CRIMINAL LAW

BURDEN OF PROOF

COMMON LAW

The Prosecution's Burden

- Presumption of innocence = "golden thread" running through criminal law. Imposes significant burden of proof upon prosecution
    - Why? An individual charged faces "grave social and personal consequences" including economically, socially, psychologically, and the possible loss of liberty (*R v Oakes)*
    - BRD is "essential in a society committed to fairness and social justice… and reflects [society's] belief that individuals are decent and law-abiding members…. Until proven otherwise" (*R v Oakes)*
- Standard: **Beyond a reasonable doubt** (BRD)
    - closer to certainty (yes) but not an absolute certainty
    - Compared to "beyond a shadow of a doubt"
    - Compromise has been made: protect as much as possible the interests of the accused while recognizing that the trial process is incapable of achieving absolute certainty
- **Applies to the prosecution case as a whole** and not something that must be applied to each piece of evidence in the case
    - Generally, burden of proof does not impose upon the prosecution a requirement to prove any single fact BRD UNLESS that fact represents an essential element of the offence charged
    - *R v Morin*
        - judge informed jury when referring to individual pieces of evidence that you will give the benefit of the doubt to the accused
        - On appeal SCC held that the judge had made an error – standard of proof is not individual items but the determination of ultimate issues
    - **Defences**: Ex. "It was self-defence", jury must be convinced that it was not self-defence BRD
    - Need to prove guilt BRD does not mean each juror must reach the same conclusion as to how guilt was proven. It is possible that jurors can reach the same verdict through different routes. Jurors can disagree on particular facts or a theory of guilt.
- **Crown always has burden** unless a statute that explicitly states a reverse onus
    - *R v Wasser*
        - the TJ erred in their statement that if the jury was satisfied that the *accused* took all reasonable steps to ascertain the victim was not under the age of 18 years, the verdict should be not guilty and if they are not satisfied beyond a reasonable doubt that the accused took all reasonable steps, then the verdict should be guilty
        - shifted burden to defence by instructing the jury that the defence had to prove their actions beyond a reasonable doubt (not true)
    - *R v Nadeau*
        - accused charged with murder and pleaded self-defence. There were two different versions of the events.
        - TJ said that the accused has the benefit of the doubt on all the evidence and if both versions are equal, then the jury had to accept the version more favourable to the accused
        - T correct that accused should receive the benefit of the doubt but erred in suggesting benefit only occurred when the two versions of events were "equally consistent" w/ the evidence. In reality, **the jury cannot accept the prosecution's version of events unless they are satisfied BRD**.

The Meaning of Reasonable Doubt

- Summary from *R v Lifchus*

- a reasonable doubt is not a doubt based upon sympathy or prejudice;
- it is a doubt based upon reason and common sense;
- it is logically connected to the evidence or absence of evidence;
- it does not involve proof to an absolute certainty;
- it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and,
- more is required than proof that the accused is probably guilty – a trier of fact which concludes only that the accused is probably guilty must acquit.

- "falls much closer to absolute certainty than to proof on a balance of probabilities" (*R v Starr*)

THE CHARTER OF RIGHTS & FREEDOMS

- **S 11 (d):** any person charged with an offence has the right . . . to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal
- S. 1: reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society
  - Justified and reasonable to save s 11(d) violation

Reverse Onus

- A provision requiring accused to disprove on a BoP the existence of a presumed fact, which is an important element of the offence in question, violates" s 11(d) – *R v Oakes*
  - Section 8 of the Act: "If the accused fails to establish that he was not in possession of the narcotic for the purpose of trafficking, he shall be convicted of the offence charged" he shall be convicted
  - Crown had to prove BRD the possession of narcotics. Then the accused must establish on a BoP that they did not have the intent to traffic to escape a conviction.
  - Would not violate if "upon proof BRD of the substituted element it would be unreasonable for the trier of fact not to be satisfied BRD of the essential element" (184)
  - In *Oakes,* there was not this close or inexorable link between was the Crown proved (possession of drugs) and presumption (intent to traffic)

Evidentiary presumptions/Mandatory Presumptions

- Presumption of innocence is infringed whenever the accused is liable to be convicted despite the existence of a reasonable doubt about a factor essential for conviction [Roach]

R v Downey (leading decision on presumptions & s 11(d)

Ratio	• 11(d) infringed whenever the accused is liable to be convicted despite the existence of a reasonable doubt • Presumptions that operate only so long as evidence to the contrary is not advanced by the accused → infringe s11(d) as well • SCC recognized there was one situation in which a presumption would not conflict with s. 11(d): ○ where proof of one element was substituted for proof of an essential element if proof of the first element "leads inexorably to the proof of the other"
Facts	• Living on the avails of prostitution case. CC s 212 & 212(3): "evidence that a person lives with or is habitually in the company of prostitutes... is, in absence of evidence to the contrary, proof that a person lives on the avails of prostitution.
Issue	• Whether the provisions violated presumption of innocence and s 11(d)
Held	• Provision violated 11(d) but justified under s 1.
Analysis	• 11(d) would be infringed whenever the accused is liable to be convicted despite the existence of a reasonable doubt ○ No difference whether presumption related to element of offence or defence. Any provision will contravene Charter if provision must be *proved* by the accused.

	○ In contrast, presumption of facts that were merely permissive (e.g., common sense inference that a person intends the consequences of their actions) did not result in breach of s.11(d) • Could result in the conviction of an accused despite the existence of a reasonable doubt. ○ "The fact that someone lives with a prostitute does not lead inexorably to the conclusion that the person is living on avails". ▪ Ex: a spouse, or companion supported independent of prostitution income • Presumption may not conflict where proof of one element is substituted for proof of an essential element. ○ "the statutory presumption will be valid if the proof of the substituted fact leads inexorably to the proof of the other". • Objective of fighting the exploitation common in the pimp-prostitute relationship, combined with the difficulty of securing evidence from reluctant prostitutes, and the moderate burden required to rebut the presumption → accused merely needed to show evidence to the contrary and did not need to disprove the fact of living on the avails, therefore s 11(d) violation but saved by s 1.

R v Audet – exception to presumptions violating s11(d)

Ratio	• A presumption that imposes an evidential burden on the accused — that is, a presumption requiring the trier of fact to draw a conclusion from proof of a basic fact (if no evidence raising a reasonable doubt is adduced by either the Crown or the accused) — does not violate the presumption of innocence if the unknown fact follows inexorably from the basic fact. • Teacher → position of authority = inevitable presumption
Facts	• Accused, a teacher, charged with sexual exploitation of a young person • Offence required crown to prove that the accused was in a position of trust towards the acquaintance • Accused presented no evidence but was acquitted bc the trial judge said that the accused was in no position to exercise power over the complainant and the sexual contact had occurred outside the framework for the teacher-student relationship.
Issue	•
Held	• Acquittal reversed. Conviction imposed.
Analysis	• In a vast majority of cases, teachers are in a position of trust and authority, and that it's incorrect to find that a teacher is not in a position of authority with no contrary evidence. • The presumption does not violate s.11(d) if the unknown fact (position of authority) follows inexorably from the basic fact (teacher). No possibility that drawing this inference will result in the accused being convicted despite the existence of a reasonable doubt.

R v Morrison 2019 SCC

Ratio	• It is only acceptable for an accused to bear a burden to rebut a basic fact presumption where proof of the basic fact leads **inexorably** to acceptance of the presumed fact. ○ The test is whether the connection between the proven fact and the existence of the essential element it replaces is "inexorable"
Facts	• Morrison posts an online ad seeking sexual conversations stating he was interested in younger girls. • Police create a character who is allegedly 14-year-old "Mia"; sexual conversations begin • Morrison argued he believed he was speaking with an adult role playing as a 14-year-old • Under s. 172.1(3), an accused person is presumed to believe that they are speaking to a child online if the person they are communicating with is presented as a child <u>unless</u> they can bring evidence that they did not believe they were communicating with a child.

	• 172.1(1)(b) stipulates that to secure a conviction, the Crown must prove BRD that, among other things, the accused *believed* the other person was under the age of 16.
	  ○ BUT 172.1(3) creates presumption that proof that the other person was represented to the accused as being under 16 will, absent evidence to the contrary, stand in for proof of the essential element that the accused believed the other person was under 16
	  ○ Crown argument: Presumption is rebuttable therefore no infringement

Issue	• Did section 172.1 violate section 11(d)?
Held	• Yes. Invalid law.

Analysis	• A basic fact presumption will infringe s. 11(d) if proof of the basic fact is not capable, in itself, of satisfying the trier of fact beyond a reasonable doubt of the presumed fact
	  ○ Being able to rebut is not enough to mitigate s 11(d) issue bc the presumption of innocence requires Crown establish guilt BRD BEFORE accused responds
	• Various provisions of the Code establish presumptions whereby proof of one fact is presumed to be proof of one of the essential elements of an offence. Any such presumption will comply with s. 11(d) solely if proof of the substituted fact leads "inexorably" to the existence of the essential element that it replaces (following *Audet* and *Downey*)
	  ○ Strictly interpreted. Inexorable link required.
	  ○ The relationship between someone presenting themselves as a child online and that person actually being a child is not "inexorable."
	<u>Can the infringement be saved under s 1? No</u>
	• *Oakes* test - a Charter infringement can be justified under s. 1 where the party seeking to justify that infringement can demonstrate that:
	  ○ (1) the law creating the infringement has a pressing and substantial objective; and
	  ○ (2) the means chosen are proportionate in that:
	  ▪ (a) they are rationally connected to the law's objective;
	  ▪ (b) they <u>limit the Charter right in question as little as reasonably possible</u> in order to achieve the law's objective; and
	  ▪ (c) the law's salutary effects are proportionate to its deleterious effects on the affected Charter right.
	• the presumption under s. 172.1(3) fails the minimal impairment test.
	  ○ Absence of the presumption would not undermine the prosecution of the child luring offence
	• Further, deleterious effects outweigh its salutary effects

Summary of presumptions:

- For a statutory presumption that one has committed an offence to comply with s. 11(d) of the Charter, the link between the conduct giving rise to the presumption and the conduct that actually constitutes the offence must be "inexorable" (*Morrison*, para 53).

ACTUS REUS

THE PHYSICAL ELEMENT

- "*actus non facit reum nisi mens rea sit*" → "the act does not make a person guilty unless the mind is guilty"
- Two essential aspects of most crimes:
  - AR – physical elements
  - Mens Rea – mental elements
- Rationale for requiring an act – cannot punish a person for doing something that is not specifically prohibited
  - *Kissick* – need to have an actual wrong committed.
    - Girl had been hitchhiking and became fearful of assault by the driver and jumped out of the car. Judge acquitted because apprehension of bodily injury solely grounded in complainants mind, and not through any act.

        - Accused cannot be held guilty merely b/c another person receives injuries through an apprehension of the accused's intentions
- Defining the AR
    - The majority of criminal offences are phrased in terms that forbid the commission of particular acts
    - every one of the constituent elements of the actus reus must be established for a conviction to be imposed.
        - Proof of the AR as set out in each *Code* offence is an essential aspect of any criminal charge, but nothing more than what is set out need be proven to establish guilt.

Hamilton City Council v Fairweather 2002 NZ – Interpretation issue

- Fact – D owned a dog which attacked kitten. Kitten had ran onto the property which had a high fence preventing the dogs escaping.
- The *Dog Control Act* - Dog owner must keep the dog in control. A dog that is properly controlled is not exposed to destruction, nor is the owner vulnerable to conviction and fine.
- Holding:
    - "To relieve the owner of liability for injury caused to another entering the control zone, but holding the dog absolutely liable for any escape of the animal from control, in my opinion achieves a sensible result".
        - If an animal wanders into the controlled area and is attacked by the dog, then the dog owner is not liable
        - But the dog owner is absolutely liable for any escape of the animal from the control
- Note: sounds like any escape would result in losing control → destruction. Future cases would have to distinguish or overrule.

R v W (DL) 2016 SCC

Ratio	• AR elements driven exclusively by terminology in statute. Interpretation of the word "bestiality" in question. Does it require penetration? Court must not expand scope of liability beyond that established by Parl. Expanding term bestiality would create new common law crime, which Court is not allowed to do.
Facts	• Stepfather charged with sexual abuse of his daughters, including a charge of bestiality. He tried to get the dog to penetrate, then put peanut butter on her vagina and made the dog lick it off while filming.
Issue	• Does there need to be penetration for bestiality?
Held	• Yes. Penetration necessary, no bestiality. Appeal dismissed.
Analysis	• Cromwell J – Not requiring penetration equates to creating new common law crime of sexual activity with an animal. Courts cannot create crimes (s9). • Three important principles guide statutory interpretation: 1) When Parliament uses a legal term with a well-understood legal meaning, it is presumed that Parliament intended to incorporate that legal meaning into the statute. 2) Any departure from that legal meaning must be clear, either by express language or necessary implication from the statute a. It is open to Parliament to change the law in whatever way it sees fit, but the legislation in which it chooses to make these alterations known must be drafted in such a way that its intention is in no way in doubt. 3) No common law crimes. Courts must not expand scope of criminal liability. Policy debates are for Parliament. a. Courts will only conclude that a new crime has been created if the words used to do so are certain and definitive. This reflects the appropriate respective roles of Parliament and the courts.

	b. Further, it is permissible for courts to interpret old provisions in ways that reflect social changes, in order to ensure that Parliament's intent is carried out in the modern era. • Certainty and fair notice to the people are necessary. When the court is taking away liberty – ambiguity resolved in favour of the people. • Bestiality has a well-established legal meaning → sexual intercourse between a human and an animal and requires penetration
Dissent	• Abella J • Bestiality should be defined in modern ways which would mean any sexual acts not simply penetration as most animals cannot penetrate and because half the human population cannot commit it. • Requiring penetration would not widen the scope of criminal liability. Bestiality was separated from buggery, why bother if they are the same? Cruelty and abuse to animals – only if penetration? Not the intent of Parliament.
Notes	• Parliament changed the definition of bestiality → now means any contact, for a sexual purpose, with an animal

R v Krajnc 2017 ONCJ

Ratio	• "interfere" – up for interpretation • Possible overcriminalization and overbreadth effects should be considered during statutory interpretation. Ambiguity is resolved in favor of the side of liberty, especially when underlying conduct is not dangerous.
Facts	• Animal rights protestor beside a truck full of pigs gave water to the pigs. Trucker came out and told her to stop but she continued. Trucker then drove off to the slaughterhouse. • Protestor charged with mischief to property
Issue	• Did she interfere with the lawful use, enjoyment or operation of property [of the Pig Farm] contrary to section 430(1)(c) of the Criminal Code?
Held	• Charge dismissed. The Crown failed to prove that the elements required to be charged with obstruction, interruption or interreference with the lawful use, enjoyment, or operation of the property.
Analysis	• Look at 430(1) and 428 of the CC. ○ 430. (1) Every one commits mischief who wilfully … (c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property; ○ 428. In this Part, "property" means real or personal corporeal property. Need to prove all below beyond a reasonable doubt: • Were the pigs property? ○ Property is a legal term and pigs are unquestionably property • Were the pigs being used lawfully? ○ Yes, complied with governing regulations • Did she obstruct, interrupt, or interfere with the lawful use, enjoyment or operation of property? ○ Crown's theory is that she gave an "unknown substance or possible contaminant". But driver declined offer to test bottle of water, didn't bring contaminated pigs back, no evidence slaughterhouse did anything to find what liquid it was. ○ Also, she did not stop the truck as it was stopped at a red light, the driver willingly stopped and got out. No harm to profit, the slaughterhouse did not refuse the pigs. • Did she do so willfully? ○ No need as above failed. • Did she do so without legal justification, excuse and without colour of right? ○ No need as above failed.
Notes	Interpretation

	• Doesn't matter if fact scenario COULD come within statutory wording....
	• The real issue is whether it SHOULD come within.
	  ○ Smokey's situation COULD have been "exceptional circumstances", but was it?
	  ○ Oral sex with an animal COULD have been "bestiality" but was it?
	  ○ What Jevon did COULD be a "threat", but was it?
	• The question is OFTEN: What are the ramifications if that interpretation is accepted?

Important Note

- Common law helps to define criminal conduct (*Jobidon*)
- BUT "courts must not expand the criminal liability beyond that established by Parliament" (*DLW*)
  - Certainty and fair notice to people principles

LIABILITY FOR OMISSIONS

- **Omission = failure to act**
- Three objections to criminalization of omissions
  - 1) difficult to enact limits regarding the law of omissions
  - 2) effect of forcing people to engage in a particular conduct – free will/autonomy
  - 3) may put an individual's well-being at risk (e.g., failure to rescue)
- THUS, **person cannot be punished for failing to act UNLESS such a person was under a duty to act**

Code-Created Responsibilities

- Applies to specific cases, for example parents have obligation to provide care for children. AR = *failure* to provide food, water, shelter, care etc.
- Similar obligations on those where one is placed in a vulnerable position of dependency to another by status
  - *Westray* Bill –anyone who directs, or has the authority to direct, how a person does work must take reasonable steps to prevent injury to that person. This means that employers can be held criminally responsible for employee injuries caused by their negligent omissions.
- Omission is often punishable where a person takes a positive act of some sort and then fails to take subsequent acts in circumstances where harm is likely to result
  - s. 217 – an individual who undertakes to do an act is under a duty to perform it if the failure to do so would risk another's life.
    - Imagine life preserver example, the person says they will throw the life preserver, runs up and then decides not to. That person would be guilty.

Duties imposed by provincial or common law

- Other parts of the *Code* do not refer to specific duties. For example, section 219.
  - 219 (1) Every one is **criminally negligent who (**a) in doing anything, or (b) in omitting to do anything that it is his duty to do, **shows wanton or reckless disregard** for the lives or safety of other persons. Definition of duty (2) For the purposes of this section, **duty means a duty imposed by law.**
  - Omission may amount to criminal negligence IF and only if the accused is under some sort of duty to act in the first place (s 219) - Police, doctors, etc.
- The prosecution may also resort to duties imposed under a provincial statute
  - *Nixon* – police officer in charge or lockup facility when intoxicated person was brought in after having been arrested. Evidence indicated individual was severely assaulted by officers. Officer accused could not be linked directly to the beating yet charged under the *Police Act* which required him to protect individuals under his care. Omission = punishable.
  - *Phillipon* – Manager of a bar failed to intervene when a drunken brawl broke out. Charged for failing to stop the fight. Crown argued the accused's omission could be found in the *Alcohol Control Act:* "no

licensee... shall permit quarrelsome, violent or disorderly conduct to take place on the licensed premises". Section was directed to controlling quarrelsome conduct generally, did not create a duty to intervene or protect third parties. If a duty that was interpreted, would place licensees in considerable danger by requiring them to intervene.

- Common law is another potential source of duties to act
  - *Miller* (UK) – Vagrant inadvertently set fire to a mattress upon which he was sleeping in a vacant house. Instead of taking any precautions to put it out, he simply went to another room to go to sleep. House burned down. Charged with arson. Defence argued fire had started unintentionally, a mere omission to put the fire out could not give rise to criminal liability in the absence of a positive duty to act. Holding: c**ommon law duty to take steps to rectify danger that he had created**
    - Omission will only be punishable if it meets other requirements of the crime for which the accused has been charged
      - If, for example, Miller was charged with criminal negligence under s. 219, it would have to be established that his failure to comply with the duty described above by going to sleep amounted to "wanton or reckless disregard" for others.
    - **Remains to be seen if this case applies in Canada**. Never been applied
      - s. 9 of the *Code* enacts that no person shall be convicted of an offence at common law and the argument against applying *Miller* here is that the "duty" referred to in section 219 must be one set out in the *Code* or another statutory provision
      - But since the term "duty" is not defined in the *Code,* and it is ultimately for the courts to do so, it could be argued to apply in this situation where a person creates a dangerous situation
  - *Thornton* – Accused, an HIV positive man, donated blood w/o informing them. Convicted of committing a common nuisance, on the grounds that his failure to disclose breached a legal duty.
    - ONCA said there was a common law duty owed by every person "to refrain from conduct which it is reasonably foreseeable could cause serious harm to other persons".
    - The duty in question was essentially adopted from the law of torts, taken from the basic notion that you must not injure your neighbour.
    - Colvin and Anand argued "relevant breach of the duty should have been the failure to inform the authorities about the contamination rather than the failure to refrain from donating blood"
      - Or, donating the blood created a dangerous situation, for which the accused was responsible. Should have taken reasonable measures to counteract the danger, based on *Miller.*
    - No case since has adopted this general principle that people are under a common law duty to refrain from harming their neighbour and translating it into criminal law

The Future of Omissions

- Haphazard area of law
- 1980s Law Reform Commission made a number of recommendations including adopting *Miller* and a good Samaritan rule. But not currently on the books.
- Concerns
  - The first concern is whether it is actually a good idea for the criminal law to require people to act in this manner
    - Traditionally, criminal law focused on prevention, rather then prompting people to do things
    - On the other hand, one may argue one aspect of the welfare state is that we need to take care of each other, and there is some minimal duty there
  - Second problem is, interpreting the exemptions
    - is being afraid a valid reason? Is being a recluse? Law would compel people to act at the risk of personal harm, so long as the harm is not "serious"
    - Would punish meek and cowardly

- If it ever existed, should only be along the lines of the Quebec *Charter* where no obligation arises where the act involves danger, or the French *Penal Code* which only imposes liability where assistance could be rendered without risk.

R v Browne 1997 ON CA

Ratio	• Threshold for what constitutes "undertaking" under s.217 is high. **Must be more than mere expression of words indicating a willingness to do an act**. Must show commitment, generally where reliance can reasonably be said to have been placed. Undertaking must be clear with binding intent. • Need for restraint – must set threshold for undertaking high so we don't criminalize everyone.
Facts	• Browne and victim were drug dealers. Victim swallowed bag of drugs to conceal them. Began showing symptoms when she didn't throw them back up. When Browne saw symptoms, said "I'll take you to the hospital", then called a taxi and took her to the hospital. • CC s. 217: everyone "who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life"
Issue	• Whether Browne had breached a legal duty arising from an "undertaking" within the meaning of 217 to take her to the hospital?
Held	• Appeal allowed. Conviction set aside. No legal duty.
Analysis	• Under s. 217, there is no pre-existing relationship or situation that creates a legal duty; there must be an undertaking before a legal duty is introduced into the relationship. ○ Relationship and the context are irrelevant. Only relevance it serves it in the determination of whether the breach reflected a "wanton or reckless disregard" under s. 219(1), not whether there was an undertaking under s.217 • What kind of an undertaking gives rise to a legal duty within the meaning of s. 217, the breach of which can result in criminal culpability? ○ Threshold applied must justify penal sanctions ○ "The mere **expression of words indicating a willingness to do an act cannot trigger the legal duty**. There must be something in the nature of a commitment, generally, though not necessarily, upon which reliance can reasonably be said to have been placed. ○ …before someone is convicted of recklessly breaching a legal duty generated by his or her undertaking, that **undertaking must have been clearly made, and with binding intent**. Nothing short of such a binding commitment can give rise to the legal duty contemplated by s. 217" • Inquiry begins with whether there was an undertaking. Is it in the nature of a binding commitment? If yes, then a legal duty under s 217 arises regardless of the nature of the relationship between the individuals
Notes	• S 219 creates offence of criminal negligence causing manslaughter. To prove criminal negligence, must prove the person committed an act wanton or reckless disregard OR failed to provide a legal duty that had the same effect.

MENS REA: CONCEPTS

Defining Mens Rea

- Mens Rea: the sum total of mental elements
- The meaning of *Mens Rea*
  - "Though the phrase mens rea is in common use... [it is] actually misleading. It suggests that [with all crimes] such a thing as a… "guilty mind", is involved in every definition. This is obviously not the case, for the mental elements of different crimes differ widely"

        - I.e., mens rea in murder requires malice aforethought; theft requires intention to steal
- Criminal liability requires the existence of a culpable state of mind (*Vaillancourt*)
- "The intent and act must both concur to constitute the crime" (*Tolson*)
- Rationale: mens rea rests on the notion that it is unfair to designate a person's acts as criminal when they have not chosen to do anything worthy of condemnation
    - Accidents happen
    - Individuals are autonomous – holding those liable for choices
- Many "lesser" offences possess potential for imprisonment and yet do not require proof of a mental state
    - Strict or absolute liability offences

How to distil the mental elements of specific offences?

- Difficult to do!
- Criminal Code based on structure of original 1892 code. Messy. Parl refuses to majorly consolidate.
- Each offence is treated in its own unique fashion
    - Some provide explicit descriptions of what is required
    - Others indicate the need for one element, silent on others
    - Good number provide no indication of required mental state
    - → leaves common law to try to interpret + fill in the gaps
- Code uses different linguistic terms to describe similar concepts
- So, what do we do?
    - Start with the wording of the provision
        - *Zundel*
            - accused charged with wilfully publishing a statement that he knew to be false and likely to cause mischief to the public interest, an offence under section 181.
            - Trial judge said conviction warranted if the accused knew that statement was false or was reckless as to whether it was false or not
            - ONCA – determined that as drafted, proof of actual knowledge of falsity of the statement was required. Why? "He knew to be false" → must *know* it is false. Cannot just be reckless.
    - If the statute contains no mens rea → presumptions MR is still required unless "Parl has by express language or necessary implication" disclosed intention for no MR (*Watts & Grant*)
        - Thus, court will supply the MR via determining (as much as possible!) what the legislative intent was

Motivation v Intention

- Motive = the reason someone makes a choice (the why)
    - Motive is a sufficient condition for intent; but not the necessary condition (i.e., absence of motive can show a lack of intent, but you do not need a motive to show intent)
    - Motive is relevant to sentencing – evil motives may lead to harder punishment
- Intention = a person does an acting knowing it will cause a forbidden consequence (what the accused thought)

R v Steane 1947 England CoA

Ratio	• Court equated intent w/ motivation. • Steane knew what he was doing and did it intentionally. Motive may have been pure but doesn't matter.
Facts	• Steane was a British actor who had been employed in Germany prior to WWII. Detained in Germany during the war and was forced to work for the German broadcasting service. • Charted with breach of the War regulations after the war: "If with intent to assist the enemy, any person does any act which is likely to assist the enemy, then… he is liable"
Issue	• whether these acts were done with the intention of assisting the enemy?
Held	• Appeal allowed; conviction quashed

Analysis	• Man is taken to intend the natural consequences of his acts • If he does an act that is likely to assist the enemy, then must be assumed that he did it with intention to assist the enemy • When someone is subjected to power of others (especially the enemy), cannot make the inference that a person intended the natural consequences of their acts just b/c they did them • Only convict if satisfied that the act was done with the intent to assist the enemy
Notes	•

R v Hibbert 1995 SCC

Ratio	• The presence of threats may be relevant to whether someone possessed the MR necessary
	  ○ May also have conduct excused through common law defence of duress
	• Motivation does not equal intention
	• "for the purpose" = intention
	  ○ "'purpose" in s. 21(1) (b) should not be seen as incorporating the notion of "desire" into the mental state for party liability, and that the word should instead be understood as being essentially synonymous with 'intention'."

Facts	• Hibbert called his friend Cohen to come downstairs from his apartment. Another fam shot Cohen 4 times. • Charged with aiding attempted murder. Crown contended that accused assisted another person "for the purpose" of aiding them commit an offence. • He unquestionably helped the other person but contended he was forced to do so under the threat of death
Analysis	• situations where duress will operate to "negate" mens rea will be exceptional • a person who performs an action in response to a threat will know what he or she is doing, and will be aware of the probable consequences of his or her actions • Whether or not they **desire** the occurrence of the consequences depends on the circumstances ○ Existence of threats "clearly has a bearing on the motive" underlying actor's decisions • "For the purpose" does not require the accused actively view the commission of the offence they are aiding as desirable, ∴ MR of this offence cannot be negated by duress

R v Buzzanga and Durocher 1979 ONCA

Ratio	• Where no mental state defined in statute, the MR is intentional or recklessness • Willfully = For the Purpose = Knowingly = Intentionally = Highest level of moral certainty. ○ Not recklessness or mere possibility • Reckless = subject state of mind of a person who foresees conduct may cause result but takes the risk anyway
Facts	• Two French speaking Canadians distributed hate pamphlet against French minority. • Accused thought the pamphlet would be catalyst for government action and to show how ridiculous stereotypes are. • Statute says, "willfully promote hatred".
Issue	• What does "willfully" mean for MR?

Analysis	• The required MR for most crimes, where no mental element is mentioned, is either the intentional or reckless bringing about of the result which the law seeks to prevent
	  ○ ∴ unnecessary to import "willfully" given the presumptive meaning
	  ○ ∴ purpose of the word was to limit conduct to only intentional conduct and not reckless conduct

	• person who foresees that a consequence is certain or substantially certain to result from an act which he does in order to achieve some other purpose, intends that consequence. • Here: the appellants "wilfully" (intentionally) promoted hatred against the French-Canadian community of Essex County only if: (a) their conscious purpose in distributing the document was to promote hatred against that group, or (b) they foresaw that the promotion of hatred against that group was certain or morally certain to result from the distribution of the pamphlet, but distributed it as a means of achieving their purpose of obtaining the French-language

R v Boone 2019 ONCA

Ratio	• Can't just be reckless for attempted murder, must be intent to kill. ○ Recklessness refers to a state of mind in which a person decides to do an act, realizing that a specific consequence may flow from that act (*Buzzanga)* • Intention requires believing there is a virtual certainty the result will occur
Facts	• Accused was HIV positive, and purposely aimed to have sex and infect his partners with HIV. • Charged with multiple counts of attempted murder and aggravated assault ○ The crime of attempted murder requires proof BRD that the accused *intended* to kill, coupled with conduct by the accused done for the purpose of carrying out that intention. Actus Reus in this case is not in dispute.

Analysis	• Intention to inflict harm combined with recklessness as to the consequences is not enough to satisfy mental element of an intent to kill
	  ○ Intent to kill: carrying out some purpose in the knowledge that killing is virtually certain (morally certain or substantially certain), regardless of if their desire is to kill or not
	• Conduct must amount to "some act more than merely preparatory"
	• Crown must prove:
	  ○ (1) appellant intended to infect each of the complainants with HIV AND
	  ○ (2) appellant believed that death at some point in the future was a virtual certainty as a consequence of contracting HIV
	  ○ Trial: Crown able to show that accused intended to infect others
	  ○ Evidence supporting inference that accused believed that death was a virtual certainty was not strong
	  ▪ Accused believed that even if infected, death from AIDS was far from a certainty

R v Zora 2020 SCC

Ratio	• Long-standing presumption that Parliament intends crimes to have a subjective fault element unless there is a clear expression of legislative intent overriding presumption ○ Reflects value to not convict morally innocent • If CC is ambiguous → presumption of subjective MR has not been displaced
Facts	• Zora was charged with drug crimes and was out on bail. • One of his bail conditions was that he had a curfew, and that he had to come to the door within five minutes if they were checking. Two times, he didn't come to the door, charged with breaching his bail conditions. Mr. Zora claimed he did not hear the door.
Issue	• is the mens rea for this offence to be assessed on a subjective or objective standard?
Held	• Subjective required.
Analysis	• To be guilty of a crime, a person must DO something that is against the law. This is the actus reus. • But something must make the person responsible, which is Mens Rea. • For many crimes, a subjective standard is used, where a person is responsible if they intended, knew or were aware of what might happen.

	○ However, some crimes, a person can be responsible even if they did not mean to do anything (objective mens rea). The courts look at whether the accused did something different from what an ordinary, sensible person would have done in the same situation. • In *Zora*, the SCC was unanimous, mens rea for breaching a bail condition was subjective. Court had to look at what the person "actually intended, knew, or foresaw the consequence" when deciding if they were guilty of a breach.

MENS REA: ELEMENTS

"MENTAL STATES" - SANKOFF READING

Recklessness

- Intention (*Buzzanga*) focuses on the 'accused's desire to effect a particular consequence' (e.g., "I want X to occur")
  - Or equally, 'where the accused is certain or virtually certain that the consequence will result' ("I don't want X to happen, but know that if I undertake this act, it is certain to occur")
- Recklessness – focuses on the subjective awareness of a likely risk and the decision to act notwithstanding such risk
  - Reckless person is one "who sees the risk and takes the chance" (*Sansregret*)
- Two substantive components for mental state of recklessness
  - Accused must first foresee the risk that is relevant to the offence
  - Decide to take such a risk
- Error:
  - Any definition provided to the jury indicating that the standard is what the accused *should* have foreseen, or
  - what a reasonable person *would* have foreseen,
- To be reckless, risk must also be "unjustifiable" which imports an objective element
  - Subjectively proceeding considering particular risks is occasionally desirable, even though an illegal consequence may occur
    - Ex: Doctor taking invasive measures to treat a patient, entails some risk but does not make his or her conduct reckless
  - What constitutes unjustifiable risk?
    - *Sault Ste. Marie* – Dickson required "there be a substantial risk of the consequence materializing, that the consequence is less than inevitable but more than possible"
      - Sounds like probability
- Commentators: Level of risk should depend upon the nature of the risk in question as well as the social value of the activity being performed
  - Ex: If A is fooling around with a rifle and fires at a friend from 500m, low risk of hitting friend, but nature of risk is very high and no value to activity.
  - Benefit of this approach is it is flexible to accommodate various circumstances and assigns consideration to elements that assist in measuring what should be considered "justifiable"
  - However, this could be unwieldy
    - Hard to explain to jurors, especially in marginal cases. Jurors might confuse the distinction between subjective and objective parts of the inquiry, focusing only on the value of the actions
- On the "unjustifiable" aspect, subjective nature of recklessness is always important
  - Key is what the accused knew or believed
  - If accused made a mistake, he or she cannot be reckless
    - Ex: If the accused really believes his friend is a tree, he is not reckless in shooting in that direction, no matter the risk.

Knowledge of Circumstances

- large number of crimes that can be committed without proof of any specific result and are thus sometimes referred to as "circumstantial" or "conduct" crimes.
    - Focus: to deter behaviour with the *potential* to cause harm
    - Requires: only that the accused intentionally commit a prohibited act w/ knowledge of the requisite circumstances
- These types approached in two ways within the CC:
    - 1) Knowledge must be proven before guilt can be established
        - Ex: s 155 offence to commit incest – must know person is a relation first
        - Ex: defamatory libel – must know what is published is false
    - 2) Or, more commonly, CC will not list a knowledge requirement at all
        - However, just bc it isn't listed, does not mean you just need actus reus
        - Knowledge is ALWAYS relevant
- **Recklessness**
    - In the same way that recklessness can provide an alternative to intent in relation to consequences, can sometimes operate to establish the accused's subjective knowledge of relevant facts
    - Exists whenever the accused is aware of a particular risk that a relevant fact may be present, and nonetheless proceeds
    - How to determine whether recklessness is a sufficient fault element for a particular crime?
        - Occasionally statute will state it
            - 264 of the Code makes clear that a person is guilty of criminal harassment where they knew or were reckless as to whether their victim was harassed
        - When left to the common law – more complex
            - Authority suggests reckless will not suffice
            - *Beaver* – There is no possession without KNOWLEDGE of the character of the forbidden substance
            - Penney: while there is some ambiguity around this, as a general rule recklessness will suffice to establish MR. If we have never come across the offence and it is not possession based, assume recklessness.
- **Wilful Blindness**
    - Term rarely appears in the Code
    - Like recklessness but is viewed as a more substantive and morally culpable mental state
    - How to determine wilful blindness?
        - Example, man outside Canada asked to bring a package into the country for someone else
            - 1. does not address his mind at all as to what is inside the package – circumstances provide no reason to (although a reasonable person would have)
            - 2. Might wonder what's in the package, but decide not to ask
            - 3. May suspect there are narcotics in the package, but decide not to ask because he "doesn't want to know" (lack of knowledge = deliberate → wilful Blindness)
    - Crown must show that the accused knew of the need for inquiry and *deliberately* refrained from ascertaining the true facts.
    - *Jorgensen* - "a finding of wilful blindness involves an affirmative answer to the question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge"
    - *Briscoe* – Charged w/ first degree murder. Drove car but did not commit the murder. Claims did not know what would occur.
        - wilful blindness requires, at the outset, a fairly heightened level of suspicion
        - Where this suspicion exists, the accused must make inquiries or face conviction
        - The mere fact that certain inquiries were made does not preclude a finding of wilful blindness
        - "**deliberate ignorance**" is a better descriptor of wilful blindness
    - *Lagace* – accused charged with possession of stolen property. Accused appealed because he had made certain inquiries about the property and were satisfied that there was no criminality involved

- Trier of fact will have to decide whether the Crown has proved beyond a reasonable doubt that despite that inquiry the accused remained suspicious and refrained from making any further inquiry because she preferred to remain ignorant of the truth.
- Wilful blindness inquiry should focus upon what the accused chose to do or not do
- As a matter of law, the question is the same whether steps were taken or not: was the accused aware of a risk, and did he or she deliberately refrain from inquiring further out of a wish to remain ignorant?

R v Theroux 1992 SCC

Ratio	• 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.
Facts	• Accused was convicted of fraud for accepting deposits from investors in a building project having told them he had purchased deposit insurance when he had not.
Issue	•

Analysis	• The actus reus has its own mental element; the act must be the voluntary act of the accused for the actus reus to exist.
	• MR refers to the guilty mind, the wrongful intention
	• MR test = subjective
	  ○ Question is whether the accused appreciated that certain consequences would follow from their act (don't care about values / morals of accused)
	  ○ Crown need not show precisely what thought was in the accused's mind at the time of the act
	  ▪ In certain cases, subjective awareness of the consequences can be inferred from the act itself (barring some explanation casting doubt on such inference)
	• Re: Fraud
	  ○ Prohibited act is deceit, falsehood, or some other dishonest act
	  ○ MR is an awareness that one was undertaking a prohibited act which would cause deprivation or putting that property at risk
	• To establish the mens rea of fraud the Crown must prove that the accused knowingly undertook the acts which constitute the falsehood, deceit, or other fraudulent means, **and** that the accused was aware that deprivation *could* result from such conduct

Beaver v The Queen 1957 SCC

Ratio	• There is no 'possession' without **knowledge** of both presence and nature of the thing possessed
Facts	• Accused convicted of two counts: possession of morphine and trafficking in morphine • Accused claims he had no knowledge that the substance contained in the package was morphine and believed it was sugar of milk • Act has no MR outlined.
Analysis	• In law, there is no possession w/o knowledge of the character of the forbidden substance

CONSEQUENCES

- Many crimes require a distinct element proof that A was responsible for a particular consequences
  - S 267 assault causing bodily harm → crown must show V sustained bodily harm AND A caused it

ACTUS REUS

- Two components: factual + legal = **significant contributing cause**
- **Factual**
  - **"but for**" the accused contributions to the act, the consequence would not have occurred (*Nette*)
  - Any degree of contribution is sufficient
  - Accused must take the victim as he finds them (*Smithers*)
  - Exception to the rule: **multiple sufficient causation** where more than one independent actor is causally responsible. Since we cannot distinguish which caused the death as they are acting simultaneously an exception to the but for test applies.
- **Legal**
  - If no factual causation, there can be no legal causation
  - Concerned with "whether the A should be held responsible in law" (*Nette*)
    - Reflects fundamental principle that morally innocent should not be punished (*JSR*)
  - Standard: is any contribution "beyond de minimis" (*Smithers*)
    - now known as "**significant**" (*Nette; Maybin*)
    - requires contributing act be more than trivial
  - Doctrine of **intervening** acts – severs chain of causation
    - Intervening act must be "extraordinary" or "unusual" to make the A's act insignificant (*Sinclair*)
    - Ask: was the act reasonably foreseeable? Was the act independent of the A's actions?
      - Neither presence nor absence is enough, but they are considerations

Smithers v The Queen 1978 SCC

Ratio	• It is a well-recognized principle that one who assaults another must take his victim as he finds him
Facts	• Appellant punched Cobby in the head twice, then kicked his stomach. Cobby fell to the ground and stopped breathing. Medical experts testified that he died from aspirations. Normally the epiglottis protects the person from choking when they vomit but in this case, Cobby's epiglottis failed. A charged with manslaughter.
Issue	• Whether there was evidence on the basis of which the jury was entitled to find that it had been established BRD that the kick caused the death? Did it cause the aspiration?
Held	• Manslaughter conviction upheld.

