the underlying offence of forcible confinement in order to sustain a charge of first-degree murder under s. 231(5)?

Decision:
• No – appeal dismissed

Ratio:
• The deceased and the victim of the underlying offence of domination do not have to be the same, given that both offences form part of one continuous sequence of events forming a single transaction

Analysis: (McLachlin CJ)
• The language of s. 231(5) is clear – it does not state that the victim of the murder and the victim of the enumerated offence have to be the same
• Nothing in the phrase suggests that the provision’s application is limited to cases in which the victim of the murder and the victim of the enumerated offence are the same – if interpreted the provision to recognize such a limitation it would be reading into the provision a restriction that is not stated
• Other provisions of the Code indicate that where Parliament intends to limit the phrase ‘while committing’ it does so in express language – if intended to restrict could have done so explicitly like it did in other sections
• The essence of the reasoning in Pare was that s. 231(5) reflects Parliament’s determination that murders that are committed in connection with crimes of domination are particularly blameworthy and deserving of more severe punishment
• Can only be convicted under this section if there is a close temporal and causal connection between the murder and the enumerated offence – form part of one continuous sequence of events forming a single transaction [Pare]
Infanticide [Section 233]

- **Section 233**: A female person commits infanticide when by a wilful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed.

**R v LB (Ontario Court of Appeal 2011)**

**Facts:**
- LB was charged w/ 2 counts of first-degree murder – first in 1998 when LB was still a youth and the second in 2002 (as an adult). LB smothered her first child when she was only 6 weeks old – authorities believed it was from SIDS.
- 4 years later LB had a second child whom she smothered in his crib when he was 10-weeks old.
- In 2004, she confessed to killing her 2 children to a physician – she was arrested + gave a statement to the police - she said she was really confused and fighting with her thoughts when she smothered the babies.
- She insisted she wanted to help her children – LB’s own childhood was difficult [her mother was an alcoholic who abused her].
- LB suffered from serious personality disorder prior to her pregnancies – this predisposed her to postpartum mood disturbance.
- Trial judge convicted her of infanticide on both charges – the Crown appealed and sought a new trial on murder charges.

**Issues:**
- Was LB’s mind sufficiently disturbed from the effects of giving birth or the effects of lactation to justify a conviction of infanticide as opposed to murder?
- Is infanticide a substantive offence and a partial defence to murder, or is it exclusively a substantive offence that may be included in a murder offence?

**Decision:**
- Yes – appeal dismissed
- The accused was entitled to be acquitted on murder + charged w/ infanticide unless the Crown could negate the defence of infanticide beyond a reasonable doubt.

**Ratio:**
- To prove infanticide, the Crown must establish the MR associated w/ the unlawful act that caused the child’s death and objective foreseeability of bodily harm to the child from the assault. It is the AR that distinguishes it from murder/manslaughter. The presence of MR for murder is not a condition precedent to the existence of that partial defence.

**Analysis:** (Doherty JA)
- If it is a partial defence – mother is liable to a max penalty of 5 years.
- However, if it is used only if murder is not proven then if the mother is found to have committed murder she must be sentenced to life imprisonment.
- **The definition of infanticide focuses on two things:**
  - 1) It requires a mother-child relationship between perpetrator + victim
  - 2) The mental state of the perpetrator must be disturbed + the disturbance must be connected to the effects of giving birth/lactation [not already depressed/mentally ill]
- No causal connection is required between mental state + decision to cause child’s death.
- The mental disturbance is better considered as part of the AR [not MR].
- S. 222(4) – culpable homicide is murder, manslaughter, or infanticide.
- By using a modern principle of statutory interpretation = Parliament intended to make infanticide a partial defence to murder – it is also a stand-alone indictable offence.
- Cannot read s. 233 as requiring proof of the same MR as required for murder – MR akin to that for manslaughter is more consistent w/ the hierarchy of culpable homicides in the Code.
- MR for infanticide = captures both the mother who intends to kill + the mother who unlawfully assaults her child in circumstances where bodily harm is foreseeable.

**Notes:**
- Infanticide is a separate crime by itself and can ALSO be used as a partial defense to murder.

**Chapter Fourteen – Provocation [Section 232]**

**Introduction**
- Provocation is a partial defence to the offence of murder only – can have the effect of reducing the charge to manslaughter, but cannot result in a complete acquittal.
The accused who successfully pleads provocation escapes the mandatory minimum sentence of life for murder [10-years w/o parole for 2nd degree + 25-years w/o parole for 1st degree]

- No minimum sentence for manslaughter (unless a firearm is used – mandatory 4 years)

S. 232

1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation

2) A wrongful act or insult that is of such nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purpose of this section if the accused acted on the sudden and before there was time for his passion to cool

3) For the purposes of this section, the questions
   a) whether a particular wrongful act or insult amounted to provocation, and
   b) whether the accused was deprived of the power of self-control by the provocation are questions of fact, but not provocation if had the legal right to do so, or anything the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm

4) Culpable homicide that otherwise would be murder is not necessarily manslaughter by reason only that it was committed by a person who being arrested illegally, but the fact that the illegality of the arrest was known to the accused may be evidence of provocation for the purposes of this section

- As with all defences, before the matter can be left to the jury, there must be an air of reality to the claim that the accused acted w/ provocation [Tran] – if the defence is left, the Crown must disprove the existence of provocation beyond a reasonable doubt
- There are criticisms against this defence – provocation’s privileging of anger/rage, its understanding of intense emotion and the responses it can produce, and the deeply gendered nature of the defence

Interpreting and Applying the Provisions

R v Hill SCC 1986

Facts:

- Gordon Hill (aged 16) was charged with committing first degree murder contrary to s. 218(1) of the Code – he was found by the jury to be guilty of second degree murder + sentenced to life w/o parole for 10 years
- Two different stories –
  - Crown → homosexual lovers + Hill killed after a falling out [first by striking in the head, then stabbing]
  - Hill → subject to unwelcome sexual advances while asleep on the Pegg’s [victim] couch and the victim pursued Hill to the washroom at which time Hill swung a hatchet to attempt to scare the victim which hit him in the head – he then ran from the apartment but later returned and was confronted by Pegg who threatened to kill him so he stabbed Pegg to death
- Trial judge charged jury when assessing if an ordinary person would be deprived of self-control by the act, the personal characteristics should not be taken into account
- Appeal court allowed the appeal, set aside conviction, and ordered new trial on basis that the trial judge failed to properly instruct the jury on the attributes that should be described to the ‘ordinary person’

Issues:

- Whether the trial judge erred in law by failing to instruct the jury that if they found a wrongful act/insult they should consider whether it was sufficient to deprive an ordinary person ‘of age and sex of the accused’ of his power of self-control

Decision:

- The trial judge’s charge to the jury on the ordinary person standard in the defence of provocation was correct in law – it was not necessary to direct the jury that the ordinary person means an ordinary person of the same age and sex as the accused – allow appeal + restore conviction

Ratio:

- For characteristics – the collective good sense of the jury will naturally lead it to ascribe to the ordinary person any general characteristics relevant to the provocation in question – features such as sex, age, race [features that are not peculiar or idiosyncratic can be ascribed]; but a judge does not need to explain which specific attributes the jury is to ascribe to the ordinary person

Analysis: [Dickson CJ]

- The Criminal Code codified the defence of provocation by including 3 general requirements under s. 232:
  - 1) The provoking wrongful act/insult must be of such a nature that it would deprive an ordinary person if the power of self-control [objective]
  - 2) The accused must actually have been provoked [subjective]
3) The accused must have acted on the provocation on the sudden and before there was time for his/her passion to cool [subjective]

The Objective Test/Ordinary Person Standard

- Wright v the Queen – while character, background, temperament, idiosyncrasies, or drunkenness of the accused are matters to be accused under the second branch, they are excluded from consideration in the first branch
- The ordinary person is not exceptionally excitable, pugnacious, or in a state or drunkenness
- For characteristics – the collective good sense of the jury will naturally lead it to ascribe to the ordinary person any general characteristics relevant to the provocation in question – features such as sex, age, race [features that are not peculiar or idiosyncratic can be ascribed]
- The central criteria is the relevance of the particular feature to the provocation in question – age is relevant when the accused is a young person
- The trial judge need only charge the jury on the defence of provocation, however it is not necessary to tell the jury which specific attributes it is to ascribe to the ordinary person

Dissent:

- The trial judge should have drawn specific attention to the age of the accused in this case
- Wilson – the jury must be directed to consider any facts which make the wrongful act or insult comprehensible to them in the same way it was comprehended by the accused then measure the accused’s response against the objective standard of the ordinary person similarly situated/insulted

Notes:

- Why objective test? 
  
  need a reasonable standard to measure each person by in order to use this defence – or else the calm, cool individual would not be able to use the defense and would get charged with murder, whereas the hot-headed person would have his/her murder charge reduced to manslaughter

R v Thibert SCC 1996

Facts:

- The accused’s wife was having an affair with a co-worker and told the accused about the relationship – he was distraught and convinced the wife to stay w/ him and make the marriage work
- A few months later, the wife made the decision to leave her husband – that night the accused drove around looking for the hotel his wife was staying at, returned home and loaded a rifle and said he thought about killing the deceased, his wife, or himself
- Met the wife + the deceased the next morning where the accused threatened the deceased
- He went to the wife’s work with the rifle in his car – was trying to convince his wife to go some-place with him to talk – the deceased came out of the office and held the wife by her shoulders, and was saying to the accused ‘you want to shoot me? Go ahead and shoot me. Come on big fellow, shoot me.’
- The accused said the deceased kept coming towards him, ignoring his instructions to stay back and that his eyes were closed as he tried to retreat and the gun discharged
- The appellant was charged w/ first-degree murder after shooting his estranged wife’s lover
- The trial judge failed to instruct that for a defence of provocation, there is no onus on the accused to prove the defence but rather that is rested on the Crown to establish there had not been provocation beyond a reasonable doubt

Issues:

- Was the trial judge correct in leaving the defence of provocation with the jury [if not it is immaterial that he incorrectly charged the jury about the defence]

Decision:

- Yes – it was appropriate for the trial judge to leave this defence with the jury + once it was left, the trial judge was required to correctly relate the principles of reasonable doubt as they applied - appeal allow, direct a new trial

Ratio:

- Before the defence of provocation is left to the jury, the trial judge must be satisfied that a) there is some evidence to suggest that the particular wrongful act or insult alleged by the accused would have caused an ordinary person to be deprived of self-control [objective]; and b) that there is some evidence showing that the accused was actually deprived of his or her self-control by that act or insult [subjective]

Analysis: (Cory J)

- Before the defence of provocation is left to the jury, the trial judge must be satisfied that a) there is some evidence to suggest that the particular wrongful act or insult alleged by the accused would have caused an ordinary person to be deprived of self-control; and b) that there is some evidence showing that the accused was actually deprived of his or her self-control by that act or insult
- **Insult** → an act, or the action, of attacking or assailing; an open and sudden attack or assault w/o formal preparations; injuriously contemptuous speech or behavior; scornful utterance or action intended to wound self-respect; an affront indignity

**The Objective Element**
- *Hill* – particular characteristics that are not peculiar or idiosyncratic can be ascribed the ordinary person – the jury should assess what an ordinary person would have done if subjected to the same circumstances as the accused
- It is also proper for the jury to consider the background between the deceased and the accused
- The ‘ordinary person’ must be of the same age, and sex, and share w/ the accused such other factors including the past history of the relationship between the accused + the deceased, that would give the act or insult in question a special significance and have experienced the same series of acts/insults experienced by the accused

**The Subjective Element**
- The background and the history of the relationship between the parties should be taken into account – the sudden provocation = unexpected and takes the person by surprise and sets passions aflame
- Continuing insults and a desire for revenge can be taken into account as long as the accused had no desire up until immediately before the last minute to kill

**Application**
- Objective → It is appropriate to take into account the history of the relationship between the accused and the deceased – taking this into account a jury could find the actions of the deceased to be taunting and insulting; could be reasonable to find that a married man faced w/ the breakup of his marriage would have been provoked by the actions of the deceased to cause him to lose his power of self-control
- Subjective → the accused had not slept in 34 hours, was devastated, stressed, and suicidal – the deceased was taunting him and charged towards him when he had a gun in his hand + told him to stop – here, rejection is not a significant/overriding factor and will not constitute as a basis for the provocation defence – it is the fact that the appellant sought to avoid the deceased in order to talk privately w/ his wife + that the confrontation in the parking lot was unexpected

*S. 232(3) – Acts of the decease ones which he had a legal right to do?*
- “Legal right” = a right which is sanctioned by law as distinct from something which a person may do without incurring legal liability
- The defence is open to someone who is ‘insulted’ – the conduct of the deceased was not specifically prohibited however it was not sanctioned by any legal right

**Dissent:**
- There is no evidence of a wrongful act or insult sufficient to deprive an ordinary person of the power of self-control
- It would be dangerous precedent to characterize involvement in an extramarital affair as conduct capable of grounding provocation even when coupled w/ the deceased’s reactions to the dangerous situation he faced
- The accused had known about the affair and that his wife wanted to leave him for quite some time – it cannot be said that the accused’s mind was unprepared for the sight of his wife w/ the deceased – there was no element of suddenness in this case
- Would dismiss the appeal

**Class Notes:**
- Trial judge can put question of provocation to jury if there is some evidence of elements 1,2 and 3 (in *Hill* stated as two elements here).
- New trial ordered because judge did not tell jury that provocation could be used as defense and hence be reasonable doubt as to murder.
- What did this case do to objective standard in *Hill*?
  o Starting to push the standard out of the objective realm into a more subjective realm
  o Letting the jury know if there is any evidence of provocation then it should be put to the jury

