CRIMINAL LAW

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INTRODUCTION TO CANADIAN CRIMINAL LAW

The Adversary System vs The Inquisitorial System:

The roles of the criminal justice system's personnel are bounded by this model. Applies best to trial proceedings and is a form of conflict resolution.

4 main features:

1. The triers of fact and law have relatively passive and neutral roles (the judge)
    a. Trier of fact is either judge or jury, trier of law is always judge
2. Counsel for each litigant are the active players; counsel argue strongly for their clients perspective and carry the burden of making their clients case
3. The accuse (the Crown) must establish its complaint beyond a reasonable doubt within the rules of evidence
4. Trial by jury is available for serious cases

Different from Inquisitorial system in four main ways:

1. The trier of fact and law has an active role in litigation
2. Counsel are relatively passive
3. No formal burden of proof, and few formal rules of evidence exist
4. No trial by jury, only trial by judges.

The Judiciary

Play 5 important roles:

1. Decide questions of fact (unless there is a jury)
2. Decide questions of law
3. Create and maintain the common law
4. Apply the law to facts (unless there is a jury)
5. Interpret and apply the *Charter*

5 courts figuring criminal law:

1. Provincial Courts- hears trials of certain criminal offences.
2. Court of Queen's Bench- appeals from provincial court go here. Jury trials are only heard here.
3. Court of Appeal- highest court of appeal in a province. Only hears appeals. Appeals are taken from Queen's bench or from indictable matters in provincial court.
4. Supreme Court of Canada- final court of appeal, also hear references
5. Federal Courts

Stare Decisis- judges must follow rulings of higher courts

Criminal Procedure:

3 types of offences (DON'T SWEAT JUST KNOW HEIRARCHRY)

1. Prosecutable by summary conviction only (tried only at provincial court) (fairly minor criminal offences)

2. Prosecutable by indictment only (most serious!!! Can do in provincial court or Queen's bench, up to the offender!)
    a. Offences under the exclusive jurisdiction of the superior court of criminal jurisdiction, must be tried by jury unless both sides waive jury trail (ie murder)
    b. Offences under the absolute jurisdiction of the provincial court (ie. "theft under")
    c. Offences which may be tried by provincial court by judge alone, superior court by jury alone, or superior court by judge and jury (at the choice of the accused)
3. "Hybrid", "Dual Procedure", or "Crown election" offences prosecutable by either

Stages of procedure:

1. Complaint/Investigation (someone complains to police, or police initiate investigation themselves)
2. Apprehension and Arrest (if information (includes name of informant, name of accused, alleged offence, date) is laid, warrant or summon can be pursued next, if no information laid then arrest was done by a citizen or by a peace officer)
3. COMMENCMENT OF PROCEEDINGS: Release from custody pending trial (varying conditions), or bail/judicial interim review
    a. Alternates for some accused persons include the Alternative Measures Program (usually used for those with less severe charges), Mental Health Court or Drug Treatment court.
    b. If an accused is not released on an Appearance Notice, they may have counsel assist with bail (bail procedures not a concern here)
4. Preliminary Inquiry- crown leads evidence, accused can cross-examine, accused can also lead evidence (if any). The justice uses this phase to determine if there is sufficient evidence for the accused to stand trial. Accused person does not have to enter a plea at this time.
5. First Appearance
    a. Crown election, if any (only in hybrid cases they must choose if they will do summary or indictment)
    b. Stinchcombe (crown is obligated to disclose all relevant information)
    c. If summary conviction, accused enters plea. If indictable offence, accused must decide whether to be tried by provincial or superior court. If they choose provincial court, they elect a plea. If they choose superior court, they are entitled to a preliminary inquiry (only if requested by one of the parties)
6. Indictment- sets out name of accuses, charges, and list of witnesses.
    a. Ordinary Procedure
    b. Direct Indictment- crown can force indictment with no preliminary inquiry
    c. Arraignment- after indictment, accused is arraigned, if a not guilt plea, then there is a trial.
7. Juries- If accused elects for a trial by judge and jury, the next step is for a jury to be picked.

*R v Gunning (*The respective function of the judge and jury)
Judge is trier of law, and jury, in direction of judge, is trier of facts. Jury exclusively determines verdict. Judge can give opinion, but jury does not have to follow it. Judge inly directs the jury on issues raised and cannot bring up any other ideas not raised in court. Judge determines if evidence is admissible, jury determines credibility, reliability, and weight of said evidence.

8. Trial (only if accused enters a plea of "not guilty")
    a. Voir dires (trial within a trial) excludes the jury and is used to determine if evidence is admissible (such as a confession), jury is not told about the voir dires because it can alter the perspective on evidence or the trial going forward.
    b. Examination of witness- no leading questions, allows for cross-examination
    c. The order of trial (opening statement by crown and then witnesses, after each examination, accused is allowed to cross-examine, accused then calls their witness, which can be cross-examined by crown, if accused left evidence, then accused sums up first and vice vera.
    d. The Charge of the Jury
    e. Verdict- Guilty or not guilty (guilty only if beyond a reasonable doubt), for jury cases it must be a unanimous decision.
    f. Sentencing- if guilty, the judge sentences the accuses. Can include victim impact statements (if victims are not alive, then family, friends, or others can read statements… not considered for more aggravated sentence, that must be proved beyond a reasonable doubt by the crown.
    R v Daley: judge instructed jury to consider intent, jury found accused guilty. Defendant filed appeal saying judge was in the wrong for addressing jury, appeal was dismissed because the counsel did not object to judges' instructions to jury which means misdirection's of judge were not the serious and not going to alter the jury's verdict.
    g. Once on witness stand, you lose the right to silence and have to answer questions.
9. Appeals
    a. 2 grounds of appeal: Questions of law, or questions of mixed fact and law.
        i. If the judge errs in some aspect; misapplies the law, inappropriately considers certain evidence, etc.
    b. Sometimes can be multiple grounds of appeal.
    c. Appeals are not trials de novo- they are based on the record formed at rial (transcripts, exhibits, etc.)

EVIDENCE

Sources of Rules of Evidence

- Criminal Code
- Canada evidence Act
- Common Law
- Charter of Rights and Freedoms

Admissibility

Evidence is admissible at trial if…

- Relevant to the fact-in-issue
    - Something that makes a fact or issue more/less likely
- Probative value exceeds prejudicial effects of the evidence
    - How strong an inference can be made between the known fact and the fact you are trying to prove/disprove
    - Probative= how strong the evidence is
    - Prejudicial effect= the other side of the scale.
      Two forms of prejudice:
        1. **Reasoning Prejudice-** distracts from the proper focus (ex. Brining up complainant's sexual history)
        2. **Moral Prejudice (a form of reasoning prejudice)-** bad character evidence. (Not allowed to mention past criminal record if unrelated, BUT allowed to mention if accused testifies and says "I am a good person")
- Cannot be excluded by a common law or statutory exclusionary rule
- Cannot be excluded under the *Charter*

Admissibility of Statements

Every Canadian has the right against self-incrimination. This is protected by common law and ss. 7,10, and 13 of the *Charter.*

1. **What is a statement?**

- Both oral and written communications, as well as physical conduct and gestures of the accused. Does not have to be a confession, but any type of statement from excluded.
  Two types of statement
  1. **Exculpatory-** to deny or raise a doubt about a material element of an offense. Statements which are in favour of the defense.
     - Accused cannot bring into evidence what they say, because it could be hearsay or fabricated. However, there are exceptions:
       - Rebutting an allegation of recent fabrication- if Crown is alleging accused made up a story, the accused can retell it to show that they know the story and it has always been the story.
       - Circumstantial evidence of the accused's state of mind- statements that show the mental state of the accused (phone calls reporting a crime, or incoherent statement made to the police)
       - Pure narrative- used to understand how/why events unfolded (like the retelling of dialogue which cumulated to the events in question)

- Completeness- entire statement must be used, not just bits and pieces.
- *Res Gestae*- as narrative and circumstantial evidence, admitted for the truth of their contents (includes excited/spontaneous utterances, statements associated with conduct, or statement of current subjective perception and intention)
- Timely statements made when found in possession of contraband
- Statements made upon the accusation of a crime- reaction or statements of accused upon arrest; accused should be allowed to explain why they reacted this why.

2. **Inculpatory-** statements that are helpful to the offence
    - No prohibition against admission of statement by an accused to a civilian. They are not made to an authority or while under arrest/detention.

Hearsay Rule

- Hearsay is inadmissible; when someone says "oh and blank told me they were…" No. Can only know what you saw, not what someone else told you they saw.
- Hearsay is an out of court statement introduced to prove the truth of its content: The four elements to hearsay are declarant, recipient, the statement itself, and the purpose.
- Hearsay is excluded from evidence because the trier of fact is not able to see/hear the statement in court to assess the credibility and reliability of what is being asserted.
- Tisi is because witnesses already have potential errors in pereptin, memory, communication, and honesty, so how can we know the accuracy when theres all these potentials
- **Exception-** dying declarations ("it was a red car that hit me" was what the person said right before they died)

Common Law Confession Rule

- **Different then a breach of ss 10(a) and (b).**
  2 occurrences:
  1. If confession/statement was made to a police officer….

Whenever prosecution wishes to tender into evidence an accused's confession to a person of authority, it must be proven beyond a reasonable doubt that the confession was voluntarily made. This rule protects all statement, not just confession. Can lead to the exclusion of all derivative evidence.

- Police officers are not allowed to threaten or induce accused into confessing.
  Threat- offer punishment; to beat or hold them longer
  Inducement- offer reward; like food or getting out sooner

2. If confession was made to a third part or another witness over head confession…
****Exception to the hearsay rule**

- A statement made by a declarant to a recipient for the truth of its contents, but it was made by someone other than the witness, against the <u>state's interest.</u>
- If the statement was found to have been given against the common law confession rule, then not only is the statement exclude, but so is any derivative evidence.
- Accused bears responsibility to show the evidence should be excluded based on s 24(2) of the *Charter*
- Admissibility of evidence happens during voir dire, so jury is not involved

Common Law confession rule does not apply to Mr. Big (under cover cop) operations since the accused did not know they were an authority figure.

R v Hart (MR BIG OPERATIONS)

Facts:

- Hart;s twin daughters drowned while in his care**;** Hart was suspected of killing them
- Police commenced undercover operation to try and get a confession

Issue:

- How should confessions elicited during Mr Big operations be treated?
- What other considerations/limits should be made regarding Mr. Big operations?

Analysis:

- Confession is excluded because…
    - Each came about in the face of overwhelming inducements
    - No confirmatory evidence to support reliability
    - Prejudicial effect outweighs probative value

Holding:

- Police must use restraint and avoid abusive processes when using Mr. Big tactics
- Mr Big confessions are presumptively inadmissible unless Crown can prove on a balance of probabilities that probative value outweighs prejudicial effects

S 7 of *Charter*- Protects an individual's right to silence by prohibiting the state from compelling him to provide a statement against his own *interest*

The Herbert Rule- - the conversation would not have happened "but for" the intervention of the state, stopping silence from occurring, so not susceptible evidence to use in court.

Right to Be Informed- s 10(a) *Charter*

s. 10(a)- "Everyone has the right on arrest or detention… (a) to be informed properly of the reasons therefor"

- Assists a detainee to make an informed, voluntary choice in their interactions with the police.
- Requires the police to inform every arrested person in clear and simple language about every offence they are under investigation for. If there is a change of charge, they must inform the detainee.
- The main purpose of this is to help with retaining counsel. (How are you supposed to get good advice if you do not even know what you should be given advice about?)
- **Must be detained to have this right.**

Right to Counsel- s 10(b) *Charter*

S 10(b)- "Everyone has the right on arrest or detention… (b) to retain and instruct counsel without delay and be informed of that right"

The right to counsel, if new charges are added or change in charges, accused must be given the opportunity to speak with counsel again. (**Must be detained to have this right)**

Two components:

1. Informational- accused must be informed propmoty upon arrest or detention…
    - Right to counsel
    - Availability of counsel through Legal Aid and the means of access
    - Availability of immediate, temporary legal advice through Brydges duty counsel

    - The means of access to free preliminary legal advice
- If individual chooses not to speak to lawyer, officer has to read out a Proper warning explain what rights they are giving up

2. Implementation- triggered when accused says they want to speak toa lawyer. Policed are then obliged to…
    - provide accused with reasonable opportunity and the means to contact counsel
    - and then refrain from trying to elicit evidence from the accused until they have had a reasonable opportunity to speak with counsel.

Rights under 10(b) may be defeated if the accused is <u>not reasonably diligent</u> in exercising right, or if <u>exigent circumstances (urgent or dangerous) exist</u> that act against allowing the accused the opportunity to consult counsel.

Exceptions to right to counsel:

R v Sinclair (FURTHER CONSULTATIONS WITH COUNSEL)

Facts:

- Sinclair was being charged with second-degree murder
- When arrested he was advised to his right to retain and consult counsel; his response was that he did not need a lawyer right this second
- After being booked, he was again asked if he wanted to exercise his right; he asked to speak with a specific lawyer and had the opportunity to consult him twice
- An officer started to interview Sinclair, and Sinclair responded multiple times by saying he felt uncomfortable without his lawyer being present and that he wanted to call his lawyer again. The office said NO and continued to tell Sinclair he had the right not to answer.
- Eventually Sinclair made inculpatory statements.

Issue: Does a detainee who has been properly informed of their s 10(b) right to counsel, and whom has exercised their right, have a constitutional right to further consultation with counsel during the course of interrogation?

Analysis:

- There are only 3 exceptions to reconsult a lawyer:
    1. New procedures involving the detainee
        - Further advice is only necessary when non-routine procedures are requested by police. These are things like polygraphs and lineups.
        - Since these activities do not often occur, the detainee should be granted another phone call on further advice for what to do in these situations.
    2. Change in Jeopardy (a change in charges)
    3. Reason to believe the detainee did not understanded their s 10(b) rights
        - If events indicate that the detainee waved their right to counsel, and they didn't understand what that right mant, the police should rexplain the right,
        - Similarly, if the police undermine the legal advice the detainee received, this may effect or disort the advice, and they should have another right to talk to counsel
- Sinclair did not fall under any of these categories.

Holding:

- S 10(b) does NOT give the right to have defence counsel present throughout interrogation
- S 10(b) does NOT provide secondary access to counsel, especially when the accused states they were satisfied with the advice received.

- It is up to the accused ti exercise their right to counsel diligently, not an ongoing right

R v Willier (LIMITS TO COUNSEL OF CHOICE)

Facts:

- Willier initially contacted legal aid, then was given another opportunity to contact a specific lawyer who was away form the offence.
- Willier wanted to wait for the lawyer of his choice, but accepted the police suggestion to call Legal Aid again
- Willier expressed satisfaction with the advice he got from Legal Aid
- The police offered him numerous attempts to call a lawyer again, but Willier confessed.

Issue: Does an accused have the right to counsel of choice, and what are the limits of this right?

Analysis:

- An accused has the right to contact and retain their counsel of choice prior to police questioning
- If their chosen counsel is unavailable, the accused can wait for a "reasonable" amount of time (reasonable amount is case specific)
- An accused must be reasonably diligent in exercising right to counsel
- If counsel of choice is unavailable after a reasonable time, the police duty to "hold off" from questions no longer applies (however, accused can choose to contact other counsel at this time)
- No violation of s 10(b) occurred, because Willier chose to speak with aother counsel then wait for his preferred

Holding:

- No duty on the police ot ensure the quality of accused's right to counsel
- Accused has right to choose of counsel, but cannot wait beyond a reasonable time to contact them (reasonable time depends on the charges)

R v Taylor (IMPLEMENTATIONAL COMPONENT)

Facts:

- Taylor was the driver in a crash that injured 3 people; Taylor asked for a lawyer and was transported to hospital for examination
- Taylor was not provided with a phone at the scene or at the hospital to contact her lawyer
- Blood saples were drawn and it was found Taylor was intoxicated

Issue: Do the police have to provide reasonable opportunity and means to exercise 10(b) rights?

Analysis:

- Police needed to give Taylor the opportunity and means to exercise her right by providing a phone and/or phone numbers
- There was no implementation component; the police needed to facilitate the phone call.
- All evidence from that point forward breached her 10(b) right.

Holding:

- Until access to counsel is given, police must delay questioning or obtaining evidence

Right to counsel summary:

- Accused has burden of proof when asserting a *Charter* violation.

- Accused does not have the right to counsel present during questioning nor an automatic right to a second call unless an exception applies. Exceptions include if the jeopardy change.
- Police must provide reasonable opportunity and means to access counsel
- An accused can waive the right to counsel, but must do so knowingly with an understanding of the implications of doing so
  - Crowns bear responsibility to prove waiver

Detention

s. 9 of *Charter*- "Everyone has the right not to be arbitrarily detained or imprisoned"

Forms of Detention:

1. Physical- the most obvious form; when an officer touches/hold you; manual handling of an individual.
2. Psychological with legal compulsion- an individual is legally required to follow actions or a command, or else there would be legal punishment. (Example- Not stopping for a police officer when they try and pull you over. BUT when they stop you and start asking question, you are no legally considered detained so you can ask for counsel).
3. Psychological without legal compulsion- occurs when an individual believes they have to listen because they do not have a choice (like in *Grant*). (Investigative detention occurs when police stop you and just start asking questions. Police can pat you down because they have right to protect themselves)

Carding and street checks both count as detention.

R v Grant (DETENTION TEST)

Facts:

- Officers were on patrol for purposes of maintaining a safe environment near a school.
- 3 officers stopped Grant because he looked nervous and suspicious.
- Police stood in his path and told him to keep his hands in front of him.
- One officer asked Grant if he had anything on him that he shouldn't; Grant confessed to the possession of marijuana and a firearm
- Grant is arguing his s 8, 9, and 10 rights have been breached.

Issue: What constitutes as detention?

Analysis:

- **Test for Detention:** "Would a reasonable person, placed in the position of the accused, conclude that their right to choose hotw to act had been removed by the police, given their conduct?
- Police argued they were not abusive in their nature toward him and that he could have walked away or not answered, BUT;
- They issued demands such as putting his hands out and stoof infront and surrounding here.
- A reasonable person would have felt intimated by the power imbalance.

Holding: Based on a reasonable persons viewpoint, this would be a detention.

R v Le (CONFIRMS GRANT DETENTION TEST AND ADDS DETAIL)

Facts:

- Le and 4 friends were hanging in his backyard and socializing.
- 3 police officers patrolling the area approached and entered the backyard; they were not responding to a call and did not have a warrant (only knew this house as troublesome)
- Police questioned the men, asking for their IDs and too keep their hands visible
- Le said he had no ID with him. Police asked what was in his bag if not an ID.
- Le ran away (which is seen as a guilty conscious) and was arrested. IN his bag they found drugs, a gun, and cash.

Issue:

1. Were Mr Le's section 9 *Charter* rights breached?
2. Should the evidence be excluded under section 24(2) of the *Charter*?

Analysis:

- A detention occurs when an ordinary person in that situation would feel they are not free to leave and must comply with the police.
- The officers entered the yard without warning and without any reasonable suspicion a crime was being committed.
- Based on the conduct of the police; they were trespassing, their language, the way they asked for IDs, a reasonable person would have assumed they were detained.
- The officers were trespassers with no valid investigative purpose.

Holding: Police had no right to step foot in the backyard in the first place, so Le's detention was arbitrary and all evidence should be excluded.

Search & Seizure- s 8 *Charter*

S. 8- "Everyone has the right to be secure against unreasonable search or seizure"

R v Collins (1ST GEN- REPLACED BY *GRANT*)

Facts:

- Officer was suspicious of Collins and her suspected involvement with heroine
- Office approached her at a club, grabbed her by her throat (to prevent the swallowing of evidence) and pushed her to the ground.
- He found heroine in her hand and arrested her for possession with the intent to sell

Issue:

1. Was the search unreasonable?
2. If so, having regard to all circumstances, would the admission of the evidence bring the administration of justice into disrepute?

Analysis:

- Offer did not disclose reasonable grounds supporting his search.
- The flying tackle, and throat hold were unreasonable in the circumstances
- Warrentless searches are presumptively unreasonable. Onus on Crown to prove reasonability.
- **A search will be deemed reasonable when authorized by law, the law itself is reasonable, and it was carried out in a metter that is reasonable. (outlined in s. 8)**

Holding: Officers need reasonable and probable grounds to conduct a search (more than a hunch)

R v Patrick (PRIVACY IN GARBAGE)

Facts:

- Police suspected that accused was operating a drug lab from his home.
- The police took garbage bags from the accused's property by reaching over the property line.
- The garbage contained several items that indicated drugs were being made and allowed police to get a warrant.

Issue: Was the inspection of the garbage an unreasonable search and seizure under s.8 of the *Charter?* (Does a person maintain a reasonable expectation of privacy over garbage?)

Analysis:

- Since the garbage was near the property line anyone could access it and accused gave up right to privacy when he placed it there
- The bags being on the property line was not the issue, it was whether or not the accused should have expected privacy
- Some argue garbage should stay protected until made anonymous, but in some cases anonymity never occurs until decomposition
- **Use "totality of circumstances" test to determine if it's reasonable to expect privacy (intent, placement, disposal practices)**

Holding: No right to privacy over garbage once it is abandoned property.

R v Cole (PRIVACY IN WORK COMPUTERS)

Facts:

- IT found child pornography on a teacher's laptop
- The laptop was given to police, who searched it without a warrant

Issue:

1. Does an employee have a reasonable expectation of privacy in a work computer?
2. Did the search of the computer constitute a breach of s.8?
3. If there was a breach, should the evidence be excluded under s 24?

Analysis:

- We have a high degree of privacy for computers since they have our whole lives on them
- There is a reasonable expectation of privacy/a privacy interest in a work computer
- Thus, since they didn't have a search warrant, the police breached Cole's section 8 right
- Court ultimately decided that the evidence would not be excluded and ordered a new trial à officer didn't know this rule, it was an innocent breach
- You can negate this right to privacy though if the employer made you sign a document saying they're allowed to search it when they wan

Holding: Reasonable expectation to privacy over work computer, but it varies.

R v Vu (ADDITIONAL SEARCH WARRANTS FOR COMPUTERS)

Facts:

- Accused was suspected of having a grow up and stealing electricity
- Police obtained a warrant to search the home (seizing cellphones and computers)

Issue: Do computer searches require additional distinct judicial authorization by police?

Analysis:

- Computers are highly personal devices with unique privacy interest

- Police wishing to search them must obtain warrants that specifically mentions those devices
- There are levels to privacy interest, and the higher the interest the more protected (highest-body. Electronic devices, houses, cars-lowest)

Holding: A search warrant for a home does not automatically include authorization to search electronic devices found in home.

R v Fearon (THE EXCEPTION TO SEARCHING A PHONE)

Facts:

- Accused was arrested shortly after an armed robbery of a jewlery store
- When police were searching the bodies of the arrested, they came acrros phones which displayed texts and images incriminating the accused to the crime
- Months later, police applied and were granted warrants to search the phone, but no new evidence was found.

Issue: Was the warrantless search of the cellphone upon arrest unreasonable and a violation of s.8?

Analysis:

- Common Law framework requires that a search incident to arrest must be 1) founded on lawful arrest and 2) be truly incidental to that arrest and 3) be conducted reasonably.
- The exception recognizes that in some cases, the immediate needs of law enforcement authorities outweigh an arrested individual's privacy interest.
- This was the case because the police had reason to believe the jewelry was out there and recoverable, and there was a possible weapon on the street.

Holding: Incidental searches are allowed if they follow the 4 parameters:

1. The arrest is lawful
2. The search must be truly incidental to the arrest
3. The nature and extent of the search must be tailored to a purpose
4. The police must take detailed notes of hat they examined and for what duration

R v Grant (SEARCH AND SEIZURE)

Facts: already stated in section 10(b) discussion

Issue: Was the gun obtained in breach of Grant's S 8, 9, 10(b) Charter rights? If so, should the gun be excluded under s 24(2)?

Analysis:

USE THE GRANT TEST TO DETERMINE IF EVIDENCE SHOULD BE EXLCUDED: The Grant Test→ test to assess whether evidence obtained from a Charter breach should admitted (3 parts):

1. **The seriousness of the Charter-infringing conduct**
   - **The more severe the state conduct that led to the Charter violation, the greater the need for the courts to dissociate themselves from that conduct by excluding evidence linked to it, in order to preserve public confidence**
   - In R v Cole, officer breached s. 8 but it was a more innocent breach since he didn't know you needed a warrant to search
     - Now though, the SCC because of R v Grant says the officer does have to know certain parts of the CC that affect the daily parts of procedure
     - The longer a law from a case has been out, the less innocent "not knowing" will be

- Eg. Case where officer pulled over a car for not having a front license plate
  - In AB, front license plates are not necessary, and officer should have known that
  - Lo and behold, officer found 3kg of cocaine in car § However, the officer should have known the law, so the evidence was excluded

2. **The impact on the Charter-protected interests of the accused**
   - **The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that Charter rights are of little actual avail to citizens**
   - Certain breaches don't affect you as badly (hair, breath)
     - Cars are expected to have a lower degree of privacy than your house (doesn't mean 0, just less)
     - Locker in a school has a lower degree of privacy
     - Computer issued by a schoolboard has a lower degree of privacy compared to a personal laptop
   - Certain breaches are highly invasive though (body cavities, a person's house, computers, phones)
   - **Breaches of ss. 8, 10(a), and 10(b) are considered highly impactful**
3. **Society's interest in an adjudication on the merits**
   - **Whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion**
   - Real evidence (cocaine, a gun): society has a great interest in it being admissible in trial, so it's at the high end of the admissibility spectrum
     - And whether the admission of the evidence obtained would bring the administration of justice into disrepute
     - Through the test, the court favoured admitting the evidence of the gun

For each piece of evidence; Do the Grant Test

"Totality of the Circumstances" test (*R v Patrick*): (used to see if an accused had a reasonable expectation of privacy)

1. An examination of the subject matter of the alleged search
2. A determination as to whether the claimant had a direct interest in the subject matter
3. An inquiry into whether the claimant had a subjective expectation of privacy in the subject matter
4. An assessment as to whether the subjective expectation of privacy was objectively reasonable, have regard to the totality of the circumstances.

Test to determine if the admission of evidence would bring the administration of justice into disrepute:

1. The seriousness of the *Charter*-infringing conduct
2. The impact of the breach on the *Charter* protected interested of the accused
3. Society's interest in the adjudication of the case on its merits.

Exclusion of Evidence- s 24(2) *Charter*

24(2)- When a court concludes that evidence was obtained in a matter that infringed or denied any rights or freedoms guaranteed by the Charter, the evidence shall be excluded, so long that the admission of it in the proceedings would bring the administration of justice into disrepute.

3 requirements for evidence to be obtained in a matter:

- **i)** Casual- did the breach of the Charter right cause the statement to be made?
- **ii)** Contextual- was the violation severed from the investigatory process which culminated in the discovery of evidence? If severable, contextual connection is not met.
- **iii)** Temporal- the entire chain of events during which the Charter violation occurred and evidence was obtained.

Bring the administration of justice into disrepute analysis (Grant, 3-part inquiry):

i) The seriousness of the Charter-Infringing State Conduct

ii) The impact of the breach on the Charter-protected interest of the accused

iii) Society's interest in the adjudication of the case on its merits

Derivative evidence will undergo it's own inquiry under *Grant*.

Questioning of a young person

An individual under 18 years of age is provided more protections than an adult. Must meet 3 requirements of…

I) Voluntariness

II) Informational requirement (must clearly explain to the young person certain things)

III) Opportunity to consult counsel and parent

Compelled Statements

- **a.** Statutorily compelled statements- sometimes a party will have to provide potentially self incriminating evidence. Like for the purposes of investigation, such as s. 71 of the *Traffic Safety Act* where individuals have to report accident to authorities.
- **b.** Compelled testimony form another proceeding ("Use Immunity")
- **c.** Regulatory Compulsion

Application of s. 24(2) to certain types of evidence:

1. Statements by the Accused- inadmissible unless found to be voluntary
2. Bodily Evidence- can't be just taken
3. Non-bodily physical evidence

4. Derivative evidence- physical evidence discovered as a result of an unlawfully obtained statement. (the type of evidence at issue in Grant)

3 Generations of s. 24(2):

First Generation → R v Collins

- Chokehold case, drugs in her hand
- Breach of s. 8, as the search manner was not authorized by law
- Court in 1987: were creating Charter law from scratch by interpreting the text
- Court figured out that there was several considerations that went into the circumstances of the case:
    1. Fairness of a trial→most important
        - Was the evidence conscriptive, was the evidence created from a Charter breach?
        - Unfairness usually meant exclusion of evidence, so other 2 weren't necessary to show
    2. Seriousness of the breach. How did the officer act?
        - An innocent breach isn't too bad
    3. Factors that would bring the administration of justice into disrepute
        - Could the evidence have been found by non-breaching conduct?
        - If excluded, the public may be outraged if a killer were to go free
        - Or, would a right thinking member of the public say "what good is the right if you cannot exclude?"