Analysis	• Factual causation: whether A caused B. Answer to this question can only come from evidence of witnesses. Nothing to do with intention, foresight, or risk
	  ○ This case, Crown had burden of showing factual causation – that BRD the kick caused death
	  ○ But for the kick, would the death have occurred?
	• Crown under no burden of proving *intention* to cause death or injury
	  ○ Only intention necessary was that of delivering the kick to Cobby.
	  ○ All Crown had to prove was that the kick caused vomiting
	  ○ Foreseeability also not an issue
	  ○ Not a defence to manslaughter that the fatality was not anticipated or that death wouldn't normally result from the unlawful act

R v Maybin 2012 SCC

Ratio	Focus on legal causation • An accused's unlawful actions need not be the only cause of death, or even the direct cause of death; the court must determine if **the accused's actions are a significant contributing cause** of death. • Objective foreseeability has been a useful tool in determining whether an intervening act severs the chain of legal causation.

Facts	• Timothy Maybin grabbed the victim and violently punched his face and head in quick succession. Tim's brother helped but was pulled away by bar staff. Victim was unconscious on the pool table. Bouncer came and struck the unconscious victim on the back of the head with considerable force. Two assaults took place within less than a minute. Victim died b/c of bleeding in the brain. • Three possible causes of death – blow by Maybin, bouncer hit, or combination. • TJ not convinced BRD what the cause was so acquired all three of manslaughter. • CoA ordered new trial for Maybin brothers. Dismissed acquittal of the bouncer.
Issue	• Did the trial judge err in failing to address whether the appellants' assaults were in fact a cause of death? • Was it open to the trial judge to find that the appellants' assaults remained a significant contributing cause of death despite the intervening act of the bouncer because (a) the intervening act was reasonably foreseeable; or (b) the intervening act was not an intentional, independent act?
Held	• Maybin guilty. Appeal dismissed.

Analysis	• Factual causation is "an inquiry about how the victim came to his or her death, in a medical, mechanical, or physical sense, and with the contribution of the accused to that result" (*Nette*, at para. 44).
	  ○ BUT FOR the action, would the consequence have occurred?
	• Legal causation: Based on moral culpability.
	  ○ ASK should the accused be held legally responsible? Or would this amount to punishing the morally innocent?
	
	Factual Causation
	• Even if appellant's actions were not the direct cause of death, "but for" their actions the victim would not have died – he was only on the table and hit by bouncer as a result of the initial fight
	
	Legal Causation – Intervening Act
	• The fact that other persons or factors may have contributed to the result may or may not be legally significant in the trial of the one accused charged with the offence.
	  ○ Bouncer may have been an intervening act
	• Doctrine of intervening acts - used to reduce the scope of acts that generate criminal liability
	  ○ How to approach an intervening act? → was the intervening act **reasonably foreseeable**? Was the act **independent** of the accused's actions?
	  ○ Reasonable foreseeability and independent acts are not new legal tests. Neither the presence nor the absence of either is enough to establish or break the chain of legal causation, respectively.
	• Test remains the same whether an intervening act has interrupted the chain of causation: Were the dangerous, unlawful acts of the accused a **significant contributing cause** of the victim's death?
	
	Reasonable foreseeability
	• An intervening act that is reasonably foreseeable will usually not break or rupture the chain of causation so as to relieve the offender of legal responsibility for the unintended result.
	  ○ Question asked - Is it fair to attribute the resulting death to the initial actor?
	• "Extraordinary" or "unusual" intervening acts are, in some cases, the reasons for not holding the accused responsible
	  ○ ex. *Sinclair* – passing motorist hitting a person beaten and left on the side of the road didn't count as a unusual intervening act
	• What needs to be reasonably foreseeable?
	  ○ It's the **general nature of the intervening act and the accompanying risk of harm that needs to be reasonably foreseeable**
	  ○ Chain of causation should not be broken just b/c specific subsequent attack by the bouncer was not reasonably foreseeable

	○ Here: Risk of intervention by patrons and the bouncer was objectively foreseeable when the appellants commenced a one-sided fight in a crowded bar <u>Independent Acts</u> • Should not place legal liability on accused if their actions were "overtaken by the more immediate causal action of another party acting interpedently (*JSR*) • Whether intervening act was an independent factor that severs the impact of the accused's actions involves assessment of the relative weight of the causes ○ *Smith* – if at the time of death, the original wound is still an operating cause and a substantial cause, and the intervening act is not so "overwhelming" that it makes the original wound merely history than the first cause cannot be overlooked ○ *Hallett* - When the intervening acts are natural events, they are tied closer to foreseeability, then Courts ask if they are extraordinary • Whether an intervening act is independent is thus sometimes framed as a question: 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**? • THIS CASE: Bouncer and appellant's acts were interrelated ○ Bouncer's assault was not independent of the unlawful acts ○ Appellant's acts were a significant contributing cause of the victim's death ○ Appellant's actions were dangerous and unlawful and not so remote to suggest that they were morally innocent of the death

R v Romano 2017 ONCA

Ratio	• Two scenarios for finding *against* legal causation: independent intervening act is reasonably foreseeable; or it is significant enough to overwhelm the accused's act
Facts	• Undercover cop was speeding (109 km/hr on a 60 street) to catch up to the rest of his crew. Hit a jaywalker stepping out on a busy road, charged with dangerous driving causing death.
Issue	• Was the jaywalker intervening act? ○ Generally, it's a foreseeable risk, not significant enough to overwhelm though.
Analysis	• The doctrine of intervening acts applies **where an event independent of the accused's conduct occurs that severs the chain of factual causation** between the accused and the consequence [para 34] ○ Side note: typically view severing chain of *legal* causation not factual. Penney says there are circumstances that something factually truly does break the chain (say A commits an assault but then something happens that would have led V to the hospital anyway – A makes no contribution to the result). But 99% of the time there is no break in the chain, it is just the second act intervenes (legal causation) which makes A's insignificant. • A finding against legal causation will **generally** occur in one of two situations. ○ 1. the independent intervening event is <u>not reasonably foreseeable</u>, and/or ○ 2. the intervening act is an <u>independent cause of the consequence</u> that is significant enough in relative weight to sever or break the chain of causation between the act of the accused and the consequence:

MENS REA

- Must presume subjective fault for actus reus unless legislation states otherwise (*Zora*)
- Mens rea, on the other hand, is almost always objective
    - Exception is murder (s 229) and some considerations stemming from *Charter* challenges

Mens Rea and the Charter

- When s 7 is triggered (right to liberty – so where imprisonment is an issue) and the crime attaches a sufficient "stigma", some level of MR is required. Cannot be absolute liability. (*Vaillancourt; Martineau)*
    - In the case of murder, it required subjective fault due to the high level of stigma (*Martineau)*
- Short list where subjective fault is required due to stigma: murder, attempted murder, war crimes, and crimes against humanity.
- Already a presumption of subjective fault when law is silent, so little room for *Charter* to make an impact

Relevant cases:

- *Ref s 94(2)* of the *Motor vehicle act* 1985
    - Held it was a principle of fundamental justice that the **morally innocent could not be subject to criminal penalty**
    - As such, where an offence triggers interests protected by s7 of the Charter, and removes any need to show the offender was morally at fault → charter violation and invalid UNLESS saved under s1
- *Vaillancourt*
    - Relationship b/w MR and s 7 expanded here
    - At the time s. 230(**d)** of the Code "constructive murder" – made any culpable homicide murder where a person caused death during the commission of another offence
        - Enabled people to be conceited of murder despite no intention to cause death
    - decision to **convict someone of constructive murder without requiring any foresight of death contravened s7**
- *Martineau*,
    - Court addressed whether 230 **(a)** was a similar violation.
    - Lamar CJ held a **conviction for murder can only be based upon subjective foreseeability** of death
    - Why? special nature of **stigma** attached to murder

- After these cases, all that was clear is that **when s. 7 is triggered (liberty, so imprisonment), some level of mens rea is required**. Can't be absolute liability.

- Questions arose as to whether there were other offences whose "stigma" requires subjective MR or does the *Charter* require it?
    - SCC immediately stated subjective MR is *not* required for most criminal offences (*Creighton; DeSousa)*
    - Once SCC ruled manslaughter had an insufficient stigma to impost a subjective MR, it was clear that very few offences would receive it (*Creighton)*
    - Short list where subjective fault is required due to stigma: murder, attempted murder, war crimes, and crimes against humanity.

Level of Fault Required for Consequence-Based Offences

- For those with a predicate offence, all that is required is **objective foreseeability of non-trivial bodily harm**
    - that the **REASONABLE PERSON would have foreseen the risk** of non-trivial bodily harm regardless of the actual harm required to be proved (*DeSousa; Creighton)*
- In some cases, the underlying predicate offence also requires objective MR
    - Criminal negligence causing death, causing bodily harm, dangerous driving causing death etc.

- In exam while looking at consequence-based offences
    - Start with predicate offence – prove those elements first
        - Ex: assault

- AR = *voluntary* application of force
- MR = intention (subjective fault element)

- Then move on to the consequence-based offence
  - Ex: Assault causing bodily harm
    - Must provide bodily harm [the consequence] AND
    - AR: factual but for causation + legal causation
    - MR: objective foreseeability of nontrivial bodily harm

S 229 Culpable homicide (murder)		**Comments**
Conduct (AR)	Fault (MR)	• Statute tells us MR ○ Intent or heightened form of recklessness (subjective awareness of the likelihood of death)
Death of human	n/a	
Factual & legal causation	Intends to cause death or intends to cause bodily harm knowing deal is likely	

S 269 Bodily Harm (*DeSousa*)		**Comments**

Conduct (AR)	Fault (MR)	• Unlawful act is unspecified
		  ○ Could be assault, careless use of a firearm etc.
		  ○ Must prove the AR & MR of this first
		• AR: That there really was bodily harm - factual &legal causation
		• MR: objective foreseeability of non-trivial bodily harm
		  ○ No need to prove accused foresaw it, just that a reasonable person in similar circumstances would have foreseen non-trivial bodily harm

Unlawful act (whatever predicate offence may be)	Unlawful act	
Factual & legal causation + bodily harm	objective foreseeability of non-trivial bodily harm	

S 268 Aggravated Assault (*Godin*)		**Comments**
Conduct (AR)	Fault (MR)	• AR – Factual and legal causation + endangerment (so serious of an assault that it's life threatening, definition in the CC) • MR – Objective foreseeability of non-trivial bodily harm (could just be foreseeable that it's a broken wrist – not life endangering, etc.)
Voluntary touching w/o consent (predicate offence of assault)	Intent to touch; recklessness for non-consent (predicate offence of assault)	
Factual & legal causation + endangerment	objective foreseeability of non-trivial bodily harm	

S 225 Unlawful act causing death (manslaughter) (*Creighton*)		**Comments**
Conduct (AR)	Fault (MR)	• AR – factual and legal causation for death • MR – Objective foreseeability of non-trivial bodily harm (not death!) ○ Even if the accused nor a reasonable person would foresee death would arise in the circumstances
Unlawful act (whatever predicate offence may be)	Unlawful act	
Factual & legal causation + death	objective foreseeability of non-trivial bodily harm	

Discharging a Firearm (w/ intent to wound)		**Comments**
Conduct (AR)	Fault (MR)	• Offence that is defined in a way that its plain language dictates that there is a fault element that is free-standing → not connected to any AR element • Always must be voluntary (aware you're pulling the trigger) • Intent or handling in a reckless way that could pull trigger • Offence is not just discharging firearm; it is discharging WITH intent to wound
(Voluntary) discharging firearm	Intention or recklessness	
n/a – no corresponding AR element	Intent to wound	

R v DeSousa 1992 SCC

Ratio	• Clarified the requirements for a crime based upon an underlying (predicate) offence
	  ○ Underlying's offence must be satisfied.
	  ○ Additional fault requirement must be satisfied
	• For "causing bodily harm", in addition to predicate offence element, all that was needed was merely **objective foreseeability of non-trivial bodily harm**
	  ○ That the **reasonable person** would have foreseen the risk of non-trivial harm **REGARDLESS** of the **actual harm required** to be proved
	• In absence of express legislation, **subjective MR only attaches to the predicate offence** and not the aggravating circumstances.

Facts	• Appellant threw a beer bottle against a wall, and it shattered. Piece of the glass struck the victim on her arm, and she required stiches. Appellant charged with unlawfully causing bodily harm (CC s. 269) • To be within ambit of s 269, accused must have committed an underlying predicate offence. • Accused argued not requiring subj foresight would go against *Ref re s 94* and *Martineau* – imposing punishment despite moral innocence
Issue	• What mental element is required by s269? Is subjective foresight required for unlawfully causing bodily harm
Held	• Constitution does not require subjective fault for 269 • Further no principle of fundamental justices requires proof for ALL elements of the offence
Analysis	• Fault requirement is a fundamental aspect of common law. Also matter of constitutional law via s 7 of the Charter. • Statutes should be interpreted to include mental element unless explicitly states otherwise • Court rejected the idea that subjective fault was required. ○ s. 269 requires **objective foresight** of the consequences of an accused's unlawful act • Also **rejected idea that generally speaking the reasonable person would have to foresee the precise consequence** specified in the offence

	• The mental element of s. 269 is composed of two separate requirements.
	  ○ The first requirement is that the mental element of the underlying offence of s. 269 (the "unlawful act) be satisfied.
	  ○ The second requirement is that the "unlawful act" must be at least "objectively dangerous" so that a reasonable person would realize the act created a risk of bodily harm
	• *In absence of express legislation**, subjective MR only attaches to the underlying*** and not the aggravating circumstances. Not morally innocent because particular consequence was unforeseen by actor.
	  ○ Not necessary to show an intent to cause the eventual consequences. To do would "substantially restructure current notions of criminal responsibility"
	
	TLDR
	• De Sousa basically said that some offences (like murder) require subjective foresight, whereas others (like unlawfully causing bodily harm) required nothing more than objective foresight.
	  ○ *But* presumption stands that MR is required unless statute says otherwise.

R v Creighton, 1993 SCC

Ratio	• Manslaughter requires "objective foreseeability of the risk of bodily harm, which is neither trivial nor transitory, in the context of a dangerous act. Foreseeability of the risk of death is not required".
Facts	• Drug user administered cocaine to a willing woman who died. • He refused to contact authorities, but his friend eventually did • Charged with "Unlawful act causing death" (manslaughter) – s222(5)(a). • Intent not required (or else it would be murder). Essentially, its an unintended causing of death in which homicide is culpable but less so than murder.
Issue	• Is the mens rea required for manslaughter subjective or objective? Considering *Charter*
Held	• 5-4. Objective req'd.
Analysis	• The unlawful act must be objectively dangerous, and the unreasonableness must be a marked departure from the standard of care of a reasonable person. • Basically, if s. 7 doesn't work to play a subjective MR on manslaughter, won't work on anything beneath it.

R v Godin 1993 NBCA

Ratio	• Aggravated assault requires objective foresight of bodily harm only. No intent required as there is an underlying predicate offence.
Facts	• Taking care of girlfriend's baby. Baby suffered a severe head injury and accused statements unreliable. Trial judge found baby was cranky, the accused struck the baby intentionally, causing the child serious injury which threatened his life. Charged with aggravated assault.
Analysis	• NBCA: Held intentional force without consent is not enough, requires MR towards consequences. • SCC: Overturns CoA. Held only objective foresight of bodily harm is important – not necessary that there might be an intent to injure.

SEXUAL ASSAULT: INTRO

CONTEXT

Reliance of Myths and Stereotypes

- Certain behaviours expected in society when it comes to sexual matters (sexism rampant)
    - Much of the law developed over the last few decades have been to address this
- *R v Wagar*
    - Facts:
        - Nineteen-year-old Indigenous J.M. (100 lbs) met Wagar (240 lbs) at a youth centre where she was picking up groceries. J was homeless at the time. The next morning, she reported that Wagar sexually assaulted her the night before. Wagar said sex was consensual, or he had mistaken belief it was. She describes a violent rape. The issue is credibility.
    - Judge Camp
        - Removed from the bench
        - Told the girl she should have just kept her legs together
        - Canada's rape shield was unfair. Cross examined the girl himself. No impartiality.

Credibility

- Most time sexual assault happens in private. **Cases often come down to a weighing of credibility**. Difficult to sometimes meet the BRD standard when it comes down to this.
- Lesson: can use common sense but be careful of being drawing into myths and stereotypes
- *Cepic*
    - **Historically myths were used to undermine a complainant's testimony, but it can also operate in the reverse**
    - Facts:
        - Complainant and stripper go to VIP room and have sex. Very few words were exchanged until the appellant told her he was about to ejaculate. He testified she said "No, I have a boyfriend". Boyfriend arrives, complainant states she had been sexually assaulted.
    - TJ said statement about boyfriend as stripper was about to climax was "completely implausible and nonsensical". Inferred based on her character she would never have touched stripper and consented.
    - ONCA: "…[T]he trial judge also seems to have utilized stereotypes about male aggression …". Complainant also pursued the dancer. "While this certainly does not lead to an inference of consent, it is evidence that the trial judge chose to ignore when she concluded that the complainant could not have been the sexual aggressor and was stunned and confused."

R v Lacombe 2019 ONCA

Ratio	• Myths and stereotypes have no part to play
Facts	• Complainant and the accused were tenants in an adult assisted care residence for persons with disabilities. Each had their own room. Complainant alleged that the accused assaulted her on two consecutive nights. The version of the events differed. • Trial judge acquitted the accused, identifying credibility and reliability as the sole issues. ○ Found that "common sense and life experiences would comport with the notion" that the woman would act in this way (e.g., did not complain, did not leave after assault, continued interaction, kiss back, dress scantly)
Held	• Appeal allowed. New trial ordered
Analysis	• Trial judge **invoked prohibited discriminatory reasoning** • Myths and stereotypes about sexual assault victims have no place in a rational and just system of law. Relying on myths and stereotypes to assess the credibility of complainants jeopardizes the court's truth-finding function ○ The stereotypical assumption that "if a woman is not modestly dressed, she is deemed to consent" no longer finds a place in Canadian law": *R. v. Ewanchuk,*

	○ Not immediately reporting is not a factor either ○ There is no rule as to how victims are apt to behave

Criminalizing Sexual Conduct

- What forms of sexual mis[conduct] should be criminalized?
  - Want to protect victims, while ensuring criminal sanction is not used where moral responsibility lacking.
  - Ensure proof of a guilty mind, but not allowing the ignorant to prey on vulnerable people.
  - Should the law LEAD (set new requirements) or FOLLOW (recognize existing social norms)?
- Importance of Consent
  - Best way to protect people's sexual autonomy
  - Sets boundaries and creates the importance of seeking agreement before proceeding.
- Keep in mind the broader social context: barriers to reporting, disproportionate impact on women and children (particularly Indigenous), stereotypes & myths still circulating, desire to hold people accountable and yet also not criminalize the innocent

"Sexual Assault" – Sankoff (#29)

- CC 271: everyone who commits a sexual assault is guilty of:
  - (a) an indictable offence OR
  - (b) an offence punishable on summary conviction
- General definition of assault applies to those of a sexual nature (s 265(2))
  - Intentional application of force, either directly or indirectly w/o the consent of the other person, or an attempt to threat or apply such force if one has or causes to believe on reasonable grounds that one has, the ability to effect that purpose.
    - Thus, a threat to apply force of a sexual nature can amount to a sexual assault.
- s. 278 provides that a husband or wife is also liable to be charged with sexual assault in respect of his or her spouse. Earlier versions offered an exception, was repealed in 1983. Out of an abundance of caution, s. 278 was added as well.
- No definition of "sexual"
  - In *Chase*, the Supreme Court held "The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: "**Viewed in light of all the circumstances, is the sexual or carnal conduct of the assault visible to a reasonable observer**?"
    - It follows that the sexual aspect of the assault is effectively an element of the actus reus, and no need for proof of a corresponding mental component
    - For this reason, sexual assault is viewed as a crime of general intent only, and intoxication is not a defence to charges under s. 271
  - In *V. (K.B.)* – Osborne J.A. stated that a sexual assault **may not even involve overt sexuality**, as the crime is best characterized as an act of **power, aggression, and control.**
    - In this case, the accused roughly grabbed his son's genital area as a response to the child having engaged in similar activity with others. In assessing whether the assault was "sexual", the accused's purpose in attacking his son was considered, along with the child's anatomy involved. Viewed as a dominant act violating his son's sexual integrity, and constituted sexual assault
  - *Alceus* – charged with a number of counts under s. 271
    - striking the complainant in the face after she refused to perform fellatio. Trial judge acquitted sexual assault and found assault; Quebec Court of Appeal reversed decision. The bedroom setting, ongoing sexual activities, words used highlighted it was of a sexual nature to the reasonable observer
- Typically, sexual nature will be obvious
  - Ex: Person could grab another by the shoulder (assault), but if proved it was to drag them into the bushes for sex (sexual assault) – in such a case, motive or purpose is highly relevant

- *Chase* – test of "sexual" **cannot be assessed purely from the accused's subjective viewpoint** since the gravamen of the offence is the affront to the personal sexual integrity and dignity
  - *Ex*: Doctor decides medically necessary to conduct intimate examination w/o consent. Not for sexual gratification, nevertheless = sexual assault. IT is a deliberate application of force violating sexual integrity of the victim

SEXUAL ASSAULT ELEMENTS

R v Ewanchuk 1999 SCC - actus reus of sexual assault – 3 elements

Ratio	• Sexual assault actus reus requires – touching, of a sexual nature, the absence of consent
	• Re: element #3 – Ask, did complainant consent?
	  ○ The question is one of credibility considering the totality of the circumstances and any ambiguous conduct by the complainant
	  ▪ if trier of fact is satisfied BRD did *not* consent, AR is established
	  ▪ If reasonable doubt as to consent or there was consent, the trier must consider whether the complainant consented bc of fear, fraud, or exercise of authority (s.265(3))
	• Implied consent is not a defence in sexual assault

Facts	• 17-year-old girl lured into trailer for a job interview. Unwanted massage, she said no, and he stopped. Started again, dry humping, stopped when she said no. Started again and she said no and left. He gave her $100 for the massage. • Trial Judge: Crown had not proven the absence of consent BRD (interesting after he explicitly says that she did not want the touching). Defense of "implied consent": objectively construed
Issue	• Does the accused perception of complainant's state of mind factor into the consent analysis? • Is implied consent a defence?
Held	• Appeal allowed; conviction entered. • As part of the AR, there was no subjective consent from the complainant.

Analysis	• The actus reus of sexual assault is established by the proof of three elements:
	  ○ (i) touching (objective)
	  ○ (ii) the sexual nature of the contact (objective) and
	  ○ (iii) the absence of consent (subjective)
	
	iii – absence of consent
	• determined by reference to the *complainant's* subjective internal state of mind towards the touching at the time it occurred
	• Actual state of mind of the complainant is determinative
	  ○ Only concerned with complainant's perspective
	  ○ Purely subjective approach
	• While the complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trial judge, or jury, in light of all the evidence.
	• Accused perception of the complainant's state of mind is irrelevant
	  ○ Only arises when a defence of honest but **mistaken belief in consent is raised in the mens rea** stage of the inquiry.
	
	Implied consent
	• Does not exist in the context of sexual assault
	  ○ Does exist for other crimes though

	• If there is reasonable doubt as to consent, or if it is established that the complainant actively participated in the sexual activity, trier of fact must consider whether the complainant consented because of fear, fraud, or the exercise of authority as in s. 265(3)
Dissent (L'Herureux – Dube)	• Violence against women discussion • Case is not about consent, it's about myths and stereotypical assumptions • Criticized the judge for highlighting how the complainant is living with his boyfriend and another couple with a 6-month-old baby – was it to show she was not a virgin? Or of good moral character?
Notes	Changes to CC after this trial: • section 273.1 added two new sections: ○ (1.1) **Consent must be present <u>at the time</u>** the sexual activity in question takes place. ○ (1.2) The question of whether no consent is obtained under subjection 265(3) or subsection (2) or (3) is a question of law. • Section 273.1(2) was also amended. ○ It now includes two sections, providing that no consent is obtained if: ▪ (a.1) the complainant is **unconscious** ▪ (b) the complainant is **incapable of consenting** to the activity for any reason other than the one referred to in paragraph (a.1)

SEXUAL ASSAULT: CONSENT

READING #30

Consent and Mens Rea

- *Pappajohn* – The SCC concluded that a **mistake must be honestly held**, but it need not be based on objectively reasonable grounds [overruled by statute – s273.2]
  - Criticism: permitting one to raise an unrestricted defence of honest belief in consent undermines the robust nature of the consent element itself
  - Permits one person to impose themselves upon another where they believe the other is in agreement
    - Worst case scenario – no means yes argument
- Parliament enacted new restrictions in 1992 to address this problem, s. 273.2
  - Prior to this enactment, it was still well established that both recklessness and wilful blindness to the complainant's failure to consent were culpable mental states. Similarly, accused had been unable to rely on self-induced intoxication as a defence for decades.
  - The substantial change arose from **subsection b** – **modifies the subjective standard of awareness by placing an objective qualification on the accused's conduct.**
    - **Imposes an obligation upon him or her to make inquiries about the potential lack of consent**.
  - It **is not a defence** to a charge [of sexual assault] that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, **where:**

    (a) the accused's belief arose from the accused's

    (i) self-induced **intoxication**, or

    (ii) **recklessness** or **wilful blindness** or

    (b) the accused **did not take reasonable steps**, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

Mistake of Fact or Mistake of Law

- S 19 CC – ignorance of the law is no excuse

- Mistake of Law example: two people decide to get into a fist fight intending to commit bodily harm – and bodily harm is in fact caused. MR relates to knowledge of the law. Cannot consent.
- *Ewanchuk*
    - Evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question. A belief by the accused that the complainant, in her own mind wanted him to touch her but did not express that desire, is not a defence. The accused's speculation as to what was going on in the complainant's mind provides no defence.
    - **Actus reus** – "consent" means that **the complainant in her mind wanted** the sexual touching to take place
    - **Mens rea** – specifically for honest but mistaken belief – "consent" means the **complainant has affirmatively communicated by words or conduct** her agreement to engage in sexual activity with the accused
- Accused is only permitted to raise mistakes that (a) relate to the communication of consent, and (b) permissible in law
    - S 273.1(2) lists number of factors that cannot be relied upon to establish consent. These are equally relevant to refuse the basis of a HBM in consent (as to allow it would essentially allow A to raise defence of mistake of law)
    - Things that cannot be raised include:
        - Application of force
        - Threats or fear of the application of force
        - Fraud
        - Exercise of authority or abuse of trust, power, or authority
        - Agreement expressed by someone other than the complainant
        - Silence, passivity, or ambiguous conduct (*Ewanchuk*)
        - Expression of a lack of agreement to engage or continue in the activity, or to stop the activity
        - Lack of capacity
    - What is critical is whether A had awareness of these facts and proceeded nonetheless
        - *R.(R.)*
            - accused engaged in sexual acts with a mentally disabled woman. Accused was aware of developmental disability, chose to proceed anyway.
            - Mistaken belief rejected – accused was aware of the cognitive disabilities – mistake in law, she could not consent
        - Re: intoxication example
            - Both drunk.. Consensual sexual touching. Woman passes out. A continues to touch woman. Cannot raise MR defence even if unaware she had passed out (as no communication of consent)
            - For the accused to raise the defence of HBM in consent, A would need to convince the jury that the intoxicated complainant was acting in a manner sufficient to establish an apparent consent AND that reasonable steps to establish consent were taken. (s. 273.2b)

Reasonable Steps Requirements

- s. 273 (2)(b) does not reverse the burden of proof, it places evidentiary burden on the defence to show reasonable steps were taken.
- *Darrach* – ONCA considered constitutionality of the provision and rejected the contention that reasonable steps clause renders sexual assault a crime of negligence.
    - The provision does *not* require the A to know or perceive matters as a reasonable person would.
    - **Culpability arises from subjective awareness of circumstances** that give rise to concern and a corresponding failure to take reasonable steps to ascertain that the sexual activity is consensual
- So, s. 273.2 (b) creates, in effect, an additional element of the actus reus BUT one that is only triggered when the defence of HMB is being raised.
- What qualifies as reasonable steps?

- No fixed requirements
- *G.(R.)* – "there may be cases in which (the steps required) are such that nothing short of an unequivocal indication of consent from the complainant, at the time of the alleged offence, will suffice". In other cases, less will be required.

- *Malcolm* – Section 273.2 (b) requires the court to apply **a quasi-objective test to the situation**.
  - First, circumstances known to the accused must be ascertained.
  - Then the issue which arises is, if a reasonable man was aware of the same circumstances, would he take further steps before proceeding –
    - if the answer is yes, and the accused has not taken those steps → then the accused not entitled to the defence.
    - If the answer is no, or maybe → then accused would not be required to take further steps and the defence will apply.
- Focus becomes what was communicated by the complainant?
  - Non-verbal?
    - Non-verbal cues generally have to be unequivocal (*S. (T.)*)
  - Previous relations?
    - A sexual encounter between persons with no history of sexual experience together requires clear and unambiguous communication of consent, not self-serving interpretations of equivocal or contradictory behaviour (Hill J in *S. (T.)*)
    - Depending on the facts, the context of prior relationship together may in certain circumstances impliedly prove scope for the perception of the existence of consent (*S. (T.)*)
  - Intoxication
    - If the complainant is intoxicated, the accused is under an obligation to make further inquiries about the person's capacity to consent
    - A person may indicate interest in sexual activity while sober but that does not constate consent and should not be enough to make an honest belief in consent valid if the person subsequently becomes too intoxicated to consent
    - Where the accused becomes aware of this intoxication, it is up to him or her to take reasonable steps to ascertain whether the complainant retains the capacity to make a valid choice

Air of Reality Test

- Crown must prove BRD all elements but does not have to negate every conceivable defence
- Jury does not even have to consider a potential defence unless evidence to support it
  - Essentially, a defence is not "live" until the A can point to evidence giving an "air of reality" to the defence
  - Threshold to overcome air of reality is that there is some evidence upon which a properly instructed jury could reasonably decide the issue in favour of the accused
  - Bare assertion from the A that they had an HMB is not enough
  - Judge need not consider the merits; instead, must look at the totality of the evidence and assumes the evidence relied upon by the accused is true
- Diametrically opposed stories?
  - Where the stories of accused and complainant are diametrically opposed, it doesn't make sense that there is a possibility of there being either consent or an honest mistaken belief in consent (*Pappajohn*)
    - For acquittal, just must have reasonable doubt regarding consent; there is no alternative
  - BUT judges should not be too quick to reject the defence. It is possible that between the testimony of the complainant, accused and third parties, there might be evidence to render the defence available, even if its not a particularly likely possibility.
- Unresolved Q: whether s 273.2(B) – reasonable steps provision – has to be considered in assessing the air of reality test
  - Likely yes need to take reasonable steps to make a defence of honest and mistaken belief (*Cornejo*)

- *Cornejo* – ONCA set aside the acquittal of the accused on the basis that the trial judge had erred in leaving the honest but mistaken belief in consent defence with the jury. One reason was the judge's failure to consider whether reasonable steps had been taken by the accused.

R v Ewanchuk, 1999 SCC – Mens Rea portion

Ratio	• Consent in the actus reus analysis considers the state of the mind of the C
	  ○ Consent means A in their mind wanted the sexual touching
	• Consent in the mens rea considers the state of mind of the A
	  ○ Consent means the C, by words or conduct, communicated to A the C's agreement to engage in sexual activity

Facts	• 17-year-old girl lured into trailer for a job interview. Unwanted massage, she said no, and he stopped. Started again, dry humping, stopped when she said no. Started again and she said no and left. He gave her $100 for the massage.

Analysis	• Sexual assault is a crime of general intent. Therefore, Crown only needs to prove that the accused intended to touch the complainant to satisfy the basic mens rea requirement – *R v Daviault*
	• However, sexual assault only becomes a crime in the absence of the complainant's consent –
	  ○ common law recognizes a defence of mistake of fact which removes culpability for those who honestly, but mistakenly believed that they had consent to touch
	• As such, **mens rea of sexual assault contains two elements**: 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 (*Park*)
	• Defence may change evidence of MR by asserting a HMB in consent
	  ○ Defence of mistake is simply a denial of MR
	  ○ Does not impose burden of proof upon the accused
	  ○ Support for the defence may arise from the Crown's evidence and testimony of the C; though typically arises in evidence called by the A
	
	• Consent is integral to MR but this time from the perspective of the A
	  ○ MR of SA is satisfied when it is shown that the accused knew that the complainant was essentially saying no but *also* satisfied when it is shown that the accused knew that the complainant was essentially not saying yes (L'Heureux-Dube J in *Park*)
	  ○ The accused needs to show that they believed that the complainant communicated consent to engage in the sexual activity in question
	  ○ **Did the A believe that they had obtained consent?**
	  ▪ Accused speculation as to what was going on in the complainant's mind provides no defence.
	  ▪ Further, not all believes which A may rely upon will provide a defence (e.g., believe that silence, passivity, or ambiguous conduct constitutes consent is a mistake of law and thus no defence)

R v Barton

Ratio	• Primarily this test illustrates the possible ways the issue of HMB could be resolved. How should vitiation of consent be dealt with in relation to sexual assault? • Re: honest but mistaken belief in consent → Communication is key • Mistake of law: implied consent, broad advance consent, propensity to consent • A must take reasonable steps to ensure consent was communicated if raising the HMB defence • Air of reality test is the requirement
Facts	• Hotel, fist, blood bath case • Indigenous sex worker • Barton brought up the defence of honest but mistaken belief in consent

Analysis	• To make out the HMB defence, the accused must have an **honest but mistaken belief** that the complainant actually **communicated consent**, whether by words or conduct (*Park*)
	• The principal considerations that are relevant to this defence are:
	  ○ (1) the complainant's actual communicative behaviour, and
	  ○ (2) the totality of the admissible and relevant evidence explaining how the accused perceived that behaviour to communicate consent. Everything else is ancillary
	
	• So, → re-define defence as "honest but mistaken belief in *communicated* consent" – focus on the communication, instead of straying into forbidden "implied" territory
	  ○ Practical consequences – if seeking to rely on C's prior sexual activities then the A must show how and why that evidence informed his HMB belief that A *communicated* consent to the activity at the time it occurred
	  ▪ Prior relations may establish legitimate expectations about how consent is communicated
	  ▪ But cannot advance broad consent to any and all manner of activity
	  ○ However, case must be taken not to rely on rape myths or stereotypical assumptions about women and consent cannot constitute reasonable steps
	• Mistake of fact defence operates where the accused mistakenly perceived facts that negate, or raise a reasonable doubt about, the fault element of the offence
	• BUT cannot rely on mistake of law. 3 consent-related mistakes of law
	  ○ Implied consent
	  ▪ Rests on the assumption that unless a woman protests or resists, she should be deemed to have consented. No place in Canadian law – *Ewanchuk*
	  ▪ Silence, passivity, or ambiguous conduct is a mistake of law too
	  ▪ Also, a mistake of law to infer that the complainant's consent was implied by the circumstances or by the relationship between the accused and the complainant
	  ○ Broad advance consent
	  ▪ Erroneous notion that complainant agreed to future sexual activity of an undefined scope *(J.A)*
	  ▪ S. 273.1(1) suggests that consent of the complainant must be specifically directed to each and every sexual act
	  ○ Propensity to consent
	  ▪ Law prohibits inference that the complainant's prior sexual activities by reason of their sexual nature make it more likely that she consented to the sexual activity in question
	• S 273.2(b) the accused must take steps that are objectively reasonable, and the reasonableness of those steps must be assessed in light of the circumstances known to the accused at the time (R v *Cornejo*)
	  ○ Doesn't need to take all reasonable steps
	  ○ Highly contextual and what is required will vary from case to case
	  ○ Yet can state what things are *not* reasonable steps
	  ▪ Cannot rely on rape myths of stereotypes
	  ▪ Silence, passivity, ambiguous conduct
	  ○ Further, more invasive the activity the greater care required to ascertain consent
	
	• Application to the Case:
	  ○ Barton honestly perceived Gladue's consent due to a subjective misunderstanding of the law but not a misperception of the fact so the defence of honest but mistaken belief in communicated consent does not apply
	  ○ Mistake of law - absence of signs of disagreement could be substituted for affirmative communication of consent

	○ Also, a mistake of law - belief that prior similar sexual activities between the accused and the complainant, the complainant's status as a sex worker or the accused's own speculation about what was going through the complainant's mind could be substituted for communicated consent to the sexual activity in question at the time

R v Cornejo

Ratio	• Previous conduct refusing consent known to the accused can ground the need for further steps to be taken
Facts	• One count of sexual assault and one count of breaking and entering. • Flirtatious work relationship. Previous contact by A was rejected. • Work gold tournament – did not speak to each other. Drinking. Left separately. • He calls her multiple times that night. Asks if he can come over, he said he thought she said "mm-hmm". Approx one hour later at 1:30 he found her door unlocked (she said it was that way for her BF). C was asleep on the couch. He woke her, she shouted at him. • A's version: A states C did not touch him. Kept her eyes closed but lifted her pelvis. Tried intercourse, she said no. He noticed blood on his hands. Left. • C's version: drunk 9 beers. Fell asleep. Woke to C on top, naked, trying to penetrate. She was wearing a tampon. No recollection of phone calls. • Trial judge erred in leaving honest but mistaken belief before jury. Thought the lifting of the pelvis met the air of reality threshold.
Held	• Allow the appeal, set aside the acquittals and direct a new trial.
Analysis	• Abella "In these circumstances, the movement of the complainant's pelvis was simply an insufficient basis to allow the defense of mistaken belief to go to the jury" • Cornejo failed to take reasonable steps to ascertain the consent of the complainant in order to invoke this type of defense (as per s. 273 (b)) Ewanchuk demonstrates that silence; facility or ambiguous conduct constitutes consent is not a defense.