**R v Tran SCC 2010** [The leading case on the defence of provocation]

**Facts:**
- The appellant entered the locked apartment of his wife unexpectedly and uninvited – the couple had separated a few months earlier; the appellant gave up his keys however secretly kept a set
- The wife was in her bed with her boyfriend when they heard the door open – the appellant attacked both his wife and her boyfriend then ran to the kitchen
- He came back w/ two butcher knives taken from the kitchen – he stabbed the boyfriend once in the chest, then chopped his wife’s hand, slashed her face, then repeatedly stabbed the boyfriend again – 17 times [6 were lethal]
- Trial judge accepted the defence of provocation – reduced to manslaughter; the court of appeal held that the defence had no air of reality + substituted a second-degree murder conviction
Issues:
- Whether the trial judge was correct that the murder should be reduced to manslaughter due to the defence of provocation

Decision:
- No – there was no ‘insult’ within the meaning of s. 232 + if there was an ‘insult’ it could not have struck upon a ‘mind unprepared for it’ as required by law; there was also no air of reality to the appellant ‘acting on the sudden at the time of the killing’ – appeal dismissed

Ratio:
- Must be an air of reality before the defence is put to the jury

Analysis: (Charron J)
- The requirements of s. 232 are most usefully described as comprising two elements – one objective and the other subjective

The Objective Element
- [A wrongful act or insult sufficient to deprive an ordinary person of the power of self-control]
  1) There must be a wrongful act or insult
  2) The wrongful act or insult must be sufficient to deprive an ordinary person of the power of self-control
- S. 232(3) – ‘legal right’ does not include all conduct not specifically prohibited by law → means a right which is sanctioned by law [such as a sheriff proceeding to execute a legal warrant, or a person acting in justified self-defence]
  - The fact that a person may not be subject to legal liability for an insult directed at the accused does not mean he or she has the ‘legal right’ to make the insult w/in s. 232
- The Ordinary Person – characteristics that are not peculiar or idiosyncratic can be ascribed to an ordinary person without subverting the logic of the objective test of provocation → we must be careful not to take into account all characteristics or else the ‘ordinary person’ turns into the accused
- The ordinary person standard must be informed by contemporary norms of behavior – would be appropriate to ascribe to the ordinary person relevant racial characteristics if accused were recipient of a racial slur; but not to ascribe accused as homophobic if subject to homosexual advances
- The particular circumstances in which the accused finds himself are relevant to set the appropriate standard – a matter of common sense – however, must take care not to assimilate circumstances that are peculiar to the individual into the objective standard
- Personal circumstances are relevant for whether the accused was provoked [subjective] – but do not shift the ordinary person standard to suit the accused
- Must make a distinction between contextualizing the objective standard and individualizing it

The Subjective Element
- [The provocation must have caused the accused to lose self-control and act while out of control]
  1) The accused must have acted in response to the provocation, and
  2) On the sudden before there was time for his or her passion to cool
- This inquiry focuses on the accused’s subjective perceptions of the circumstances, including what the accused believed, intended, or knew → the accused must have killed because he was provoked and not because the provocation existed
- Suddenness applies to both the act of provocation + the accused’s reaction to it – the wrongful act/insult must strike upon a mind unprepared for it

Role of Judge and Jury
- Determining if an act amounted to provocation and whether the accused was deprived of the power of self-control are questions of fact → the jury, not the judge, is to determine whether the Crown has discharged its burden of disproving that the killing was caused by provocation
- However, the determination of whether there is an air of reality to a defence is a question of law – whether there is an evidential foundation for a defence
- The judge is only to put forward the defence where the is evidence upon which a ‘reasonable jury acting judicially’ could find the defence succeeds

Application
- Objective – the accused does not suggest he was provoked by a ‘wrongful act’ – rather that his discovery of his wife’s sexual involvement w/ the deceased amounted to an insult at law
  - Here – nothing done by the deceased or by the wife comes close to the definition of insult
  - There was also nothing sudden about the discovery – he both suspected his wife had a relationship w/ another man + made attempts to surveillance her activity
- Subjective – knew that the accused’s anger continued, however trial judge failed to consider whether this anger amounted to a continuing lack of the power of self-control w/o an opportunity to recover from it

Notes:
What does this case do to Thibert and Hill?
  o Thibert – some evidence/any evidence before put to the jury
  o **NOW – ‘air of reality’ → now more modern views of the defence**
  o Cannot just allow any person who walks in on his wife to use the defence of provocation
  o Before goes to jury must be an air of reality

R v Mayuran SCC 2012 [Air of Reality]

Facts:
  o Suganthi immigrated to Canada from Sri Lanka in 2004. She married Mayuran in an arranged marriage earlier that year
  o When she arrived to Canada she moved into an apartment with her husband, his father, mother, younger sister, brother, and brother’s wife (Dayani)
  o In December 2004, she was arrested for the murder of her sister-in-law – she had been stabbed 45 times
  o She apparently confessed to the murder – saying D had ridiculed her about her education level and learning ability – then she apparently denied it

Issues:
  o Whether there was sufficient evidentiary foundation for the defence of provocation to have been put to a jury notwithstanding that it was not raised as a defence at trial

Decision:
  o No – allow appeal and restore conviction
  o This has no air of reality and therefore there was no duty on the trial judge to instruct the jury on this defence

Ratio:
  o **In order for the defence of provocation to have an air of reality in this case, the evidence must be capable of giving rise to a reasonable doubt that an ordinary person in her circumstances would be deprived of the power of self-control when hearing insults about his/her level of education**

Analysis: (Abella J)
  o The ‘air of reality’ test imposes 2 duties on the trial judge:
    o 1) To put to the jury all defences that arise on the facts, whether or not they have been specifically raised by the accused
    o 2) To keep from the jury defences lacking an evidential foundation
  o In determining if a defence has an air of reality to it there must be:
    o 1) Evidence; 2) Upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true
  o There must be a sufficient evidential basis in respect of each component of the defence before it is left to the jury – the evidence must be reasonably capable of supporting the inferences necessary to make out the defence before there is an air of reality to the defence
  o In order for the defence of provocation to have an air of reality in this case, the evidence must be capable of giving rise to a reasonable doubt that an ordinary person in her circumstances would be deprived of the power of self-control when hearing insults about his/her level of education
  o By saying that she was a new immigrant who was trying to integrate quickly therefore heightening her sensitivity insults – would ‘individualize’ the objective element of the test

Notes:
  o Is this an ordinary person test? → The defence is now starting to be narrowed

Provocation and Intent
  o The central issue is whether provocation is a defence that vitiates or compromises the intent for murder, or whether it operates outside the scope of the positive fault requirements for murder as an independent, or ‘free-standing’ excuse
  o In Cameron the accused argued that the objective element of the defence conflicted w/ the constitutional principle that mens rea for murder must be subjective

R v Cameron (Ontario Court of Appeal) 1992
  o The appellant was convicted of second degree murder – he was sentenced to life imprisonment without eligibility for parole for 10 years
  o He appeals this conviction alleging that the defence of provocation contravenes ss. 7 and 11(d) of the Charter by negating an essential element of the mens rea of murder

Analysis:
• This argument misconceives the effect of s. 232 – this section does not detract from or negative the fault requirement for murder, but serves as a partial excuse for those who commit what would be murder but for the existence of the partial defence created by s. 232
• This defence only needs to be considered when the Crown proves beyond a reasonable doubt that the accused committed murder
• This defence serves to reduce homicides committed with the mens rea necessary to establish murder to manslaughter
• S. 232 does not impose liability where subjective fault does not exist, but reduces the liability even when the fault exists
• It also does not place any burden of proof on an accused to disprove anything essential to the establishing of his culpability – the onus is on the Crown to negate provocation beyond a reasonable doubt

Class Notes:
• Provocation can reduce charge from murder to manslaughter – no constitutional problem.
• Mens rea is still subjective. Provocation is a defense or excuse.

R v Parent SCC 2001

Facts:
• Parent shot and killed his estranged wife – she initiated divorce proceedings 4 years earlier and they were involved in litigation over division of their assets – some of which were held in a corporation
• During this time their financial situation deteriorated and Mr. Parent’s shares were seized and put up for sale
• The wife attended the sale – allegedly intending to buy the shares
• Mr. Parent also attended – he also brought a loaded gun
• Ms. Parent suggest they chat and they retired to a nearby room – shots were heard, Mr. Parent shot her 6 times
• He said that while in the room she said to him ‘I told you that I would wipe you out completely’ and then he felt a hot rush and shot her – he said he did not intend to kill his wife
• The judge charged the jury saying “… the influence of events was strong enough to cause the accused not to know or not want what he was doing by reason of his state of mind, that his faculties were too diminished to fully assess the situation, or that raise a reasonable doubt in favor in this respect”

Issues:
• Did the judge err in his instructions to the jury on the effect of anger, creating a ‘defence of anger’ distinct from the defence of provocation?

Decision:
• The trial judge did err in his direction on intention and that the recharge did not eliminate the possibility that this error led the jury to wrongly find the respondent guilty of manslaughter
• Conviction for manslaughter set aside and new trial ordered

Ratio:
• Anger is not a stand-alone defence – it may form part of the defence of provocation when all requirements of the defence are met \(\rightarrow\) the 4 elements

Analysis: (McLachlin CJ)
• The defence of provocation does not eliminate the need for proof of intention to kill, but operates as an excuse that has the effect of reducing murder to manslaughter
• The trial judge is suggesting that anger if sufficiently serious (but not amounting to the defence of provocation) may reduce murder to manslaughter and it may also negate criminal intention for murder
• NO – intense anger enough is not sufficient to reduce a murder charge to manslaughter
• Anger is not a stand-alone defence – it may form part of the defence of provocation when all requirements of the defence are met \(\rightarrow\) the 4 elements
• Anger could in extreme circumstances cause someone to enter a state of automatism in which the person does not know what he is doing therefore negating the voluntary component of the actus reus \(\rightarrow\) AND, IF this defence is successful it would result in total acquittal not a reduction of the charge

Chapter Fifteen – Mental Disorder and Automatism

• The mental disorder defence has the potential to apply to an accused person whose psychiatric or developmental condition renders them unable to appreciate the nature and consequences of their actions or unable to know that their actions are wrong
• Section 16 (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.
See Interpretation section 2:
- mental disorder means a disease of the mind; (troubles mentaux)

- **Section 16(2)** balance of probabilities
- **Section 16(3)** burden is on accused

**PROCEDURAL ELEMENTS OF THE MENTAL DISORDER DEFENCE**

**Fitness to Stand Trial**
- **Section 2**: “unfit to stand trial” means unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and in particular, unable on account of mental disorder to
  - a) Understand the nature or object of the proceedings,
  - b) Understand the possible consequences of the proceedings, or
  - c) Communicate with counsel
- **Section 672.22** An accused is presumed fit to stand trial unless the court is satisfied on the balance of probabilities that the accused is unfit to stand trial
- **Section 672.23(1)** Where the court has reasonable grounds, at any stage of the proceedings before a verdict is rendered, to believe that the accused is unfit to stand trial, the court may direct, of its own motion or on application of the accused or the prosecutor, that the issue of fitness of the accused be tried
  - (2) An accused or a prosecutor who makes an application under (1) has the burden of proof that the accused is unfit to stand trial
- **Section 672.32 (1)** A verdict of unfit to stand trial shall not prevent the accused from being tried subsequently where the accused becomes fit to stand trial
  - (2) The burden of proof that the accused has subsequently become fit to stand trial is on the party who asserts it and is discharged by proof on the balance of probabilities

**R v Whittle SCC 1994**
Analysis: (Sopinka J)
- By virtue of s. 16 of the criminal code, people suffering from a disease of the mind in the circumstances defined in that section are exempted from criminal liability and punishment
- However, these people are not exempt from being tried – there are detailed provisions in the Code providing for mental assessments by physicians and for determination of the fitness of these persons to stand trial
- Just because an accused is found to be mentally ill under s. 16 does not mean he/she is unfit to stand trial
- The test for fitness [s. 2] requires limited cognitive capacity to understand the process and to communicate with counsel
- The “limited cognitive capacity” test strikes a balance between the objectives of the fitness rules and the constitutional right of the accused to choose his own defence and to have a trial within a reasonable time
- Provided the accused possesses this limited capacity, it is not a prerequisite that he/she be capable of exercising analytical reasoning in making a choice to accept the advice of counsel/in coming to a decision that best serves her interest

**Who Can Raise the Mental Disorder Issue?**

**R v Swain SCC 1991**
Analysis: [Lamer CJ]
- In circumstances where the accused’s own evidence tends to put his or her mental capacity for criminal intent into question, the Crown will be entitled to put forward its own evidence of insanity + then trial judge can charge the jury on s. 16
- The objective of the common law rule that allows the Crown (in some cases) to raise evidence of insanity over and above the accused’s wishes is twofold
  - 1) To avoid the conviction of an accused who may not be responsible on account of insanity, but who refuses to adduce cogent evidence that he was insane [both to avoid unfair treatment of the accused but also at maintaining the integrity of the criminal justice system]
  - 2) The protection of the public from the presently dangerous persons requiring hospitalization
- These objectives could not be met without unnecessarily limiting Charter rights if the existing common law rule were replaced with a rule that would allow the Crown to raise independently the issue of insanity only after the trier of fact had concluded that the accused was otherwise guilty of the offence charged
This would mean that the issue of insanity would be tried after a verdict of guilty had already been reached but prior to a conviction being entered

- Under the new common law rule there will only be 2 instances in which the Crown will be entitled to lead evidence of insanity
  - 1) The Crown may raise evidence of insanity after the trier of fact has concluded that the accused is otherwise guilty of the offence charged – this cannot interfere with conduct of the accused’s defence because the Crown’s ability to do so will not be triggered until after the accused has concluded his or her defence
  - 2) The Crown may raise evidence of insanity if the accused’s own defence has put the accused’s capacity for criminal intent in issue

[La Forest J]

- Not sure that such a modified common law rule can survive full Charter scrutiny
- Allowing the Crown to raise insanity during the course of trial [even if conditional] still infringes upon the accused’s right to control his defences – nor can it satisfy the minimal impairment branch of Oakes test [not the least intrusive means]
- Would be better if the issue of insanity was raised at the conclusion of the trial in cases where the defences put forward by the accused have been rejected and the essential elements have been established by the prosecution beyond a reasonable doubt – at this point either party should be free to raise the issue

