22/23

Criminal Law

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INTRODUCTION TO CRIMINAL LAW

WHAT IS A CRIME?

- **Crime:** any offence enacted under Parliament's criminal power

    - Includes every offence in the *Criminal Code*, also *Controlled Drugs and Substances Act*, other crimes enacted under the federal power (*Customs Act, Copyright Act* – "offences")
- Colloquial definition: any offence where a person faces the possibility of jail
- Federal offences enacted under powers other than the criminal law power is a regulatory offence, which typically controls more common, less serious offences.
    - To ensure compliance
- Provincial offence (regulatory)
- There are 4 main differences between regulatory and criminal offences:
    1. Penalties – imprisonment available, but usually much lower. Often no imprisonment possibility
    2. Criminal record – no "moral opprobrium" for regulatory offending
        - Past regulatory convictions will not be held against you in court, be used to deny you a job, etc.
    3. Procedure – procedures less significant for non-criminal offending
        - *Charter* protections on due process don't distinguish between regulatory offences and crimes.
    4. Mental elements – less required for non-crimes

DIVISION OF POWERS

- "Crime" – how to decide which level of govt can decide what a crime is who can enact criminal laws
- *Constitution Act, 1867*
    - Federal govt and Provincial govts every law falls under these two jurisdictions, and they don't enter into each other's **division of powers**
- *Constitution Act* holds that criminal law is under the **exclusive jurisdiction** of the federal government
    - If province makes law that's regarded as "criminal" it's unconstitutional
    - Parliament can validly pass laws if they can show that they qualify as criminal law
- Three things must be present for a law to be considered a criminal law:
    - Criminal Law Purpose – some kind of public harm (social, econ, political interests)
        - Public peace, order, security, health, morality
    - Prohibition bans things (murder, theft)
        - What provinces do is create regulatory schemes which tend to govern a particular activity rather than banning it.
    - Serious punishment
- Where they failed:
    - Ex: *Margarine Reference*
        - Crime to sell margarine coloured a particular way
        - Fed: couldn't show butter was healthier (no purpose, therefore no criminal purpose unconstitutional law)
- Three criteria have gotten vaguer over the years
    - Ex: assisted health reproduction act complex mixture of bans and regulations
        - SCC held that some were okay and some weren't
    - Ex: driving provincial jurisdiction
        - But certain types of driving get into federal sphere (ex: drunk driving) SCC has made it clear that both jurisdictions can regulate the same activity as long as the feds are dealing with it in a criminal manner

R v. Morgentaler, [1993] 3 SCR 463

The Nova Scotia government passed a law banning, among other things, abortions in private clinics in the province, claiming that this was being done to fight the privatization of the health care system and establishing $10,000 to $50,000 fines for violation.
Based on the Nova Scotia government's objections to abortion and its lack of attention to the privatization in legislative debates on the matter, the SCC ruled that the pith and substance of the legislation was to limit what the Nova Scotia

government saw as the socially undesirable conduct of abortion, which would be a criminal law function. Hence, the law was found to be *ultra vires* the Nova Scotia legislature.

JURISDICTIONAL ISSUES

- What happens when you're charged with both a crime and provincial offence?
- When a person is convicted of both a federal and provincial offence for the same conduct, they only have to serve the more serious sentence, as one cannot be sentenced twice for the same thing.
- When a person is charged with multiple crimes for the same conduct that fall under both federal and provincial jurisdiction, there are not two separate trials (there are only separate trials for completely separate incidences).
    - The *major/minor agreement* kicks in to determine who appoints the prosecutor that tries the case, depending on which crime (among the crimes the accused is charged with) is the most serious.
    - Provincial prosecutors can prosecute when either a Criminal Code or a provincial regulatory offence is the most serious.
        - s. 92(15) of the *Constitution Act, 1867* **holds that the provinces are responsible for the administration of justice.**
        - Federal prosecutors prosecute when either a federal regulatory offence (e.g. customs offences) or all drug offences
- The most serious crime a person is charged with (if multiple at one point) determines which judge hears the case
    - The most serious offences tend to be tried before federally appointed judges (e.g. in the Court of King's Bench in Alberta)
- Less serious offences are tried before provincially appointed judges

BURDEN OF PROOF

- Law favours the accused has to be this way
    - *Have to be **certain** the accused is guilty*
- Significant burden of proof on the prosecution – "innocent until proven guilty beyond a reasonable doubt" per s. 11(d) of *Charter*
    - Dickson CJ: "essential in society committed to fairness and social justice"
    - Principal safeguard which seeks to ensure that no innocent person is convicted
    - Functional framework by which we decide if someone is guilty
        - After the Crown puts forth their evidence, the defence can introduce evidence, challenge the Crown's evidence, or do absolutely nothing
        - Reason for this lies in the gravity of the criminal sanction
        - Safeguard against wrongful convictions
- BRD standard best understood as compromise: designed to protect as much as possible the interests of the accused while understanding the trial process is ***incapable of achieving absolute certainty***
- Prosecution tasked with proving every relevant fact in issue and disproving every available defence BRD

Burden Applies to Prosecution Case as a Whole

- SCC in *R. v Morin:* proof BRD is a threshold that applies to the prosecution's case as a whole not something applied to each and every piece of evidence in the case
- Every *essential* element of the case
    - If every element is not met, you haven't proved it BRD & must have acquittal
    - Actual facts of the case don't have to be proven BRD or agreed unanimously by jurors
        - Ex: all jurors don't have to believe if the accused punched or kicked, just that force was applied

Burden Never Shifts to the Accused

- Jurors must be reminded that the burden of proving BRD rests with the prosecution
- *R. v Wasser:* trial judge misstated burden of proof (flipping the onus) and Ontario CoA ordered new trial as consequence
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The Meaning of Reasonable Doubt

- Cory J in *Lifchus:* "there cannot be a fair trial if jurors do not clearly understand the basic and fundamentally important concept of the standard of proof that the Crown must meet in order to obtain a conviction".
- In *Lifchus,* Cory J summarized how "reasonable doubt" should be explained to jurors
  - Not doubt based on sympathy or prejudice, but on reason and common sense
  - Logically connected to the 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
- Cory J also recommended that the following types of instructions be avoided:
  - Inviting jurors to apply reasonable doubt in the "everyday sense" of the words
  - Equating proof BRD as proof to a moral certainty
  - Qualifying doubt by some adjective other than "reasonable", such as suggesting that an acquittal requires a "serious" "substantial" "haunting" doubt
- *R v. Starr,* Iacobucci J noted that the reasonable doubt standard falls closer to absolute certainty than it does to proof on a balance of probabilities

Reverse Onus

- Reversals of burden of proof inevitably violate s. 11(d) of the *Charter* – struck down unless they're justified as reasonable limits under s. 1.
  - Ex: *R v. Whyte*
  - If the burden does shift to the accused, it's on a balance of probabilities, not BRD
- Relationship b/w presumptions and s. 11(d) of the *Charter*
  - *R v. Downey:* SCC recognized that a presumption that imposes an evidential burden on the accused does not violate s 11(d) if the unknown fact follows inexorably from the basic fact
    - Ex: in *R v Audet,* SCC held that if one is a teacher, they are presumed to be in a position of trust and authority towards their students
- Presumptions relating to uncommon situations that relive otherwise culpable conduct may be constitutional
  - Ex: requiring the accused in a break and enter to prove that they did so under duress
- Violations of s. 11(d) can be upheld if they are demonstrably justified and reasonable, in accordance with section 1 of the *Charter*
  - Examinations of this sort will consider the importance of the objective being propounded, the role played by the presumption, and the difficulty of obtaining the sort of evidence to which the presumption relates

Categories of offending

- Procedures by which people get tried doesn't impact the substance of the crime
- Main difference between the two: the **procedure** by which they're tried

1. **Indictment (eg: sec 236)**
    - Crown has to present formal indictment engages whole host of procedures that are triggered by word indictment
    - Reserved for most serious crimes (murder, manslaughter, kidnapping…)

        - Choice between judge alone or jury trial
        - Almost always before the Superior Court
        - No limitation period
    2. **Summary Conviction offences**
        - Procedure designed to be shorter, more compact, easier
        - Charged in an "information" but overall less formal
        - Less serious in every way: punishments always lower
            - Default: not more than 2 years less a day & fine of $5000
        - Always judge alone trials
        - Almost always before the lowest court (Provincial Court)
        - Sec 786(2) – summary offences have a limitation (charging) period of 12 months
    3. **Hybrid Offences**
        - Option of both proceedings
            - Example: sexual assault (s 271) – can be charged either way
        - Prosecution chooses when they lay the charge

- **Provincial offences**
    - Think about them like summary conviction offences
    - Most adopt Crim Code for procedure
        - Either set out their summary offences procedure, or adopt the criminal code

APPEALS AFTER FINAL DISPOSITION

- **As of right**: once you have received your disposition, you have the right to appeal
- **With leave:** higher court must grant you leave to appeal
    - Preliminary bar to appeal: must convince Court of Appeal judge that your appeal has merit
    - SCC: groups of 3 judges to determine if leave should be granted

Routes of Appeal

- Summary Conviction Appeal
    - v liberal route of appeal (as of right) to a Summary conviction appeal court (s 813)
    - Can appeal pretty much anything
    - True for accused and the Crown
        - Both parties, identical routes
    - Summary conviction appellate courts: single judge in the superior court
    - After this, accused/Crown can appeal with leave only to provincial court of appeal
- Indictable offences
    - Appeal as of right on the **merits of the trial**
    - Don't get free right of appeal on sentence must seek leave
- After provincial court of appeal, must seek leave to appeal to the SCC
    - Two "as of right" situations for getting to SCC

- 1) dissent in Court of Appeal on law
- 2) Court of Appeal reverse acquittal and acquits

Standards of Appeals

When can an appellate court allow appeal?

1. Unreasonable verdict (a verdict that is not supported by the evidence)
   - High threshold for this: contesting either what happened at your trial (jury or judge unreasonable)
2. Legal error (not instructing jurors properly, unreasonably allowing the admission of evidence, not following proper procedure, etc.)
3. Broader miscarriage of justice

When does appellate court dismiss appeal?