SEXUAL ASSAULT: VITIATING CONSENT

VITIATING: #31 SANKOFF

- Advance Consent? Not legally permissible (*A.J.)* –
  - Now enshrined by statute: s. 273.1(2) (a.1) "no consent is obtained if the complainant is unconscious"

- Vitiating Consent: **Force**
  - Violence negates any apparent agreement given on behalf of the complainant
  - Factual inquiry aimed at determining whether the force was sufficient to negate the agreement of the complainant to participate in the activity in question
- Vitiating Consent: **Threats or Fear**
  - Fear of the application of force will also vitiate an apparent consent
  - *Ewanchuk*, SCC emphasized measurement of this fear involves a consideration of the subjective view of the complainant alone
    - Whether she believed herself to have only two choices: to comply or to be harmed
- Vitiating Consent: **Abuse of Trust or Authority**
  - Two sections of the Code address the abuse of power or authority
    - S. 265(3)(d) no consent obtained where the complainant submits or does not resist by reason of the exercise of authority – also applies to regular assault

        - Rendered mostly irrelevant by s. 273.1(2)(c) – vitiates consent in a broader range of circumstances. No consent is obtained where the accused "induces the complainant to engage in the activity by abusing a position of trust, power or authority."
    - *Alsadi* – security guard at a hospital with limited authority held to be in a position of power with respect to a patient
    - *L. (F.)* – Baptist minister in a position of trust with a vulnerable 24-year-old
    - *H. (A.)* – Drug dealer in a position of power to a drug user where there is a relationship of dependency
    - Must be a relationship established, and must be abused
- **PREVENTS** Subjective consent: **Absence of Capacity**
    - A person who is asleep, unconscious or in a coma, clearly not capable of providing consent
    - Issues become trickier with drugs and alcohol
    - A complainant lacks requisite capacity to consent, if the complainant did not have an operating mind capable of:
        - 1. Appreciating nature and qualify of the sexual activity;
        - 2. Knowing the identity of persons involved; or
        - 3. Understanding that she could agree or decline to engage in sexual activity
    - Issues with developmentally disabled
        - Abella J.A. noted in R. (R.)
            - "This is not to suggest that persons who are developmentally disabled cannot consent; rather, it requires that prior caution be exercised to avoid the exploitation of an exceptionally vulnerable individual."
        - Capacity unfortunately too often treated as all-or-nothing
        - A person with moderate to severe disability who resides in a residential facility, through targeted sexual education and assistance, may consent with a fellow resident. That same person might not have the capacity to consent with a stranger visiting the facility.
- Vitiating Consent: **Policy Concerns**
    - *Jobidon* – people could not consent to a fistfight in which bodily harm was caused
    - Welch – accused engaged in "rough sex" with the complainant
        - TJ instructed that whether she consented or not is irrelevant, legally can't consent to that type of bodily harm
        - ONCA agreed
            - "The message delivered by the majority in Jobidon is that the victim cannot consent to the infliction of bodily harm upon himself or herself… Unless the accused is acting in the course of a generally approved social purpose when inflicting the harm"
            - Policy wise – "There is something particularly disturbing about asking the complainant whether she might have wanted it or enjoyed herself in the circumstances where the accused left her with [severe injuries]"
        - Criticized – sexual autonomy
    - *Zhao* (following *Jobidon* in sexual assault context), sexual assault causing bodily harm requires:
        - 1) An **intent to cause bodily harm (**subjective) **AND**
        - **2) bodily harm occurred**
        - Bodily harm no longer automatically vitiates consent – need intent!

R v GF 2021 SCC

Ratio	• Two aspects to consent: subjective + vitiation of consent ○ Must keep them separate in analysis ○ SJ refers to C subjectively and voluntarily agreeing to the sexual activity. Capacity issues are dealt with in SJ. ○ Vitiation assumes subjective consent – but is it effective?
Facts	• 16-year-old went on a trip with family and mother's co-workers. Co-workers were common-law partners. Engaged in sexual activity with 16-year old

	• the C's testimony portrayed an extremely intoxicated 16-year-old who awoke to sexual acts being performed on her, who resisted but then acquiesced, thinking she did not have any choice in the matter. G.F. described the complainant as a sober, active, and enthusiastic participant.
Issue	• Was the sexual activity consensual?
Held	• Appeal allowed. Convictions restored. No subjective consent.

Analysis	• Two aspects to consent:
	  ○ Subjective consent (*Hutchinson)*
	  ▪ Relates to the factual findings of the trier of fact about whether the C subjectively and voluntarily agreed to the sexual activity
	  ○ If no agreement → AR established
	  ▪ Precondition to SC: capacity to agree. So, capacity *prevents* SC rather than vitiates.
	  ○ If no capacity → AR established
	  ○ Subjective consent must be effective "as a matter of law" (*Ewanchuk; Lutosklawski)*
	  ▪ Ask whether the SJ has been vitiated?
	• Capacity [57] (*Al-Rawi*). C must be capable of:
	  ○ 1. Appreciating nature and quality of the sexual activity;
	  ○ 2. Knowing the identity of persons involved; or
	  ○ 3. Understanding that she could agree or decline to engage in sexual activity
	  ○ Need all factors. If Crown proves absence of 1 BRD, C is incapable of SJ
	• Must keep these two aspects distinct
	  ○ A factor that *prevents* SC must logically be linked to what SJ requires.
	  ○ Conversely, a factor that vitiates SJ is *not* tethered to the conditions of SJ and must find footing and justification in broader policy considerations
	  ○ Fraud demonstrates this distinction
	  ▪ Can either vitiate SJ or prevent SJ (interchangeable w/ a mistake)
	  ▪ If fraud as to who the person C believes they are engaging with – there is no SJ so cannot be vitiated. SJ does not exist in the first place. (*Hutchinson; G.C)*
	  ▪ If fraud relates to vitiating, held to a higher standard. Only vitiates where it entails the "the reprehensible character of criminal acts" (*Cuerrier)*
	  ○ So, lying about network, profession – immoral possibly but not criminal (*Cuerrier)*
	• Four factors will vitiate (s 26(3)(a)-(d))
	  ○ Force
	  ○ Threats or fear of force
	  ○ Fraud
	  ○ Exercise of authority
	•

R v Barton, 2017 ABCA

Ratio	• Vitiation of consent could only be if the Crown proved Barton had subjectively intended to cause Gladue serious hurt or non-trivial harm. Interpretation of the law is based on *R. v Zhao* • SCC overturned this case but did not comment on whether Zhao should be followed which requires: ○ 1) An intent to cause bodily harm (subjective) AND 2) bodily harm occurred
Facts	• Hotel, fist, blood bath case • Indigenous sex worker • Barton admitted (1) he intentionally applied force to Gladue; (2) the force took place in circumstances of a sexual nature; and (3) he caused bodily harm to Gladue....

Issue	• whether the Crown had proven the absence of consent as part of the actus reus and the required mens rea of sexual assault?
Analysis	• Vitiation of consent could only be if the Crown proved Barton had subjectively intended to cause Gladue serious hurt or non-trivial harm. Interpretation of the law is based on R. v Zhao

VITIATING CONSENT BY FRAUD - SANKOFF

- s. 265(3)(c) – consent is not provided if the complainant submits or does not resist by reason of fraud
- Before this acct, common law had a narrow definition → focused on fraud in relation to the nature + quality act itself
    - Ex: person pretends to be a medical practitioner and exams another's sexual organs. Any consent provided is considered invalid as fraud goes directly towards the nature + quality of the act
    - BUT THIS WOULD NOW BE UNDER SUBJECTIVE CONSENT!!!
- Historically, law would not include such cases:
    - *Papadimitropoulous* – woman had sexual intercourse after undergoing a marriage ceremony, notwithstanding that the accused was already married and knew the ceremony was a sham (Australia).
        - No sexual assault as there was consent to the nature + character of the act.
        - This was law in Canada up until section 265(3)
    - *Petrozzi* – accused promised a prostitute a sum of money in return for sex but didn't pay
        - Court of appeal ruled this wasn't fraud

- *Cuerrier* – accused charged with aggravated assault after having unprotected sex with two complainants on numerous occasions despite being aware of the fact that he was infected with HIV
    - SCC unanimously agreed that his actions amounted to fraud and vitiated consent
    - Cory J ruled, disproving of Petrozzi, that **Parliament's use of the term fraud demonstrated a move away from the rigidity of the common law**
    - Created a new framework for fraud vitiating consent
        - 1. **Dishonesty**: either falsehoods of failure to disclose HIV status (perhaps other diseases)
        - 2. **Deprivation**: *must* result in an actual harm or significant risk of serious bodily harm
            - Also, cannot be any trivial harm or risk of harm
                - That case: risk of contracting Aids from unprotected intercourse met that test
            - Entails a "realistic possibility of transmission of HIV"

R v Mabior

Ratio	Confirms + clarifies *Cuerrier test*
	Applies to all cases where fraud vitiating consent to sexual relations is alleged on the basis of the non-disclosure of HIV status
	• (1) **dishonest act** AND
	  ○ Misrepresentation or non-disclosure of HIV
	• (2) deprivation
	  ○ Whether the act poses a "significant risk of serious bodily harm"
	  ○ occurs where there is a "realistic possibility of transmission of HIV"
	• For all other diseases → consider whether there is a "significant risk" of harm and risk of transmission; is it untreatable? Does it seriously alter a person's life or life-expectancy? If yes, may raise to the level of "serious bodily harm"

Facts	• A failed to disclose HIV status. Sometimes wore condoms, sometimes not. • Low viral load • TJ acquitted as viral loads when using a condom does not place partner as a "significant risk of serious bodily harm" - *Cuerrier*

Issue	• whether an HIV-positive person who engages in sexual relations without disclosing his condition commits aggravated sexual assault.
Held	•

Analysis	*Cuerrier* test:
	• (1) **dishonest act** AND
	  ○ Misrepresentation or non-disclosure of HIV
	• (2) **deprivation**
	  ○ Whether the act poses a "significant risk of serious bodily harm"
	  ○ occurs where there is a "realistic possibility of transmission of HIV" (*Mabior)*
	  ▪ if A's viral load at the time was low AND condom was used → would *not* vitiate consent
	
	• What is "significant risk? And what constitutes "serious bodily harm"?
	  ○ The more serious the nature of the harm, the lower the probability of transmission is required to amount to a significant risk of serious bodily harm (think HIV v herpes)
	  ○ Criminal conduct requires a "significant fault element" (*Beatty) - consequences* of aggravated sexual assault **underline the importance of insisting on moral blameworthiness** when interpreting the statute
	  ○ deception that *exposes* a partner to a risk of transmission -- but that does not ultimately result in transmission -- is not criminalized in many jurisdictions
	
	• *Cuerrier* requirement of "significant risk of serious bodily harm" entails a realistic possibility of transmission of HIV
	  ○ For other diseases, not clarified!
	  ○ But consider the degree of the harm and risk of transmission. A treatable sexually transmitted disease that does not seriously alter a person's life or life-expectancy might well not rise to the level of constituting "serious bodily harm" and would also fail to meet the requirement of endangerment of life for aggravated sexual assault under s. 273(1). [para 92]
	
	• So, for HIV, (1) if the accused's viral load at the time of sexual relations was low, AND (2) condom protection was used → Either of those are untrue, then it would vitiate consent
	  ○ Crown must show that the complainant's consent to sexual intercourse was vitiated by the accused's fraud as to his HIV status.
	  ○ **Failure to disclose (the dishonest act) amounts to fraud where the complainant would not have consented where he/she would have known the accused was HIV positive, and where sexual contact poses a significant risk of or causes actual serious bodily harm (deprivation).**

R v Thompson 2018 NSCA

Ratio	• The sole test to determine deprivation is a "realistic possibility of HIV transmission". Emotional stress is irrelevant.
Facts	• Accused failed to disclose HIV status to two complainants, who would not have consented to sex if they had known – he used a condom with one, not with the other. Accused's viral load was uncertain at the time of the incidents. • Trial judge accepted that the complainants had suffered psychological harm caused by the uncertainty in not knowing whether the virus had been transmitted
Issue	• Whether *psychological* harm caused by non-disclosure of HIV status vitiates consent to sex?
Held	• No.

Analysis	• The sole test to establish deprivation is actual transmission of HIV or "a realistic possibility of HIV transmission". • an HIV-positive person has no duty, enforceable by the criminal law, to disclose their HIV status *unless* there is a significant risk of serious bodily harm, satisfied by actual transmission or a realistic possibility of HIV transmission • stress is simply not sufficient (*Hutchinson)*

R v Boone 2019 ONCA

Ratio	• Following *Mabior* – the greater the potential harm, the lesser the likelihood needed to satisfy the realistic possibility of transmission requirement • Need condom use AND treatment to keep the realistic possibility of transmission low ○ Potential condom sabotage would therefore increase possibility
Facts	• Accused was HIV positive, and purposely aimed to have sex and infect his partners with HIV. • Charged with multiple counts of attempted murder and aggravated assault [covered above under requirements for intention] • Complainant insisted A where a condom. Saw A put it on then take it off. Did not get infected.
Issue	• Whether there was a realistic possibility that HIV would be transmitted?

Analysis	• Realistic possibility of transmitting increases with anal, high viral load of infected person, lack of condom use, and ejaculation.
	• A had a high viral load, did use a condom at a point, did not ejaculate
	  ○ estimated that if the appellant properly used a condom and did not ejaculate before he withdrew from B.C., the chances of infection were 1 per 1,000 acts. If the appellant ejaculated, Dr. Remis put the risk at 1 per 500 acts (0.2 percent).
	• A argued the TJ should have instructed the jury that in the absence of ejaculation or sabotaging of condom, Crown could not establish a realistic possibility of transmission
	• Court disagrees. It was open to the jury to infer A had sabotaged the condom. His text messages had references to deceiving partners, pretending to use condoms, and poking holes in them. It was for the jury to infer that the A had used on of these "tricks" despite insistence by the C to use a condom
	• Risk is significantly reduced by either condom use or antiretroviral therapy, but when it's just one of those, it is still a realistic possibility.
	  ○ Risks in the order of 1 in 1000 remain realistic risks for the purpose of non-disclosure. Evidence in this case shows risk of infection, absent ejaculation, remained at about 1 in 1000. Sufficient to cross risk threshold. Appellant was properly convicted.

R v Hutchinson 2014 SCC

Ratio	• At the first stage of the consent analysis, the Crown must prove a lack of subjective voluntary agreement to the specific physical sex act.
	  ○ The sexual activity in question refers to the physical act itself, does not include qualities of the physical act like birth control methods or prevention, STDs, etc.
	  ○ Voluntary agreement to the sexual activity refers to the sexual nature and identity of partner
	• Second stage, deceptions about conditions or qualities of the physical act may vitiate consent under s. 265(3)(c) of the Criminal Code, if the elements for fraud are met.
	  ○ Dishonesty occurred via sabotaging condoms
	  ○ Sufficient deprivation: Depriving someone of their choice to become pregnant or increase risk of pregnancy = "significant risk of bodily harm"
	  ○ Financial deprivation or sadness = insufficient

Facts	• Guy poked holes in a condom in order to get his girlfriend pregnant. She did and had to have an abortion. Did his act vitiate the consent?
Issue	• Whether consent was vitiated via fraud because of deception as to the condition of the condom? • Broader: where should the line between criminality and non-criminality be drawn when consent is the result of deception?
Held	• Appeal dismissed. Conviction upheld.
Analysis	• Criminal law should be used with "appropriate restraint to avoid over criminalization" [18] • Two approaches to what constitutes voluntary agreement? ○ 1. Defines sexual activity as extending beyond the basic sexual activity and qualities of the act or risks, provided the conditions are "essential features" of the activity or go to "how" the physical touching was carried out; ▪ Essential features vary from person to person; therefore, it would be impossible to predict what a person considers "essential" ▪ This approach produces uncertainty and is over-broad, catching those without proper Mens Rea ▪ Extends to how touching occurs but not to the consequences ▪ This is the approach the dissent took ○ 2. Narrower approach. Defines the activity as the basic physical act agreed to at the time, its sexual nature and identity of the partner. If C subjectively agreed to the partner's touching and sexual nature, voluntary agreement is established ▪ Plain interpretation favours approach #2
Dissent (Abella)	• It is not about whether consent was vitiated by fraud, but whether there was consent in the first place. • Fraud requires dishonesty and deprivation; however, deprivation should not be the benchmark when non-consensual touching that violates the complainant's sexual integrity takes place • It does not make sense that because a condom is a form of birth control that it is not a part of the sexual activity, only vitiating consent when pregnancy is a serious risk – means individuals that have no risk of pregnancy have no right to insist upon the use of a condom • Because the individual cannot become pregnant, criminal law will not uphold his/her right to sexual autonomy and personal dignity • This approach would not result in overcriminalization, because the MR still captures those who knowingly touch the complainant in a way that he or she has not agreed to, thereby disregarding the complainant's wishes • The majority decision trivializes the seriousness of the violation towards the complainant's bodily integrity
Class Notes? Brandon	• Signals another expansion in the conceptualization of sexual assault with resulting ambiguity about the boundaries of liability • Seems gendered, because only a woman can be subject to the physical risks of pregnancy, meaning a woman could never be convicted for successfully creating a pregnancy when it's against the man's wishes.

PP v DD 2017 ONCA

Ratio	• Only deceit giving rise to a significant risk of bodily harm may vitiate consent • When there are no physically injurious consequences, there can be no cause of action for fraudulent misrepresentation.
Facts	• This is actually a civil case about sexual battery but related to sexual assault. • PP and DD were in a short relationship that resulted in a child; DD said she was on birth control, so they had sex without a condom, PP is angry (childcare costs, emotional harm).

	• PP claims his consent was vitiated because he was induced by DD's misrepresentations that led him to believe she was taking the pill; damages suffered; deprived of the benefit of choice with respect to conceive a child • At Trial - Novel" sexual battery claim was focused on the non-pathological emotional harm of an unplanned parenthood; PP's sense of violation arose not from sexual touching, but spoiling of plans
Issue	• Is it possible to recover damages for "involuntary parenthood"
Held	• "Novel" sexual battery claim was focused on the non-pathological emotional harm of an unplanned parenthood; PP's sense of violation arose not from sexual touching, but spoiling of plans
Analysis	• *Hutchinson* – a deception with respect to contraception does not go to the "nature and quality of the act" or "sexual activity in question" but it may nevertheless vitiate consent where fraud gives rise toa significant risk of bodily harm ○ Also, the dishonest act must result in serious deprivation (*Cuerrier*) • The deception in this case was not to the nature of the act, but to the consequences flowing therefrom ○ Appellant (PP) was willing to assume some risk that pregnancy would result from sex even when DD was taking contraceptive pills ○ A man's situation is quite different from that of the woman; profound physical and psychological effects on a mother undergoing pregnancy do not apply to the father. His sexual autonomy was not hindered in any way that gives rise to battery

MISTAKES OF FACT & LAW

Overview

- The defence of mistake is really another way of expressing the fact that a mental element (*mens rea)* of the offence has not been established
- Criminal law does not normally punish mistakes of fact because they were not undertaken with an improper intent or guilty knowledge
- Only applies to mistakes of fact
    - Mistake must be relevant to the offence
        - E.g., still guilty of theft if someone steals a car believing it belonged to A when in fact it belongs to B
- Generally, reasonableness of the mistake has no impact on the ability to rely on a mistake of law nor do attempts to comply (*Custance)*
- s. 19 is a general provision, applies to entirety of the code and all of criminal law.
    - These can be overridden by a specific provision
        - a colour of right (must be in the statute! - *Jones)* or
        - language like "evade" (which implies knowledge *and* a deliberate attempt not to comply)
    - A mistake of law can exonerate a person ONLY when the code makes it an exonerating quality.

MISTAKE OF LAW

- Ignorance of the law by a person who commits an offence is not an excuse for committing that offence (section 19 of the *CC*)
    - Necessary but harsh. People don't get to decide the law for themselves. Provides certainty to the application of the law and everybody lives under same system of rules (fairness).

- Objections to the notion that ignorance of the law never provides an excuse can be raised on at least three different bases.

- First, it could be argued the maxim is overly broad, as numerous offences deliberately include a legal fact as an element of the actus reus and it is unclear why knowledge of such facts should not also form part of the mens rea
- Second, even if mistakes of law are deemed to be irrelevant, the accused is always permitted to raise a mistake of fact as a valid defence.
- Third, a strict approach can be criticized for breeding injustice on the grounds that it neglects the reality of individual circumstances and the occasional difficulties of accessing and understanding "the law" in the modern era
- It is troubling that persons who make every attempt to act in a legal manner can still be punished for failing to comply with the law solely because their interpretation of the law, despite being reasonable, was incorrect.

- *Ignoranta juris neminen excusat* – ignorance is not excuse.

- Ignorance of the law does not always stem from a person being unaware the law exists
  - A may know the law exists but is mistaken about how it applies.
  - B may mistakenly think he is outside the jurisdiction where the law is enforced
  - C may be unaware of certain technical elements of the law that bring her within its scope.
    → should all 3 situations be treated the same?

MISTAKE OF FACT?

- Mistake of fact
  - Not a discrete defence → just an absence of MR
  - **Mistakes about relevant factual matters that cause a person to unknowingly breach their legal obligations CAN be raised as a defence**
    - Ex: A, a fisherman, governed by certain regulations preventing him from keeping fish under a certain weight. Scale malfunctions. Contravened the *actus reus* of the regulations. The mistake that caused the failure to comply was one of fact, not of law. A mistakenly believes the fish is of the correct weight when it is not.
    - Ex: But say B, who believes the regulation sets the minimum at 3 kg, when it is 5kg. A has a potential defence, B does not.

- Determining whether something is a mistake of fact or law is complicated due to the court's fudging of the line
  - Problem is complicated as the accused can raise relevant mistakes of fact to avoid liability, but can the law ever be a relevant fact upon which a mistake can be premised given the existence of section 19?
    - No definitive judgement from the courts yet

- *Prue*
  - Accused convicted of a code driving offence by virtue of which his licence has been automatically suspended. Subsequently charged with driving while suspended. Claimed he did not know it had been suspended.
  - Lasken – "the existence of a suspension from driving is a question of fact underlying the invocation of that provision, and so too is proof that an accused charged thereunder drove while his licence to do so was under suspension… For the purpose of the CC, whether there has been an effective suspension is simply a question of fact"
    - Essentially, absence of knowledge of the FACT (suspension) is an aspect of ME. Because he did not know it was suspended (due to it being automatic and no notification) → acquittal.
  - Minority opinion – Ritchie – viewed ignorance of some admin action (mistake of fact) and ignorance of what the law enacted (mistake of law) – would have allowed the Crown's appeal from acquittal.
- *MacDougall*
  - Accused charged with a *provincial* offence for driving while under suspension, similar to Prue.
  - SCC held that it was a mistake of law

- Distinguished Pure on the basis that the contravened law was provincial instead of federal and offence was one of strict liability.
    - Penney says he has not seen any commentary saying this decision makes sense in *Prue*. *MacDougall* should be the correct law. Ignorance is not an excuse. Should know your licence is suspended. No specific language in the offence either stating the colour of right is part of the offence.

- *Pontes*
    - Court considered a provincial provision that disqualified a person from driving "automatically and without notice" when convicted of other driving offences. Accused argued absolute liability and thus unconstitutional.
    - SCC upheld because it did not impact liberty, no possibility of imprisonment
    - Re mistake issue - "It cannot be that a mistake as to the law under the CC constitutes a mistake of fact, whereas a mistake as to the provisions of the provincial statute constitutes a mistake of law" (Cory J)
        - Indicates for approach from *MacDougall* but cautions that refusing to allow mistakes of law in certain contexts could have the effect of imposing strict or absolute liability upon individual accused with potential constitutional implications
    - So, where does that leave the line between mistakes of fact and mistakes of law?
        - Prue is far more respectful of a person's individual mental state, recognizing the gravamen of the offence of driving while under suspension is the intention to drive, knowing it is suspended.
        - *MacDougall* adopts a public welfare approach, placing responsibility for knowing the law firmly on the accused. Pontes expresses a preference but cautions that refusing to allow mistakes of law in certain contexts could have the effect of imposing strict or absolute liability.

- *Aryeh*
    - Accused brought gemstones, rings, vases and other objects into Canada contrary to the *Customs Act*, claimed he was able to bring them into goods as household effects in his wife's name.
    - ONCA rejected defence stating, "defence was based on ignorance of the law and that defence therefore fails by reason of section 19".
    - Dissent – Trial judge found this was an error by the appellant. He believed the appellant's testimony that he was free of any blameworthy state of mine or intention. His defence of no mens rea should have succeeded. He would have acquitted.
    - knowledge is itself a component of the requisite mens rea then absence of that knowledge must be a good defence

→ Overall, case law is difficult to reconcile

R v Custance 2005 MBCA

Ratio	• The extent of the reasonableness of the mistake has no impact on the ability to rely on a mistake of law.

Facts	• C was released on bail with a promise to stay in his sponsor's apartment.
	• His sponsor messed up, and when C arrived, the apartment was not ready to stay in.
	• Rather then return to jail, he stayed in his car in the parking lot. He was charged with a breach of recognizance pursuant to s. 145(3).
	• Elements of 145(3):
	  ○ (i) must prove that order existed (AR);
	  ○ (ii) must prove that accused did not comply with order (AR);
	  ○ (iii) must prove that accused (a) knew that the order existed, AND that (b) accused knowingly or recklessly did not comply with the order.
	• C claimed he did not commit offence because he believed parking lot was the same as the building.
	  ○ However, order was to stay in place X and he knew he wasn't staying in place X.

Issue	• Was the breach a mistake of fact or law?

Held	• Law thus it does not negate MR

Analysis	• AR – clear Crown proved ACC was bound to the recognizance and failed to comply
	• In order to have required MR, ACC must knowingly or recklessly infringe the conditions of the undertaking (carelessness or negligence is insufficient)
	  ○ Crown doesn't have to prove that ACC intended to breach recognizance, just that ACC intended to commit AR. Mere carelessness or negligence will not suffice, must be knowingly or recklessly
	• MR test is subjective, and Court looks to the ACC intention and the facts as the ACC believed them
	  ○ No question ACC knew of the conditions
	• Two mistakes in this case:
	  ○ (1) Mistake of fact – the person he was supposed to live with testified in open Court that he had an address for ACC to reside in. No reason not to believe this.
	  ○ (2) Mistake of law – ACC thought that by residing in his car in the parking lot in an attempt to comply with recognizance this would be complying with his conditions. He was incorrect about the legal consequences of his actions. Unlike mistake of fact above, this does not negate MR

R v Phillips 1978 ONCA

Ratio	• Mistake of fact defence successful. • Whether he knew that the knife was "prohibited" was irrelevant → mistake of law • BUT if any reasonable doubt that he was not aware of the feature of the knife that *made it* a prohibited weapon → mistake of fact → negates MR
Facts	• Police raid a motorcycle club. Phillips is holding a knife to "make a sandwich". Officer finds that it opens with centrifugal force which makes it a prohibited weapon.
Issue	•
Held	• Mistake of Fact therefore elements of offence not satisfied. Conviction set aside

Analysis	• Crime is punishable by 5 years imprisonment
	  ○ There is thus a presumption that MR applies
	• So, MR is an essential element of the offence, in the sense that ignorance of the fact that the knife in question opened automatically by centrifugal force is a good defence
	  ○ The necessary guilty knowledge required to constitute the offence can be *inferred* from the possession of a knife which is, in fact, a prohibited weapon
	• Upon proof that the ACC had in his possession the knife which possessed the characteristics of a prohibited weapon, the evidential burden of proving absence of guilty knowledge passed to appellant
	• BUT evidence that ACC didn't know knife could open automatically: officer didn't know it could,
	  ○ Officer had to practice open automatically, normal way to open was manually and ACC testified he had only even opened it manually

R v Lambrecht 2008 OJ

Ratio	• If you know something is illegal or might be against the law, making inquiries, even fruitless ones where police don't know the answer, will not constitute a defence • Knowledge of the characteristics of the item constitutes MR of the offence.
Facts	• L received a crossbow, wanted to determine whether it was antique and thus exempt from restricted weapons. • He knew all the factual characteristics (which constitutes MR) but did not know it was legally designated as a restricted weapon requiring a licence.

	• He asked a police officer while on a field trip for school years prior. The officer said they did not know about the legality of a crossbow. He made no further inquiries.
Held	• Mistake of law. May have made reasonable inquiries but makes no difference.
Analysis	• ACC argued he did not have the criminal intent as he was unsure if the possession was illegal • Does not matter – he knew the item was a cross bow. Knowledge of the characteristics of the item constitutes MR of the offence.

COLOUR OF RIGHT

- The Colour of Right
  - Not a discrete defence
    - Instead, it operates to negate mens rea
  - **Can only be raised because of statutory wording** (*R v Jones*)
    - Accused invoked colour of right
    - "The appellants cited no authority for the proposition that colour of right is relevant to any crime which does not embrace the concept within its definition."
  - Offence is defined in such a way that knowledge of the law can be construed as an element of subjective *mens rea*
  - Courts sometimes permit mistakes of law to operate as an excuse because of the manner the statute is drafted → So, accused is permitted to raise certain mistakes of law as a way of avoiding culpability for an offence.
    - Ex: Theft is defined as "taking of something fraudulently and without colour of right" with intent to deprive. If one takes something intending to deprive, but under the mistaken belief that he or she has the legal right to take it, offence of theft has not been committed.
  - "Right" is not a factual concept, but a legal concept, just as ownership is – and the requirement that the deprivation have the absence of any "colour" of right imports a mental element, specifically the absence of the accused believing he or she has a legal claim.

R v Howson 1966 ONCA

Ratio	• If upon all the evidence it may be fairly inferred that the ACC acted under a genuine misconception of fact OR LAW, there would be no offence of theft
Facts	• Tow truck driver refuses to return car, insists owner pay expenses. • No right in law to keep vehicle in possession. Charged w/ theft • "322 Every one commits theft who fraudulently and without colour of right takes…" •
Issue	• Did the ACC have a colour of right to justify his refusal to release the vehicle?
Held	• Yes, no offence. Acquitted.
Analysis	• There is no offence if there is colour of right • If upon all the evidence it may be fairly inferred that the ACC acted under a genuine misconception of fact OR LAW, there would be no offence of theft

Docherty 1989 SCC

Ratio	• knowledge is itself a component of the requisite mens rea then absence of that knowledge must be a good defence
Facts	• A is found drunk in a parked vehicle which could not be started • Plead guilty with having "care + control of a vehicle while impaired" (the offence is preventative. So, even if you do not drive it is an offence).

	○ He is on probation, so also charged with s 666(1). • S. 666(1) [historical section] An accused who is bound by a probation order and who wilfully fails or refuses to comply with that order is guilty of an offence punishable on summary conviction.
Issue	•
Held	▪
Analysis	• "An accused cannot have wilfully breached his probation order through the commission of a criminal offence unless he knew that what he did constituted a criminal offence." ○ S 666 required a higher level of MR due to "wilfully". ○ Needed to have the *intent* to breach terms of probation. ○ Persons who unknowingly violate the terms should not be convicted. The MR of the underlying offence (s 236 – care and control) should not extend to the intent required under s 666
Notes	S 666 replaced by 733.1 now • 733.1 An offender who is bound by a probation order and who, without reasonable excuse, fails or refuses to comply with that order is guilty of...

- TopHat:
  - Would Docherty have been convicted under the new provision – s 733.1? No.
    - While several ON decisions stated parliament clearly intended to remove intent/wilful the decision in *Zora* SCC clearly stated **where there is an absence of statutory language indicating the type of fault, presume subjective fault** (recklessness as it is the lowest form)
    - So, it does lower the level of intention but recklessness still requires subjective awareness of a risk they are in breach of the law. Crown would need to prove BRD there was a risk that what he was doing illegal and thus a breach of probation, so he would not be convicted.
  - A did not realize he was not permitted to make a certain tax deduction. Is this a defence to the charge of "wilfully evading the payment of taxes"?
    - Yes.
      - Required intention (wilfully) but that is not determinative
        - still possibility Crown could say "willfully" refers not to the decision to make the law rather it refers to the physical act (*actus reus).* In other words, did you decide to make this deduction. Argument could be made you willfully/intentionally submitted the tax form (unless you had someone else doing them).
      - Real reason: **evade**, as opposed to "avoiding" in the context of this provision connotes a deliberate attempt to not pay not only what is owed (objectively) but what you know to be owed (subjectively). To convict someone of evading (even in the absence of wilfully) would have to show the accused knew they were not entitled to make that deduction.
- *Klundert*
  - Willfully evading income taxes. Mistake of law evident in term **evade – trying to not comply with the law.** Therefore, need to know the law.

R v Tavares 1996 NL CA

Ratio	• Wrongly decided – blurs mistake of law with mistake of fact ○ Colour of right (mistaken belief) can only be relied on if explicitly or implicitly contained in the statute!
Facts	• Ship captain charged w/ offence related to overfishing, fishing w/o a licence • The position of the Crown at trial was the Kristina Logos was a Canadian vessel by operation of Canadian law because it was registered in this country. • The defence argued, primarily, that the vessel was registered in the Republic of Panama and that Canada had no jurisdiction over it or its crew members.

Issue	• Was the vessel foreign? Or under Canadian jurisdiction? What MR is required?
Analysis	• If captain is not aware it was created in Canada but now a Panana shift and honestly believed origins of the ship were no longer relevant → mistake of fact. • "It would be expecting too much of the Captain to determine whether the vessel was Canadian" (para 13) ○ Mistake of law does NOT work this way. • Penney: by operation of law, it was registered in Canada and ignorance of law is not a defence and no colour of right explicitly or implicitly contained in the statute. So, wrongly decided.

OFFICIALLY INDUCED ERROR

- Recent innovation of Canadian Law.
- Recognizes the strict application of s 19 to some circumstance is unjust (*see Molis*)
- This assumes crown can prove all AR and MR elements but still allows a defence
  - Burden is on the accused on a BoP. Crown does not have to disprove BRD as it is just a procedural defence.

- *Molis*
  - the accused operated a laboratory manufacturing certain drugs, which when he started was not illegal. They were added to the Food and Drugs Act and became restricted. Charged w/ trafficking, claimed he did not know the drugs were illegal. Prior to them become illegal he had checked w/ various govt officials to ensure they were not restricted.
  - SCC said no difference between being ignorant as to the existence of a law, and ignorant as to its meaning, scope, or application.
    → RESULT was arguably unfair
    - Two of the strongest rationales for s 19 is that it would promote ignorance of the law and allow individuals to make the law for themselves
    - Yet this rationale does to apply when the ACC takes reasonable steps to ascertain the law

- *Jorgensen* - modern defence of officially induced error
  - While knowledge of the law is to be encouraged, it is certainly **reasonable for someone to assume he knows the law after consulting a representative of the state acting in a capacity** which makes him expert on that particular subject.
  - Six elements to be met before **error could be officially induced:**
    - Error of law was made
    - Accused considered the legal consequences of their actions
    - Advice obtained came from an appropriate official
    - Advice was reasonable
    - Advice was erroneous
    - Accused relied on the advice.

- Result of proving an officially induced error:
  - Stay of proceedings, rather than an acquittal (so no declaration of innocence/guilt)
  - It does *not* negate MR.
  - Just provides a procedural bar to conviction (like entrapment)
- First question then from *Jorgenson* is whether the mistake in question was truly a mistake of law:
  - If it is of fact, reliance upon the defence is unnecessary
  - From here it must be shown that the ACC considered the legal consequences of their action and sought advice and then relied upon
    - *Levis v Tetreault*

- ACC charged with operating a motor vehicle w/o paying the fees relating to its registration.
    - ACC had consulted with the authority and told when fees were due they would receive a notice of renewal
    - Postal error caused the notice to renew be delayed.
- Held:
    - Company was aware the date the fees were due and only inquired as to the typical procedure followed by the registry.
    - Did not inquire as to the *legal* result of not paying the fees.

- Who is an appropriate official?
    - Unresolved but the official must be one whom a reasonable individual in the position of the accused would normally consider responsible for advice about the particular law in question (*Jorgensen)*

- Sankoff reading -- thinks there is no good reason treating it as a procedural matter, akin to entrapment. Feels with officially induced error, the person has done all they can, imposing liability is inappropriate not because of the Crown's improper actions, but because the actor is not morally culpable. More in common with defences like duress and necessity than with entrapment.

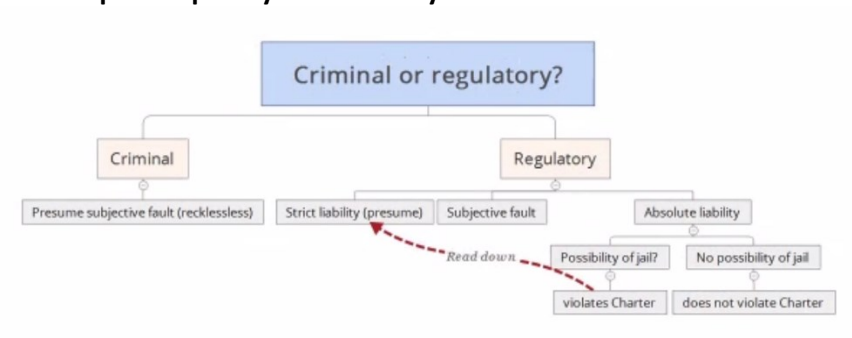
REGULATORY OFFENCES

- Quasi-criminal/public welfare/regulatory – all the same things. Contemporary language is regulatory

Criminal or Regulatory?