Burden of Proof

R v Chaulk SCC 1990
[Here it was found that s. 16(4) – ‘everyone shall until the contrary proven be presumed to be and to have been sane’ violated s. 11(d) of the Charter but was reasonable under s. 1]

Analysis: (Lamer CJ)

- The presumption of sanity violates the presumption of innocence
- If an accused has been found to be insane at the time of the offence he will not be found guilty – therefore, the fact of insanity precludes a verdict of guilty
- S. 16(4) allows a factor which is essential for guilt to be presumed rather than proven by the Crown beyond a reasonable doubt – and requires accused to disprove sanity (prove insanity) on a balance of probabilities – it violates the presumption of innocence because it allows a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused
- However, s. 16(4) limits s. 11(d) as little as reasonably possible – there is proportionality between the effects of the measure and its objective – therefore it is a reasonable limit which can be upheld under s. 1

[McLachlin J]

- Held that s. 16(4) did not violate s. 11(d). The presumption of innocence found in s. 11 is merely another way of expressing the principle that the Crown must prove an accused’s guilt beyond a reasonable doubt
- The presumption of sanity does not affect the prosecution’s burden to prove beyond a reasonable doubt everything that constitutes guilt
- The presumption of sanity merely relieves the Crown from establishing that the accused has the capacity for rationale choice which makes attribution of criminal responsibility and punishment morally justifiable – the Crown must still prove the guilt of the accused beyond a reasonable doubt

Dissent: [Wilson J]

- Provision violated s. 11(d) and could not be justified under s. 1
- Not justified → Legislature has not proven that it was aimed at a pressing and substantial concern and has not even succeeded in establishing a likelihood of it arising
  - Would have to show that perfectly sane persons who had committed crimes were in significant numbers escaping criminal liability on tenuous insanity pleas + something should be done about it
  - Rare to use the insanity defence – fraction of 1% of all felony cases

Consequences of Mental Disorder as a Defence

Winko v British Columbia (Forensic Psychiatric Institute) SCC 1999
Issues:

- The appellant submits Part XX.1 violates his rights to liberty, security of the person, and equality of interests
Decision:

- Part XX.1 protects the liberty, security of the person, and equality of interest of those who are NCR by requiring that an absolute discharge be granted unless the court or Review Board is able to conclude that they pose a significant risk to the safety of the public
- This new regime does not violate ss. 7 or 15 of the Charter

Analysis: (McLachlin J)

- R v Swain struck down the provision for automatic, indefinite detention of an NCR accused on the basis that it violated s. 7 liberty rights
- In response to Swain, Parliament introduced Part XX.1 which reflected an entirely new approach to the problem of the mentally ill offender – rejects that the only alternatives are conviction or acquittal and proposes a third alternative → once a person is found to have committed a crime while suffering from a mental disorder that deprived him or her of the ability to understand the nature of the act or that it was wrong, is diverted into a special stream
- Thereafter – the court or a Review Board conducts a hearing to decide whether that person should be kept in a secure institution, released on conditions, or unconditionally discharged
- Emphasis on protecting the public and also treating the mentally ill offender fairly and appropriately
- S. 672 lays out the requirements for an NCR person
- Review Board can only order psychiatric/other treatment if the NCR consents + RB considers it to be reasonable and necessary (672.55(1))
- Board must have a hearing within 12 months of making an disposition other than an absolute discharge (672.81(1)), also when restrictions on the liberty of the accused are increased significantly (672.81(2))
- Can also review at any time on request of accused or any other party (672.82(1)) – can also appeal a decision made (672.82(2))
- New alternative for them – assessment and treatment

S. 672.54

(A) Where a verdict of NCR has been rendered and according to the RB the accused is not a significant threat to safety of the public, then the accused should be discharged absolutely
(B) The accused be discharged subject to such conditions as the court of RB considers appropriate
(C) By order direct that the accused be detained in custody in a hospital subject to such conditions as the court or RB considers appropriate

MENTAL DISORDER AS A DEFENCE

S. 16

(1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong
(2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of (1), until the contrary is proved on the balance of probabilities
(3) The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue

Mental Disorder or Disease of the Mind

Cooper v The Queen SCC 1980

Analysis: (Dickson J)

- Disease of the mind is a legal term – it is within the province of the judge to determine what mental conditions are within the meaning of that phrase and whether there is any evidence that an accused suffers from an abnormal mental condition comprehended by that term
- If there is any evidence the accused did suffer such a disease in legal terms, the question of fact must be left with the jury
- In a legal sense “disease of the mind” embraces any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion – in order to support a defence of insanity the disease must be of such intensity as to render the accused incapable of appreciating the nature and quality of the violent act or of knowing that it is wrong

R v Bouchard-Lebrun SCC 2011 [Intoxication/Drugs]

Facts:

- The appellant brutally assaulted two individuals while he was in a psychotic condition caused by chemical drugs he had taken a few hours earlier
• The drug he took had an unanticipated effect on him – it caused complete dissociation between the appellant’s subjective perceptions and the objective reality
• He experienced an episode that might be described as a ‘religious delirium’
• He seriously injured one of them by stomping on his head – the victim suffered serious and permanent harm
• It is not in dispute that the appellant was in a serious psychotic condition at the time of the attacks
• The appellant had never experienced a psychotic episode such as this before, he had no underlying disease of the mind, and he was not addicted to a particular substance

Issues:
• Does a toxic psychosis that results from a state of self-induced intoxication caused by an accused persons use of chemical drugs constitute a ‘mental disorder’ within the meaning of s. 16?

Decision:
• The appellant was not suffering from a mental disorder for s. 16 at the time he committed the assault
• Appeal dismissed

Ratio:
• **A malfunctioning of the mind that results exclusively from self-induced intoxication cannot be considered a disease of the mind in the legal sense since it is not a product of the individual’s inherent psychological makeup**

Analysis: (Lebel J)
• The criminal law relies on a presumption that every person is an autonomous and rational being whose acts and omissions can attract liability – however, this presumption can be rebutted by proving that the accused did not have the level of autonomy or rationality required to attract criminal liability (insanity is an exception to the general principle)
• An insane person is incapable of morally voluntary conduct – their actions are not a product of the person’s free will
• An accused must prove on a balance of probabilities that at the material time he/she was suffering from a “mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing it was wrong…” (s. 16(1))

**There is a 2-stage statutory test:**

  - 1) **Characterizing** the mental state of the accused – whether the accused was suffering from a mental disorder in the legal sense at the time of the alleged events
  - 2) The **effects of the mental disorder** – it must be determined whether, owing to the mental condition, the accused was incapable of knowing the act or omission was wrong

• The ‘mental disorder’ concept continues to evolve so it can be adapted to advances in medical science, therefore it will never be possible to define an exhaustive list of the mental conditions that constitute a ‘disease of the mind’
• ‘Disease of the mind’ is a legal concept with a medical dimension – whether a condition is a medical disorder is a question of law to be decided by the trial judge and in a jury trial, the judge decides this – expert’s opinions have little or no evidentiary value
• The courts should exercise caution where an accused’s person’s mental condition was closely related to an episode of intoxication
• There must be a contextual approach intended to strike a fair balance between the need to protect the public from persons whose mental state is inherently dangerous and the desire to impose criminal liability solely on persons who are responsible for the state they were in at the time of the offence
• This means that a court must base its analysis on the particular circumstances of the case before it – therefore, toxic psychosis cannot always be suggested to be a disease of the mind
• Temporary psychosis is covered by the exclusion from Cooper – however, this can be rebutted if accused shows that he/she was suffering from a disease of the mind that was unrelated to the intoxication-related symptoms
• Must do the analysis on a case-by-case basis

Class Notes:
• No –general rule (stated in Cooper) is that self-induced ‘disease of the mind’ by alcohol or drugs does not count.
• Individuals presumed autonomous, rational, and sane who can distinguish right from wrong.
• Insanity is the general exception to this presumption.
• Need to show:
  - 1. Accused suffering mental disorder in legal sense at the time of events.
  - 2. The effect of the disorder was that the accused was incapable of knowing the act was wrong (or what accused was doing).
• No issue about whether knew what was happening or distinguishing right from wrong.
• Question is whether this is a legally recognizable mental disorder.
• Mental disorder is a legal term, so do not take medical expert’s word at face value. Rather must:
  - 1. Trial judge has to see what is claimed could be a disease of the mind, legally speaking. Why?
- Determine if it exists – is it a disease in the first place
  - 2. Trial judge looks at specific evidence of case at hand to see if the claimed disease fits into legal framework as applied to accused.
- Context must fit the claimed disease
  - 3. Trier of fact then determines if accused indeed has disease of the mind.
- Self-induced psychosis (and temporary psychosis) excluded from mental disorders.

Appreciating the Nature and Quality of the Act

Cooper v The Queen SCC 1980
Analysis: (Dickson J)
- ‘Appreciating the nature and quality of the act’ makes it clear that cognition is not the sole criterion
- Emotional, as well as intellectual, awareness of the significance of the conduct is in issue
- To appreciate the nature/quality may involve an estimation and understanding of the consequences of the act
- The level of understanding of the act is more than mere knowledge that it is taking place – must appreciate the nature of the act + its consequences
  - This requirement is unique to Canada and is that of perception – an ability to perceive the consequences, impact, and results of a physical act
- The true test is → was the accused person at the time of the offence by reason of disease of the mind unable to fully appreciate not only the nature of the act but the natural consequences that would flow from it?

Class Notes:
- Old common law rule (M’Naghten test): to be truly mental disable must be in such a state where do not know the nature and quality of the act.
- New rule in Sec. 16: appreciate the nature and quality of the act.
- Appreciate is broader than know, so allows for a more robust defense.

R v Abbey SCC 1982
Facts:
- The accused was charged with importing cocaine and possession of cocaine for the purpose of trafficking
- He agreed to buy cocaine in Peru for himself and some friends and upon his return the drug was located in a cursory check by customs officials
- He knew what he was doing was wrong but thought he could was protected from punishment by a higher force
- Both the defence + the Crown psychiatrist agreed he suffered from a disease called hypomania but differed as to whether he was incapable of appreciating the nature and quality of his acts

Issues:
- Is not appreciating the consequences of the penal sanctions the same as not appreciating the nature and quality of the act?

Decision:
- No – the trial judge erred in law in holding that a person who by reason of disease of the mind does not ‘appreciate’ the penal consequences of his actions is insane within s. 16(2)
- Appeal allowed – new trial ordered

Ratio:
- A delusion which renders an accused incapable of appreciating that the penal sanctions attaching to the commission of the crime are applicable to him does not go to the mens rea of the offence, does not render him incapable of appreciating the nature and quality of the act, and does not bring into operation the ‘first arm’ of the insanity defence

Analysis: (Dickson J)
- While he appreciated that he was bringing cocaine into Canada and knew it was wrong, he believed if he was caught he would not be punished
- He is deprived of the ability to assess an important consequence of his act – he is deprived of the effect of the penal sanctions
- ‘Consequences’ refer to physical consequences of the act
- A delusion which renders an accused ‘incapable of appreciating the nature and quality of his act’ goes to the mens rea of the offence and brings into operation the first arm of s. 16(2) – he is not guilty by reason of insanity
- A delusion which renders an accused incapable of appreciating that the penal sanctions attaching to the commission of the crime are applicable to him does not go to the mens rea of the offence, does not render him incapable of appreciating the nature and quality of the act, and does not bring into operation the ‘first arm’ of the insanity defence

Class Notes:
Does he have a disease of the mind? – Yes
Does he have the ability to appreciate right from wrong? – Yes
  o Does not matter that he did not appreciate the nature and quality of the penal sanctions

Knowing That the Act is Wrong
R v Chaulk SCC 1990 [Morally vs. Legally Wrong]
Facts:
  • Chaulk and Morrissette entered a home looking for valuables then stabbed and bludgeoned its sole occupant to death – a week later they turned themselves in making full confessions
  • The only defence raised was that of insanity – they appellant suffered from paranoid psychosis which made them believe that they had the power to rule the world and that the killing was a necessary means to that end – they believed they were above the ordinary law
  • The accused appealed from the judgment at the MB CA which dismissed their appeals from convictions for first-degree murder
  • Trial judge said the insanity defence was not available pursuant to the 2nd branch of 16(2) because said the appellants knew at the time that the act was contrary to the laws of Canada

Issues:
  • The interpretation of the word ‘wrong’ found in s. 16(2) and the capacity of the accused person to know that a particular act or omission is wrong

Decision:
  • ‘Wrong’ can include knowing an act is morally wrong as well as legally wrong
  • Order a new trial

Ratio:
  • A person may know that an act is contrary to the formal law but by reason of disease of the mind is at the same time incapable of knowing that the act is morally wrong in the circumstances according to the moral standards of society
  • Broadening the definition of “wrong” from only included what is legally wrong to also morally wrong as well

Analysis: (Lamer CJ)
  • Trial charge – “…rendered him incapable of knowing that his act was wrong”
  • The trial judge interpreted the word ‘wrong’ as a criminal act or legal wrong
  • Appellants argue it should mean ‘morally’ wrong
  • ‘Wrong’ was determined in Schwart → the capacity to know that an act is wrong in this context means no more than the capacity to know that what one is doing is against the law of the land
  • Dickson dissented + said it would include morally wrong – and this interpretation would not open up the insanity defence to a greater number of accused
    o 1) What is illegal and what breaches society’s moral standards does not often differ; 2) moral wrong is not to be judged by the personal standards of the offender but by his awareness that society regards the act as wrong
    o An offender is not free to substitute his own sense of morality for that of society but is to be acquitted if he is incapable of knowing that society generally considers a particular act to be immoral
  • A person may know that an act is contrary to the formal law but by reason of disease of the mind is at the same time incapable of knowing that the act is morally wrong in the circumstances according to the moral standards of society
  • 1) The incapacity to make moral judgements must be causally linked to a disease of the mind – must establish a serious mental disorder and 2) moral wrong is not to be judged by the personal standards of the offender but by his awareness that society regards the act as wrong
  • An accused will be protected by 16(2) if he is incapable of understanding that the act is wrong according to the ordinary moral standards of reasonable members of society

Dissent: (McLachlin J)
  • Does not matter whether the capacity relates to legal vs. moral wrongness – all that matters is whether the accused is capable of knowing that the act was in some sense ‘wrong’
  • The issue of making the test for criminal responsibility where the incapacity is caused by mental illness as the capacity to appreciate moral wrong is that there will have to be a determination of what society’s moral judgment will be in every situation

R v Oommen SCC 1994 [Applying Knowledge to Case at Hand]
Facts:
  • The accused suffered from a paranoid delusion and believed that the woman he repeatedly shot was part of a conspiracy that was coming into his house to kill him. He shot her as she was asleep on a mattress in his apartment
• Oommen had been suffering from a mental disorder described as a psychosis of a paranoid delusional type + therefore he harbored beliefs he was the butt of conspiracies and situations that endangered him – he was hospitalized 3 times for it
• He believed the victim was pretending to be asleep because she wanted to kill him
• The trial judge held the accused was not entitled to the mental disorder defence because he had the capacity to know that society in general would regard his acts as wrong even though 'subjectively the accused did not believe his act to be wrong’ and ‘he believed that he had no choice to do anything but what he did’
• He was convicted of second degree murder w/ life and no parole for 10 years
• The Court of Appeal set aside conviction and ordered a new trial

Issues:
• Did the accused’s delusion exempt him from criminal responsibility on the ground that he lacked the capacity to know the difference between right and wrong?