1. No errors
2. No **substantial** wrong or miscarriage of justice
   a. Errors take place when trials are long court will review substance of the error
      i. Focus on the gravity of the error
3. Procedural irregularity if it didn't impact substance of the appeal

Remedies

- When convicted person appeals & appellate court grants appeal (based on conviction let's say), appellate court can either:
  - Order new trial
  - Acquit/convict
- The way they determine which route to take depends heavily on the nature of the error
  - Question will be: if you take the error out, was there enough evidence to make the conviction
- Also look at who is making the appeal
- Note: while, Court of Appeal can order new trial …
  - Ultimately, Crown has to decide if it's worth having new trial—might decide not to pursue

Limitations on criminal law

- Rule of law: we can't punish someone unless they've broken the law
  - Sec. 11(g) of the Charter holds that a person cannot be convicted of something if it was not, at the time it was committed, a crime.
  - Sec 9 – "notwithstanding anything in this Act or any other Act, no person shall be convicted"
    - Only parliament can create new crimes
      - Parliament is better place to recognize what is a crime, not the judiciary
      - Bc judges react to what's in front of them, while Parliament has resources to look at broader picture
    - This enhances certainty and fair notice but can let some immoral actions go unpunished. o Judges can, however, expand the boundaries of existing crimes to punish immoral conduct.
    - Two exceptions to the limitations of the common law in the area of criminal law:
      - Contempt – the last common law crime (offending the judiciary—used w/restraint)
        - Retained in the judiciary because they are "protecting their own house"
        - Very rare in criminal much more serious
          - Civil power more often executed

- Defences – have the limited to
  - Defences exist in the Code, and s. 8(3) preserves the ability of courts to create new ones
  - Essential to explain *wrong* acts; but flexibility required to establish defences

R v Samir (1994), 152 AR 309 (Prov Ct)

Facts:
- Accused charged w/offence contrary to s. 423(1)(c) of Crim Code. "Acted like a complete jerk" and followed the complainant in his car, trying to get her to get in the car and repeating a "vulgar sexual proposal" – took approx. 10 min.
- s. 423 of the Code holds that everyone who, without lawful authority, persistently follows person about from place to place to compel them to do something they are entitled not to do or abstain from doing something they are entitled to do is guilty of an offence.

Issue: Do the facts of the case constitute an offence?
Rule: The conduct of the accused, even if objectionable, can't be punished if it doesn't constitute a crime.
Application:
The accused's actions can't be understood as something other than a "misguided and childish attempt to pick her up." Even with the brief interception and short period of time following her, it can't be considered intimidation as it lacks the "degree of persistence" that section 423(c) requires.
Holding: Accused acquitted.
Notes:
- Samir's actions weren't criminal harassment because in '91 when the crime happened, criminal harassment wasn't a crime (not til 94).
- Can't be convicted if you aren't charged with it
- interpretive principle – "should be careful in our use of the criminal code"

Frey v Fedoruk, [1950] 2 SCR 517 (no common law crimes)

Facts: Frey was caught by Fedoruk looking into a woman's room. Frey charged with "unlawfully acting in a manner likely to cause a breach of the peace by peeping." Conviction overturned because there was no such offence. Frey brough civil suit as pl against Fedoruk for false imprisonment.
Procedural History: O'Halloran, J.A., found guilty of indictable offence.
Issue/Holding:
- Did the conduct of Frey constitute a criminal offence?
- Was Fedoruk justified in arresting him without a warrant? **NO**

Ratio:
Application:
Leaving it to a judge to decide if acts proved constituted a crime or otherwise, not by reference to the *Code* or in reported decisions, but according to his own view around whether they were a disturbance of the tranquility of people, would introduce great **uncertainty** into the administration of criminal law
How would people know how to act if they don't know the law
Notes:
- Court determined that judges couldn't recognize "peeping tom" as Common Law crime *should no longer be recognizing common law crimes*
  - If smth hadn't been recognized as a crime to date, then should leave it to parliament to enact it as Crim Code crime

Class Notes:
- Section 9 means:

- Parliament is a better place to recognize what a crime is, not the judiciary
    - Judges react to what's in front of them; Parliament has Dept of Justice, committees etc to look after this (in theory though they don't always do this)
- Value of "certainty" is important in Canadian criminal law
    - People should be able to know that their acts are wrongful (not discover after the fact)

R v Jobidon, [1991] 2 SCR 714

Facts:

- After a brief scuffle in the bar, two men (including the accused) went outside, where the accused struck the other man on the head, knocked him down, and then struck him repeatedly on the head, killing him.
- Manslaughter requires that a person commit an unlawful act that causes another person's death.
- Assault requires one to apply force intentionally to another person, directly or indirectly, without their consent.

Procedural history:

- Charged with manslaughter; trial judge found him not guilty ("victim's consent to a 'fair fight' negated assault & accused not criminally negligent")
- Court of Appeal set aside acquittal for guilty verdict on charge of manslaughter—for reasons of public policy there could be no consent to this type of assault. Accused appealed to SCC.

Issue:

- Can consent be used as a defence in this case of a fist fight where non-trivial force was intentionally applied and resulted in bodily harm?

Analysis:

Gonthier J.:

- In the absence of clear language in the *Code* indicating it has displaced the common law, courts can look at pre-existing common law rules/principles to give meaning to an existing defence
    - Believe this to be one such case
    - That is, as long as conduct was criminal before the *Code,* can go back to look at what it meant pre-1955 (as long as parliament hasn't revamped)
- Believe that: Consent is vitiated between adults intentionally applying force causing non-trivial bodily harm during a fist fight or brawl unless it has some sort of social value (ex: rough sporting activities where force is w/in customary norms of the game)

Sopinka J (concurring but disagreed with application of the law):

- Interpreting section 265 in light of common law is **contrary** to sec 9(a)
    - Effect is to create an offence where one does not exist under terms of the *Code* by application of the common law
    - *the intentional application of force with the consent of the victim*
- ***Accused should not have to search the book to discover the common law to determine if the offence charged is indeed an offence at law***
- However, the trial judge was correct in ruling that the **victim's consent did not extend to a continuation** of the fight once he had lost consciousness; the accused, by continuing to pummel the victim after he knew the victim was unconscious, knowingly acted beyond the ambit of the victim's consent.

Holding:

- Committed assault, guilty of manslaughter

R v Barton, 2017 ABCA 216

Facts: Barton charged w/1st degree murder in the death of Gladue, who died from blood loss from a perforation more than 11 cm long that went through her vaginal wall.

- Crown theory: Barton used sharp object to cut vaginal wall while Gladue was incapacitated due to alcohol.
- Alt Crown theory: Barton still guilty of unlawful act manslaughter bc he caused her death during sexual assault.

Defence: non-culpable act of homicide (Barton tore her vag wall and caused her death but was "accident" during consensual sex.)

Procedural History:

- Trial judge instructions: consent could only be vitiated if the Crown proved that Barton had subjectively intended to cause Gladue serious or non-trivial harm (per *Jobidon, R. v Zhao)*
- Jury: Barton not guilty of 1st degree murder, not guilty manslaughter
    - Crown appeal: seeking new 1st degree murder trial

Issue:

- Should consent or apparent consent be vitiated for policy reasons based on objective or subjective foreseeability of the risk of bodily harm in circumstances where death results from sexual activity?

Analysis:

- *R v Zhao (ONCA)* extended *Jobidon* to sexual assault – vitiating consent to where the accused subjectively intended to cause non-trivial harm
    - Can't assume Ontario jurisprudence will govern that addressed cases where complainants were alive to testify (Gladue was not)
    - Issues, reasoning, result may differ when person dies as result of sexual activity
- *R v Paice* – accused must intend *and* cause bodily harm to vitiate consent
    - Winners and losers of fights now treated differently
- *Jobidon* majority expressed that courts could develop further limitations on consent on case-by-case basis (bc they only considered in the course of a fist fight)
    - Parliament has also expressly granted courts statutory authority to impose limits on consent for sexual offences in s 273.1(3)
    - Courts free to decide whether *Jobidon* principle applies in the case before them.
        - *R v Barton, 2020:* "consent is vitiated where bodily harm foreseeable in context of sex trade worker who dies"
        - Things to consider:
            - Desire to cause death, the most serious form of bodily harm possible
            - the relative ease with which an accused can raise defences of consent or mistaken belief in cases when person isn't alive to testify
                - the need to protect *Charter* rights of sex trade workers, sexual violence against women -- public policy objective in reducing/mitigating that violence
                - balance that against *Charter* rights of the accused
- also consider rational for vitiating apparent consent – where should the focus be?
    - Whether apparent consent would be vitiated when there was serious bodily harm, bodily harm defined in the *Code,* or some other threshold
- Defence: assuming consent to BDSM activity (fisting) arguing that consent wasn't vitiated

Holding: Barton should be retried for murder

Common Law Limits

1. Restraint in interpretation
2. Omissions not punishable without a duty
3. Motive is not the same as intent
4. MR will be presumed for every element (subject to certain limits
5. Causation is a law threshold

All of these are subject to statute

What LIMITS are not subject to statutory reversal?

Limits on what is a valid criminal law

1. Section 11(g) – retroactivity

    - Can't retroactively be punished for something if it wasn't a crime when you did it
2. Section 7 – must have MR
    - High stigma: subjective MR element
3. Federalism – only fed govt can create valid "criminal law"
4. Section 9 of the *Code* – no common law crimes (must be against statute law) *subject to repeal

Section 7 of the *Charter* – "life liberty and security of the person and not to be deprived thereof except in accordance w/principles of fundamental justice"

- Liberty freedom of movement
    - Every aspect of the criminal code has the *possibility* of imprisonment, so it's the easiest way into s7 liberty of the person is engaged so easily

VAGUENESS

An accused person must be able to tell in advance what type of offence is being charged as the whole approach to a defence depends on it.