- Regulatory can be enacted by Parliament and provincial legislatures under s 91/92
    - So, Feds can regulate banking, trade, postal etc.
    - If it is a provincial offence, either it is regulatory or *ultra vires* because province cannot enact criminal
- Legislation enacted under s. 91(27) must be treated as criminal law and have a *mens rea* requirement
    - Every offence in the Code
    - Controlled Drug and Substances Act (since *Beaver*, considered criminal law)
- More difficult to determine the difference w/ other parliamentary acts
    - Courts will have to determine whether the intent was criminal or regulatory at times
    - Typically, all that a provision will do **is omit words that clearly require some form of MR** such as "**knowingly", "wilfully" or "intentionally**".
        - If none of these words → not automatically a SL. MR may be implicitly required. Nevertheless, it is a starting point to consider whether it is SL or not.
    - Another consideration is the **legislation's target**: individuals or corporations
        - when the criminal law is applied to a corporation, it loses much of the criminal nature and becomes in essence, a rigorous form of administrative law *(Wholesale Travel)*
        - *Pierce Fisheries Ltd*
            - Accused charged with being in possession of a number of lobsters less than the minimum size required by the regulations.
                - Defendant company specifically instructed its employees to not buy undersized lobsters, but since such a large amount was involved, some were missed. 26 lobsters out of 50,000lbs were undersized. No one in the employ knew
                - SCC reversed held that mens rea was not required, "if lack of knowledge by any responsible employee constituted a defence for a limited company to a charge under 'insert regulations' then I think it would in many cases be virtually impossible to secure a conviction"
        - *Pee-Kay Smallwares*

        - "If, on a prosecution for the offences created by the Act, the Crown had to prove evil intent of the accused, or if accused could escape by denying such evil intent, the statute, by which it was obviously intended that there should be complete control without the possibility of any leaks, would have so many holes in it that in truth it would be nothing more than a legislative sieve"
    - Stigma
        - *Beaver*
            - Sugar "mistaken" for heroin case
            - Question for the court was, is this drug offence criminal or regulatory in nature?
            - SCC states drug offences did have moral connotations, were considered inherently wrongful, and carried severe penalties therefore criminal → so subjective MR
        - *Pierce* (above)
            - "I do not think a new crime was added to our criminal law by making regulations which prohibit persons from having undersized lobsters in their possession, nor do I think that the *stigma* of having been convicted of a criminal offence would attach to a person found to have been in breach of these regulations."
    - Final factor to consider is the maximum **penalty** available
        - Law has traditionally been wary of imposing hefty penalties in absence of evil intent
        - Problematic
            - Numerous summary conviction crimes with penalties as low as 2 years, regarded as full *mens rea* offences
            - In contrast; exporting a polar bear skin can be punishable on indictment up to 5 years imprisonment (non CC law)
- **Regulatory offences are presumptively strict liability offences**



Theoretical justification for distinction b/w criminal + regulatory offences

- *Malum in se* (wrongful in it of itself) v *Malum prohibitum (*wrongful because its prohibited – just acknowledges downsides to some activities)
- Licensing theory
    - Regulatory offences involve the type of commercial/industry activity that requires state supervision (typically licence to operate in a particular sphere). Then you implicitly accept and consent to particular level of the state oversight (including charges/prosecution) that does not involve the full security of the criminal law
- Vulnerability
    - Criminal law viewed as concerning the vulnerable more
- Penalty
    - All else equal, imprisonment or very harsh fines would create a presumption it is criminal

Rationale for Strict Liability Offences (reading)

- Control certain risks that the public is exposed to
    - Issues with this, since lots of 'criminal' acts cause as much harm and risk whether the person means to or not

- However, certain activities that do create a risk to the welfare of society, and legitimate to argue that those who voluntarily undertake that activity also assume the risk
    - Not generally with CC offences
        - Ex: offence of murder is not intended to stop people killing but define what circumstances a killing amounts to murder and reduce that occurrence
    - In contract, there are some activities inherently create a risk, and if one did not carry on these activities, there would be no risk
        - These are controlled rather than prohibited
- "True crimes" are acts requiring the imposition of social stigma through conviction and punishment, regulatory offences are not
- *Sault Ste Marie* – "In short, absolute liability, it is contended, is the most efficient and effective way of ensuring compliance with minor regulatory legislation and the social ends to be achieved are of such importance as to override the unfortunate by-product of punishing those who may be free of moral turpitude"
    - Courts would get jammed if every case had to prove mens rea etc

Voluntariness

- Earlier we learned actus reus is physical elements, while the mens rea is the corresponding mental examination
    - Example: A is upset with B, he pushes C into B, causing B to be injured. A has committed assault, but has C?
        - Recognize no intention to assault B, no liability
        - This isn't always possible to recognize, esp as we talk about regulatory offences
- It is only where "a person is unable to decide whether to perform an act and unable to control the performance of the act that they cannot be said, in any meaningful sense, to have committed the act" (*Luedecke*)
    - Example: Gardener is mowing a law, while doing so he mows over his employers cellphone laying in the grass. He didn't intend to destroy the phone, but he was committing the voluntary act of mowing the lawn.
- *Hill*
    - Accused was charged with the offence of failing to remain at the scene of an accident
    - Driver knew she had come into contact with a car in front of her, but didn't know that an "accident" had resulted
    - Argued that because of this absence of knowledge, her failing to remain was not a voluntary act
    - Rejected, holding that "the only fact of which she was ignorant of was the extent of the damage".
    - The actus reus happened as soon as the accused left the scene voluntarily without taking the required steps

Kilbride v Lake NZ HC

Ratio	• A person cannot be convicted [even of an absolute liability crime] unless he has committed an overt act prohibited by law or defaulted in action where there was a legal obligation to do so. This act or omission must be voluntary.
Facts	• Man bought a parking ticket and put it on his windshield. • He left and then the ticket disappeared (fell off or someone took it). Evidence shows he did pay for one. • He was then charged with absolute liability offence for not having a parking pass
Issue	• whether or not the physical element in the offence was produced by the appellant
Held	• No physical element proved.
Analysis	• ACC argued if he could show an absence of MR, he could not be convicted ○ BUT the statutory offence excluded MR as an element to be proved (absolute liability) • Court holds this is not a *MR* issue. It is an *AR* issue.

	○ As such, a person cannot be convicted unless he has committed an overt act prohibited by law or defaulted in action where there was a legal obligation to do so. This act or omission must be voluntary. • A person cannot be made criminally responsible for an act or omission unless it was done or omitted in circumstances where there was some other course open to him. ○ No opportunity to take a different course and inactivity on the part of the ACC after parking ticket was removed was involuntary and unrelated to offence • AR was not a result of ACC conduct – intended or accidental

STRICT AND ABSOLUTE LIABILITY OFFENCES

- Canadian law recognizes that certain offences dispense entirely with the requirement of *mens rea*
- Two categories:
  - **Strict** – no proof of MR required but does permit the ACC to raise a limited number of defences (most importantly **due diligence**)
    - Even for those strict liability offences, if parliament intends **subjective fault** by using language such as "willfully" or intent" then **courts will require *MR*** to be proved by the Crown (*Sault Ste Marie)*
  - **Absolute** – punishable offence regardless of the ACC' intent or steps they may have taken to avoid committing it (*Sault Ste. Marie)*
    - There must be a clear and unmistakable indication of legislative intent to impose AL (*Sault; Levis)*
- There is a **presumption in favour of strict liability** unless the statute explicitly calls for absolute liability
- **Proof of actus reus is still required for SL**
  - It would be overstating it to say that an accused's mental state is entirely irrelevant to the proof of strict liability offences.
    - Must show a voluntary act was undertaken, which requires at least a minimal mental process.
  - Even offences of strict liability require the actor to do something
    - Ex: If A secretly puts a package containing illicit drugs into B's pocket, to say that B has no knowledge of the drugs and hence no *mens rea* misses the point
      - If B has no knowledge that a package is even there, B is acquitted not owing to a lack of knowledge regarding the drugs but because of an absence of knowledge regarding the package. Possession, like any actus reus, requires voluntary conduct.
      - B must have knowledge that a package is present, until this is proved, the second element of knowledge of what is inside the package is irrelevant.

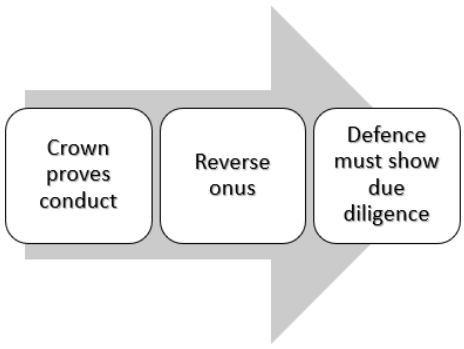


Figure 1 STRICT LIABILITY OFFENCES ONLY

Strict or Absolute Liability?

- Charter considerations

- SCC held that **where section 7 is triggered**, principles of fundamental justice are **inconsistent with the concept of absolute liability offences** in which no mens rea need to be proved, and no possibility of any defence of due diligence (*Reference re Motor Vehicle Act*)
    - Essentially, if there is jail time, cannot be absolute
- when interpreting legislation, courts will presume that the Legislature acted within the limits of its constitutional powers and not in violation of the Charter (*Raham)*
    - Does not permit court to re-write legislation, but if it can be interpreted to follow the constitutional and charter, it will
- → result is it takes very clear language to create an absolute liability offence that is potentially punishable by incarceration

- Three Situations where the Charter will not dictate the offence is strict liability over absolute
    - 1. Theoretically possible the state could justify an absolute liability offence with the potential to imprison under section 1 of the Charter
    - 2. Some courts have accepted that a statutory default scheme can be constructed so as to restrict the potential of imprisonment enough to negate the liberty deprivation under s. 7
        - *Polewsky*
            - Ontario Court of appeal considered an absolute liability offence punishable only by a fine. Relevant legislation required a separate proceeding in cases where the accused failed to pay the fine, and this included a means test to assess whether the offender was capable of paying before resorting to jail
            - Court held the unlikely possibility of imprisonment made it "sufficiently remote" to avoid constituting a deprivation of liberty under s 7 and upheld the offence
    - 3. Finally, best way to ensure constitutionality is to remove possibility of imprisonment
        - *Pontes*
            - SCC upheld a provision imposing absolute liability by holding that amendments to BC's punishment regime eliminated any prospect of an offender going to jail, even where he or she failed to pay a fine.

- "Offences of a**bsolute liability** would be those in respect of which the **legislature had made it clear that guilt would follow proof merely of the proscribed act**" (*Sault Ste Marie)*
    - "The **overall regulatory pattern** adopted by the Legislature, the **subject matter** of the Legislation, the importance of the penalty, and the precision of the **language** used will be primary **considerations**"
    - Test favours offences being treated as strict liability rather than absolute
- *Chapin*
    - SCC reiterated the importance of presuming that those charged with a public welfare offence have access to a due diligence defence, rejecting the notion that potential difficulties in enforcement should dictate otherwise
- *Levis (City) v Tetreault*
    - SCC applied the *Sault Ste Marie* classification in the context of two provisions that imposed fines for failing to drive with a valid driver's licence, and failing to pay registration fees
    - "nothing in the words.. indicates an intention to create a *MR* offence, or… to impose absolute liability so as so to exclude due diligence defence"

Defences to a strict liability charge

- Key difference between strict and absolute is that the former permits availability of defences premised upon reasonableness of accused failure to comply

- 1: **Reasonable Mistake of Fact**
    - Accused mental state is relevant in one instance: Where he or she reasonably acted on the basis of a mistake of fact that, had it been true, would render the act or omission innocent

- Difference between the operation of a mistake of fact defence in relation to "true crimes" and strict liability offences:
    - With "true crimes" the defence is usually available so long as the ACC honestly believed in a mistaken set of facts, whether or not such a mistake was reasonable.
    - For strict liability offences: mistake must be both honest AND objectively reasonable

- **2: Due Diligence**
    - An accused person may be acquitted of a strict liability offence where he or she "took all reasonable steps to avoid the particular event" (*Sault*)
        - Sometimes the inquiry will examine the actions of the specific accused, while in most cases the focus will not be upon what occurred, but what precautions taken to avoid such an occurrence
        - Consider how foreseeable was the event?
        - Generally, the greater the potential the conduct in question has to cause harm, the more precautions the court will require before finding that the accused acted diligently.
        - Offenders are not excused: (1) b/c mistake was not egregious, (2) unintentional, (3) Resulting prejudice is small, (4) b/c there was a reasonable explanation for failure to comply
    - *Harris*
        - the accused was charged with taking a haddock catch in excess of that permitted by his license
        - Defence submitted the accused discharged the requirement of due diligence in giving appropriate instructions to his crew to carry out
        - NSCA found that since the accused's method had been carried out successfully in previous years, and by the crew members in question in the preceding year, the steps taken by the accused to ensure compliance with the law were sufficient and reasonable.
- Alternative Defences
    - Question remains whether duress and necessity can be raised in regulatory prosecutions
    - *Klem*
        - Accused charged with shooting a bear out of season when it wandered into his yard. Believed, mistakenly, that it was a danger to him and his dogs.
        - Accused was acquitted, primarily on the grounds that he had acted diligently in shooting the animal
        - Court of Appeal allowed the appeal and ordered a new trial, saying due diligence was unavailable because prohibition had been deliberately breached.
        - Court said defence of necessity was a better fit
        - Accused should bear the burden of proving there was an imminent peril or danger, the absence of any reasonable legal alternative, and the harm inflicted was disproportionate to the harm sought to be avoided.

- What precisely is a regulatory offence? (2018 article in reading #34)
    - *R v Precision Diversified Oilfield Services*
        - Case arose out of workplace fatality
        - Company charged under *Occupational Health and Safety Act*, to ensure the health and safety of the worker 'as far as it is reasonably practicable for the employer to do so'
        - Offences are strict liability offences, prosecutor relied upon accident as *prima facie* proof of breach
        - Prosecutor did not prove, as part of the *actus reus,* what was 'reasonably practicable' in the circumstances
            - Court of Appeal found that this is an active part of the actus reus
            - The legislature specifically emphasized the need for a mens rea type concept as part of the actus reus

Ratio	• If statute has language such as "wilfully", "with intent", "knowingly", or "intentionally" in a strict liability offence → court will presume it also requires subjective *mens rea* • Offences of absolute liability would be those in respect of which the legislature had made it clear that guilt would follow proof merely of the proscribed act ○ If intent of parliament is clear for absolute liability, then no defence of due diligence
Facts	• Defendant charged under provincial legislation that it did discharge, or permit to be discharged, deposited materials that polluted the water supply.
Issue	• Whether a mental element was necessary

Analysis	• Strict liability is unfair. Can meet the goals of regulatory offences by having defence of due diligence. Defence then has to prove on BoP they acted with due diligence (reasonableness)
	• Dickson recnogized public welfare offences had a vital function yet was unimpressed with the arguments facvouring automatic responsibility after proving the AR
	  ○ He rejected the notion that absolute liability led to fewer transgressions, noting that "if a person is already taking every reasonable precautionary measure, is he likely to take additional measures, knowing that however much care he takes, it will not serve as a defence in the event of breach?"
	  ○ Justice Dickson also disagreed with the idea that there was no stigma attached to these offences, holding that an accused person did suffer in this regard, even if it was to a lesser extent than with "true crimes".
	  ○ Finally, he had little time for the suggestion that it was more efficient to proceed without need for proof of the accused's mental state, noting that evidence of one's intention would still be relevant in sentencing, and raised in appropriate cases.
	
	• Recognized three categories of offences rather than the traditional 2:
	  ○ 1. Offences in which MR consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
	  ○ 2. Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care.
	  ▪ This involves consideration of what a reasonable man would have done in the circumstances.
	  ▪ The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.
	  ▪ → called offences of strict liability …
	  ○ 3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.
	
	• In this case, "An offence of this type would fall in the first category [rather than strict liability – 2nd category] only if such words as "wilfully," "with intent," "knowingly," or "intentionally" are contained in the statutory provision creating the offence." → need this language to move away from presumption into requiring subjective fault
	  ○ "…the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The overall regulatory pattern adopted by the Legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category."
	• → but if intent is clear that parliament intended no defence of due diligence then it is an absolute liability offence

OBJECTIVE FAULT CRIMES

- MR Elements up to this point in criminal cases
  - Where there is an absence of statutory language indicating the type of fault, presume subjective fault (recklessness as it is the lowest form) (*Zora*)
    - Subjective indicators: Wilfulness, intention, knowledge (intent) or awareness of risk (recklessness)
    - In both cases, have to show accused is aware of the relevant consequence or circumstance
  - Objective only permissible where the element was an aggravating feature (consequential) of an unlawful act (causi offence)
    - Ex: aggravated assault, unlawful act causing death
- BUT clear language from parliament can impose objective liability

- Negligence-based standards impose liability even where the accused acted without intent to cause harm, without foresight of the relevant consequences, or without knowledge of the relevant circumstances, so long as it can be established that a hypothetical reasonable person would not have conducted him or herself in the defined manner.

- Arguments against negligence in criminal law:
  - One objection that has been made to making negligence the basis of criminal liability is that it is somewhat incongruous to include in the concept of mens rea or guilty mental element what is, in reality, the *absence* of a mental element.
    - Negligence is NOT thinking when one should think
  - While it may be proper for torts, it is not the function of the criminal law to require persons to look after others
  - Just deserts: a theory which is designed to promote equality and fairness of sentencing for the imposition of a sentence. The principle behind just deserts is that the punishment should fit the crime.
    - Comparing the accused to a "reasonable person" is bound to eventually punish the stupid or inept who might not have been able to live up to the standard by any ordinary citizen, instead of the ill-motivated person who made a deliberate choice to break the law
    - Someone who does not abide by social norms may be unjustly punished despite the lack of intention to cause harm. Should they be held responsible?
  - Objective fault also does not sit as easily with idea of retribution and deterrence of wrongful conduct (if one does not realize conduct is dangerous or cause harm, unlikely criminal sanction will deter them

- Powerful counter-argument
  - The negligence standard is appropriate in at least SOME circumstances where it is necessary to control those who partake in activities where there exists the potential for serious harm if precautions are not taken.
  - Proper for the criminal law to impose a standard here → Must provide deterrent message to ensure that the risk posed by dangerous acts is minimized to the extent possible
  - Hart has long argued that a negligent person is morally culpable if they fail to act in such a way so as to minimize risk

OBJECTIVE – MARKED DEPARTURE TEST

- For negligence-based crimes there must be "… a marked departure from the standard of care that a **reasonable person** would observe in the accused's situation" (*Hundal* 1993 SCC) → modified objective standard of fault
  - Not like negligence in civil law though as consequences are severe
  - Better viewed as gross negligence. Mere negligence is not sufficient. Has to be a marked departure.
  - This stems from *Charter* values and principles

        - "… it is only when there is a marked departure from the norm that objectively dangerous conduct **demonstrates sufficient blameworthiness** to support a finding of penal liability" (*Beatty*)
- If a reasonable doubt exists either that the conduct in question did not constitute a marked departure from that standard of care, or that reasonable precautions were taken to discharge the duty of care in the circumstances, a verdict of acquittal must follow (*Gosset; Creighton*)

- Does this apply to all objective fault elements?
    - SCC have never fully resolved this
    - Ex: fault element that corresponds to causation (objective foreseeability of non-trivial bodily harm – except for murder).
        - No mention of marked departure in the jurisprudence.
        - But SCC says cannot have objective fault unless it's a market departure. So, why does objective foreseeability conform with section 7?
            - Because causation never stands alone. It always linked to an underlying predicate offence (never just causing bodily harm alone it's assault causing bodily harm).
            - So, as **long as the underlying fault elements are subjective <u>OR</u> if they are objective they conform to the requirement the crown must prove a marked departure then no problem.**
- Reasonable steps in sexual assault
    - Gap in the law re the constitutionality of reasonable steps since it requires objective fault but arguably does not require a marked departure (but maybe it is built in)

What to consider when determining a marked departure?

- **Must consider the circumstances of those involved** at the time
    - what is the inherent risk with the conduct being engaged in? what would the reasonable person have perceived? What would they have done?
    - Example driving – consider the response times, awareness in the context of the conditions
- But what about personal characteristics? No.
    - People are highly variable in their aptitudes, abilities – to what extent if any can we consider this when looking at marked departure?
    - The test **does not consider personal characteristics** of the accused **unless** they render the accused **incapable of appreciating the consequences** of her actions (*Creighton*)
        - *Creighton* 1993 SCC
            - There is a minimum standard of care. Anyone who becomes a parent must meet this minimum standard. It is gross negligence after all.
            - "… considerations of principle and policy dictate the maintenance of a single, uniform **legal standard of care for such offences, subject to one exception: incapacity** to appreciate the ***nature*** of the risk which the activity in question entails."
                - Reason: importance of negligence and notion that society is best protected when people choosing to undertake dangerous activities are held to a uniform benchmark
                - The exception would require some sort of extreme disability
                    - → Penney: very difficult standard for defence to meet then. Incapacity – someone who cannot appreciate the risk. Someone severely intellectually disabled who does not understand a gun is not a toy then that would meet this otherwise argument likely unsuccessful.
        - *Gosset* 1993 SCC
            - Careless use of a firearm – negligence-based offence (carelessness – failure to take adequate steps to ensure firearm is used safely).

        - Crown argued accused had a higher standard of care based on the fact she was an officer and had experience and training with a firearm and should therefore be required to meet a higher level of care.
    - *Naglik* 1993 SCC
        - Young mother from impoverished background. Charged with failing to provide necessities to her child who ends up dying. S 215 is a crime of objective liability.
        - Defence argued due to limited education, family, support & resources. Not knowledgeable about basic requirements of parenthood – the standard should then be decreased.
        - McLachlin (Majority): reiterated *Creighton* – **determine conduct of the reasonable person engaged in the particular activity in the specific circumstances**
- HOWEVER, the court will **consider the nature of the activity and certain activities require special attention** and skill (*Javanmardi* 2019*)*
    - An ACC undertaking such an activity may be found to have breached the reasonable person standard if they are not qualified to provide the special care the activity requires or negligently failed to exercise such care while engaged in the activity.
    - The standard is not determined by the accused's personal characteristics, it is informed by the activity.

R v Javanmardi – marked departure analysis section

Ratio	• The question is always does this constitute a marked departure from the standard of care we would expect of anyone engaged in the specific activity?
	  ○ While the modified objective standard is not determined by the accused's personal characteristics, it is informed by the activity.
	• Still cannot consider personal characteristics BUT ACC' conduct must be contextualised by the circumstances.
	  ○ Certain activities require special attention + skill
	  ○ Person must be both qualified AND exercise the special care
	  ○ Evidence of training and experience may be used to show that the applicable standard of care was met and that a reasonable person would have performed the activity in the circumstances

Facts	• Naturopath in QC. Not licensed or regulated in province. She administered nutrients to patient intravenously. 84-year-old died. The L-Carnitine vial was contaminated but the other 2 patients that had the injection did not experience any adverse reactions • Charged with criminal negligence causing death contrary to s. 220(b) of the Criminal Code and manslaughter • At trial Javanmardi was acquitted on both charges. The trial judge was satisfied that Javanmardi had the necessary skills to administer injections, had observed the correct protocols, and taken sufficient caution, so no negligence was found; a reasonable person would not conclude there was a risk of harm.
Analysis	• Following *Creighton* cannot adjust the standard of care dependent on the person and their characteristics BUT certain activities require special attention due to the inherent danger of the activity, the nature, and circumstances of the activity. In such a case, ○ So, whether someone is licenced or registered to practice, up to date on qualifications, has the credits etc. is not determinate but considered relevant evidence as to the standard of care required or whether an individual conduct was a marked departure. • The majority noted the trial judge was right to consider Ms. Javanmardi's extensive training and experience as a naturopath when deciding what was reasonable in the circumstances. • Both offences therefore require marked departure from reasonable person but… • "…[G]reater care may be expected of the "reasonable person" on the basis of the nature and circumstances of the activity …"

	○ **Certain activities … require special attention** and skill. An accused undertaking such an activity may be found to have breached the reasonable person standard if he or she is not qualified to **provide the special care that the activity requires**, or negligently failed to exercise such care while engaged in the activity. • In this way, the law maintains a "constant minimum standard" for every person who engages in an activity requiring special care and skill: **they must be both qualified *and* exercise the special care that the activity requires.** ○ [standard here: reasonably prudent naturopath in the circumstances] • Where the Crown's theory is … that the accused engaged in an activity without the requisite training and knowledge, the accused's activity-specific knowledge and experience are clearly relevant to determining whether the applicable standard of care was met. ○ Ms. Javanmardi's professional experience and her education were relevant in determining whether she was qualified for the activity in which she was engaged and were, as a result, relevant in determining whether she met the applicable standard of care. • An accused's training and experience may, for example, be used to rebut an allegation of being unqualified to engage in an activity. Evidence of training and experience may also be used to show how a reasonable person would have performed the activity in the circumstances.
Dissent (Wagner)	Did not read • Administering an injection is objectively dangerous act • It doesn't depend on the training or experience of the person performing the act • Offence of unlawful act manslaughter requires proof of: ○ Underlying unlawful ○ Mens rea of the underlying act ○ Mens rea specific to manslaughter • The actus reus of manslaughter has 3 elements ○ An underlying unlawful act ▪ The actus reus will be proved if the court is satisfied that the accused did something that a reasonable person would have known was likely to subject another person to a risk of harm. ○ The objective dangerousness of that act ▪ Assessed without reference to the accused's personal characteristics. ○ A causal connection between the act and the death • In Creighton, the majority stated that a person who engages in an activity that requires special care to be exercised may fail to meet the standard of care either (i) because the person is not qualified to exercise the required care, or (ii) because the person fails to exercise that care • However, the person's experience is not relevant in determining what is required by the standard of care or what special care is required by the activity in question.

Sankoff (p 18 of #35) Reasonable Person shorn of personal characteristics

- Strongest advantage of the strict standard is what it does *not* do
  - The more the objective reasonable person is described like the person before the court, including with particular characteristics, the more likely the trier of fact is simply going to revert to a description of the offender and what he or she subjectively perceived.
    - Requires very complex charge to the jury
  - Many of the subjectivist concerns regarding the punishment of those who could not have foreseen the particular risks caused by their conduct are already met by the high standard required to convict someone for negligence in this setting.
    - While foresight is a critical issue, accused cannot be convicted of unlawful act manslaughter – or any other crime – without having committed a crime involving at least criminal negligence

        - As a consequence, accused's actions must be a "marked departure" from the conduct of the ordinary reasonable person, which provides some leeway for conduct impeded by certain types of frailties
            - Helps protect those who are lacking or acting stupid/incompetent.
- Weaknesses of strict standard
    - McLachlin refusal to adopt a purely objective test for every scenario
        - Recognizes implicitly that there will be situations in which it would be unfair to hold a person to an inflexible standard. She labels these "extreme" scenarios as ones in which the accused lacks the capacity to perceive the risk in question.
    - Relies on the notion that "reasonableness" normally focuses solely on an objective standard, citing from comparable tests relating to provocation and necessity
        - Inaccurate, as most defences DO allow relevant perceptions and characteristics to be considered in the objective inquiry.
    - Suffers from a lack of understanding regarding those who act negligently through no fault of their own, and demands that jurors ignore factors they are likely to find quite relevant
        - Teenager driving for a week, is it really fair to apply the standard of the average, experienced driver?
        - *Gosset* – are we to ignore that the accused was a trained officer who knew how the gun cocked?
- Overall, those who possess the skills to avoid particular hazards should be assessed more stringently when they fail to live up to what a reasonable person with that knowledge or training would have done
    - Similarly, those who lack the ability to live up to that standard should not be faulted when they fail

DANGEROUS DRIVING

Conduct Element	**Fault Element**
• Objectively dangerous driving - When viewed objectively was it dangerous? - Ex: crossing lane is objectively dangerous	• *Marked departure* from standard of care of a reasonable person - Does that represent a marked departure? - In *Roy*, no. There was not highly morally culpable conduct (no drinking, drugs, fatigued etc.)

- SCC in examining the actus reus element of dangerous driving, the **focus should be on the manner of driving**, not the consequences of driving (*Beatty; Roy; Romano)*
    - because it is an offence to drive dangerously even if no-one is injured
    - the act or conduct that the offence of dangerous driving addresses is driving in a manner that puts the public at risk that his may happen
    - There must be a meaningful inquiry into the *manner* of driving, not into the degree of departure from the norm that the consequence demonstrates
    - a consequence that has occurred can verify the nature of the risks that existed, but that consequence should not be used in determining whether the manner of driving was dangerous or in marked departure from the norm (*Romano)*

R v Beatty – example of the steps to go through

- AR element:
    - Look objectively and focus on the manner of driving: was it objectively dangerous driving?
        - Yes. Should have stayed on the right side. All of a sudden veered into he wrong land and killed 3 people of the oncoming vehicle.
- MR element: Does the conduct constitute a *marked departure* from the reasonable Canadian driver?

- Seems like he fell asleep at the wheel or possibly distracted. No evidence of mechanical failure. No evidence of drinking or driving while egregiously fatigued to indicate he should have stayed off the road.
- BUT was that a marked departure?
  - Element of moral blameworthiness here. Talking about penal consequences for objective crime.
  - While the accused driving over the line was objectively dangerous, unclear it constituted a marked departure from the conduct of an ordinarily prudent driver, not uncommon for drivers to have momentary lapses in attention
  - the criminal law is not always the appropriate response to all dangerous conduct. Accidents happen. Remember, focus is on the manner not the terrible consequences.

R v Roy 2012 SCC

Ratio	• The actus reus of the offence is driving in a manner dangerous to the public, having regard to all the circumstances, including the nature, condition, and use of the place at which the motor vehicle was being operated and the amount of traffic that at the time was or might reasonably have been expected to be at that place ○ Focus is on manner of driving. Must not simply leap from the consequences to conclusion about dangerousness. • The mens rea is that the degree of care exercised by the accused was a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances ▪ Often this is a matter of drawing inferences considering all of the circumstances ▪ Required MR may be inferred from the fact the ACC drove in a manner that constituted a marked departure
Facts	• Driver pulled his motor home from a stop sign onto the highway. Pulled in the path of an oncoming tractor-trailer. Visibility was limited due to fog and snow covered the road and it was slippery • Collision resulted that killed the motor home driver's passenger. • Dangerous driving causing death. • Convicted at trial, and appeal was dismissed.
Held	• Not a marked departure
Analysis	• Dangerous driving causing death (s 294(4) has two components (like all crimes) ○ Prohibited conduct: operating a motor vehicle in a dangerous manner resulting in death ○ Fault: marked departure from the standard of care that a reasonable person would observe in all the circumstances • In considering *actus reus*, question is whether the driving, viewed objectively, was dangerous to the public ○ **Focus on risks** created by the accused's manner of driving, not the consequences ▪ If one were to focus on consequences, it would be *ex post facto* reasoning ○ Meaningful inquiry into the **manner** of driving • *Mens Rea* ○ Two questions ▪ First is whether a reasonable person would have foreseen the risk and taken steps to avoid it if possible ▪ Second is whether the accused's failure to foresee the risk and take steps to avoid it was **a marked departure** from the standard of care expected ○ Determining whether there was a marked departure will generally be a matter of drawing inferences from all of the circumstances ○ Generally, the existence of the required objective mens rea may be inferred from the fact that the accused drove in a manner that constituted a marked departure from the norm. ○ However, even where the manner of driving is a marked departure from normal driving, the trier of fact must examine all of the circumstances to

	determine whether it is appropriate to draw the inference of fault from the manner of driving ○ Simple carelessness, to which even the most prudent drivers may occasionally succumb, is generally not criminal. ○ ○

R v Romano 2017 ONCA

Ratio	• We look to the manner of driving and determine whether it was objectively dangerous and constituted a marked departure. Do not focus on the end result (1 death, 5 deaths, 0 injuries).
Facts	• Eighteen-year-old Carla Abogado was on her way home from a part-time job when she was struck and killed by truck being operated at high speed by Mr. Romano (a police officer). It was around 8:19 p.m. At the time she was struck, Ms. Abogado was jaywalking, taking the most direct route from the bus stop where she had been dropped off to her home across the street. • Remo Romano was acquitted by a jury of the charge of dangerous operation causing death This charge arose out of a tragic event that occurred on February 12, 2014.
Analysis	• "… when asking whether the manner of driving has been dangerous, or represents a "marked departure", a consequence that has occurred can verify the nature of the risks that existed, but that **consequence should not be used in determining whether the manner of driving was dangerous** or in marked departure from the norm. • Judging whether driving was dangerous by exploring whether the accused is at fault for an accident that occurred obscures the proper focus on the manner of driving, and duplicates causation considerations that arise when, as in this case, an aggravated form of dangerous driving is charged. • The charge gave undue focus to the collision, and to questions of responsibility for the collision, when it should have focused on Mr. Romano's driving, and whether that driving constituted a marked departure from the standard of care expected of a police officer in Mr. Romano's circumstances. • The **issue for the jury** at this juncture was not the specific question of whether the collision with Ms. Abogado was foreseeable and avoidable. It was the **more general question whether the manner of driving presented foreseeable and avoidable risks** to the public, including risks that would arise if persons entered or were on the roadway

UNLAWFUL ACT CAUSING DEATH MANSLAUGHTER

- Prove predicate offence then prove consequences
  - Here it is an unspecific lawful act (predicate) causing death (manslaughter)

Conduct	Fault
• Unlawful Act	• Fault for unlawful act ○ Minimum standard for unlawful act: marked departure*
• Caused death • Legal causation (significant) • factual causation (but for)	• Objective foreseeability of nontrivial bodily harm (considering issues of accused's capacity and circumstances surrounding offence)

- *"… where the predicate offence is one of strict liability … the fault element for that offence must be read as a marked departure from the standard expected of a reasonable person in the circumstances …." (*Javanmardi)*
  - So regulatory offence (like in *Javanmardi)* can ground criminal liability under the unlawful act but only when they are "read up" to include a marked departure standard

Ratio	• Unlawful act manslaughter requires
	  ○ AR: a predicate offence AND the act caused death
	  ○ MR: fault for predicate offence AND objective foreseeability of non-trivial bodily harm

Facts	• Naturopath in QC. Not licensed or regulated in province. She administered nutrients to patient intravenously. 84-year-old died. The L-Carnitine vial was contaminated but the other 2 patients that had the injection did not experience any adverse reactions • Charged with criminal negligence causing death contrary to s. 220(b) of the Criminal Code and manslaughter • At trial Javanmardi was acquitted on both charges. The trial judge was satisfied that Javanmardi had the necessary skills to administer injections, had observed the correct protocols, and taken sufficient caution, so no negligence was found; a reasonable person would not conclude there was a risk of harm.

Analysis	• Following *Creighton* cannot adjust the standard of care dependent on the person and their characteristics BUT certain activities require special attention due to the inherent danger of the activity, the nature and circumstances of the activity. In such a case,
	  ○ So, whether someone is licenced or registered to practice, up to date on qualifications, has the credits etc. is not determinate but considered relevant evidence as to the standard of care required or whether an individual conduct was a marked departure.
	• The majority noted the trial judge was right to consider Ms. Javanmardi's extensive training and experience as a naturopath when deciding what was reasonable in the circumstances.
	Abella:
	• Overlap b/w unlawful act manslaughter & criminal negligence causing death
	  ○ **Crim negligence causing death**
	  ○ AR: ACC undertook an act – or omitted to do anything if it was their legal duty to do – and it caused someone's death
	  ○ MR: measure degree to which ACC conduct departed from a reasonable person. Must be marked AND substantial [other negligence-based offences, such as dangerous driving, just required a "marked" departure]
	  ○ **Unlawful act manslaughter**
	  ▪ AR: ACC committed an unlawful act and that the act caused death
	  ○ Underlying (predicate) offence here is administering drug contrary to *Medical Act,* a strict liability offence
	  ○ AR satisfied by proof BRD that the accused committee an unlawful act causing death. No independent requirement of objective dangerousness.
	  ○ Predicate offences involving carelessness or negligence must be read as requiring a marked departure
	  ▪ MR: objective foreseeability of the risk of bodily harm that is neither trivial nor transitory coupled w/ the fault element for the predicate offence
	• Both offences therefore require marked departure from reasonable person but…

Dissent (Wagner)	Did not read
	• Administering an injection is objectively dangerous act
	• It doesn't depend on the training or experience of the person performing the act
	• Offence of unlawful act manslaughter requires proof of:
	  ○ Underlying unlawful
	  ○ Mens rea of the underlying act
	  ○ Mens rea specific to manslaughter
	• The actus reus of manslaughter has 3 elements
	  ○ An underlying unlawful act

	▪ The actus reus will be proved if the court is satisfied that the accused did something that a reasonable person would have known was likely to subject another person to a risk of harm. ○ The objective dangerousness of that act ▪ Assessed without reference to the accused's personal characteristics. ○ A causal connection between the act and the death • In Creighton, the majority stated that a person who engages in an activity that requires special care to be exercised may fail to meet the standard of care either (i) because the person is not qualified to exercise the required care, or (ii) because the person fails to exercise that care • However, the person's experience is not relevant in determining what is required by the standard of care or what special care is required by the activity in question.

CRIMINAL NEGLIGENCE

- **219**(1) Every one is criminally negligent who
  - (a) in **doing** anything, or
  - (b) in **omitting** to do anything that it is his duty to do,
  - shows **wanton or reckless disregard** for the lives or safety of other persons.
- **220** Every person who by criminal negligence causes **death** to another person is guilty of an indictable offence …

- Criminal negligence is not itself a crime, but it is the basis for the crime of criminal negligence causing bodily harm and criminal negligence causing death
  - S 219 sets up the baseline requirements (similar to unlawful act/predicate offence).
  - Whereas in unlawful act causing manslaughter we have to fill in the unlawful act with whatever occurred, here we already know the underlying offence required.

- For every objective fault crime → need marked departure EXCEPT for criminal negligence.
  - Criminal negligence requires **a marked AND substantial departure**
    - Penney "wrinkle in the law" here requiring substantial too. Mega negligence?! How much more negligent – unsure.
  - Objective test focuses on the conduct of the accused and whether it was unreasonable in the circumstances.

	Criminal Negligence Causing Death (s 220)	
	Conduct	**Fault**
S 219 Predicate offence: criminal negligence	• 1. Act; or ○ Duty to act found in s 216, 217, 217.1 • 2. Omission AND duty to act	• S 219 "wanton or reckless disregard" for others = marked **AND** substantial departure • (considering issues of accused's capacity and circumstances surrounding offence
S 220 portion: Causing death	• Caused death • Factual causation (but for) • Legal causation (significant)	• Objective foreseeability of nontrivial bodily harm (not required to foresee death)

- Difference b/w dangerous driving causing death and criminal negligence causing death
  - The latter has possibility of a life sentence (max sentence for both forms of manslaughter)
  - Therefore, courts reason criminal negligence needs more than dangerous driving hence the "substantial departure" requirements.