Decision:
• Yes, the accused’s mental disorder deprived him of the capacity to know his act was wrong by the standards of the ordinary person. Appeal dismissed

Ratio:
• The focus on 16(1) is not that the accused knows the act of killing is wrong, but that the act ‘committed’ or omission ‘made’ at issue is wrong at the time of committing it. S. 16(1) embraces not only the intellectual ability to know right from wrong, but the capacity to apply that knowledge to the situation at hand

Analysis: (McLachlin J)
• Dr. Trichard testified that a person suffering from this disorder would know the difference between right and wrong, however the delusions would affect the interpretation of events so that the individual would honestly believe killing to be justified under the circumstances
• Here, Oommen possessed the general capacity to distinguish right from wrong however on the night of the killing his delusions deprived him of the capacity to know that killing the victim was wrong + that his delusions led him to believe the killing was necessary and justified
• Trial judge said he knew right from wrong however subjectively he did not believe his act to be wrong – but still found that in view of the general capacity to know right from wrong he was not relieved from responsibility under s. 16(1)
• The accused must possess the intellectual ability to know right from wrong in an abstract sense, but must also possess the ability to apply that knowledge in a rational way to the alleged criminal act
• The focus on 16(1) is not that the accused knows the act of killing is wrong, but that the act ‘committed’ or omission ‘made’ at issue is wrong
• The accused accepted society’s views on right vs. and wrong and in accepting those views he was unable because of his delusion to perceive that his act of killing was wrong in the particular circumstances of the case
• This is different from a psychopath who is capable of knowing his/her acts are wrong in the eyes of society and despite this chooses to commit them
• Here, the accused’s mental disorder deprived him of the capacity to know his act was wrong by the standards of the ordinary person

MENTAL DISORDER AND NON-MENTAL DISORDER AUTOMATISM

• Automatism is unconscious and involuntary behavior. In cases where the cause of automatism is not a mental disorder, a successful claim of automatism will result in a not guilty verdict and the freedom of the accused

R v Parks SCC 1992 [Non-Mental Disorder Automatism]
Facts:
• The respondent attacked his parents-in-law killing his mother in law with a kitchen knife and seriously injuring his father in law
• The occurred while both were asleep in bed
• Immediately after R went to police and frantically told them he just killed two people
• At trial he presented a defence of automatism stating the incidents took place while he was sleepwalking
• He had stressful events occurring at the time in his life – however his parents in law always supported him and he had excellent relations with them
• The trial judge put the defence of automatism to the jury – he was acquitted of both murder and attempted murder
• The court of appeal upheld the acquittal

Issues:
• Did the trial judge err by leaving the jury with non-mental disorder automatism?
Decision:
- No - appeal dismissed; acquittal upheld. Non-mental disorder automatism is a **complete defence** so complete acquittal.

Analysis: (Lamer CJ)
- **“Automatism”:** behavior performed in a state of mental unconsciousness or dissociation without full awareness. This is applied to actions or conduct of an individual apparently occurring without will, purpose, or reasoned intention in his part
- Three important points emerge from the testimony of experts: 1) the respondent was sleepwalking at the time of the incident; 2) sleepwalking is not a neurological, psychiatric, or other illness: it is a sleep disorder very common in children and also found in adults; 3) there is no medical treatment as such, apart from good health practices

[La Forest J]
- Only those who act voluntary with the requisite intent to commit an offence should be punished by criminal sanction

**R v Stone SCC 1999**

**Facts:**
- This case involved an accused charged w/ murder and convicted by a jury of manslaughter for stabbing his wife 47 times after she made various insulting comments about the accused including statements that his children with his prior wife were not his and he was a bad lover and she would not sleep with him again
- He claims that nothing more than his wife’s words caused him to enter an automatistic state in which his actions were involuntary
- The accused raise defences of both non-mental disorder automatism and mental disorder automatism

**Issues:**
- Can an accused demonstrate that mere words caused him to enter an automatistic state such that his actions were involuntary and therefore do not attract criminal law sanction?

**Decision:**
- No – appeal dismissed

**Ratio:**
- For mental disorder automatism in order to determine the disease of the mind a holistic approach should be taken which takes into account internal cause factors, the continuing danger factor, and other policy factors

Analysis: (Bastarache J)
- **Automatism:** a state of impaired consciousness rather than unconsciousness in which an individual, though capable of action, has no voluntary control over that action
- **Non-mental disorder automatism:** involuntary action which does not stem from a disease of the mind gives rise to a claim of non-insane automatism and if successful it will entitle the accused to an acquittal
- **Mental disorder automatism:** involuntary action which is found to result from a disease of the mind – this is subsumed under the defence of insanity leading to an NCR verdict
- The legal burden in cases involving claims of automatism must be on the defence to prove involuntariness on a balance of probabilities to the trier of fact – this is justified in order to further the objective behind the presumption of voluntariness
- The assessment of which form of automatism should be left w/ the trier of fact comes down to the question of whether or not the condition alleged by the accused is a mental disorder and what is a disease of the mind is a legal question to be determined by the trial judge
- There are 2 approaches to the disease of the mind inquiry:
  1. **The internal cause theory**
     - In psychological blow automatism evidence of an extremely shocking trigger will be required to establish that a normal person might have reacted to the trigger by entering an automatistic state
     - The accused’s reaction must be assessed from the perspective of a similarly situated individual – therefore, the circumstances of the case must be taken into account
     - The objective component of whether the condition claimed is a disease of the mind does not affect the burden of proof on the issue of whether the offence was committed voluntarily and does not violate the Charter because it only applies after a subjective inquiry into whether there is evidence upon which a properly instructed jury could find the accused acted involuntarily
     - This theory is only an analytical tool + is not the definitive answer to the disease of the mind question
     - This theory attempts to strike a balance between the objectives of providing an exemption from criminal liability for morally innocent offenders and protecting the public
  2. **The continuing danger theory**
     - One policy factor that is central to the disease of the mind inquiry is the need to ensure public safety
     - This theory holds that any condition which is likely to present a recurring danger to the public should be treated as a disease of the mind
While a continuing danger suggests a disease of the mind, a finding of no continuing danger does not preclude a finding of disease of the mind
This should be considered as a factor when determining whether a condition should be classified as a disease of the mind

To reflect a holistic approach, it is appropriate to refer to the factors of each theory rather than the theories as a whole along w/ other policy considerations

Dissent: (Binnie J)
Believe the appellant was entitled to have the plea of non-mental disorder automatism left to the jury in this case

R v Luedecke (Ontario Court of Appeal) 2008
Analysis: (Doherty JA)
Stone alters the approach to the characterization of automatism as non-mental disorder automatism or mental disorder automatism in 2 significant ways:
1) Now the trial judge must begin from the premise that the automatism is caused by a disease of the mind and look to the evidence to determine whether it convinces him/her that the condition is not a ‘disease of the mind’ which is the opposite of Parks where the claim succeeded because the Crown failed to prove that the condition was caused by a disease of the mind
2) It refocuses the continuing danger aspect of the multi-factoried approach – and now in evaluating the risk of repetition and danger to the public, trial judges must not limit their inquiry only to the risk of further violence while in an automatistic state

In the pre-verdict stage, social defence concerns dominate these focus on the risk posed by the potential recurrence of the conduct in issue and where that risk exists and combined with the occurrence of the conduct that led to the criminal proceedings it will almost always justify further inquiry into the accused’s dangerousness so as to properly protect the public

In the post-verdict stage, the emphasis shifts to an individualized assessment of the actual dangerousness of the person found NCR-MD – where that personalized assessment does not demonstrate the requisite significant risk, the person must receive an absolute discharge; and even where a significant risk exists, the disposition order must be tailored to the specific circumstances of the individual and must minimize interference with that individual’s liberty

Notes:
Taking holistic approach (individual could do this again), the Court held that trial judge should not have accepted automatism defense.
Should have ordered NCRMD – new trial ordered but defendant pled NCRMD. Then was given absolute discharge

Chapter Sixteen – Intoxication

I. The Common Law Defence of Intoxication
DPP v Beard (House of Lords) 1920 AC 479 ‘
Under the law of England as it prevailed until early in the nineteenth century voluntary drunkenness was never an excuse for criminal misconduct
Should be considered an aggravation rather than a defence
Except in cases where insanity is pleaded, the decisions establish that where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime
If he was so drunk that he was incapable of forming the intent required, he could not be convicted of a crime which was committed only if the intent was proved
In cases falling short of insanity a condition of drunkenness at the time of committing an offence causing death can only, when it is available at all, have the effect of reducing the crime from murder to manslaughter
1) Insanity, whether produced by drunkenness or otherwise, is a defence to the crime charged
2) Evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent
3) Evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime and merely establishing his mind was affected by the drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts

Class Notes:
Old common law rule: being drunk was no defense and it could add to the charges or sentence.
• New English rule: can be defense to specific intent crimes but not necessarily general intent crimes.

• Specific intent: 2 intents — a) intend to do the act; b) in order to do something further
  o Ex. first/second degree murder, assault to maim or wound

• General intent: just intend to do the act
  o Ex. Manslaughter, common assault, sexual assault

R v Bouchard-Lebrun 2011 SCC 58
Analysis: (Lebel J)

• In Beard the H of L stated the principle that intoxication can be raised as a defence in respect of a specific intent offence in certain circumstances and this principle still represents the state of the law in Canada

• In Robinson the SCC held that the third of the rules in Beard which was based on the capacity of the accused to form a specific intent, violated ss. 7 and 11(d) of the Charter because it required a jury to convict even if there was a reasonable doubt that the accused possessed actual intent – the court replaced this rule with one to the effect that intoxication can be a defence if it prevented the accused from forming the actual specific intent to commit the offence

• Can apply the intoxication defence to acquit an accused charged with a specific intent offence or where the nature of the offence so permits to convict the accused of a lesser included offence requiring only general intent

• In Leary it was determined that the principle that the recklessness shown by an accused in becoming voluntarily intoxicated can constitute the fault element needed to find that a general intent offence has been committed – but this was cast aside in Daviault and it was established that an accused person who were in a ‘state akin to automatism or insanity’ at the time they committed an act constituting a general intent offence would be legally entitled to raise a reasonable doubt concerning the required mental element

• Parliament enacted s. 33.1 to ensure that intoxication may never be used as a defence against general intent violent crimes such as sexual assault and assault

Notes:
• 3 key points arise from this passage
  o 1) If a party raises mental disorder on the basis of intoxication the court must initially consider whether the accused meets the requirements of s. 16 – whether suffer from disease of the mind at the time
    ▪ the court should only consider the intoxication defence if s. 16 does not apply
  o 2) Where s. 16 does not apply the court must consider whether s. 33.1 governs this case
  o 3) Case law offers an important clarification to the 3rd Beard principle

Class Notes:
• If party raises mental disorder defense based on intoxication, this is considered under Section 16 jurisprudence (see previous chapter).
  Where not mental disorder, then voluntary intoxication is no defense to general intent crimes (also sec. 33.1)

II. Intoxication and Specific Intent
R v George SCC 1960
Facts:
• A man was violently manhandled – he was badly injured, dumped into a bathtub, and pulled out again for the $22 he had on him – he spent a month in the hospital. The accused said after a drinking period, he came into the house and remembered hitting a man and did not know where he went afterwards
• The trial judge acquitted the accused on the defence of drunkenness – he was so drunk he could not form the intent to do it
• Appeal agreed – if could not form the intent to commit the robbery, then rationally could not form an intent to commit the assault

Issues:
• Should a distinction be drawn between the degree of drunkenness required to negative the intent for robbery and that to negative an intent for common assault?