- In *Reference re ss. 193 and 195.1(1)(a) of the Criminal Code,* the SCC recognised the "void for vagueness" doctrine as principle of fundamental justice under s. 7 of the *Charger*
    - Where a law is vague, it violates s. 7 of the *Charter* and can be struck down
    - The "void for vagueness" doctrine rests on 3 rationales from *Nova Scotia Pharmaceutical Society*
        - 1. Rule of law (criminal law should not arbitrarily dictate who is and is not guilty
        - 2. Fair notice to the citizen of what activity is proscribed (perfect understanding not req)
        - 3. Limitation of enforcement discretion (no law should be so devoid of precision that a conviction will automatically flow from the decision to prosecute; it must be intelligible enough to provide the boundaries of legal debate such that *precise* boundaries can be ascertained)
- However, vagueness *Charter* challenges almost always fail; for a law to be ruled vague, it essentially must have no ascertainable meaning
    - The factors to be considered in determining whether a law is too vague include:
        - The need for flexibility and the interpretive role of courts, which can consider prior judicial interpretations, the legislative purpose of the statute, the subject matter and nature of the impugned provision, societal values, and related legislative provisions to give meaning to vague laws
        - Impossibility of achieving absolute certainty standard of intelligibility more appropriate
        - Possibility that many varying judicial interpretations of a given disposition may exist and coexist
        - Also allows provisions to change over time
    - Courts would rather uphold vague laws and interpret them more strictly than strike them down
    - While the vagueness doctrine is functionally inert, it is nevertheless an important principle of interpretation (motivates judges to give meaning to vague laws by drawing from the jurisprudence and expert evidence)
- Vagueness doctrine would have much greater meaning – and provide a more valuable form of protection – if the Court were to reaffirm that laws should not be upheld where they are incapable of providing a constant and settled meaning

Class Notes:

How does vagueness become a *Charter* issue:

1. Route 1 – direction challenge through section 7
2. Route 2 – impacts another right

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 2004 SCC 4

- S. 43 of the *Code* gives parents a defence for assault where they use force to correct behaviour in way that are "reasonable" under the circumstances. Foundation applied to have this section struck down, claiming that, among other things, it is too vague and violates s. 7 of the *Charter*
- The SCC rejected the vagueness challenge and set down limits themselves. It held that s. 43 includes only "minor corrective force of a transitory and trifling nature" but does not include "corporal punishment of children under two or teenagers", "or degrading, inhuman or harmful conduct" such as "discipline using objects," "blows or slaps to the head" or acts of anger.
    - This shows that courts would rather uphold vague laws and interpret them more strictly than strike them down
- Dissent (Arbour J) – wholly unpersuasive for SCC to delineate

Class Notes:

- Has to have a constitutionally sufficient MR to be a crime

The Harm principle

2 essential features

- It rejects paternalism (prohibition of conduct that harms only the actor)
- It excludes moral harm (requires clear and tangible harm to the rights and interests of others)

Harm Principle rejected not a principle of fundamental justice

- No consensus that it's the sole justification for criminal prosecution

To a certain degree (esp if you measure indirect harm), harm principle loses all value as a limit

R v Malmo-Levine; R v Caine [2003] 2 SCR 571

Matters of choice in criminal law should be left to Parl, unless Parl is acting in a way that's completely arbitrary, irrational or grossly disproportionate.

***Malmo-Levine* Argument structure**

- Essentially: right to smoke weed
- Section 7 provides right to liberty
- Risk of imprisonment infringes my liberty
- Must be in accordance with fundamental justice
- It's against fundamental justice to imprison me for risking a harm to self alone **harm principle**

Argument Fails

1. Lack of sufficient consensus as a legal principle
2. Lack of consensus that criminal justice should prohibit it
3. Harm is too malleable a concept to act as a legal standard

Caveat One: Section 12

- *Everyone has the right not to be subjected to cruel and unusual punishment*
- *Malmo-Levine* hints that putting someone in jail for harm caused only to self might be "cruel and unusual punishment" in some cases

Caveat Two: Disproportionality

- Where the exposure to imprisonment is grossly disproportionate to Parl's objective, there may be a s. 7 infringement…

Issue/rationale/holding:

1. Does Parl have the authority to criminalize the simple possession of marijuana despite lack of harm beyond the individual? **YES**
    a. The harm principle is not a principle of fundamental justice that justifies lifting the marijuana prohibition because:
        i. There's no sufficient consensus that the harm principle is vital to society's notion of criminal justice
            1. While the *presence* of harm to others may justify legislative action, the *absence* of proven harm does not create an unqualifies barriers to legisl action
            2. Crimes like animal cruelty, bestiality, indignity to dead bodies, cannibalism, and incest are crimes despite not harming anyone
        ii. no consensus against the criminalization of harm to self; Canada continues to have paternalistic laws (seatbelts) bc harm to one is often borne collectively
        iii. it's not a manageable standard against which to measure deprivation of life, liberty and security "harm" is too malleable
            1. too many things (many of them trivial) can qualify as harm to be a controlling principle of fundamental justice (eg physical harm, econ harm, psycho harm, attitudinal harm, harm to social order, etc) and there's much disagreement about what qualifies as harm
2. Has the power to criminalize marijuana possession been exercised in a manner contrary to the *Charter?* **NO**
    a. Marijuana is a psychoactive drug that causes alteration of mental function to which members of certain groups (pregnant women, schizophrenics) are particularly vulnerable (ie laws not arbitrary)
    b. Conviction for marijuana possession for personal use carries no mandatory minimum, most first offenders are given a conditional discharge, and imprisonment is typically reserved for trafficking and hard drugs
    c. While the effects on an accused person of the criminalization of marijuana are serious, the harm that is causes is not *grossly* disproportionate to the harm imposed by marijuana use

Dissent (Arbour J)

- It's wrong to imprison people for conduct posing little to no risk of harm to others, as is the case with marijuana use
    - The costs of marijuana use on the welfare and health care systems are negligible, esp compared to the costs of alcohol and tobacco use
- With vulnerable groups (eg adolescent, women of childbearing age, people with pre-existing cardiovascular and respiratory diseases, schizophrenics, etc) it would be wrong to punish them to protect them
- The harms of marijuana criminalization on accused persons outweigh the harm or risk of harm to society caused the prohibited conduct
- Harms to wider society are valid reasons, but must be measurable
- Need to balance these against the effects of prohibition

Note:

- The harm principle is not a principle of fundamental justice; it presents an indeterminate standard and fails to account for the legitimacy of "paternalistic" laws forbidding conduct that doesn't directly harm others
- Fundamental question raised in these appeals is whether harm is a constitutionally required component of the *AR* of any offence punishable by imprisonment
- At issue here isn't whether marijuana prohibition is good, but whether Parliament can prohibit its possession

- no longer exists; repealed in 2019
- used to provide that anyone in a house where indecent acts performed was guilty
- other indecency/obscenity provisions remain

What does it mean?

- "Would it deprave and corrupt other members of society?" *Hicklin*
- "Would it breach the community standard of tolerance?" *Brodie*
- "Would it cause people to act in an anti-social manner? *Butler*

***Labaye rejects them all* finds a way to go back to the harm principle**

- Important for what it tells us about the criminal law *what should be criminal*
- Need to find objective criteria that makes sense given the nature of the provision
    - **Should focus on what HARM the acts cause**
        - This harm should be incompatible with societal functioning
        - HIGH threshold

Malmo-Levine/Labaye

- *ML* = constitutional decision
- *SCC uncomfortable with using "harm principle" to strike down Parl's decision*
- *Labaye* common law decision
    - Operates as form of presumption that Parliament is trying to prevent harm, not regulate morality
    - Parliament retains supreme ability to regulate certain things
- Court sees value in using harm principle to (NOTES)

Developments in Constitutional Law after Malmo-Levine

- *Malmo-Levine* was a declaration that matters of choice in criminal law should be left to Parliament, unless Parliament is acting in a way that is completely arbitrary, irrational or grossly disproportionate

R v Labaye, [2005] 3 SCR 728

Facts:

- Appellant operated a club to permit member couples and single people to meet each other for group sex. Entry into the club and participation in sex was voluntary and no one was paid for sex

Issue:

- Did the appellant commit acts of indecency within the meaning of the criminal law?

Procedural History:

- Appellant appealed from a conviction of violating s. 210(1) of the *Code,* which makes it an offence to keep a common bawdy-house, defined in s. 197(1) as a place kept by one or more persons for the purpose of prostitution or the *practice of acts of indecency*

Analysis:

Two step objective test for establishing indecent acts:

- Has the Crown established a harm or significant risk of harm to others that's grounded in norms which our society has formally recognized in our Constitution or similar fundamental laws? (*three types of harm have emerged as supporting finding of indecency)*
    1. Harm to those whose liberty may be restricted by being confronted with inappropriate conduct
    2. Harm to society by predisposing people to antisocial conduct
    3. Harm to individuals participating in the conduct
- Is the harm in its degree incompatible with the proper functioning of society?
    - High threshold; demands that we tolerate conduct of which we disapprove
    - To maintain objectivity in determining whether this threshold is crossed, judges must:

- Make value judgements based on evidence (not just assumptions) and full appreciation of the relevant factual and legal context
- Carefully weigh and articulate the factors that produce the value judgements

Rationale/Holding (McLachlin CJ):

- none of the kinds of harm discussed were established
  - the acts didn't affect the liberty of members of the public; only those already disposed to this sort of sexual activity were allowed to participate and watch
  - no evidence that the acts predisposed people to anti-social acts/attitudes: no one pressured to havae sex, paid for sex, or treated as a mere sexual object for the gratification of other
  - no evidence of third type of harm – physical or psychological harm to persons participating in the acts
- *appeal allowed; conviction set aside*

Dissent: (Bastarche and LeBel JJ)

- propose continuing to apply original test for indecency, which incorporates concept of harm as significant but not determinative factor to consider in establishing acceptable level of tolerance
- majority's determination of the level of harm required for a finding of indecency is too demanding and abstract
- acts of the accused, by failing to meet the minimum standards of public morality, caused a form of social harm and were therefore indecent

THe Role of the Charter

- *ML* – no "independent" s.7 review premised on harm as governing principle
- *C(M)* – Section 15 – anal sex violates equality
- *Zundel* (1992): struck down false news provision.- freedom of expression
- *Keegstra* (1990): upheld hate propaganda crime ….

Section 7 after *Malmo-Levine*

***Bedford* in Historical Context**

- Charter could limit criminal sanction when a substantive right was used (eg 2(b), 15)
- …..