R v Tutton and Tutton

Ratio	• Marked AND significant departure required for criminal negligence

	• This is an objective standard
Facts	• Chid had diabetes and were told to put kid on insulin. Parents did for a bit but then believed that divine intervention would cure their kid. They truly wanted the best for their child but then stopped giving insulin to child. Believe god has healed the child. • The child died. Charged with manslaughter
Issue	• How to interpret the crime of criminal negligence? • Do we impose liability on the basis of reasonable person/parent would have believed? Or to impose criminal liability the crown has to show some level of subjective awareness?
Held	• Only 6 judges, split 3-3
Analysis	• McIntyre: objective standard is all that is required ○ "whether the conduct of an accused person has shown, within the meaning of s. 202 of the Criminal Code, wanton or reckless disregard for the lives or safety of other persons, the authorities dictate an objective test" ○ The test is that of reasonableness, and proof of conduct which reveals **a marked and significant departure** from the standard which could be expected of a reasonably prudent person in the circumstances will justify a conviction of criminal negligence. ○ Since the test is objective**, the accused's perception of the facts is not to be considered for the** purpose of assessing malice or intention on the accused's part **but only to form a basis for a conclusion as to whether or not the accused's conduct,** in view of his perception of the facts**, was reasonable** • Lamar: ○ Agrees with McIntyre but objective norm must be applied with "generous allowance" made for factors of accused ○ Caveat reasonable grounds for factors such as youth, mental development and education • Wilson: ○ Crown must show awareness of risk that prohibited consequences will come ○ Parliament must clearly adopt standard before courts will impose it. ○ Agreed no valid distinction between negligent omission and negligent commission

PARTY LIABILITY

- Common law had complicated rules for defining criminal liability of various parties.
  - Actual perpetrators were known as principals in the first degree
  - Those aiding and abetting at the scene of the crime, but not perpetrating – known as principals in the second degree. Conspired with the principal in the first degree or aided and abetted despite not being present = accessories before the fact. Those who intentionally aided a principal to escape from the law or assisted in the concealment of the crime were accessories after the fact
- The Criminal Code fixed these distinctions.
  - Criminal code does not distinguish b/w principal offenders and parties to an offence (*R v Cowan*)
  - BUT there may be differences in regard to participation are dealt with in sentencing
    - Degree of participation, responsibility, harm personally caused, etc. will often be relevant factors in sentencing

- Number of ways in which someone may be convicted as a party to an offence:

Section 21 – most important provision

- (1) Every one is a party to an offence who
  - (a) actually commits it,
  - (b) does or omits to do anything for the purpose of aiding any person to commit it; or
  - (c) abets any person in committing it.
- (2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence

- *R v Pickton*:
  - … [U]nder s. 21(1)(a), every person who commits **all of the elements of an offence will face … liability as a co-principal** along with any other who also committed all elements of that offence.
    - → then no party liability as they are a principal
  - Under s. 21(1)(b) and (c), an accused will **be found liable** for an offence even if he or **she did <u>not</u> commit all elements** of that offence, but provided aid or encouragement, with the requisite mens rea, to another person who did commit the offence.

S 21 wrinkles

- Reference to omission
  - We have seen that the law is generally reluctant to punish people for omissions
  - Raises the question, what type of omission can result in liability?

- There is a reference to *MR* required in s 21(1)(b) – "for the purpose" (meaning intent/desire/ or near certain knowledge – *Hebert).*
  - BUT (c) is silent. Courts have said this is just a weird drafting quirk

Committing the Offence Directly or by Use of an Innocent Agent

- May be more than one person who actually commits a crime
  - Where two people rob a bank with a gun, only one person can carry and point the weapon, and it may be more convenient for a second, not occupied with a weapon, to scoop up the cash. <u>The robbers have not, individually performed all the elements of the offence, yet they both have committed the crime in the sense that they are both co-perpetrators</u> (*Ball)*
- Actually, committing the offence, as opposed to merely assisting it, normally requires the person in question to perform the *actus reus* and *mens rea* of the crime – or most aspects of it
  - BUT there is one situation where this does not occur → is referred to in law as the problem of "innocent agency" – one person uses another to commit an offence for them
  - Can occur in two ways
    - One is where the agent is incapable of knowing what they are doing is wrong (such as where an accused uses a mentally incompetent person or small child)
    - Second is when some aspect of the offence is committed by a person who by reason or situation is compelled to participate in a series of events initiated by the principal, while unaware, for one reason or another, that they are committing the offence
- *Berryman*
  - Facts:
    - Accused was employed in a passport office and charged with forging a passport. Falsely indicated on the applications that the applicants had produced the required proof, and someone else made the passport
  - Justice Wood reviewed s. 21 and stated that Parliament intended to include this doctrine within section 21(1)(a) by the words "actually commits it"

        - read in the doctrine of **innocent agency** as predicated on the notion that a person who committed an offence by means of an innocent agent "was deemed to be the actual perpetrator".
        - Thus, a person who commits an offence by means of an instrument "whose movements are regulated by him" actually commits the offence himself or herself
    - Result - while the trial judge was correct in concluding that the accused could not be convicted as an aider or abettor because the innocent agent had committed no forgery
        - Open to convict the accused as a principal in the first degree under section 21(1)(a) of the Code

AIDING OR ABETTING

- Code envisages a distinction between aiding and abetting and, although the two are almost universally used conjunctively, there is a difference between them
    - **Abetting** includes "encouraging, instigating, promoting or procuring" a crime to be committed (*R v Greyeyes*, 1997 SCC)
    - **Aiding** means assisting or helping without necessarily encouraging or instigating the actor (*R v Greyeyes*)

Actus Reus of Aiding or Abetting

- Acts undertaken prior as well as during the crime itself will qualify
    - Does not matter whether the assistance was actually effective, so long as it was performed "for the purpose" of aiding another to commit an offence

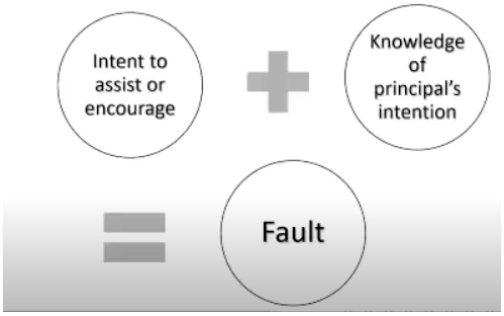
21(1)(b) "omits to do anything"

- Must be more than mere presence (even where morality and ethics would compel an ordinary person to do something) (*Dunlop*)
    - *Dunlop and Sylvester* SCC – instance of "gang rape"
        - The accused just brought beer and watched
        - Held that there must **be something more than mere presence**. At the very least, **must be encouragement** of the principal offender, or an act **that tended to prevent or hinder interference** with accomplishment of the criminal act
        - While presence, in some circumstances, could provide evidence of aiding or abetting, this was only true if other factors such as prior knowledge of the intended offence or attendance for the purpose of encouragement were also present.
    - *Coney*
        - Accused were present at an illegal fight and charged with aiding and abetting a battery
        - Mere presence of persons at a prize fight, unexplained, is not in itself conclusive proof of the intent to encourage the fight
        - Need to show they bet on the fight, or shouted encouragement to the fighters, etc
- Mere knowledge is not enough unless ACC is under some type of duty to act
    - *Rochon*
        - Accused found not guilty as a party to cultivating marijuana despite doing nothing after finding her son growing the drug on the property
        - Her failure to act may have implicitly supported her son but was under no duty to do anything and could not be penalized
- BUT subtle forms of action amounting to encouragement or assistance should *not* be construed as omissions
    - *Re S. (A.C.)*
        - accused were university students who were present during the occupation of a university computer centre
        - Charged with mischief in obstructing the lawful use of the centre
        - While they played no role in the barricades, were convicted of aiding and abetting
        - **Occupation gave the strength of numbers that it required to succeed, so mere presence in these circumstances amounted to actus reus**
    - *Lai*

        - Victim was attacked by a mob of young people in the hallway of a bar and viciously beaten to death with bats and pipes. Clear the accused was not the primary perpetrator, but there was evidence showing that they were part of a group that entered the hallways – prevented or hindered interference w/ the criminal act.
    - Laurencelle
        - Victim kidnapped by four men and held for more than three days in a nearby house. After the kidnapping, the accused – who lived with one of the men – came home with her daughter
        - She was unaware of the plan relating to the kidnapping, but provided the victim with food and water
        - Acquittal. Accused was under no duty to leave and she had no power over the principals. Moreover, acts of kindness towards the victim did not amount to aiding or abetting in the circumstances
- In the context of motor vehicle offences:
    - *Halmo*
        - Owner of a motor vehicle allowed his chauffeur to drive while he himself remained in the rear
        - Chauffeur was extremely intoxicated and caused an accident killing four people
        - Owner was convicted of aiding and abetting the offence of reckless and dangerous driving
        - Chauffeur drove the car with the consent and in the presence of the owner
        - Element of control
    - *Kulbacki*
        - Qualified this finding, stating that "**every passenger in an unlawfully driven motor vehicle is not necessarily subject to conviction** as an aider and abettor, as it is conceivable that a passenger might not have any authority over the car or any right to control the driver".
        - Test to determine who is an aider or abettor in driving cases seem to be **an ability to control** followed by a failure to exercise that control
        - Failure to act is encouragement to the other party and amounts to abetting the offence

Mens Rea of Aiding or Abetting

- "for the purpose" – from 21(1)(b) and can import that into para 21(1)(c) too



- Hardly bears stating that a person who provides assistance without any idea that such assistance will be used to commit a crime cannot be held liable
    - If I pull over to help someone change a tire, and the car is the getaway vehicle for a bank robbery, I cant be liable for that.
- Critical – Don't confuse motive with intention
    - Section 21 is concerned solely with <u>the intention for the assistance</u> provided as opposed to the reason for this intention
    - *Hibbert*
        - where the accused aided another party who attempted to commit murder against a third individual

        - Accused argued he had only participated due to threats on his life, and didn't act with the purpose of aiding or abetting
        - SCC ruled that his motive may have been to save his or her own life, purpose and motive are not synonymous
        - Purpose in section 21(1)(b) means the same thing as intent
- So, he or she must **intend to assist the party**
    - **T**o avoid confusing it with motivation, they must know with substantial certainty that their actions are assisting the party in committing the offence
- In addition to the required intention, must be a second mental component: **knowledge**
    - Effectively, the person providing the assistance "must know that the perpetrator intends to commit the crime, although he or she need not know precisely how it will be committed"
    - Accused need only know the general details of the crime when providing assistance, as opposed to the particulars, is well accepted as a matter of Canadian law
    - Not necessary that the aider know that the act they are providing assistance for is legally a crime, so long as they know the circumstances necessary to constitute the offence in question
    - Must be knowledge OR its equivalent: wilful blindness
        - recklessness will not suffice
    - *Roach*
        - Accused charged with assisting in a fraud scheme. Defence was that he believed – in spite of considerable circumstances – that no one was being defrauded by the acts of the principal – in spite of considerable circumstances to the contrary
        - Judge instructed he could be convicted if he knew the enterprise was fraudulent or was reckless or wilfully blind to that issue.
        - Accused was convicted but overturned on appeal. **Grounds for intention did not include recklessness.**
        - More restrictive approach to *mens rea* was required for party liability
- IT is unclear whether the party need be aware of the consequences that may flow from such an act, unless this is a specific element of the crime for which the principal is being charged
    - *Kirkness*
        - Accused charged with murder by virtue of being a party to that offence. Accused broke into a house with another to steal, once inside, the other party sexually assaulted a woman and killed her. Kirkness had no idea this would happen.
        - Aiding or abetting murder requires the same requisite intent as the person actually doing the killing
            - **So, murder requires subjective foreseeability** of death from both principal and for party liability (*Martineau; Creighton*)
        - A person could be convicted as a party to **unlawful act manslaughter** where he or she knew that their assistance was being provided for an inherently dangerous act that was **objectively likely** to cause harm that was neither trivial nor transitory (*Creighton*)

- It is possible for the situation to have a person who actually kills has the *mens rea* for murder, but the party providing assistance is only guilty of a lesser offence (*Jackson*)
    - E.g., If a person only intends to aid or abet an offence that he or she thinks cannot result in harm, or is not harmful enough to result in death, then if death ensues, the person who actually kills may well be guilty of murder, but the aider or abettor, not having the mens rea for murder, would be guilty of manslaughter

COMMON INTENTION S 21(2)

- 21(2) Where two or more persons form an **intention in common** to carry out an **unlawful purpose** and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who **knew or ought to have known** that the commission of the offence would be a **probable consequence** of carrying out the common purpose is a party to that offence.

- While s 21(1) is concerned with offences intended, s 21(2) extends liability to offences that may not have been intended or desired
    - Section 21(1) deals with parties to the offence where one or more persons have the intention to aid or abet a person commit the offence in question
    - Section 21(2) deals with the situation where one or more persons intend to assist in the commission of one offence and a different offence is committed

- So, two elements to this crime:
    - 1. **Intention in common** to **carry out** an unlawful purpose and assist
        - Requirement is that two or more accused have the ***mens rea*** or knowledge and understanding of the unlawful act that is going to be committed
        - "Intention in common" means they "have in mind the same unlawful purpose", not that they have the same motive (*Hibbert*)
            - As in, must agree to the purpose. If one thinks defrauding and another thinks they are to rob, both are unlawful purposes, but neither is common to other
        - "Unlawful purpose"
            - If the unlawful purpose is the offence committed, then apply section 21(1)
            - Only where the unlawful purpose is different from the offence that section 21(2) can have any application
        - To assist each other therein
            - Not only carry out an unlawful purpose, but also to assist each other therein
            - What is not required is proof that the accused actually helped in carrying out the unlawful purpose. Requires common intention to assist, not the rendering of actual assistance.
    - 2. **Knew** [or should have known] **that the offence would be committed**
        - Square brackets because it imposes a form of objective fault/liability → problem w/ that is that for certain offences (like murder) objective foreseeability of death is constitutionally insufficient to ground liability (s7 of the Charter – some crimes have such high stigma that subjective awareness is required as a matter of proportionality)
            - So, for murder, treason, attempted murder, and war crimes the courts *read down* "should have known" and thus the person must have known (*Logan*)

- It is not a substitute for aiding and abetting, **it is used for cases where there a consequential offence is committed for which the accused did not aid or abet**
    - "… intended to provide liability in the case of consequential offences which were not committed nor aided or abetted by the accused, but which resulted from the prosecution of the original offence …" *(v Kirkness)*
    - Say A and B come up with a plan. A is accused. B carrying out that plan commits another offence. A did not commit that offence (in the sense of being a principal) nor did they aid or abet. Nevertheless, the offence flowed naturally from the plan.
    - Example – A and B agree to rob a bank (common intention!) During this, B commits a sexual assault. Is that a natural and probable consequence of robbing a bank? In most circumstances, no.
        - No knowledge it was going to happen. No reasonable person would think it would happen.

        - BUT replace it with ordinary assault and typically it will be viewed as a natural and probable consequence. Even though A did not plan to assault, or aid or abet the assault, the question is – is it conceivable that B will assault someone?
    - On the other hand, if while bank robbery is ongoing and A comes up and says "I need that bat because this bank teller is not listening" → clearly abetting, so no need to look at common intention

- Where culpability is based on section 21(2) there is no participation in the act that renders the principal guilty but rather knowledge that another would commit the act arising from an agreement to a common unlawful purpose.
    - Accused can be charged under 21(1) or (2) depending on whether the evidence discloses that the offence was intended by the accused or was a probable consequence even if not intended

ABANDONMENT DEFENCE

- Not a discrete defence it just negates the MR for aiding or abetting (21)(1)(b/c) OR for common intention (21)(2)
    - Most commonly invoked for 21(2) because it is difficult to abandon a criminal enterprise AFTER already aiding or abetting.
- Re: s 21(2) It may well be that although a person forms a common intention to carry out an unlawful purpose, he or she may decide not to go through with it

- *Gauthier* 2013 SCC – **abandonment**
    - SCC accepted that a defence of abandonment where:
        - (1) **Intention to abandon** or withdraw from the unlawful purpose
        - (2) that there was **timely communication** of this abandonment or withdrawal from the person in question to those who wished to continue
            - Must be communicated to the others involved! Not enough to have a change of heart.
        - (3) that the communication **served unequivocal notice upon those who wished to continue**; and
            - Cannot just exhibit cold feet. Must be very clear.
        - (4) that the accused took, in a manner proportional to his or her participation in the commission of the planned offence, **reasonable steps in the circumstances either to neutralize or otherwise cancel out the effects of his or her participation** or to prevent the commission of the offence.
- More difficult to extend to s21(1)
    - "**Aiders and abettors generally do much more than promise their support** in carrying out an unlawful purpose in the future. They perform concrete acts to aid the principal offender to commit the offence or to abet him or her in committing it. Their criminal liability and their moral culpability are proportional to these acts and stem from the fact that they have performed them. Thus, merely communicating in unequivocal terms their intention to cease participating...will not be enough "to break the chain of causation and responsibility" (*Gauthier*)
        - So, if someone has actually aided or abetted, if they have committed concrete acts, the defence will not save them – even if they try to take steps.
            - BUT if they have only hatched a plan and agreed to assist, then provided they have met the first three criteria and then do the fourth – then this may negate whatever they have done to date
- TopHat Problem
    - Boris' accomplice says "guard the door while I rob the bank. Do not worry it is a toy gun". Assume accomplice robs then kills someone.
        - What can Boris be guilty of? Murder, manslaughter, robbery? Or all?
            - Robbery only because all Boris knows is that there is a plan to rob.
            - Do most robbery's end up in a death? No. They are dangerous and serious, threat of violence but vast majority of cases, nobody is hurt.

        - For murder would have required subjective awareness someone would die
        - For manslaughter would require a reasonable person would think death or non-trivial bodily harm would occur – but why would they if most cases have no deaths?
    - This time, accomplice says "if anyone gives me any guff, I am gonna kill them"
        - What can Boris be guilty of?
            - Just murder and robbery (not manslaughter)
            - Not manslaughter because that would arise in a case where Boris was not aware of the possibility that someone would die. But it is clear subjective awareness of a possibility of death and that is enough to ground someone for murder.
            - S7 only requires reckless w/ respect to death
                - **In other words, can have liability for murder on a lower standard of subjective fault than required for murder as a principal**
    - Let's imagine Boris is aware his friend has a lengthy criminal record of violent crimes (inc. shooting people) and aware his accomplice is carrying a real loaded firearm. Boris says to himself "but he promises he wouldn't kill anyone this time. And I believe him"
        - May say that is naive and stupid but take it at face value for now
        - After he agrees to guard the door, and accomplice kills, what can Boris be found guilty of?
            - Manslaughter
                - Boris does not have subjective awareness his friend was going to kill
                - Cannot convict of murder just because he should have known (remember it gets read down)
                - Only requires foreseeability of non-trivial bodily harm; doesn't require foreseeability of death, even if unintentional.

COUNSELLING

No video for first half. These are mostly Bergman's notes

- Criminal liability for a person who counsels can be imposed in two distinct ways:
    - (1) as a party to a criminal act under section 22, where the counselled person goes on to commit an offence; or (2) as a distinct offence under section 464 where no crime is actually committed.
        - Most are brought under 464, and will discuss in Inchoate Offending

- 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 who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.
- (2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.
- (3) For the purposes of this Act, "counsel" includes procure, solicit or **incite**.

- 22(3): for the purposes of the Act, counsel includes procure, solicit, or incite
    - *Cowan* principle: don't have to prove the specific identity or elements for the person who actually commits the offence, even though we talk about an offence being committed
        - "Although the jurisprudence setting out the elements of abetting refers to encouraging "the principal", intending to abet "the principal", and knowing that "the principal" intended to commit the offence, the Crown is not required to prove the identity of "the principal" or their specific role in the commission of the offence for party liability to attach" (*R v Cowan* 2021)
    - It's just a base line idea that for counselling there must have been an offence committed and you incited them to do so

ACTUS REUS of Counselling

- The actus reus…will be established **where the materials or statements** … **actively induce** or advocate — and do not merely describe — **the commission of an offence** (*Hamilton* 2005 SCC*)*
    - Nevertheless, something must be said or done by the ACC. Mere acquiescence does not amount to counselling.
- Person charged does not have to be the primary instigator and the person who was counselled and need not have initiated the plan
    - *Glubisz*
        - Accused was ensnared in an undercover operation by a police officer posing as a killer for hire. Discussions were recorded in which the police officer offered to kill the accused's wife for a fee, and the accused agreed.
        - Charged with counselling murder, but contended that he could not be convicted because he was a passive participant, at most agreeing to pay the officer to complete the act that the officer had proposed
        - BCCA disagreed, held that the objective of the legislation was to "discourage anyone from bringing about the commission of an offence", and that the **accused's agreement** to pay for his wife's death was **sufficient to constitute counselling**, even if the original plan had not been his.
- Final element of the actus reus requires that **whatever the accused counsels actually amount to an offence**
    - Possible for one person to counsel another to do an act that he or she does not think is an offence, but in fact is (Mistake of Law – not an excuse)
    - Counsel a person to do an act that he or she thinks is an offence but in fact is not (then no crime)
    - So, counsel to commit an offence means "counsel to do an act that is an offence"

MENS REA of Counselling

- "… it m**ust be shown that the accused either <u>intended</u> that the offence counselled be committed**, **<u>or</u>** knowingly counselled the commission of the offence while aware of the **<u>unjustified risk</u>** that the offence counselled was in fact likely to be committed as a result of the accused's conduct" (*Hamilton*)
        - This is the definition of recklessness
        - Residual concern that there are risks that are so small to society that we would not punish them the same way as worse offenders

- Where the basic elements are established, party liability under section 22(1) will be established if the recipient of the counselling "commits that offence... notwithstanding that the offence counselled was committed in a way different from that which was counselled"
    - If I counsel you to shoot someone, and you stab them – still guilty.
    - But, if I counsel you to break and enter and rob, but you commit sexual assault, liable for the break and enter/robbery but not the sexual assault. But liability may depend upon how precise the indictment is.

Distinguish between COUNSELLING from INCITEMENT

- They have very similar definitions, but there are subtle differences of what the conduct and fault requirements consist of. Two differences:
    - Incitement is not a form of party liability - it is a distinct offence with a lower punishment
        - Study it with forms of inchoate offences (incomplete)
        - Incitement **involves someone who encourages another to commit an offence, but that offence is never committed** (so there is no completed offence)
            - Akin to an attempt or conspiracy to commit an offence
    - Counselling is required to prove that the other person is afterwards a party to that offence
        - In a general way you have to prove that, as a result of your counselling, someone committed an offence

Counselling versus abetting

- Not much difference in sense that you can have same conduct being charged as either one
  - Both seem to be the encouragement of a commission of an offence
- The same conduct can be charged in many cases under either heading, and both are forms of party liability
  - Maybe could be alternative bases for liability
- In practice, we will charge with abetting when the accused is either present at the scene of the offence, or participated in the offence in a manner that is temporally quite proximate to the commission of the offence
- Counselling is usually charged when your counselling happens more in advance, and lets the other person commit the crime from a distance
  - But these are not hard and fast lines
- Counselling does not require actual participation or assistance to be rendered

- TopHat Problem
  - Harold and Kumar are thinking about robbing a jewellery store. They talk to Rose, who owns a pawn shop. She tells them that she will buy any stuff they steal, but only if it is from out of town. Harold asks his brother Fred if he can borrow his truck and some tools. Fred suspects that Harold might be up to no good and says "sure, but don't tell me what you need them for." As they park the vehicle, Harold tells Kumar that he can't go through with the robbery. Kumar tells him to "just wait and keep the motor running." Kumar breaks into a store (in Edmonton), assaults an employee, steals a tray of diamond rings, and escapes in the car.
  - Who you think is liable for what?
    - Kumar = Principle (theft and Assault)
    - Harold = theft (aiding and abetting) and assault (common intention)
    - Rose = Counselling OR not liable (for robbery)/ assault (not liable)
    - Fred = Robbery (aiding/abetting - willful blindness) and assault (not liable)

R v Cowan 2021 SCC

Ratio	•
Facts	• Two individuals robbed a Subway restaurant in Regina, Saskatchewan, on July 7, 2016. • One wore a mask and brandished a knife, while the other stood watch at the front door. The robbers made off with $400 and a coin dispenser. • Cowan charged as a party to the armed robbery in that he either abetted the commission of the offence under s. 21(1)(c) of the Criminal Code or counselled its commission under s. 22(1).
Issue	•
Held	•
Analysis	• Where, as here, an accused is being tried alone and there is evidence that more than one person participated in the commission of the offence, the Crown is not required to prove the identity of the other participant(s) or the precise part played by each in order to prove an accused's guilt as a party Abetting • The actus reus of abetting is doing something or omitting to do something that encourages the principal to commit the offence • As for the mens rea, it has two components: o intent and knowledge (para. 16). The abettor must have intended to abet the principal in the commission of the offence and known that the principal intended to commit the offence Counselling • The actus reus is the "deliberate encouragement or active inducement of the commission of a criminal offence" (*Hamilton*) o The person deliberately encouraged or actively induced by the counsellor must also actually participate in the offence.

	• for the mens rea, the counsellor must have "either intended that the offence counselled be committed, or knowingly counselled the commission of the offence while aware of the unjustified risk that the offence counselled was in fact likely to be committed as a result of the accused's conduct" (*Hamilton*). Application • The Crown was only required to prove that any one of the individuals encouraged by Mr. Cowan went on to participate in the offence either as a principal offender — in which case Mr. Cowan would be guilty as both an abettor and a counsellor — or as a party — in which case Mr. Cowan would be guilty as a counsellor.

R v Strathdee 2021 SCC

nalysis	• Any implication from *Cabrera* that joint/co-principal liability is automatically eliminated if the evidence demonstrates application of force by only a single perpetrator is not accurate. • **Joint/co-principal liability flows whenever two or more individuals come together with an intention to commit an offence, are present during the commission of the offence, and contribute to its commission**. • In the context of manslaughter, triers of fact should focus on whether an accused's actions were a significant contributing cause of death, rather than focusing on which perpetrator inflicted which wound or whether all of the wounds were caused by a single individual. • In the context of group assaults, absent a discrete or intervening event, the actions of all assailants can constitute a significant contributing cause to all injuries sustained. Properly read, the discussion of party liability in R. v. Pickton, 2010 SCC 32, [2010] 2 S.C.R. 198, is fully consistent with the foregoing.

MENTAL DISORDER

- The defence of mental disorder is concerned with an accused person's mental capacity to commit a criminal act.
- NCR - Not criminally responsible

- **Criminal responsibility** is appropriate only where the actor is a **discerning moral agent**, capable of making choices between right and wrong (*R v Chaulk,* 1990 SCC)
    - If we take a way the capacity to make autonomous choices, then the justification for criminal punishment goes away
        - There is no social utility of deterrence
        - And they can't be criminally culpable
    - "Punishing a person for violating the law only makes sense if that person were capable of understanding and choosing whether or not to obey the law. We do not punish a person for making a wrong choice if he or she could not make a choice or could not understand the choices to be made. We do not punish a person for his or her acts if the person could not understand what was done or could not understand that what was done was wrong" (*Cowan)*

- Difficult **balancing act between respect for the needs of the mentally disordered and those of the wider public**.
- The mental disorder defence captures only a slice of those instances where we might accept there was an inability to choose
    - And we only intercept at the punishment level - not necessarily their liberty
- For the most part if you aren't suffering from serious delusions, you won't meet the NCR designation
    - Mostly covers cases where there is a Schizophrenic-like diagnosis
    - Example issue of FASD

- Prevalent in Indigenous communities. Major issue in criminal justice system because those with severe forms of FASD have severe deficits and thus more involved in criminal offences. Very difficult to treat. Nothing seems effective. Permanent feature although some ways to manage to potentially help.
- Ability to make a rational choice is severely compromised – is that really different from someone suffering a delusion?
    - If truly incapable of choosing not to do wrong. Should we hold them criminally responsible? Penney argues in some rare cases when incomplete or near incomplete can be concluded they should be placed within s 16

MENTAL DISORDER ELEMENTS

- 16(1) No person is criminally responsible for an act committed…while suffering from a **mental disorder** that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.
- 16 (2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.

Disease of the mind

- Legal definition of disease of the mind:
    - "**Disease of the mi**nd embraces **any illness, disorder, or abnormal condition** which impairs the human mind and its functioning…" (*Cooper*, 1980 SCC; *Cowan*)
        - This is an incredibly broad (at least at first instance) and pragmatic legal definition
        - It isn't difficult to establish the accused had a disease of the mind because almost anyone who is not capable of knowing what they're doing, or that they didn't understand what they were doing was wrong, would be able to meet this definition
        - There are almost 0 NCR cases where the accused loses on the definition of disease of the mind
    - "… **excluding** however, self-induced states caused by **alcohol or dr**ugs as well as transitory states such as **hysteria or concussion**"
        - So, disease of the mind does not apply where there is evidence that the incapacity was caused either by drugs (inc alcohol) OR some other transitory state whereby you have a temporary one-off form of incapacity (such as a concussion or automatism)
        - Barring these exceptions, the definition of NCR will be easy to meet
- In cases of true NCR cases, the evidence is usually crystal clear
    - The Crown is unlikely to seriously challenge this in cases where it is obvious where the accused suffers from a condition
    - They won't oppose the NCR designation, but they also won't stand up to support it
    - The key tell is if the Crown is not opposing it, and you can tell they're not fighting it, it's game over - NCR will win
- How to prove NCR?
    - Need an evidentiary basis – usually expert evidence
        - This is not a medical definition - it is a legal one

- **SUMMARY**
    - 1. Mental disorder/disease of the mind **AND**
    - 2. Incapable of ONE of the following
        - Appreciating nature & Quality of act **OR**
        - Knowing that it was wrong

- There are many cases where the accused knew what they were doing, but didn't know that it was wrong on moral social norms
    - So, some jurisdictions have removed the "appreciating nature" and just focused on "knowing it was wrong"

Appreciating

- So, once we have shown there is a disease of the mind the accused then must prove on a BoP they did not appreciate the nature and quality of the act OR know it was wrong

- S. 16 (1) **No person is criminally responsible** for an act committed…while suffering from a mental disorder that rendered the person **incapable of appreciating the nature and quality** of the act or omission **<u>or</u>** of **knowing that it was wrong.**
    - Accused has to prove this on a balance of probabilities

- Nature and quality of Act?
    - Ex knifing example
    - Case where Crown argued accused should be found guilty because he knew he was picking up a knife and thrusting it into the body of someone
    - Defence argued that he had no appreciation to understand that this could cause harm - that it could cause consequences. Yes, he knew it was a knife and human but no idea it's consequences.
    - Nature and quality of the act = understanding that your act has consequences akin to the operating mind test
- *Longridge* (more below)
    - There was understanding of basic consequences, but raises the question: what does it mean to understand something was wrong?
    - Long history of mental illness by the mum - this came to a head when she stabbed her daughter to death
    - "On the evidence, she was in the grip of the delusions that she had expressed the day before and years before. Her delusions tore her from ordinary moral understanding. She acted to achieve the moral goal of protecting the Messiah. The inserted thoughts raised a terrifying cacophony in her mind. Her <u>capacity to know what was morally wrong was utterly degraded</u>."
    - She knew that her actions would cause the death of her daughter, and she desired that death - so she would fail on the first NCR prong (appreciating nature & quality of the act)

<u>LEGALLY v MORALLY WRONG</u>

- It is not sufficient for the crown to say that it was legally wrong - that's not enough to justify a conviction
- When we say **morally wrong**, what we mean is a **subjective appreciation that what you are doing would violate the ordinary norms of society**
    - It is a subjective inquiry into the accused's understanding about whether ordinary people in society would condemn the accused's conduct - whether other people would find the accused's conduct immoral
- If you look at your actions, and you characterise them as a normative matter - you're saying that you're prescribing a normative assessment to your actions, even though others would condemn you and you know this - then you would not qualify for NCR
    - Because it shows you know what the norms are and choose to ignore them
    - Try and imagine yourself as he accused - imagine that the delusions represent reality
    - And the fate of the world depends on you acting in the moment
    - You think that, in this altered reality, you have saved society. You will be hailed a hero.
    - If you are acting righteously and believes others would too if they could see through your eyes, then LACK CAPACITY TO KNOW YOUR ACT IS WRONG

- TopHat Problem

- Donald suffers from a mental disorder that causes him to believe that the ordinary moral norms applying to other lesser humans do not apply to him. He therefore genuinely believes that it is acceptable to kill whoever displeases him. He does not believe that such actions are acceptable for other, lesser humans. Dopes Donald had a mental disorder defence?
  - No, bc he understands both the consequences of his actions and the difference b/w right and wrong. He judges himself to be morally acceptable even though he knows other will believe it is morally culpable.
  - **That is the key: if you look at your own actions and find own actions acceptable but know others will disagree → does not meet NCR.**

- ""Moral wrong" is not to be judged by the personal standards of the offender but by **HIS AWARENESS** that society regards the act as wrong" (*Schwartz* 1977 SCC)
  - So, the question really seems to be - if the delusion was real, would society thank you for your action?
  - If society could see what you see - now that society can see the "truth", would they look back and still judge you as acting morally wrong?
  - Would we find they acted justifiably if their delusion was real?

- *Dobson*:
  - "… an **accused who**, through the distorted lens of his mental illness, **sees his conduct as justified,** not only according to his own view, but also according to the norms of society, **lacks the capacity to know that his act is wrong**"
    - The accused suffered a delusion,
    - Knew his actions were *legally* wrong but believed he was justified
    - But he couldn't prove that he knew his acts were morally wrong on a balance of probabilities
    - He had some sense that society would view his acts as wrong, even if society viewed his action from his own worldview
- TopHat Problem
  - H believes that J was an alien from Pluto to kill her. She killed him to defend herself. She knew that killing is wrong and knew that most would not believe that J was an alien. She believed she was one of only a very few humans w/ the ability to detect their presence. Could she be found NCR?
    - Yes.
    - She knows subjectively society will view actions as wrongful. Crown would argue she had an ability to choose then.
    - BUT s 16 is about whether she really has a rational choice?
      - In the Donald problem, he did he just did not care about others. He thought they were lesser.
      - Here H is aware but thinks people just cannot see what she sees.
    - Now that society understands the "truth" would society judge me? No, the veil of ignorance dissipated would then see H as a hero who acted in self-defence.
  - Separate those who have delusions that give them an altered sense of morality versus reality (H is in the latter, Donald is in the former)

- ALTERED MORALITY
  - Someone suffers from mental condition that alters normal functioning, that leads them to believe the ordinary rules of society don't apply to them
  - They know the empirical reality of the world - but believe that doesn't apply to them
  - Because they believe they're on a higher plane of reality, or have achieved some superior protection
  - Cases such as this, where there is an altered sense of morality (rather than reality) are unlikely to lead to a finding of NCR

Who can raise the issue (& when?) (*Swain*)

- Everyone is presumed not to suffer from a mental disorder
- Defence:
  - Anytime before the verdict
  - Though usually raised at the start
  - On a BoP – more likely than not that they meet the conditions of 16(1)
- Prosecution:
  - 1. In a case when the accused has been found guilty but before conviction entered
    - Where just being found guilty might not be sufficient to protect the public interest
    - Especially where the time served under a guilty ruling would be less than under the NCR and there is a concern about the public interest
    - This can happen ONLY after the accused has been found guilty and BEFORE the conviction is entered
    - Then Crown can ask a claim for NCR - assuming there is evidence for that
  - 2. Where the defence wants to get an acquittal, but there are some obvious mental capacity issues (and don't want NCR) that they want to use to raise a MR issue
    - But employing that strategy can open the door for the Crown to raise the issue of NCR
    - So: Crown can raise it when the accused raises the issue of mental CAPACITY
  - But if neither of these conditions are present, then the Crown cannot introduce NCR issue into the proceedings

Consequences

- Does not amount to a conviction or acquittal → 672.54 - Court of Review Board (usually this option) will review the case and decide whether the person should be kept on secure institution, released on conditions, or unconditionally discharged
  - 672.54 When a court or Review Board makes a disposition … it shall, taking into account the **safety of the public**, which is the **paramount consideration**, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is necessary and appropriate in the circumstances:
    - So, consider
      - Safety of the public (paramount consideration)
      - Mental condition of the accused
      - Reintegration of the accused into society
      - Needs of the accused
- Want to give the NCR the most freedom possible
- Where the above considerations do not rise to a threat to the safety of the public, then the accused must be DISCHARGED ABSOLUTELY
- Order of NCR can lead to different outcomes for the accused
  - Freedom
  - Hospital
  - Mental institute
  - Etc.
- Ex. Greyhound bus case
  - Mr. Vince Li (Will Baker) beheaded his neighbour and started to eat him
  - He was eventually released unconditionally

R v Longridge 2018 ABQB

Ratio	• ACC suffered a disease of the mind and that prevented her from understanding that her actions were morally wrong (second branch of test). Successful NCR defence.
Facts	• Longridge killed her daughter Rachael in the family home.

	• According to the autopsy report, Rachel's death was the result of multiple sharp force injuries. The injuries were caused by a knife. • Agreed facts establish BRD that Ms. Longridge caused the death of Rachael. • Long history of mental illness by the mom. She becomes convinced her son is the messiah, and that to save him and the rest of the world she has to kill her daughter and herself.
Issue	• Whether NCR (s 16(1)) applies?
Held	• On a balance of probabilities, at the time Longridge caused Rachael's death, she was suffering from a mental disorder that rendered her incapable of knowing her actions were wrong.

Analysis	Subsection 16(1) and the NCR Verdict
	• If an accused proves that he/she met the conditions of s.16(1) at the time of the act, the verdict is that the accused is "not criminally responsible on account of mental disorder."
	  ○ Note: this is a different verdict than an acquittal and conviction.
	• Ms. Longridge bears burden of proving that s. 16(1) applies to her. Ms. Longridge must establish on a balance of probabilities that at the time of her attack on Rachael
	  ○ she suffered from (1) **mental disorder** and
	  ○ that the mental disorder either
	  ▪ (2) **rendered her incapable of appreciating the nature and quality of her** act, **<u>or</u>**
	  ▪ (3) the mental disorder **rendered her incapable of knowing her act was wrong**
	Mental Disorder
	• Whether a condition is characterized as a "disease of the mind" is a question of law decided by a judge, but the determination is based on medical, psychological evidence, etc.
	  ○ A psychologist may consider a condition a disease of the mind, but the law will not
	• Disease of the mind includes **any illness, disorder or abnormal condition that impairs a person's mind and its functioning**. Does **<u>not</u>** include states that an accused has created by voluntarily drinking alcohol or taking drugs.
	• SCC has taken a more holistic approach as to whether the accused suffered from disease of the mind. Considerations: whether conduct was internally caused, whether accused poses continuing risk of danger to others, and whether policy factors count against classifying the accused's condition as a disease of the mind
	
	Evidence
	• Two expert witnesses provided information regarding the mental condition of Ms. Longridge. They relied on similar sets of information
	• Each concluded that Ms. Longridge suffered from a major intellectual disorder: bipolar 1 (with psychotic features)
	• The bipolar aspect of Ms. Longridge's disorder was an "affective" disorder. It manifested in manic behaviour, flight of ideas, decreased need for sleep, and grandiosity. The psychotic aspect of Longridge's disorder detached her from objective reality. Manifests in hallucinations, or perceptions inconsistent with objective reality.
	