Second Generation – still looks to Collins, but starts to expand what factors impact on the fairness of a trial

Third Generation → R v Grant – time to re-evaluate the "fairness of a trial"

- Trial fairness is better served as an overarching goal, not a distinct stage of the analysis
- Fairness may not be as important as we thought, so it should not be part of the analysis anymore

ONUS OF PROOF IN CRIMINAL CASES

S 7 *Charter*- "Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice"

Principles of Fundamental Justice:

1. Presumption of innocence (and Crown has onus to prove beyond a reasonable doubt)
2. *Nullem Crimen*- conduct must not be punished unless it is constituted an offence at the time of commission and the law must be sufficiently clear and determinate to intelligibly circumscribe the conduct of persons and the authority of the state to enforce law
3. Conduct must have a sufficient connection to the interest of the prosecuting state to support prosecution by that state
4. Accused must have a sufficiently morally blameworthy to warrant conviction and punishment for a particular offence which entail that
    a. The accused have committed a culpable act of omission, accompanied by
    b. The fault requisite for conviction and punishment

Burdens of Proof

6 issues of burden of proof:

1. What is the nature of the burden?
2. Who bears the burden?
3. How is the burden set? (Common law, statute, Charter)
4. Who decides whether the burden is satisfied? (Trier of fact or law?)
5. What evidence is considered in determining whether the burden is satisfied?
6. To which standard of proof? (E.g. BARD, BOP, evidence to the contrary)

3 types of Burdens of Proof:

1. Legal Burden of Proof
2. Case-To-Meet: Burden Going Forward
3. Tactical Burden

Legal Burden of Proof

1. **What is the nature of the burden?**
   - "Ultimate" burden to prove/disprove a fact in issue
   - Party bearing the legal burden bears the "burden in persuasion" on the issue in question
2. **Who bears the burden?**
   - Crown has burden to prove accused is guilty <u>beyond a reasonable doubt</u> (based on jurisdiction, identity, *actus reus*, and *mens rea*)
3. **How is the burden set?**
   - Common law, statute (*Criminal Code*), and *Charter*
4. **Who decides whether the burden is satisfied?**
   - Trier of fact (judge in judge-alone trial, or jury in jury trial)
5. **What evidence is considered in determining whether the burden is satisfied?**
   - The evidence as a whole as presented during the trial
6. **To which standard of proof?**
   a. Beyond a reasonable doubt: Crown must prove
   b. Balance of Probabilitie: accused's burden to establish *Charter* breaches
   c. Evidence to the contrary: accused's burden to rebut certain statutory presumption (like sanity)
   d. "Some Evidence"

Case to Meet: Burden of Going Forward

1. **What is the nature of the burden?**
   - Burden on a party to adduce sufficient evidence to raise an issue as to the existence/non-existence of a fact-in-issue
   - The burden to get past the judge
   - Satisfying the burden may permit (not compel) the trier of fact to make a determination favourable to the party
2. **Who bears the burden?**
   - Generally, the party bearing the legal burden of an issue carries the case-to-meet burden as well
   - In criminal cases, that is most often the Crown

3. **How is the burden set?**
    - Common law, statute, and Charter
4. **Who decides whether the burden is satisfied?**
5. **–** Trier of law
6. **What evidence is considered in determining whether the burden is satisfied?**
    - Assessed at the conclusion of the party's case (or in a vior dire if required)
7. **To which standard of proof? (E.g. BARD, BOP, evidence to the contrary)**
    - The trie of law should determine whether there is some evidence on which a reasonable jury, properly instructed, could find that the fact-in-issu was established

Tactical Burden

- Not determined by law
- Refers to the practical burden falling on a party when adverse evidence is adduced by an opponent (ex. Accused is under no compulsion to adduce any evidence in their defence, but in some cases, this may be a poor choice)
- Why am I going to trial? Look at your case and other sides case, and make up a good response to that. (decided by each counsel based on their respective strategies in the trial)
- If an accused asserts a defence that is not merely a denial of an element of the offence, the accuses has the CTM burden of adducing sufficient evidence to raise the issue (ex. For a judge to instruct a jury on a particular defence, that must have an air of reality)
- Determined by each counsel based on their respective strategies

Woolmington v The Direct of Public Prosecutions (GOLDEN THREAD CASE)

Facts:

- Woolmington was charged with murdering his wife by shooting her
- Wife was staying with her mother, and W went home with a gun concealed under his coat
- He said he intended to scare his wife and threaten suicide if she does not come home, but the gun fired accidentally, and she was killed
- Judge told jury man was guilty unless he could prove himself to be innocent by reason of accident. At trial, W was convicted and sentenced to death.

Issue: Did the trial judge err in his statement to the jury?

Analysis:

- Golden threat: duty of Crown to prove guilt (aka the presumption of innocent), not the accused's onus to prove innocence

Holding: Golden thread funs through common law: burden remains on Crown to prove accused' guilt beyond a reasonable doubt

Beyond a Reasonable Doubt

Issues of Proof Beyond a Reasonable Doubt:

- Jury must be provided with an explanation of proof beyond a reasonable doubt to ensure no innocent person is convicted.
    - A reasonable doubt is not “certain” or “serious” that I cannot sleep or eat or whatever
    - A reasonable doubt is a real doubt, that is based on evidence and not speculation.

R v Lifchus (EXPLAINING REASONABLE DOUBT TO THE JURY)

Facts: Accused was a stockbroker facing fraud and theft charges

Issue: Should the expression of beyond a reasonable doubt be explained to a jury? And if so, in what matter?

Analysis:

- Finds that the court should explain it as it is significant to the outcome of trials, but how do they explain it in a way that is understood?
- The burden of proof rests on the prosecution, a reasonable doubt is not a doubt based upon sympathy or prejudice, but upon reason and common sense
- It is logically connected to the evidence or absence of evidence, and odes not involve proof to an absolute certainty, but more is required than being probably guilty, if that is the case the jury must acquit.

Holding: Proof beyond a reasonable doubt inextricable from presumption of innocence; proper explanation of “reasonable doubt” is essential element of jury charge.

Acceptable Language	Unacceptable Language
- A real doubt, a doubt that is not imaginary or fanciful	- Ordinary / an ordinary concept
- A doubt based on the evidence	- "Proof to a moral certainty"
- A doubt that does not arise from pure speculation	- "Haunting", "Substantial", "Serious"
- A reasonable possibility that the issue is not as the party bearing the burden claims	- A doubt which keeps one from sleeping
- Jury must be "sure", provided BARD is explained at the same time. "Sure" = most accurate description of BARD	- "Certain", "Probably guilty" or "Likely guilty"
- Although proof BARD does not mean proof to an "absolute certainty", proof BARD is a lot closer to "absolute certainty" than it is to BOP standard - Starr modifier	- For which one must give a logical reason - reasonable doubt can exist in situations where it cannot be articulated (you may have a reasonable doubt but don't now how to explain it)

Additional Cases about Presumption of Innocence and Standard of Proof

R v W.(D). (MAINTAING THE PRESUMPTION OF INNOCENT)

Facts:

- A he said , she said sexual assault case
- Trial judge said they had to pick whether they believe the accused or complainant

Issue:

- Did the trial judge err in the recharge by placing the accused and the complainant on the same plane when viewing the charges as a whole?
- Did he leave the jury with the impression that they must accept the accused's evidence in order to acquit him? (Instead of the presumption of innocence?

Analysis:

- Ideally, appropriate instructions on the issue of credibility should be given… A trial judge might well instruct the jury on the question of credibility along these lines:
  1st if you believe the evidence of the accused, obviously you must acquit
  2nd if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
  3rd if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused"

Holding: Cannot tell jury to believe what they want because it puts the accused on the same plane; need to maintain the presumption of innocence

R v Layton (CLARIFICATION FOR BEYOND A REASONABLE DOUBT)

Facts:

- The accused was on trial for sexual assault.
- The trial judge delivered careful and complete instructions that borrowed from *Lifchus,* on how to define beyond a reasonable doubt.
- The jury came back with a question to further clarify beyond a reasonable doubt and balance of probabilities.
- The judge did not explain any further but just repeated what they said to stop confusion. The judge's response was discouraging and did not encourage any new questions.

Issue: How should a trial judge respond when the jury asks for clarification on the standard of proof?

Analysis:

- A trial judge must answer a jury's questions in a manner that goes beyond repeating the instructions they have already received
- Trial judges have a responsibility to clarify issues and concepts when a jury states that they are confused.

Holding: When a jury asks for clarification on standard of proof, a judge must assist them in understanding what is required of them

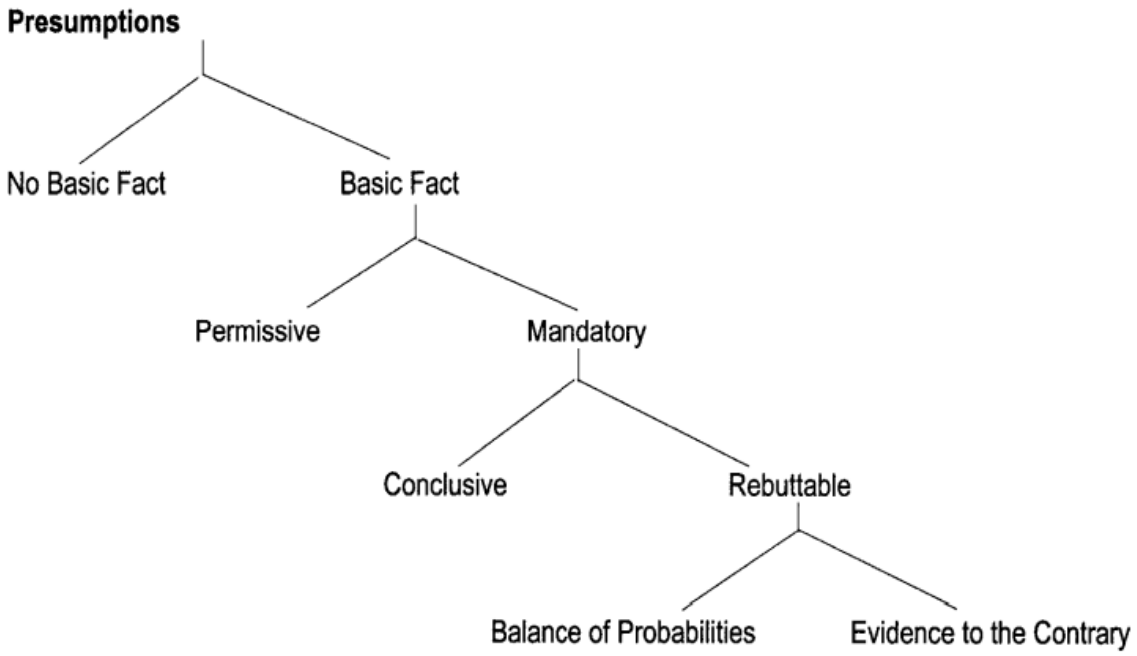
Presumptions

To presume a fact has been proven, even when it has not

4 ways presumptions are distinguished:

1. No basic fact v Basic Fact

    a. No basic fact- the presumption of innocence and presumption of sanity. No facts need to be proven for these to be considered.
        i. Of innocence- innocent until proven guilty. Crown must put forth evidence to prove guilt, Accused does not have to put forth evidence to prove innocence.
        ii. Of sanity- accused must prove they were not sane if they are to plead a mental disorder caused them to commit acts. If not, the accused is presumed to be sane.
    b. Basic fact- By proving one fact another fact is deemed to be the case. (ie. by proving that an accused was in the drivers seat, it can be presumed they were in control of the car).
2. Permissive v Mandatory
    a. Permissive- one the allows, but does not require the drawing of an interference to a presumed fact. May be, but not must be.
        i. Example- Doctrine of Recent Possession: if an accused is found in unexplained possession of recently stolen property, an inference may be drawn that the accused has mens rae required for conviction of theft or possession of stolen property.
        ii. Causation- a jury may infer that a person intends the natural consequences of his or her actions. (Being drunk could take away the application of this inference, especially if actions were not planned but impulsive)
    b. Mandatory- one that required the presumption of a presumed fact. Typically found in statute.
3. Conclusive v Rebuttable
    a. Conclusive- rare and statutory. (ex. A place with a slot machine is presumed to be a common gaming house.) No amount of evidence can rebut this presumption.
    b. Rebuttable- on the proof of fact, the presumed fact is to be the case (so when a mandatory presumption is made), the accused can rebut the presumption through some type of evidence.
        i. Balance of Probabilities- the accused must establish some fact.
        ii. Evidence to the contrary (reasonable doubt)- just must raise a reasonable doubt
        iii. Trier of fact/tried of law- trier of fact decided on presumption as long as trier of law says evidence is admissible.



Limitations- s 1 *Charter*

s. 1- "The Charter guarantees the rights and freedoms set out in it, subject only to such reasonable limits, prescribed by law as can be demonstrably justified in a free and democratic society"

R v Oakes (THE OAKES TEST FOR S. 1)

Facts:

- Accused was charged with unlawful possession of narcostics for the purpose of traficking. He elected for trial wihtout a jury.
- The Act imposed the accusedimposes the burden to prove that he was not in possession for purpose of trafficking. (It is a presumption if you are in possession, you are traffickcing). The accused finds this a violtion of the presumption innocent until proven guilty.

Issue: Did the reverse onus of proof created by s 8 of *Narcotics Act* violate s 11(d) of the *Charter?* If so, is it justified by s 1 of the *Charter?*

Analysis:

- No rational connection between simple possession and intent to traffic

Holding: Creation of the Oakes Test:

1. The government must show the law under review is pressing and substaintal (must be both important and necessary)
2. 3-part proportionality test:
    a. The provision of the law is rationally connected to the laws purpose
    b. Must minimally impair a Charter right
    c. Impairment of rights must be more beneficial than having the right

R v Keegstra (APPLICATION OF OAKES TEST)

***JUST NEED TO KNOW THE ONUS ON THE ACCUSED TO SHOW WHAT WAS SAID WAS TRUE; BREACH OF PRESUMPTION OF INNOCENCE.

Facts:

- Accused was charged for promotiong anti-semtic hate speeh to students.
- Accussed argued his freedom of expression was being infringed

Issue: Does the prohibition of hate speech infringe on s 2 of the Charter? If so, is it allowed because of s 1?

Analysis:

- Found that the law only effects hate speech, not all types of expression.
- This Act is found to be reasonable and have more benefits as it protect others safety.

Holding: Prohibition of hate speech does infringe on s 2 but is justifiable under s 1.

ACTUS REUS

The "guilty act"; who, what, when, and where, of an offence.

- Act or omission prohibited by legislation
- Must be voluntary
- Must overlap at least temporarily with mens rea

Types:

1. Acts- the prohibitions of the commission of a specifed act. Criminalized acts inolving only the performeance of a specifc activity (assault and touching wihtout conent)
2. Omissions- Criinal repsonsbility only for omissions where the accused was under a legal duty to act.
    a. Specifc Omission- Requirement to perform a speciifed act on pain of punishement uless the person had a lawful excuse not to perform the act.
    b. The prohibition of certain forms of neglgienct activities. A person is penalized for failing to take the care expected of a reasonable person.

R v Dunlop (WATCHING A CRIME)

Facts:

- The appellants were twice tried and convicted on a charge of rape.
- Complainant was gang raped as part of an initiation ritual, she testified that she reconginzed the accusds, but was nusure if they had particpated.
- Jury asked if the accussed were aware of a rape taking place and did nothing to prevent, are they considered an accomplace to the act under law?
- Judge have confusing answer

Issue: Did the judge err in his answer to the jury?

Analysis:

- The answer to the jury question is simply no.

- A person is not guilty merely because he is present at the secene of the crime and does nothing to prevent it. As long as there is no evidence of encouragement,presence is not illegal.

Holding: Mere presence at the scene of a crime in not sufficient to ground culpability

R v Moore (REFUSING TO GIVE IDENTITY TO AN OFFICER)

Facts:

- D went through a red light while riding his bike.
- Peace officer attempted to stop him and chased after him requesting that he gave his name.
- D refused to give name or address to officer for ticket.

Issue: Does the failure to identify self to a police officer constitute an offence?

Analysis:

- D had obligation to identify himself after he was seen committing an offense.
- Officer was required to ascertain D's identity in order to charge him.
- Therefore, by failing to stop for the officer he was obstructing the officer from performing his duties.
- Moore's refusal to ID self constituted obstruction of a peace officer in the execution of his duties; applies to situation when officer directly observes an offense or has reasonble grounds to believe an offence has occurred

Dissent- A person cannot be guilty of obstructing a police officer merely by doing nothing, unless there is a legal duty to act. If officer wanted to accused's identity who could have arrested him.

Holding: When an officer sees a person committing any offence, the accused has a duty to identify themselves

Result from this case:

- Because of concerns regarding the right against self-incrimination and the right to silence, the law now is that a detainee or suspetc enjors an absokute right to silecne unless:
    - A police officer sees them committing an offence
    - A police officer has reaosnable grounds to believe the suspetc committed an offence

  Even then, the suspect need only give their name and date of birth to identify themsellf. Nothing more.

Voluntariness

Was the act performed under some constraint of compulsion? Was there a physical external force that compelled the performance of the act? Can it be attributed to the accused and can the accused be held responsible?

- Must be the product of a conscious mind
- Physiological involuntariness vs moral involuntariness (physiological are things like a heart attack, reflex, and sleep walking)

- When considered voluntariness of actus reus, think of it seperalty then the moral choice… If someone was holding a gun to your head, you still are choosing, which makes it voluntary under actus reus.
    - Cognitive capability not eliminated
    - Act is still physiologically voluntary, but morally involuntary
    - This situation givesrise to the defense of duress (which will be discussed later on)

R v Daviault (INTOXICATION- BECAUSE OF THIS CASE THE LAW HAS CHANGED)

Facts:

- Complaitant is partially paralyzed and confined to a wheelchair. Appellant and Complaintant drank some brandy together.
- D had 7-8 beers and 35 oz of brandy, and D sexually assaulted complaintant.
- He was singifcantly more intoxicated then she was, and is a chronic alocholic, however his alcohol was so high that most people would have died that high and that his brain was temporarily dissociated from normal functioning and he was not aware of his actions.

Issue: Can a state of drunkenness which is so extreme that an accused is in a condition that closely resembles automatism, or a disease of the mind as defined in s. 16 of the Criminal Code, constitute a basis for defending a crime which requires not a specific but only a general intent?

Analysis:

- His alcohol levels were so high he should have died or been in a coma.
- The individual had no awareness of his actions and no memeoryr in this state. Trial judge found D did commit the offece, but acquited him because by reason of extreme intorixcation he found the intent to commit was not there.
- The mental aspect of an offence has long been recognized as an intergral part of crime, and to eliminate it would deprive an accused of fundamental justice)Charter 7 and 11d)
- The preusmption of innocence requires that the Crown ebar the burden of establishing all elements of a crime, including the mental element of voluntariness

Holding: His mental state was altered and voluntariness was not there, so he got off.

Because of this case, the CC was amended to restrict the defense of intoxication

- **(s. 33.1-** Any criminal offence that will efcet the bodily integrity of another person, intoxication defense does not apply… if it is like property damage or something that intoxication defense can be used)… This law is being appealed in SCC as unconsitutional, but has not been decided on yet…. (people argue it goes against defense's right to be innocent until proven guilty, and forces them to show their innocent, instead of crown showing their guilty)

R v Wolfe (REFLEX)

Facts:

- Wolfe was part owner of a hotel.
- Complaintaint was told by Wolfe not to enter hotel premises, but returned anyways.

- Wolfe went to call police and complaintant struck Wolfe.
- Wolfe quickly turned and hit the complainint with the telephone, inflicting a serious cut to his forehead

Issue: Are reflexes voluntary?

Analysis:

- Complaintant hit appellant first, and appellant in reflex, hit the appalent with a phone.
- Court of Appeal found no offence was committed because some intent is required, but a reflex in not voluntary (and crown failed to prove tha actus reus was voluntary).

Holding: There must be at least some cognition that makes the act voluntary; a pure reflex is not voluntary.

De Minimis No Curart Lex

Conduct should rise to a level of moral seriousness, before falling within the crutiny of the criminal law.

- The De minimis principle is addressed in two ways:
    - The law does not concern itself with matter of a merely trifling or trivial nature
        - Although an offence may technically have been committed, it may not be worthy of prosecution
        - Conduct should rise to a level of moral seriousness before falling within the scrutiny of the criminal law
        - Examples include stealing sugar packets from Starbucks or an agrument that involved minor pushing (especially if it only happened one time)
    - The threshold of contribution required for guilt in causation cases

R v Kubassek (TRIVIAL NATURE AS A DEFENCE)

Facts:

- K was a homephobe who went to a church that married gay people.
- One Sunday she went to the front and started reciting scripture franticly.
- The pastor went to talk to her but she pushed him and he fell.
- A secuirity guard carried her out as she screamed and threw anti-gay pamphlets at everyone. She was charged with assault.

Issue: Can de minimis of trivial nature be used as a defence?

Analysis:

- K intended to push the reverand, but the judges applied the priniciple of *de minimis non curat lex:* the law does not concern itself with trifles. They say this because the contact was brief and transiet, there were no injuries, and she was just trying to speak her mind.
- The crown is appealing this decision under the argument that the application shouldn't be used in criminal law, and even if it does it did not apply in these circumstances because the act could have caused very bad harm and she chose to go to this place and do what she did and she did intend to push him.

Holding: De minimis does not apply in these circumstances because there are public interest and policy concurs to deter this type of conduct.

Causation

Did the act cause the consequence? Does the unlawful act contribute beyond the de minimis range towards harm or injury?

The threshold test:

1. Was it a cause in fact? Was it a necessary condition for the occurrence of the consequenc. The conseuqences happened but for the act.
2. If perpetrator factually caused consequence, can they be held legally resonsible?

Must be significantt and a contributting cause outside the de minimis range; very broad and inclusive

s.224, 225, 226 of Crimianl Code (Causation rules):

224- cannot blame victim for not going to the hospital (or if they refuse treatment)
225- cannot blame doctor of treatment if the individual goes to get help and still does
226- accelerating the death is still a causation even if they were going to die anyway eventually

Smithers v the Queen (THE SMITHERS TEST)

Facts:

- Smither was a black player on a hocey team. Rough hockey game where the deceased was being racists towards Smithers, Smithers uttered many threats and asked him to fight both in and out of hockey game.
- The deceased left the game and avoided Smithers, but smithers beat him up (stiking him in the head and kicking his stomach) and he died from aspiration by vomit.
- It was later discovered that the victim had a malfuntioing epiglottis. Smithers is accused of manslaughter.

Issue: Would the death not have occurred but for the kick?

Analysis:

- Kick to stomach aused the vomitting which caused death (casual connection close enough). He did not intend to kill him so it was manslaughter not murder.
- **Thin skull rule-** You take your vicitm as you find them. (just because they were more prone to injury does not absolve libility to injury that occurs). It does not matter that he victim had an unusual medicial cndition that increased his liklihood of death, it does not absolve the accused of liability.

Holding: Created Smithers Test for ruling on causation:

1. The factual determination of causation was to be made by the trier of fact by considering all the evidence
2. It only needs to be a contributing cause beyond de minimis
3. The thin skull doctrine applies to criminal law

R v Nette (EDITS SMITHERS TEST JUST SO IT USES PSOITIVE, UNDESTANDABLE LANGUAGE)

Facts:

- Nette robbed an old lady and tied her up with a ligature around her neck.
- She suffocated and died over a period 48 hours.
- Nette admitted to robbing and tying her up. He was charged with first-degree murder,

Issue: What is the proper threshold of causation required for second-degree murder?

Analysis:

- Update language in Smithers test→ Preferable: did the actions contributed in a significant way?
- Were the actions of the accused a "significant contributing cause"?
- The but-for test remains the same à usually easy to answer
- But the legally causation aspect has changed from "beyond de minimis" to "would it contribute in a significant way" → same test, but different language is all

  Dissent- changing the test makes it harder to prove for the Crown
  - Beyond de minimis is a low threshold, but when you are talking about a "significant contributing cause" you've created a higher threshold and a different test…
- Most judges tell juries now in the way Nette describes, it's still the same test though
- Separate causation test for second degree murder not required
- Smithers standard applies: "more than a trivial cause"

Holding:

- Instead of saying beyond de minimis in Smithers, just say significant contributing cause.
- If an act contributes in a significant way resulting in harm, liability is establish.

R v Maybin (INTERVENING ACTS)

Facts:

- In a bar, T. and M. repeatedly punched victim in the head.
- T. struck blow that knocked victim unconscious.
- Arriving on scene within seconds, bouncer struck victim in the head again.
- Medical evidence inconclusive which blows caused death. Trial judge acquitted.
- CA ruled that the accused's assaults were factual contributions to the cause of death; "but for" their actions, victim would not have died. The risk of harm caused by bouncer was reasonably foreseeable to the accused.

Issue: When does an intervening act absolve the accused of legal responsibility for manslaughter?

Analysis: Approaches to intervening acts grapple with the issue of moral connection between accused's acts and the death

·Intervening act that is reasonably foreseeable to the accused may well not break the chain of causation, while an independent/intentional act by a third party may in some cases make it unfair to hold accused responsible

·Depends on context

Causation test remains whether the dangerous/unlawful act or accused was a significant contributing cause of victim's death

·**An accused who undertakes a dangerous act and contributes to a death should bear the risk that other foreseeable acts may intervene and contribute to that death**

* The time to assess the reasonable foreseeability is at the time of the initial unlawful act, rather than at the time of the intervening act

·Intervening acts and ensuing non-trivial harm must be reasonably foreseeable in sense that the acts/harm that occurred flowed from the conduct of the accused; if so, the accused's actions may remain a significant contributing cause of death

·Did the act of the accused merely set the scene, allowing other circumstances to coincidentally intervene, or did the act of the accused trigger or provoke the action of the intervening party?

If the intervening act is a direct response or is directly linked to the accused's actions and does not by its nature overwhelm the original actions, then the accused cannot be said to be morally innocent of the death.

Holding:

- Smithers-Nette test MUST be used for determining causation
- Reasonable foreseeability and intervening actor can help apply test BUT not replace it
- Start with the factual causation analysis, then for legal causation ask: "were actions a significant contributing cause?"
- Thin-skull doctrine is not intervening act or condition – part of taking your victim as you find them

MENS REA

Introduction to Mens Rea

Two sources of fault:

1. Intention to commit act in question… Mens rea
2. Failure to act in accordance with a relevant standard of care**… objective fault or penal negligence.**

Proof of mens rea:

Crown must establish beyond a reasonable doubt:

i) The actus reus of the offence

ii) The mens rea for the offence

1. Intention to perform the actus reus, or intent of consequences
2. Knowledge of the relevant fact/circumstance

External evidence to show mens rea:

- What the accused said relating to his mental state at or around time of offence
- Any confessions or admissions
- Circumstantial evidence- what the accused did before act, when the act took place, and after the act took place.

Based on what the accused knew or intended!!! (not what a reasonable person would)

Proof beyond a reasonable doubt there was a guilty mind

- Trier of fact may (but not must) infer that a person intended the natural consequences of their act (Permissive interference)
- In absence of circumstances giving rise to a reasonable doubt, a person intended to do what they have done
- Presumption does not equal permissive interference

Types of Mens Rea:

1. True knowledge or true intention: person knew what they were doing (person knew they were acting without consent, or knew they were in possession of drugs)
2. Wilful blindness (almost equivalent to above, just not AS much)
3. Recklessness (applies to some criminal offences, but not to others. Does not apply to true knowledge based offences, such as possession)

Recklessness v Wilful Blindness

Recklessness and Wilful Blindness (routes to proving mens rea)

- **Recklessness-** subjective (unless statue requires a different interpretation); two elements:
  - Awareness of risk, AND
  - Proceeding regardless

  Only works on some offences.

  Example: Dangerous driving causing bodily harm.
- **Wilful blindness-** subjective; two elements: (Could add third fact: first thing would be the awareness of a probable fact)
  - Awareness of need for inquiry AND
  - Choosing (deliberately) not to make the inquiry

  Example: Buying a watch on the street that is regularly $15000, for $300. Chooses not to ask if the item is stolen, just ignores the fact is might be.

- Willful blindness applies to knowledge of facts (is equivalent to knowledge), Recklessness applies to intention to produce consequences
- Wilful blindness is to equivalent of knowledge (can be used to prove mens rae)
- Recklessness CANNOT be used to establish knowledge of the facts (cannot be used to prove mens rea)
- IF the actus reus for an offence involves the production of consequences, then the Crown can try and establish that the accused intended the consequences by:
  - Proof that the accused actually consciously intended consequences
  - Proof that the accused was reckless

Recklessness vs Virtual intention:
Recklessness= awareness of risk, but proceeds anyways
Virtual Intention= awareness of risk AND awareness of substantial certainty consequences would take place AND proceeded anyways

If CC says “who knows” or “knowingly” then that means actual knowledge, or bare minimum wilful blindness is required. (Such as the submission of a forged document by someone else)

If CC says “intentionally applies” that means it is open to any form of proof of mens rea.

*R v Sandhu (*DISTINGUISHING BETWEEN RECKLESSNESS AND WILFUL BLINDNESS)

Facts:

- Accused charged with importing heroin in Canada, and possession of heroin for purposes of trafficking.
- Accused says he was unaware of the contents of his bag, that he was duped into bringing these drugs back to Canada by a woman he had an affair with.

Issue: What is the difference between actual knowledge, wilful blindness, and recklessness?

Analysis:

- Trial judge told jury they can find individual guilty of actual knowledge, wilful blindness, or recklessness.
- This was wrong because it is a knowledge-based offence; so recklessness was wrongfully explained. Additionally, jury was not told wilful blindness was equivalent to actual knowledge.
- Jury should have been directed t consider whether there was a point during Sandhu's travels in India where he became aware of the need to inquire about the contents of his suitcase, and declined to do so (wilful blindness)

Holding: Recklessness is NOT an extension of wilful blindness and does not apply to knowledge-based offences.