The Section 7 Interest

- *Malmo Levine:* Liberty – I may go to prison
- *Bedford:* Security – my life is at risk by these measures

Bedford succeeded on a security of the person argument, not a liberty argument

- "Drove prostitutes underground… etc"

Arbitrariness, overbreadth, and disproportionality

- In the last few years, the Court has begun demonstrating a renewed willingness to intervene and set limits on Parliament's ability to enact criminal laws.

1. **Arbitrariness (hardest to prove):** occurs when there's no rational connection b/w purpose of the law and the impugned effect on the individual (limits it imposes on life, liberty or security of the person)
   - **Law unconstitutional where it bears no connection to its objective**
   - Eg: *Morgentaler* – need for abortions to take place in hospitals was arbitrary
   - Eg: marijuana prohibition (health grounds – *Parker*)

2. **Overbreadth:** occurs when a law is rational in some cases, but overreaches in its effect in others; when a law is so broad that it includes some conduct that bears no relation to its purpose
    - **Law goes farther than it needs to (limited arbitrariness)**
    - Historically, court was very deferential about what "too far" was – not so in *Bedford*

3. **Gross disproportionality:** occurs when law's effects on life, liberty, or security are so disproportionate to its purposes that they cannot rationally be supported

- All of these principles compare the rights infringement caused by the law with the objective of the law
    - Where one of these things is present, a law may be found to violate s. 7 of the *Charter*

R v Ndhlovu, 2022 SCC 38 (Overbreadth; Grossly Disproportionate)

- Struck down two major aspects of the SOIRA order regime recognizes that there needs to be discretion for these
- Lifetime order anytime you commit two offences
- TJ had no discretion to refuse an order this has changed
- Court said it was grossly disproportionate, mandatory and lifetime registration is somewhat overly broad
    - Despite its long existence, there's little/no evidence of the extent to which it assists police in the prevention/investigation of sex offences
    - Failing to comply with SOIRA brings serious consequences for offenders
    - Further, police officers conduct random compliance check to verify the info on the registry

BIG PICTURE: The Charter provides limits on what Parliament can do in terms of criminal law
- **Limits are stronger where other freedoms at stake, also where law puts others at risk of harm**
- **Pendulum continues swinging as courts waver – deference/policy inquiry**

Sankoff prefers judicial review more than Parliamentary supremacy

Canada (AG) v PHS Community Services Society (Arbitrariness and Disproportionality)

Fed Minister of Health refused a special exception from *CDSA* for Insite safe injection site.
SCC found that CDSA's objective was protection of health and public safety; Insite decreased risk of death and disease w/o negative impact on public safety.
- Failure to grant exception undermined *CDSA's* purpose and was thus unexplainable and **arbitrary**

The effect of denying the service of the injection site to the population having regard to the effects on public safety and health objectives was grossly disproportionate to any benefit that Canada might derive from presenting a uniform stance on the possession of narcotics.

Canada (AG) v Bedford, 2013 SCC 72 (Overbreadth and Disproportionality)

huge case – really rescued the *Charter*
Applicants, representing a wide variety of prostitutes and prostitute's groups, contended that the law was unconstitutional in that it imposed dangerous and unnecessary restrictions on the way prostitution could be conducted. The Court agreed, beginning its analysis with a finding that the living on the avails provision was found to be **overly broad.**
the prohibition on communicating with prospective customers in a public place, which the Court regarded as an integral protective measure for screening out dangerous clients, was found to be **grossly disproportionate** as well.

Class Notes:
Sankoff: not a difficult constitutional case

Old law **did not** criminalize prostitution did criminalize three main things:

1. solicitation
2. bawdy-house rule
3. living on the avails

These rules generally affect the communicator and the person buying
Dealt with the case through s7 security

Section 210: combat public nuisance/neighbourhood disruption

- consider the balance of nuisance vs threats to the safety of those involved
- grossly disproportionate
- **benefits to be gained were grossly disproportionate to the "dangers"**

Section 212(1)(j): stop pimping and parasites who live on prostitutes

- way over broad because it impinges on legitimate relationships too (like what about an IT person)

Section 213(1)(c) – nuisance of street prostitution

- grossly disproportionate
- safety and screening needs to be the most important for sex workers taking this away unduly places them in danger

Law was struck down but held for a year basically the police weren't enforcing until the year was up and the new legislation came into effect

New legislation makes buying sex illegal punish the problem where it lives, not the people selling the sex

- allows prostitutes to do things that make their act of selling sex safer (eg hiring security)

Constitutional?? New law much harder to attack criminalizes the **act**

- govt changed the objective of its law which makes it harder to object
    - looks fair but makes it difficult for prostitutes to work safely (brothel has to be just you)
    - brothels technically legal, but difficult to operate difficult to set up a brothel to make it useful
    - fear of prosecution of clients will drive it underground, leading to danger
- **the actual impact of the law is no different than original law prostitutes still at risk**

Even though you can't prosecute the sex trade worker, the act itself is **illegal**

- but if parliament makes act of buying sex illegal to protect vulnerable people …
- can prostitute make same s. 7 claims?
- Are they in more of a *Malmo-Levine*

Perrin article: Section 213

- Inhibits prostitutes from screening clients in public, as they can't stop cars or impede traffic
- Argument is that prostitutes could be arrested for talking to people in cars or on sidewalk
- Objective is still public order, not protecting vulnerable people (that's goal of 286.1)
- Given recognition that prostitutes can SELL sex w/o prosecution, they should be able to screen safely

Carter v Canada (Overbreadth)

SCC concluded that s. 241, which made it a criminal offence to aid/abet another person in committing suicide, was overly broad & therefore violates s. 7 of the *Charter*.

- Designed to protect vulnerable persons from being induced to commit suicide but it also caught cases outside that

R v Khawaja

The Court rejected the contention that the offence of participating or contributing to a terrorist activity was either overly broad or grossly disproportionate
The Court reduced the scope by the requirement of specific intent and close connection to terrorism and the exclusion of conduct that a reasonable person would not view as capable of materially enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity

Elements of an offence

Actus reus

- ***Actus Reus:*** Physical elements of the offence: physical elements of an offence; the conduct, the circumstances, and the consequences (if any).
- Criminal law requires an act due to the notion that a person can't be punished for doing something that's not specifically prohibited
    - I.e., an accused can't be held guilty merely ecause another person receives injuries through apprehension of the accused's intentions
    - Law won't punish for intentions alone either
- Majority of criminal offences are phrased in terms that forbid commission of particular acts
    - Sometimes, the act(s) constituting an offence aren't defined by statute and determining what qualifies as criminal conduct is left to common law
        - Example: definition of "sexual"
    - Statutory provisions and common law could also both be relevant
- Filling in legislative gaps regarding *actus reus* is one of the primary tasks of criminal courts
- Rule of law requires accused only be found guilty if they have committed offence as defined by law
    - Therefore, every one of the constituent elements of the *actus reus* must be established for conviction to be imposed
- Proof as the *actus reus* 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 in order to establish guilt

Fault elements – sets out circumstances under which the defendant is considered blameworthy
- Often sets out a mental state which the defendant must have in order to be convicted
    - If we see this, we say the offence is one of subjective fault
- Standard of care that df failed to achieve objective fault

R v DLW, 2016 SCC 22

Facts:
- The respondent tried to make his dog have sex with the complainant and when that failed, he spread peanut butter on her vagina and took photographs while the dog licked it off. He was charged with bestiality.
- Bestiality is not defined in the *Code*. Penetration has always been considered one of the offence's elements, but the Crown argues it no longer requires penetration and is committed by engaging in any sexual activity with an animal.

Issue: Is penetration an essential element of the offence of bestiality? **YES (appeal dismissed)**
Analysis:
- Criminal offences are statutory (except for contempt) but defining the elements of statutory offences often requires interpretation by the courts.
    - The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

- 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.
    - Any departure from that legal meaning must be clear, either by express language or necessary implication from the statute; vague change must be rejected to enhance certainty and fair notice. o
- While it is permissible for courts to interpret provisions in ways that reflect social changes to ensure that Parliament's intent is carried out (*Mabior*), *the courts must not expand the scope of criminal liability beyond that established by Parliament*.
- Enactments which interfere with liberty should be clear and any ambiguity resolved in favour of the subject.
- Points of policy as they relate to statutory interpretations are matters for Parliament to consider.

Rationale: (Cromwell J):

- Penetration of or by an animal has always been understood to be an element of bestiality; Parliament adopted that term without a definition and the evolution of the provisions show no clear intent to depart from the well-understood meaning of the term.
    - The crime of "buggery" committed either with mankind or any animal appeared in the 1869 *An Act respecting Offences against the Person*; this offence was understood as requiring penetration. o
    - The text of the *1955* Code revisions does not suggest that any significant change in the law was intended.
        - The word "bestiality" was substituted for "buggery" in the English version, but the French version was left unchanged; this appears to be merely the substitution of a more precise legal term.
        - The absence of a statutory definition of bestiality is consistent with the intent to adopt the accepted legal meanings of the term. •
        - Abella J's suggestion that the 1955 revision to the English version was linked to amendments to the animal cruelty offence has no foundations in the principles of statutory interpretation.
- There are important policy questions involved in expanding the offence of bestiality; thus, ***expanding criminal liability for this offence is for Parliament to do.***
    - As well, expanding the scope could turn a person such as this victim to a co-perpetrator (though unlikely to be charged)

Dissent: (Abella J):

- Good case to be made that by 1988, Parliament intended, or at least assumed, that penetration was irrelevant
    - While ambiguities should be resolved in favour of the accused, an interpretation more favourable to the accused should not be adopted if it is unreasonable given the scheme and purpose of the legislation. •
        - From 1869, bestiality was covered under "buggery," committed against a person or animal. •
        - In 1955, the offence of "bestiality" appeared at the same time the offence of animal cruelty was expanded to cover all birds and animals, reflecting an increased recognition of animal welfare.
            - It is hard to attribute to Parliament the inconsistent purpose that animal cruelty protection would now cover all birds and animals but the bestiality provisions would be limited to those animals whose anatomy permitted penetration (which undermines the legislative protections from animal cruelty).
            - If the elements of bestiality and buggery were the same, the addition of "bestiality" was redundant & no legislative provisions should be interpreted to render it redundant.
        - The 1988 amendments to the Code confirm the view of a broader meaning of "bestiality."
- Concerns about the victim in this case being charged as a co-conspirator are overblown; it is inconceivable that bestiality charges would ever be laid against someone who was forced to participate in the activity.