	Incapacity to Appreciate the Nature and Quality of Her Acts
	• First branch: Under s. 16(1), "No person is criminally responsible for an act committed... while suffering from a mental disorder **that rendered the person incapable of appreciating the nature and quality of the** act..."
	  ○ "Appreciating" an act requires an understanding of the nature of what is done by the physical act and an understanding of the consequences of the physical act.
	  ○ The true test: was the accused person at the very time of the offence, by reason of disease of the mind, unable to fully appreciate not only the nature of the act but the natural consequences that would flow from it? In other words, was the accused person, by reason of disease of the mind, deprived of the mental capacity to foresee and measure the consequences of the act?

	▪ The legally relevant time is the time when the act was committed... ○ The word "appreciates", imports an additional requirement to mere knowledge of the physical quality of the act. The requirement is that of perception, 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 (i.e., choking) without necessarily having the capacity to appreciate that, in nature and quality, that act will result in the death of a human being... • Held: Longridge's mental disorder did not prevent her from appreciating that her acts would result in Rachael's death. She intended to kill. She appreciated the physical consequences of her acts. This was admitted. Incapacity to Know Her Acts Were Wrong • Second branch: under s. 16(1): "No person is criminally responsible... knowing that it was wrong" ○ Longridge's delusions were the direct consequence of her mental disorder (world ending, had to save son) ○ Longridge believed she had the moral authority to kill her daughter. Delusions had substantial effect on her understanding the morality of her acts ○ Knowing that she was going to be punished could be circumstantial evidence that she knew what she did was legally wrong – which could be evidence that she knew what she did was morally wrong ○ If the evidence only showed that Longridge knew that her acts were legally wrong, that would not rebut the application of s. 16(1). Under s. 16(1) the question is whether the accused could know that his or her acts were morally wrong, not legally wrong. Knowledge of the legal wrong could be circumstantial evidence of knowledge of the moral wrong. • Moral wrong → she showed remorse which could tell us that she knew what she did was morally wrong. However, she was fluctuating in and out of lucidity and delusion.

R v Dobson 2018 ONCA

Ratio	• An accused who has the capacity to know that society regards his actions as morally wrong and proceeds to commit those acts cannot be said to lack the capacity to know right from wrong. • He is not NCR, even if he believed that he had no choice but to act, or that his acts were justified.
Facts	• The appellant killed his two friends and tried to kill himself. He was charged with two counts of first degree murder. • trial proceeded before a judge alone. The appellant advanced a not criminally responsible on account of mental disorder ("NCR") defence. • The defence argued that the appellant suffered from a mental disorder that rendered him incapable of knowing that it was wrong, in the circumstances, to kill his two friends.
Issue	• Did the trial judge err in his interpretation of "knowing that it was wrong" in s. 16(1)?
Held	• Appeal dismissed. No NCR.
Analysis	• Step 3 of s.16 – experts agreed that ACC was capable of appreciating the nature and quality of the acts. ○ Experts disagreed on step 4 – ACC knew that when he killed his friends that his actions were legally wrong, but they disagreed on whether he knew they were morally wrong • Applied the rule from *Oommen*: ○ ACC who has capacity to know that society regards his actions as morally wrong and proceeds to commit those acts cannot be said to lack the capacity to know right from wrong • Thus, not NCR, even if he believed that he had no choice but to act or that his acts were justified • However, ACC who, through the distorted lens of his mental illness, sees his conduct as justified, not only according to his own view, but also according to the norms of society, lacks the capacity to know that his act is wrong

	• ACC who, on account of mental disorder, lacks the capacity to assess the wrongness of his conduct against societal norms lacks the capacity to know his act is wrong and is entitled to NCR defence

Irresistible Impulse

- Committing an illegal act while under mental pressure defined as an "irresistible impulse" does not constitute a defence
    - "The law says to men who say they are afflicted with irresistible impulses: "If you cannot resist an impulse in any other way, we will hang a rope in front of your eyes, and perhaps that will help" (*Creighton*)
    - A mental disorder that produces an irresistible impulse in the accused will not provide the basis for a successful section 16 defence.
- Policy Question: Is it appropriate to deny those who suffer from irresistible impulses a section 16 defence in cases where their illness does not deprive them of appreciating the nature and quality of their acts or knowing what they did was wrong
    - Arguable that these people have no control over their actions and any resulting conduct is as "morally involuntary" as a person acting under duress
        - When this leads to violence, good reason to confine them to a hospital as opposed to a prison to receive treatment
    - Other side, trying to distinguish between impulses that are "irresistible" and other forms of compulsion – say addiction – would prove troublesome.
    - BUT scientific research has suggested that limiting the defence is not only possible, but realistic. Great progress made in ascertaining the nature of impulsivity.
        - Defence could be "a total inability to exert control in the circumstances"

Fitness to Stand Trial

- What to do when someone is suffering from a mental disorder so severe that it negates their ability to participate in their trial?
    - Not hold a trial (s 672.22 to 672.33)
- Presumption an accused is fit to stand trial, unless on a BoP shows he or she is unfit. Likely know before trial might be an issue.
    - Capacity here is not interpreted as "fully functioning capacity"
    - Section 2 provides that a person is unfit to stand trial if he or she is unable to **understand the nature, object or consequences of the proceedings** against them, unable to instruct counsel, or unable to intelligently present a defence → high threshold
        - *Taylor*
            - ONCA held that the fitness threshold would be surpassed where the accused had sufficient cognitive capacity to have a rudimentary understanding of the judicial process.
            - Not necessary to show that the accused is capable of making choices that relate to his or her defence, so long as he or she had a basic ability to communicate with counsel, some limited understanding of what the proceedings were about and what the consequences of the proceeding are.
            - No real degree of analytical ability or appreciate what was in his or her best interest
        - *Jobb*
            - Accused suffered from fetal alcohol spectrum disorder and had cognitive deficiencies that gave him the intellectual abilities of a child
            - Extremely poor memory and was "easily led"
            - SKCA said fitness assessment limited "to an inquiry into whether an accused can recount to his or her counsel the necessary facts relating to the offence in such a way that counsel can then properly present a defence
    - Sankoff concerns – focus on understanding and a basic ability to communicate <u>ignores the critical element of every person's right to make fundamental decisions relating to their own interests</u>.

        - This "result obligates counsel to keep informed and consult with an accused who has no more than a rudimentary understanding of the process and can only recite basic facts, but cannot meaningfully participate in the process"
        - The capacity to make rational decisions should be an important component in any fitness assessment. Does not mean that an accused who makes irrational decisions must be considered unfit, but at the very least they should have the potential to make decisions on matters of substance in the proceeding.
- 672.33 requires an inquiry to be held every 2 years to ensure that the prosecution can still put forth a sufficient *prima facie* case. Where the court is not convinced that there remains a strong enough case to warrant a trial, accused must be acquitted immediately.

MENTAL DISORDER + INTOXICATION

- Factors to consider - temporary (intoxication) vs permanent (MD); triggering presumption; "normal person" standard

Bouchard-Lebrun:

- Facts:
    - ACC committed severe assaults that took place while in a "psychotic state" by virtue of drugs he had consumed earlier in the evening. ACC was barred from raising intoxication as a defence (aggravated assault is a general intent offence and s.33.1 barred any claim of automatism) but he contended that he had been suffering from a mental illness (toxic psychosis) brought on by drugs he had consumed
    - Called expert evidence stating that toxic psychosis was an abnormal effect of intoxication brought on by his particularly vulnerable mental state – better construed as a mental disorder and not an intoxicated state.

Analysis

- Cases involving mental disorder and intoxication **best considered by finding the source of the mental condition** that deprived the accused of the relevant actus reus or mens rea
    - Strong presumption: In cases where mental condition caused by alcohol or drugs, then treat as intoxication, even if reaction is unusual
    - This result stemmed from the fact that a section 16 defence led to a verdict of NCR, not an acquittal.
        - This triggers an administrative process whose purpose is to determine whether the accused is a significant threat
        - Where an ACC is otherwise "normal" makes no sense to characterize the accused as suffering from a mental disorder

- Permanent v. temporary
    - Long-term effects of drugs or combination of drugs/alcohol. Brain degeneration from alcoholism. Can become permanent deficits in cognitive function.
        - If you can point to a condition or lack of normal functioning in someone's brain [from long-term drug/alcohol abuse] and state it is long-term (not episodic form of intoxication) → now suffer from a mental disorder under s 16
    - Temporary intoxication → fall under intoxication rules and NOT mental disorder

- Ask what was the trigger (presumption)?
    - Presumption is if you take a substance knowing to have behaviour altering qualities then court will presume the cause of the altered functioning is from the substance NOT a mental disorder
    - Have to rebut this presumption to run a s 16 defence

- "Normal person" standard
    - Would a normal person have the same reaction to taking the drug that the accused did?

        - If a normal person *might* have also reacted in a similar way mental condition → not a disease of the mind → no NCR
        - If this could NEVER happen to a normal person → then the accused *might* have a mental disorder
            - Courts reluctant to give an NCR defence when drugs/alcohol involved

- Problems with this approach?
    - Conviction without culpability?
        - If say this will only be resolved in most cases based on the intoxication rule, then can have someone convicted (because they would not have a defence under intoxication rules) and yet conduct not particularly culpable
        - Took a substance that ordinarily does not have a profound effect and generally viewed as safe
        - But from weird circumstance they end up committing a serious crime (maybe it mixed with underlying condition, mental state, or was some freak abnormality) even though they had no rational choice
    - Acquittal without public protection?
        - If decide based on intoxication rules, the person was intoxicated and then entitled to an acquittal – might be left w/ a situation it would have been preferable to deal with it as a s16 NCR case on a public policy basis
        - Because although we believe the person should not be punished or is not morally responsible yet what happened is troubling and concerned it could happen again
        - If just acquit – there is a risk it could happen again. Yet, there is no mechanism to oversee the individual – have been acquitted. No restrictions at all then.
    -

Different view was reached in *Turcotte*:

- Facts: Accused charged with murder of his two children. Tried to commit suicide by drinking washer fluid, made him extremely intoxicated, in the drunken haze he killed his children.
- Question was whether the intoxication played a role in the killing, and precluded the accused from raising a mental disorder offence
    - QCCA held that it did not – recognized that section 33.1 normally governed cases of this kind, a conclusion that the accused was intoxicated at the time of the killings did not terminate the analysis.
    - **Section 16 could still be in play if there was some reason to believe that the accused's mental state would have been the same despite the impairment brought on by alcohol.**
        - Up to the defence to show that it was the disease of the mind that caused the accused's incapacity, as opposed to the intoxication

AUTOMATISM

- Does a person who sleepwalks and kills while unconscious commit murder? Has a person who is stunned by a blow to the head and unconsciously strikes out at someone committed a volitional act? How should we address "dissociative" states that do not qualify as a "disease of the mind" for the purposes of s 16?

- Definition of **automatism**: "… a state of **impaired consciousness** … in which an individual, though capable of action, **has no voluntary control** over that action." (*Stone*)

- *Rabey*: The Court unanimously agreed that automatism was a concept recognized at law, and that an accused who committed an offence while in such a state generally warranted an acquittal.

- "Although spoken of as a 'defence', [automatism] is conceptually a sub-set of the voluntariness requirement, which in turn is part of the actus reus component of criminal liability" (*Parks*)
    - The defence of automatism really "amounts to a claim that one's actions were not voluntary" (*Stone*)

R v Parks 1992 SCC

Ratio	• Sleepwalking does not stem from a disease of the mind. Automatism defence allowed (unlikely now)

Facts	• Respondent attacked parents-in-law, killing the mother and seriously injuring the father. He droves 23km to their residence. He was sleepwalking. Immediately after the incident, respondent went to the nearby police station, again driving his own car.
	• Charged w/. first degree murder
	• At the trial, respondent presented a defence of automatism, stating that at the time the incidents took place he was sleepwalking. The respondent has always slept very deeply and has had trouble waking up.
	  ○ Almost killed himself while sleep walking as a child.
	  ○ Several members of his family suffer or have suffered from sleep problems such as sleepwalking, adult enuresis, nightmares and sleep talking.
	  ○ The year prior was very stressful for the respondent. He lost his job, and a court proceeding was launched against him after he was caught stealing money from his employer. He had a good relationship with in-laws

Issue	• Is sleepwalking a "disease of the mind" in the legal sense of the term and does it give rise to the defence of automatism.
Held	• Sombambulism not viewed as a mental disorder as a result ordinary rules of involuntariness applies and Parks was acquitted
Analysis	• there are no compelling policy factors that preclude a finding that the accused's condition was one of non insane automatism.
Notes	• Never overruled but if ruled today he would be found NCR (according to Penney) because at the time Automatism steps were not fleshed out and there was no external v internal approach to determining a mental disorder (comes later in *Stone)*

Distinguishing Automatism from Mental Disorder (reading #39)

- Classic example of physical involuntariness is where an accused's body is propelled by an external force into another, no issues here to find an acquittal (because the Crown would be unable to prove the element of *actus reus* – voluntary conduct)
- Matters become complicated when the involuntary behaviour stems from some physical or psychological attribute of the accused, where the behaviour is not so much propelled as *unwilled*.

- Where does section 16 end, and the defence of automatism begin?
  - If mental disorder within the requirements of section 16 is proven → NCR → will usually result in the person being detained in a mental facility
  - If automatism is successfully raised → result is the accused acquitted outright
  - Must consider the cunning accused with a perfectly valid NCR defence who would prefer to assert automatism and that the Crown failed to establish proof of the actus reus, as opposed to relying on s. 16
    - This would basically eliminate the defence of mental disorder
    - SO, courts have struggled to distinguish MD from Automatism
    - Particular problems arise when the automatism arises from a "dissociative" state, where some unexpected factor causes the accused to suddenly lose consciousness

R v Rabey 1977 ONCA (and SCC after)

Ratio	• If an ordinary person faced with ordinary stresses and disappointments of life would not have gone into a dissociative state, but the accused did → he was suffering from something "internal" to him that caused a malfunctioning of mental processes → disease of the mind (mental disorder automatism)

	• Automatism (w/ no s 16 implications) must demonstrate: ○ that the transitory state owed its origin to an external factor that would or could produce the same reaction in anyone and which was not dependent on any malfunctioning of the mental processes of the accused • However, the internal/external "test" is just one consideration since *Stone*
Facts	• Accused charged with causing bodily harm with intent to wound • Raised automatism as a complete defence on the ground that he was unconscious at the time of the assault. • Letter written by the victim caused him severe emotional shock and he entered a dissociative state. Hit victim with a rock and began choking her. • Medical evidence indicated that nothing mentally wrong with the accused beyond immaturity
Issue	• Can Rabey use the defence of automatism?
Held	• No. Must be something internal to Rubey to act in a disproportionate manner.
Analysis	ONCA distinguished valid cases of automatism from situations under s 16 • There is a "distinction be to be drawn… between a malfunctioning of the mind arising from some cause that is primarily internal to the accused… as opposed to a malfunctioning of the mind which is the transient effect produced by some specific external factor such as, for example concussion" • "Transient disturbances of consciousness due to certain specific external factors do not fall within the concept of disease of the mind." • If the accused was in a dissociative state, it had to be due to a disease of the mind (and hence constituted mental disorder automatism) ○ BECAUSE If an ordinary person faced with "the **ordinary stresses and disappointments** of life" **would not have gone into dissociative state**, but the accused did, **then it must have been because he was suffering from something "internal"** to him that caused a malfunctioning of the mental processes.

- Internal/External division has never been fully satisfactory from *Rabey*
  - Medical science generally accepts some extraordinary external occurrences, such as a blow to the head resulting in concussion, some physical state of shock producing a hysterical reaction, or inhalant of carbon monoxide
  - Capable of making the ordinary person go into a dissociative state
  - Many internal conditions such as epilepsy, hypoglycemia, stroke, brain tumour that would produce a dissociative state, and not be commonly viewed as a disease of the mind
  - Would it be a NCR defence or an automatism defence?
    - Depends on whether the condition is characterized by a transitory state brought upon by external factors, or as a malfunctioning of the mind due to a disease of the mind
  - Policy concerns clash with legal principles
    - Grossly inappropriate to label an epileptic or a diabetic as mentally disordered
    - On the other hand, unless something is done by way of treatment or control, while only transient during the attack, may become recurrent and accused may represent continuing danger.

- Two different theories for automatic behaviour:
  - the "**internal cause" theory** (above) and
  - the **continuing danger theory**
    - holds that any condition likely to present a recurring danger to the public should be treated as mental disorder
    - "**Recurrence is but one of a number of factors** to be considered in the policy phase of the disease of the mind inquiry. Moreover, the absence of a danger of recurrence will not automatically exclude the possibility of finding insanity." (*Burgess*)

Ratio	• Internal test and continuing danger theory are relevant but only a consideration, not binding • Where automatic behavior was said to stem from a psychological blow/trigger, the ACC' reaction must be assessed from the perspective of a similarly situated individual ○ Requires evidence of an **extremely shocking trigger** to establish a "normal person" may have reacted the same
Facts	• After receiving a fit of verbal abuse from his wife, accused felt a "whoosh" sensation, sending him into a state of automatism, during which he stabbed his wife 47 times.
Issue	•
Held	• Narrow majority of the SCC agreed to take the defence of automatism away from the jury

Analysis	• Held the "internal cause" test was no longer binding and whether the ACC suffered from automatism was a question of mixed fact and law to be determined from the evidence
	• Accepted that psychological shock could trigger the defence
	• Every other aspect of the decision narrowed the defence of automatism
	• Bastarache cited from the Canadian Psychiatric Association that stated from a medical perspective, <u>all automatism stems from mental disorder</u>. He began his reasons by taking "judicial notice that it will only be in rare cases that automatism is not caused by a mental disorder".
	• Only where the psychological blow producing a dissociative state is of such a nature and severe degree that it would cause the ordinary reasonable person to enter a dissociative state, such as seeing a member of one's family violently assaulted or one's child sexually abused, will it result in a complete acquittal. In other words, rarely.
	  ○ "claims of psychological blow automatism**, evidence of an extremely shocking trigger will be required** to establish that a normal person might have reacted to the trigger by entering an automatistic state, as the accused claims to have done."
	Burden of proof
	• Before *Stone*, there was an evidentiary onus upon the accused to assert the defence, and once satisfied, burden of proof shifted to the Crown to negate it beyond a reasonable doubt.
	• In Stone, Bastarache J held that such a defence should rest with the accused on a balance of probabilities.
	  ○ Why the change?
	  ▪ Perceived difficulty of disproving the defence
	  ▪ Same burden as claims of mental disorder automatism and intoxication-related automatism, and there is a value to creating a single legal approach
	  ▪ Automatism is "easily feigned and all knowledge of the occurrence rests w/ the accused"
	  ○ BUT (counter to majority argument)
	  ▪ Similar jurisdictions impose only an evidential burden on the accused
	  ▪ Increased change based on a vague fear that the defence would be too readily accepted by juries

- Burden of proof changed in *Stone* but Sankoff discusses concerns with this (p 12 of #39):
  - On the one hand there is no consensus on whether a person in an automatic state can engage in complex behaviours.
    - Majority of psychiatrists abhor the defence, with there being a general belief in the community that dissociative states are almost invariably the product of mental disorders
    - Overarching concern, that it leads to a complete acquittal.

- But there is a concern that full recognition of the defence, with the burden of proof on the Crown will lead to complex evidentiary battles with psychiatrists, with many of the issues too complex to be resolved by judges or juries.
    - Result would be reasonable doubt.
    - Possibly why the court limited access to this defence, and resort to it only in clear cases where the accused discharges the burden
- Objections to this approach as well concerning stigma
    - could stigmatize people suffering from one of these illnesses as having a mental disorder.
    - In *Taylor*, judge didn't like concept of treating cases involving epileptic seizures as the product of mental disorder automatism.
    - Treating these behaviours under section 16 ignore the fact that illnesses of this type operate in a very different manner from those involving a purely psychological cause, and may lead to NCR in situations where a conviction is warranted
        - So, where the accused is aware of his or her condition, and fails to take steps to avoid the danger, no reason he or she should not be liable for criminal negligence (if not the first time, then on subsequent occasions
            - Example of a diabetic who knows they have issues requiring them to eat and drink properly, fail to do so, and kills someone while in a dissociative state
                - May not be guilty of murder, but should be of criminal negligence
    - Therefore, one can avoid labelling as mentally disordered those that common sense would indicate are clearly not disordered, yet ensure they do not constitute a continuing danger immune from liability.
- No easy answer to this but one suggestion:
    - treating two types of non-mental disorder automatism in a separate manner.
        - Cases involving physical or neurological sources (epilepsy, diabetes etc) AND
        - Automatism caused by external causes
    - These could proceed in an ordinary manner, with the onus upon the Crown to prove BRD
    - Where the automatic behaviour is the product of the accused's own negligence, a charge premised on some form of criminal negligence may also be warranted
    - In contrast, cases of psychological blow automatism can be dealt with according to *Stone*, albeit with modifications to the extreme aspects of that test that have been criticized above.

R v Fontaine 2017 SKCA

Ratio	• Voluntariness and intention are two separate concepts ○ **Automatism refers to involuntary conduct** that is the product of a mental state in which the conscious mind is disassociated from the part of the mind that controls action. ○ "Disassociate state is the hallmark of automatism" • Reflexes, while involuntary, are treated differently → not counted as automatism (no dissociative state) AND as such does not require burden of proof to shift to the defence. The Crown must prove the act was voluntary.
Facts	• Accused struck his partner after she violently woke him from his sleep. He was charged with assault causing BH. • The Trial Judge said it was a "reflexive action" and acquitted. • The Crown appeals, on the basis that, as per *Stone*, the accused has the burden of proving he struck his partner involuntarily and it was required to call expert psychiatric evidence.
Issue	•
Held	• Appeal dismissed. *Stone* does not apply to situations where an action is involuntary because it was reflexive in nature.
Analysis	• Voluntariness and intention are separate concepts.

	○ The former is an aspect of the *actus reus* of an offence. ○ The latter involves the *mens rea* of the offence… • Read as a whole, the trial judge's decision is best seen as being based on a concept of voluntariness, rather than intention. ○ Notwithstanding that she sometimes used the word "intention" in her decision, the authorities relied on by the TJ deal with voluntariness and the heart of her analysis does as well. ○ E.g., "on the evidence that can be inferred, it was an automatic and unthinking response to being startled from sleep in an aggressive fashion" • Court proceeds on the assumption that the TJ concluded the accused **acted reflexively, and hence involuntarily**. *R v Stone* is the leading Canadian authority on the law of automatism • SCC held that in cases of automatism, the defence bears the burden of proving involuntariness on a balance of probabilities. To satisfy the burden, there **must** be an **assertion of involuntariness and confirming psychiatric evidence** ○ The Crown argues that that applies to *every* case of automatism ○ The court says they don't read *Stone* to have used automatism as a synonym for voluntariness. Circumstances involving reflex actions do not fall within the ambit of the approach prescribed in Stone. • Bastarache defined automatism as "A state of impaired consciousness... in which an individual, though capable of action, has no voluntary control over that action." It describes conditions that were underpinning *Stone* (psychological shock), *Parks* (somnambulism), and *Daviault* (extreme intoxication) ○ It does not describe involuntary acts such as reflexes ○ Further, concurring judge, La Forest, classified automatism as a "sub-set of voluntariness" • Underlying policy rationale for treating dissociative states where accused does not know what he/she is doing different than involuntary actions that are a result of reflex. ○ As noted in *Stone*, automatism raises a number of concerns: ▪ Easily feigned because knowledge of it rests with the accused ▪ The nature of dissociative states that result from drugs, psychological blows, and somnambulism are beyond the ordinary experience of judge or jury → accused who relies of the defence must call expert psychiatric evidence and carry the burden of proving it. ▪ The same concerns are not present with reflex actions. ▪ Common part of human experience. Can be ordinarily understood and evaluated by judges and juries without assistance from expert testimony.

R v Ghiorghita 2019 BCCA

Ratio	•
Facts	• G's marriage was unstable. His wife began a romantic affair with a co-worker. G confronted his wife about the affair and she eventually admitted. They sent their son away so the two could work on their relationship. Upon the son leaving, the relationship soured, and G's wife asked him to sleep in a separate bed. G hacked his wife's emails and tracked her via GPS, found she was still having an affair. • On July 15, G's wife asked him to pick up some clothes and shoes she needed for her vacation. G knew that the vacation was with her lover. G was very stressed. • That morning, G shot his wife 8 times. He testified that he had very little memory around the event. He had some memory of taking the gun from the gun safe, and the sounds of screaming. He went to the RCMP shortly after and said he shot his wife.

Issue	• Is the law set out in *Stone* consistent with the current state of medical evidence, and that this should be reflected in the legal analysis of involuntary acts caused by dissociation?
Held	• Appeal dismissed.

Analysis	• *Stone*: Court provided guidance for TJs in formulating jury instructions in the case of automatism. It concerns reviewing two key policy considerations:
	  ○ (1) Is the potential that the accused could have been feigning automatism
	  ○ (2) Is the risk of harm to the administration of justice if people commit a violent crime are acquitted on the basis of automatism.
	• *Stone*: Look to:
	  ○ Severity of the triggering event,
	  ○ whether there was corroborating evidence of bystanders,
	  ○ whether the accused has a documented history of dissociative events,
	  ○ whether there is motive for the crime.
	  ○ Whether the alleged trigger of the automatism was also a victim of the violence
	• The Stone factors remain logically relevant, considered in the context of the expert evidence in this case
	
	• G takes issue with the factors to be present during an automatistic state – cumulative rather than sudden trigger, motive, and the victim being the trigger – these factors are hallmarks of voluntary criminal conduct, readily identifiable through the lens of judicial experience
	  ○ The absence increases the plausibility that a non-voluntary mechanism was at play since the behaviour would not resemble otherwise explicable criminal behaviour
	  ○ Conversely, their presence makes the conduct more difficult to distinguish from ordinary criminal behaviour, thereby rending it more difficult for ACC to meet the burden of establishing automatism
	• Doctors acknowledged the difficulty in distinguishing the difference between an anger-driven killing from a killing as a result of a dissociative state created by suppressed anger.
	
	• Factors in Stone were not meant to be rigidly applied, nor did the TJ apply them in such a manner.
	  ○ Not one factor is determinative, factors are to be weighed along with evidence.
	
	• Here: Wife's infidelity provided G with a motive.
	  ○ He took the necessary steps to carry out the criminal act (locating firearm, finding her After sending email). TJ found the sequence of activities weighed against the finding of an involuntary act in a state of automatism.

Summary of Automatism Steps

- Automatism → unconscious, involuntary behaviour, the state of a person who, although capable of action is not conscious of what he is doing.

1. Did the ACC act involuntary? (*Stone; Ghiorghita)*
   - Question of fact
   - Evidentiary burden / reverse onus
     - Evidentiary burden on the ACC to show not only an air of reality to this defence but also a reverse onus – have to prove you acted involuntary on a BoP
   - Consider
     - Severity of triggering event
     - Whether there was corroborating evidence of bystanders
       - In *Parks* – police saw ACC and his state

- Whether the accused has a documented history of dissociative events,
  - *Parks* – sleepwalking history; family who sleepwalk
- Whether there is motive for the crime.
  - If there is a motive, court will approach the claim with skepticism
  - *Parks* – warm loving relationship w/ in-laws. Surviving father in-law supported him even after his wife was murdered.
- Whether the alleged trigger of the automatism was also a victim of the violence
  - If the victim was the "trigger", the claim is viewed as suspicious
  - *Ghiorghita* – Suspicious when alleged trigger is dissociation. ACC claimed act occurred while in dissociative state; but it was plausible it was just uncontrolled rage.
  - *Parks* – no trigger from victims. In own home prior to acts.

2. Was the automatism a result of mental disorder or not? (Assuming we met the burden that the accused didn't know what they were doing) *Stone; Ghiorghita)*
   - Question of fact
   - Courts must determine whether the defence is to be one of mental disorder or non-mental disorder automatism because the result is different
     - If the cause is a disease of the mind → only NCR is available as a defence via section 16.
     - If not a mental disorder → acquittal
   - **Presumption that the cause was a mental disorder** (*Stone* came after *Parks)*
     - That you enter into a dissociative state presumes there is a disorder
     - Can be rebutted
   - The "holistic" approach (rebuts presumption) (*Stone)*
     - External v. internal cause (*Rabey)*
       - Just a factor to consider – not determinative
       - External: something that might cause an ordinary person to enter a dissociative state
         - Must be something "extremely shocking" to amount to a psychological blow
       - Internal: something that would *not* cause the ordinary person to react in the same manner → disease of the mind
       - Ask: would the shock cause an **ordinary person** to enter a dissociative state?
         - … the **ordinary stresses and disappointments** of life which are the common lot of mankind do **not constitute an external cause constituting an explanation for a malfunctioning** of the mind which takes it out of the category of a "disease of the mind"." (*Rabey)*
       - Sleep walking today:
         - Could result in acquittal or NCR
         - *Stone* hints that ordinary person standard implies ordinary person does not enter into such a state even when deprived. What happened to *Parks* is out of the ordinary (at least in adulthood)
         - Tend to thus find it is an internal issue (disease of the mind)
     - Continuing danger (*Burgess)*
       - Look at individual in a pragmatic way: Is society better with an acquittal or NCR here?
       - Focus on whether trigger for dissociation will occur again
         - Act of violence reoccurring again is highly unpredictable but is the TRIGGER something that could occur again
         - In *Parks* – if today, we would ask could he be deprived of sleep again? Could he be engaged in vigorous exercise that tires him? We would hope he would mitigate the risk but there is a non-trivial change that the trigger(s) could occur
         - Similarly, will you be triggered by someone being mean to you? Or rejecting you? In relationship type-context abuse situations
       - Recall more willing to find someone NCR today than when *Parks* decided

- SUMMARY OF CONSEQUENCES OF A FINDING
    - Automatistic Act caused by:
        - Mental disorder? = NCR regime via s 16
        - Drug? = Intoxication rules
        - Neither = no special rules (not guilty)
    - Which rules trump which?
        - Mental disorder vs. intoxication
            - Presume intoxication
        - Mental disorder vs. Non-mental disorder automatism
            - Presume mental disorder

INTOXICATION

- Earlier learned the defence of mistake is really nothing more than the denial of the requisite mens rea.
- Similarly, **intoxication, per se, is not a defence.**
    - Being drunk or high is hardly a fact likely to engender sympathy, much less warrant an acquittal
    - On the other hand, consumption may have an impact on the accused's mental state sufficiently to raise concerns about whether the relevant *mens rea* was present.

- When can an offender claim that their conduct failed to meet the requirements for responsibility because their intoxicated state prevented them from satisfying *mens rea* of the offence; or in extreme cases, even the actus reus?
    - No easy answers
    - Clash of principles of law and policy
    - While intoxication undoubtedly has an effect on one's mental state, permitting offenders to escape criminal liability on the grounds that they were too drunk to know what they were doing is highly unpalatable to a civilized society.
    - Courts have resisted treating it the same as a mental illness or low intelligence
    - Strong feeling that those who choose to become intoxicated should pay the price for criminal behaviour that results.

INTOXICATION AND GENERAL PRINCIPLES OF LIABILITY: BEARD TEST

Background (#40)

- *Beard* UK HoL
    - The facts of the case involved a charge of murder where the accused killed a young girl by putting his hand over her mouth in the course of raping her. Accused admitted to the rape, but said he would not have done it if he had not been "sodden and mad with drink"
    - Historical position regarding drunkenness had been premised on the notion that a person "who by his own voluntary act debauches and destroys his will power shall be no better situated in regard to acts than a sober man"
    - The conclusions to be drawn, may be stated under three heads
        - (1) Insanity, whether produced by drunkenness or otherwise... is a defence to the crime charged. Law takes no note of the cause of the insanity. If actual insanity, as a result of alcoholic excess, exists, it is a complete answer as much as insanity would be in any other circumstance
        - (2) Evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent

        - (3) That **evidence of drunkenness falling short of a proved incapacity** in the accused to form the intent necessary, and merely establishing that his mind was altered so as to give way to violent passion **does not rebut the presumption that a man intends the consequences of his actions**.

- Supreme Court has for some time accepted that where intoxicants are simply an element affecting the accused's conduct, it means nothing insofar as criminal responsibility is concerned
    - Intention is not to be confused with motivation
    - Intoxication that renders a person more susceptible to committing a crime in no way negates one's intention or recklessness in proceeding
    - Can't claim intoxication by saying it prevented them from distinguishing between right and wrong
    - So, mild or ordinary levels of intoxication insufficient to affect intention (*mens rea)* are entirely irrelevant to guilt, jury need not be instructed to take such intoxication into account

- Decision to treat intoxication differently depends upon whether the intoxication:
    - (1) occurred voluntarily;
    - (2) gave rise to "insanity" (mental disorder); or
    - (3) in circumstances that do not fall into 1 or 2, capable of affecting the accused's *mens rea* in the eyes of the law
        - Controversial aspect of the *Beard* decision remains in #3 – evidence of drunkenness should *only* be taken into consideration where it "renders the accused incapable of forming the specific intent essential to constitute the crime"

- This excerpt of *Beard*, starting in a serious of SCC decisions, such as *George*, interpreted as creating two separate categories of crimes
    - (1) Specific intent crimes → defence of voluntary intoxication available
    - (2) General intent crimes → no matter how extreme, intoxication is treated as irrelevant to liability

Involuntary Intoxication

- Must distinguish between involuntary and voluntary intoxication
    - To some degree, criminal liability for acts committed while on drugs or alcohol is premised on the notion that the intentional taking of a substance provides a form of "substituted intent" from which guilt can be inferred
        - Does not apply when intoxication is involuntary

- "**If the intoxication was not the result of an act done with an informed will there is no intent which can be transferred**... [T]here is no reason why the law should preclude the defendant from relying on a mental condition which he had not deliberately brought about." (*Kingston* UK HoL)
    - BUT the line between involuntary and voluntary is not always clear
        - Easiest scenario is a person who consumes an alcohol or drug and is unaware that such a thing has been consumed
            - Very ingestion of the substance is involuntary in the sense that it is not the result of a conscious decision on the part of the accused
            - If intoxication results, it is easy to conclude that the state was achieved involuntarily and if an offence is subsequently committed, there is no logical reason or policy concern that prevents the accused from having resort to any defence that may be applicable – whether it is premised on a lack of *actus reus* or *mens rea*
- "Defence" of involuntary intoxication appears to be reserved **for situations where the accused truly had no knowledge whatsoever of what he or she was ingesting or did not know they were ingesting anything that could have an intoxicating effect**.
    - *King* – SCC acquitted an accused charged with impaired driving after he was given sodium pentothal at the dentist and not informed about its effects

- Where it is only the ***consequences* of a voluntary ingestion** of alcohol or drugs that are unknown or unwanted, a more challenging problem arises.
    - **Most** cases, **treated as self-induced**
    - Culpability will have to be considered by assessing what the accused knew
        - Both about what he or she was taking, and regarding their awareness of the possible effects.

INTOXICATION AND SPECIFIC INTENT CRIMES

Creation of the Specific Intent Crime

- *George*
    - ACC acquitted of robbery and assault. Crown appealed arguing drunkenness had no relevance to charge of assault as there was no "specific" intent required for the offence. SCC agreed.
    - In considering the question of *mens rea,* a distinction is to be made between:
        - (1) intention as applied to acts considered in relation to their purposes and
        - (2) intention as applied to acts considered apart from their purposes.
        - A general intent attending the commission of an act is, in some cases, the only intent required to constitute the crime
            - Robbery, where, with respect to theft, a specific intent must be proved as one of the constituent elements of the offence, there is no specific intent necessary to constitute the offence of common assault.
    - → decision enshrined categorization scheme whereby all crimes fell into one of two groups
        - Specific intent or ulterior *mens rea* versus those requiring only a simple straightforward mental element (such as knowledge or intention to commit an act)

How does the categorization operate?

- Assault is a general intent crime → required nothing more than a "minimal" mental element – an intention to commit the conduct (application of force w/o consent = the AR)
- Whereas theft requires more than an intention to remove someone else's property – which could be regarded as the "general intent" aspect of the offence. One must have an <u>intention to deprive the owner</u> of the item, either absolutely or temporarily therefore → specific intent crime

- Division of crimes premised on a "rather dubious" legal proposition:
    - That intoxication can only deprive a person of the mental state required to commit crimes of specific intent.
        - One can be too drunk to have the intention to deprive a person of something, but never too drunk to intentionally apply force
    - So, intoxication can be utilized to defend a charge of theft, but never to defend a charge of assault.

How do we know what is a specific intent crime?

- **Offences requiring an explicit purpose or motivation will invariably be considered to be of specific intent.**
    - Murder is one of the best examples, for it requires that the act of violence be undertaken with a clear intention: to cause the death of another.
        - Whereas manslaughter requires no such objective → so it is a general intent crime
    - Section 88 of the Code prohibits the possession of a weapon for a purpose dangerous to public peace
        - In contrast to most offences involving firearms, which simply criminalize handling or use – thus regarded as general intent – s 88 offence requires possession combined with an explicit purpose → so specific intent.
- Whether an offence is designated as being of general or **specific intent does not depend upon the level of intention needed** to commit the act, even though crimes of general intent are usually referred to as requiring only a 'minimal' mental state.
    - Assault for example excludes any consideration of recklessness but is still a general intent crime.

- Focus not on the level of intent but upon whether a specific purpose or consequence is desired beyond the basic intention

- Quirk in the law
  - parties to an offence can usually raise intoxication as a defence, even when principals cannot.
  - Aiding an offence under s 21(1)(b) requires the person "do or omit to do anything *for the purpose* of aiding any person to commit it".
    - This language requires proof of a mental state beyond the minimal intent required to commit the act. As such, a party is permitted to argue that the party is in an intoxicated state which affected his or her purpose for committing the act in question.