Decision:
• Yes – evidence that the accused was in a state of voluntary drunkenness cannot be treated as a defence to a charge of common assault. Appeal allowed; verdict of guilty of common assault entered

Ratio:
• Drunkenness may show that wounds were inflicted without any intent to do grievous bodily harm but a man so drunk as to not form an intention to do this while yet in sufficient control of his senses to be able to contemplate some harm is to be found guilty of an unlawful wounding

Analysis: (Ritchie J)
In considering the mens rea a distinction should be made between ‘intention’ as applied to acts done to achieve an immediate end on the one hand (these are not done by accident/through an honest mistake) and acts done with the specific and ulterior motive and intention of furthering or achieving an illegal object on the other hand (these are the product of preconception and are deliberate steps taken towards an illegal goal – a mental process of formulating a specific intent)

The decision of the trial judge constitutes a finding that the accused violently manhandled a man and knew that he was hitting him and in these circumstances, evidence that the accused was in a state of voluntary drunkenness cannot be treated as a defence to a charge of common assault – the drinks did not produce a state of insanity and he knew he was applying force to another person

Fauteux J:
- A distinction is to be made between 1) an intention as applied to acts considered in relation to their purposes and 2) an intention as applied to acts considered apart from their purposes
- In robbery a specific intent must be proved by the Crown, whereas in assault no specific intent is necessary
- The question should be that because of drunkenness, did the accused have the incapability to apply force intentionally – here, could not be possible

Note:
- Only specific intent crimes. Assault is general intent crime – so conviction entered

**R v Bernard SCC 1988 [Sexual Assault]**

Facts:
- The complainant was beaten and intercourse had taken place without her consent
- Accused stated he did force her to have intercourse but did it because he was drunk and when he realized what he was doing he stopped. Trial judge said drunkenness was no excuse to the charge alleged; an appeal to the CA was dismissed

Issues:
- Should voluntary intoxication be a defence to the offence of rape, as a general intent offence and the rule in Leary be overruled?

Decision:
- No – intoxication of no defence to general intent offences

Ratio:
- **Sexual assault is a general intent offence requiring only the minimal intent to apply force**

Analysis: (McIntyre J)
- General intent offence = the only intent involved relates solely to the performance of the act in question with no further ulterior intent or purpose – ex. the minimal intent to apply force in common assault
- Specific intent offence = involves the performance of the AR coupled w/ an intent or purpose going beyond the mere performance of the questioned act – ex. administering poison w/ the intent to kill or assault with the intent to maim or wound
- Drunkenness in the general sense is not a true defence to a criminal act – however, where in a case involving a crime of specific intent the accused is so affected by intoxication he lacks the capacity to form the specific intent required to commit the crime charged, it may apply – however it has no application in crimes of general intent
- In general intent offences, the requisite state of mind may be proved in 2 ways 1) there is a general proposition that triers of fact may infer mens rea from actus reus – ex. common assault from mere application of force; 2) in cases where accused was so intoxicated as to raise doubt to the voluntary nature of his conduct the Crown may meet its evidentiary burden by proving the fact of voluntary self-induced intoxication by drugs or alcohol [this would only be used in the most extreme self-intoxication cases] – use the reckless behavior in attaining that level of intoxication as proof of culpable mental condition

Wilson J:
- Agreement, sexual assault is a general intent offence requiring only the minimal intent to apply force + intoxication is not a defence
- Disagrees that self-induced intoxication may substitute for the mental element required to be present at the time the offence was committed

Dissent: Dickson CJ
- Believes that evidence of self-induced intoxication should be considered by the trier of fact along w/ all other relevant evidence in determining whether the prosecution has proved beyond a reasonable doubt the mens rea required
- The artificial ‘specific intent’ threshold requirement should be abandoned
- Leary runs counter to s. 7 – because the general intent offence is converted into one of absolute liability where proof of AR alone mandates conviction
• Runs counter to s. 11 – fair hearing because wrongful intent is irrebuttable presumed upon showing intoxication and the right to be presumed innocent – guilty intent is presumed upon showing intoxication

III. Extreme Intoxication and General Intent

R v Daviault SCC 1994 [Overturns Leary]

Facts:
• The accused was charged with sexual assault of an elderly woman – he was also a chronic alcoholic
• He testified he consumed 7-8 bottles of beer and brought a 40oz bottle to the complainant at her request but the bottle was found empty
• The accused blood alcohol level was so high (400-600mg per 100 ml of blood) that it would have caused death or coma to an ordinary person
• Expert said this would cause a blackout/lose contact w/ reality and his brain would temporarily dissociate from normal functioning
• The trial judge acquitted on the basis that he had reasonable doubt as to whether the accused possessed the minimal intent necessary to commit the assault
• Appeal allowed on basis that TJ erred in holding that intoxication is a defence to a general intent offence

Issues:
• Can a state of drunkenness that is so extreme that an accused is in a condition that closely resembles automatism or disease of the mind constitute a basis for defending a crime which requires only a general intent?

Decisions:
• Yes – the Leary rule should be applied flexibly

Ratio:
• Leary should be applied flexibly → except in those rare situations where the degree of intoxication is so severe it is akin to automatism or insanity, drunkenness will not be a defence to crimes of general intent and the accused should be shown to establish it on the balance of probabilities
• It is appropriate to place an evidentiary and legal burden on the accused to establish, on a balance of probabilities, that he was in a state of extreme intoxication that was akin to automatism

Analysis: (Cory J)
• The principles in ss. 7 and 11 mandate a limited exception or some flexibility to the Leary rule which would allow evidence of extreme intoxication akin to automatism or insanity to be considered in determining whether the accused possessed the minimal mental element required for crimes of general intent
• To deny even a very minimal mental element is required for sexual assault offends the Charter that is so contrary to the principles of fundamental justice it cannot be justified under s. 1
• Given the minimal nature of the mental element required for crimes of general intent, even those who are significantly drunk will be able to form the requisite mens rea and will be found to have acted voluntarily
• It is only those who can demonstrate they were in such an extreme degree of intoxication that they were in a state akin to automatism and insanity that might expect to raise a reasonable doubt as to their ability to form the minimal mental element required for a general intent offence
• “Drunkenness akin to insanity or automatism” describes a person so severely intoxicated he is incapable of forming even the minimal intent required of a general intent offence
• Further, it is open to the Parliament to fashion a remedy which would make it a crime to commit a prohibited act while drunk
• The rule in Leary is a substantial breach of the Charter, eliminating the mental element of crimes of general intent in situations where the accused is in an extreme state of intoxication – this rule should be applied flexibly

Dissent: (Sopinka J)
• Reject that Leary should be overturned
• Since sexual assault is a crime of general intent, intoxication is no defence to a charge of sexual assault
• The fact an individual voluntarily consumed intoxicating amounts of drugs/alcohol cannot excuse the commission of a criminal offence unless it gives rise to a mental disorder within terms of s. 16
• Changes to the rule are for Parliament and not the court to make

Notes:
• In R v Penno, the SCC held that intoxication could not be a defence to an offence in which it is an element → ex. care and control of a motor vehicle while impaired
Bill C-72

- Amends s. 33.1 which denies the defence of extreme intoxication to any offence of general intent that involves interference or threatened interference with the bodily integrity of another person provided that the act performed in a state of intoxication that shows a marked departure from the standard of reasonable care

The Law today:

- 1) The common law rules in cases such as Bernard that restricts the defence to specific intent offences and the need to classify an offence as specific vs. general continues to apply
- 2) The expanded definition from Daviault applies to general intent offences — this requires expert evidence concerning the nature and effect of the intoxicant and the defence cannot succeed unless proved on a balance of probabilities
- 3) S. 33.1 denies the defence of extreme intoxication to any offence of general intent that involves interference or threatened interference with the bodily integrity of another person provided that the act performed in a state of intoxication that shows a marked departure from the standard of reasonable care

R v SN (2012) NUCJ
[Sharkey J]:

- The real object of s. 33.1 is the protection of women from alcohol-related or intoxicated violence and in turn the preservation of women's equality rights to full participation in Canadian society
- The statistical data showing the extent to which women suffer from intoxicated violence is stunning
- It is rare in this course to see violence against women where the offender is not intoxicated — it is within this context I analyze the legislative objective of s. 33.1

IV. Involuntary Intoxication

R v Chaulk 2007 (NS CA) [Test for Self-Induced Intoxication]

Facts:

- Chaulk broke into MacDougall’s apartment, yelling he was going to kill him and his children – M contained C and then C removed all of his clothes placing them in a pile, he grabbed the female neighbor and grabbed her by her blouse
- The police arrived and C was naked, sweating, and babbling — they took him to the hospital
- He was charged w/ assaulting M; threatening to cause bodily harm; break, enter, committing assault; and mischief by damaging property
- Trial judge acquitted him accepting his defence of non-mental disorder automatism/extreme intoxication
- C said someone at the party he was at gave him a ‘wake-up’ pill — he thought it would help him stay awake; he said within an hour his heart was pounding and he tried to call his mother without success; he had no recollection of the events until he awoke in the hospital around 1030 the next morning

Issues:

- Did the judge err in concluding that C’s intoxicated state was not ‘self-induced’?

Decision:

- Yes – Allow the appeal

Ratio:

- Test for self-induced intoxication:
  - 1) Accused voluntarily consumed a substance which;
  - 2) S/he knew or ought to have known was an intoxicant; and
  - 3) The risk of becoming intoxication was or should have been within his/her contemplation

Analysis: (Bateman JA)

- C’s defence = he committed the crimes while extremely intoxicated and was unable to form the necessary intent to commit the offences; said he thought the pill was a caffeine pill and not acid and therefore it was not self-induced
- Crown = his intoxicated was ‘self-induced’ therefore s. 33.1 precludes his reliance on the defence of extreme intoxication for all but the property offence – says by his accepting the pill he should have known this risked intoxication
- S. 33.1 precludes the defence in the case of self-induced behavior where the offence charged includes as an element, assaultive behavior
- ‘Voluntary intoxication’ = consuming of a substance where the person knew or had reasonable grounds for believing such might cause him to be impaired
- Does not matter that the accused contemplate the extent of the intoxication or intend a certain level of intoxication — it is enough he knows it might be dangerous and is recklessly indifferent with respect to ingestion or as to warnings relating to the effects of ingestion
Chapter Seventeen – Self-Defence

I. Introduction

Section 34

(1) A person is not guilty of an offence if
   a) They believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person
   b) The fact that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat or force, and
   c) The act committed is reasonable in the circumstances

(2) In determining whether the act committed is reasonable in the circumstances the court shall consider the relevant circumstances of the person, the other parties and the act, including but not limited to the following factors:
   a) The nature of the force or threat;
   b) The extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
   c) The person’s role in the incident
   d) Whether any party to the incident used or threatened to use a weapon;
   e) The size, gender, age, gender, and physical capabilities of the parties to the incident;
   f) The nature, duration, history of any relationship between the parties to the incident, including any prior use or threat or force and the nature of that force or threat
      a. F.1 any history of interaction or communication between the parties
   g) The nature and proportionality of the person’s response to the use or threat of force, and
   h) Whether the act committed was in response to a use or threat of force that the person knew was lawful

(3) Subsection (1) does not apply if the force is used or threatened by another person for the purpose of doing something that they are required or authorized by law to do in the administration or enforcement of the law, unless the person who commits the act that constitutes the offence believes on reasonable grounds that the other person is acting unlawfully

II. Interpreting and Applying the Self-Defence Provisions

- The new section 34 sets out elements of the simpler rule for self-defence – a person is not guilty if 3 conditions are met:
  o 1) The accused must ‘believe on [subjective] reasonable grounds [objective] that force is being used against them or another person or that the threat of force is being made against them or another person’
  o 2) An accused must have acted with the subjective purpose of protecting him/herself (or others) from the use of threat of force
  o 3) The act committed by the accused to defend against that force must be reasonable in the circumstances

Subjectivity and Objectivity in Self-Defence

R v Cinous SCC 2002 [Elements for Self-Defence]

Facts:
- The accused was charged w/ murder – he was suspicious that the victim had stolen his revolver and had to tried to avoid him and a third party who had been with them when it disappeared
- The accused heard rumors the victim + third party intended to kill him – they both asked the accused to join them in a theft and the accused said they were behaving suspiciously
- When the victim put on latex gloves (accused thought they were to avoid getting blood on his hands), the accused thinking he would soon he killed shot the victim in the back of the head
- Trial convicted; Court of appeal allowed appeal finding errors in trial judge’s charge on self-defence

Issues:
- Did the trial judge err in the instructions to the jury on self-defence?

Decision:
- No – not all conditions of self-defence were met, therefore it should not have been put to the jury and any errors made in the charge are irrelevant
- Uphold the conviction under s. 686(1)(b)(iii)

Analysis: (McLachlin CJ and Bastarache J)
- Since not all 3 conditions of self-defence were met on the facts here, the defence lacked the ‘air of reality’ required in order to warrant leaving it with the jury – since it should not have been put to the jury, any errors made in the charge are irrelevant
Air of reality test – whether there is evidence on the record upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true

3 elements of self-defence → 1) existence of an unlawful assault; 2) a reasonable apprehension of a risk of death of grievous bodily harm; and 3) a reasonable belief that it is not possible to preserve oneself from harm except by killing the adversary

If any lack an air of reality the defence should not be put to the jury

Subjective element = the accused’s perception of the situation

Objective element = the accused’s belief must be reasonable on the basis of the situation he perceives

First must inquire about the subjective perceptions of the accused, then ask whether those perceptions were objectively reasonable in the circumstances

If a jury could not have reasonably come to the conclusion that the accused’s perceptions were reasonable then the defence should not have been put to the jury

The Putative Evidential Basis for the Defence

The issue is not whether the accused should be believed, but whether if the jury were to accept the construction of the evidence the requisite inferences could reasonably be drawn

Accused’s evidence → heard suspicions, did not take their jackets off when came into his house [leading him to believe they were armed], one put his arm under his coat (means that one is armed); kept latex gloves on while driving; avoided eye contact with him; did not want to call police

1. The Existence of an Assault

The existence of an actual assault is not a prerequisite for self-defence – must ask whether the accused reasonably believed that she/he was being unlawfully assaulted

Up to the jury to decide whether or not the accused actually believed he was about to be attacked and whether or not that perception was reasonable

It is possible for a jury here to conclude that the accused believed he was going to be attacked and that this belief was reasonable

2. Reasonable Apprehension of Death of Grievous Bodily Harm

It must be possible for the jury to reasonably infer from the evidence not only that the accused reasonably believed he was facing an attack but that he faced death or grievous bodily harm from it

The accused’s testimony is unambiguously to the effect that he feared a deadly attack

3. Reasonable Belief in the Absence of Alternatives to Killing

Both subjective and objective – start w/ subjective perceptions of the accused and whether those perceptions were reasonable – must be established that the accused believed he could not preserve himself except by shooting the victim

Next question is whether there is anything in the testimony of the accused on the basis of which a properly instructed jury acting reasonably could infer the reasonableness of the accused’s belief that he had no alternative but to kill the victim

Objectivity – the accused must believe on reasonable grounds that he had no alternative

S. 34(2) does not require the accused rule out a few courses of action other than killing; but the accused must have believed there was no alternative course of action open to him at that time

Here – there is nothing in the evidence to explain why the accused did not wait in the service station, or flee once he left the van

Since there is no evidential foundation for the third element of self-defence under s. 34(2), the whole defence lacks an air of reality

Notes:

Need ‘air of reality’ before allowing jury to hear such a defense.