Prelim: Voyeurism: 1) surreptitious observation or recording; 2) in circumstances that give rise to a reasonable expectation of privacy. Three ways to commit***: 1) person is in place where person can "reasonably be expected to be nude, expose sexual organs… etc"*** 2) Person is nude/exposing, and observation undertaken for purpose of observing this. 3) observation done for a sexual purpose (*hardest to prove, rarest charged) – 2 and 3 have extra MR clauses*
Facts: Elements of voyeurism met in this case – accused charged under #1. Locker room was place where people expected to be nude – changing room.
Analysis:
Dickson JA (minority):

- What's the meaning of "can be reasonably expected to be nude?"
- Objective, not based on the accused's expectation
- Not limited by any temporal language! If Parliament wanted to limit it by time, it would have done so.
- Words and meaning are clear.
- Serious harms make it purposively necessary
- Problem is addressed by inquiry into reasonable expectation of privacy
- Parliament intended for all private spaces to be covered

Willcock JA (majority):

- Evidence clearly indicated that youth in that age group were normally not nude
- "Characteristics of a place are not immutable"
- "In order to characterize a place with multiple uses, it is necessary to consider the manner in which the place is expected to be used"
- "To hold otherwise is to capture conduct that does not bear the hallmarks of voyeurism". Would also eliminate/reduce the need for subsection (C)
- "Provisions are fundamentally concerned with bodily and sexual privacy and not intended to establish offences for breach of privacy alone"

Sankoff's take:

- Majority decision is preferable
- Section cannot be designed to trap every surreptitious taking in a place where, at some time, people can be expected to be nude
- If pictures were for a sexual purpose, prove it
- Evidence in this case showed pictures were taken in a place where, given the context, nudity not expected
- Dangerous to extrapolate from broader purpose of preventing "voyeurism", as dissenting judge suggests
- Moreover, reasonable expectation of privacy would not solve the problem

R v. Krajnc, 2017 ONCJ 281

Facts: A tractor trailer carrying pigs stopped at a light and was approached by animal rights protestors. A protestor, Anita Krajnc, reached in to pet some of the pigs and give them water. Krajnc was charged with mischief to property for wilfully interfering with the lawful use of property contrary to s. 430(1)(c) of the Code.
Issues, rationale: (Harris J)

- Can the Crown establish each and everyone of the following issues beyond a reasonable doubt? **No**
    - Were the pigs property? **Yes**
        - Property is a legal term; pigs are property not persons
    - Were the pigs being used lawfully? **Yes**
        - Evidence that the farmer and driver were aware of governing regulations and complied fully with these, including the transportation of pigs to the slaughterhouse
    - Did Ms. Krajnc obstruct, interrupt, or interfere with the lawful use, enjoyment, or operation of property? **NO**
        - No evidence that she gave the pigs an unknown substance let alone a contaminant as the Crown argued
            - Evidence she gave them water

        - The driver did not do anything to suggest he believed the pigs were contaminated – continued to drive them to the slaughterhouse and didn't communicate whether he believed they were contaminated
    - Her giving them water did not obstruct, interrupt, or interfere with the lawful use, enjoyment or operation of any property
        - Did not cause the truck to stop
        - While Crown counsel argued that the risk of the slaughterhouse turning the pigs away caused very real concern, this is contradicted by the evidence.
        - Protesters had given water to pigs before, and the slaughterhouse had never refused to accept a load of pigs for that reason.
  - Did she do so wilfully? (*irrelevant*)
  - Did she do so without legal justification or excuse and without colour of right? (*irrelevant*)

Holding: Charge dismissed, accused acquitted

MENS REA

- **Mens Rea:** the sum of mental elements of an offence (the guilty mind)
  - Notion that only those who *choose* to engage in activities that contravene the law and possess the capacity to make such a choice should be sanctioned
    - This recognizes that individuals are autonomous, recognizes that it is unfair to punish someone who has not done anything worthy of condemnation, and reinforces the rule of law by assuring citizens that they will only be convicted of a crime if they have a guilty mind.
  - Many lesser offences which do not require proof of a mental state
- *Mens rea* requirements are often less visible in statutory provisions than actus reus elements; some offences have no *mens rea* given in the statute, leaving it to the courts to describe the precise mental elements of the offence.
  - In this case, the court will seek to supply the necessary fault element by divining what the legislative intent was as much as possible from express language or by necessary implication (Gaunt and Watts).
  - While some crimes have explicit *mens rea* elements, others do not; this absence of consistency makes ascertaining the *mens rea* challenging, as one cannot simply rely upon what has been provided in the Code.
  - Legislators sometimes use a variety of terms to describe a concept (e.g., "intention" and "for the purpose of")
- How to approach ascertaining *mens rea* of an offence?
  - Must be with wording of the provision

MR: CARDINAL PRINCIPLES

1. Always start with what the STATUTE says (*Gaunt & Watts)*
2. If statute says nothing, default presumption is subjective MR for EVERY element (*Zora\/Theroux)*
3. Subjective MR for conduct (the act) and consequences is intention or recklessness (*Buzzanga)*
4. Subjetive MR for circumstances is knowledge or wilful blindness – *Beaver/Sansregret/Briscoe*
5. Use of HIGH subjective mental state EXCLUDES lesser subjective mental states – *Buzzanga*
6. Common law presumption of subjectivity does not apply to the consequences of a predicate unlawful act – *DeSousa/Godin)*

MOTIVATION

- A person who does an act that they know will cause a forbidden consequence still possesses the intention to cause that consequence even if doing so may not have been the reason why the act was committed (i.e., the motive).
- Requiring an improper motive (as opposed to an intent) would be extremely detrimental to the criminal law
    - If intention treated as motivation, an accused who deliberately caused harm would be exculpated because their motivation was other than the harm caused, thus narrowing the range of punishable harms
        - This would certainly exculpate defensible actions but would also exculpate many wrongful ones.
    - If law reworked to excuse only "laudable" motive, then the courts would have to ascribe or deny value to a motive on case-by-case basis, causing considerable unpredictability
- Thus, in most cases, motivation is legally irrelevant to the *mens rea*; if Parliament wants motive to be relevant, it must expressly state that (which is rare).
- Motivation often relevant in criminal proceeding
    - Evidence of motive can be useful in providing indication of accused's intent
    - Evidence of motive might help the jury to speculate as to whether the defendant did the act (Rosenberg).
        - A motive makes it more likely that the defendant committed the offence in question (Imrich).
    - Courts will take excusable motivations into account when fashioning the appropriate penalty; evil motivations (e.g., hatred) will warrant harsher punishment.

R v Hibbert, [1995] 2 SCR 973

Facts: 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.
Issue: Does the expression "for the purpose of aiding" in s. 21(1)(b) require that the accused actively view the commission of the offence he or she is aiding as desirable? **NO**

- It is not open to persons charged under this section to argue that because their acts were coerced by threats they lacked the requisite *mens rea* (though this may come in under the defence of duress).

Analysis:

- It might be argued that an accused charged under s. 21(1)(b) possesses the mens rea (assistance "for the purpose" of aiding) where they desire the consequences of their actions, but this results in distinctions which are unreasonable. o Under this interpretation, a person would not be guilty of aiding in the commission of an offence if they were genuinely opposed or indifferent to it (e.g., if someone drove robbers to a bank to make money).
- Parliament's use of the term "purpose" in s. 21(1) *(b)* should not be seen as incorporating the notion of "desire" in the mental state for party liability and the word should instead be understood as being essentially synonymous with "intention"

Ratio: "For the purpose" does not require that the accused desire the consequences; i.e., motivation does not equal intention. Instead, "for the purpose," for reasons of policy, is essentially synonymous with intention.

R v Steane, [1947] 1 KB 997 (Eng. Crim. CA)

Facts: Steane was a British actor who admitted to working for the Germans Broadcasting Service during WWII. He was charged under War regulations which stated that "If with intent to assist the enemy, any person does any act which is 69 likely to assist the enemy, then. . . he is liable to penal servitude for life." Steane said that he was arrested in Germany and repeatedly refused to work for the Nazis but capitulated when they threatened his family and beat him up
Issue: Whether these acts were done with the intention of assisting the enemy. **NO**
Ratio:

Rationale: (Lord Goddard CJ)

- It is impossible to say that where an act was done by a person subjected to the power of others, especially if that other be a brutal enemy, an inference that he intended the natural consequences of his act must be drawn merely from the fact that he did it; the guilty intent cannot be presumed and must be proved.
    - The jury would be entitled to presume that intent only if they thought the act was done because of the free, uncontrolled action of the accused.
    - In this case the accused had the innocent intent to save his wife and children, not to assist the enemy.