GENERAL INTENT CRIMES AND THE LAW OF INTOXICATION

- Could drunkenness operate as a defence to the crime of rape?
  - Courts did not agree whether rape was general or specific intent
- *Leary*
  - SCC sided with BCCA in holding **rape was a general intent crime**, therefore no defence from intoxication.
  - Dickson Dissent – criticized the existing approach
    - 1. Recognized the arbitrariness of the distinction and the absence of clear, principled criteria for separating crimes of general from specific intent
    - 2. Attacked the majority's unwillingness to accept fundamental principles of criminal law requiring proof of the actus reus and mens rea
      - Defence is not drunkenness, but an absence of voluntariness caused by excessive drinking
    - 3. Rejected the notion that drinking oneself into an intoxicated state was sufficient to establish the recklessness required for proof of general intent crimes
    - Dickson's view was that once it is accepted that intoxication can affect a person's mental state, surely it must be capable of affecting one's intent with respect to ANY subjective element of an offence

R v Daviault 1994 SCC

Ratio	• Categorization of crimes as either specific or general is well established •
Facts	• The accused was a long-time alcoholic, sexually assaulted an elderly and disabled acquaintance in a horrific fashion after consuming a significant amount of alcohol. He claimed to have no memory of the events in question and was found to be suffering from an extremely elevated level of intoxication that expert testimony indicated was capable of causing an automatic state. Expert witnesses estimated his blood alcohol BAC between 400-600 milligrams per 100 millitires of blood – this would cause death or coma in an ordinary person. The accused was acquitted at trial, but an appeal was allowed and the Court of Appeal, applying Leary, concluded that intoxication could not be raised as a defence to sexual assault.
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 CC, constitute a basis for defending a crime which requires not a specific but only a general intent?
Analysis	• The categorization of crimes as being either specific or general intent offences and the consequences that flow from that categorization are now well established ○ But not dealing with "ordinary cases of intoxication but with the limited situation of very extreme intoxication and the need, under the *Charter,* to create an exception in situations where intoxication is such that the mental element is negated".

	• Cannot agree w/ Sopinka (dissent) that it is consistent with PFJ and the presumption of innocence for the courts to eliminate the mental element in crimes of general intent.
	  ○ Further, self-induced intoxication is <u>not</u> a sufficiently blameworthy state of mind to justify culpability, and to substitute it for the mental element that is an essential requirement of those crimes.
	• Principles in Charter and ss 7 and 11(d), mandate a limited exception to the application of the ***Leary*** rule.
	  ○ This would permit evidence of extreme intoxication akin to automatism or insanity to be considered in determining whether the accused possessed the minimal mental element required for general intent crimes.
	  ○ MR is integral and fundamental to criminal law
	  ▪ Even in minimal in general intent offences, *mens rea* aspect still exists
	  ○ Here the MR is simply an intention to commit the sexual assault or recklessness as to whether the actions will constitute an assault
	  ○ Substituted mens rea of an intention to become drunk cannot establish the mens rea to commit the assault
	
	• Contended that the "blameworthy" nature of voluntary intoxication is such that there can be no violation of the Charter – majority rejects this
	  ○ Voluntary intoxication is not a crime.
	  ▪ Even if voluntary intoxication is reprehensible, it does not follow that consequences of it and any given situation are voluntary or predictable
	  ▪ A person intending to drink cannot be said to be intending to commit a sexual assault
	  ○ self induced intoxication cannot supply the necessary link between the minimal mental element or mens rea required for the offence and the actus reus.
	  ▪ This must follow from [the fact] that the mental element is one of intention with respect to the *actus reus* of the crime charged.
	
	Wilson's approach in ***Bernard*** → much better approach
	• Some argue this approach favors the extremely drunk while ignoring the less drunk
	• Given the minimal nature of the mental element of general intent crimes, even those who are **significantly drunk will usually be able to form the requisite *mens rea*** and will be found to have acted voluntarily.
	  ○ Only those who can demonstrate they were so extremely intoxicated that the state was akin to automatism or insanity that might expect to raise a reasonable doubt as to their ability to form the minimal mental element for general intent offences
	• Reverse onus on the defence on a BOP
	  ○ Such a state will only rarely occur and expert evidence is required. Burden is on the accused to show, on a balance of probabilities, he was in a state of extreme intoxication that was akin to automatism or insanity at the time he committed the offence

Dissent (Sopinka)	• Society is entitled to punish those who of their own free will render themselves so intoxicated as to pose a threat to other members of the community.
	  ○ Society deserves protection from those who choose to put themselves into a state that threatens other members of the community
	• Requirements of the principles of fundamental justice are satisfied by proof that the accused became voluntarily intoxicated.
	• Requirements of fundamental justice
	  ○ Alleged breach of fundamental justice is based is that symmetry between the actus reus, or some aspect of it, and the mens rea is constitutionally required
	  ○ Punishment must be proportionate to the moral blameworthiness of the offender

	▪ There are a few crimes in respect of which a special level of mens rea is constitutionally required by reason of the stigma attaching to a conviction and by reason of the severity of the penalty imposed by law. ▪ Unlike murder and attempted murder, sexual assault does not fall into the category of offences for which either the stigma or the available penalties demand, as a constitutional requirement, subject intent to commit the actus reus ○ The stigma and punishment associated with the offence of sexual assault are proportionate to the moral blameworthiness of a person who commits the offence after voluntarily becoming so intoxicated as to be incapable of knowing what he was doing.

Critique of the Daviault Decision

- Criticism from academics:
  - The majority's analysis here — to the extent that there is any — is highly unsatisfactory. The majority simply posits that drunkenness short of insanity or automatism will have no effect on general intent offences because the *mens rea* for these offences is so minimal that it could not be affected by anything less than extreme intoxication. The court does not, however, provide support for this conclusion.
  - Two possible explanations arise.
    - Either the court is making a policy decision that drunkenness short of insanity or automatism should not constitute a defence to a criminal charge regardless of whether it affected the accused's *mens rea,* or
    - the court is making a medical decision that as a matter of scientific fact drunkenness short of this standard can never affect mens rea.
  - In either case, the court's conclusion is problematic. If the court's decision rests on a medical conclusion, it is made without any documentation or medical evidence whatsoever. If instead the court's decision rests on a policy determination that less extreme levels of drunkenness should not serve as a defence to general intent offences even if they negate mens rea, why shouldn't this policy decision apply to all degrees of drunkenness? Why shouldn't the policy be that an accused will be held responsible for actions he or she performs in a state of voluntary intoxication regardless of the degree of inebriation?
- There was public outrage too
  - It is difficult to deny that "triers of fact may too readily accept a claim that the accused would not have engaged in assaultive behaviour had it not been for the effects of alcohol consumption, and may also too quickly accept that the accused had reached the Daviault level of drunkenness".
  - moreover, *Leary* remains compelling – society deserve protection from those who put themselves into a state that threatens others

Section 33 of the Criminal Code

- In response to the controversial *Daviault* decision, section 33.1 was enacted → It scales back the extreme intoxication defence
  - Again, involuntary intoxication does not count.
  - Intoxication is not a defence to general intent crimes involving violence or other types of interference with the bodily integrity of another person
- S 33 does not apply to crimes of specific intent

Section 33.1 Provides:

- It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2)
- For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person
- This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.

R v Sullivan 2020 ONCA

Ratio	•
Facts	• Two cases put together. • While in the throes of drug-induced psychoses and without any discernible motive, both men attacked and stabbed loved ones • Chan got intoxicated after consuming magic mushrooms and killed his father and grievously injured his father's partner • Sullivan became intoxicated after consuming a heavy dose of a prescription drug in a suicide attempt, repeatedly stabbed his elderly mother • Both men alleged that they were in a state of automatism at the time of the attacks
Issue	• Is s 33.1 constitutional?
Held	• s. 33.1 enables the conviction of individuals of alleged violence-based offences, even though the Crown cannot prove the requisite elements of those offences, which is contrary to the principles of fundamental justice and the presumption of innocence.
Analysis	• S 33.1 is prima facie violation of both ss7 and 11(d) of the Charter in 3 ways ○ Voluntariness breach ○ Improper substitution breach ○ *Mens rea* breach Voluntariness breach • S33.1 states "it is not a defence to [a violence-based offence] that the accused, by reason of self-induced intoxication, lacked general intent or the voluntariness required to commit the offence} • Principles of fundamental justice requires voluntariness is an element of every criminal offence • Also contrary to s11(d) to convict someone where there is reasonable doubt about voluntariness • What must be voluntary is the conduct that constitutes the criminal offence charged not the intoxication Improper substitution breach • Infringes the presumption of innocence guaranteed by s 11(d) of the Charter by permitting conviction without proof of the requisite elements of the offence • Before an accused can be convicted of an offence, the trier of fact must be satisfied BRD that all of the essential elements of the offence have been proved (*Morrison*) • Substituting voluntary intoxication for the required elements of a charged offence violates s 11(d) because it permits conviction where a reasonable doubt remains about the substituted elements of the charged offence (*Daviault*)

Mens rea breach

- Infringes on s7 of the Charter by permitting convictions where the minimum level of constitutional fault is not met
- Where an offence provides no other mens rea or "fault" requirement, the Crown must at least establish "penal negligence" to satisfy the principles of fundamental justice (*R v Creighton,* 1993 SCC)
    - Penal negligence is the minimum, constitutionally-compliant level of fault for criminal offences
- For penal negligence where criminal liability can be imposed, the relevant risk must be reasonably foreseeable such that it not only falls below standards of ordinary prudence to engage in the risky behaviour but doing so amounts to a marked departure from standards of ordinary prudence
    - Underlying theory of fault supporting s. 33.1 rests in the irresponsibility of self-induced intoxication and the "close association between violence and intoxication"
- S 33 fails to meet the penal negligence standard as:
    - 1. It does not require a foreseeability link between voluntary intoxication and the relevant consequences (the act of violence charged)
    - 2. Even if s. 33.1 had required such a link, the charged violent behaviour is not a foreseeable risk of voluntary intoxication yet 33.1 nonetheless enables a conviction
    - 3. The allegedly negligent conduct is not a marked departure from the standards of a reasonable person
        - Voluntary mild intoxication is not uncommon
        - Difficult to accept voluntary mild intoxication is a marked departure from the norm
        - Even if moral fault can be drawn from voluntary intoxication, not evident that such intoxication is irresponsible enough to substitute for the manifestly more culpable mental states provided for in the general intent offences, such as intention or recklessness relating to sexual assault

Can it be saved by s1 of the Charter?

- (1) Pressing and Substantial Purpose
    - Protective purpose is to protect potential victims, including women and children, from violent acts committed by those who are in a state of automatism → pressing + substantial
    - Accountability purpose was to hold individuals who are in a state of automatism due to self-induced intoxication accountable for their violent acts → improper purpose because it directly contradicted core constitutional values by imposing liability for involuntary conduct
- (2) Proportionality
    - Rational connection is not met
        - Deterrence is the means s. 33.1 relies upon to achieve its protective purpose
            - Reasonable person would not anticipate the risk that, by becoming voluntarily intoxicated, they could lapse into a state of automatism and unwilfully commit a violent act.
            - People don't refrain from drinking or are deterred from drinking because of s.33.1
            - Even if this remote risk could be foreseen, the law already provides that reduced inhibitions and clouded judgment, common companions of intoxication, are no excuse if a violent act is committed.
    - Minimal Impairment Test is not met
        - Failed to demonstrate that there are not less intrusive alternatives.
        - S33.1 is not confined to general intent offence
        - The kind of self-induced intoxication is not confined to those who choose to become extremely intoxicated and to thereby court the remote risk of automatism.
        - Parliament could reasonably have chosen less intrusive alternative means to achieve the identified objective as effectively
        - Stand-alone offence of criminal intoxication would achieve the objective of s 33.1

	▪ Its reach would depend on whether the intoxication was dangerous, as demonstrated by the commission of a violence-based offence. ▪ Desire to impose accountability cannot support a reasonable limit on Charter rights that exist to restrict the reach of accountability so the Crown's argument of why s 33.1 was chosen over stand-alone offence is not valid • Deterrence that the law achieves must come from the *Leary* rules, as modified in *Daviault*, not from the added and remote prospect that if a rare and unforeseen case of automatism should happen to occur and lead to violence, non-mental disorder automatism is off the table

DEFENCES

Section 8(2) of the Criminal Code continues the application of English criminal law in force in a province immediately prior to the proclamation of the 1953-54 Criminal Code on April 1, 1955.... except to the extent that the criminal common law is altered, varied, modified or affected by the Code or other federal enactment.

- 8 still applies – common law rules & principles continue; new common law defences can be created

DEFENCES & BoP

- If there is no evidence that could in logic, common sense and experience support a particular conclusion (e.g., duress), then that conclusion is not open to the fact-finder.

- "The basic principle of common law has been that the **accused need not prove a defence**. **Once an accused raises the possibility that a defence exists**, whether by pointing to some fact in the Crown evidence or by leading defence evidence, the **Crown is required to disprove the defence beyond a reasonable doubt**. The common law has not distinguished in this area between defences that challenge the existence of a necessary element of the offence and those defences that admit the mens rea and actus reus but avoid criminal liability because of circumstances that excuse or justify the conduct. With either type of defence, all that the accused need to do is point to some evidence which supports the defence. The Crown is then required to disprove the defence beyond a reasonable doubt" (*Holmes*)

    - → Accused has to introduce some evidence supporting such a conclusion, and this is why it is often said that there is an "evidentiary burden" on the accused. The burden, in this sense, is not to introduce evidence to make the extraordinary conclusion reasonable, but to point to evidence in the case – tendered by either the prosecution or the defence – that would support it.
    - No burden to prove that the accused was provoked, self-defence, etc. – **only a burden to at least point to the existence of sufficient evidence**. Once accomplished, persuasive burden to convince the trier of fact that the defence should NOT be applied rests with the Crown.

- To use defence:
    - Defence must <u>meet</u> AOR standard for **every** element of the defence (e.g., Elements A, B **AND** C)
        - If does not meet the AOR for every element → defence does not go to trier-of-fact
        - If it does meet the AOR for every element → defence goes to the trier of fact THEN Crown must prove <u>BRD</u> that **one** element is missing (e.g., Element A, B **OR** C)

Justification and Excuses (*Perka*)

- Justification challenges the wrongfulness of an action which technically constitutes a crime
    - Concept of punishment often seems incompatible with the social approval bestowed on the doer

- Ex: Good Samaritan who breaks the speed to get victim to hospital, officer shooting hostage taker
- Excuse concedes the wrongfulness of the action but asserts that the circumstances under which it was done are such that it ought not to be attributed to the actor
  - Actors of whose criminal actions we disapprove intensely but whom in appropriate circumstances our law will not punish
  - Ex: those who claim mistake of fact, drunkenness, sleepwalking
- Judges disagreed if necessity was a justification or excuse
  - One rather large stumbling block with such an approach is the validity of the assumption that it is actually possible to conceptualize existing defences strictly as justifications or excuses

- Penney - Defences built on **moral involuntariness** are "excuses" – the law excuses those who, although morally blameworthy, acted in a morally involuntary manner...
  - Can't be said to be acting without a choice or physical volition
  - Duress is grounded on this

SELF-DEFENCE (JUSTIFICATION)

- Law was overly complex until Bill C-26

March 11th, 2013 – Bill C-26, *Citizen's Arrest and Self-defence Act*

- Defence of the person (section 34)
- Defence of property (section 35)

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

- (a) they believe **on reasonable grounds t**hat **force is being used against them** or another person or that a **threat of force** is being made against them or another person;
- (b) the act that constitutes the offence is committed for the **purpose of defending or protecting** themselves or the other person from that use or threat of force; and
- (c) the act committed is **reasonable in the circumstances**.

Pre-emptive "defence"

- The requirement…that a battered woman wait until the physical assault is "underway" before her apprehensions can be validated in law would … be tantamount to sentencing her to "murder by installment." (*R v Lavallee* 1990 SCC)
- How much do we modify the reasonable person?
  - "… the accused's beliefs were assessed from the perspective of an ordinary person who shares the attributes, experiences and circumstances of the accused where those characteristics and experiences were relevant to the accused's belief or actions …." (Khill)
    - In *Khill*: Mr. Khill's personal characteristics and experiences informed his belief that he was about to be shot by Mr. Styres, those characteristics had to be considered in assessing the reasonableness of his belief
  - Limit to this though:
    - Reasonableness is not considered through the eyes of individuals who are overly fearful, intoxicated, abnormally vigilant or members of criminal subcultures …. (Khill)
    - Similarly, the ordinary person standard is "informed by contemporary norms of behaviour, including fundamental values such as the commitment to equality provided for in the Canadian Charter of Rights and Freedoms" … (Khill)
    - Intoxication can never negatize objective fault can also never assess whether reasonable person would have responded in s similar manner
  - Personal prejudices or irrational fears towards an ethnic group or identifiable culture could never acceptably inform an objectively reasonable perception of a threat. (Khill)

Committed for the Purpose of Defending (34(1)(b))

- Motive
    - Why did individual do the "act" which is said to constitute the offence? Inquiry is subjective. Needs to be a defensive or protective purpose to respond.
        - "This is **a subjective inquiry** which goes to the root of self defence. If there is no defensive or protective purpose, the rationale for the defence disappears ….
    - If no reasonable perception of threat not for self defence
    - The motive provision thus ensures that the actions of the accused are not undertaken for the purpose of vigilantism, vengeance, or some other personal motivation." (*Khill*)

Reasonableness of the Response (34(1)(c))

- Factors to consider - In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:
    - (a) Nature of the force/threat
        - Do they have a weapon?
    - (b) extent to which the use of force was imminent and whether there were **other means available to respond to the potential use of force**
        - Means must be practically available (more likely to be killed when leaving abusive relationship)
        - Case-by-case determination if the other means is available
    - (c) **person's role in the incident**
    - (d) whether any party used or threatened to use a weapon
    - (e) size, age, gender, and physical capabilities of the parties to the incident
    - (f) nature, duration, and history of any relationship between the parties, 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) nature and **proportionality** of the person's response to the use or threat of force
        - "Detached reflection cannot be demanded in the presence of an uplifted knife." (Brown v US)
        - Courts have provided great scope for proportionality because reflection is difficult when threatened
            - Benefit of the doubt given to the accused
        - Proportionality assessment requires a flexibility to that response. People under attack have to act quickly with limited information
    - (h) whether the act committed was in response to a use or threat of force that the person knew was lawful

Key statements Penney chose from Khill

- 34(2)(c) was intended to serve a distinctive, balancing and residual function as it captures the full scope of actions the accused could have taken before the presentation of the threat … including reasonable avenues the accused could have taken to avoid … the violent incident.
- … [E]ven if Mr. Khill's military training qualifies as a relevant personal characteristic, it **does not convert the reasonableness determination into a personal standard** built only for him, much less a lower standard than would otherwise be expected of a reasonable person in his shoes. (*Khill*)
- Self-defence is not meant to be an insurance policy or self-help mechanism to proactively take the law — and the lives of other citizens — into one's hands.
- The law should encourage peaceful resolution of disputes. It should not condone the unnecessary escalation of conflicts.
- Where the accused plays a praiseworthy role in the incident, this may be a compelling factor supporting the conclusion that their ultimate act was reasonable.

- Where a person confronts a trespasser, thief, or source of loud noises in a way that leaves little alternative for either party to kill or be killed, the accused's role in the incident will be significant.
- Concurring – Maldaver
- … an accused has a "role in the incident" only when their conduct is sufficiently wrongful as to be capable of negatively impacting the justification for the use of force which undergirds their claim of self-defence.
- I am mindful that self-defence arises regularly in life-or-death situations involving lethal force. … [T]he … claim will often be the sole determinant of whether the accused goes free or faces a life sentence ….

Stand your ground
- Not required to retreat in face of a threat even if there is an option to flee
- Canada and common law never required fleeing in face of a threat
- Respond reasonably in the circumstances
- Just because there was a chance to flee -> not disentitle self-defence defence

R v Khill 2020 ONCA

Ratio	• Former law – ACC had to show they faced or reasonably perceived an unlawful "assault".
	  ○ Under the new law, what is relevant is reasonably apprehended "force" of any kind ….
	  ○ The accused's response under the new law is also **no longer limited to a defensive use of force.**
	• It can apply to other classes of offences, including acts that tread upon the rights of innocent third parties, such as theft, breaking and entering or dangerous driving.
	• Replacing "assault" with "force" also clarifies that **imminence is not a strict requirement**, consistent with jurisprudence interpreting the old provisions since *Lavallee* (imminence remains a factor under s. 34(2)(b)).
	• The accused need not believe that the victim had the present ability to cause a threat of physical force, as is required in order to establish an assault under s. 265(1)(b) of the Criminal Code

Facts	• The respondent, Peter Khill, shot and killed Jonathan Styres. He was charged with second degree murder. Mr Khill testified he shot Mr. Styres in self-defence, believing him armed and about to shoot him.
Issue	• did Mr. Khill act in self-defence, and if he did not, did he have the mens rea required for murder.
Held	•

Analysis	Self Defence, as defined in s. 34(1), has three elements:
	• The accused must believe, on reasonable grounds, that force is being used or threatened against him: s. 34(1)(a) [the trigger]
	• The act of the accused said to constitute the offence must be done for the purpose of defending himself: s. 34(1)(b) [the motive]
	• The act said to constitute the offence must be reasonable in the circumstances: s. 34(1)(c) [the response]
	
	34(1)(a) – The Trigger
	• "A person is not guilty of an offence if... they **believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them** or another person
	  ○ **Focuses on the accused's state of mind**. Must have a subjective belief that force is being used or threatened against them. Absent that belief, the defence is not available
	  ▪ Belief alone does not trigger the defence; **belief must be on "reasonable grounds" → imports an objective assessment** of the accused's belief
	  ▪ <u>Reflect community values</u> and normative expectations in the assignment of criminal responsibility

- Must consider the characteristics and experiences of the accused but this does not render the inquiry entirely subjective
    - Not what the accused perceived as reasonable based on his characteristics and experiences, but rather what a reasonable person with those characteristics and experiences would perceive
    - Reasonableness is not considered through the eyes of individuals who are overly fearful, intoxicated, abnormally vigilant or members of criminal subcultures
    - Mr. Khill's personal characteristics and experiences informed his belief that he was about to be shot by Mr. Styres, those characteristics had to be considered in assessing the reasonableness of his belief

34(1)(b) – The Motive

- "A person is not guilty of an offence if... the act that constitutes the offence is committed for the **purpose of defending or protecting** themselves or the other person from that use or threat of force.
    - Why did he do the "act" which is said to constitute the offence? Inquiry is subjective. Defensive or protective purpose

34(1)(c) – The Response

- A person is not guilty of an offence if... the **act committed is reasonable in the circumstances**
    - ensures that the law of self defence conforms to community norms of conduct
    - Court must consider "the relevant circumstances of the person, the other parties and the act". Blend of objective and subjective considerations
        - Can include mistaken beliefs held by the accused
        - If the accused believed wrongly, but on reasonable grounds, force was being used or threatened against him, that finding is also a consideration of the reasonableness of "the act in the circumstances"
    - Nature of force is but one factor in assessing the reasonableness of the act. The weight to be assigned to any given factor is left in the hands of the trier of fact.
- Section 34(1)(c) asks whether the "act committed is reasonable in the circumstances". It does not ask whether Mr. Khill's military training makes his act reasonable nor whether it was reasonable for this accused to have committed the act. The question is: what would a reasonable person with similar military training do in those civilian circumstances?

Application

- TJ had not taken Khill's role in the incident
    - If you hear someone stealing, wouldn't you call 911 before you grab a gun?
    - Skeptic may say that the Jury had that in the mind

DEFENCE OF PROPERTY #41

- Four components to this defence
    - First the accused must be, or reasonably believe that they are, in peaceable possession of the property in question.
    - Second, there must be a reasonable belief that such property is being, or is about to be, interfered with.
    - Third, any offence committed must have been undertaken for the purpose of responding to the interference.
    - Finally, the act committed in response must be reasonable in the circumstances.

- 1. Peaceable Possession
    - Possession that was not seriously challenged by others in that any challenge to that possession would be unlikely to lead to violence
- 2. Belief of Interference with Property
    - Section 35(1)(b) specifies three scenarios that permit a person to act in defence of property

        - Where a person is unlawfully about to enter, is entering or has entered his or her property
        - When a person is about to take the property, is doing so or has just done so, or
        - When a person is about to damage or destroy the property, or make it inoperative, or is in the process of doing such acts
    - Sub paras (i) and (iii) do not permit the use of force where the person has left or has already caused the relevant damage to property.
        - situations of this type, the law expects a person wronged to react by calling the proper authorities, as the damage has already been don
    - Sub para (ii) however is different. When the person has taken the property, the damage is not yet complete, so the law permits the property holder to act, so long as this is done expeditiously.
        - *Pankiw* – accused saw people at his home and testified that he believed that they had entered into it and taken his property. He followed a vehicle being driven by the notional trespassers and forced it to stop.
- 3. Purpose of the accused's actions
    - Only available where the act is committed was undertaken for a particular purpose
        - To prevent the other person from entering the property or to remove them
        - Prevent the other person from taking, damaging, or destroying the property or from making it inoperative
        - Retake the property from a person
    - This is assessed purely subjectively
- 4. Reasonableness of the Act
    - No list of factors like s. 34 that MUST be considered

- Exclusions (s 35(2)):
    - If you don't have a claim of right to the property, and the other person is entitled to its possession by law.
    - *Struble*
        - Two constables stopped a truck in which the accused was a passenger. One officer issued a 24-hour suspension to the driver. Vehicle was spotted and hour later. One of the officers found the vehicle parked on the accused's property. Asked the original driver whether she had been driving. Accused was then informed the constable was in the backyard. Accused told the officer to leave and pushed them. Police officer was authorized to be there. Issue was whether the appellant believed on reasonable grounds that the constable was acting unlawfully.
            - Accused had a subjective belief that the constable had no right to be there, but this was not objectively reasonable.
            - Well established that persons are not trespassing when they enter another person's property for a lawful reason.

DURESS (EXCUSE)

Overview of Defence of Duress

- **Duress** deals with a situation in which a **person is compelled to commit a criminal offence** because of threats by another individual
    - Effectively, free will of a person is overcome by fear
    - If A puts a gun to the head of B and says "steal from this store or I will kill you", it is morally improper for the law to punish B for taking steps to save himself or herself, even if they break the law in the process

- "The common law of duress... recognizes that an accused in a situation of duress does not only enjoy rights, but also has obligations towards others in society…. the accused remains subject to a basic duty to adjust his or her conduct to the importance and nature of the threat. The law includes an element of proportionality between

the threat and the criminal act to be executed... the accused should be expected to demonstrate some fortitude and to put up a normal resistance to the threat" (*Ruzic*)

- Two separate versions of duress, one statutorily enacted and one existing at common law

Section 17

- Section 17: A person who **commits an offence** under compulsion by threats of ~~immediate~~ death or bodily harm from a person who is ~~present~~ when the offence is committed is excused for committing the offence…..
  - If someone kidnaps child and moves them to a remote location. Then calls the parent and says "rob a bank or else". Defence unavailable under s 17 because the person threatening is not PRESENT
- …this section **does not apply** where the offence that is committed is high treason or treason, murder, piracy, attempted **murder**, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson, or an offence under sections 280 to 283….
  - No matter the circumstances and morally involuntary the conduct may be cannot avail yourself for these crimes

Paquette

- Guy under threat helps another commit murder. Lower court says section 17 removes option of any defence.
- SCC disagreed and limits s. 17 to actual perpetrators
  - Anyone charged under section 21 as parties, aiders or abettors could rely on the common law version of the defence.
  - Recognizes BROADER common law defence that lacks the section 17 limitations without openly defying Parliament
  - How do they get here? S 17 "a person who COMMITS an offence"
    - Previously interpreted as principal offender or aider and abettor
    - Penney: thinks to view it as not including aiders/abettors is inelegant, contradictory. Breaks statutory interpretation. BUT SCC wanted to achieve a just result.
- Problem: s. 17 very confined, where common law was more broad

So, If primary offender → confined to section 17
Party to offence → broader common law defence applies

Common Law Defence

Ruzic

- Challenge to s 17 based on the *Charter*. Moral involuntariness.
- The Supreme Court concluded that some of the more odious restrictions provided in section 17 – the need for a threat of "immediate" death or bodily harm and the requirement that the person making the threat be present at the time of the offence – were unconstitutional.
  - Conflicted with the PFJ that any criminal offence has to be accompanied by a moral voluntary decision to commit that offence.
- Decision brought the statutory defence more closely in line with the common law version

Ryan

- Accused admitted to importing heroin from Serbia into Canada
  - Argued that she should be excused from criminal liability because a third party in Serbia had threatened to harm her mother unless she committed the offence
  - The Serbian police would not have been able to protect her mother

- Her claim of duress didn't satisfy the immediacy and presence preconditions of statutory defence
- SCC expanded the application of s 17 adding several common law limitations into the statutory version of the defence
    - SCC left the law partly operation
    - List of excluded offences still poses problems for principal offenders.

- Statutory and Common law are now almost identical
    - Except s. 17 still only applies to principals, and that certain offences are expressly excluded from the defence of duress under section 17

R v Ryan 2013 SCC

Ratio	• Duress is available only in situations in which the accused is threatened for the purpose of compelling the commission of an offence • Justifications (self-defence) ought to be more readily available than excuses (duress) • Ruzic clarified that 17 requires only threat be made TO the accused – NOT that the OBJECT of the threatened harm be the accused herself. So
Facts	• R was a victim of violent, abusive, controlling husband. She believed that he would kill/seriously harm her and her daughter and that she didn't have a safe avenue of escape other than having her killed. She tried to hire undercover cop to kill her husband and was subsequently charged with counselling the commission of an offence not committed contrary to section 464(a) of the Code
Issue	• May a wife, whose life is threatened by her abusive husband, rely on the defence of duress when she tries to have him murdered? • Is duress available in law as a defence where the threats made against the accused were not made for the purpose of compelling the commission of an offence? • If not, and the appeal must therefore be allowed, what order should be made and, in particular, in the unusual circumstances of this case, should a stay of proceedings be entered? • Can the law of duress be clarified and how?
Held	• allow the appeal and enter a stay of proceedings

Analysis	Is Duress a Possible Defence?
	• COA erred by finding "no principled basis" upon which the respondent should be excluded from relying on duress
	• Court distinguished between self-defence and duress
	  ○ Self-defence is based on principle that is lawful, in defined circumstances, to meet force (of threats of force) with force: "an individual who is unlawfully threatened or attacked must be accorded the right to respond"
	  ▪ Self-defence is an attempt to stop the victim's threats or assaults by meeting force with force
	  ○ In duress and necessity, the victim is generally an innocent third-party
	  ▪ Duress is succumbing to the threats by committing an offence
	• Rationale of defences are distinct
	  ○ Rationale underlying duress = moral involuntariness which was entrenched as a PFJ in *Ruzic*
	  ▪ "It is a principle of fundamental justice that only voluntary conduct – behaviour that is the product of a free will and controlled body, unhindered by external constraints – should attract the penalty and stigma of criminal liability" (*Ruzic*)
	  ▪ Defences built on moral involuntariness are "excuses" – the law excuses those who, although morally blameworthy, acted in a morally involuntary manner...
	  ○ Self-defence is a justification
	  ▪ Unlike duress, self-defence does not require any course of action other than inflicting the injury was "demonstrably impossible" or that there was "no other legal way out"

- Justifications ought to be more readily available than excuses

- Duress cannot be extended so as to apply when the accused meets force with force, or the threat of force in situations where self-defence is unavailable.
  - Duress is, and must remain, an applicable defence only in situations where the accused has been compelled to commit a specific offence under threats of death or bodily harm. This clearly limits the availability of the offence to particular factual circumstances. The common law elements of duress cannot be used to "fill" a supposed vacuum created by clearly defined statutory limitations on self-defence...
- The trial judge's and court of appeal's decision is "in effect a judicial amendment of the law of self-defence"
  - No authority cited by parties or in the SCC's research has shown duress to be extended to a case where the threat was NOT made for the purpose of compelling the commission of an offence and the victim was the person making the threat
  - Duress is available only in situations in which the accused is threatened for the purpose of compelling the commission of an offence

Clarification of the Law of Duress

- In *Ruzic*, the Court dealt with the constitutionality of parts of the statutory defence of duress in s. 17 of the Code.
  - Accused admitted importing heroin from Serbia into Canada. The accused conceded her claim of duress did not satisfy the immediacy and presence preconditions of the statutory defence and challenged its constitutionality.
  - "In its analysis, the Court first addressed the question of whether it is a principle of fundamental justice that morally involuntary conduct should not be punished. The principle of moral involuntariness recognized that "a person acts in a morally involuntary fashion when, faced with perilous circumstances, she is deprived of a realistic choice whether to break the law" (Ruzic, at para 29). In **concluding that the principle of moral involuntariness was indeed a principle of fundamental justice, the Court noted that the treatment of criminal offenders as autonomous and freely choosing agents is a key organizing principle of the criminal law.** As a result, it is a violation of s. 7 of the Charter to convict a person who has no realistic choice and whose behaviour is, therefore, morally involuntary"
  - The court in *Ruzic* concluded the **immediacy and presence requirements, taken together, preclude threats of future harm and thereby infringe the Charter**.
    - The under-inclusiveness of s. 17 violated liberty and security interests under s. 7 because of the potential to convict people who, placed under duress by threats of future harm, have not acted voluntarily. Was not justified under s. 1.
    - Clarified s. 17 requires only threat be made TO the accused – NOT that the OBJECT of the threatened harm be the accused herself. So, under s. 17, the threat of harm does not need to be directed at the accused personally but may be directed against a third party.
  - Affirmed *Hibbert and Paquette* → Statutory duress only applies to persons who commit offences as principals. Common law defence of duress remains available to parties to an offence.

Statutory Defence of Duress Post-Ruzic

- Court did not strike down s. 17 in its entirety; it was found unconstitutional only "in part". As a result, **the following four requirements of the statutory defence remain intact** after the court's ruling in Ruzic:
  - (1) There must be a threat of death or bodily harm directed against the accused or a third party
  - (2) The accused must believe that the threat will be carried out;
  - (3) The offence must not be on the list of excluded offences; and

- (4) The accused cannot be a party to a conspiracy or criminal association such that the person is subject to compulsion

- Court in Ruzic then interpreted s. 17 using the common law elements b/c it was more reflective of Charter values
  - Court articulated and analyzed the following three key elements of the common law defence of duress, **which now operate in s. 17 cases alongside the four requirements** remaining in the statutory defence:
    - (1) no safe avenue of escape;
      - the accused must have had no safe avenue of escape measured on the modified objective standard of the reasonable person similarly situated
    - (2) a close temporal connection b/w threat and the harm threatened; and
      - Must be close enough that the accused loses the ability to act voluntarily
      - If threat is too far removed in time → cases doubt on the seriousness of the threat and claims of lack of safe escape options
    - (3) proportionality b/w threat and criminal act
      - the harm caused must not be greater than the harm avoided.
      - Proportionality is measured on the modified objective standard of the reasonable person similarly situated, and it includes the requirement that the accused will adjust his or her conduct according to the nature of the threat
      - derives directly from the principle of moral involuntariness: only an action based on a proportionally grave threat, **resisted with normal fortitude**, can be considered morally involuntary.

The Common Law Defence of Duress Post-Ruzic

- Following this Court's analysis in *Ruzic*, we can conclude that the common law of duress comprises the following elements:
  - (1) An explicit or implicit, present, or future, threat of death or bodily harm directed at the accused or a third person;
    - Although, traditionally, the degree of bodily harm was characterized as "grievous", the degree of bodily harm is better dealt with at the proportionality stage, which acts as the threshold for the appropriate degree of bodily harm
  - (2) The accused reasonably believed that the threat would be carried out;
    - Analyzed on modified objective test: reasonable person similarly situated
  - (3) The non-existence of a safe avenue of escape;
    - Evaluated on a modified objective standard
  - A reasonable person in the same situation as the accused and with the same personal characteristics and experience would conclude that there was no safe avenue of escape or legal alternative to commiting the offence
- If a reasonable person similarly situated would think there WAS a safe avenue of escape, the requirement is not met and the accused's acts cannot be excused by duress b/c not morally involuntary.
- (4) A close temporal connection between the threat and the harm threatened;
  - Does not preclude threat of future harm
  - Purpose = ensure no safe avenue of escape. If threat too far removed from the accused's illegal acts, it would be difficult to conclude a RP similarily situated had no option but to commit the offence. Temporal connections shows the press placed on the accused
  - Second purpose = ensure it was reasonable to believe the threat put so much pressure on the accused that between the threat and the offence – the accused lost the ability to act freely. So it helps determine if accused truly acted involuntarily.
- (5) Proportionality between the harm threatened and the harm inflicted by the accused
  - This is also evaluated on a modified objective standard;

	○ Proportionality is inherent in the principal of moral involuntariness which is measured on the basis of societies expectation of appropriate and normal resistance to pressure ○ Proportionality had two elements: ▪ (1) Harm threatened was equal to or greater than the harm inflicted by the accused ▪ (2) Do the acts of the accused accord with what society expects from a reasonable person similarly situated in that particular circumstances (whether accused demonstrated "normal" resistance to the threat) • (6) The accused is not a party to a conspiracy or association whereby the accused is subject to compulsion and actually knew that threats and coercion to commit an offence were a possible result of their participation in a conspiracy or criminal association ○ Accused who, because of their criminal involvement, that coercion or threats were a possibly cannot claim that there was no safe avenue of escape, nor can he or she truly be found to have committed the resulting offence in a morally involuntary manner.

NECESSITY (EXCUSE)

- The common law has long struggled with the question of imposing criminal liability for actions that violate the law in circumstances where the person had no reasonable choice to act otherwise.
  - Classic examples are stealing a loaf of bread or starvation; shipwrecked and cannibalism; wife in labour who speeds.

Perka

- Accused were illegally transporting a large amount of marijuana from Columbia to Alaska and shipwrecked off the BC Coast. Were arrested and used necessity to defend themselves. Claimed no intention to import the drugs into Canada but were forced to do so by the condition of their boat.

Held

- Necessity operates by virtue of section 8(3) which preserves common law defences
- Dickson posited two alternative principles
  - First, is utilitarian in nature, based on the idea that it was **justifiable in an emergency to break the law if doing so avoided a greater harm**
  - Second, premised on human frailty, and the notion that it was excusable for a person to break the law **when compliance would impose an intolerable burden.**
- Dickson quick to reject a defence premised on justification, "no system of positive law can recognize any principle which would entitle a person to violate the law because on his view the law conflicted with some higher social value"
- Preferable conceptualization was as an excuse:
  - "Rests on a realistic assessment of human weakness, recognizing that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience"
- Availability limited to situations of urgent and imminent peril
  - "The situation must be so emergent, and the peril must be so pressing that normal human instincts cry out for action and make a counsel of patience unreasonable"
- Second, compliance with the law must be demonstrably impossible, and where there was a reasonable legal alternative to breaking the law, "then the decision to disobey becomes a voluntary one, impelled by some consideration beyond the dictates of 'necessity'"
- Finally, criminal act committed must be proportionate to the harm avoided.