Must show that three elements of 34(1) [note: under old law, had to show that killing was the only way to save one’s life – now only need to show that killing was reasonable in circumstances]

See facts pleaded on paras. 99-105 pp. 891 – 92 for what defendant claimed were circumstances for self-defense.

[old rule: No need to be actually attacked or assaulted – just reasonable belief that he would be. Not in new rule]

III. Gendered Violence, “Battered Women” and Self Defence

R v Lavallee SCC 1990

Facts:

Abused partner killed her partner after he threatened her after yelling at here and beating her – he was shot in the back of the head as he was walking out of the bedroom

She claimed self-defense and introduced expert testimony about battered women syndrome. She was acquitted of murder by a judge and jury at trial

91
CA reversed and ordered a new trial – evidence of battered women should not be admitted in relation to her plea of self-defense

**Issue:**
- Whether evidence of battered women syndrome should have been allowed in as evidence to the claim of self-defense?

**Decision:**
- Yes – Expert evidence needed to help jury understand what she was going through.
- Appeal allowed and verdict of acquittal restored

**Ratio:**
- **There is a need for expert evidence to show the effects of abusive relationships in order to properly understand the context in which an accused woman killed her abusive spouse in self-defense**
- Must be properly qualified expert [jury does not HAVE to accept this but fairness and integrity demand the jury have the opportunity to hear them]
- Must apprehend death or bodily injury but not necessarily imminent.

**Analysis:** (Wilson J)
- There are two elements of the defence under s. 34(2) of the Code – 1) temporal connection between the apprehension of death or grievous bodily harm and the act alleged to have been done in self-defense; 2) the assessment of the magnitude of the force used by the accused – must believe she could not otherwise have preserved herself from death/bodily harm except by shooting the accused on reasonable grounds.
- Here – 1) the reasonable apprehension of bodily harm = Rust’s threats to kill her once everyone else theft
  - Imminence = ensure the use of force was necessary – must believe had no other choice [cannot be a significant time interval between the original unlawful assault and the accused’s response]
- A battered woman is defined once going through the abuse cycle twice
- Can have the ability to sense/anticipate the nature and extent of the violence of the conduct beforehand
- Here – Russ handed her a shotgun and warned her that if she did not kill him, he would kill her
- The issue is not what an outsider would have reasonably perceived but what the accused reasonably perceived given her situation and her experience
- DO not need to leave home to defend self + it is not up to the jury to pass judgment on the fact the woman stayed in the relationship – this does not forfeit her right to self-defense
- If after hearing the evidence (including expert testimony), the jury is satisfied the accused had a reasonable apprehension of death/grievous bodily harm and felt incapable of escape then it must ask itself what the ‘reasonable person’ would do in such a situation
  - Whether given the history, circumstances, and perceptions of the appellant, her belief that she could not preserve herself from being killed that night except by killing him first was reasonable
- Issue is not whether she is a battered woman but whether she is justified in killing – up to jury to determine whether the accused’s perceptions and actions were reasonable
- Must be properly qualified expert [jury does not HAVE to accept this but fairness and integrity demand the jury have the opportunity to hear them]
- Must apprehend death or bodily injury but not necessarily imminent. Battered women different than barroom brawl. Cumulative effect of years of brutality give context to accused’s apprehension of harm. Lack of reasonable alternative (or her course of action was reasonable today)

**Notes:**
- Canada’s first battered women syndrome defence accepting by the courts. Prior history relevant

**R v Petel SCC 1994 [Past Conduct]**

**Facts:**
- Petel was charged + convicted of second-degree murder in the killing of Raymond
- Raymond worked with Edsell in the drug trade and E lived with P and her daughter + granddaughter – E beat the daughter and threatened the accused
- E went to P’s house, gave her his weapon to hide, weighed some cocaine, and threatened to kill her, her daughter, and granddaughter. After consuming a small amount of drugs, the accused shot and wounded E and perceiving Raymond to be lunging at her, shot and killed him. Trial judge did not charge jury with previous threats – convicted her

**Issues:**
- Were the threats/acts that took place in prior months to this relevant to determine whether the accused acted in self-defence? – Should this past conduct have been given to the jury as relevant to her defence?

**Decision:**
- Yes – appeal dismissed and new trial ordered
Ratio:
- The threats prior to the date form an integral part of the circumstances on which the perception of the accused might have been based

Analysis: (Lamer CJ)
- There are 3 elements of self-defence when the victim has died [Cinous] → 1) the existence of an unlawful assault; 2) a reasonable apprehension of risk of death or grievous bodily harm; 3) a reasonable belief that it is not possible to preserve oneself from harm except by killing the adversary
- The jury must seek to determine how the accused perceived the relevant facts and whether that perception was reasonable – this is objective
- Ask – did the accused reasonably believe in the circumstances that she was being unlawfully assaulted?
- There is no formal requirement the danger be imminent – imminence is only one of the factors which the jury should weigh in determining whether the accused had a reasonable apprehension of danger and a reasonable belief she could extricate herself otherwise than by killing the attacker
- The jury’s attention should not be diverted from the guilt of the accused to an inquiry into the guilt of the victim
- The threats made by E while he lived with the accused are very relevant in determining whether the accused had a reasonable apprehension of danger and a reasonable belief in the need to kill E and R – the threats prior to the date form an integral part of the circumstances on which the perception of the accused might have been based

Notes:
- Prior history relevant – just like in Lavallee

R v Malott SCC 1998 (Relevance of Expert Advice)

Facts:
- Margaret Malott and deceased were common law spouses for 19 years and had 2 children together – M was previously married to a man who violently abused her and their 5 children
- Victim abused M physically, sexually, psychologically, and emotionally – she went to the police but Mr. M was a police informant on drug deals and the police told him of her complaints resulting in an escalation of violence towards her
- Mr. M took their son and went to live with his girlfriend – contact between them continued as he dropped by the house on a regular basis. Mrs. and Mr. M were going to a doctor together – she shot and killed him, then drove to the girlfriend’s house shot and stabbed her [she survived]. Was convicted for second degree murder and attempted murder
- Upheld at appeal

Issues:
- Did the trial judge correctly charge the jury on the issue of battered woman syndrome as a defence to the charge of murder

Decision:
- Yes – trial judge properly charged jury
- Appeal dismissed

Analysis: (Major J)
- Once the defence of self-defence and battered woman is raised, the jury should be made aware of the principles of that defence is dictated by Lavallee – should be informed on how expert evidence may be of use in understanding the following:
  - 1. Why an abused woman might stay in an abusive relationship
  - 2. Nature and extent of violence in a battering relationship (not just by expert) – jury instructed of the violence that existed and the impact on the accused [impact does not need to be proved by expert]
  - 3. Ability to perceive danger from abuser (doesn’t have to be imminent).
  - 4. Whether self-defense was reasonable – whether the accused believed on reasonable grounds that she could not otherwise preserve herself from death or grievous bodily harm

Concurrence:
- Battered woman – is a psychiatric explanation of the mental state of women who have been subjected to continuous battering by their male intimate partners
- Perspectives of women must now equally inform the objective standard of the reasonable person in relation to self-defense

Notes:
- L’Heureux-Dube (concurring): Battered women’s syndrome is not automatic defense, but goes to defendant’s state of mind. Read her concurrence for some of the issues that the syndrome raises

IV. Defence of Property
- The new section 35 provides a single, simple scheme for the defence of property
- Section 35(1) A person is not guilty of an offence if
a) they either believe on reasonable grounds that they are in peaceable possession of property or are acting under the authority of, or lawfully assisting, a person whom they believe on reasonable grounds is in peaceable possession of property; or

b) they believe on reasonable grounds that another person is i) about to enter, is entering, or entered the property without being entitled to do so; ii) is about to take property, is doing so, or just done so; iii) is about to damage/destroy property; or

c) the act that constitutes the offence is committed for the purpose of i) preventing the other person from entering the property or removing from the property; or ii) preventing the other person from taking, damaging, or destroying the property or making it inoperative or retaking the property from that person; and

d) the act committed is reasonable in the circumstances

• (2) Not applicable if other person is entitled its possession by law
• (3) Not applicable if person is doing something authorized by law

Chapter Eighteen – Duress

- Necessity/duress occur when individuals commit crimes under compulsion or coercion
- Necessity arises when circumstances have produced situations of immediate peril that compel the commission of an offence, whereas duress arises when criminal acts are committed by one who is subject to compulsion from another person
- Statutory duress = s. 17

Section 17 → A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if the person believes that the threats will be carried out and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion, but this section does not apply where the offence that is committed is high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson or an offence under sections 280 to 283 (abduction and detention of young persons).

- There is also common-law defense of duress that courts have sometimes used to be broader than Sec. 17 (under Section 7 of Charter) – more broad and no exemptions

I. Relationship Between the Common Law and Statutory Defenses of Duress

Paquette v R (SCC 1977)

Facts:
- During a robbery an innocent bystander was killed by a bullet from a rifle fired by Simard – the robbery was committed by Simard and Clermont who were jointly charged with murder
- The appellant was not present when the robbery was committed or when the shooting occurred but was charged as an accomplice under s. 21(1) – Clermont phoned the appellant for a ride – he told the appellant he wanted him to drive him to the shop because he wanted to rob it and when the appellant refused, Clermont pulled out his gun and threatened to kill him
- The appellant was acquitted under the defence of duress

Issues:
- Whether the exemptions for the defence of duress apply to accomplices (secondary parties)?

Decision:
- No – acquittal restored

Ratio:
- Section 17 only applies to principal offenders – if do not actually commit the offence, then are not restricted by the exemptions

Analysis: (Martland J)
- The exemptions in s. 17 are limited to cases in which the person seeking to rely upon it has himself committed an offence and if a person who actually commits the offence does so in the presence of another party who has compelled him to do the act then if he believes the threats would be carried out he is excused
- Here the appellant did not actually commit the robbery or murder
- If the defence of duress can be available to a person who has aided and abetted in the commission of murder, then clearly it should be available to a person who is sought to be made a party to the offence by virtue of s. 21(2)
Analysis:

- Decision: (Lebel J)
  - Yes – the under inclusiveness of s. 17 infringes s. 7 because the immediacy and presence requirements exclude threats of future harm to the accused or to third parties and it risks jeopardizing the liberty and security interests protected by the Charter and is not justified under s. 1
  - Must be struck down as unconstitutional. Appeal dismissed and acquittal confirmed

- Issues: Whether the immediacy and presence requirements of section 17 are constitutional? Whether restricting the defence of duress accords with Charter rights?

- Facts: Punishing a person whose actions are involuntary in the physical sense is unjust because it conflicts with the assumption that individuals are autonomous and freely choosing agents – it is similarly unjust to penalize an individual who acted in a morally involuntary fashion

- Analysis: Not the purpose of the threat is to compel the accused to commit an offence [SD = attempt to stop victim’s threats; duress = succumbing to the threats by committing an offence]

R v Ruzzic 2001 SCC (Immediacy and Presence Requirements Struck Down)

Facts:
- Heroin was found on the respondent – she was charged with 3 offences – possession and use of a false passport and unlawful importation of a narcotic. She claimed she was acting under duress and should be relieved of criminal liability
- A man approached her when she was walking her dog in Belgrade – each time he approached her he knew more about her although she did not share details of her life with him – his behavior became violent – he burned her arm with a lighter and stuck a syringe into her arm – also coupled with sexual harassment and threats against her mother
- He phoned her and instructed her to meet him where he strapped heroin to her and gave her a false passport and told her to take them to a restaurant in Toronto + if she failed to comply he would harm her mother
- She did not seek police protection because she believed the police in Belgrade were corrupt and would not help her

- Issues: Whether the immediacy and presence requirements of section 17 are constitutional? Whether restricting the defence of duress accords with Charter rights?