R v Vinokurov (RECKLESSNESS AND KNOWLEDGE BASED OFFENCES)

Facts:

- Accused was charged with 7 counts of possession of stolen property.
- He was a pawn shop manager who denies knowing that the property was stolen.
- However, he did call his mother (who was the owner of the store) prior to accepting the merchandise.

Issue: Was it open to the trial judge to consider recklessness to fulfil the mens rea requirement of the offence after he found that the Crown had not made out the requirements for wilful blindness?

Analysis:

- It was inconsistent of the trial judge to find that the Crown had not proven willful blindness, but that appellant was "fully conscious of the risk" and therefore reckless
- If a criminal offence uses the term "willfully" to characterize the commission of the act (in the CC or statute), mere recklessness is excluded from the *mens rea* for that offence.
- The *mens rea* may still be established on proof that the accused had foresight that the consequence was certain or substantially certain to result from the conduct in question

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Holding: Recklessness will not satisfy knowledge requirement on charge for possession of stolen property

R v Buzzanga and Durocher (MENS REA FOR WILFUL PROMOTION OF HATRED)

Facts:

- 2 French-Canadians wrote anti-french propaganda to try and motivate the French in their area to take charge in a political debate about French in their schools.
- They were charged with willfully promoting hatred against an identifiable group.

Issue: What is the mens rea for wilfully promoting hatred.

Analysis:

- D could see the consequences of their actions, but this was not their intent. (the pamphlets went outside of the community)
- 2 definitions of intention are recognized in court**: (1)** desire or direct intention (2) indirect intention of seeing that the outcome is certain, but not desiring that outcome.
- Difference between indirect intention and recklessness is that it must be certain that the outcome will result, whereas recklessness is just recognizing that results MAY occur
- Based on context, judge concluded "willfully" did NOT mean accidentally
- Given the political nature of the pamphlet, recklessly was not defined as merely proceeding in the face of an awareness of risk to bring about the prohibited consequence, but that the accused must foresee that the prohibited consequences was certain, substantially certain, or morally certain to occur

Holding:

- Courts will endeavour to infer the state of mind of an accused using objective methods
- An accused's evidence of their state of mind at the time of the offence is accepted, but it is not always conclusive as sometimes it is not believable, or contrary evidence
- Mens rea is required to prove all criminal offences unless that section expressly states otherwise.
- Mens rea, in general, is satisfied as long as the outcome was intended or achieved through recklessness, however, including the term "willfully" implies that recklessness will not suffice to prove the necessary mens rea, unless recklessness is also mentioned in the provision.

General v Specific Intent

- General= requires only intent as it "relates solely to the performance of the act in question"= intention to commit the act= objective
- Specific= "the performance of the actus reuse, coupled with an intent or purpose going beyond the mere performance of the questioned act."=intention tocommit the act for an ulterior or particular purpose (ie. shooting to kill)= subjective+

- Specific intent in CC is "everyone who does X, with the intent to do Y, commits an offence"

Shooting with intent to kill is a murder, just shooting somebody with no intent and they die, is manslaughter

R v Bernard (SEXUAL ASSAULT AS A GENERAL INTENT OFFENCE)

Facts:

- Accused sexually assaulted victim causing bodily harm
- At time of offence, accused was highly intoxicated

Issue: Should evidence of self-induced intoxication be considered by the trier of fact, along with all other relevant evidence, in determining whether the prosecution has proved BARD the *mens rea* required to constitute the offence?

Holding: Sexual assault is a general intent offence, and therefore, intoxication cannot be used as a defence.

Herbert v The Queen (REQUIREMENTS FOR PERJURY)

Facts:

- Herbert acquitted on a charge of perjury and obstructing justice.
- H admitted to lying on stand, but said he never intended to mislead the court.
- H did this to attract the judge's attention so he could advise him privately that he was being threatened.

Issue: Did the accused have the mens rea to support a charge of attempted robbery?

Analysis:

- For perjury to exists that has to be more than a deliberate false statement, is also must be made with intent to mislead.
- This is a specific intent crime, and without the specific intent to mislead there is no offence.

Holding: : Perjury requires more than a deliberately false statement; it must also be made with the intention to mislead.

R v Mathe (MENS REA FOR ATTEMPTED ROBBERY)

Facts:

- Appeal by accused on conviction of attempted robbery.
- Accused went to bank teller and said "I have a gun, give me money."
- The bank teller did so and set off alarm, then accused laughed and said "I don't want that, it was just a joke" and then left.

Issue: Did the accused have the mens rea to support a charge of attempted robbery?

Analysis:

- Must decipher if the act was always a joke or if it was a change in plan; must prove beyond a reasonable doubt
- If it was actually a joke, then no crime was committed

- If there was initial intention that was abandoned there could be a crime.
- The appeal judge had a reasonable doubt that the accused ever actually intended to commit a robbery and therefore, should have been acquitted. (**CANNOT SAY GUILTY UNLESS KNOWN BEYOND A REASONABLE DOUBT)**
- "The incident could be properly characterized as a <u>drunken and senseless prank</u>"
    - Was not so drunk that there was a disruption of his notion to view consequences

Drunkenness was not a question about specific intent of robbery, but a loss of inhibition (more apt to do stupid things the more drunk you ge

Holding: If evidence raises a reasonable doubt about accused's intention to commit the offence, he must be acquitted

Motive

- <u>Motive does not form part of the mens rea.</u>
- motive is always relevant but never essential
- Motive = purpose/objective/reason for committing an act that is not included in the *mens rea* for the offence
- A purpose of intention which may be casually linked to the performance of an act
- Crown does not HAVE to present any evidence of motive, however, it can help a case

  Example: Accused committed a murder BECAUSE they want to obtain an insurance pay out. The insurance money is the motive for the murder. The mens rea for murder is a separate concept. (He intended to kill. The reason for doing so was to collet insurance money which was the motive).

  R v Lewis:
- **Absence of proved motive:** proving a motive is not required to produce a conviction. No evidence of a motive, but unproven motive may still exist.
- **Proved absence of motive:** Always an important fact in favour of the accused and ordinarily worthy of note in a charge to a jury. Evidence od the absence of a motive compelling evidence that accused had no motive to commit the offence). These cases are uncommon.
- **Presence of proved motive:** may be an important factual ingredient in the Crown's case, notably on the issues of identity and intention, when the evidence is circumstantial. (Proof that the accused had a certain motive in committing an offence.)

R v Lewis (MOTIVE IS NOT ESSENTIAL)

Facts:

- Found guilty for murder after gifting a couple with a kettle filled with dynamite that exploded when plugged in.
- Lewis says he was unaware that he was mailing a bomb.

Issue: How should judge explain motive to jury?

Analysis:

- Intent and motive are not interchangeable
- Mens rea is intent ie the exercises of free will to produce a particular result
- Motive= precedes and induces the exercise of the will (is not involved in mens rea)
- Motive has two meanings in criminal law:
    - The emotion prompting an act (motive of jealousy)
    - A kind of intention (motive of stopping man from looking at his wife)… ls known as ulterior intention…if prosecution can prove D had motive it is more likely that there will be intention and a crime committed. (not necessary though)
- There was no reason to provide jury with definition to motive because Crown did not prove motive, and defense did not prove absence of motive.

Holding:

- Where there is absence of proved motive, it is the judge's discretion whether to refer to the lack of motive in jury charge → no obligation
- Any instruction on motive has to make clear that there is no obligation on Crown to prove motive.

R v ADH (INTERPRETING FAULT ELEMENTS)

Facts:

- ADH did not know she was pregnant and ended up giving birth in a WalMart bathroom.
- She thought the baby was dead, so she cleaned up and fled the scene, leaving the baby in the toilet (luckily, the baby was alive and got the care it needed).
- (Court trying to decide what a reasonable person whoul have done in these circumstances, especially on the note of risk of leaving the baby alone)

Issue: Is the fault level of child abandonment to be assessed objectively or subjectively?

Analysis:

- Crown thinks fault elements should be assessed objectively according to what has been called the penal negligence standard, whereas A think it should be assessed subjectively.
- Crown must prove 2 things to show penal negligence:
- 1. The risk to the child resulting from A's acts would have been foreseeable by a reasonable person in the same circumstances? And 2. Her conduct was a marked departure from the conduct expected of a reasonable person.
- Subjective standards means proof of recklessness at the minimum.
- Since case law does not settle the question; first step is to discern the intent of Parliaments regarding the statutory construction. IN this case, text does not set out a fault requirement, but when reading in full context it would imply subjective fault.
- Statute was absent of language to imply objective fault, so therefore court find parliament intents subjective fault element to this crime. (general rule)

Holding: Subjective fault required; there is a presumption parliament intends subjective fault unless otherwise stated.

These cases show how to interpret a statute and see if the mens rea involved is general or specific intent.

A person who commits a specific intent offense forms the actus reus for a ulterior purpose. Permissive inference says a sane and sober person can intend and analyze the consequences of their actions, but when not super or sane this intention is less clear. If it is significantly less clear that it provides a reasonable doubt the individual is entitled to an acquittal for specific intent cases.
Subjective mens rea= typical in criminal offence= subjective orthodox= what was in the mind of the specific accused

R v Tatton (ARSON)

Facts:

- T was very drunk. He put a pan with oil on the stove and set the burner to high.
- He left the house to get coffee and left stove on. Fire started. He says fire is an accident.

Issue:

1. Is arson a general or specific intent offence?
2. Does self-induced intoxication serve as a defence for arson?

Analysis:

- First must see if arson is a general or specific intent. General intent means intoxication is not an excuse (*Daviault, Bernard).*
- *Daviault* analysis used to determine arson is a general intent crime, meaning that the mental element simply relates to the performance of an illegal act, not intent of consequences.
- *Trial judge determined that arson awas a specific intent offence, and that the defense of intoxication was allowed.*
- THE SCCC agreed with the Crown that the arson is a general intent offence and that intoxication short of automatism could not be considered (paras 10, 20-39)
- **Two steps to statutory interpretation:**
    1. Mental Element: Arson is subjective mens rea (subjective or objective mens rea? Typically always subjective)
    2. Specific or general intent? (look at jurisprudence first and if it is already established then it is straightforward, do not reinvent the wheel…. Analysis for how to go through this process is para 30-39.)
        - **a.** Existing Jurisprudence
        - **b.** General intent= performance of an illegal act (assault is a classic example, no intent to cause injury just to make non consensual contact with another)
        - **c.** Specific Intent= done to bring about a consequence (If it requires complex mental acuity (sufficiently smart, sane or sober) then in those situations specific intent may not be present)
        - **d.** Policy is last thing to look at. It sometimes discusses the extent of alcohol and what not. (For example, intoxication is not a defense to sexual assault as it basically encourages the route of the problem)

Holding: Arson is damage to property by the mechanism of fire (the means by which the damage is accomplished). It is not the intnention to damage, but mainly the mechanism of damage.

R v Theroux (MENS REA FOR FRAUD)

Facts:

- Accused was a real estate developer who collected deposits from prospective buyers under the guise that the deposits were insured by a third part
- Accused's company never completed insurance application or made payments on policy, but displayed certificate from them as "proof of insurance"
- Accused's company became insolvent, and many depositors lost all their money

Issue: What is the mens rea for fraud?

Analysis:

- Actus reus easier to determine because it is clear the act was dishonest, and there was a risk of deprivation to the depositor's funds (Actus reus is objective, would a reasonable person have though the act was dishonest and understand the risk of deprivation cause from their act of dishonesty)
- Wishful thinking/hope is not a defence

Holding: To prove *mens rea* for fraud the Crown must prove that the defendant subjectively was aware that their actions could lead to a prohibited outcome; their view of the morality of this outcome is irrelevant.

- The *mens rea* for fraud requires the subjective awareness that you are putting others' property at risk.
- The *actus reus* for fraud has two elements: a dishonest act, and the dishonest act must cause deprivation.

REGULATORY OFFENCES

- Regulatory offences are also known as public welfare or statutory offences.
- Can be passed by either federal or provincial governments (as per s 91 and 92 of the *Constitution*)
- Reflect standard of conduct.

People should only be penalized if all three aspects of blameworthiness can be met:

1. The Act of the Offence (Actus Reus)
2. The Fault (subjective = mens rea, objective = penal negligence)
3. The Constitutional fault requirements

Regulatory Offences vs Criminal Offences

- Regulatory offences are provincial or federal, non-criminal offences and include offences set out in legislation. Regulatory offences are there for the public good.
- Criminal offence typically require proof of intent, whereas regulatory offences do not require thing. Criminal law governs safety and ensuring moral standards.
- Regulatory offences may appear to overlap with criminal offences, but are distinct.
- More regulatory offences than criminal laws.
- Punishments are similar and can include fines, imprisonment, or other punitive measures.

Three forms of Regulatory Laws; Liability (*Sault St. Marie*)

1. **Absolute**

- Lowest burden on the Crown
- Proof of actus reus is all the is needed
- No defense that the accused was entirely without fault.

2. **Strict**

- Partial reverse onus on accused to prove reasonable care.
- Crown has onus to prove actus reus BARD.
- Accused then can defend by showing due diligence, care, or absence of negligence on BOP.
- Crown does not have to prove any mental elements, as it is not about that was in the individuals mind, but what should have been there
- Not what they did, but what they ought to have done.

3. **Subjective Fault (Mens Rea)**

- Highest burden on Crown
- Proof of mens rea for true crime, must have subjective intention to commit the offence.
- Accused is not obligated to prove their innocence and should not be held liable for wrongfulness of act if it is done without mens rea.

R v Sault St. Marie (first case in the history of regulatory offences)

Facts:

- Garbage disposal lead to pollution in the river which is a regulatory offence that is prohibited due to public interest.

Issue: What standard of liability is required for public welfare offences?

Analysis:

- Although regulatory offences are enforced as penal laws, through the utilization of the machinery from the criminal law, the offences are in substance of a civil nature and may be regarded as a branch of civil law.
- Subjective orthodox is longstanding in carinal law and Canadian tradition → the doctrine of a guilty mind expressed in terms of intention or recklessness, but not negligence, is at the foundation of the law of crimes. In the case of true crimes, there is a presumption that a person should not be held liable for the wrongfulness of his act if the act is without mens rea.
- Historically, used to only be true crimes which required mens rea and absolute liability which required no proof of any mental elements.
- Court then acknowledged that there should be a halfway house of strict liability.
- The distinction between true criminal offences and offences of public welfare is of importance. When the offence is criminal, the Crown must establish a mental element mainly the accused who committed the prohibited act did the so intentionally, or recklessly, with knowledge of the facts of the offence or with wilful blindness. Mere negligence is excluded from the mental element required for conviction within the context of a criminal prosecution a person who fails to make such inquires as a reasonable and prudent person would make or fails to know he should have known is innocent in the eyes of the law
- Not about what they should have known or should have done, but what they actually know or do (some exceptions)

First Category- Mens Rea-Based Offences

- Mens rea is required for true crime offences and some regulatory offences, where keywords in the statute include “wilfully, with intent, knowingly or intentionally”

Second Category- Strict Liability

- A halfway house.
- Strict liability is where public welfare offences will fall into if absent expression of statutory language to the contrary

- Words “cause” or “permit” are often used in public welfare statutes and do not clearly donote either a mens rea or absolute liability offence.
- Regulatory offences are presumed to be strict liability unless otherwise stated.
- Offences in this category have a partial reverse onus; once the un Crown has prove actus reus BARD, the accused can furnish evidence of their due diligence or absence of negligence to negate the fault element on BOP
- The Crown is relieved form proving mens rea.
- **No mens rea needed, but accused can say they took all reasonable precautions/tried their best to stop from committing the offence.**

Third Category- Absolute Liability

- In sharp contract to mens rea, absolute liability is when proof of actus reus is all that is needed.
- No mental element is required
- It is not a defence that the accused was without fault.
- The need for protection of societal interest and administrative efficiency.

Holding: Public welfare offences are *prima facie* strict liability. Language of statute will determine where it falls.

Mistake of Fact

- When you believe in a certain condition that happens to be incorrect, but you honestly believe it to be true.
- Applies to both criminal and regulatory offences; only mens rea and strict liability. No defences to absolute liability.
- If the accused is honestly mistaken, it can render his conduct innocent. This is considered subjectively.
- BUT when it comes to stricy liability, it is what **should have been** in the persons mind or what he should have done. This then becomes an honest AND reasonable mistake of fact. Basically occurs when checking and double-checking and still getting it wrong.

Re Section 94(2) of the Motor Vehicle Act, BC (absolute liability cannot have charges of imprisonment or probation)

Facts: Government of BC wanted to make driving while suspended an absolute liability offence that would be punished by imprisonment.

Issue: Is s 94(2) of the *MVA* inconsistent with s 7 of the Charter? If so, is it allowed because of s. 1? **YES AND NO.**

Analysis:

- Not all absolute liability offences will offend the *Charter*
- Additionally, just because an absolute liability offence does not contain imprisonment does not mean that they do not offend s 7
- Exceptions include natural disasters, outbreaks of war, epidemics, or other extreme situations.
- Other exceptions may exist when an accused is a corporation since corporations cannot be jailed.

Holding: Absolute liability and imprisonment cannot be combined as per s 7. Therefore, this law conflicts with s 7 and is not allowed s 1.

R v Chapin (Example of Strict Liability Offence)

Facts:

- Accused was charged for hunting birds within ¼ mile of a place where bait had been laid.
- Accused says they were unaware of the bait and had accidentally wandered into a restricted area.

Issue: What standard of liability is required for this violation? **STRICT LIABILTIY.**

Analysis:

Mens Rea? NO.

- As a regulatory offence there were no signal words of "wilfully" or "with intent"
- Although these phrases were present elsewhere in the statute it was not in this specific section
- This offence is also not "truly criminal" because it regards both public and animal welfare, so therefore no mens rea is required.

Absolute Liability? NO

- No wording of strict prohibitions on hunting, just controlling the conditions of it.
- If it was absolute, someone could be charged for hunting where a bird was eating bait even if the bait had bene placed by someone else, which is unfair.
- Penalties for the offence also included serious finds, prohibitions of imprisonment, and the possibility of imprisonment.
- These are severe punishments and it is unreasonable to expect a hunter to search a whole area for illegal bait.

Strict Liability? YES

- Follow analysis from *Salut Ste Marie*, and that public welfare offences are *prima facie* strict liability.
- Accused can dissolve self of proof if they can show they took all the care a reasonable person would have been expected to take.

Holding: This is a strict liability offence.

- Unreasonable to convict accused, and charges were dismissed.

**On an examine, analyze to see if regulatory or criminal offence. From there, determine if language changes the liability required from *prima facie* strict liability.

Summary of Strict Liability/Due Diligence Defences:

1. **Mistake of Fact-** when you believe in a certain conditions that happens to be incorrect, but you honestly believed it to be true. Mistake must be reasonable in the circumstances. This applies to both mens rea and strict liability offence. (However, can be unreasonable in mens rea offences).
2. **Reasonable Care-**
   Strict Liability → Accused must show on a BOP that they took every reasonable precaution
   Contrast with: Penal Negligence –→Accused can avoid liability by merely raising a reasonable doubt that they did not fall below the objective standard, Crown onus is BARD

Both of these defences are presumably available unless otherwise stated in the statute.

R v London Excavators (not mistake of fact)

Facts:

- Building a hospital when a block was hit

- The block was a hydo duct and exploded when the company continued to dig
- They were charged under health and safety act for failing to follow safety regulations

Issue: Was the defence of mistake of fact established? **NO.**

Analysis:

- Regulation stated all underground services be located and marked before beginning.
- Once the block was discovered, it was no longer reasonable to continue to dig without looking into it further
- The subcontractor should have done more even though the contractor told them to keep going.
- Once the contractor had already errored by no noting the block, the subcontractor should have double checked what was happening.
- There were ways for the accused to access information on the site and block.

Holding: The defence failed because it was not objectively reasonable for the backhoe operator to act on second-hand information from the general contractor without further inquiry of circumstances.

Summary of Regulatory Offences

1. First, determine if it is a criminal or regulatory offences.
    a. Convictions for regulatory offences require less culpability
    b. Constitutional standards for criminal law do not automatically apply for regulatory offences because individuals chose to participate voluntarily in regulated activities.
    c. Regulations are there to protect the vulnerable,
2. Look to *Sault Ste Marie* to determine which out of the 3 categories of liability it falls under.
    a. Regulatory offences are presumptively strict liability (*Sault Ste. Marie*)
    b. Look to language of act to see if it is mens rea of absolute liability instead. (*Chapin*)
    c. Crown still has onus to prove actus reus BARD.
3. If Strict Liability offences, the accused must show on BOP they were due diligent to avoid liability.
    a. Reasonable belief in mistake set of facts; or
    b. They have taken all reasonable steps to avoid the offending event.
    c. Also, must look to statute itself to see what exculpatory steps were required.
4. If Absolute Liability, note they cannot be punished by imprisonment or probation. If they do, it is a breach of s 7 and will unlikely be saved under s 1, unless extreme circumstances apply. (*Re S 94 of MVA*)

ASSAULT

Actus Reus: must be the voluntary and non-consensual application of force (any type of touch, directly or indirectly) to another person.

Mens Rea:

- Not satisfied by proof of negligence.
- Subjective intention; knowing they are applying the force without consent (true knowledge or wilful blindness)
- There is a greater mens rea for aggravated assault or assault with bodily harm.

- When a resultant harm occurs, there is an added mens rea, which is that the reasonable person in the shoes of the accused would inevitably foresee the risk of bodily harm occurring.
- Does not have to be the bodily harm that resulted, but just any risk of bodily harm.

- First see if there was subjective intent, then use *Smiters/Nette* to see if harm was caused by the accused, then use objective test to see if the harm was reasonably (objectively) foreseeable.

Criminal Code ss 264-269

265- simple assault: (1) A person commits an assault when

a) Without the consent of another person, he applies force intentionally to that other person, directly or indirectly
b) He attempts or threatens, by an act or gesture, to apply force to another person, if he had, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
    - Example: cocking hand into fist
c) While openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs
    - Example: street person begs for money while openly holding a weapon.

(2) This section applies to all forms of assault, including sexual assault (with a weapon), threats to a 3rd party, causing bodily harm, and aggravated sexual assault.

(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

a) The application of force to the complainant or to a person other than the complainant
b) Threat or fear of the application of force to the complainant or to a person other than the complainant
c) Fraud, or
d) The exercise of authority.

267(a)- Assault with a weapon: assault to body with **any** foreign item that makes contact with another's body and was intended to be used as a weapon.

267(b)- Assault causing bodily harm: some bodily harm has resulted from the assault

267(c): when one chokes, suffocates, or strangles the complainant.

268- Aggravated assault: an assault that results in a wounding, maiming, or endangering of the life of the victim. Can include the breaking of a bone.

269- Unlawfully causing bodily harm

Bodily Harm is defined in s 2 of CC as any hurt or injury to a person that interferes with the health or comfort of the person and is more than merely transient or trifling in nature.

- However the threshold is very low, if they go to hospital, cannot go to work, or have to get stitches, it is likely to be bodily harm.

2 Routes to Liability for Bodily Harm, Aggravated Assault, or Manslaughter

These routes are not mutually exclusive, the Crown may sometimes be able to argue both routes (*R v Barton*)

R v Barton

De Sousa route: Crown argued that the predicate offence was a sexual assault (victim was not consenting to the sexual activity)

- Most common route for liability of bodily harm
- There first has to be an unlawful act proven BARD by the Crown
    - The predicate offence has its own MR that needs to be proven BARD
    - E.g. Crown has proven the application of force to the complainant without consent, and the intention to commit this (true knowledge, WB, R)
        - This mens rea is subjective
    - Once this is proven, the Crown has proven one crime
- The Crown now wants to prove not only the predicate offence (assault), but something else (bodily harm, aggravated, manslaughter) → need to prove more
    - They need to prove the actus reus (bodily harm, aggravated assault, manslaughter)
    - When it comes to the mens rea, the Crown has to prove merely **objective foresight of the risk of bodily harm**, and this is the mens rea for bodily harm, aggravated assault, AND manslaughter

Jobidon route: Even if there was consent, Mr. Barton foresaw the risk of bodily harm from the sexual activity (E.g. inserting a hand into Ms. Gladue's vagina

<u>THERE CASES ONLY APPLY WHEN THERE IS BODILY HARM OR WORSE</u>**

1. *DeSoursa*

- First, there must be an unlawful act such as an assault that is proven BARD
- Second, it must be determined whether the accused should be found guilty for the resultant harm of the unlawful act.
    - Must be objective foreseeability of bodily harm; <u>a reasonable person observing the conduct of the accused would foresee the risk of bodily harm</u>
    - The bodily harm that result does not have to be the bodily harm that was reasonably foreseeable
    - It is not required that the accused subjectively foresaw the risk of bodily harm

2. *Jobidon*

- This route does not necessary start with an unlawful act (could start when someone agrees to a consensual fight)
- Rather, this analysis begins with a scenario where the complainant is consenting to physical or sexual activity (or at least Crown has failed to prove BARD that the complainant was not consenting)
- Liability is based on the accused intention to commit or subjective foresight or bodily harm (or worse).
    - Even though two men were consenting to a fight, you are still guilty for causing the harm or intending to cause it
    - Ie subjective intent to cause bodily harm
- **Analysis:**

1. Was there an application of force with or without consent of the complaint resulting in bodily harm or worse? (**actus reus)**
2. Did the accused subjectively intend to cause bodily harm or at least subjectively foresee the risk of bodily harm? (**mens rea)**
3. Was it objectively foreseeable that there was a risk of bodily harm to the complainant? (**mens rea**)

R v DeSousa (1st Route to Liability- Mens rea for s 269→Unlawfully causing bodily harm)

Facts: Accused was involved in a fight in which a bystander was injured on the arm when a bottle, allegedly thrown by the accused, broke against a wall and a glass fragment struck the bystander.
Issue: What are the mental elements of the underlying offence? **OBJECTIVE FOREIGHT.**
Analysis:

- First, the mental element of s 269 must be satisfied which is the subjective intent to use an item as a weapon.
- Second, s 269 requires and underlying **unlawful act** (criminal or not), must be at least objectively dangerous. A reasonable person would inevitably realize that the underling unlawful act would subject another person to the risk of bodily harm (it must be likely to injure another person… **objectively dangerous**
- Test = objective foresight of bodily harm
- There is no constitutional requirement that intention, either on an objective or subjective basis, extends to the consequences of the unlawful acts in general,
- Intention is subjective and foresight is objective.
- S 269 requires objective foresight of the consequences of an accused's unlawful act.

Holding: S 269 requires an objective foresight.

R v Dewey (objective foreseeability means the objective foreseeability of the risk of bodily harm in general)

Facts:

- Complainant was fighting with another man in a bar when D came between them and forcefully shoved the complainant.
- Complainant fell and hit his head on the jukebox (or corner of wall) and was seriously injured.
- TJ convicted D of assault causing bodily harm, finding that the unprovoked push caused the complainant to fall and that push was "proceeded by significantly more force than would cause a stumble"

Issue:

1. Is objective foreseeability required for a conviction of assault causing bodily harm? **YES.**
2. If so, was it reasonably foreseeable that pushing someone forcefully in a bar would create a risk of bodily harm which is neither trivial or transitory? **YES.**

Analysis:

- Unlawful act manslaughter requires an objective foreseeability of bodily harm which is neither trivial nor transitory (*Creighton*)
- Objective foreseeability is the risk of bodily harm in general, not of a specific type of harm.
- It does not matter whether D could have objectively foreseen the specific injury.
- The fact that the TJ found that the push was more forceful than one that would cause a stumble meant that the risk of bodily harm was reasonably foreseeable.

- **We care about the reasonable person here, and the reasonable person would have seen it (**both judge and jury qualify as reasonable people)

Holding: Yes and Yes, because this push was more than a slight shove.

R v Jobidon (New Route for Establishing Liability)

Facts:

- J accidentally killed a man, H, during a fist fight outside a bar.
- Although H was bigger and a trained boxed, J knocked him unconscious and he fell on the hood of a car.
- Before, J noticed he was unconscious he punched him another 4 times in the face.
- Both men consented to the fight
- Crown charged him with manslaughter and had to prove the underlying crime of assault,

Issue:

1. At what point can the court vitiate consent?
2. Can one legally consent to non-trivial bodily harm? **NO.**

Analysis:

- J argued that the underlying offence of assault is not applicable because both parties consented to the fight and assault must lack consent; without this he cannot be convicted of manslaughter.
- However, there are exceptions outlined in the CC s 14; one cannot consent to death; s 150/159- children cannot consent to sexual activities; and s 286- a child cannot consent to abduction.
- The Court holds that the assault provision must be interpreted in light of the common law.
- It was a principle of common law that it would be against public policy to allow fighting with the intent to cause bodily harm to be legal because the activity does not have enough social utility
- Since intention to cause bodily harm was itself in the common law, consent to fighting could not be a valid defence.
- 4 situations in which consent can be vitiated:
    1. Application of force
    2. Threats of force
    3. Fraud
    4. The Exercise of authority

Dissent:

- Majority's decision exceeded the bounds of the judicial branch of the government
- By making a complainant's consent irrelevant when an accused has intended or foreseen the risk of bodily harm, the Majority has created a judge-made criminal offence; something exclusively reserved for parliament

Holding:

- Person cannot consent to death, or to violent force in activities that do not have enough social utility
- Even if you seemingly consent to a fight, you cannot consent in law to the other person causing you non-trivial bodily harm.