INTENTION

R v Buzzanga and Durocher (1979) 4 CCC (2d) 269 (Ont CA)

Facts: accused charged with wilfully promoting hatred against French-Canadians – controversial proposal to construct French-language school in Ontario – both are French-speakers and supported the plan. In distributing a pamphlet insulting French-canadians their purpose was apparently to show prejudice directed towards French-Canadians. Did not want to promote hatred against French ppl. – intended as satire.
Issue: Did the trial judge misdirect himself on the meaning of "wilfully?" YES new trial order
Ratio:

- **The default subjective fault element for consequences is intention or recklessness to cause them.**
- **Any time Parliament uses "intentional" or "wilful," proving recklessness will not satisfy the subjective fault element.**

Analysis:

- General *mens rea,* which is required and which suffices for most crimes where no mental element is mentioned in the def of the crime, is either the intentional or reckless xbringing about of the rest which the law, in creating the offence, seeks to prevent and, hens, under s. 281.2(1) is either the intentional or reckless inciting of hatred in the specified circumstances
- Insertion of the word "wilfully" in this section was not necessary to import *mens rea* since that req. would be implied in any event because of the serious nature of the offence
    - **Reasonable to assume that Parliament intended to limit the offence under the section to the intentional promotion of hatred**
- *General rule: person who foresees that a consequence is certain or substantially certain to result from an act which he does in order to achieve some order purpose, intends that consequence.*
- **You intend something if your desire is otherwise, but you are morally certain that result will follow**
- Conclusion: appellants were wilful only if their conscious purpose was to promote hatred or they foresaw that the promotion of hatred was certain or morally certain to result from the distribution of the pamphlet but did so to get the school

R v Boone, 2019 ONCA 652

Facts: Appellant HIV positive; set out to infect his sexual partners with HIV. The complainant D.S. had unprotected sex with the appellant, who falsely assured him that he did not have HIV. D.S. would not have had intercourse with the appellant had he known he was HIV positive. D.S. got HIV from the appellant, is on medication for the rest of his life, and has a life expectancy 12 years shorter than average.
Issue: With respect to DS, has the Crown proved BRD that appellant had necessary *mens rea* for the offence of attempted murder? **NO**
Ratio: To establish intention, the Crown must prove either (1) that the accused desired the consequences or (2) they foresaw that the consequences were certain or substantially certain to arise from their conduct.
Analysis:

- Crime of attempted murder requires proof BRD that accused intended to kill, couple with conduct by accused done for the purpose of carrying out that intention

- Intention to inflict harm, combined with recklessness as to the consequence of inflicting that harm, does not suffice
    - Likewise, if an accused believed that his actions **could** succeed in causing death, but it was not their purpose to cause their deaths, the accused is not guilty of attempted murder.
- A person intends to kill when (1) their purpose is to kill (either as an end in itself or as a means to achieving another end) or (2) they carry out some purpose with the belief that killing is virtually certain, although the killing is neither the ultimate purpose in acting nor the means chosen to achieve the desired purpose and may even be deeply regretted.
    - Recklessness is not to be equated with intention based on a belief in the virtual certainty that the consequences will flow
- If no proof that accused's purpose was to kill, Crown needs to demonstrate BRD that accused believed victim's death was virtually certain consequence

Rationale:

- To establish the mens rea of the offence of attempted murder, the Crown must prove either (1) that the appellant's purpose was to kill his partners or (2) that he believed that eventual death from AIDS was a virtual certainty.
- There was evidence that the appellant knew that his partners could be infected by HIV, and there is evidence that the appellant knew that HIV could lead to AIDS and to death at some point in the future if left untreated; however, evidence that the appellant believed that death at some point was a virtual certainty was not strong.

Common Sense Inference

- Relates to notion of **subjective foresight** (important MR element)
    - Default presumption where if no specified state of mind required, common law infers that subjective foresight (intention or recklessness) are required
        - Example: murder: intention for death
            - Subjective: have to prove the accused *actually* intended the death (aka the consequence)
- **Objective**: (RP would foresee the act) way of attributing liability
    - Example: assault causing bodily harm – MR: intention to apply force with knowledge of lack of consent do not need proof that the person intended the consequence
    - Ex: manslaughter: someone commits a fatal act but didn't intend the consequence
- Subjective: accused intended the consequence
- CSI SF, how to prove?
    - Use basic inference reasoning evidentiary deduction
    - Based on idea that we draw most logical conclusion from an act
        - We generally assume someone intends the consequences of their actions
- How it works:
    - Where a person commits an act, we assess whether a RP would know that consequences in that circumstance would follow (DIF from OBJECTIVE)
        - **This is simply permissive way of determining if the accused knew an evidentiary inference not mental state**
        - If you conclude a RP would know, absent evidence to the contrary in your case, you can draw the inference that the accused knew
            - **Helpful tool not mandatory**
    - **NEED TO CONSIDER ALL THE EVIDENCE**
        - **HAVE TO FILTER INQUIRY THROUGH ACCUSED'S SUBJECTIVE PERCEPTION OR YOU'LL GO WRONG**
            - Have to be absolutely convinced notwithstanding RP analogies
- OBJ: all you need to show is RP don't have to show that the accused knew under this inquiry

R v Zora, 2020 SCC 14

Facts: Parl made it criminal offence to breach bail conditions under s. 145(3) of the *Code* □ accuseds may be subject to imprisonment if they breach conditions even if they're never ultimately convicted of any of the crimes for which they were initially charges.
Zora granted bail but twice failed to present himself at door of his residence when police officers came by – both times he didn't know he'd missed the police at his door
Issue: Is the *mens rea* for this offence assessed under a subjective or objective standard? **Subjective**
Ratio: presumption of subjective fault intent for *Criminal Code* crimes unless legislation clearly intends otherwise
Procedural History: BCCA majority concluded that s. 145(3) requires objective *mens rea;* Fenlon JA found that it required subjective fault, but determined that the Crown had established subjective fault
Analysis:

- Subjective fault standard focuses on what was in the accused's mind t the time they breached their bail condition
    - "did the accused actually intend, know or foresee the consequence and or circumstance as the case may be"
    - Courts can consider personal circumstances and challenges of the accused in a manner which mirrors the individualized manner in which bail conditions are to be imposed
- Objective *mens rea:* doesn't matter if the accused doesn't know they were breaching conditions

Rationale:

- Long-standing presumption that Parl intends crimes to have subjective fault element
    - Presumption only overridden by "clear expressions of different legisl intent" – if ambiguous, presumption hasn't been displaced
- Examination of the language of the section to determine if legislative intent was for objective fault
    - Conclusion: subjective *mens rea*
- Requiring that accused person has knowledge of, or is wilfully blind to, their bail conditions doesn't mean that accused must have knowledge of the law (ignorance of the law is no excuse)
    - *Mistake of fact could negate mens rea but mistake of law wouldn't*
- Recklessness has nothing to do with whether the accused *ought* to have seen the risk in question but whether they subjectively saw the risk and continued to act with disregard to the risk
    - Risk cannot be far-fetched, trivial, or *de minimus* □ focus must be on whether the accused was aware of the substantial risk they took and any of the factors that contribute to the risk being unjustified

Holding: new trial should be ordered in light of error of law in applying objective rather than subjective fault standard

KNOWLEDGE, WILFUL BLINDNESS AND RECKLESSNESS

- An accused person may undertake an act without being certain that a particular consequence will occur, but with the knowledge that it is *likely* to occur. In other words, he or she is subjectively aware that an illegal consequence is a strong possibility, but proceeds nonetheless.
    - Morally culpable behaviour
- Question about degree of probability of certain consequences arises that accused believes will occur
- Line for subjective culpability seems to be drawn at recklessness □ "one who sees the risk and takes the chance"

Knowledge

- Knowledge means you **know** to a moral certainty an essential element of the offence
- Certain crimes (not most) state that knowledge must be proven before guilt can be established
    - Crime to publish defamatory libel or commit incest
    - Listing a specific knowledge requirement is said to extend such awareness to all element of *AR*

    - If knowledge is designated fault requirement, then prosecution not able to establish the charge merely by suggesting accused was reckless in regard to the particular circumstance, in that he or she was aware that such a condition might have existed but proceeded in any event.
- When an offence does not list a knowledge requirement, knowledge is presumed to be relevant where the circumstances of an offence require proof of relevant elements.
- Knowledge = Intent (high degree of certainty)
    - Reckless = aware of probability (lower degree)

Recklessness

Two substantive components:

2. Accused must first foresee the risk that's relevant to the offence; 2. Decide to take the risk *(Sansregret; Sault Ste. Marie).*

- Nothing to do with whether accused *ought* to have seen risk in question
- Not negligence
- "in essence, a reckless person is one who sees the risk and takes the chance" – *Sansregret*
- Determining whether a risk is substantial considers both the likelihood and gravity of the risk materializing.
- e.g., where a person shoots at a friend 500m away, the likelihood of the risk occurring is low but the magnitude of the risk is high and the social value of the risk is non-existent; in this case, recklessness is likely.
- Risk taken must also be "unjustifiable" – imports objective aspect into analysis (**objective test)**
    - **Test** does not consider accused's view of whether the risk was worth taking
    - If sound basis for proceeding with action, mental element of recklessness is not satisfied
- **Subjective nature of reckless inquiry must not be ignored**
    - **Key always what the accused knew or believed; justifiability of risk must be measured according to circumstances perceived by the accused**
        - **If accused made mistake, can't be reckless**
- Can smtimes operate to establish accused's subjective knowledge of relevant facts
    - Exists whenever accused is aware of particular risk that relevant fact **could** be present and still proceeds
    - e.g., in sexual assault cases, an accused is said to be reckless where they have knowledge that the other party was not consenting or where they were reckless in failing to ascertain consent.
- What does "could" mean?
    - Whether risk is substantial or unjustified
    - Substantial: not far-fetched, trivial, or *de minimis*
    - Unjustified: requires consideration of extent of risk, nature of the harm, social value in the risk, and ease w/which risk could be avoided
- Sometimes hard to determine if recklessness is sufficient fault element for a particular crim if *Code* isn't clear
    - If left to common law and decisions go in both directions, weight of authority suggests that recklessness will *not* suffice, especially where the knowledge element is critical to culpability
        - High level of certainty desirable before guilt should be imposed for an offence that's premised on the existence of certain circumstances rather than the consequences
            - Makes sense that accused should have full knowledge of circumstances before conviction

Wilful Blindness

- On surface, similar to recklessness, but more substantive and morally culpable mental state
- Wilful blindness is equated with actual knowledge -- it renders the accused culpable for crimes that must be committed "knowingly", even though finding the accused to have been merely reckless would not

- Example: man in US asked to bring package into Canada he may not at all consider what's in the package even through a reasonable person would have done so
    - May wonder or suspect drugs in package but decide not to ask – deliberate lack of knowledge
- Sopinka J, have to answer yes to: "Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?"
    - The test is not whether the accused should have known, but whether the circumstances were such that they were suspicious and deliberately avoided making inquiries to remain ignorant
- "it can almost be said that the defendant actually knew. He suspected the fact; he realised its probability, but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge."
- Requires at outset a fairly heightened level of suspicion
- *Lagace:* accused charged with knowingly being in possession of stolen property; defence: didn't know property was stolen despite strong indications he did have such knowledge
- Wilful blindness inquiry should focus upon what the accused *chose* to do or not do