- Decision: CA dismissed the Crown’s appeal

- Analysis: (Lebel and Cromwell JJ)
  - Duress is available when a person commits an offence while under compulsion of threat made for the purpose of compelling him or her to commit it – here Ms. Ryan wanted her husband dead because he was threatening to kill her and her daughter, not because she was being threatened for the purpose of compelling her to have him killed
  - The CA erred in law when it found there was no basis that Ms. Ryan should be excluded from relying on the defence of duress

  - There are significant differences among the defences of self-defence, necessity, and duress:
    - 1) Self-defence is based on the principle that it is lawful in defined circumstances to meet force with force but in duress/necessity the victim is generally an innocent third party
    - 2) In self-defence the victim simply attacks or threatens the accused; the motive for the threat/attack is irrelevant but in duress the purpose of the threat is to compel the accused to commit an offence [SD = attempt to stop victim’s threats; duress = succumbing to the threats by committing an offence]
• SD is completely codified by the Code; but duress is partially codified and partly governed by judge-made law
• Rationale underlying duress = moral involuntariness – therefore, it is an excuse for those who are morally blameworthy but acted in a morally involuntary manner
• SD = a justification – the act is considered to be right
• Duress cannot be extended to apply in situations where SD is unavailable – must look at compulsion
• Duress is only available in situations in which the accused is threatened for the purpose of compelling the commission of an offence

Statutory Defence of Duress

There are 4 requirements that remain after Ruzic:
  o 1) Threat of bodily harm or death directed the accused or third party
  o 2) Accused must believe the threat will be carried out
  o 3) Offence must not be on the list of excluded offences
  o 4) Accused cannot be a party to a conspiracy or criminal association such that the person is subject to compulsion

In Ruzic the court analyzed 3 key elements of the common law of duress which now operate in s. 17 alongside the four requirements remaining in the statutory defence
  o 1) No safe avenue of escape
  ▪ Not for people who could have extricated themselves from the situation of duress
  o 2) A close temporal connection
  ▪ A threat too far removed in time would cast doubt on the seriousness of the threat
  o 3) Proportionality
  ▪ The harm caused must not be greater than the harm avoided
  ▪ Objective – accused will adjust conduct based on the nature of the threat

The Common Law Defence of Duress

1) Threat of death or bodily harm
  • Does not need to be directed at the accused – it can be either implied or explicit and the harm threatened must be either death or bodily harm
  • Either present or future

2) Reasonable belief that the threat will be carried out
  • Modified-objective basis – according to a reasonable person similarly situated

3) No safe avenue of escape
  • Modified objective basis – same position and with same personal characteristics/experience would conclude there was no alternative

4) Close temporal connection
  • If the threat is too far removed from the accused’s illegal acts it will be difficult to conclude that a reasonable person similarly situated had no option but to commit the offence – need to see the degree of pressure placed on the accused
  • Ensure that it is reasonable to believe that the threat put so much pressure on the accused that the accused lost the ability to act freely – was it truly involuntary?

5) Proportionality
  • Between the harm threatened and the harm inflicted by the accused –
  • The moral voluntariness of an act is dependent on whether it is proportional to the threatened harm – look at the difference between the nature + magnitude of the harm threatened and offence committed as well as a general moral judgment regarding the accused’s behavior in the circumstances [what does society expect from a reasonable person similarly situated?]
  • This differs from proportionality in necessity [purely objective] here is a modified objective
  • This can be carried out in the future; necessity = imminent threat

6) Accused is not a party to a conspiracy or criminal association whereby the accused is subject to compulsion and actually knew the threats/coercion to commit an offence were the result of this
  • Division of whether knowledge of potential threats/coercion is evaluated on an objective or subjective standard
  • Subjective is more in line with moral involuntariness – if accused voluntarily puts self in position where he/she could be coerced then cannot conclude there was no safe avenue for escape

Differences:
  o Statutory defence applies to principles while common law is available to parties to an offence
  o The statutory version has a list of exclusion; unclear in common law whether those are excluded
  o This means there are certain situations where principles cannot rely on the defence for some offences, where parties to the offence can
II. Duress and Excluded Offences

- Two issues \(\rightarrow\) 1) constitutionality of the exclusion in s. 17 of certain offences for which principal offenders cannot claim duress; 2) whether some offences are excluded from the common law defence of duress, which still applies to parties to an offence

III. Duress and Mens Rea

*R v Hibbert SCC 1995*

**Facts:**
- The victim of the offence was the accused’s friend – the accused said he was forced by the principal offender to accompany him to the victim’s apartment and to lure the victim down to the lobby
- The accused stood by while the principal offender shot the victim
- Accused was acquitted of attempted murder but convicted of aggravated assault
- Appeal dismissed

**Issues:**
- Whether duress negates mens rea and whether accused can rely on duress to escape liability under section 21?
- Can the defence still be used if the accused fails to avail himself of a safe avenue of escape – is this objective or subjective?

**Decisions:**
- Appeal allowed; new trial ordered

**Ratio:**
- The mental states in s. 21 are not susceptible to being negated by duress – cannot say because their acts were coerced they lacked the requisite MR but can have their conduct excused through the operation of the common law defence of duress

**Analysis:** (Lamer CJ)
- Situations where duress ‘negate’ mens rea will be exceptional for the reason that the types of mental states that are capable of being negated by duress are not often found in the definitions of criminal offences
- A person will generally *know* what he/she is doing and likely the consequences of his/her actions – whether it is desired will depend on the circumstances
- 21(1)(b) – ‘does anything for the purpose of aiding any person to commit an offence’
- Here, Purpose = not to incorporate the notion of ‘desire’ into the mental state and that it should instead be synonymous with ‘intention’
- MR under 21(1)(b) is not susceptible of being ‘negated’ by duress
- ‘Intention in common’ for s. 21 = two persons have in mind the same unlawful purpose
- A person who commits a criminal act under threats or death or bodily harm may be able to invoke an excuse-based defence [either stat. in s. 17 or common law – depending on whether charged as principal or party] – regardless of whether or not the offence is one where the presence of coercion also has a bearing on the existence of MR
- The mental states in s. 21 are not susceptible to being negated by duress – cannot say because their acts were coerced they lacked the requisite MR but can have their conduct excused through the operation of the common law defence of duress

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**Chapter Nineteen – Necessity**

I. Necessity and Abortion

*Morgentaler v The Queen SCC [1976]*

**Facts:**
- Doctor performed an abortion and relied on the defense of necessity, because he was worried the woman, whose abortion he performed, would do something foolish if he didn’t perform the procedure.

**Issues:**
- Is this the type of situation where the defence of necessity can arise?

**Decision:**
- No – the defence of necessity was not available for M to perform an abortion on a woman in contravention of the Criminal Code

**Ratio:**
- Defence of necessity is restricted to instances of non-compliance in urgent situations of clear and imminent peril when compliance w/ the law is demonstrably impossible
Analysis: (Dickson J)
- The defence of necessity has been held to permit encroachment on private property in the case of great and imminent danger: ... Necessity has been said to justify pulling down a house to prevent the spread of a fire, or the escape of prisoners from a burning prison .... It has been held that necessity cannot justify killing ... or the stealing of food by a starving man... or the occupancy of empty housing by those in dire need of accommodation ... The courts have been reluctant to give recognition to the doctrine of necessity ... [as] “necessity can very easily become simply a mask for anarchy”. The defence of necessity finds little support in the cases."
- SCC cites: US v Holmes – NOT found = shipwreck and threw passengers overboard to lighten lifeboat
- and R v Dudley and Stephens – NOT found = 2 seamen after 18 days starving adrift in an open boat killed a companion and ate his body [establishes necessity is not available for homicide – English case]
- and Gregson v. Gilbert
- The defence of necessity does not entitle a medical practitioner who wishes to procure a miscarriage because continued pregnancy may endanger life or health or his patient to procure an abortion on his own opinion of the danger to life/health
- A defence of necessity at the very least must rest upon evidence from which a jury could find (i) that the accused in good faith considered the situation so emergent that [failure to act illegally] immediately could endanger life or health and (ii) that upon any reasonable view of the facts compliance with the law was impossible

Dissent: (Laskin CJ)
- Necessity must arise out of danger to life/health and not economic circumstances – although the latter may have an effect in producing the danger to life or health
- It was for the jury to determine whether the harm here was an immediate and physical one

R v Morgentaler, Smoling, and Scott (1985) ONCA
Facts:
- The accused were charged with conspiracy to procure a miscarriage contrary to the Criminal Code – the accused were acquitted and the Crown appealed arguing the defence of necessity should not have been left to the jury

Issues:
- Does the defence of necessity apply here?

Decision:
- No - The defence of necessity was not open to the respondents and the trial judge erred in leaving the defence to the jury

Analysis: (The Court)
- Before the defence of necessity can be available the conduct of the accused must truly be involuntary in the sense ascribed in that term in the precedents cited
- There must also be evidence that compliance with the law was demonstrably impossible and that there was no legal way out
- This defence is not premised on dissatisfaction with the law – the defence knows the law must be followed but there are certain factual situations where a person may be excused for failure to comply with the law – it is the facts of the situation which give rise to the defence

II. The Conceptualization of Necessity as an Excuse or Justification

Perka v The Queen SCC 1984 (Rules for Necessity as an Excuse)
Facts:
- Accused were charged with importing a narcotic and possession of a narcotic for the purpose of trafficking
- This drug smuggling ship faced a hurricane and had to dock in Canada due to engine breakdowns, overheating generators, and malfunctioning navigation devices
- The trial judge acquitted the accused

Issues:
- Does the defence of necessity apply here?

Decision:
- Yes – there was an aim at self-preservation in response to an emergency; they were not engaged in conduct that was illegal under Criminal law at the time the emergency arose and even if they were that alone would not disentitle them to raise the defence

Analysis: (Dickson J)
- As a justification → [seen as rightful] would exculpate actors whose conduct could reasonably have been viewed as ‘necessary’ in order to prevent a greater evil than that resulting from the violation of the law – balance the benefits of
obeying the law and when the balance is in favor of disobeying then the defence exculpates the person who contravenes a criminal statute – do not like this view

- As an excuse → less open to criticism – cannot hold people to strict obedience of laws in emergency situations where normal human instincts would impulse disobedience – acts are still wrongful but in the circumstances are excusable
- Defence of necessity is restricted to instances of non-compliance in urgent situations of clear and imminent peril when compliance w/ the law is demonstrably impossible
- There can be no reasonable alternative
- 1) Imminent peril or danger; 2) no reasonable legal alternative to the course of action he/she undertook; 3) proportionality between the harm inflicted and harm avoided

Rule:
- (1) The defence of necessity could be conceptualized as either a justification or an excuse;
- (2) It should be recognized in Canada as an excuse, operating by virtue of s. 7(3) of the Code
- (3) necessity as an excuse implies no vindication of the deeds of the actor;
- (4) the criterion is the moral involuntariness of the wrongful action;
- (5) this involuntariness is measured on the basis of society’s expectation of appropriate and normal resistance to pressure;
- (6) negligence or involvement in criminal or immoral activity does not disentitle the actor to the excuse of necessity;
- (7) actions or circumstances which indicate that the wrongful deed was not truly involuntary do disentitle;
- (8) the existence of a reasonable legal alternative similarly disentitles;
- (9) the defence only applies in circumstances of imminent risk;
- (10) where the accused places before the Court sufficient evidence to raise the issue, the onus is on the Crown to meet it beyond a reasonable doubt

III. Necessity and the Latimer Case

R v Latimer SCC (2001) [Test for Necessity]

Facts:
- Defendant’s daughter suffered from severe cerebral palsy and was in constant need of treatment and care. He killed her and pled necessity.

Issues:
- Whether these circumstances warranted a defense of necessity?

Decision:
- No – before putting to the jury the defense of necessity, there must be an air of reality
- The test is narrow and of limited application. Conviction for second degree murder upheld

Analysis: (The Court)
- Test:
  - First, there is the requirement of imminent peril or danger.
  - Not enough the harm is foreseeable or likely
  - Second, the accused must have had no reasonable legal alternative to the course of action he or she undertook.
  - No reasonable alternative to disobeying the law – if there was a reasonable alternative there was no necessity
  - Third, there must be proportionality between the harm inflicted and the harm avoided.
  - Cannot excuse the infliction of a greater harm to allow the actor to avert a lesser evil
  - The two harms must be of comparable gravity – one need not clearly outweigh the other
- Use a modified objective test → an objective evaluation but one that takes into account the situation and characteristics of the particular accused persons
- First and second: modified subjective objective: accused honestly perceived certain facts, which must be reasonable → necessity is rooted in an objective standard that takes into account society’s expectation of appropriate and normal resistance to pressure but it is appropriate to take into account personal characteristics that legitimately affect what may be expected of that person
- Third is purely objective (hence question of law) – determining the proportionality threshold is a matter of moral judgment about what we expect people to be able to resist in trying situations – evaluating the gravity of the act is a matter of community standards infused w/ constitutional considerations
- To determine if jury should have been left to consider this defence = air of reality to the defence
  - It is for the trial judge to determine whether the evidence is sufficient to warrant putting a defence to a jury as this is a question of law alone
Is there sufficient evidence that if believed would allow a reasonable jury to conclude the defence applied and acquit the accused

- Here, there was no air of reality to the 3 requirements of necessity
- Not certain whether necessity can be used for killing another person – Dudley and Stephens
- But here, killing someone to relieve suffering from a medically manageable physical/mental condition is not a proportionate response
- No air of reality for any of the 3 requirements – and if even 1 requirement lacks an air of reality if should not be left to the jury

IV. Necessity and Codification

- Necessity remains a common law defence in Canada, preserved by s. 8(3) of the Code
- The Law Reform Commission of Canada proposed a codification of the defence of necessity

Chapter Twenty – Sentencing

I. The Legislative Framework

Sentencing purposes Section 718.