Necessity Defence Requirements (*Perka*)

- **Imminent risk to life or limb** (*Latimer; Perka*)
  - (1) Whether the accused subjectively perceived the imminence of the risk AND
  - (2) Whether the reasonable person with relevant personal characteristics of the accused in the same situation would do the same

    - = modified objective standard
    - *Case Example*
        - *McKay* – Accused were charged with prison-breaking and hostage taking, and raised the defence based on their being wet and cold, and threatened by a guard after being hosed and put in a segregation cell
            - Discomfort due to cold and wet could not be regarded as "imminent risk" or "direct and immediate peril"
- **No reasonable legal alternative** (modified objective standard) (*Perka*)
    - A reasonable person with relevant personal characteristics in a similar situation **would not see any reasonable legal alternative**
    - However, "the accused need not be placed in the last resort imaginable, but he must have no reasonable legal alternative".
    - Case examples
        - *Berriman* - The accused believed that an attacker was pursing her and escaped in her car even though she had been drinking. Defence was not allowed since she had other reasonable and legal options
        - Similarly, accused who started car while impaired as a means to keep warm could not plead necessity when there were other options in the vicinity he could go in to get out of the cold.
        - *Desrosiers* – Accused charged with impaired driving and conceded committing the offence. Testified that he consumed a great deal of alcohol and tried to kill himself the night before. When he woke, he felt the immediate urge to go to the hospital to get help, lest he try again
            - → successful as accused was unable to perceive other legal alternatives. Ability to focus on other avenues, such as calling 911, limited by the frenzied mental state
- **Proportionality** (PURELY objective standard) (*Perka*)
    - Proportion between harm avoided and harm caused by committing offence
    - **Harm avoided must be roughly equal to or greater than harm caused** evaluating the nature of an act is fundamentally a determination reflecting society's values as to what is appropriate and what represents a transgression
        - *Perka* - easy to judge in some cases, like a person who blows a bomb up to avoid breaking a finger
    - Measured on a strictly objective standard
        - Evaluating the nature of an act is fundamentally a determination reflecting society's values as to what is appropriate and what represents a transgression (*Latimer*)

Sankoff Discussion #43

- Re: Proportionality - Question is whether it is supposed to focus on actual harm caused, or potential for harm?
    - Suppose to avoid a dangerous tornado, you drive down a one-way street which is usually empty. You collide and kill someone.
        - Actual harm = death; potential for harm / action = driving down a one-way street (so maybe an accident, fender bender, etc)
            - If actual harm is measured → no defence. Although he may have been threatened with injury or damage to his car if he had not driven dangerously, his conduct resulted in someone's death, and this harm will clearly outweigh the peril he faced.
        - If focus is on the illegal act and foreseeability of harm, defence may succeed. Not objectively foreseeable that death would result.
            - Since necessity is conceptualized as an excuse, much more appropriate to use the forgiving version, and measure the accused's conduct in light of what was foreseeable, rather than what actually occurred.
            - Occurrence of an unexpected result should not render the accused's actions any less excusable; nor should it make his or her decision to take a particular course of action out of self-preservation any less understandable.

- Would it be possible to invoke necessity where the crime involves killing another?
  - *Dudley and Stephens* – English case
    - Two sailors who killed and ate a boy when they were stranded at sea for many days. All three at the point of starvation
    - UK court rejected necessity and suggested that it could never provide a justification to homicide.
    - Not clear it would be the same result in Canada
      - Canadian version is premised on it being an excuse and should be easier to excuse than to justify it.
      - Much of the reasoning in the case is premised on the fact that it would be impossible to objectively determine who should die in a case where multiple parties are at risk, a factor that will not be present in every case of necessity involving a homicide.
  - *Latimer* expressed doubt there could ever be a situation that necessitated the intentional killing of another person, although it left it open
  - *Re A (children*) (conjoined twins: surgical separation) – UK case, involved conjoined twin infants. One would survive on their own, the other, would not, and was dependent on sister for life. If they remained conjoined, would both die within six month. Surgical separation would kill one, was it legal?
    - Court found taking life was necessary. Case was distinguishable from Dudley and Stephens bin that there was no possibility of an arbitrary decision regarding who would die
    - JC Smith has suggested, necessity in the case of an intentional homicide should be limited to the situation where: "A is, as the defendant knows, doomed to die in the near future but even the short continuation of his life will inevitably kill B as well, it is lawful to kill A, however free of fault he may be"
  - Notwithstanding obiter in Latimer, likely a case like Re A in Canada would be treated the same
    - In some ways should be easier, wrt Justification vs Excuse
      - In Canada individuals are able to raise the defence of necessity owing to the lack of a reasonable legal alternative, and not because their actions were objectively justifiable (as compared to UK conceptualizing the defence more narrowly and intertwined with mroality).

- Illegality or Contributory Fault
  - In Perka, crown argues the defence shouldn't be available since they were in the process of committing a crime
    - Dickson rejected this argument
      - The fact that the accused were trafficking in narcotics while outside of Canadian waters did not disentitle them from relying on the necessity test when unforeseen circumstances (the storm and damage to their boat) caused them to import drugs into Canada
    - Dickson did not say it was irrelevant however, on the contrary, a necessity defence was precluded where the peril arose out of the accused's own illegal actions:
      - "If the necessitous situation was clearly foreseeable to a reasonable observer, 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 sense, an emergency"
  - Example, *Hendricks*
    - Accused charged with driving while impaired. Was sitting in his car to keep it warm and accidently set it in motion, when stopped by police, said he was trying to stop the car and prevent an accident
    - Necessity prohibited because of the way the peril originated
      - Since the accused had created the risk that eventuated, and such danger was entirely foreseeable because of his intoxicated state, he could not subsequently claim necessity as a means of alleviating the peril in question.
  - In Contrast, *Maxie*

- Accused attended a party that degenerated into a series of arguments, accused was chased out with a gun. Accused got into his car and drove away, despite being impaired. Ended up striking someone and causing injuries
- Crown argued failure to leave the party early enough before it escalated created the peril
- Sask CoA disagreed, upholding the trial judge's decision to excuse the conduct – no reason to believe that the accused should have foreseen a gun would be threatened. No reasonably foreseeability of this fact.

INCHOATE OFFENCES

- While the law's primary focus will always be upon conduct that has <u>actually occurred,</u> society has an equally strong stake in deterring certain types of action,
  - Application of the law should not depend upon whether a person with criminal intent is fortunate or skilled enough to succeed in their objective

- Two countervailing principles
  - Do not want to criminalize behaviour that causes a very negligible risk of causing actual harmful consequences. Even if the person engaging in this behaviour to have an intent to cause great harm. May have MR for serious offence but if do not believe enough has been done to bring the offence into fruition, then we say it is just to criminalize what is effectively a state of mind.
  - Versus where people have gone as far as to attempt or try to bring to fruition a harm (and may be inclined to try again) the law takes an interest. Where there is an intent beyond mere preparation.
- Other philosophical issue
  - Once we decide we are dealing with something that DESERVES to be criminalized. Thought has been operationalized. The Q becomes why would we want to criminalize an attempt any less severely as compared to completed offence. Because in many circumstances the only moral difference, arguably, between someone who has attempted versus someone who has been successful is luck. So, why base punishment based on contingency?
  - Tophat problem
    - Tina, a police officer, comes home early from work to find her wife Nicole in bed with another woman. Livid, she grasps her service revolver and firs once, hitting Nicole in the chest.
      - Two alternate timelines
        - 1: Nicole is rushed to hospital. Hector notices severed artery. Nicole survives
        - 2. Rushed to hospital. Hector is a sleep-deprived surgeon. Does not notice the severed artery and uses standard technique while attempting to help her. Nicole dies.
      - Should Tina be punished? In Canadian law, we do not punish the same conduct and mentality the same; consequences matter.

ATTEMPT

Section 24 of the Code:

- (1) Everyone who, having an **intent** to commit an offence, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence w<u>hether or not it was possible under the circumstances to commit the offence</u>
- (2) The question whether an act or omission by a person who has an intent to commit an offence is or is not **mere preparation** to commit the offence and **too remote** to constitute an attempt to commit the offence, is a **question of law**

Punishments for attempt: s 463 (general suite of punishments), 239

- Maximum punishment is half the punishment of a completed offence.
  - So murder where life imprisonment, attempt is 14 years – significant discount despite moral equivalency

- Subsection (1) sets out the two requirements for a culpable attempt
  - The mental element, being the intent to commit an offence
  - The physical element, which is the doing or omitting to do anything for the purpose of carrying out what is intended
  - It follows that an improper intent, standing by itself, is insufficient to constitute an attempt.

Actus Reus of Attempt

- "question of law" means the judge decides if the actions were more than mere prep and not too remote
  - Why assign to the judge without defining further? (what is mere prep? What is too remote)
    - Because it is more of a codification of the common law. Parliament apparently did not find it necessary to be explicit about what the offence at common law was. Just assumed courts would know based on the previous cases.
  - *Cline* "While it is not difficult to define the *mens rea* of an attempt, a precise and satisfactory definition of the *actus reus* is perhaps impossible."
- Defining the boundaries of AR is difficult
  - IF threshold set too high, objective of punishing attempts will be undermined, as those who come exceptionally close to committing a crime will be exculpated on the grounds that they were "merely preparing"
  - BUT if threshold set too low, law would wind up punishing improper thoughts.

- In contemporary Canadian jurisprudence the focus is placed upon the quality of the acts undertaken, how significant they are, and how closely they fall in time to the completion of the criminal offence.
  - Abstract search for connection, often characterized by terms such as "proximate", "immediate", and "not too remote"
  - Very fact sensitive
    - *Cline* – accused, wearing dark glasses, asked a young boy to carry a suitcase for him up an alley, even though he had no suitcase.
      - Objectively, a harmless, eccentric act
      - Accused on previous occasions approached several other young boys in the same manner and had on at least one occasion successfully completed an assault
      - Objectively harmless act took on a different dimension
      - Court held that the accused's acts in putting on dark glasses, hanging around a street corner may have been mere preparation; but approaching the young boy was, given what was known about his intent, a criminal attempt.
    - *Deutsch* – SCC considered the different approaches to this problem, and effectively concluded there was no perfect solution.
      - Le Dain "The distinction between preparation and attempt is essentially a qualitative one, involving the relationship between the nature and quality of the act in question and the nature of the complete offence, although consideration must necessarily be given, in making that qualitative distinction, to the relative proximity of the act in question to what would have been the completed offence, in terms of time, location and acts under the control of the accused remaining to be accomplished"
- Clear that attempting to find the specific act that transforms preparation into an attempt is pointless.
  - Qualitative test compels an examination of the nature and quality of the acts performed in the context of the overall endeavour, including the accused's intent, enhanced as these facts might be by any other evidence available.
  - Roach "much will depend on the strength of the evidence of wrongful intent...[and] in practice, a more remote actus reus will be accepted if the intent is clear"
- Proximity of the acts undertaken to the ultimate offence will be regarded as an important factor.

- Closer one comes to engaging in key elements of the criminal act in terms of time and location, the less it can be said that the actions in question were merely preparatory.

- SO WHAT DO WE NEED?
  - Conduct which is beyond mere preparation constitutes the *actus reus* of an attempt
  - Consider time, location, and the acts under the accused's control.
    - Time
      - If ACC has prepared to commit an offence but some treason thwarted but absent that prevention, the offence would have been committed in short order. Not much time would have had to pass before the offence would have been completed.
      - The less time it would have taken to complete the offence more likely to find it went beyond mere preparation
    - Location
      - Proximity of the acts undertaken to the ultimate offence is an important factor
        - If AT the location intended to rob, for example, and thought you had the key to open the bank. But it was the wrong key. More likely to see it as an attempt
        - Contrast with effort to rob the bank is thwarted as something happens before you get there less likely to view it as more than mere prep than above example
      - Closer a person comes to engaging in the key elements of a crime in terms of time and location, the less likely those acts were just preparatory
    - Acts under accused's control
      - The remaining acts left to be committed that WOULD HAVE led to a successful completion of the offence AND under the accused control
        - Bank example with the key – done almost everything done to get access to the bank & rob it. Nothing else under control to realize the goal. Thwarted by the wrong key, or some security feature unaware of etc.
        - In contrast, put a gang together. Sitting 12 hours before the rob and friends chicken out and then decide not to do it right now. Still arguably a lot that needed to be done → less likely to have gone beyond mere pre.
      - Nature and number of acts under ACC control is MOST important (*Deutsch*)

Deutch 1986 SCC

- Appellant indicated to the applicants that a secretary/sales assistant would be expected to have sexual intercourse with clients or potential clients of the company where that appeared to be necessary to conclude a contract. One applicant was an undercover female cop. Appellant did not make an offer of employment to any of the three applicants who became uninterested after hearing the requirements of the position.
- Issue - whether appellant's acts or statements could, as a matter of law, constitute an attempt to procure (commit the offence)
- Held – yes applying the four factors
  - Time between interviewing and procurement of sexual services
    - Not much time was needed between the interview and signing the employment contract
    - If this had been with a person willing to do the job (and not a cop), she would have been available to provide sexual services to clients at any point.
  - Location
    - Could have happened within a matter of minutes or hours at the interviewing place
  - Acts under accused's control that remained to have been done before the offence was completed
    - All that remained was for the women to accept the job offer and go on to have sex with their clients
    - Accused has done almost everything he can do to make the offence occur. Nothing really left for him to do. So, court had little difficulty concluding his conduct went beyond preparation.
  - SCC considered the different approaches to this problem, and effectively concluded there was no perfect solution.

- Dain "The distinction between preparation and attempt is essentially a qualitative one, involving the relationship between the nature and quality of the act in question and the nature of the complete offence, although consideration must necessarily be given, in making that qualitative distinction, to the relative proximity of the act in question to what would have been the completed offence, in terms of time, location and acts under the control of the accused remaining to be accomplished"

Mens Rea of Attempt

- Intent to commit the desired offence is a basic element of the law (*Ancio*)
  - Heightened requirement regardless of what the complete offence is. In order to convict someone of someone attempting, must show the accused had an INTENT → desire or mere certain belief the offence would be committed (knowledge / willful)
  - Justification: because the offence hasn't yet occurred, the harm has not yet occurred, better be sure the ACC has the highest form of MR

- *Cline*, Laindlaw J.A. "Criminal intention alone is insufficient to establish a criminal attempt. There must be mens rea and also an actus reus. But it is to be observed that whereas in most crimes it is the actus reus which the law endeavours to prevent, and the mens rea is only a necessary element of the offence, in a criminal attempt the mens rea is of primary importance and the actus reus is the necessary element"

- *Lajoie* – SCC held that a person could be convicted of attempted murder where he or she did not intend to kill but did intend to cause bodily harm that was subjectively likely to cause death, and was reckless whether death ensued or not...
- *Ancio* – SCC reconsidered this, where the accused had been charged with attempted murder, where during the commission of an offence (in section 230), he had been armed with a weapon that discharged and narrowly missed the victim
  - Had the victim been shot and died, would have met the criteria for murder
  - SCC overturned Lajoie, held that the words "having an intent to commit an offence" require nothing less, in the case of murder, than the intent to kill

Abandonment

- Once the threshold beyond preparation has been crossed, the *actus reus* of attempt will be established
- If they decide some time later to not go through with it (abandon), does not change liability.
- *Goodman* – Accused charged with attempted arson as being a party to the offence committed by one Waters. Waters struck a match to set alight some materials, but as he bent down, flame extinguished. Waters left without trying a second time.
  - Attempt completed the first time. Abandonment will affect what happens subsequent to the abandonment but cannot affect what happened prior to it.

Impossibility

United States of America v Dynar 1997 SCC

Ratio	• Impossibility of completing the crime is not a defense to the offence in Canada (see s 24(1))

Facts	• D, a Canadian money launderer, knows a bookmaker in Vegas named Lucky. Calls Lucky and says if he ever wants laundering to call him up.
	  ○ Lucky becomes an FBI informant, passes information to FBI.
	  ○ FBI calls D sets up a meet in Buffalo.
	  ○ D sends his friend to buffalo to take the money to launder.
	  ○ US wants to extradite Dynar to face money laundering crimes
	• Argument by D

	○ Completed offence of money laundering has not yet occurred. US conceded. At the time, money laundering in Canada required proving that the money that was accepted was from criminal enterprises. Here the money was not proceeds of crime – was from the FBI. ○ D argues he also cannot be committed of ATTEMPTING because it was legally impossible to launder money that is not dirty. • **Dual Criminality**: Principle that the crime committed in the US must constitute a crime in Canada before Canada will extradite.
Issue	• If an accused conduct attempts to do the impossible, can they be guilty of attempt? Could Dynar's conduct have amounted to an offence under Canadian law if it had occurred in Canada?
Analysis	• Two types of impossibility ○ Factual impossibility ▪ someone who attempts to rob someone's pocket but nothing on the victim → does not matter. Still intent to rob. No negation of moral culpability. ○ Legal impossibility ▪ Umbrella example wanted to steal a fancy umbrella and then actually "stole" your own one - Had intent, went beyond mere preparation but it was a mistake. • No sense in distinguishing between factual and legal impossibility ○ "62 …. There is no legally relevant difference between the pickpocket who reaches into the empty pocket and the man who takes his own umbrella from a stand believing it to be some other person's umbrella. Both have the *mens rea* of a thief. ○ 64 Accordingly, there is no difference between an act thwarted by a "physical impossibility" and one thwarted "following completion". Both are thwarted by an attendant circumstance, by a fact: for example, by the fact of there being no wallet to steal or by the fact of there being no umbrella to steal. The distinction between them is a distinction without a difference. Professor Colvin himself agrees that "[t]he better view is that **impossibility of execution is never a defence to inchoate liability in Canada**" (p. 358). ○ Impossibility in this case – to launder clean money - doesn't matter ▪ he had the intent to launder • But third possibility: imaginary crimes ○ Cannot be convicted of an offence when you attempt to commit an imaginary offence (you think it's illegal, but it isn't). ○ Sugar example – importing believing it is illegal. MR lacking because ther eis no crime.

R v Forcillo

- Facts:
  - Sammy Yatim had a knife in the street car. Forcillo entered the streetcar and Yatim made threatening movements to Forcillo. Forcillo shot him.
  - First three shots were necessary and justified force
  - Charged with attempted murder & second degree – acquitted on second degree, convicted on attempted murder.
- Jury must have found:
  - Intent to kill throughout
  - First volley justified under ss 25 (allows police to use reasonable force to protect safety) or 34
    - After the first 3 shots, there was a pause, no reason to shoot without intending to murder
  - Second volley not justified but Crown could not prove that Yatim was still alive
    - Murder requires proven BRD that Yatim was still alive. If he had been alive → would have been convicted of murder

- TopHat: VOODOO – ATTEMPTED MURDER?

- Biff unequivocally believes in Voodoo. He makes a doll in the likeness of his arch-enemy, Chip, and stabs it in the heart with a pin. Biff fully expected that Chip would immediately die. He did not. Could Biff be convicted of attempted murder?
  - No correct answer.
  - How to argue he should be convicted?
    - Took every step known to him to complete the offence – from a subjective point of view
    - Subjectively, he thinks he's done more than mere preparation. No proximity (time + location) issue.
  - Argue to not convict
    - Objectively – infinite steps to take to get to murder, large gap in time, location because voodoo is not real
    - Manifested no actual behaviour to worry about. Has intent but no realistic method to kill.. yet

COUNSELLING/INCITEMENT

Sankoff, "Counselling as an Unfulfilled Offence"

> 464 …(a) every one who counsels another person to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence and liable to the same punishment to which a person who attempts to commit that offence is liable ….

- Counselling is, in itself, a substantive offence under section 464. Once a person has been counselled to commit an offence, the offence is complete.
  - Not necessary that recipient be influenced by it, nor, indeed, that he or she ever had any intent to commit the offence

- Incitement (Penney calls it this; Sankoff uses "counselling")
  - *Actus Reus* – actively induce or advocate – and do not merely describe – the commission of an offence
  - *Mens Rea* – accused either intended that the offence counselled by committed, or knowingly counselled the commission of the offence while aware of the unjustified risk that the offence counselled was in fact likely to be committed as a result of the accused's conduct

R v Hamilton

Ratio	• the actus reus for counselling is the deliberate encouragement or active inducement of the commission of a criminal offence. • the mens rea consists in nothing less than an accompanying intent or conscious disregard of the substantial and unjustified risk inherent in the counselling: ○ that is, it must be shown that the accused either intended that the offence counselled be committed, or knowingly counselled the commission of the offence while aware of the unjustified risk that the offence counselled was in fact likely to be committed as a result of the accused's conduct.
Facts	• Accused offered for sale through the internet access to a "credit card number generator", bomb recipes, information on how to commit burglaries, etc. • Charged under 464 counselling the commission of indictable offences • Trial judge acquitted, not satisfied accused had the requisite mens rea. • Crown – It is unnecessary to prove that the person who counselled the offence intended that it be committed; recklessness is sufficient. Even if it is insufficient, the trial judge erred in confounding motive and intent.
Issue	• Did the TJ err in respect to MR of counselling – does the Crown need to prove the person who counselled the offence INTEND that it be committed and recklessness is insufficient?

Held	• allow the Crown's appeal, order a new trial on the count for counselling fraud and dismiss the appeal with respect to the three remaining counts.
Analysis	• • Actus reus for counselling will be established where the materials or statements made or transmitted by the accused actively induce or advocate — and do not merely describe — the commission of an offence (*Sharpe*) • Mens rea consists of nothing less than an accompanying intent or conscious disregard of the substantial and unjustified risk inherent in the counselling ○ In their relevant senses, the Canadian Oxford Dictionary defines "counsel" as "advise" or "recommend (a course of action)"; "procure" as "bring about"; "solicit" as "ask repeatedly or earnestly for or seek or invite", or "make a request or petition to (a person)"; and "incite" as "urge". "Procure" has been held judicially to include "instigate" and "persuade": R. v. Gonzague. ○ Must be shown the accused either intended that the offence counselled by committed, or knowingly counselled the commission of the offence while aware of the unjustified risk that the offence counselled was in fact likely to be committed as a result of the accused's conduct • *R v Sansregret* ○ Court defined recklessness as the conduct of "one who, aware that there is a danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk... in other words, the conduct of one who sees the risk and who takes the chance" ○ SCC would not revisit the definition as they had not been invited to in this case
Rationale for secondary liability	• . . . the rationale for secondary liability is the same as that for primary liability. Primary liability attaches to the commission of acts which are outlawed as being harmful, as infringing important human interests and as violating basic social values. Secondary liability attaches on the same ground to their attempted commission, to counselling their commission and to assisting their commission. • This is clear with participation. If the primary act (for example, killing) is harmful, then doing it becomes objectionable. But if doing it is objectionable, it is also objectionable to get another person to do it, or help him do it. For while killing is objectionable because it causes actual harm (namely, death), so too inducing and assisting killing are objectionable because of the potential harm: they increase the likelihood of death occurring. • The same arguments hold for inchoate crimes. Again, if the primary act (for example, killing), is harmful, society will want people not to do it. Equally, it will not want them even to try to do it, or to counsel or incite others to do it. For while the act itself causes actual harm, attempting to do it, or counselling, inciting or procuring someone else to do it, are sources of potential harm — they increase the likelihood of that particular harm's occurrence. Accordingly, society is justified in taking certain measures in respect of them: outlawing them with sanctions, and authorizing intervention to prevent the harm from materializing. [Emphasis added.]

CONSPIRACY

- Criminal code defines Conspiracy in section 465.
-
- All conspiracies are divided into four types for sentencing
  - (a) murder, punishable by life
  - (b) wrongfully prosecuting someone – max 10
  - (c) any other indictable offence – max same as offence
  - (d) summary – max same as offence

- Code creates offence but does not define it. The elements filled in from common law.
    - "Essential that the conspirators have **the intention to agree**, and this agreement must be complete. There must also be a **common design to do something** unlawful, or something lawful by illegal means. Although it is not necessary that there should be an overt act in furtherance of the conspiracy, to complete the crime, I have no doubt that there **must exist an intention to put the common design into effect"** (*O'Brien*)
    - Reaffirmed in United States v Dynar: "an intention to agree, the completion of an agreement, and a common design"

Actus Reus - Completion of the Agreement

- At the heart of every conspiracy is the **agreement to pursue a common criminal objective**
- Offence regarded as complete from the moment the conspirators reach such an agreement
    - Contractual notion of consensus *ad idem* on all points is hardly required.
- Focus is on whether the parties have agreed upon the unlawful objective(s), The details of execution does not matter.
    - If objectives are fulfilled, accused can be charged with substantive offence itself → Then section 21(2) comes into play to make co-conspirators parties to the offence
- If one enters the agreement and withdraws, still committed conspiracy

- If there is no agreement, there can be no conspiracy, and this raises the question whether a person can be convicted of conspiracy when the other person only pretends to agree
    - O'Brien – police officer who "agrees" with someone else to commit an offence, having no intention themselves
        - SCC held that no, can not be convicted
        - Strong minority held that the accused should be convicted, had the requisite mens rea

Actus Reus requires two people to agree.

Mens Rea

- Intention to commit a common objective
    - Mere proof that the accused *knew* of the existence of a scheme to commit a crime or agreed to participate in it is insufficient to establish that he or she was involved in the conspiracy.
- Accused must not only agree to the terms proposed, he or she must also intend that the objective in question will be pursued
- *O'Brie*n – SCC held there "must exist an intention to put the common design into effect"

Parties to a Conspiracy

- Precondition: Existence of at least two parties
    - BUT Crown does not have to prove how many conspirators, or even that the accused knew them personally
    - As long as other elements established, remains possible to charge a person for conspiring with one or more "unknown" parties
- Conspiracy isn't frozen in time, it is often an on-going offence where people may join along the way.

United States of America v Dynar

- Does it make any difference to the potential liability of the conspirators that they could not have committed the substantive offence even if they had done everything that they set out to do?
    - Put another way, should conspirators escape liability because, owing to matters entirely outside their control, they are mistaken with regard to an attendant circumstance that must exist for their plan to be successful? Such a result would defy logic and could not be justified.
- Like attempt, conspiracy is a crime of intention.

- The factual element, or actus reus, of the offence is satisfied by the establishment of the agreement to commit the predicate offence.
    - This factual element does not have to correspond with the factual elements of the substantive offence.
    - The goal of the agreement, namely the commission of the substantive offence, is part of the mental element of the offence of conspiracy.

- since the offence of conspiracy only requires an intention to commit the substantive offence, and not the commission of the offence itself, it does not matter that, from an objective point of view, commission of the offence may be impossible.
    - The intention of the conspirators remains the same, regardless of the absence of the circumstance that would make the realization of that intention possible. It is only in retrospect that the impossibility of accomplishing the common design becomes apparent.

R v Dery

Ratio	• Can't stack them. Essentially can't 'attempt' to commit a 'conspiracy' to commit a 'theft'.
Facts	• Déry convicted of attempting to conspire to commit theft, and of attempting to conspire to unlawfully possess the proceeds • Interception of discussions between Mr. Déry, Daniel Savard and others revealed the possibility of stealing this liquor stored outdoors. • Messrs, Déry and Savard were both charged with conspiracy to commit theft and conspiracy to possess stolen goods. • There was no evidence that either accused had taken any steps to carry out the proposed theft
Issue	• Is attempt to conspire to commit an indictable offence a crime in Canada?
Analysis	• To conflate counselling and attempt to conspire is to rely on semantics where principle fails. While it may well be true that to counsel another to conspire is, in the ordinary sense of the word, to "attempt" (or try) to form a conspiracy, **not all efforts to conspire amount, in law, to counselling**. ○ The actus reus for counselling is the deliberate encouragement or active inducement of the commission of a criminal offence (*Hamilton; Sharpe)* ○ Here, the Crown proposes an actus reus for attempted conspiracy that, if not open-ended, is much broader than the actus reus of counselling. ▪ **Even a tentative and vain effort to reach an unlawful agreement would suffice** • This would be an inappropriate occasion for this Court to recognize attempt to conspire as a crime for unilateral conspiracies • Criminal liability should not attach to fruitless discussions in contemplation of a substantive crime that is never committed, nor even attempted, by any of the parties to the discussions ○ Given that conspiracy is essentially a crime of intention, and "[c]riminal law should not patrol people's thoughts" (Dynar) it is difficult to reach further than the law of conspiracy already allows • … though Mr. Déry discussed a crime hoping eventually to commit it with others, neither he nor they committed, or even agreed to commit, the crimes they had discussed. The criminal law does not punish bad thoughts of this sort that were abandoned before an agreement was reached, or an attempt made, to act upon them. • No combining forms of inchoate liability

SENTENCING

- Section 718: The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful, and safe society by imposing just sanctions that have one or more of the following objectives:
    - To denounce unlawful conduct;
    - To deter the offender and other persons from committing offences;
    - To separate offenders from society, where necessary;
    - To assist in rehabilitating offenders;
    - To provide reparations for harm done to victims or to the community; and
    - To promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community

Fundamental principle

- 718.1: A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender

Other Principles

- 718.2: A court that imposes a sentence shall also take into consideration the following principles:
    - (a) A sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing
        - (i) evidence motivated by bias, prejudice based on race, nationality, language
        - (ii) evidence abused the offender's spouse or common law partner
        - (iii) evidence abused person under eighteen years of age
        - (iv) evidence abused a position of trust
        - (v) evidence offence had impact on victim, considering age and personal circumstances
        - (iv) evidence offence committed for benefit of criminal organization
        - (vii) evidence that the offence was terrorism … shall be deemed aggravating circumstances
    - (b) A sentence should be imposed to similar offenders with similar circumstances
    - (c) Combined sentence (consecutive sentences imposed) should not be too harsh
    - (d) Offender should not be deprived of liberty if less restrictive sanctions are reasonable
    - (e) All sanctions should be considered for all offenders, with particular attention to aboriginal offenders

Additional consideration — increased vulnerability

- 718.201 A court that imposes a sentence in respect of an offence that involved the abuse of an intimate partner shall consider the increased vulnerability of female persons who are victims, giving particular attention to the circumstances of Aboriginal female victims.

R v M (CA) 1996 SCC

Ratio	• Appellate courts do not interfere unless error of law of "clearly disproportionate." Sentences will vary across the court and will very by intention and blameworthiness • Court could make an efficiency argument. If there is a complete standard and no individualization in sentencing, there would be a lot of appeals to argue that a person did not receive the "perfect" sentence.
Facts	• Accused was sentenced by the trial judge to 25 years after pleading guilty to numerous counts of sexual assault and sexual offences against children. • BC CA reduced the sentence to 18 years and 8 months. • Crown appealed.
Held	• BC CA erred in applying as a principle of sentencing that fixed-term sentences under the Criminal Code ought to be capped at 20 years, absent special circumstances.

Analysis	• Determining of a just and appropriate sentence is a delicate art which attempts to carefully balance the **societal goals of sentencing against the moral blameworthiness of the offender** and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community.
	• Retribution, in a criminal context represents an objective, **reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender**, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender and the normative character of the offender's conduct.
	• Denunciation is different from retribution in that the objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct.
	  ○ In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law.
	• A sentence which expresses denunciation is simply the means by which these values are communicated. In short, in addition to attaching negative consequences to undesirable behaviour, judicial sentences should also be imposed in a manner which positively instills the basic set of communal values shared by all Canadians as expressed by the Criminal Code.
	• the overarching duty of a sentencing judge is to draw upon all the legitimate principles of sentencing to determine a "just and appropriate" sentence which reflects the gravity of the offence committed and the moral blameworthiness of the offender
	• it is important to stress that **neither retribution nor denunciation alone provides an exhaustive justification for the imposition of criminal sanctions**.
	  ○ Rather, in our system of justice, normative and utilitarian considerations operate in conjunction with one another to provide a coherent justification for criminal punishment.
	  ○ Accordingly, the meaning of retribution must be considered in conjunction with the other legitimate objectives of sentencing, which include (but are not limited to) **deterrence, denunciation, rehabilitation and the protection of society**. Indeed, it is difficult to perfectly separate these interrelated principles.
	  ○ And as La Forest J. emphasized in Lyons, the relative weight and importance of these multiple factors will frequently vary depending on the nature of the crime and the circumstances of the offender. In the final analysis, the overarching duty of a sentencing judge is to draw upon all the legitimate principles of sentencing to determine a "just and appropriate" sentence which reflects the gravity of the offence committed and the moral blameworthiness of the offender.

R v Proulx 2000 SCC – emphasis on restorative justice

Analysis	• Section 742.1 makes a conditional sentence available to a subclass of non-dangerous offenders who, prior to the introduction of this new regime, would have been sentenced to a term of incarceration of less than two years for offences with no minimum term of imprisonment.
	  ○ Parliament's objective with this new legislation was
	  ▪ (i) reducing the use of prison as a sanction, and
	  ▪ (ii) expanding the use of restorative justice principles in sentencing
	• Prison has been characterized by some as a finishing school for criminals and as ill-preparing them for reintegration into society:
	• Para (d), (e), and (f) → restorative justice which involves some form of restitution and reintegration into the community
	  ○ Parliament's reaction to the general failure of incarceration to rehabilitate offenders and reintegrate them into society

	▪ Canadian sentencing jurisprudence has traditionally focussed on the aims of denunciation, deterrence, separation, and rehabilitation, with rehabilitation a relative late-comer to the sentencing analysis

R v Ipeelee 2012 SCC

Analysis	• There is an overrepresentation of Aboriginal people in the Canadian criminal justice system
	• S 718.2(e) does more than affirm existing principles of sentencing; it calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders
	• When sentencing an Aboriginal offender, a judge must consider (*Gladue*):
	  ○ (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and
	  ○ (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection
	• [60] To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. (para 60)
	• Sentencing judges, as front-line workers in the criminal justice system, are in the best position to re-evaluate these criteria to ensure that they are not contributing to ongoing systemic racial discrimination.
	• The purpose of sentencing is to promote a just, peaceful, and safe society through the imposition of just sanctions that, among other things, deter criminality and rehabilitate offenders, all in accordance with the fundamental principle of proportionality.
	  ○ Just sanctions are those that are not discriminatory
	• The overwhelming message emanating from the various reports and commissions on Aboriginal peoples' involvement in the criminal justice system is that current levels of criminality are intimately tied to the legacy of colonialism

R v Morris 2021 ONCA – Anti-black racism consideration in sentencing

Facts	• Morris found guilty of possession of a loaded prohibited handgun contrary to s 95 & other charges • Trial judge sentenced to 1 day in jail with 18 months probation • The Crown contends the sentence is manifestly unfit and the trial judge made several material errors in his reasons, particularly in his treatment of the evidence led by Mr. Morris concerning the impact of overt and institutional anti-Black racism ○ the trial judge allowed his consideration of the impact of overt and institutional racism on Mr. Morris to overwhelm all other considerations relevant to fashioning a fit sentence
Analysis	• Anti-black realism is a reality of the system • The trial judge's task in sentencing is to **impose a just sentence tailored to the individual offender** and the specific offence in accordance with the principles and objectives laid out in Part XXIII of the Criminal Code; • **Social context evidence relating to the offender's life experiences may be used where relevant** to mitigate the offender's degree of responsibility for the offence and/or to assist in the blending of the principles and objectives of sentencing to achieve a sentence which best serves the purposes of sentencing as described in s. 718; • The gravity or **seriousness of an offence is determined by its normative wrongfulness and the harm posed or caused by that conduct** in the circumstances in which the conduct occurred.

	Accordingly, unlike when assessing the offender's degree of personal responsibility, an offender's experience with anti-Black racism does not impact on the seriousness or gravity of the offence; • Courts may **acquire relevant social context evidence through the proper application of judicial** notice or as social context evidence describing the existence, **causes and impact of anti-Black racism** in Canadian society, and the specific effect of anti-Black racism on the offender; • Consistent with the rules of admissibility, a generous gateway for the admission of objective and balanced social context evidence should be provided; • The **Gladue methodology does not apply to Black offenders. However**, that jurisprudence can, in some respects, **inform the approach to** be taken when assessing the impact of anti-Black racism on sentencing • [124] The restraint principle plays a specific and important role in sentencing for serious crimes like crimes involving the unlawful possession of loaded handguns. **Because of the seriousness of crimes** involving the possession of loaded handguns, **some term of imprisonment will usually be required to reflect the seriousness of the crime.** o That principle requires the court, if it determines that a sentence of less than two years imprisonment would be appropriate, to consider whether the term of imprisonment could be served in the community under a conditional sentence: 742.1 • [129] The use of conditional sentences when sentencing young Black offenders, in appropriate cases, also carries the added advantage of addressing, at least as it relates to the offender before the court, the ongoing systemic problem of the over-incarceration of young Black offenders.

R v Lloyd 2016 SCC – s 7 + 12 Charter + minimum sentences

Facts	• Lloyd was a drug addict and dealer in Vancouver's Downtown Eastside. • He was addicted to cocaine, methamphetamine and heroin, and sold drugs to support his addiction. • He had been convicted of a number of drug-related offences.
Issue	• constitutionality of a one-year mandatory minimum sentence for a controlled substance offence
Held	• violates the guarantee against cruel and unusual punishment in s. 12 of the Charter and is not justified under s. 1.
Analysis	• A sentence will infringe s. 12 if it is "grossly disproportionate" to the punishment that is appropriate, having regard to the nature of the offence and the circumstances of the offender • Court needs to determine what constitutes a proportionate sentence for the offence having regard to the objective and principles of sentencing in the Criminal Code o Doesn't need to fix the sentence or sentencing range at a specific point • Court must ask whether the mandatory minimum requires the judge to impose a sentence that is grossly disproportionate to the offence and its circumstances o If it is, then it violate s 12 • To be **grossly disproportionate, sentence must be more than just excessive, it has to be so excessive as to outrage standards of decency and abhorrent or intolerable to society** • Llyod says that the one-year minimum jail term is not a sentence that is grossly disproportionate as applied to him but only in relation to reasonably foreseeable applications of the law to others • **The crime catches not only the serious drug trafficking that is its proper aim but conduct that is much less blameworthy.** o This renders it constitutionally vulnerable. o Applies to any amount of Schedule I substances ▪ Both to professional drug dealers who sell dangerous substances for profit and to drug addicts who possess small quantities of drugs that they intend to share with a friend, a spouse or other addicts

	○ Definition of traffic captures broad range of conducts ▪ Not only people selling drugs but all who administer, give, transfer, transport, send or deliver the substance irrespective of the reasons for doing so and regardless of intent to make a profit ○ Applies when there is a prior conviction for any designated substance offence within the previous 10 years • At one end of the range of conduct caught by the mandatory minimum sentence provision stands a professional drug dealer who engages in the business of dangerous drugs for profit, who is in possession of a large amount of Schedule I substances, and who has been convicted many times for similar offences. • At the other end of the range stands the addict who is charged for sharing a small amount of a Schedule I drug with a friend or spouse and finds herself sentenced to a year in prison because of a single conviction for sharing marijuana in a social occasion nine years before. Most Canadians would be shocked to find that such a person could be sent to prison for one year