2 parts of mens rea for assault causing bodily harm:

1. The subjective intention to touch that person knowing that they were not consent (or being wilfully blind that there was not consent)

2. If the above is established BARD< would the reasonable person standing in the shoes of the accused inevitably see that there was the risk of bodily harm that could come from the touch? (This is now an objective test of foreseeable harm).

***DeSousa* and *Jobidon* only kick in when boldly harm or worse charges are being considered.**

- *DeSousa* starts with the proposition that it starts with an unlawful at that led to a bodily harm or worse. Vast majority or charges are through this route.
- *Jobidon* is an entirely new route for harm. Notwithstanding the true intention or consent of the complainant to the touching, policy considerations will apply such that the persons consent to the application of touch will not matter since that consent is vitiate. It is vitiated in a narrow way if bodily harm has happened, or the accused subjectively intended to cause bodily harm/ If the accused both intended to cause ad did cause bodily harm, the complainants consent to the touching is vitiated by operation of law.
- Objective Jobidon- even though he did not intend to cause bodily harm, if a reasonable person would have been there and foreseen the harm, that is enough (*Barton*).

R v McSorley (3 Levels of Rules)

Facts: M hit B in the head with his hockey stick during a NHL game.
Issue: Is M guilty of assault? **YES**
Analysis:

- Just because the NHL has internal disciplinary procedures, it does not shield the game from the purview of the criminal law
- There are 3 levels of rules:
  1. Rules of Hockey
     - There's no slashing allowed→ M's first problem
  2. An unwritten code of conduct among NHL players
     - Impliedly agreed by players and official
     - Slashing is permissible as long as it is during play and not to the head
  3. The discretion given to the referees
     - Every red is a judge
     - They are human beings, and have different tolerance levels for what you can get away with
- There are 3 rules at play in any sporting event, and its within these rules that a player plays the game
- Hockey has both written and unwritten rules governing conduct
- Referees use discretion when assessing penalties or allowing minor physical confrontations between player's without punishment
- The Crown's theory was that:
  - M's slash was not a typical or accepted norm in hockey
  - M deliberately struck B on the head with consent, or
  - Perhaps aiming for B' shoulder, M was reckless and hit B in the head
- After a lengthy analysis, the TJ concluded that M had intended to strike B in the head

- Given M's abilities as a hockey player an athlete, the TJ did not accept that M had struck him by accident.

Holding: Consent to assault in the context of a game can be vitiated if the assault foes beyond the rules and customs of a game.

Causation Test (*Smithers/Nette*) and Assault Causing Bodily Harm:

- *Smithers* is used when determining actus reus. "But for" the actions of the accused, would the complaint had died/been injured?
- Next ask, Should the accused be held liable? Did the accused's action contribute significantly to the resulting harm or death?
- Then turn to *DeSousa* to check for mens rea since it started due to an unlawful act.
    - Was there intent to do the act?
    - Objectively, would a reasonable person foresee the harm?

PENAL NEGLIGENCE

- Usually the violation of a "legal duty", "duty imposed by law" or an "unlawful act"
- Conduct of the accused is compared with **what a reasonable person would have done in the circumstances**
    - Objective; the reasonable person is not personalized but contextualized (*Beatty*)
    - Conduct is a "marked departure" from the normal standard of care
        - Reasonably foreseeable risk of non-trivial, non-transitory bodily harm
- Strict and absolute liability offences
- No need to prove subjective or objective fault
- Prosecution established *prima facie* case by establishing that the accused committed the prohibited act.

S 219(1): Everyone is criminally negligent who

- In ding anything, or
- In omitting to do anything that his duty to do

Shows wanton or reckless disregard for the lives or safety of other persons.

Sources of duties: Drafting Considerations

- Sometimes penal provisions of the CC do not describe acts or omissions directly, but provide that liability is based on the violation of a "legal duty", a "duty imposed by law", or an "unlawful act"
- First two terms are duties imposed by federal or provincial law. Unlawful act refers to acts contrary to these legislations.

The Reasonable Person

- Reasonable person is NOT personalized, but is to be appropriately contextualized (*Beatty*)
- Conduct in penal negligence is compared with what a reasonable person would have done in the circumstances.
    - Accused is at fault if they fail to do what a reasonable person would have done

Standard of Negligence: Degree of Fault

- Mere civil negligence does not suffice for criminal liability
- Must involve some fault greater than that attracting civil liability
- Conduct that is a "marked departure" from the normal standard of care or objectively dangerous

Dual Fault Offences

- Some offence have both fault elements of mens rea and penal negligence; must have intended to perform some elements of the actus reus, but need only have been negligent respecting other elements

Dangerous Driving

S 320.13(1): Dangerous Operation- Everyone commits an offence who operates a conveyance in a manner that, having regard to all of the circumstances, is dangerous to the public.

(2): Causing Bodily Harm- And as a result causes bodily harm to another.

(3): Causing Death- And as a result causes the death of another person.

R v Hundal (flexible application of modified objective etest)

Facts:

- Accused was driving a dump truck on a busy, wet road… the truck was loaded beyond its maximum weight
- The accused ran a red light and t-boned another persons car. He died immediately.

Issue: Does the offence of dangerous driving require the accused have a subjective intention or failure to adhere to a standard of reasonableness? **MODIFIED OBJECTIVE**

Analysis:

Looked to 2 things:

1. The manner of driving establishes the actus reus, **and**
2. The degree of departure, in all circumstances, determines whether there is mens rea

Rationale for use of a modified objective test to this provision:

- The licensing requirement: implies a reasonable awareness of the dangers of driving and the standards of operation of motor vehicles
- The automatic and reflexive nature of driving: means that subjective intent would be difficult to determine
- The wording of the section: suggesting a "manner" of driving with liability based in negligence
- Statistics: tragic accident rates suggest a need to curb conduct that is exceedingly dangerous

What does modified mean?

- The departure is marked: the objective test should not be applied in a vacuum, but rather in the context pf the events surrounding the incident. The tried of fact should be satisfied that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's situation.
- Cannot ignore the actual mental state of the accused
- Applied flexibly- must look at all circumstances intervening and unexpected events may effect the existence of mens rea.

Holding: The act was no involuntary and H is guilty.

- Established the modified objective test, not just a straight civil objective test
    - **Actus reus:** Manner of driving (how did the driving pattern emerge?)
        - In this case, he was driving in excess of the speed limit and went through a red light
    - Mens rea: Was there a marked departure from the standard a reasonable driver in those circumstances would employ?
- Modified objective standard for penal negligence offences: conduct expected of a reasonably prudent person in the circumstances (departure must be marked or significant)

R v Beatty (NOT personalized, but contextualized to the case at hand)

Facts:

- Driving home when suddenly veered into oncoming traffic, striking another vehicle, and killing three occupants
- B is being charge with dangerous driving causing death.
- NO evidence of mechanical failure or intoxication. Be says he might have ad heat stroke and went unconscious.

Procedural History:

At Trial:

- B's momentary inattention was not "objectively dangerous"
- In any event, a momentary lapse of attention could not, without more, support a finding of a marked departure from the standard of care of a reasonably prudent driver.

At BCCA:

- The accused's conduct could only be viewed as objectively dangerous and a marked departure from the requisite standard of care

Issue: Is B guilty of dangerous driving causing death for this moment of negligence? **NO.**

Analysis:

- Consequences of the driving are not important to the actus reus or mens rea of the crime.
- Penal negligence is aimed at punishing morally blameworthy conduct
- The consequences of the action is not taken into account when determining if an act was objectively dangerous→ you can do something dangerous and not hurt anybody, but that doe not mean the act should go unpunished
- Modified objective test is used for establishing penal negligence
- Dangerous driving is concerned with the manner of driving not the consequences
- A momentary lapse of attention is not a marked departure from the reasonable person standard
- Objectively dangerous describe actus reus and marked departure is mens rea
- In determining actus reus, mental state is not relevant
- In determining marked departure, the accused's mental state is relevant. It is also relevant in relation to potential exculpatory offences.
- It is important to not confuse the personal characteristics of the accused, with the context of the events surrounding the incident.

Holding: Not guilty. The test for penal negligence is marked departure from reasonable person standard, contextualized to the case at hand.

R v Roy (mens rea for dangerous driving)

Facts:

- A snow covered, slippery highways, with foggy visibility was where R was operating a motor home
- R entered the highway in execution of a left hand turn across the path of an oncoming semi
- The semi could not avoid a collision and the passenger of R's motor home died.
- R had no memory of events or surrounding circumstances

Procedural History:

At Trial:

- Since R's visibility was obscured R's driving was clearly dangerous, therefore he displayed a marked departure.

At BCCA:

- Said TJ erred equating the mens rea inquiry with the question of whether there was an explanation
- Again concluded R was guilty

Analysis:

- BCCA made an error for drawing an improper inference, but they were right in finding the judge used the wrong legal principle.
- 2 questions to ask on the issue of mens rea in regard to dangerous driving:
    1. Would a reasonable person have foreseen the risk and taken steps to avoid it if possible?
    2. Was the accused's failure to foresee the risk and take steps to avoid it, if possible, a marked departure from the standard of care expected of a reasonable person in the accused's circumstances?

R v Chung

Facts:

- C was operating a high-performance car in a major intersection with light traffic
- He suddenly accelerated hard while changing into the right lane, narrowly avoid a collision with a right-turning vehicle ahead
- His path took his car directly into oncoming traffic

Procedural History:

At Trial:

- Short driving pattern established actus reus of dangerous driving being objectively dangerous
- BUT since excessive speeding was only momentarily, it failed to satisfy the mens rea

BCCA:

- Overturned this decision saying TJ erred in law in conceiving of a principle that a brief period of speeding is not mens rea

Issue: Is this penal negligence? **YES**

Analysis:

- BCCA was correct in finding the TJ erred by applying a wrong legal principle
- Momentary excessive speeding on its own can establish the mens rea, where having regard to all circumstances, it supports an inference that the driving was a marked departure
- The conduct though momentary is not comparable to the momentary mistakes that might be made by a reasonable driver

Holding: Appeal dismissed. This is dangerous driving.

Other Offences

Review of modified Objective Test:

1. Look to weather manner of driving, fell below that expected of a reasonably prudent driver. This is the actus reus, being objectively dangerous.
2. In all surrounding circumstances, was the degree of negligence disclosed by that conduct a marked departure frim the standard expected of a reasonably prudent driver? The mens rea.

Test was further refined to look at the issue of mens rea:

1. Would a reasonable person have foreseen the risk and taken steps to avoid it, if possible?
2. Was the accused's failure to foresee the risk and take steps to avid it, If possible, a marked departure from the standard of care expected of a reasonable person in the accused's circumstances?

R v Gunning (S 86: Careless Use of Firearms)

Facts:

- Notes someone uninvited showed up to G's party
- The individual refused to leave
- G tried to intimidate the person by taking out his shotgun. He also loads it (which is strange because he says he never intended to shoot).
- G waves the gun around and it accidentally goes off, killing the uninvited man.

Analysis:

- Since this was a murder/manslaughter case, it began with an unlawful act
- TJ instructed the jury that G was clearly guilty of careless storage. However, this offends the basic principles of the modified objective test.
- Must first look at the manner of the actus reus, and then the marked departure on when the act became criminally negligent.

R v DeSousa (S 269- Unlawfully Causing Bodily Harm)

Facts:

- Accused was involved in a fight in which a bystander was injured on the arm when a bottle broke against a wall and glass struck a bystander.

Analysis:

- Criminal law is based on proof of personal fault;
    - The concept of "unlawful as it is used in s 269 does not include any underlying offence of absolute liability.
    - In this case the underlying offence must be objectively dangerous, here the offence was throwing a bottle.
- Being guilty of one offence in doing antecedental what is in itself unlawful, the accused is criminally guilty of whatever consequence may follow the first misbehaviour
- The test is one of objective foresight of bodily harm for all underlying offences. Must be objectively dangerous.

R v Creighton (unlawful act manslaughter)

Facts:

- Helped friend overdose

Issue: Is this manslaughter? **YES**

Analysis:

- Objective foreseeability of the risk of the bodily harm which was neither trivial nor transitory
- Causation was made between the act and the harm

R v Tutton (s 219)

Facts:

- Parents though child had a magic cure to his diabetes
- They stopped giving him his insulin
- He died

Analysis:

- The test is that of reasonableness, and proof of conduct which reveals A MARKED AND SINGIFCANT departure from the standard which could be expected of a reasonably prudent person in the circumstances will justify a conviction of criminal negligence
- The necessary mens rea may be inferred on an objective basis form the acts of the accused.

*R v Brander (*standard for police officer)

Facts:

- Police officer was riding through the city and some stunters were racing
- He was speeding to catch them
- A collision occurred between the police officer and another vehicles
- Some kids died

Analysis:

- Personal characteristics of individual are not usually important, but the list of circumstances includes the skill of the driver and purpose of driving
- In order to convict an accused for criminal negligence in the operation of a motor vehicle, an accused's departure from the standard of care of a reasonable person **must be more marked In both the external circumstances and the mental elements,** than in dangerous operation cases.
- The standard is not determined by the accused's training and experience, but the activity being performed is.
    - The activity being performed determines the standard
    - Since the officer was under a duty to pursue other dangerous individuals, it gave him the ability to drive quicky and the level had to be a higher level form him to exceed the standard.

R v Javanmardi

Facts:

- Man is denied treatment for his heart disease, so he goes to J to inject nutrients which is illegal in QB
- Despite caution form J, individual persisted it get done

- Notwithstanding precautions to prevent contamination, one of the nutrient vials contained bacteria
- As a result, the man was infected and his death was guaranteed.

Analysis:

- Was charged with criminal negligence causing death and unlawful act manslaughter
- At trial, it was determined there was no marked departure from a reasonable person in the shoes of the accused, and also no wanton or reckless disregard since she took all precautions she could think of
- Additionally, the injection was no objectively dangerous so there was no foreseeable risk of harm
- At the Court of Appeal, they found the trial judge erred in considering the experience and training of the accused and that any injection of this nature is objectively dangerous.
- **SCC said criminal negligence causing death requires:**
    1. Actus Reus: The act of failure to act which causes death
    2. Mens Rea: Wanton or reckless disregard for life or safety,
        - Measured by the degree to which the accused departed from the reasonable person in the circumstance
        - There is an elevated standard of marked AND substantial.
- **SCC unlawful act manslaughter requires:**
    1. Actus Reus: Unlawful act, causing or contributing to death
        - Crown is not required to independently prove the act was objectively dangerous
        - If you prove an act is unlawful, it is basically presumed there was objectively dangerous thing about it. (*DeSousa;Creighton*)
    2. Mens Rea: Modifed objective test
- Both offences require a measurement of the actions against the standard of a reasonable person in the circumstances.
- The standard is not determined by the accused's training and experience, but the activity being performed is.

R v Stephen (s 215- Necessaires of Life)

Facts:

- Family failed to provide sick child with care
- They used herbal medicines instead of taking him to the hospital

Analysis:

1. Actus Reus- failure to act
2. Mens rea- degree of failure/marked departure

SEXUAL ASSAULT

- An assault violating the sexual integrity of the victim.
- The aggravating aspect of the assault is assessed objectively.
- No such thing as implied consent for sexual touching.
- NO means NO, and YES means YES

Actus Reus: the non-consensual application of force (directly or indirectly) to another person that violates the complainant's sexual integrity. (determined objectively)

Mens Rea: the subjective intention to touch knowing the complaining is not consent to the touch (include true knowledge, wilful blindness, or recklessness).

Sexual Assault Analysis

- **Actus reus**
  - 1. Application of force (obj)
  - 2. Violation of sexual integrity (Chase, with obj-KBV)
  - 3. If established BARD there no consent, the AR is established (subjective)
- **Mens rea**
  - 1. Intention to touch
    - The accused does **not** need to have the **motive** of sexual gratification in mind
  - 2. Did the accused touch the complainant **knowing** she was not consenting?
    - True knowledge, WB, or R that the complainant was not consenting
    - Failure to take reasonable steps to ascertain consent (Darrach)
      - Must show **some** reasonable steps taken to ascertain consent (unlike mistake of fact or age, where **all** reasonable steps must have been taken)

- If accused subjectively honestly believed he took reasonable steps and it's held that this was unreasonably held, they still may be entitled to an acquittal
  - The accused cannot have formed belief due to self-induced intoxication, WB, R, or reliance on one the twin myths
  - Consent must consciously be positively given at every stage (JA)

Criminal Code ss 150.1-162

150.1- There is no consent to sexual activity for a person who is under the age of 16.

Exemptions:

If the complainant is 14 or 15, and the accused is less than 5 years older.

If the complainant is 12 or 13 then there may be consent if the accused is less than 2 years older.

- Crown would have to prove lack of consent from other means in these circumstances
- Reason for this law is because we do not want to make young people in consensual relations automatic criminal.
- However, they do not want predatory relations and older people to take advantage of those who do not have the idea of dully informed consent.

151- Sexual Interference: Touching a minor's body for a sexual purpose.

- Point of adding sexual purpose is because those with young children need to help clean them and care for them.

152- Invitation to sexual touching: Inviting, counselling, or convincing a minor to touch you.

153- Sexual Exploitation: A person who is 16 or 17, NOT 18 or OVER, but the person who is having sexual activity with them stands in a position of trust or authority with them.

153.1- Sexual exploitation of a person with a disability

155- Incest

160- Bestiality

162- Voyeurism: The practice of gaining sexual pleasure from watching others when they are naked or engaged in sexual activity. Can be reordered or just a peeping tom. Putting a video camera in a bathroom or vulnerable spot to watch someone. (any age)

162.1- Broadcasting or publishing intimate images with consent (any age)

163.1- Child pornography: producing, broadcasting, publishing, or receiving images of anyone under the age of 18.

Criminal Code ss 271-276

271- Sexual Assault

272- Sexual assault with a weapon, threats to a 3rd party, or causing bodily harm

273- Aggravated sexual assault

273.1: Consent for 271-273 means the voluntary agreement to engage with the sexual activity in question. (Basically, just because someone is consenting to one activity or touching, DOES NOT mean they are consenting to anyone else)

273.1(2): No consent is obtained if…

- The agreement is expressed in words by another complaint,
  a.1 if the complainant is unconscious, (as soon as person is unconscious, person must stop whatever act they were performing even if they had consented to it)
- the complainant is incapable of consenting for any other reason, (very high levels of intoxication)
- the individual induces consent from complainant through their position of authority (ie. police officer and someone they just arrested)
- there is an expressed lack of agreement; or
- the complaint consented to an activity and then expressed lack of agreement (person can always say stop at any point)

273.1(3): 273.1(2) is not an exhaustive list and court can come up with other reasons for vitiation of consent.

276- Rape Shield Law: Not allowed to bring forward evidence of complainants sexual past without permission from court. Just because the individual has consented once before does not mean they will consent again (a) or that they are less worthy of belief (b). These are the twin myths.

- Even if Crown messes up and mentions complainant sexual history, the defense cannot use this as an opportunity to go against s 276 (*Barton*).

R v KBV (sexual gratification is not required for charges of sexual assault)

Facts: Accused is charge with sexually assaulting his 3-year-old son by grabbing his genitals.
Issue: Is this a sexual assault within the meaning of CC s 271(1)? **YES**
Analysis:

- Sexual assault is an assault which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated.
- The test to determine whether the conduct is sexual in nature is **objective**: "viewed in the light of all the circumstances is the sexual context of the assault visible to a reasonable observer?
- **The test looks at the body part touched, the nature of contact, situation in which it occurred, words and gestures accompanying the act, and other circumstances. (**If a mean kicks another man in the nuts, it is unlikely to be deemed a sexual assault)
- Motive of sexual gratification is NOT required, but can help when determining if the conduct was likely sexual.

Dissent:

- Lack of motive or intent on part of the accused to seek sexual gratification in doing what he did
- Sexual gratification should be considered
- The only party of this assault which was sexual in nature, it the body party that was attacked
- It was a misguided form of discipline and is assault, but not sexual assault.

Holding: The act was a sexual assault even if the dad did not get sexual gratification from it.

Consent in Sexual Assault

- Crown must prove the absence of consent in the context of sexual assault
- No defence of implied consent; implied consent is only a defence in regular assault cases with mild touching (typically communal touching, such as tapping a friend on the shoulder)

Statutory Provisions About Consent

As stated above in ss 150.1-153, 160(3), and 173(2).

265(2)- consent is vitiated if obtained through fraud

273.1(c)- no consent is obtained where the accused induced the complainant to engage in activity by abusing a position of trust, power, or authority

273.2- no consent is made unless an agreement has been made by words.

R v Ewanchuk (no such thing as implied consent)

Facts:

- 17 year old complainant went into E's van for a job interview
- After she went to his trailer where he made multiple sexual advances. She said no multiple times.
- She testified that she was afraid and did not take further action to stop the sexual conduct.
- When she went to leave, E paid her $100 and told her not to tell anyone.

- In trial, E was successful in his argument of implied consent, since she stopped saying no.
- In Court of Appeal, judge said E's conduct was less criminal, more hormonal, and upheld the acquittal.

Issue: Is there a defence of implied consent available in sexual assault? **NO.**

Analysis:

- No defense of implied consent
- Three part of actus reus for sexual assault:
  1. A force
  2. That invaded sexual integrity
  3. In the absence of consent
- Two parts of mens rea for sexual assault:
  1. Intention to touch
  2. Knowing that the touch is not being consent to (true knowledge, wilful blindness, and recklessness apply)
- **ONLY YES MEANS YES**
- Accused must raise a reasonable double that there was consent.
- Consent is observed subjectively in the mind of the complaint, so long s the complainant believe in her claim of no consent the actus reus is proven (as long as the defence does not raise a reasonable doubt, such as credibility)
- The accused knew or was at least reckless that the complainant was not consenting because she communicated non-consent multiple times, through both words and actions.
- Consent can be shown in 2 ways:
  1. The complainant in her mind wanted the sexual touching to take place
  2. The complainant had affirmatively communicated by words or conduct, her agreement to engage in sexual activity with the accused.

Holding: SCC denied that without clear consent, sexual touching ay be considered sexual assault.

- Accused did not make any attempt to ensure that he had consent
- Presumption is the complainant must verbally say they consented.

R v JA (no such thing as pre-consent, no consent while unconscious)

Facts:

- JA and KD were having sex
- KD consented to JA choking her. She lost consciousness. This has happened before.
- While unconscious, JD tied her to the edge of the bed and inserted a dildo up her anus.

Procedural History:

- JA was convicted of sexual assault at trial
- JA appealed, and majority set aside the conviction.

Issue: Can a person perform sexual acts on an unconscious person if that person consented before becoming unconscious? **NO.**

Analysis:

- Based on legislative analysis of 273.1, he court concluded that "parliament viewed consent as the conscious agreement of the complainant to engage in every sexual act in a particular encounter"
- Actus reus is whether or not complainant was consenting, mens rea is whether or not accused thought they were consenting.

- The Court included that parliament intended for a person to have an active mind during the sexual activity in question.
- Consent could not be obtained is complainant was incapable of consenting, or if complainant revoked consent at any time.
- JA's belief that KD was consenting was a mistake of law NOT a mistake of fact.
- It is not upt to Court to carve exceptions for spouses , that is up to parliament to decide and enact.

Dissent:

- It is a fundamental principle of law governing sexual assault in Canada that no means no, and yes means yes. KD said yes.
- Adopting the Crown's position would also require us to find that cohabiting partners across Canada, including spouses, commit a sexual assault when either one of them, even with express prior consent, kisses or caresses the other while the latter is asleep.
- The dissenting opinion also focused on the problematic nature of KD's recantation.

Holding: An individual must acquire consent **during** the sexual activity in question, when someone is unconscious they cannot give consent.

R v Barton (twin-myths, objective Jobidon, and honest mistake belief in communicated consent)

Facts:

- Barton had hired an indigenous prostitute for sex.
- On the first night he put his entire hand in her vagina before proceeding in sexual intercourse.
- On the second night, she came to his hotel again and they drank at the bar. He paid her again to have sex.
- He proceeded to put his entire hand in her vagina and thrusted more deeply and harder than the night before.
- She began to bleed. He told her to clean up and that he waned his money back since she was on, what he believed to be, her period.
- He went to bed and she dies in the shower.

Analysis:

Twin Myths

- Crown introduced the victim's sexual history saying the she was a sex worked and had come back for a second night,
- Bottos assumed he no longer needed to get permission from the Judge in s 276 and continued to talk about the sexual past between his victim and Barton.
- THIS IS WRONG. YOU ALWAYS NEED PERMISSION.

Objective *Jobidon*

- New route to liability created → the objective foresight of bodily harm
- "(1) Legal Principles
- [86] One of the ways in which an accused may respond to a charge of sexual assault is to rely on the defence of honest but mistaken belief in communicated consent. To lay the foundation for the analysis that follows, it will first be useful to briefly review several key principles relating to this defence, namely: (a) the role consent plays in the sexual assault analysis, (b) the necessity of having a belief in *communicated* consent in order to raise the relevant defence, (c) mistakes of law, and (d) the reasonable steps requirement. I will address these four points in turn.
- (a) *The Role of Consent in the Sexual Assault Analysis*

- [87] A conviction for sexual assault, like any other true crime, requires that the Crown prove beyond a reasonable doubt that the accused committed the *actus reus* and had the necessary *mens rea*. A person commits the *actus reus* of sexual assault "if he touches another person in a sexual way without her consent" (*R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at para. 23). The *mens rea* consists of the "intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched" (*R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 42).
- [88] "Consent" is defined in s. 273.1(1) of the *Code* as "the voluntary agreement of the complainant to engage in the sexual activity in question".[6] It is the "conscious agreement of the complainant to engage in every sexual act in a particular encounter" (*J.A.*, at para. 31), and it must be freely given (see *Ewanchuk*, at para. 36). This consent must exist at the time the sexual activity in question occurs (*J.A.*, at para. 34, citing *Ewanchuk*, at para. 26), and it can be revoked at any time (see *Code*, s. 273.1(2)(e); *J.A.*, at paras. 40 and 43). Further, as s. 273.1(1) makes clear, "consent" is not considered in the abstract. Rather, it must be linked to the "sexual activity in question", which encompasses "the specific physical sex act", "the sexual nature of the activity", and "the identity of the partner", though it does not include "conditions or qualities of the physical act, such as birth control measures or the presence of sexually transmitted diseases" (*R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, at paras. 55 and 57).
- [89] Consent is treated differently at each stage of the analysis. For purposes of the *actus reus*, "consent" means "that the complainant in her mind wanted the sexual touching to take place" (*Ewanchuk*, at para. 48). Thus, at this stage, the focus is placed squarely on the complainant's state of mind, and the accused's perception of that state of mind is irrelevant. Accordingly, if the complainant testifies that she did not consent, and the trier of fact accepts this evidence, then there was no consent — plain and simple (see *Ewanchuk*, at para. 31). At this point, the *actus reus* is complete. The complainant need not *express* her lack of consent, or revocation of consent, for the *actus reus* to be established (see *J.A.*, at para. 37).
- [90] For purposes of the *mens rea*, and specifically for purposes of the defence of honest but mistaken belief in communicated consent, "consent" means "that the complainant had affirmatively communicated by words or conduct her agreement to engage in [the] sexual activity with the accused" (*Ewanchuk*, at para. 49). Hence, the focus at this stage shifts to the mental state of the accused, and the question becomes whether the accused honestly believed "the complainant effectively said 'yes' through her words and/or actions" (*ibid.*, at para. 47)."
- How can one prove victim was not consenting when she is dead?
    - Crown made the inference no one would consent to pain like that
    - Even if she did, consent was vitiated.
    - No one can consent to death
    - Bottos argued some people have higher pain tolerances, and fisting is a common sexual act.

Honest but Mistake Belief:

- Mistaken fact negates mens rea → it is not the same thing as implied consent.
- Occurs when there is an error in reality of the accused that the crown cannot disprove, the accused can be acquitted because the crown did not prove the mens rea.
- If dealing with a regular criminal defence, then we are looking at subjective orthodoxy.
- If the accused does commit the actus reus, but made a mistaken belief that the complainant did consent, there is no proof of mens rea.
- Mistaken belief can be unreasonable, but the less reasonable, the less likely the court is to believe them
- Key principles to this defence:

1. The role consent plays in the sexual assault analysis
2. The necessity of having a belief in communicated consent in order to raise the relevant defence
3. Mistake of Law, and
4. The reasonable steps requirement.

Holding: Guilty of sexual assault and manslaughter.

- Accused must be able to say that complainant WAS communicating consent to him to use honest but mistaken belief
- Accused has onus to induce evidence when claiming honest but mistake belief
- To please honest but mistake belief, the accused must have the capacity and ability to remember the events.

Parliament has encroached on the view of honest, but mistaken belief in consent for sexual touching's. It is done so in 3 ways:

1. S 265(4)- Credibility Test
2. S 273.1(2)- A number of ways a person cannot come to a mistaken belief at law.
3. Consent can neve be implied, not even between husband and wives. There are no special rules for spouses or long-term relationships.