Wilful Blindness vs Recklessness

Wilful blindness: v specific doctrine with limited scope designed to deal with one problem

- How we deal with knowledge
    - Doctrine of knowledge protects most ppl from being culpable for criminal facts when they are not sure or don't know relevant info about those facts
    - Knowledge is a high standard – limits the scope for those culpable

Recklessness: lower degree of certainty (sufficient mental state of awareness where consequences are concerned)

- Where a person is merely aware of the risk that something is "drugs", that's generally not enough to hold them liable
- Most often used wrt to the consequences of an act that you take (act consequence)
    - Ex: punch someone serious harm
- Sometimes want to make people liable for risky acts
    - Ex: sexual assault sexual act without consent (recklessness can be enough)
        - You bear the burden of knowing they are consenting

Knowledge – high degree of certainty about a particular element

- "I knew it was drugs in the bag"

Recklessness – lower threshold – "awareness of risk"

- "I thought it could be drugs in the bag"

When someone doesn't know – intentionally – then that's wilful blindness

- Doesn't want to know, to avoid liability – take every attempt not to know
    - Ex: *Briscoe*
- Comes into play when you need to prove knowledge – deemed equal to knowledge
    - It's a guy who knows something really bad is going to happy and makes the deliberate decision not to confirm in effect, they know

R v Théroux, [1993] 2 SCR 5

Facts: The accused was convicted of fraud for accepting deposits from investors in a building project having told them he had purchased deposit insurance when he actually hadn't. Fraud is defined in s. 380 of the *Code*.
consequence crime
Issue: What is the guilty mind of fraud?
Analysis:

- Subjective test: whether accused subjectively appreciated the consequences at least as a possibility
    - Nothing to do with accused's system of values
- Court need not show precisely what thought was in the accused's mind @ time of criminal act
- Fraud: prohibited act is deceit, falsehood, or some other dishonest act. The prohibited consequence is depriving another of what is or should be his, which may, as we have seen, consist in merely placing another's property at risk
- **The mens rea of fraud is established by proof of:**
    - 1. Intentional deceit, falsehood or other…
        - **subjective** knowledge of the prohibited act (higher degree of certainty than 2)
            - **requires intentional lie – must know**
    - 2. Intention/recklessness that the prohibited act could have as a consequence the deprivation of another.
        - i.e., intention or recklessness to cause the consequences of deprivation.
        - A belief that actual deprivation will result is not required; i.e., you do not need to know that deprivation will result, knowing that it could result is enough.
- The subjective fault requirement can be met even where the accused believed that nothing was wrong with what they were doing (i.e., lack of subjective awareness of dishonesty).
- Where the conduct and knowledge required by these definitions are established, the accused is guilty whether he intended the prohibited consequence or was reckless as to whether it would occur.

Beaver v The Queen, [1957] SCR 531

Facts: The accused was convicted of possessing morphine even though he had no knowledge that the package containing the morphine contained morphine when it was in his possession. Instead, he honestly believed it to be sugar.

- s. 4(1) of the CDSA holds "Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II, or III." The accused's possession was not authorized by the regulations.

Issue: Did the trial judge err in instructing the jury that the accused's knowledge was irrelevant? YES (new trial)
Ratio: An accused is deemed to have acted under that state of facts which he believed to exist when he did the act alleged to be an offence unless the legislature defined to clearly make the existence of any state of mind immaterial.
Analysis:

- **jury was told not to consider whether the accused legit thought it was sugar**
- essential question is whether the belief entertained by the accused is an honest one and that the existence or nonexistence of reasonable grounds for such belief is merely relevant evidence to be weighed by the tribunal of fact
    - **aka: subjective knowledge plus common sense inference**
- essence of the crime: possession of the forbidden substance and in criminal case, in law no possession w/o knowledge of the character of the forbidden substance
    - in this case, X did not have possession of heroin so long as he honestly believe the package to contain baking soda
- quash conviction on charge of having possession of a drug

Holding: not guilty of possession; guilty of trafficking (it is enough if you sell something held out to be an illegal drug without actually knowing what it is)

MORAL INNOCENCE

- common law presumption: subjective fault for every physical element of an offence
    - can be removed by statute; if this occurs, Charter is consulted to determine if mental element is constitutional requirement

- *Reference re: Section 94(2) of Motor Vehicle Act* held that it was a principle of fundamental justice that the "morally innocent" could not be subject to criminal penalty
    - Thus, where an offence removes any need to show that the offender was morally at fault, it will result in a s. 7 violation and be invalid unless it can be saved under s. 1.
- In *Vaillancourt,* constitutionality of section 230(d) (constructive murder – permitted a person to be convicted of murder even where they had no intention to cause death, or (d) where it wasn't even required that death have been a likely result) was challenged under s 7 on ground that it improperly imposed liability for an offence where *mr* for the commission of the offence (murder) was not required
    - SCC agreed, for it imposed the harshest sanction available under our law without requiring a clear and appropriate mental element
    - Case only dealt with section d, but *obiter* made it seem like Court was open to extending this all of 230.
- In *Martineau,* the accused challenged the constitutionality of s. 230(a), which made any culpable homicide murder where a person caused the death of a human being during the commission of another listed offence if he means to cause bodily harm for the purpose of facilitating the commission of the offence or escaping after its commission.
    - The Court adopted a mechanism called "stigma" to delineate when an offence requires proof of subjective foresight; it held that crimes that are particularly stigmatizing demand a high mens rea.
        - Offers protection for the morally innocent while upholding the many crimes which do not require proof of subjective foresight.
        - The Court agreed that given the special nature of the stigma attaching to murder, the principles of fundamental justice require subjective foresight for the offence.
    - After this case, it remained uncertain what offences (besides murder) had a stigma which required subjective *mens rea* (i.e., it is difficult to measure and apply stigma).
- In *DeSousa,* SCC put a damper on the hope that most criminal offences required subjective standards of mens rea as matter of constitutional necessity
    - SCC concluded that it wasn't contrary to fundamental justice for Parl to punish those who engage in unlawful conduct and cause unintended consequences
    - It suggested that some offences (like murder) required subjective foresight while others (like unlawfully causing bodily harm) required nothing more than objective foresight.
        - Thus, the only question that remained was the place at which to draw the line
- In *Creighton,* the accused challenged the constitutionality of s. 222(5)(a) of the Code, which provides that a person commits culpable homicide when he causes death by means of an unlawful act even though he lacks the intent to kill.
    - Court applied test from *DeSousa* and held that what was needed was merely "objective foreseeability of the risk of bodily harm which is neither trivial nor transitory, in the context of a dangerous act"
    - Held that the fact that the *mr* of manslaughter requires foreseeable risk of *harm* rather than foreseeable risk of *death* does not violate the principle of fundamental justice
        - The moral fault required for manslaughter is commensurate with the gravity of the offence and the penalties which it entails and offends no principle of fundamental justice
    - Court held that differences in moral responsibility were matters to be considered primarily in sentencing
    - If a crime as serious as manslaughter possesses insufficient stigma to impose subjective fault standards, very few offences will.
        - In fact, leaving aside murder and a few associated party offences to that crime, only crimes against humanity and war crimes have been held to require subjective awareness of consequences to date.
        - Therefore, most of the time, courts defer to Parliament instead of applying stigma analysis.

- This case effectively put an end to the use of s. 7 as a means of imposing higher standards of subjective *mens rea*, or even in requiring symmetry between the physical and mental elements of the offence.

R v DeSousa [1992] 2 SCR 944

Facts: Constitutional challenge to s. 269 (unlawfully causing bodily harm).

- Appellant involved in fight where bystander was injured when a bottle allegedly thrown by the appellant broke against wall and shard hit bystander
- The appellant, arguing that he did not foresee bodily harm, challenged the constitutionality of s. 269, arguing that s. 7 of the Charter requires subjective foresight of all consequences which constitute part of the actus reus of an offence.

Issue: The mental element of s. 269 of the *Code*—is it constitutionally sufficient? YES

Ratio: Provided that an actor is already engaged in a culpable activity, subjective foresight of consequences is generally not required in order for Parliament to hold that actor responsible for the results of their unlawful activity.

Analysis:

- Provision should not be interpreted to lack any element of personal fault unless statutory language mandates such an interpretation unambiguously
- To require intention in relation to every consequence of an action would bring many Code offences into question, which cannot be justified by the aversion to punishing the morally innocent because one is not morally innocent who causes injury through avoidable unlawful action.
- Allows Parliament to deter people from causing bodily harm during certain offences by distinguishing between equally reprehensible acts on the basis of the harm that is actually caused.
- S. 269's mental element has two separate requirements:
  - Mental element of underlying offence of s. 269 be satisfied
  - Additional fault requirement supplied by wording of s. 269 also be satisfied
- Meaning of unlawful in context of s. 269 requires that the unlawful act be at least objectively dangerous
- Objective foresight of bodily harm should be required for both criminal and non-criminal unlawful acts which underlie a s. 269 prosecution
- The elements of unlawfully causing bodily harm under s. 269 are:
  - An unlawful act (the predicate offence), and
    - The corresponding mental element must be constitutionally sufficient; this would not include offences of absolute liability.
  - The causing of non-trivial bodily harm as a result of the unlawful act.
    - The corresponding mental element is that the causing of non-trivial bodily harm must be an *objectively* foreseeable consequence of the unlawful act. The mental element required by s. 269 is constitutional unless it is one of those few offences which due to its stigma and penalty require fault based on a subjective standard.
    - **Note:** the need for only objective foreseeability is that someone who does something unlawful, we are less worried about whether they subjectively knew what would happen.
      - The consequence does make the act wrongful; it is merely an aggravating factor.

Sopinka:

- S. 269 has neither the stigma nor criminal sanction to require a more demanding mental element than it already has
  - Stigma associated with conviction will generally reflect degree of opprobrium which the underlying offence attracts

R v Godin (1993) 82 CCC (3d) 44 (NBCA)

Facts: Appellant convicted that he "did endanger the life of Andrew Doiron thereby committing an **aggravated assault**" contrary t o s. 268(2) of *Crim Code.* Sentenced to 18 months and 2 year probation. Appeals conviction, seeks leave to appeal sentence.