- 718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
  - (a) to denounce unlawful conduct;
  - (b) to deter the offender and other persons from committing offences;
  - (c) to separate offenders from society, where necessary;
  - (d) to assist in rehabilitating offenders;
  - (e) to provide reparations for harm done to victims or to the community; and
  - (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

Objectives—offences against children

- 718.01 When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

Objectives—offence against peace officer or other justice system participant

- 718.02 When a court imposes a sentence for an offence under subsection 270(1), section 270.01 or 270.02 or paragraph 423.1(1)(b), the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

Fundamental principle

- 718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Sentencing Principles 718.2

- 718.2 A court that imposes a sentence shall also take into consideration the following principles:
  - (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
    - (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor, or
    - (ii) evidence that the offender, in committing the offence, abused the offender’s spouse or common-law partner,
    - (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
    - (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
    - (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,
    - (iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or
    - (v) evidence that the offence was a terrorism offence shall be deemed to be aggravating circumstances;
  - (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
• (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
• (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
• (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

Available Sentencing Tools

• Absolute + Conditional Discharge:
  o If an accused is found of an offence for which no minimum punishment is prescribed by law and is not punishable
by 14 years’ or life imprisonment, an absolute or conditional discharge can be given – despite a finding of guilt, no
conviction is registered
  o S. 730 – discharge must be in the best interests of the accused and the public interest
  o A conditional discharge is accompanied by a probation order
• Probation: rehabilitation
  o S. 731 – can be imposed when conditionally discharged, fined, or imprisoned for less than 2 years
  o The maximum duration is 3 years
  o Usually accompanied by conditions – Court discretion
• Restitution: goes to victim
  o S. 738 – required to make restitution for damage to property/body
• Fines: goes to state
  o S. 734(2) – only if offender is able to pay or work to pay off the fine
• Conditional sentences: see next case
  o 742.1 - Serve the sentence in the community subject to the offender’s complying with the conditions

742.1  If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court
may, for the purpose of supervising the offender’s behaviour in the community, order that the offender serve the sentence in the
community, subject to the conditions imposed under section 742.3, if (a) the court is satisfied that the service of the sentence in the
community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles
of sentencing set out in sections 718 to 718.2; (b) the offence is not an offence punishable by a minimum term of imprisonment; (c)
the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life; (d)
the offence is not a terrorism offence, or a criminal organization offence, prosecuted by way of indictment, for which the maximum
term of imprisonment is 10 years or more; (e) the offence is not an offence, prosecuted by way of indictment, for which the maximum
term of imprisonment is 10 years, that (i) resulted in bodily harm, (ii) involved the import, export, trafficking or
production of drugs, or (iii) involved the use of a weapon; and (f ) the offence is not an offence, prosecuted by way of indictment,
under any of the following provisions: (i) section 144 (prison breach), (ii) section 264 (criminal harassment), (iii) section 271 (sexual
assault), (iv) section 279 (kidnapping), (v) section 279.02 (trafficking in persons—material benefit), (vi) section 281 (abduction of
person under fourteen), (vii) section 333.1 (motor vehicle theft), (viii) paragraph 334(a) (theft over $5000), (ix) paragraph 348(1)(e)
(breaking and entering a place other than a dwelling-house), (x) section 349 (being unlawfully in a dwelling-house), and (xi) section
435 (arson for fraudulent purpose).

R v Proulx 2000 SCC

Facts:
• 18-year old accused was convicted of dangerous driving causing death and dangerous driving causing bodily harm – he had
been drinking
• Trial judge = 18-months sentence was appropriate but not a conditional sentence
• Appeal allowed appeal and substituted conditional sentence

Analysis: (Lamer CJ)
• Too many people are being sent to prison – to remedy this problem of over-incarceration the conditional sentence was
introduced
• Available for non-dangerous offenders who would have been sentenced to a term of less than 2 years for offences with no
minimum term of imprisonment
  o 2 stages – 1) judge decides the appropriate sentence according to the general purposes/principles of sentencing
then finding a term of less than 2 years is warranted; 2) decide whether this same term should be served in the
community pursuant to s. 742.1
• The punitive aspect that distinguishes CS from probation – should include punitive conditions that are restrictive of the
offender’s liability
• Breaches of CS – proved on balance of probabilities; breaches of probation – beyond a reasonable doubt
Should be a presumption that if breach condition then remainder served in jail

- Safety in community is viewed as a conditional precedent for whether a CS would be fit
- Courts evaluate danger to community → 1) risk of the offender re-offending; and 2) the gravity of the damage that could ensue in the event of re-offence

Class Notes:

- Conditional sentences 742.1
- Punitive
- No minimum sentence required and less than two-year sentence – allows court to keep watch on defendant but give flexibility to keep out of jail. Safety of community must not be endangered.
- Goals of sentencing: denunciation, deterrence, separation, rehabilitation
- Restorative justice – alternative sentencing techniques
- Conditional: threat of jail meant to control offender’s behavior

R v M(CA) 1996 SCC

Facts:
- Defendant sentenced to 25 years in jail after pleading guilty to numerous accounts of sexual assault and sexual offences against children

Issue:
- Whether retribution can be a factor in sentencing?

Decision:
- Yes – different from vengeance
- Appeal allowed

Ratio:
- Retribution represents nothing less than the hallowed principle that criminal punishment should also be imposed to sanction the moral culpability of the offender
- Retribution represents an important unifying principle by offering an essential link between the attribution of criminal liability and the imposition of criminal sanctions

Analysis: (Lamer CJ)
- Trial judges have a wide ambit of discretion under s. 717 in selecting a ‘just and appropriate’ fixed-term sentence
- In exercising the special discretion, a sentencing judge should generally refrain from imposing a fixed-term sentence which so greatly exceeds an offender’s expected remaining life span
- An appellate court should not be given free rein to modify a sentencing order simply because it feels that a different order ought to have been made – only modification if found the sentence to be clearly unreasonable
- Vengeance = an uncalibrated act of harm upon another, frequently motivated by emotion and anger as a reprisal for harm inflicted upon oneself by that person
- Retribution represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intention, risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender’s conduct – it requires the imposition of a just and appropriate punishment, and nothing more
  - It requires that a judicial sentence properly reflect the moral blameworthiness of that particular offender
  - Denunciation = a sentence should also communicate society’s condemnation of that particular offender’s conduct

R v Song 2009 ONCA

Facts:
- Accused was drug dealer – involved in a large-scale grow operation.
- The Crown sought jail time but the trial judge gave him lenient sentence because he didn’t believe in deterrence value of sentence – gave him a 12-month conditional sentence

Issues:
- Whether judges can use their personal preferences when sentencing?

Decision:
- No – must use objective criteria.
- What could judge have done if he didn’t like system?

Analysis: (The Court)
- The judge made errors in principle – by refusing to apply both the provisions of the Criminal Code and binding jurisprudence that general + specific deterrence be taken into account in arriving at an appropriate sentence in cases of this nature
Judges are entitled to hold personal/political opinions but are not free to allow those views to color or frame their trial and sentencing decisions. This is not a situation where a condition sentence is appropriate – Mr. Song was involved in a large-scale commercial marijuana grow operation involving more than 1400 plants worth a considerable amount of money including theft of a considerable amount of electricity – no issues of ill-health, dire financial need, or addiction. Here, Mr. Song already served the entire sentence imposed on him – and the court is reluctant to send people back to prison in such circumstances.

II. Sentencing of Aboriginal Offenders

R v Gladue SCC 1999

Facts:
- The appellant suspected her fiancé was having an affair with her older sister – she approached him with a large knife in her hand and then he collapsed – she stabbed in once in the chest, the knife penetrated his heart.
- She was charged with second degree murder but pled guilty to manslaughter.

Issues:
- How s. 718.2(e) should be interpreted – should it be remedial in nature or whether it is simply a codification of existing sentencing principles.

Decision:

Analysis: (Cory and Iacobucci JJ)
- S. 718.2(e) is more than a re-affirmation of existing sentencing principles – the remedial component consists of a direction to sentencing judges to undertake the process of sentencing aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case.
- It does not shift the fundamental duty of the sentencing judge to impose a sentence that is fit for the offence/offender – what it does alter it the method of analysis which each sentencing judge must use in determining the nature of a fit sentence for an aboriginal offender.
- It requires alternatives to imprisonment as a penal sanction generally which amounts to a restraint in the resort to imprisonment as a sentence, and recognition by the sentencing judge of the unique circumstances of aboriginal offenders.
- 718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
  - (a) to denounce unlawful conduct;
  - (b) to deter the offender and other persons from committing offences;
  - (c) to separate offenders from society, where necessary;
  - (d) to assist in rehabilitating offenders;
  - (e) to provide reparations for harm done to victims or to the community; and
  - (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.
- Section 718.2(e) directs sentencing judges to undertake the sentencing of aboriginal offenders individually, but also differently, because the circumstances of aboriginal people are unique. In sentencing an aboriginal offender, the judge must consider:
  - (A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
  - (B) 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.
- p. 1016 [summary]

Notes:
- Aboriginal offenders should have their special circumstances presented in sentencing report to judge. This will allow the judge to craft an appropriate sentence.
- 718.2 (e)
- “Section 718.2(e) directs sentencing judges to undertake the sentencing of aboriginal offenders individually, but also differently, because the circumstances of aboriginal people are unique. In sentencing an aboriginal offender, the judge must consider:
  - The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
  - 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.
7. In order to undertake these considerations the trial judge will require information pertaining to the accused. Judges may take judicial notice of the broad systemic and background factors affecting aboriginal people, and of the priority given in aboriginal cultures to a restorative approach to sentencing. In the usual course of events, additional case-specific information will come from counsel and from a pre-sentence report which takes into account the factors set out in #6, which in turn may come from representations of the relevant aboriginal community which will usually be that of the offender. The offender may waive the gathering of that information.”

R v Ipeelee SCC 2012
Facts:
- Two offenders had long criminal records and each declared a ‘long-term offender’
- Both breached conditions of their LTSO
Issue:
- What is the appropriate sentence for this type of breach of condition?
Decision:
- 3-year sentence reduced to 1-year; and the 1-year sentence the CA imposed to be affirmed
Analysis: (Lebel J)
- Do not need to show a causal link between background factors and the commission of the current offence
- Systemic and background factors do not operate as an excuse – they provide the necessary context to enable a judge to determine an appropriate sentence
- The sentencing judge has a statutory duty (imposed by s. 718) to consider the unique circumstances of Aboriginal offenders and failure to apply Gladue in any case involving an Aboriginal offender runs afoul of this statutory obligation
- The Courts below erred in concluding that rehabilitation was not a relevant sentencing objective
- Ipeelee was sentenced to 3 years imprisonment; he breached term of becoming intoxicated → A fit sentence should seek to manage the risk of re-offence he continues to impose to the community in a manner to address his alcohol abuse, rather than punish him for what might have been
  - No evidence he consumed alcohol prior to this
- Taking into account the relevant sentencing principles, that fact this is his first breach and he plead guilty, would substitute a sentence of one year’s imprisonment
- Ladue was sentenced to 3 years imprisonment; CA intervened and substituted a 1-year imprisonment [said trial did not take into account his circumstances as an Aboriginal offender and the objective of rehabilitation ought to have been given greater emphasis; and that a 3-year sentence was not disproportionate to the gravity of the offence + degree of responsibility of the offender]
  - This judgment was well founded – affirm this sentence of 1-year
Notes:
- SCC emphasized its seriousness to lower courts to take Gladue factors seriously and not just pay lip service to them
- “When sentencing an Aboriginal offender, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters provide the necessary context for understanding and evaluating the case-specific information presented by counsel.”

III. Constitutional Considerations
- The guarantee most relevant to sentencing is s. 12 which provides that “everyone has the right not to be subjected to any cruel and unusual treatment or punishment”

R v Smith (Edward Dewey) 1987 SCC (Sentence Proportionate to Offence)
Facts:
- First time offender imported drugs into Canada and was sentenced to seven years.
Issue:
- Whether this violates the prohibition on cruel and unusual punishments?
Decision:
- Yes – sentence must be proportionate to offense.
- S. 5(2) of the Narcotic Control Act [a sentencing provision that mandated a minimum sentence of 7-years imprisonment for importing narcotics] violated the prohibition of cruel and unusual punishment under s. 12 and not justified under s. 1
Analysis: (Lamer J)
In assessing whether a sentence is grossly disproportionate, the court must first consider the gravity of the offence, the personal characteristics of the offender, and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate, or deter this particular offender or to protect the public from this particular offender.

The minimum 7-year fails the proportionality test enunciated above and therefore infringes the guarantees established by s. 12 of the Charter – it is grossly disproportionate when examined in the light of the wide nest cast by s. 5(1).

We do not need to sentence the small offenders to 7 years in prison in order to deter the serious offenders.

Dissent: (McIntyre J)

Sentencing is an imprecise procedure and there will always be a wide range of appropriate sentences – here, Parliament concluded that the gravity of the offence alone warrants a sentence of at least 7 years imprisonment – this does not make the sentencing process arbitrary, nor a cruel and unusual violation of s. 12.

Notes:

- Note: this case and Nur are the only two major cases to strike down sentences as unconstitutional.
- Court display a reluctance to use s. 12 to interfere w/ punishments outlined in the Code.
- In the US, there has also been some movement on mandatory sentencing.

**R v Latimer SCC 2001**

**Facts:**

- Latimer convicted of second-degree murder in the death of his severely disabled daughter – the Code provides a mandatory sentence of life imprisonment for second-degree murder with parole to be set between 10 and 25 years by trial judge.
- The jury recommended 1 year in prison – and the trial judge granted the accused a constitutional exemption from the mandatory sentence and imposed a one-year imprisonment, one-year probation sentence.
- CA affirmed conviction but set aside sentence and imposed the minimum mandatory required by law.

**Issue:**

- Was the 10 year no parole sentence appropriate?

**Decision:**

- Yes – appeal dismissed.

**Analysis: (The Court)**

1. The character of the offender’s actions; and
   - In considering the character of actions – we are directed to an assessment of the criminal fault requirement or mens rea element of the offence rather than the offender’s motive or general state of mind – a greater degree of responsibility or moral blameworthiness is attached to conduct where the accused knowingly broke the law – here, for second-degree murder the mens rea is the subjective foresight of death [the most serious level of moral blameworthiness].
   - The existence of aggravating and mitigating circumstances must be weighed – look at the attempts to conceal his actions, lack of remorse, his position of trust, degree of planning vs. his good character and standing in the community, his tortured anxiety about Tracy’s well-being, and perseverance as a caring parent.
   - Considered together the personal characteristics/circumstances of the case cannot displace the serious gravity of the offence.

2. The consequences of those actions
   - Murdering daughter.

The objective of denunciation mandates that a sentence should communicate society’s condemnation of that particular offender’s conduct + this becomes much more important in the consideration of sentencing in cases where there is a high degree of planning and premeditation and where the offence and its consequences are highly publicized so like-minded individuals may be deterred by severe sentences.

Notes:

- The fundamental principle of sentencing is that the sentence must be proportionate to both the gravity of the offence and the degree of responsibility of the offender [proportionality].