Other Forms of Vitiation of Consent:

R v Audet (consent in a powerful relationship)

Facts:

- A was a 22-year0old teacher who went to a club where he encountered the complainant, a student he had taught in grade 8 and just turned 14.
- The complainant was at the club with her cousins in their 20s and drank beer they offered her.
- The group went back to the cottage where the accused was staying. He has complained of a headache and went to bed.
- The complainant later followed him and fell asleep next to him.
- During the night the two engaged in oral sex. AS it went on, the complainant felt uncomfortable and asked him to stop.

Issue: When being charged with 153(1) does the accused have to be in a position of trust or authority while the incident is occurring?

Analysis:

- Trial judge said in order to prove sexual exploitation, Crown had to prove that A abused his position of trust or authority over B.
- SCC says this is WRONG. You do not have to prove exploitation or abuse of position.
- **<u>The common law has recognized that exploitation of vulnerability will impact the validity of consent.</u>**
- Majority in SCC felt this was contrary to Parliament's objective in passing the law, which was "to protect young people in vulnerable positions towards certain persons because of an imbalance of power based on their relationship"
- Consent is not a defense to sexual exploitation
- To obtain conviction under 153(1), Crown must prove VARD:
    - The complainant is a young person

    - Accused engaged in a sexual activity
    - At the time the acts were in question, the accused was in a position of trust or authority, or the young person was in a relationship of dependency of the accused.
- In this case, her was her teacher before and it did not matter this incident happened over summer holidays.

Holding: Audet is guilty of 153(1).

How would this case change now that the age of consent is 16, not 14?

- Based on the age difference between the accused and complainant, it would not be a charge of sexual exploitation.
- If the complainant was 16 or 17, and other person was a teacher, it would more likely be sexual exploitation.
- MUST determine if there is a position of authority.

Example:

- Highschool gym teacher goes to bar and meets a 17 year old. She goes to school in the South, he teaches in the North, and they consensually have sex. This is NOT sexual exploitation, as the relationship is not close enough to show breach of care.
- BUT if he substitute taught at her school specifically teaching her, it is more convincing.

R v S(DG) (consent when threats are being made)

Facts:

- S and M broke up
- S threatened to share nude photographs of M to her friends unless she had sex with him.
- M engaged in one act of anal, and two acts of vaginal intercourse to stop S from sharing the images.

Issue: Did M consent? If so, did the threats vitiate her consent under 273.1?

Analysis:

- S testified that he blackmailed M, but the sex was consensual. TJ acquitted on this reasoning, but the judge erred by framing the issue as M "agreeing " to sexual activity, without regard to the legal definition of consent and whether M had actually given voluntary agreement.
- M testified she did not consent and just wanted the photos deleted.
- Court felts that S's conduct amounted to extortion, even though he was not charged with that offence.
- If someone had a gun to your head, or blackmailed/threatened you, it is not consent. **Vitiation of consent is not an exhaustive list.**
- In the circumstances, there was no consent under s 273.1(1).

Holding: Appeal allowed, acquittal set aside, new trial ordered.

R v Faulkner (capacity to consent when drugs or alcohol are involved)

Facts:

- F and his friend attended a party
- The complainant was 15 and the accused was 22. (Age of consent at the time was 14)
- At the party, the complainant consumed alcohol, marijuana, and one tab of LSD which was given to her by the accused. She never lost consciousness.

- Complainant had a 10 PM curfew and asked accused to take her home. He offered to pay for a cab, but she got upset and instead waited until he would drive her.
- Accused drove 15 minutes past her house, and they engaged in intercourse in the car. Complainant said she never had the chance to say, yes, no, or maybe.
- Complainant's mother testified that C was upset and crying but did not notice signs of consumption alcohol or drugs.

Issue: Did the complainant lack the necessary capacity to consent to sexual intercourse? **NO.**

Analysis:

- TJ found that due to her age, injection of drugs and alcohol, and the isolated location of the incident, the complainant was at her most vulnerable and incapable of consenting.
- Although Court of Appeal finds that all 3 factors are relevant when looking at capacity, there is no evidence in this case that she did not have the ability to not consent.
- C's awareness of her curfew, decision to leave and request a ride home, show her awareness of her surroundings and memory of evidence.
- Additionally, her mother did not notice any impairment that would display C lacked capacity.

Holding: She was not "obliterated" enough to not have capacity.

R v Currier (failure to disclose HIV status = fraud = vitiates consent)

Facts:

- C tested + for HIV. He was informed he must use condoms and inform all his sexual partners of his disease.
- C did not inform his girlfriend of 18 months, and they had unprotected sex over 100 times.
- At one point, she started to develop hepatitis. She tested – and he tested + again.
- He told her that if he had to use a condom he would find a new partner who was + so he did not have to.
- In fear of losing her boyfriend, she continued to have unprotected sex.
- The two broke up, he found another partner. He never informed her he was +, and they had unprotected sex.

Issue: Is complainant's consent to engage in unprotected sexual intercourse vitiated by fraud when her partner knows he is HIV + and deliberately fails to disclose or deceive her about it? **YES.**

Analysis:

- The women's consent was obtained through fraudulent means.
- An HIV + individual who practices safe sex does not necessarily have to disclose status.
- To prove aggravated sexual assault in this case, Crown has to prove:
    1. That the accused's act endangered the life of the complainant (risk of contracting HIV met this requirement)
    2. The accused applied force without consent (harder to prove because complainants did consent, however, courts considering not disclosing HIV status as a vitiation of consent)
- Three criteria on what should be proven to prosecute on the grounds of fraud:
    1. The accused committed an act that a reasonable person would see as dishonest
    2. There was a harm or risk of harm to the complainant as a result of that dishonesty
    3. The complainant would not have consented but for the dishonesty of the accused.

Objective test for fraud: **a dishonest act (would an ordinary person view this act as dishonest?) + deprivation (significant risk of serious bodily harm)**
Holding: Fraud vitiates consent under s 265.3.

R v Mabior (new test for fraud)
Facts:

- M had sexual relations with 9 complainants. He told none of them that he was HIV +. He even told one he had NO STDs.
- Sometimes he wore condoms, sometimes he did not.
- None of the complainants contracted HIV, but 8/9 of them said they would not have consent had they known he was +
- M is being charged with aggravated sexual assault:

Issue: Was M's failure to disclose a vitiation of consent due to fraud? **YES.**
Analysis:
2 main criticism of the *Currier* test:

1. That it is uncertain, failing to draw a clear line between criminal and non-criminal conduct, AND
2. That it either overextends the criminal law or confines it too closely

- The *Currier* test gives rises to the following uncertainties: what is a significant risk? And what is a serious harm? These can be interpreted in many ways.
- The court settled on the following approach;
  The Crown must show consent was vitiated due to fraud. **Failure to disclose amounts to fraud where the complainant would not have consented if they knew the accused was HIV +., and where sexual contact posed a serious risk.**
- New Test: **dishonest act (same as *Currier*) + deprivation (realistic probability of transmission)**

Holding: New test for fraud.

R v Hutchinson (sabotaging condoms… consent for protected sex is not consent for unprotected sex)
Facts:

- H told his girlfriend he wanted to have a child, but she did not want to get pregnant.
- After they broke up, H confessed to sabotaging the condoms they were using.
- The complainant says she would not have consented had she know the state f the condoms they were using.
- The complainant did get pregnant, but had an abortion.
- H is being charged with aggravated sexual assault.

Issue:

1. Is there a difference between consenting to protected sex vs unprotected sex? **YES**
2. If so, does he lack of consent to unprotected sex change the act to sexual assault? **YES**
3. Are the effects of the abortion to be included in the harm caused by the sexual assault? **YES**

Analysis:

- The sabotaging of the condoms fundamentally altered the nature of the sexual activity in question. The complainants consent could therefore not be reasonably informed and freely exercised.
- The Court held that the sexual activity in question should be interpreted narrowly in accordance with parliament's intent in amending the legislation around sexual assault and consent.

- The correct way to interpret sexual activity in question is to refer simply to the sex act itself. They must agree to the specific act. It does not include the conditions or qualities f the act, such as birth control m easure or presence of transmitted diseases. Consent can only be vitiated if fraud is present.
- Fraud is **dishonest act + deprivation.**
    - Here, there was clearly a dishonest act as H wore sabotaged condoms
    - The deprivation was the risk of pregnancy as H deprived her of the choice of getting pregnant or not. This is as serious as the risk of serious bodily harm from the abortion.

Holding: Must do fraud test to see if consent is vitiated.

Consent Summary

Fraud Vitiating Consent Analysis

- Fraud vitiating consent towards aggravated sexual assault (endangering life of complainant)
    - Dishonest (objective)
        - Would a reasonable person think that this was a dishonest representation/non-disclosure?
    - Deprivation
        - Significant risk of serious harm (Cuerrier)
            - Realistic possibility of transmission of HIV (Mabior)
                - Defence can show two things to raise a doubt on this
                    - 1) Accused's low viral load
                    - 2) Wore a condom
            - Risk of unwanted pregnancy (Hutchinson)

Vitiation of Consent Quick Summary

- **Audet** – Position of authority/trust on young person, irrespective of consent (s. 153)
- **S(DG)** – Don't need to be charged with extortion/fraud for the act to vitiate consent (s. 273.1(3))
- **Faulkner** – Complainant's alcohol level must be at a level of incapacitation (lack of cognition) for it to vitiate consent
- **Cuerrier** – Fraud = Dishonesty (objective) + Deprivation (significant risk of serious harm)
- **Mabior** – Significant risk of serious harm for HIV: realistic probability of transmission of HIV (although Defence can try to raise a reasonable doubt either by low viral load or if they wore a condom)
- **Hutchinson** – Significant risk of serious harm for unwanted pregnancy: risk of unwanted pregnancy

Consent to Sexual Activity

- Consent must be
    - Directed to each and every sexual act (***JA***)
    - Communicated by the complainant to accused by words or conduct
    - Provided only while conscious and during time of the application of force (***JA***)
    - Whether consent is given or not is wholly within the mind of the complainant (must be believed)
        - No defence of implied consent no mature the nature/length of relationship
        - No time limit to bring forward a complaint
    - If the AR is proven BARD, the accused is guilty of the MR if they
        - Intended to touch while
        - Knowing/WB/R to the complainant not consenting or failing to take reasonable steps to ascertain consent (***Ewanchuk***)
    - Agreement to sexual touching of one part of the body is not an agreement to another part (***Hutchinson***)

Sexual Assault Summary and Examples

- Most commonly considered sexual assault principles:
    - Consent must be directed for each sexual act (*JA*)
    - Consent must be communicated. If accused is to claim honest but mistaken belief in consent, they must be able to prove complainant communicated consent.
    - No responsibility on complainant to communicate consent or non-consent (so long as they have not already said yes, and then changed there mind during, then they have to say stop). **Whatever is in the mind of the complainant in regard to consent counts as actus reus,**
    - Consent must be provided only when conscious and without application of force (*JA* and CC)
    - Assuming actus reus has been proven BARD, then the accused will be found guilty of mens rea IF they intend to apply force knowing (true knowledge, wilful blindness, OR recklessness) that the complainant was not consenting
    - If the actus reus has been proven, and the accused wants to establish honest, but mistaken belief in consent, it is on the accused to induce some evidence to show "I believe they were consenting because it was communicated…". This is done though the employment of the reasonable steps analysis: accused must take reasonable steps in the circumstances at the time to make sure the complainant is communicating consent. (*Barton*)

See notes for examples of sexual assault.**

CULPABLE HOMICIDE

Actus Reus: Causation has already been reviewed in *Smithers/Nette* test

Mens Rea: Murder is a full mens rear offence; liability cannot be established objectively through penal negligence. Subjective intent is required, even in cases where recklessness is considered. Intent can be transferred from the actual person you meant to kill, to the person you accidentally killed.

Criminal Code ss 215-229

215- Duty to Provide Necessaries: Can be source of culpability if you fail to meet these duties, such as not providing the necessities to a baby.

217- Duties on persons who undertake acts: example, lifeguard must act as a lifeguard when on duty.

218- Child abandonment

219- Criminal negligence: acting criminally by falling below a certain standard; showing a disregard for others life and wellbeing; a marked departure from the norm.

220- Criminal negligence causing death

221- Criminal negligence causing bodily harm.

222(1)- "Homicide" is causing the death of a human being, directly or indirectly, by any means.

222(2)- Homicide can be culpable or non-culpable

222(3)- Non-culpable homicide is not an offence.

222(4)- Culpable homicide is murder, manslaughter, or infanticide.

222(5)- Culpable homicide is causing the death of a human being….

(a) By means of an unlawful act
(b) By criminal negligence
(c) Threats or violence that cause human being to do something that causes their death
(d) By wilfully frightening a human being in the case of child or sick person, that causes them to die

222(6)- Notwithstanding anything said here, a person does not commit homicide within the meaning of this Act by reason only that he causes death of a human being by precuring by false evidence the conviction of death by sentence of law. (Basically, when people were capitally punished for murder, and people falsely testified, and the accused was killed, that person would not be charged with homicide, just perjury. Although Canada no longer has the death penalty, this is around just in case Canada deports someone and another country kills them. Typically, Canada will not deport unless the other country says they will not kill.)

223- When a child becomes a human being: When it is completed proceeded in a living state from the body of its mother whether or not it has breathed, has independent circulation, or the naval string is severed.

224: Death that might have been prevented: Where a person, by an act or omission, does any thing that results in the death of a human being, he causes the death of that human being notwithstanding that death form that cause might have been prevented by resorting to proper means.

225: Death from treatment of injury- Where a person causes to a human body being a bodily injury that is of itself of a dangerous nature and from which death results he causes the death of that human being notwithstanding that the immediate cause of death is proper or improper treatment that is applied in good faith.

226: Acceleration of Death: Where a person causes to a human being a bodily injury that results in death, he causes the death of that human being notwithstanding that the effect of the bodily injury is only to accelerate his death from a disease or disorder arising form some other cause.

228- Influencing the mind

229**- Murder can only happen in specific instances. It is defined separately by manslaughter largely by the intention of the actor.

Mens Rea for Murder can be made out in cc 229:

a) Culpable homicide is murder when 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) By accidence or by mistake causes death to another human being, notwithstanding that he means to cause death or bodily harm to that human being (<u>when a person is trying to kill one person, but accidentally kills someone else instead, the intent is transferred)</u>

c) If a person, for an unlawful act, does anything they know is likely to cause death, and by doing so, causes the death of a human being, even if they desire to effect their object without causing death or bodily harm to any human being (<u>If someone wants to do something extremely dangerous, but hopes it will not cause death, and it does, it can constitute as murder)</u>

**ALWAYS STARTS WITH S 229 ANALYIS. IF CROWN WANTS TO INCREASE CULPABILITY THEN GO TO 231.

Murder is either first or second degree; s 231(1):

First degree murder is:

a) Planned **AND** deliberate (231(2))
    i. Contract killings are planned and deliberate (231(3))
    ii. NEVER say pre-mediated
b) The victim was a police officer or prison guard acting in the course of his or her duties (or anyone employed to keep peace. The purpose of this is deterrence) (231(4))
c) The murder took place while an offence of domination was taking place (231(5))
    i. Hijacking an aircraft
    ii. Sexual assault
    iii. Sexual assault with a weapon, threats to a 3rd party, or causing bodily harm
    iv. Aggravated sexual assault
    v. Kidnapping and forcible confinement
    vi. Hostage taking

Second degree murder is anything that is not first (231(7))

Difference between 1st and 2nd degree

- Both have automatic life in prison
- BUT 1st degree is a minimum stay of 25 years before being eligible for parole
- 2nd degree the judge will determine eligibility of parole.
- There is NEVER no eligibility for parole in Canada.
- However, you can get consecutive sentencing, such as 3 charges of life for 15, meaning eligibility for parole is after 45 years.

S 232- Murder is reduced to manslaughter when they have been legally provoked. Not because he did not intend death, but because the law has always had sympathy to somebody who was provoked by the deceased to cause their death. Only applies in very specific circumstances.

R v Vaillancourt

Facts:

- V was convicted of 2nd degree murder resulting from a robbery
- He had a knife and thought that his friend also had a knife when in fact his friend had a gun.
- He told his friend to take the bullets out. His friend gave him 3 bullets and V now believed the gun was unloaded.
- He explicitly told his friend before the event he did not want guns involved.

- During the robbery, his friend fired shots and killed someone. V is charged but is friend was never found.
- S 213(d) negates any necessity for mens rea of killing to be proven before a conviction can be entered.
- S 213 (has since been repealed and turned to 230, but 230 is now a zombie law)

Issue: Does s 213(d) offend s 7 and 11(d) of the *Charter*, either alone or in combination with s 21 of CC?

Analysis:

- A principle of fundamental justice is that there must be at least a minimal mental state requirement before criminal liability can be imposed.
- S 213 broadens the definition of murder by requiring only proof of the commissions of a different offence
- In historical context, malice aforethought was used to distinguish murder from manslaughter
- Over time, the felony murder rule which made any death that occurred during the commission of an unlawful act murder, even if the death was unintended or accidental.
- S 213 offends s 7 of the *Charter* as the principle of fundamental justice requires proof of a subjective mens rea, and that there must be some special mental element with respect to death before culpable homicide can be treated as murder.
- The wording of s 214 would allow for juries to convict someone for murder even if they has a reasonable doubt that the accused knew or ought to have known that death would likely ensure, so it does infringe s 11(d).
- 213 is not saved by s 1, because Parliament has other ways of punishing people who commit crimes with weapons that do not impair rights to such a high degree.
- Murder is a highly stigmatized offence and we should not label people as murderers unnecessarily. It is a principle of fundamental justice that before a person is convicted of murder, there must be proof BARD of at least objective foreseeability of death.

Holding: All crimes with significant stigma attached, such as culpable homicide and constructive murder, require the Crown prove objective foresight of death BARD.

R v Martineau (change of *Vaillancourt* to subjective foresight instead of objective)

Facts:

- M & his friend were out with a pellt gun and rile, they knew they would commit a crime. M though it would just be a break and enter.
- They broke into and robbed a trailer.
- M's friend shot and killed the people living there.
- M is charged under s 230(a) which states that homicide is murder if it is committed during a break and enter, and a death ensues when a person means to cause bodily harm to commit the crime or get away.

Issue: Does a charge of murder require intent? **YES, SUBJECTIVE.**

Analysis:

- Parliament has the power to define the elements of a crime, but post-Charter, they must do so in a manner that accords with principles of fundamental justice. The court must measure the content of legislation against the guarantees in our Charter.

- Subjective foresight of death is required before a conviction for murder can be sustained. This represents a step beyond the decision in V, where the minimum threshold was objective foresight of death.
- Canadians value free will. Thus, offenders should be liable and punished according to their exercise of free will in bringing about the offence/consequences.
- All murders should require subjective intent, as it is the most heinous and punished crime, and therefore, a high threshold should be set; **"a conviction for murder cannot rest on anything less than proof BARD of subjective foresight of death"**

Holding:

- Section 230(a) of CC is contrary to the Charter.
- A person cannot be convicted of murder without proof of subjective foresight of death. This is a step beyond the decision in V where the minimum threshold was objective foresight of death.

R v Logan (same day as court held *Martineau*)

Facts:

- During a series of robberies, a person was shot and severely injured.
- The accused is charged with attempted murder.
- Johnson, one of the robbers, had stated he had no intention to shoot and that there was no discussion concerning the use of guns.
- TJ instructed the jury that Crown was required to establish BARD that the respondent's knew or ought to have known that someone would probably shoot with the intention of killing.

Issue: Does s 21(2) of the CC infringe on s 7 of the *Charter*?

Analysis:

- For attempted murder, there is a requirement of subjective intent.
- To be admitted as a part of murder, you must also have subjective foresight that death would have resulted.

Holding: On chargers where subjective foresight is a constitutional requirement, the objective component saying someone should have "ought to known" is not justified and does not apply to murder or attempted murder cases.

Methodology of Murder

1. Was there a death of a human being (not merely brain dead or in a coma)?
    - Look at s. 223 for definition of when a child becomes a human being
2. Was the human being in an infant?
    - Usually talking days – not a precise time frame
    - If it's a newborn and the accused happens to be the **biological mom** → infanticide potentially – s. 233 (come back to it at the end)
3. If it's not a newborn child or if that newborn child is killed by someone other than the biological mother, you remain still in culpable homicide (s. 222), but now it's either going to be murder or manslaughter
4. Decide if the Crown can establish murder – s. 229
    - **(a)** Both (i) and (ii) have **subjective foresight of death**
    - **(b)** Transferred intent; trying to kill one person and end up killing another
    - **(c)** Rare; "ought to know" is no longer operative
    - ***DO NOT use s. 230 (felony murder rule is a zombie law)
5. If the Crown can establish murder, is it **first-degree or second-degree**?
    - First degree includes
        - i. Planning and deliberation (prove BARD)
        - ii. Contract killing
        - iii. Death occurs during terrorist activity or other special act
        - iv. Special employee/kidnapping
6. If not murder, is it **manslaughter or infanticide?**
    - If Crown cannot prove subjective foresight of death for murder, culpable homicide falls to **manslaughter** (e.g. High degree of intoxication can prevent foreseeing natural consequences of actions; may raise reasonable doubt)
    - S. 232: If murder emanates from a sudden provocation of law; that can reduce the verdict from murder to manslaughter
    - If killing of a child by mother, you must prove a "disturbance of mind" to reduce to infanticide

Manslaughter

- For manslaughter, there are 4 things to consider under actus reus:
    1. An unlawful act (can be criminal or regulatory)
    2. Must be dangerous, likely to injure another, or put their own bodily integrity at risk
    3. Consider *Smithers/Nette* test, causation "but for" and then significant cause
    4. Constitutes bodily harm under s 2 of CC
- 2 part to mens rea:
    1. Subjective intent to apply force
    2. Objective foresight of bodily harm

R v Creighton (mens rea for manslaughter: objective foresight of bodily harm)

Facts:

- C administered cocaine to a willing woman who overdosed and died
- He did not contact the authorities when she stopped breathing

Issue:

1. Is the mens rea for manslaughter subjective or objective? **OBJECTIVE**
2. If objective, how much weight should be given to the personal characteristics of the accused? **NONE; only to circumstances and capacity.**

Analysis:

- Not objective foresight of death, just objective foresight of the **risk** of **bodily harm**
- Definition of bodily harm is under s 2 in CC. This is important to both the actus reus and mens rea. "Any hurt or injury to a person that interferes with the health or comfort of the person that is more than merely transient in nature.
- To establish 1st degree murder, must first establish 2nd degree, and cannot establish without s 229.

Three-Part test to convict on manslaughter:

1. Establish actus rues- the activity must constitute a marked departure of the care of a reasonable person in the circumstances
2. Establish mens rea- the activity must have been done while there was objective foresight of harm (not death) that can be inferred from the facts. The standard is of the reasonable person in all circumstances of the accused.
3. Establish Capacity- given the personal characteristics of the accused, were they capable of appreciating the risk of harm flowing from their conduct?

Holding:

- Objective standard is whether or not a reasonable person would have foreseen the risk of harm from the accused's actions.
- Personal characteristics should not be included unless they lacked capacity to understand the risk.
- Defense cannot argue incapacity due to cocaine use, incapacity is a state where one is completely or near completely unaware of what is going on, what they are doing, and what is being done to them. C was not incapacitated as he was functional enough to inject someone.

R v Nygaard and Schimens (unlawful confinement resulting in 1st degree murder)

Facts:

- The accused planned and beat a victim with a baseball bat over a dispute about money and property. The victim died.

Issue: Is the element of planning and deliberation required by what is now known as s 231, incompatible with the requisite mens rea for what is now s 229? **NO.**

Analysis:

- The planning and deliberate intent to cause harm and ignore that it could kill the person is still first-degree even if there was no intent to actually kill.
- Planned means that the scheme was conceived and carefully thought out before it was carried out
    - "The scheme was conceived and carefully thought out before it was executed"
- Deliberate means it was "considered, not impulsive"
- "Planned is supposed to be assigned is natural meaning as a calculate scheme or design which has been carefully thought out and the nature and consequences of this have been considered and weighed. But that does not mean that the plan need to be complicated, it may be very simple and the simple it is perhaps the easier to formulate." The plan could literally be "I am going to get in my car with my knife, go to his house, and stab him to death"
- "The important element seemed to me so far is the time involved in developing the plan, not the time between development of the plan and doing the act. The more complicated and the more planning, the more damning, but still short and simple plans are also culpable."
- As far as deliberate is concerned, it should also carry its natural meaning of considered and not impulsive, slow in deciding, cautious. Implying the accused must take time to weigh the

advantages and disadvantages of their intended actions. (Must have evidence that shows this, even inference is good)
- Deliberate does not have to mean intentional, that is already part of mens rea of s 229. Deliberate must have a higher meaning than intention or else its presence is meaningless. Motive can help prove deliberation.
- The longer the planning the easier it is to prove deliberation.
- It must be planned AND deliberate.

Holding: Murder may be classified as first degree on the basis of the secondary intent of reckless killing in s 229(a)(ii).

R v Pritchard (1st degree murder by way of unlawful confinement)

Facts:
- P went to steal marijuana stash from a rival drug dealer
- He testified that he accidentally shot the women on the premises of the theft.
- He said the gun just "went off" and he "lost it" and then "just kept shooting her"
- He then buried her body.

Issue: Since robbery is not a predicate offence under s 231(5). P argued that the evidence did not support a conviction of first degree murder. Is this first-degree murder? **YES.**

Analysis:
- Whenever there is first-degree murder under 231(5) there are 2 distinct crimes that occurred, but they happen in combination of one another in one continuous transaction. The first crime is second-degree murder causing death intentionally, the second crime must be listed on 231(5), and thus the combination creates first degree.
- When holding someone at gunpoint for more than a trivial amount of time, it extends from robbery to confinement.
- Parliament intended that murders committed along with certain "crimes of domination" be punished more severely.
- There was sufficient evidence that P had confined S and restricted her movements. The fact that P had used a gun to make S submit to his request before killing her created a sufficient causal and temporal connection between the acts to constitute a single transaction.
- The "high degree of blameworthiness" is found in a situation "where murder is committed by someone already abusing his power by illegally domination another… Parliament has chosen to treat these murders as first degree".

Holding: Robbery is not a predicate offence, but confinement is. Holding someone at gunpoint for a long period of time extends from just robbery to confinement.

Infanticide

S 233- A female person commits infanticide when by a wilful act or omission she causes the death of her newly born child (less than on year old), if a 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 the effect of lactation consequent on the birth of the child her mind is disturbed.

Infanticide is a lot lower of a sentence than murder, so it is often used as a defence as well.

S 223- A human being is defined as a person outside of the mother's womb.

R v Borowiec (interpretation of "her mind must be disturbed")

Facts:

- Gave birth to a baby and left it in a dumpster.
- Admitted to doing this two-times prior.

Issue: What does "her mind is then disturbed" mean? Does she have to have a disturbed mind or a disturbed mind that is connected to her in a homicidal way?

Analysis:

- The mens rea for infanticide is the same for manslaughter; objective foresight of bodily harm.
- "her mind is disturbed" is a question of statutory interpretation.

The term should be applied as follows:

1. The word disturbed is not a legal or a medical term of act, but should be applied in its grammatical and ordinary sense.
2. In the context of whether a mind is disturbed, the term can mean "mentally agitated", "mentally unstable" or "metal discomposure". So, in the mind of the mother at the time, there must be evidence that this was present and that the disturbance was caused by the effects of child birth or lactation. There is no second causation required that says the mental disturbance caused the mother to act in a homicidal way, just that the disturbance was caused by childbirth or lactation.
3. The disturbance need not constitute a defined mental or psychological condition or mental illness. It need not constituted a mental disorder under s 16, or amount to a significant impairment o the accused's reasoning faculties.
4. The disturbance must be present at the time of the act or omission that caused the newborns death, and the act or omission must occur at a time when the accused is not fully recovered from the effects of giving birth or lactation.
5. However, there is no requirement to prove the act or omission was caused by the disturbance. The disturbances part of actus reus, not mens rea.
6. The disturbance must be 'by reason of" the fact that the accused had not fully recovered from giving birth or lactation consequent on the birth of the child.

Holding:

- Mens rea for infanticide is the objective foresight of the risk of bodily harm
- "Disturbance of the mind" carries its ordinary meaning: the disturbance must be connected to the effects of birth or lactation, but no causal connection is required between the disturbance and the decision to cause death to the child.

R v Effert

Facts:

- E did not tell anyone she was pregnant
- She gave birth unattended and without medical treatment in her parent's basement
- She strangled the baby with her underwear and through the body over the fence into the neighbour's yard

Issue: Should the verdict of guilty for 2nd degree murder be set aside because it is not one that a reasonable jury, properly instructed could reach on evidence? **YES**

Analysis:

- An expert witness testified that E was suffering from an acute stress disorder at the relevant time, and in their opinion the events in question occurred within the context of mental illness that was a direct result of child birth The expert withstood extensive cross-examination.
- Juries do not give reasons so it is not possible to know why they convicted 2nd degree murder.
- Court of Appeal held that the evidence could not support a conviction of murder.

Holding: If evidence leaves the trier of fact with a reasonable doubt that the accused's mind was not disturbed in killing of the child, must convict of infanticide instead of murder.

ON AN EXAM:

1. Is it culpable homicide under s 222?
2. Is it 2nd murder under s 229?
3. Is it established as first-degree under s 231?

PARTIES TO AN OFFENCE and SECONDARY LIABILITY

Parties- not the perpetrator or individual who does the deed, but the person who assist, aid and abets, counsels, or encourages the principal.

Aiding or Abetting

S 21(1)- Everyone is a party to an offence who

a) Actually commits it,
b) Does or omits to do anything for the purpose of aiding , OR
    - Omission is only a crime when someone has a duty to act
    - Example: Watching your kid get sexually abused and not stopping it
    - Example: Being the getaway driver
    - Mens rea is the intention to aid
c) Abets any person in committing it
    - Encouraging them to do it (telling them, or showing solidarity)
    - Mens rea is the intention to encourage

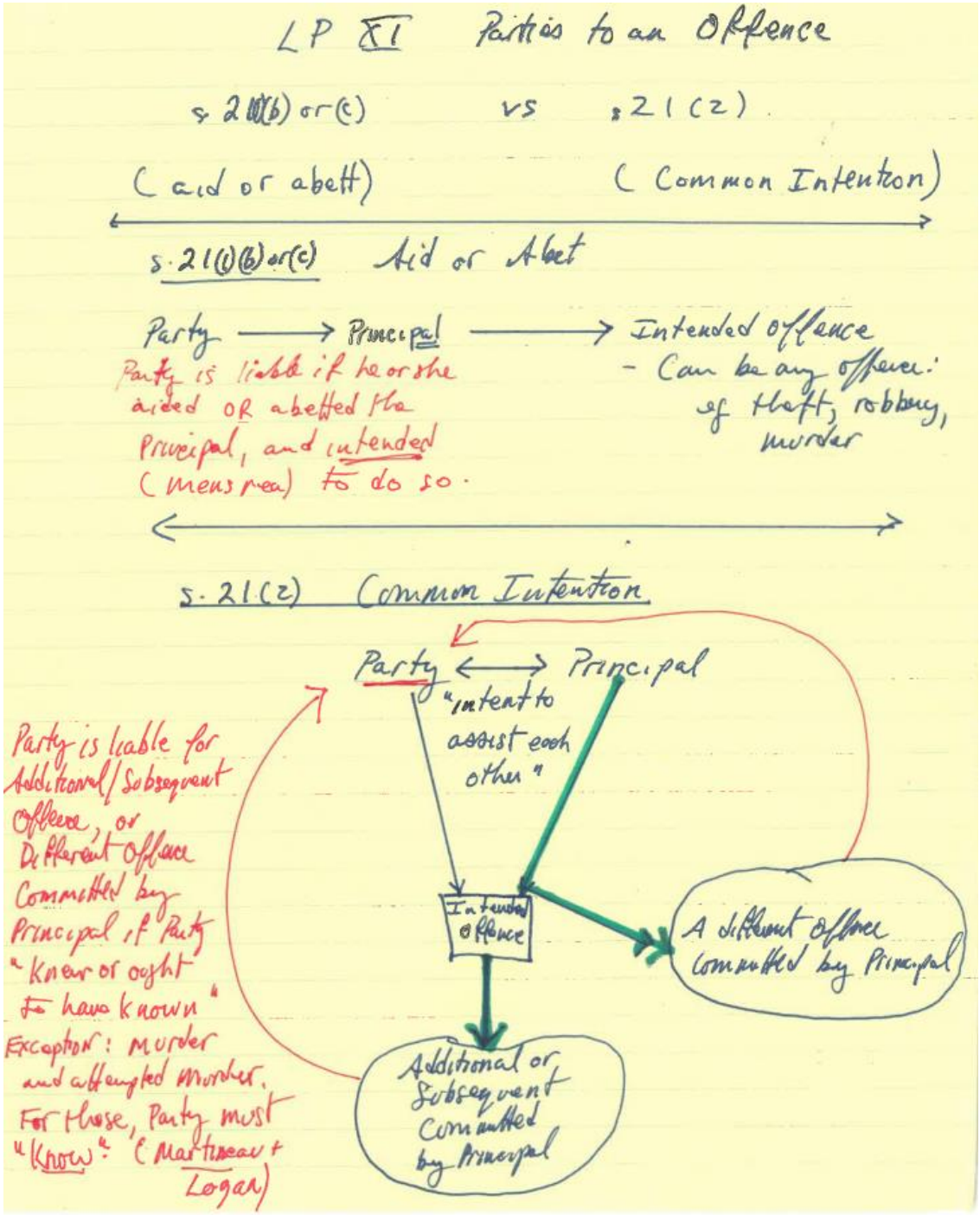
- Recklessness does not suffice for A or B.

Common Intention

S 21(2)- Where two or more person form an intention in common to carry out an unlawful purpose and to assist each other therein and anyone 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 probably consequence of carrying out the common purpose is a party to that offence.

- Original purpose does not have to be a criminal offence
- Basically, when you have a common intention to commit one crime, and while that act is occurring another crime occurs that you knew was going to happen or should have known would happen/
- "Ought to have known" is Inoperable to murder and attempted murder (*Logan*;*Martineau*)

Aiding or Abett vs Common Intention



Counselling (an offence that is committed)

S 22(1)- 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 is counselled is a party to that offence, notwithstanding that the offence was committed in a different form that which was counselled.

(2)- Everyone who counsels another person to be a party to an offence is a party to every offence that the other commits in consequences of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequences of the counselling.
(3)- Counsel includes to procure, solicit, or incite.

- Mens rea for counselling requires true knowledge, wilful blindness, or a high standard of recklessness.

Counselling (an offence that is not committed)
S 464(a)- Everyone who counsels another person if the offence is not committed, is still guilty.

Accessory after the Fact
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 their escape.

Where One Party Cannot be Convicted
S 23.1- For greater certainty, s 21-23 apply in respect of an accused notwithstanding the fact that the person whom the accused aids or abets, counsels or procures or receives, comforts or assists, cannot be convicted of the offence.

- Basically, this means it is possible for an accused to be convicted of aiding, abetting, or counselling, even if the person actually committing the crime is not guilty or cannot be tried and/or convicted.

R v Dunlop (AIDING; mere presence at scene of crime is not a crime)
Facts:

- D and S were gang members. They were bringing beer to other members when they saw someone on top of a girl having intercourse.
- Complainant was raped as part of a gang initiation.
- She recognized the accused, but was unsure if they participated.

Issue: Would accused be guilty by being aware of the rape taking place and doing nothing to prevent it?
NO.
Analysis:

- Mere presence at scene of crime is not sufficient grounds for culpability
- Something more is needed to be charged as a party → keeping watch, or preventing or hindering interference with the accomplishment of the act such as preventing the victim from escaping or being ready to assist.
- There is no positive duty at law to assist a person who is being sexually assaulted, so no liability when D & S did not assist.

Holding: Failure to act/omission is only a crime when the person has a duty to act.

R v Jackson (more than mere presence)
Facts:

- J is found sleeping in a camouflage tent with fertilizer bags near a secluded marijuana grow operation in a forest; he emerges wearing rubber boots the fit him; there was evidence he had been there for at least 2 days.

- J claims he was sleeping there and the boots were not his.
- At trial he was found guilty of illegal production of marijuana
- On appeal, the conviction was upheld, but there was a dissenting judgement, so there was an appeal as of right to SCC

Issue: Was the verdict unreasonable within the meaning of 686(1)(a)(i) of the Criminal Code? **NO.**

Analysis:

- Recall *Dunlop*, mere presence at crime in not proof of culpable commissions.
- However, the evidence showed more than mere presence.

Dissent:

- The state benefits from broad investigative powers. **T**his is necessary for prevention and suppression of crime.
- Police investigation is essential to work of prosecutors, who must prove BARD that alleged crimes have been committed.
- They cannot do so by means of vague allusions or associations, not even the cumulative effect of many such allusions or associations can turn a lack of evidence into evidence that a properly instructed jury, acting judicially, may rely on to convict the appellant.
- Believes there is lack of evidence

Holding: Verdict was not unreasonable as there is enough evidence to support J's conviction.

R v Greyeyes (Agent of Purchaser vs Assisting a trafficker)

Facts:

- Undercover officer bought 5 joints from G. The next day the undercover officer wanted to know if G would know whether to go get cocaine.
- G said yes, and if the officer drove him he would help him try and get some.
- M and G got the cocaine, and M drove G home, giving him $10 for helping him
- G is charged with trafficking marijuana and cocaine.
- G argued he cannot be charged for trafficking since he was acting on behalf of the purchaser and not the seller.

Issue: Is G aiding and abetting making is correct to charge him with trafficking? **YES.**

Analysis:

- Aid means to assist or help, abet means to encourage, promote, or procure.
- The court says that someone who purchases a narcotic must assist the vendor to complete the sale. Without a purchaser, there would be no sale. However, there are other charges for purchasing drugs that are not trafficking.
- Majority say that if a boyfriend drives his girlfriend and she goes to get drugs, she would be charged with just possession, and he would be charged with trafficking, which is not fair.
- Purchasers face different liability for drug possession. There are sperate parliament policies and intentions on this rule when created. However, this rule covered purchased and AGENST or purchaser.
- Agents can be convicted as parties to possession.
- G did more than just assist the purchased. He took money, told the price, and handed the cocaine over to the purchaser, so it was more than assisting the purchaser, and also assisting the trafficker.

Holding: G is guilty of aiding trafficking.

Reasons for ruling:

- Stigma attached to trafficking I far worse than being known as a drug use.
- Possession charges are way less. Trafficking is long sentence
- Agent of purchased does not get off completely, but will still be charged as a party to possession.

R v Roach (pre-Briscoe; mens rea for aiding or abetting)

Facts:

- D accused of fraud for misrepresenting to people on the phone and telling them they won prizes.
- R claims he was helping his friend D with what he thought was a completely legal prize company, not a scam.
- R opens a bank account and mailbox to receive the money orders for what he thought was a prize fund.
- R is being charged for aiding fraud.

Issue: What is the mens rea requirement for asinign or abetting? **TRUE KNOWLEDGE OR WILFIL BLINDNESS. (Since aiding and abetting are *s*pecific intent, knowledge-based offences).**

Analysis:

- Actus reus has to be done "for the purpose of aiding or abetting"
- For the purpose signifies a knowledge-based offence, as purpose is synonymous with intention.
- R's state of mind is significant when considering innocence or guilty
- Recklessness does not satisfy mens rea for fraud, so Crown must prove R was wilfully blind or had true knowledge of D's scheme.
- S 21(1)(b) also does not support recklessness as a form of mens rea. Purpose is synonymous with intent and recklessness cannot be intentional.

Holding: If you are aiding or abetting, you must have true knowledge or wilful blindness of the crime being done. NO RECKLESSNESS.

R v Hamilton (counselling → crimes not committed)

Facts:

- H is charged for counselling to make explosive substances with intent, doing anything with the intent to cause an explosion, breaking and entering, and fraud.
- H was selling online "top secret files" and "bomb recipes" and information of how to commit burglaries.

Issue: What is the mens rea for counselling? **SUBJECTIVE INTENT TO FORESEE RISK THAT PEOPLE <u>MIGHT</u> TAKE HIM SERIOUSLY.**

Analysis:

- Actus reus is the deliberate encouragement or active inducement of the commission of a criminal offence. Counselling is an offence whether the crime is committed or not.
- Mens rea include true knowledge, wilful blindness, and a heightened form of recklessness.
- Mens rea consist of nothing less than an accompanied intent or conscious disregard of the substantial and unjustified risk of counselling**<u>. It must be shown the accused either intended the offence be committed, or knowingly counselled the commission of the offence while aware of the unjustifiable risk of the offence counselled was in fact likely to be committed as a result of the accused consequence.</u>**

- This is a heightened form of recklessness as it is not just a foreseen risk, but counselling while aware of the risk it may be committed as a result of their conduct.
- Even when a crime is not committed, it is still important house the offence of counselling.
- We generally criminalize harmful actions. Therefore, we charge those with secondary liability because they increase the likelihood of a crimes possible occurrence, which is harmful to society.

Holding: Does not matter if H intended for people to take his words seriously, so long as he foresaw the possible risk that people would take him seriously, and in face of that risk counselled anyway.

R v Logan (ought to have known does not apply to murder, attempted murder, or theft?)

Facts:

- HL did a robbery and shot someone.
- SL admitted to helping plan the robbery, but not the guns.
- W did the robbery, but said here was no agreement to use guns.
- TJ said SL and W should have known there was a possibility guns would be used.
-

Issue:

1. Are SL and W parties to the attempted murder?
2. Should the phrase "ought to have known" be operable to s 22(2)? **NO.**

Analysis:

- Attempted murder is almost as stigmatic as real murder.
- In situation like murder and attempted murder, parties to this case should be found guilty only in the knew, their accomplice would commit a second crime if that crime requires subjective foresight.
- No objective for these crimes, only subjective on what the person actually knew.

Holding: Have to know they would or that there was a probable likelihood it would happen. Not "ought to have known", This is inoperative for murder, and attempted murder.

R v Briscoe

Facts:

- A 13 year old girl was lured from West Edmonton Mall by a group of individuals saying they were going to a party
- B drove his friend, C and some other youth to a secluded golf course,
- Earlier that day B;s friend said he wanted to find someone and kill them.
- Upon arrival, B gave his friends some pliers from the car. B stayed in the car initially, but later rejoined the group as one of the other youths hit C in the head with a wrench.
- B told C to be quiet and watched as she was raped and murdered.

Issue:

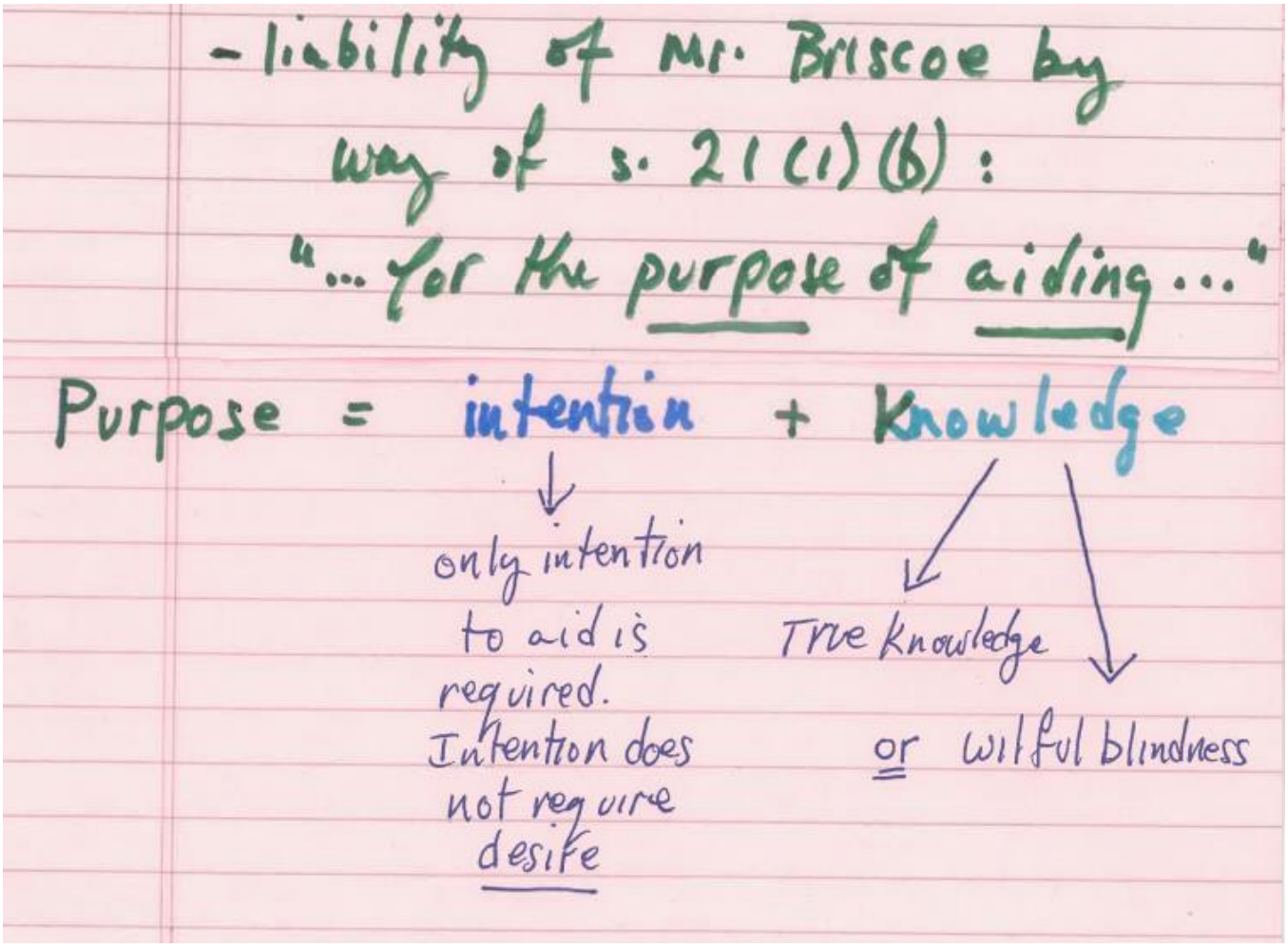
1. Did B have the sufficient mens rea under s 21(1)(b) to be part to the murder?
2. Did the trial judge err y failing to consider whether B was wilfully blind?

Analysis:

- B admitted to knowing something bad would happen. He knew his friends had weapons and said "do not do this around me, I do not want to see or know what you are going to do."
- Canadian criminal law does not distinguish between the principal offender and parties to an offence when determining criminal liability.

- Purpose in s 21 means intent and knowledge
- Intention does not mean desire, it means to aid or abet. Knowledge means the true knowledge OR wilful blindness that the principle intends to commit the offence.
- For knowledge, the aider must know they intent to commit the crime, even if they do not now precisely how it will be committed.
- Wilful blindness can be a substitute for actual knowledge where knowledge is a component of the mens rea. A finding of willful blindness involves answering this question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?

Holding: B is guilty because he was wilfully blind.



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WINTER SEMESTER- DEFENCES

Air of Reality Test (*Cinous*) (relevant for all defenses)

- 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.
- Once passed by the Judge, it means the defence will be put to the trier of fact

- A trial judge should put all defences to a jury that arise no the facts, even if the accused has not specifically argued the defence
- A trial judge has a positive duty NOT to put defences to the jury if there is no evidential foundation (aka the gatekeeping rule)
- Trial just must consider the totality of the evidence raised by the accused, but should not engage in an evaluation of the substantive merits of the defence or whether the defence is likely to succeed.
    - The trier of fact will evaluate the merits in their deliberation
    - Judge does a quantitative analysis, not a qualitative analysis of evidence in this test
- Whether the evidence put forth is capable of supporting the inference, or inferences, required to acquit the accused.

The Modified Objective Test (*Lavallee*)

- Before considering whether accused is entitled to a certain defence, must take into account the accused's subjective circumstances to an extent, and then determine if their perceptions and actions were reasonable.
- Focus is not on who the person is, but what they did whether their actions and perceptions were reasonable
- Law has not evolved that a jury should be instructed to consider a reasonable person with any of the characteristics that are relevant to the accused's ability to perceive and respond to harm.
- Age, gender, strength, past relationships, may all be relevant to this. At the same time, still must be a reasonable basis for determining this.
- Innocently arising dysfunction or personal circumstances
- *Being drunk is not a factor to consider.

SELF DEFENCE, DEFENSE OF OTHERS, and DEFENSE OF PROPERTY

Justification vs an Excuse

- Voluntary and intentional application or threat of force without consent is an assault
- However, an accused may be acquitted where there is a justification or excuse for the application or threat of force
- Justification → challenges the wrongfulness of an action which technically constitutes a crime
    - "I did this but I am justified because…"
- Excuse → concedes the wrongfulness of the action of the accused but asserts hat the circumstance which it was done in are such that it not be attributed to the perpetrator.
    - Examples include necessity, duress, provocation, infanticide, and insanity.
    - "I am morally innocent"
- Justification is morally acceptable, excuse is morally wrong, but criminal law does not actually care
- Self defense used to be a justification, now it lets the person be not guilty.

Defence of Person

S 34(1)- A person is not guilty of an offence is

a) They believe on a 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
    - A subjective belief on reasonable grounds

- incorporated modified objective test here
- threat of force include utterance of threats

b) The act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from the use or threat of force; and
   - For the purpose is important… the intent has to be to defend
   - One can still be mad or scared AND have the intent to defend, just cannot be anger alone.

c) The act committed is reasonable in the circumstances

34(2)- Factors of self defence in determining whether the act committed is reasonable in the circumstances (THIS IS NOT A EXHAUSTIVE LIST)

a) The nature of the force or threat (**primary importance… if someone is coming at you with a banana, it is not reasonably justifiable to use a gun)
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 (if the event is not imminent, what else could have been done in the timeframe to prevent the harm)
c) The person's role in the incident (what was the accused doing? Did they start the fight?)
d) Whether any party to the incident used or threatened to use a weapon (a smaller man could probably be entitled to use greater force or a weapon when defending themselves from a significantly larger man)
e) The size, age, gender, and physical capability of the parties to the incident
f) The nature, duration, and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat.
   f.1) Any history of interaction or communication between the parties to the incident
g) The nature an proportionality of the person's response to the use or threat of force
h) Whether the committed was in response to a use or threat of force that the person knew was lawful (ex.cop was arresting someone and they punch him, that is not self-defence)

*Self defense is not just for physical actions. It can be used for threats of violence.

Example: "I will kick your ass if you come any closer" if someone has backed you in a corner and is yelling at you.

Defence of Property

S 35(1)- A person is not guilty of an offence is

a) They either believe on reasonable grounds that they are in peaceful possession (property you know is yours) of property or acting under the authority of, or lawfully assisting (body guard, bouncers, etc), a person whom they believe on reasonable grounds is in peaceful possession of property.
b) They believe on reasonable grounds that another person is
   i. About to enter, is entering, or has entered, their property without entitlement
   ii. Is about to take the property
   iii. Is about to damage the property
c) The act that constitutes the offence is committed for the purpose of

(i) Preventing the other person form entering or removing, or
(ii) Preventing the other person from taking, damaging, or destroying

d) The act committed is reasonable in the circumstances (can turn to 34(2) if the terms are applicable)
    - Have they taken or threatened your property in the past?
    - Are they much larger than you?
    - Value and replaceability of the property, sentimental value can be taken into account

BIG EMPHASIS ON REASONABILITY AND PROPROTIONALITY HERE; **<u>is the defence reasonable in light of the threat?</u>

R v Cinous (Air of Reality)

Facts:
- C was going to commit computer theft with some peers. He noticed their behaviour change.
- C became convinced they were going to kill him; a gun he had went missing about a month before, and there were rumours that they wanted to kill him, plus they were wearing surgical gloves at the time
- C stopped at a gas station to get :windshield washer fluid" but instead opened the rear door and shot one in the back of the head.
- C is claiming self-defence for the charge against second-degree murder.

Issue: Should self-defence have been left to the jury? **NO.**

Analysis:
- Ran with the idea from *Lavallee* that a fear and threat of violence can constitute self-defence, but Court said this was not an imminent danger and that C had many other options.
- The defense lacks the "air of reality" to be self-defence in this case.
- The air of reality test: Is there evidence upon which a properly instructed jury could be acquitted? Is the evidence reasonably capable for arising the acquittal of the accused?
- A defence should only be put to the jury when there is evidential foundation.
- A trial judge should put all defences to a jury that arise on the facts, even if the accused as not specifically argued the defence,
- The conditions of self defence were not met under s 34(1).

Holding: C is guilty of 2nd degree murder. Where any elements of self-defence lack an air of reality, it should not be put to the jury.

R v Szczerbaniwicz (Defense of Property)

Facts:
- S is charged with assault causing bodily harm after he pushed his ex wife down the stairs
- He says she threw his diploma at him pf the wall before he pushed her
- S says he pusher her to protect his personal property, but he "may have gone too far"

Issue: Did S use more force than necessary to protect his property? **YES**

Analysis:
- There was an air of reality to the defense of property
- Do not judge defense based on the consequence of the force, but of the reasonableness of the force in the moment of time. <u>Consequence is not determinative of reasonableness.</u>

- Purpose must be to defend, not punish.
- Court accepts the diploma is important as it represents a major achievement for him in his professional development.
- However, he lost his temper and used a force that was disproportionate to the circumstances, especially since a diploma is easily replaceable.
- Also, S said he went too far and that he "manhandled" his wife. He was not defending, but punishing after losing self-control
- When losing self control, it is hard to say one I acting with purpose.
- When you are angry you can still have control of purpose, but once you lose it the purpose is lost.

Dissent:

- No explanation of how the dots are connected. Need to explain why it is excessive in the circumstances.
- It is still possible to act defensively AND be angry,
- The words manhandle means to handle someone roughly, but if the level of force was required to stop the harm to his property, he could still do so.
- Cannot judge reasonableness just because the complainant has bruises; some people bruise more easily or you could lightly shove someone, but they run into a wall.

Holding: S is guilty of assault.

R v Lavallee (Modified Objective Test and the Battered Woman Defence)

Facts:

- L and R were roommates.
- One morning they got in an argument. L said "wait until everyone leaves our party and you'll get it then, either you kill me or I will kill you".
- He turned to go out of the room and L shot R in the back of the head
- L is claiming she was in an abusive relationship with R and that he was just in the process of pushing and slapping her when she killed him.

Issue: Can expert evidence be used in a claim of self-defense, and if so, to what extent? **YES**

Analysis:

- Dr Shane, an expert psychiatrist who treats battered women, testified at trial. He did an assessment of L and said "she had been terrorized by R to the point of feeling trapped, vulnerable, worthless, and unable to escape their relationship despite the violence. At the same time, the continuing pattern of abuse put her life in danger. The shooting of the deceased was a final desperate act by a woman who sincerely believed she would be killed that night"
- In order for expert evidence to be admissible, the subject matter of the injury must be such that an ordinary person would be unlikely to form a correct judgement about it if uninformed by an expert's knowledge.
- The judge said expert evidence on the psychological effect of battered wives and their common law partners must be both relevant and necessary. The average public can be forgiven forsaking "why would you stick around? How can you love someone like this?" She believes people need help understanding this, and an expert can explain it.
- Judge asked, and turns to expert testimony to answer the following questions:
    1. Was she in reasonable and imminent harm?

2. Is the magnitude of the force being used reasonable? Could she preserve herself from bodily harm.

- **Subjective belief backed by modified objective test.**

Three distinct phases associated with recurring battering cycle:

1. Tension Building; verbal and physical abuse ongoing, not explosive, and women tries to please him.
2. Acute Battering Incident; uncontrollable discharge of tensions, the BIG assault.
3. Loving; kindness, remorse, gifts, and promises to never do it again.

- Women should not have to wait for battery to be in progress so she can justifiably protect herself.
- She again uses expert evidence to explain why the women did not choose to do something else. Batter wives stay because they become helpless, do not have self-esteem to act, are embarrassed, do not have relationships with others, or are economically dependent on their partners.
- Judge says based on the threat of being told he would come and kill her late, that she was reasonable in her actions.

Holding: In the context of a battered relationship, expert evidence can be useful in determining whether the accused had a reasonable apprehension of death when she acted.

Modified Objective Test: what the accused reasonably perceived, given her situation and experience.

Another example, a case that Bottos had a few years ago (*Miller*)

- M was head doorman at a bar in Edmonton. He was a huge man.
- Drunk patron had been causing problems, so some other doormen ushered him and his friends out. Complainant was fighting about getting of property, so now he is committing an assault via trespass. Now M can evict the trespass by reasonable force.
- M puts him in headlock and march him off property. Complainant claims he was being choked and lost consciousness.
- M immediately released c when they got off property, and c fell face first and bashed his teeth out on the cement.
- M is being charged with aggravated assault.

Analysis

- C said he saw the ground, which means he was not unconscious, so there is reasonable doubt he was even being choked.
- Lots of people testified on both sides and it was a credibility contest essentially.
- All about whether M was using reasonable force to protect bar property.

Holding: Judge had reasonable doubt that C was unconscious and being choked, therefore, the force was reasonable.

Defense of Correction of Child by Force

S 43- Every teacher, parent, or guardian, is justified in using force towards a child who is under their care, so long as the force does not exceed what is reasonable in the circumstances

- Most school board now do not allow teachers to use force for correction
- Our society has advanced a great deal, and the use of force is now considered barbaric
- Parents still use force sometimes… depends on parent, child, culture, etc.
- Lots of parents will lose their temper and go too far.

- Bruises found on kids typically show excessive force, and in this circumstances, this can be better shown if the kid gets injured.
- This provision was brought to SCC> They passed the provision, but limited it to how it can apply;
    - Reasonable force is determined both subjectively by the accused, but also objectively.
    - Force must be used for corrective purposes, not anger or revenge.
    - No weapons are allowed.
    - No blows to the head.
    - No physical use of force for children under 2 because they do not understand.
    - No physical use of force on children over 12 because it causes more trauma than it does benefit and correct.

INTOXICATION

- Technically no defense of intoxication. Rather it is evidence of intoxication being admissible in certain circumstances to demonstrate the accused is lacking the requisite fault or ability to act voluntarily.
- Relevant to both complainant and accused.
- The mere loss of inhibition caused by intoxication is not a defence. Instead, evidence of intoxication is or is not relevant to the issue of whether the accused has the mens rea for an offence. Line is drawn at incapacity.
- Difference between voluntary and involuntary intoxication. If an accused has an unexpected ration to medicine or unwittingly consumed intoxications (without fault) then it is involuntary. This makes it easier to show lack of fault.

R v Daley

Facts:

- Accused is charged with murder of his common law wife. He called expert evidence about his blood alcohol level and its effect on him.

Issue: How is a jury to be charged regarding intent and intoxication?

Analysis:

3 relevant degrees to intoxication:

1. Mild intoxication; irrelevant when considering mens rea
2. Advanced; lacks specific intent, accused's foresight into consequences is in doubt
3. Extreme; akin to automatism and negates voluntariness of one's actions and is a complete defense to criminal responsibility (negates both mens rea AND actus reus)

Holding: Ruling was "whether the accused, by reason of intoxication, lacked the culpable intent that is an essential element of murder"

R v Daviault

Facts:

- Alcoholic got so drunk he should have been dead
- During this state, he sexually assault a woman

Issue: Does voluntary intoxication to a point the closely resembles automatism act as a defence for crimes of general intent?

Analysis:

- SCC said it is in breach of s 7 of *Charter* and goes against principles of fundamental justice if one is so drunk that they cannot have mens rea to intend a crime; even in general intent offences
- If the accused can raise a voluntary doubt that the actus reus was involuntary, and the accused can have the onus to prove that they were so drunk and acting akin to automatism, then if proven on BOP, a person should be acquitted of the general intent offence.

Holding:

- If an accused is intoxicated to the extent that they have no control over their action and they are acting autonomously then they form the necessary mens rea to commit crimes, or be said to act voluntarily; thus, being this intoxicated is a defence to crimes requiring both general and specific intent
- The burden of proof is on the accused to prove this on BOP.

WHAT HAPPENED BECAUSE OF THIS CASE:

There was an outcry across Canada about this decision, so Parliament passed s 33.1 of CC.
This section says that self induced intoxication cannot be a defense to general intent offences.

- Basically, any crime that invades the bodily integrity of another person

Debowski Chart

0.01-0.05: a social drink, a few drinks just visiting, no craziness

0.09-0.25: 0.09 is probably someone who rarely drinks, but 0.25 is for those who have more alcohol tolerance

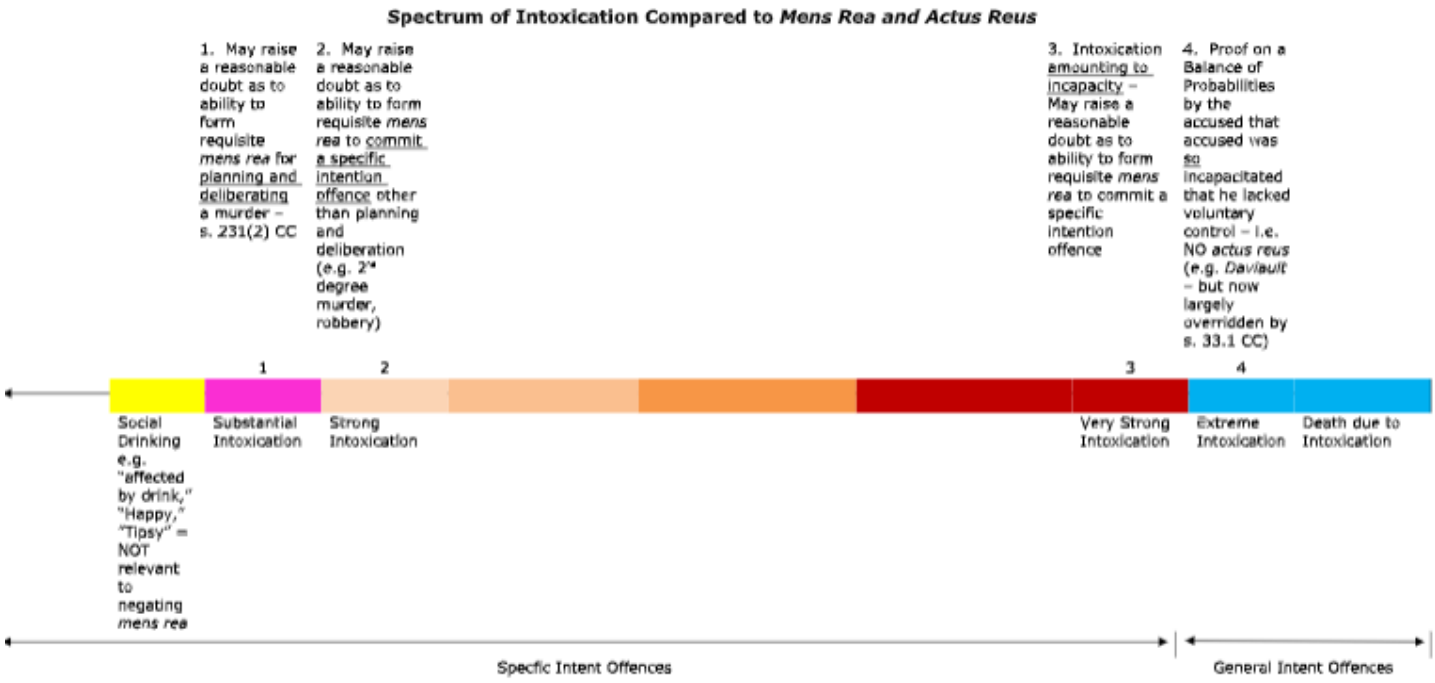
Levels do change based on tolerance levels, etc.

In complainants' point of view, line is drawn at incapacity.

In accused, intoxication is determined by the intent of the crime.

STAGES OF ACUTE ALCOHOLIC INFLUENCE/INTOXICATION

BLOOD-ALCOHOL CONCENTRATION grams/100 mL	STAGE OF ALCOHOLIC INFLUENCE	CLINICAL SIGNS/SYMPTOMS
0.01-0.05	Subclinical	Influence/effects usually not apparent or obvious Behavior nearly normal by ordinary observation Impairment detectable by special tests
0.03-0.12	Euphoria	Mild euphoria, sociability, talkativeness Increased self-confidence; decreased inhibitions Diminished attention, judgment and control Some sensory-motor impairment Slowed information processing Loss of efficiency in critical performance tests
0.09-0.25	Excitement	Emotional instability; loss of critical judgment Impairment of perception, memory and comprehension Decreased sensitory response; increased reaction time Reduced visual acuity & peripheral vision; and slow glare recovery Sensory-motor incoordination; impaired balance; slurred speech; vomiting; drowsiness
0.18-0.30	Confusion	Disorientation, mental confusion; vertigo; dysphoria Exaggerated emotional states (fear, rage, grief, etc) Disturbances of vision (diplopia, etc.) and of perception of color, form, motion, dimensions Increased pain threshold Increased muscular incoordination; staggering gait; ataxia Apathy, lethargy
0.25-0.40	Stupor	General inertia; approaching loss of motor functions Markedly decreased response to stimuli Marked muscular incoordination; inability to stand or walk Vomiting; incontinence of urine and feces Impaired consciousness; sleep or stupor
0.35-0.50	Coma	Complete unconsciousness; coma; anesthesia Depressed or abolished reflexes Subnormal temperature Impairment of circulation and respiration Possible death
0.45+	Death	Death from respiratory arrest



- Intoxication is not a defense to general intent offences… in fact, it even makes you look worse. Can show you lost inhibition to respect someone else's body.
- Alcohol and other drugs can be used as a defense to specific-intent offences. If accused admits to murdering someone, and confesses to police while very drunk saying "ya, I am glad he is dead, I killed him, I hated him" those words would get him convicted as it is clear he meant to cause death.
- However, if it is unclear if he meant to cause death and instead the Crown said from his actions he meant to cause death, he could still potentially be convicted via the second route and being reckless to potential consequences.
- However, intoxication can substantially hurt someone's foreseeability to the natural consequences of their actions.

R v Cairney

Facts: C was drunk and shot hit best friend after confronting him for beating his wife.

Issue: Can the defense of intoxication work here?

Analysis:

- C was very drunk, even more so than his friend. C was suffering alcohol myopia and could not appreciate the consequences of his action.
- Added defence of rolled up defence: If the Court found his impairment by alcohol did not raise a reasonable doubt to his foresight of death, they'd have to consider whether the impairment combined with other factors together would raise a reasonable doubt of intent.
- Must consider whether the whole of the evidence raises a reasonable doubt of the accused's intent

- Even if satisfied BARD that the accused was not intoxicated enough that his awareness that death would probably occur was affected, must re-examine the evidence for anything that suggests he acted instinctively or without necessary intent
- A combination of substantial intoxication, and excitement, anger or fear, may raise a reasonable doubt as to the subjective foresight of death.

PROVOCATION

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.

- Partial defence: only applies to murder. However, provocation for other crimes can be helpful for sentencing in other crimes.
- Crown has already proven BARD one of the two routes to murder, but the accused says they killed because they were provoked by the victim. If the defense has an air of reality, then the Crown must disprove the provocation defense, otherwise, even though the accused intended and did kill, they would be found guilty of manslaughter if provoked by the victim.

What is provocation?

S 232(2): Conduct of the victim that would constitute an indictable offence under this act that is punishable by 5 or more years of imprisonment and that is of such a nature as to be s**ufficient to deprive an ordinary person of the power of self-control is provocation** for the purposes of this section, if the accused acted on it on the sudden and before there was time for their passion to cool.

- A criminal offence under this act must be punishable by 5 years or more in prison. Provocation has to be sufficient in nature as to deprive the accused of self-control.

(3): Whether or not the act is provocation is a question of fact

Defense of provocation is compassion to human weakness; recognizing all persons can be brought to a breaking point if the other person has done an unlawful act to them.

- Not just an anger defence, cannot say you were just angry, need to meet the four-part test.

1. **OBJECTIVE: Criminal Act;** was the conduct of the victim that would constitute an indictable offence under this Act that is punishable by 5 or more years of imprisonment.
2. **OBJECTIVE: Nature of Act;** the nature of which is "sufficient to deprive an ordinary person of the power of self-control"
    - Just about an ordinary person, not a reasonable person**;** a reasonable person would never lose control
    - An ordinary person is not drunk.
3. **SUBJECTIVE: Sudden Act;** the wrongful act must occur on the sudden
    - The act must strike upon the accused's mind unprepared for it
4. **SUBJECTIVE: Act Before Regaining Control;** The accused must have acted on the sudden before regaining his self-control

- **3 and 4** must have occurred within seconds of each other

Summary for Test in General:

- Must be some evidence on each part of the test before it can be put to the jury (Air of Reality Test)
- Crown then must disprove it BARD
- Could be second-degree, or first-degree of a certain person (but NEVER planning and deliberate)

Thibert v The Queen

Facts:

- T's wife had disclosed her affair to T. He had multiple attempts to persuade her to return home, but was unsuccessful.
- T put loaded rifle in the back of the car thinking he might kill himself, his wife, or the deceased.
- T says he abandoned that thought on his way over and instead planned to use his rifle as a final bluff.
- The accused shot his wife's lover after an exchange where he was taunted.
- The deceased had held the accused's wife in front of him as a target and said "come and shoot me"

Issue: Whether there was any evidence upon which a reasonable jury acting judicially and properly instructed could find that there had been provocation?

Analysis:

- Before the defence of provocation is left to the jury, the TJ must be satisfied that:
  1. 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**
- Objective element of test ensures criminal law encourages responsible behaviour, but to be applied sensitively
- Ordinary person must share with accused gender, age, ethnicity, and such factors as would give the act/insult in question a special significance and have experienced the same series of acts/insults as those experienced by the accused
  - Propensity to drunken rages or short temper are NOT taken into account
  - Background of the relationship between the deceased and accused CAN be taken into account
  2. There is some evidence showing that the accused was actually deprived of their self control by that act or insult.
- Subjective Element- Sudden provocation means act/insult must make an unexpected impact, taken you by surprise and set passions aflame
- Affronts over a long period of time do not preclude the defence of provocation, as long as immediately prior to the last one, accused did not intend to kill
- Prior history of relationship MAY be taken into account
- If this threshold is met, the defence may be left with the jury.

Holding: Before defence of provocation is left to the jury, the TJ must be satisfied there is evidence for each part of the test.

R v Tran

Facts:

- T had knowledge that his estranged wife was involved with another man
- T walked into his ex's home uninvited and found her in bed with her boyfriend
- T attacked them both, and killed the boyfriend.

Issue: Was the standard of provocation met?

Analysis:

- No wrongful act or insult; the couple was not expect T in the bedroom, so they did not insult him, and neither were they engaged ina wrongful act.
- T's mind was not struck unprepared as he long suspected the affair and went into the home expecting to find him,
- Observed that the ordinary person has developed over the year Social context plays an important role. The ordinary person has a weakness/infirmity that the reasonable person would not have
- Provocation has also evolved over the years; initially it was the invasion of property (especially because wives were considered a chattel), then it involved to preserving a man's honours, then finally evolved to the requiring of a wrongful act or insult recognizes the compassion to human frailty and inappropriate and disproportionate, but understandable reactions.

Holding:

R v Cairney

Facts:

- C shot and killed his long time friend, F
- F was in a common law relationship with R, who was C's cousin. F had a history of physically abusing R. C had just lost his own wife one year ago to cancer.
- C overheard F tell R that if her back was not sore, he would have thrown her across the kitchen
- C scared F later by striking his phone with a gun. He lectured F on his abuse of R and F responded with "What are you gonna do, shoot me? You do not have the guts to shoot me".
- When see went to leave F taunted him and said "Fuck you, this is none of your business, I'll beat R whenever I want"
- C shot and killed F; charged with 2nd degree murder.

Issue: What is required to give an Air of Reality to the defence of provocation where the provocative conduct of the deceased came about as a result of the accused initiating an aggressive confrontation?

Analysis:

- When the accused is prepared for an insult or initiates a confrontation and receives a predictable response, this is a factor which may deprive provocation of an air of reality.

Application of the Air of Reality Test:

1. The wrongful act or insult in F's conduct and words were not sufficient to deprive an ordinary person of the power of control
2. F's reaction was a predictable response. When C sought out the gun point confrontation, he induced F's response, which was predictable.
   - This is called self-induced provocation. It only happened because C initiated it.
   - An ordinary person would not have lost self-control.

- Also, C started the conversation with a firearm and the SCC does not condone the use of a lecture with a firearm.

Holding: NO air of reality for the defense of provocation here.

R v Nealy

Facts:

- N and hif gf had consumed drugs and attended a nightclub.
- The deceased made repeated provocative comments about N's gf.
- N and the deceased fought. N stabbed the deceased and killed him.

Issue: Should the TJ have instructed the jury to take into account the cumulative effects of the evidence of drinking and provocation in determine whether N had the requisite intent for murder? **YES**

Analysis:

- The Rolled Up Defence (as in *Cairney*→ intoxication): when there is close to provocation together with emotional reaction and intoxication (if present), although alone would not be enough to raise a reasonable doubt, would together raise a reasonable doubt that the accused had a foresight of death.
- The provocative conduct does not operate as a defence alone because on of the four parts is missing.
- Court tells jury to take into account all the circumstances surrounding the act of killing must be taken into account in determining whether or not the accused had intent required for murder.

Holding:

INSANITY and AUTOMATISM

Insanity

Two times when this defense is relevant:

1. When considering the capacity of the accused and their ability to stand trial.
2. The capacity of the accused for criminal responsibility at the time of the alleged criminal offence.

S 2: Definition of Unfit to Stand Trial- 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
   - Basically, it means by reason of a disease of the mind, a person lacks the ability to understand what is going on at their trial.
   - They have to be able to understand the basics once explained to them by the Court. If they do not, they are deemed unfit.
   - Must understand things such as the adversary system, defense lawyers, conviction, judge and jury duties, evidence, oath, testification, pleas, and their rights.

- Psychiatric hospitals will typically hold people who have committed crimes where there Is a concern for their mental fitness.
- Judges check for sanity and automatism.

History

- Until 1991, offenders with mental disorders had 3 verdicts available to them:
  1. Conviction- mental disorder not sufficient to constitute insanity, no differential treatment
  2. Acquittal by reason of insanity- followed by automatic and indefinite detentions served at the "pleasure of her majesty".
  3. Full acquittal- The Crown cannot prove the case.
- Pre- Swain- Crown would ask judge/jury to find the accused "insane" without the consent of the accused.
  - Crown is administrator of justice and is to see that the accused gets best possible care.
  - Also, Crown has duty to ensure the society is safe and benefits from the verdict.
- Law changed in 1991 in *R v Swain*.

R v Swain (new common law rule, and no more indefinite detention)

Facts:

- S attacked his wife and child because he believed they were being attacked by the devil.
- Charge with assault.
- He behaved strangely in custody, but improved after taking medication.

Analysis:

- Crown adduced evidence of S's mental disorder. Defence objected.
- S was not found not guilty by reason of "insanity" and was ordered to be detained indefinitely. D argued this was unconstitutional.
- At SCC, Court found:
  - Accused has right to control their own defence. Common law rule that allowed the Crown to adduce evidence about accused's mental health was too broad.
  - Common law rule is changed to allow Crown to only raise accused's mental health if:
    - Trier of fact has determined the accused is guilty, or
    - The accused has put their mental capacity in issue
  - Court also found that automatic detention amounted to arbitrary detention which is contrary to the *Charter* and not justified via s 1.
  - Parliament enacted s 16 of CC in response.

The verdicts now available are (as per s 16 of CC):

1. **Full Acquittal-** Crown cannot prove case or jury has a reasonable doubt.
2. **Conviction-** Person suffers from a not severe enough mental disorder and was found guilty.
3. **Not criminally responsible on account of mental disorder-** The accused is found not criminally responsible, and then is diverted to a special screen by where the judge will typically order them to go to a psychiatric hospital to be treated until they are no longer a threat to themselves or society.
   - Every year their status will get reviewed. They can gain more privileges or be released on conditional or absolute discharge.

- Can only be raised in two situations:

1. After conviction but before sentencing
2. When the defense puts their own mental capacity into question to show they were acting as an automaton, which means no actus reus, and no crime.
    - In this case, Crown could say that you were not acting involuntarily, you were acting by means of a mental disorder and should be in a psychiatric hospital.

R v Manoton (UK Case)

Facts:

- Believed he was part of international conspiracy involving the British Prime Minister.
- Went to Britain, killed a man he thought was the Prime Minister, but it obviously was not.
- Was Convicted under the *Lunatics Act of 1800*¸ and put in mental facility for the rest of his life.

Analysis:

House of Lords established these common law rules:

1. Everyone is presumed sane
2. Must be suffering from a disease of the mind
3. Can be found insane when because of their disease they do not know the nature and quality of the act, OR barring that they know what they are doing, they do not know that it is wrong.

S 16 of the Criminal Code:

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 <u>appreciating the nature and quality of the act or omission</u> or <u>knowing that it was wrong.</u>

(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 proven on BOP.

(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 (can be defence of Crown, depends on at which instance the disease of mind is alleged)

Broken down into 2 elements:

1. Requirement of a mental disorder
    - Mental disorder under s 2 is “diseased of mind”
    - Common law defines what a disease of mind is. (*Cooper*)
2. The effects of that mental disorder. Two possible effects:
    a. Incapable of appreciating the nature and quality of the act
    b. Incapable of knowing the act was wrong

Cooper v The Queen (defining disease of mind and first route)

Facts:

- C was charged with the murder of H; they were patients at a psychiatric hospital.
- C is now an outpatient at this time and goes to a dance with H, they leave to get soda and smokes. C attempts to have intercourse with H and then strangles H to death. (causing death by strangulation usually takes two to three minutes and usually is more easily proven to the jury that they meant to cause death since it is not “accidental” or a “quick” decision)

- A nursing assistant observed C looked dazed and blank.
- C called his dad and breathlessly explained he killed someone. He also called police and said he WITNESSED a murder, but the police thought it was a prank since the caller was emotionless.
- Easier to prove C is suffering from a disease of mind since he has a lengthy history in a hospital. A Dr provided medical evidence of C' mental issues, narcolepsy, low IQ, auditory hallucinations, abnormal brainwaves, and diagnoses over the year, C's dad also testified to his past behaviours.
- The doctor's opinion was that C was not suffering from a disease of mind at the time, but may have been incapable of knowing his actions would cause death

Issue: Did C have a disease of mind that rendered him incapable of appreciating the nature and quality of the act or of knowing that it was wrong?

Analysis:

What meaning should be ascribed to disease of mind?

- Not just determined by what a medical professional says, but up to judge to determine.
- **It is a legal determination for the trier of law to decide, but medical/expert evidence can be considered when making this determination.**
- A disease of mind can stem, from physical or purely mental origins.
- Once judge determines whether accused suffers from a condition, it is up to jury to find as a matter of fact whether the accused had disease of the mind at the time the criminal act was committed.
- Basically, judge would say "Yes this is a disease of the mind" then the Jury determines if the accused was suffering from it during the alleged offence
- Must be proven on BOP, against the rebuttable presumption that the accused is sane.

What interpretation should be given to the words "incapable of appreciating the nature and quality of the act"?

- The legally relevant time is the time the act occurs
- Used to be incapable of knowing act, but Canadian law changed to incapable of appreciating which is different than knowing.
- Knowing involves the mere awareness of a physical act. Appreciating means to understand the consequences of the act (a higher degree of awareness)
- The requirement is that of having an ability to perceive the consequences, impact, and results of a physical act. An accused may be aware of the physical character of his action, without having the capacity to appreciate that, in nature and quality, it would result in the death of a human being.
- This is simply a restatement specific to the defence of insanity of the principle that mens rea or intention as to the consequences of an act is a requisite element in the commission of a crime.

Holding: New trial ordered. Real question at hand is whether C lacked capacity to appreciate the nature and quality of his act, and doctor gave evidence that C may not have had this capacity, so trial judge needs to restate jury.

**When answering an exam question say cc s 16(1) says suffering from mental disorder. Mental disorder is defined as a disease of the mind in s 2 of CC. What a disease of mind is determined by the judge, and then presented to jury on whether accused was suffering from said disease at the time.

Kjeldsen v The Queen (psychopaths and expanding on the term "appreciating")

Facts:

- K is a patient at a mental hospital and was detained there for charges of rape and attempted murder.
- K was given a day pass from the hospital, flew to Calgary, and hired a female taxi driver to take him to Banff.
- K produced a knife and forced her to engage in sexual intercourse.
- He killed the driver by hitting her on the head with a rick and left her in the bushes.
- K is a psychopath with sexually deviant tendencies, which was accepted evidence by both parties.

Procedural History:

- TJ found that psychopathy could be a disease of mind, and that the term appreciate was about the physical act and its consequences (hitting her with a rock), not the emotional consequence.

Issue: Was K suffering from a disease of mind? Was K incapable of appreciating the nature and quality of his acts by reason of psychopathy? **YES and NO.**

Analysis:

- To be capable of appreciating the nature of quality of his act, an accused person must have the capacity to know what he is doing; in the case at bad he must know that he was hitting the woman on the head with a rock at great force, AND in addition je must have the capacity to estimate and understand the physical consequences that would FLOW from the act, in this case it was causing physical injury which could result in death.
- TJ had correctly defined appreciate to the jury as limiting it to mature and quality of physical consequences, not emotional consequences.
- Floodgates Concern; by allowed K to be off, we are potentially allowed one of the most scary group of people out and about. Psychopaths do not have emotions and would recommit crimes.
- Psychopaths constitute about 1% of the regular population, 16% of prison population. And 4% of CEOS.

Holding: Psychopaths have a mental disorder but do not qualify under s 16 as they do not meet the standard of failing to appreciate.

R v Chaulk (explains constitutionality of s 16 and definition of wrong for second option)

Facts:

- C and other boy broke into a home to commit a burglary and stabbed and bludgeoner an 83 year old owner to death
- Both boys turned themselves in a week later

Procedural History:

- AT trial, experts indicated C suffered from paranoid psychosis and believed he had power to rule that world and killing was necessary

- C was convicted of 1st degree murder by jury, CoA upheld the conviction.

Issue:

1. Is the reverse onus on the accused to prove insanity on a BOP violate s 11(d) of the Charter? **YES BUT JUSTIFED BY S 1.**
2. IS the meaning of wrong in s 16 of the Code intended to be restricted to legally wrong lonely? **NO.**

Analysis:

Presumption of Sanity

- Requiring the accused to prove insanity requires him to discharge an evidentiary burden and impose a persuasive burden.
- The presumption DOES violate s 11 because it would permit a conviction in spite of reasonable doubt.
    - State bears burden of proving guilt BARD, and presumption requires accused to prove insanity to rebut presumption of sanity.

Oakes Test if reasonable under s 1 of *Charter*:

1. Objective- court concluded parliament wished to avoid the "impossibly onerous burden" and "tremendous difficulty" of proving sanity in order to secure convictions.
2. Proportionality- rationally connections since accused raises s 16 to prove insanity on BOP which furthers the objective of not putting a burden on the crown which is virtually impossible to meet.
3. Minimal Impairment- Less intrusive means cannot achieve same objective,
4. Detrimental effects- s 16(4) represents accommodation to three important societal interests. The alternatives to this compromise raise their own Charter problems and give no guarantee as to whether they will achieve the objective.

- Justified under s .1

Meaning of Wrong

- Purpose of s 16 is to protect people from criminal liability if they are incapable of understanding whether an act is wrong.
- The inquiry as to the capacity of an accused to reason must not end simply because it is determined that the accused knew that the act was a crime.
- Court rejected the floodgates argument that understanding wrong and meaning more then legally would result in an insupportable expansion of s 16/
- Sometimes actus reus and mens rea are proven, then on pivots to insanity or the mental disorder in question may raise a doubt to either actus reus or mens rea.

Holding: C was found not guilty by reason of insanity, after 4 months of treatment he was declared sane and released.

R v Oomen

Facts:

- O believed a local union was trying to destroy him
- While B was sleeping he though she was in on this.
- O killed B, firing 9-13 shots at her while she slept.

Procedural History:

- O was convicted of 2nd degree murder for killing a sleeping women.

- CoA set aside conviction and ordered a new trial,
- Crown appealed to SCC to have conviction reinstated

Issue: What is meant by the phrase "knowing that the act was wrong" in s 16(1)?

Analysis:

- Focus must be on capacity to know that the act committed was wrong and not merely on a general capacity to distinguish right from wrong.
- The crux of inquiry is whether the accused lacks the capacity to rationally decide whether the act is right or wrong and hence to make a rational choice about whether or not to do it,
- Did the mental disorder at the time of the act deprive him of the capacity for rational perception and hence rational choice about the rightness or wrongness of the act (not whether an ordinary person knew the act was wrong)
- Not fair to assume O should have known to runaway instead of to kill.

Holding: Appeal dismissed.

R v Longridge

Facts:

- L was charged with 2nd degree murder for killing her daughter R. R died of multiple knife injuries and blunt injuries,
- L believed her son M was messiah, and the only way to save the world and protect him, was to sacrifice the daughter and herself
- L had a long history of mental illness, including diagnoses of schizo-affective disorder and bipolar disorder.

Issue: At the time of R's death, was L suffering from a mental disorder? **YES.** Did the mental disorder render L incapable of knowing her actions were wrong? **YES.**

Analysis:

- Two experts testified about L's mental conditions. Experts concluded that L had a disease of mind. L's condition was long standing, consistent, and supported by other witnesses who observed L's mental illnesses.
- Even though L knew she was stabbing to ill and appreciate the physical consequences, she thought she was doing right to protect her son and the world.

Could L appreciate the nature and quality of her acts?

- YES. Her mental disorder did not prevent her from appreciating that R would die. She intended to kill.

Did L have the capacity to know her act was wrong?

- If wrong mentally only legally, L would be criminally responsible if it was found that she knew she violated the law, regardless of any delusion.
- However, SCC has determined wrong to mean morals. A person cannot be convicted if that person is only capable of knowing that his or her act violated the law.
- An accused may know it is legally wrong, but not morally wrong.

Holding: Her mental disorder provided her incapable to know what she did was wrong.

How to answer a question:

1. **Is there a disease of mind? Determined by trier of law. (*Cooper*).**
2. **Was it so severe that:**

A. **They were incapable of appreciating? (*Cooper*, and *K*)**
B. **Or incapable of knowing what they did was wrong? (*Chaulk*, *Oommen, Longridge*)**

Automatism

- Similar to the defence of insanity, in that the claim of both defences is that the accused did not have sufficient control over their actions to be culpable.
- Crown's preference is to get someone on insanity as they will go to a mental hospital and still be monitored, whereas automatism mean they are released.
- Defined as the unconscious, involuntary behaviour, state of a person who, though capable of action is not conscious of what is being done. **The unconscious, involuntary act, where the mind does not go with what is being done (*Rabey*)**
- A negation of the actus reus; not about unconsciousness anymore but the involuntariness of the actions. Proof of unconsciousness no longer required.

Three Types:

1. Mental disorder Automatism: Verdict is not Criminally Responsible, like insanity.
2. Non-Mental disorder automatism: Verdict is not guilty
3. Automatism caused by voluntary intoxication: *Daviault*→ no longer a defence as per s 33.1 of the CC)

R v Rabey

Facts:

- R was helping A study for geology. R loved A.
- R saw a letter A wrote talking about R as nothing.
- R confronted A about his feelings, she said he was just a friend.
- He reacted and hit her on the head with a rock, then choke her and yelled "You Bitch" repeatedly.

Issue: Does the defence of non-insane automatism apply? **NO.**

Analysis:

- In general, the distinction to be drawn is between a malfunctioning mind arising from some cause that is primarily internal to the accused, as opposed to a malfunctioning of the mind which is the transient (temporary) effect produced by some external factor.
- Any malfunctioning or menta disorder having its source primarily in some subjective condition or weakness internal to the accused may be a disease of the mind, but transient disturbances do not fall within this category.
- The ordinary stresses and disappointment of life which are common of mankind do not constitute an external cause constitution an explanation for a malfunction of the mind which takes it out of the category of a disease of the mind.
- All that is required is to raise a reasonable doubt on automatism to eliminate actus reus.

Holding: No, not a case of non-insane automatism.

R v Parks

Facts:

- P drove to his in-laws (23 km and on a multi-lane highway) and attacked them with a knife while sleeping, killing one and seriously injuring the other.
- P claims he was sleepwalking.
- P called expert evidence about his sleep problems and high stress levels.

Issue: Is sleepwalking classified as non-insane automatism or disease of the mind? **NON-INSANE AUTOMATISM.**

Analysis:

- Automatism occupies a unique place in our criminal law system. Although spoken as a defence, it is conceptually a subset of the voluntariness requirement, which in turn is part of the actus reus component of criminal liability.
- Experts say sleepwalking is not a mental or psychiatric illness, it is a sleep disorder. No medical treatment for this.
- Crown basically argued that if he really was sleeping, it should be a mental disorder, adopting the definition from *Burgess.*
- Judge says for the defence of insanity, there must be evidence that shows sleepwalking was the cause for the respondent's state of mind. This was not the case here, stress was the cause of it (<u>This can change depending on the individual and evidence called)</u>
- TJ must decide if there is an air of reality before raising defence to jury, and hen must also consider whether the condition is a non-insane automatism.
- Insanity vs non-insane automatism is not just interval vs external, but policy factors are considered as well.

Two approaches for inquiry of disease of mind:

1. Continuing danger: How likely is reoccurred?
   - Recurrence suggests insanity, but absence does not preclude insanity.
   - In this instance, violent sleepwalking (somnambulism) is unlikely (but not necessarily reason to acquit)
2. Internal Cause: Is the cause internal or external?
   - In this case, this question is not helpful because the line is blurred for sleepwalking.

Other conditions to consider include: how easily the condition feigned, the floodgates, and if the administration of justice would be into disrepute.

Holding: Sleepwalking is non-insane automatism.

R v Stone

Facts:

- S stabbed his wife 47 times after she made various insulting comments.
- S said a whooshing sensation come over him, and when he came to, he was sad.

Issue: Can mere words cause a person to become automation? **YES** Is that the case here? **NO**

Analysis:

- All cases of automatism require the claimant to lay the proper factual and evidential foundation.
  - The old standard of "some evidence" is not clear.
  - New minimum requirements are the <u>assertation of involuntariness are the time of offence and expert psychiatric evidence</u>

    - There is a presumption of voluntariness and accused must prove involuntariness on BOP.
- Judge must consider severity and nature of the alleged trigger. Including corroborating evidence of bystanders or medical evidence of past dissociative states, and he consideration of motive or lack thereof.
- Next step is for judge to determine as a matter of law whether the facts show insane automatism or non-insane, as ONLY ONE can be left with the jury.
- Start with presumption I is a mental disorder, then consider evidence that it is not, then pick one and present to jury.

Holding: Not non-insane automatism.

R v Fontaine

Facts:

- F worked at a garage, R called and made threats.
- F got firearms because he thought there was a hit on him. He got high and became paranoid.
- F shot another employee multiple times believed he was the hit man.

Issue:

1. Did the CoA err in law as to the nature of the evidential burden on a defence of mental disorder automatism?
2. Did the Court err in law in concluding that the respondent had discharged that burden in this case and was therefore entitled to have his defence considered?

Analysis:

- It is not up to judge to determine whether the evidence is true – the judge should determine if the evidence were true, could it be used to properly raise the defense of automatism?
- This effectively overturns parts of *Stone*.
    - *Stone* should be read in light of subsequent cases like *Cinous* (air of reality) and *Acuri* (test for committal) which make it clear that weight of the evidence is not permitted (quantitative not qualitative analysis)
    - Evident burden is a matter of law
    - Accused must present evidence his actions were involuntary (reverse onus BOP)

Holding: Appeal dismissed.

R v Luedecke

Facts:

- L and O fell asleep together. O awoke to L having sex with her.
- L said he was asleep at the time and not acting voluntarily (Sexsomnia)
- L was acquitted by TJ. Crown is appealing.

Issue: Is sexsomnia insane or non-insane automatism? **DEPENDS**

Analysis:

- L had past gfs testify that he had acted this way in the past. He also called medical evidence about parasomnia and his sleep disorder.

Judge must decide on 2 questions:

1. Were the respondents actions involuntary? This speaks to culpability.

2. If the respondents actions were involuntary, were they the product of a mental disorder, hereby rendering him NCR-MD? This speak to disposition.
    - Parasomnia involves a sudden unexplained arousal from sleep. Persons may carryout various activities while in this state. Usually not complex, but may include had gestures, talking or walking. More rarely it includes eating, sex, or driving.
    - There was a consensus that L acted involuntarily, but disagreement about whether L had a disease of the mind, while perhaps not culpable, was dangerous to the public.
    - Judges should presume involuntary actions are a disease of mind, then look to evidence to remove it.
    - Crown argues that NCR allowed the monitoring of someone who is potentially dangerous, but this restrict his liberty.
    - TJ failed to properly consider L's history, hereditary evidence, triggers, and strong likelihood of reoccurrence.

Holding: Appeal allowed, new trial order. ON re-trial, KL received an absolute discharge.

R v Bouchard-Lebrun

Facts:

- B brutally assaulted 2 people during a psychotic state caused by drug use.
- B raised the defence of insane automatism on the basis that the drugs had caused him to act involuntarily.

Issue: Does a self-induced toxic psychosis constitute a mental disorder within he meaning of s 16? **NO.**

Analysis:

2 stage test for s 16:

1. Was the accused suffering from a mental disorder at the time of events?
2. Was the accused, due to this mental disorder, incapable of knowing the act or omission committed was wrong?

- B argues a single episode of intoxication can be a mental disorder if it produces abnormal effects on accused, such as psychotic symptoms
- Intoxication can be raised as a defence to specific intent offences where intoxication is so extreme that the accused was unable to form the requisite intent to commit the act.
- Insanity and intoxication are distinct defences. The key is identifying the source of psychosis.

Did B's toxic psychosis result from a mental disorder? **NO**

- Evidence does not suggest that B was suffering and B did not rebut the presumption that his toxic psychosis was a self-induced state caused by drug use.
- Internal cause? Taking the drugs (an external factor) and the rapid reversal of the symptoms suggest intoxication, not mental disorder.
- Continuing Danger? If B abstains from drugs, he would likely not be dangerous again.
- S 33.1 applies to states of toxic psychosis, which prevents the accused from avoiding criminal liability on the ground that intoxication rendered him incapable of voluntariness required to commit the offence.

Holding: B was not suffering from a disease of mind, so cannot rely on s 16 of the CC.

MISTAKE OF LAW

"Ignorance is not bliss, and neither is it a defence"

This is a really rare defence.

S 19- Ignorance of the law by a person who commits an offence is not an excuse for committing that offence.

A basic rule is that ignorance of the law is NOT an excuse. A person may be convicted even though the person did not realize their actions were illegal.

R v Campbell and Mlynarchuk

Facts:

- C was a stripper.
- At this time is was a crime to dance without any clothes.
- She did that based on the decision of a different judge that said this was not a crime.

Issue: Is she guilty? **YES**

Analysis:

- C argued the lack of necessary mens rea
- It is a mistake of law to misunderstand the significance of the decision of a judge, or their reason.
- It is also a mistake of law to conclude that the decision correctly states the law, unless the judge speaks on behalf of the court of ultimate appeal.

The Policy Rationale: Necessity and Efficiency of the System

- The Principle that ignorance of the law should not be a defence in criminal matters is not justified because it is fair, it is because it is necessary.
- The first requirement of any system of justice is that it works efficiently and effectively. If the state of understanding of the law is to be relevant in criminal proceeding.
- The issue in criminal trial would then not be what the accused di, but whether the accused had a sufficiently sophisticated understanding of the law to appreciate that what he did offended against the law
- Sometimes judges will inflict a milder punishment

Holding: This was a mistake of law. C was guilty, but was given an absolute discharge.

Four Justifications for the rule that ignorance of the law is not a defence:

1. Allowing a defence of ignorance of law would involve the courts insuperable evidential problem
2. It would encourage ignorance where knowledge is desirable
3. Otherwise every person would be a law unto himself, infringing the principle of legality and contradicting the moral principles underlying the law; and
4. Ignorance of the law is blameworthy in itself.

R v Simpson

Facts:

- S is charged for breaking-and-entering for living in a part of an apartment he was not paying for.

Issue: Is the defence of mistake of law available?

Analysis:

- Did not know they were not allowed to occupy the premises
- Assesses "colour of right" and "air of reality" of the defence.

Holding:

R v Whelan

Facts:

- Landlord tenant dispute.
- Property was leased from W to H. H obtained an order that W could not distrain the assets of H.
- Notwithstanding, W did so,
- W Is being charged with breach of court order.

Issue: Does Mistake of law work here? **NO.**

Analysis:

- W acknowledged the actus reus of theft, but denied the mens rea. W said his lawyer told him that an argument could be made that the court order was only limited to the month of July. Court rejected this argument.
- If a court were to accept this argument, a mistake of law would constitute a valid defence and accused would have to know that the act they were committing was unlawful in order for the Crown to obtain a conviction. This argument displaces the mental element of the offence, suggesting that it should relate to the legality of the act, not the act itself.
- A more accurate way of stating the principle of s 19 is "that knowledge that one's act is contrary to the law is not, in most cases, one of the constitute elements of mens rea and therefore, a mistake as to what the law is does not operate as a defense"
- Mistake of law is different than mistake of fact because it speaks to the legal effect of the facts, not the facts at hand.

Holding:

R v Watson

Facts:

- W is an environmental activist. His ship approached a fishing vessel and W told them to stop and leave (because he thought they were fishing for cod, even though they were not)
- He brought his ship close to the other vessel and threw a one litre gas hat on it. It smelt bad but was not corrosive.
- W said he was unaware Canadian law applied outside the 200 mile zone.
- He is being charged with mischief

Issue: Is this mistake of law? **NO**

Analysis:

- S 292(2) says that no person shall be convicted of an offence under s 430 to 446 where he proves that he acted with legal justification or excuse and with colour of right (belief on the legality of actions committed)

Holding: Ignorance of the law does not extend to questions of jurisdiction.

Summary of the above cases:

- An accused cannot rely on a lawyer's advice (*Whelan*) or decision of lower court (*Campbell*) as a defence
- In some cased, knowledge that your conduct is contrary to the lay form part of the mens rea of the offence and therefore be a defence,
- A mistake of law defence does not extend to questions of jurisdiction (*Watson*)
- If efficient, the rule is sometimes unfair. A person who makes a good faith and reasonable mistake of law in committing an offence has a very reduced level of culpability (*Campbell*).
- Section 19 has broad application as it applied to both ignorance of the law and to its meaning, scope and application. (*Molis*)

Availability of the Defence of Mistake of Law owing to the Drafting of the Offence Provision

R v Howson

Facts:

- Haines parked his car on private property. There was a sign that said no parking day or night; unauthorized vehicles would be towed.
- H tells Haines he can have his car back if he pays the tow and impound charges.
- H had a letter from the property owner giving him the right to tow away parked cars without consent.
- H is charged with theft.

Issue: Does the defence of mistake of law apply? **YES**

Analysis: Court considered colour of right. It should be read broadly. If upon all the evidence it may be fairly inferred that the accused acted under a genuine misconception.

R v Klundert

Facts:

- K was an optometrist and an anti-taxer,
- He decided the government did not have the legislative power to impose and collect taxes.
- He decided not to pay and was charged.

Issue: Does mistake of law apply? **NO**

Analysis:

- Wilfully in this statute means that they have intended to avoid paying taxes.
- Most crimes do not require knowledge of illegality
- The extent to which any mistake can negate the fault requirement
- Considering the act, it is enormously complicated and people usually rely on professionals.
- K did not make a mistake, but he denied the laws power.
- Mistakes in taxes is different than not paying because one does not like the law.

Holding: Statute plays a role in determining if mistake of law is available as a defense.

Officially Induced Error: Moving Towards a Mistake of Law Defence where you rely on advice from a civil servant

R v Jorgenson

Facts:

- J operated an adult video store.
- Undercover officers bought some video and decided they were obscene within the meaning of s 163(2).
- However, they were approved by the Alberta Film Review Board.

Issue: Does mistake of law apply? **YES**

Analysis:

- J did not knowingly sell obscene materials so he does not have the mens rea.
- Given the complexity and amount of law, the presumption a citizen will know the law is unreasonable.
- Exception to s 19 because comprehensive knowledge is unreasonable, but creating a limited exception is justified.

6 steps to prove this defence of Officially Induced Error:

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

Holding: J would git in the standard of the defence of officially induced error.

Levis v Tetrault

Facts:

- T is charged with driving an unregistered motor vehicle and driving without a valid license.
- He thought the date on his license was payment for renewal, not the expiry date.
- There were also some errors with mailing.

Issue: Does defence of officially induced error apply? **NO**

Analysis:

- Court modified test from *Jorgenson* to say steps 4 and 6 are to be viewed on an objective standard based on a reasonable person in their circumstances.

Holding: Steps 2 and 6 were not met.

La Souveraine, Compagnie d'assurance generale v Autorite des marches finacniers

Facts:

- AB company does insurance and was doing insurance with 56 brokers in QB.
- The brokers technically were not authorized.

Issue: Is this mistake of law? **NO**

Analysis:

- S did not know their brokers were breaking the law.
- They asked for help from QB, but none was given.
- This is a strict liability regulatory offence and due diligence is required.
- S did not make enough inquiries and was relying on legal advice from a lawyer in MB who was not an insurance specialist.
- A reasonable person would have gotten help from an insurance lawyer in QB.

- It is troubling though, that the regulator did not know the fll law and whether S was actually breaking it right away.
- If we need to consider an exception for the defence, we need a better case.

Holding: No mistake of law as per regular test. Unfortunately, Court determined this was not a good enough case to modify the test.

NECESSITY

"The lesser of two evils"

Necessity is when circumstances demanded an act in violation of the law.

- An extrinsic defence that is either a justification or an excuse:
  - Justification= An exoneration from the criminal nature of the offence.
  - Excuse= A recognition that the offence was committed, but not punishable.
- The ultimate result either way is not being convicted; even if the Crown can show both actus reus and fault.

History:

1. Philosophers in history:
   - Aristotle: "any sensible man does so:
   - Kant: "although an act of self-preservation through violence is not inculpable it still is unpunishable"
2. England
   - BlackStone's "choice between 2 evils"
3. Canada
   - *Morgenatler v the Queen*
     "If it does exist it can go no further than to justify non-compliance in urgent situations of clear and imminent peril when compliance with the law is demonstratable impossible"
   - Criminal Code s 8(3): Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in forces and applies in respect of proceedings for an offence under the Act or any other Act of Parliament except in so far a they are altered by or are inconsistent with this Act or any other Act of parliament.

Even if actus reus is proven, if it was a defence of necessity, it will not be convicted.

- Accused bears the tactical burden respecting defence of necessity.
- They need only raise a reasonable doubt about whether the facts support the defence. Crown must disprove the defence beyond a reasonable doubt if the accused plays that card.
  - Judge decides if there is some evidence on which a reasonable jury, properly instructed, could acquit.
  - Judge does not weigh the evidence; they assume the accused's evidence is true to be put to the jury.
  - The jury then decides whether it has a reasonable doubt

Even if the conduct would otherwise lead to conviction, the proper defence would lead to not guilty. This allows human frailty, a lack of 'moral voluntariness'.

- The excuse must be from external threats.

3 elements of the defence (the 3 P's) (*Perka*):

1. Peril (Modified Objective; *Latimer*)
    a. Accused was faced with dangerous circumstances/peril
    b. Must be so emergent and perilous that normal human instincts would cry out for action
    c. Not reasonably foreseeable
    d. Must be highly likely and immediate (must be on the verge of transpiring and virtually certain to occur; *Latimer*)
    2. (im)Possibility (Modified Objective; *Latimer*)
        a. Compliance with the law was not a practical choice (demonstrably impossible) so breaking the law was *necessary*
        b. No reasonable legal alternative
        c. Human instincts cried out for action
        d. Was there a legal way out?
3. Proportionality (Modified Objective; *Latimer*)
    a. Conduct engaged caused harm that was 'proportional' to the harm that was created.
    b. Relating or comparing the harm caused to the harm avoided

The emergency must produce an immediate threat. It also cannot be speculative, but highly likely to actualize.

- If the accused was doing an illegal act that forced him to act out of necessity, he may be charged for that initial unlawful act.

Subjective: the accused must have subjectively known they were in an emergency and subjectively known they had no option other than to break the law.

Objective: must have had reasonable grounds for his or her beliefs.

1. The circumstances must have appeared as an emergency to a reasonable observer
2. A reasonable person would have believed that he or she would have no way to avoid the danger without breaking the law.

R v Perka

Facts:

- They weren't ready to go to sea; the ship was ill prepared and they were inexperienced. They were waiting for a delivery of contraband marijuana.
- There was a huge storm and the pumps were failing. With bad luck they landed in Canada, which was never there intention.

Issue: Does the defence of necessity work here?

Procedural History:

Trial:

- Acquitted based on defence of necessity
- Use *Morgentaler* formula to reason out to the jury the elements of the necessity defence

BCCA:

- New trial ordered for an unrelated reasons
- Necessity was not dealt with here

Analysis:

Step 1: The imminent risk that is faced is what drives the moral involuntariness of the action.

- **Moral involuntariness** needs to be present; the actor is not really taking a choice
- The voluntariness is an objective standard; it is up to society's standard but a subjective element of the accused persons circumstances
- **Imminent risk:** at a minimum the situation must be so emergent and peril must be so pressing that normal human instincts cry out for action and make a counsel of patience unreasonable.

Step 2: Was there any reasonable legal alternative for the illegal response open to the accused?

- **No reasonable legal alternative**; Kerry does not like the alternatives; if they were really in a risk there would be no time to assess if there are alternatives. Adds an objective component.
- he thinks 'no opportunity for legal alternative' is better; nothing to take advantage of in terms of a legal alternative

Step 3: Was the harm avoided greater than that which was caused?

- **Proportionality:** except individual to bear the harm and refrain from acting illegally so long as it is the lesser of two evils.
- Proportionality: harm avoided > harm caused
    - This is the reasonable part of the analysis; it needs to be reasonable

Other:

- Illegality- the illegality of any preceding actions is NOT relevant, but contributory fault may disentitle"
  "if the actor contemplated or ought to have contemplated that his actions would likely give rise to an emergency requiring the breaking of the law, then I doubt whether what confronted the accused was in the relevant send an emergency."
- The illegality of the initial enterprise is not relevant (the contraband) UNLESS the actor contemplated or ought to have contemplated that his actions would lead to a case where he would have to break the law
- Crew was bad, boat was bad, weather was bad

Holding: Appeal dismissed, new trial ordered. Necessity is an excuse rather than justification. Dickson was worried about the floodgates; must be strictly controlled and scrupulously limited to situations that correspond to its underlying rationale.

Excuse has to present some evidence for the 3 Ps

- Then the Crown has the onus of proving there is no reasonable doubt that there was a 3P
- If they can prove there was no peril BARD, there is no defence

The Onus:

- Accused manages to point to some evidence relating to the defence of necessity
- Must include evidence on EACH element of the defence
- Crown then has onus to establish no necessity BARD

R v Latimer

Facts:

- L's daughter has cerebral policy
- She has multiple seizures/day and intense pain
- L felt desperate and pained by watching his daughters pain and killed her.

Issue: Does the defence of necessity apply here?

Procedural History:

Trial

- No air of reality to the defence
- If there is no air of reality, necessity should never be put to the jury

SCA

- Conviction appeal dismissed, sentence appeal allowed.

Analysis:

- Before applying the 3 requirements of the necessity defense to the facts of this case, we need to determine what test governs necessity. Is it objective or subjective? **Modified objective test. An objective test that considers what a reasonable person in the characteristics and shoes to the accused would do at the time.**
    - First and second steps are evaluated on the modifed objective standard
    - Third is evaluated on an objective standard
- Need to look at the reasonable man and transport him into the circumstances of the accused so the reasonable man is facing the same circumstances
- Move from *Perka*; the harm can be the same level or less than harms avoided
    - *Perka* wouldn't allow equal to
- Proportionality: can't ask the accused about these issues so it is modified.
- Crown doesn't assess credibility for air of reality
- Fairly low standard for getting past air of reality; the trial judge makes this decision
- Arguing Air of Reality can be hard for the Crown to argue

Holding: They found there was no danger; his daughter was always in a baseline danger of having a seizure. There was an imminent danger of seizure, but not death. Necessity not available here.

R v CWV

Facts:

- Young man at a bush party who was in a fight with multiple threats.
- He was drunk and drove away. He then came back to the party.
- When he went back he was attacked. He got in his car to drive away and hit a few people and a tree and was charged with dangerous driving

Issue: Is this necessity?

Analysis:

- No finding that L foresaw or ought to have foreseen the necessitous situation

Dissent:

- Evidence is clear that C could not have known with nicety the fullness of the response.
- He voluntarily resorted to self-help to recover the stolen property, courting a predictable reaction

Holding: Necessity

DURESS

Duress is when an accused was coerced into doing an act by threat made by others.

- An extrinsic defence
- Based in common law
- Unlike necessity, duress is in the code (ss 8(3) and 17)
    - **S 8(3):** already stated above in necessity
    - **S 17:** A person who commits an offence under compulsion by threat 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 conspiracy or association whereby the person is subject to compulsion, but this section does not apply whether the offence that is committed is….
        - high treason or treason
        - murder
        - piracy
        - attempted murder
        - sexual assault
        - forcible abduction
        - hostage taking
        - robbery
        - assault with a weapon or bodily harm or aggravated assault
        - arson, or
        - abduction and detention of young persons
- Not party to a conspiracy relates to the necessity
- There is also a lot of things exempt from the duress defence

Accused has evidentiary burden to show air of reality, and Crown then has to show BARD it does not apply if it passes air of reality test.

History:

Common law history reveals it is a subset of necessity

Elements include:

- Peril
- Impossibility
- Proportionately

Criminal Code provision elements include (*Carker*):

- Threats of immediate death or bodily harm
- From a person who is present when the offence is committed
- The person believes that the threats will be carried out
- The person is not a party to a conspiracy or association whereby the person is subject to compulsion
- The offence that is committed is not one as listed in s 17.

New Elements based off *Ruzic*:

- Threat of haem (to the accused or third party)
- Threat was believed by the accused

- Not on the excluded list of s 7
- Not in conspiracy or criminal association
- Criminal temporal connection, linked with no safe avenue of escape, and sometime proportionality.
- Proportionality is not required, but can be used.

Clarified between common law and statutory duress

- Close temporal connection (replaced with with no safe avenue) for the immediacy factor that was tossed out in Ruzic
- Proportionality was then added, but only as a factor of moral involuntariness (like it was in necessity).
    - Objective consideration and indistinguishable from moral voluntariness

  Other than the excluded list, there is almost no difference between duress and necessity

Elements of duress: (*Ryan)*

Statutory Defence (available to principals of an offence only)

- Threat of death or bodily harm directed against the accused or a third party
- The accused must believe that the threat will be carried out (MODIFIED OBJECTIVE)
- The offence must not be on the list of excluded offences in s 17
- The accused cannot be a party to a conspiracy or criminal association such that the person is subject to compulsion (SUBJETIVE)
- Close temporal connect
- No safe avenue of escape (modified objective)
- Proportionality (modified objective):
    - The difference between the nature and magnitude of the harm threatened and the offence committed, and
    - A general moral judgment regarding the accused's behaviour in the circumstances

Common Law Defence (available to parties to offences)

The exact same as above, but no list of excluded offences in s 17.

R v Carker

Facts:

- Prison riot where accused was threatened to be beat up unless he participated in it

Issue: Is this duress?

Analysis:

- Court denied the defence even though he satisfied the words of the code, but since he was not facing immediate death or harm, and those who forced him to weren't there, he didn't qualify

Holding: NO duress

R v Paquette (difference between common law defence of duress and criminal code)

Facts:

- P was not a willing wheelman in a robbery
- He was threatened if he did not partake he would be sho**t**

- There was a murder during the robbery which he was not present for
- Charged as a party to murder

Issue: Is this duress?

Analysis:

- Had the common law defence, but he committed an offence from the non allowed list in the Code (also not applicable if you are party to an offence)

Holding: No duress.

R v Ruzic

Facts:

- Imported heroin, she claims the guy in Serbia made her do it by threatening her mother

Issue: Is duress available? **YES**

Analysis:

- This would not be available at all
- She was the perpetrator (not party)
- Court looked at *Carker* since this was not immediate; and immediacy and presence were required for duress
- Here, they looked to the Charter to see if s 17 is valid
    - Is it a principle of fundamental justice under s 7? YES. Only voluntary conduct should attract the penalty and stigma of criminal liability.
    - Do the immediacy and presence requirements infringe this principle? YES.
    - Is it saved by s 1? **NO.**
- Instead, there should be no safe avenue escape and a close temporal connection between the threat and the offence committed.
- There was a threat of harm here (to an accused or third person), it was believed by the accused, not on thee excluded list, and not in conspiracy or criminal association.
- Threat can be from threat of harm, not on excluded list , she believed it (subjective), not part of conspiracy (in CC)and linked with common law (no safe avenue of escape
- Proportionality was NOT added to elements to consider in deciding air of reality for duress
- It can be used, but is not necessary to be charged to the jury

Holding:

R v Li, Chen and Liu

Facts:

- Home invasion by 4 individuals
- Residents tied up or kidnapped
- The objectives was to capture the informant and seek ransom for loss of drug income
- After 22 days the hostages were free
- Accused admitted involvement but raised defence of duress as there were threats to their families in China

Issue: Is duress available here? **NO**

Analysis:

- Not comparable to *Ruzic* as there was no air of reality

- Their criminal oragnziation ties were important,as they chose to get involved with this gang in the first place.
- Intorduced and used proportionality in their consideration

Holding: No duress

R v Ryan

Facts:

- Abused wife counselled another person (who happened to be an undercover cop) to murder her husband
- Husband had threatened to kill her and her daughter; there is evidence of long-term spousal abuse

Issue: Is duress available? **NO**

Analysis:

- Ryan was not a duress case, but since it was advanced, the SCC had the chance to clarify
- SCC said she didn't even have the starting point of duress; she could do self defence, but duress is an excuse based offence.
- Limiting concept of duress was clarified here. Applicably only when forced to do a specific threat under threat

Holding: No duress.

R v Aravena

Facts:

- Gang-related execution killing in ambush as someone's property
- Some of the accused participated as parties, not as perpetrators
- Basically told "kill this guy, or we will kill you"

Issue: Is duress available?

Analysis:

He was with Bandidos, and he didn't do the murder but was a party to them. SO he was not subject to s17 as well as it was an excluded offence.

- The threat didn't occur until after the first killing
- Main Issue: is duress available for parties for murder?
    - It is, but the ones in this case are not since there was no air of reality
        - So exclusion list is a little flexible if considered unconstitutional
        - Less serious offences on the exclusion list are subject to charter scrutiny

Holding:

R v Sheridan

Facts:

- 60-year-old mom smuggling drugs into prison where her son was an inmate
- Son had gang connects
- S was told son would be killed unless she delivered drugs

Issue: Is this duress? **YES**

Pretty much every offence on the list is doomed, they are all under charter scrutiny. Eventually parties to an offence will be treated the same.

ROLE OF DEFENSE LAWYER

- Some people say they feel unsafe around those who represent criminal lawyers; but this is due to a fundamental lack of understanding of what criminal defense lawyer do
- Bottos says as lawyers we should try to obtain a JUSTICE system, not just a legal system. It is a fair system that anybody can rely on when charged with a crime.
- Both parties try to obtain the trust, but not amongst all costs (we have search warrants and always on what the government or cops can do; no torture, etc.)
- Prosecutors start with a theory of the truth is, sometimes theory is right, sometimes it is wrong.
- How do we come to know the truth? We are all merely human (judges, lawyers, jury, etc). We have biases, we are dishonest, some have motives to law. When we allege, investigate, and try a crime, we must do our best to unravel the truth.
- There need to be checks and balances, and that why we have multiple courts and parliaments. We have these checks and balances for the betterment of society.
- The effect of fairness is keeping accessed, state, court, and counsel in check.
- To get the truth, fairness needs to be employed!!! If public does not trust the system, they won't use the system and seek justice outside the court (often in illegal ways)
- Everyone deserves a lawyer. We do not want to wrongfully convict, or unfairly over convict those who make mistakes.

JUSTICE SYSTEM, NOT JUST A LEGAL SYSTEM.

- Without lawyers it is just the loudest voice that gets heard, the weaker and marginalized will continue to lose.
- Being a criminal defence lawyer does not mean having empathy for every person you represent, just making sure you help them get treated fairly.
- Being a criminal lawyer, your clients stakes are VERY high.
- You do not have to enjoy every experience you do as a lawyer, it is just your job.
- Everyone started as a child, and some people had to grow in violence and traumatic situations which change people. BUT sometimes people are just bad. BUT you need to be open and willing to everyone. Some people have mental illnesses and need better supports.