- G called ambulance and took baby to hospital—diagnosed w suffering major head trauma
- G gave versions of what happened/how the baby ended up with major head trauma

Procedural History:

- Trial judge: G never tried to give honest account of what took place that night
    - 1) child was cranky; 2) accused struck child intentionally; 3) caused the child serious injury, endangering his life

Analysis:

- T judge: bc of working in s. 268(1) as opposed to s. 267(1), an intent to endanger life had to be proven
    - 268(1) – everyone commits an aggravated assault who does certain things
    - 267(1) "everyone who, in committing an assault, does certain things is guilty of an offence
- Intentional force without consent is NOT ENOUGH
    - Crime requires MR towards consequences
- Crown argues that *DeSousa* has changed necessary intent for the offence
    - Sopinka J "to require fault in regard to each consequence of an action in order to est liability for causing that consequence would substantially restructure current notions of crim responsibility"
- *Vaillancourt & Martineau:* liability for murder required *mens rea* no less than subjective foresight of death
- Underlying offence is to commit one of the forbidden acts—it follows that the mental element must attach to those forbidden acts. MR must be the subjective foresight of the forbidden act
- **This case:** Trial judge correct to require proof of an intent to endanger the life of the child. Held that there was such an intent
    - but if accused acted out of "anger or frustration", such fact would tend to negate subj foresight…

Holding: appeal dismissed

R v Godin, [1994] 2 SCR 484 (SCC)

Mens rea required for s. 268(1) of *CC* is **objective foresight of bodily harm;** not necessary that there be intent to wound or maim or disfigure. Per: *DeSousa* and *Creighton*

Holding: appeal allowed; conviction restored

PREDICATE OFFENCES

Predicate offences

- crime that is a component of a larger crime
- Default presumption: subjective MR for every element. That presumption doesn't apply to predicate offences
- "Is the act criminally complete without a consequence?" If yes, it's a predicate offence

Unlawful acts & consequences

- Someone who does something UNLAWFUL should bear cost of consequences
- Subjective MR would negate this approach
- These are sometimes called PREDICATE offences
    - Offence is committed first, without any consequences
    - Wrongness (moral culpability) is already committed when you commit the act
- The consequence is not part of the moral culpability for the offence (what makes it wrongful), but is merely an aggravating factor

- Unlawfully causing bodily harm – s 269 (still exists as a residual "catch-all")

- *DeSousa: "*provided there's a **sufficiently blameworthy** element in the AR to which a culpable mental state is attached, there is **no additional requirement** that any other element of the AR be linked to this mental state or a further culpable mental state"

- Manslaughter (unlawful act causing death – 222(5)a
  - Basically, every homicide that's not accidental that's not murder

Theroux vs. Godin
- In *Theroux,* SUBJ awareness of deprivation required
- In *Godin,* SUBJ awareness of consequences not required
- Fraud? w/o deprivation, main element is just a dishonest act
- But aggravated assault, w/o consequences IS ALREADY UNLAWFUL CONDUCT

Consequences subjective?
1. if state says so (eg wilful promotion of hatred) – **YES**
2. if consequences are part of what makes the act unlawful (eg fraud) – **YES**
3. If the consequences are additional to a PREDICATE offence – **NO** (objective foresight only)

MR: questions to consider
- Do you know basic presumptions?
- What does the statute say?
- Is there a consequence element?
- Is there underlying wrongful conduct?

ACTUS REUS AND MENS REA – ISSUES

HOMICIDE

Question #1: Culpable or Non-Culpable?
- S. 222(1) – a person commits homicide when they directly or indirectly cause the death of another human being
- S. 222(2) – homicide is culpable or non-culpable
  - 4 type of culpable homicide

<u>Non-culpable homicide</u>
- 222(3) – not an offence
  - Defined in "reverse" – culpable homicide lists four discrete situations. Everything else is non-culpable
  - In practice: any death caused by a lawful act
  - Accidents are not unlawful
  - Caveat: don't forget where unlawful act does not CAUSE death (person still guilty of unlawful act)

<u>Culpable homicide</u>
Murder
- 229(a) Intentional kills– most common by far
- 229(b) Transferred intent murder (meant to kill A, but killed B by mistake)
- 229(c) Unlawful object murder (did something unlawful, knew likely to cause death)
- **Penalty:** life imprisonment no chance of parole
- **(**Have to first prove it's one of the above three types of murder)
- **First degree – s 231 (auto 25 years parole ineligibility)**
  - Planned and deliberate
  - Special victim murders: kill police officer or similar, prison guard acting in course of duties

    - Killed while committing sexual offence, kidnapping, hijacking or criminal harassment
    - Terrorist acts or at direction of criminal organization
- **Second degree (anything not first degree) – min 10 year parole ineligibility, up to 25 where warranted**

Infanticide – 233 entirely
- Only for women, killing newborn child
- Often under postpartum depression
- Created infanticide as "halfway house" – applies where woman kills her newborn by wilful act or omission
- "Mind is disturbed by effects of childbirth or lactation"
- Separate charge/defence to murder/manslaughter
- Max sentence: 5 years

Specific acts – 222(5)
- A) by unlawful act
- B) by criminal negligence
- C) by causing person, by threats, fear of violence or deception, to do something that leads to death
- D) by wilfully frightening child or old person
    - C & D – residual from manslaughter

Manslaughter
- Any culpable homicide that's not murder or infanticide
- Can be charged on its own OR occur as a result of failure to prove murderous intent
- Can also occur as result of provocation (s. 232)
- Punishment: max life,; min of 4 years where firearm used

MENS REA AND THE CHARTER

Practical:
1. Don't need to know how to APPLY "stigma" analysis;
2. LIMITED day to day applicability
3. Understanding some of the basics should help some of the cases you read make some sense
4. "The Charter is simultaneously important and unimportant to *mens rea*

- Common law presumption: MR unless taken away by legislation

Basic Argument
- Section 7 has right to liberty (risk of imprisonment)
- Is *MR* principle of fundamental justice?
    - S 229(c) of Code
        - Homicide is murder where a person, for an unlawful object … does anything that he _____ knows is likely to cause death
        - *Stigma* (lamer) – what does this actually mean
    - *Martineau:* imprisonment + no sufficient MR = s. 7 breach
    - Lots of imprisonment offences w/no to little MR

MR and the Charter: 10 things to know
1. Idea that a crime must have some level of fault (MR) is a principle of fundamental justice
2. Cannot imprison someone if the crime lacks a "fault element"
3. What is a constitutional fault element?
4. Depends on the crime. Court looks to level of "stigma" attached to the conviction
5. For some crimes, OBJECTIVE fault elements suffice. For others, SUBJECTIVE are needed

6. In 1990, SCC said murder had so much "stigma" that you can't have OBJ fault element
7. Problem: what is STIGMA?
8. Very difficult to measure (abstract value)
9. Underlying principle is suspect
10. It still exists but applies only in very rare cases (murder, war crimes)

TRANSFERRED INTENT

Had to do with mistake on the part of the accused

Situations: don't need doctrine of transferred intent

1. where you shouldn't use it
2. where you can use it

Mistake – but you don't need transferred intent

- accused has full *mens rea*
- Ex: A goes to assault B, but unknown to A, he punches C
    - Identity of victim irrelevant (crime completed, error immaterial)

Where you can't use doctrine of transferred intent

1. No illegal intent
    a. Ex: A & B decide to have sex at hotel for fun. A accidently goes into C's room thinking it's B's. Starts to fondle C, who screams. A had desire/intent to touch B, not C. Had no intent to touch C.
2. Is illegal intent, but doesn't match the crime for which the person is charged
    a. A is mad, decides to cause mischief. Plans to break a window. Throws the rock but the window opens and A hits B. Charge A with assault? NO. No intention to apply force to B. A charged with attempted mischief.

Where you can

Deakin

- A intends to apply force to B; A breaks glass. Glass breaks and lodges in C's eye.
    - Court transferred intent from B to C (because A intended to apply force to B)

Flaws with transferred intent misrepresents liability

Ex: *Gordon*

- Can't transfer intent when dealing with attempt cases
- *(A didn't attempt to murder C/D/E, only B)*
    - Charged with attempted murder for B, and reckless discharge of firearm wrt C/D/E

CAUSATION

Practical Aspects

- Causation – attempt to analyze
- Any offence w/o consequence isn't concerned with causation (it's irrelevant)
    - Ex: assault, impaired driving, possession
- Other offences can be where mens rea overwhelms need to prove causation usually much harder to prove someone intended to prove consequence than physically *caused* a consequence
- Ex: murder
    - *AR* low standard (just have to prove they were a partial cause)
    - Murder: Subjective intent to kill
        - Weaker causal connection, harder to prove intent to kill

- Ex: (weak causal chain) 99/100 times these will be run as *mens rea* cases

Situations where causation has *little to no* practical relevance

1. no consequence element to the offence
2. The consequence element requires significant proof of intention, whether wilfullness or recklessness (aka subjective intention)

Situations where causation has practical relevance

1. No mental element for the offence (and a consequence element is required);
   a. Absolute liability/strict liability offences that need a consequence element fight on causation
2. Consequence element requires only objective foresight (eg: assault causing bodily harm; negligence-based offences);
   a. Causation looks at what actually happened and whether you're responsible for it
   b. *MR* looks at probability
3. Mental consequence requirement is different from physical consequence element
   a. eg: manslaughter
      i. MR element: objective foresight of bodily harm
      ii. AR element: causal proof of death
         1. Can maybe prove you weren't the actual cause of death
4. Vary rare circumstances where INTENT clearly present; desire to show AR not caused (guilty of an attempt only)
   a. Like, someone really wants to kill someone but at the end of the day, the act that caused the death didn't happen (sooo unlikely)

***<u>factual causation is not always fair</u>**

- remote cases of causation are meaningless where subjective MR of consequence is required

Causation

- Wrongful act must FACTUALLY AND LEGALLY cause the consequence
- Always have to prove the first one (factual) & only sometimes have to prove the second (legal)
  - ^these two elements are not the same thing
- Many crimes require as distinct element proof that the accused was responsible for particular consequence.
  - Ex: s. 267 – accused commit assault that *causes* bodily harm
    - To convict, prosecution must est both that victim sustained bodily harm **and** that the accused was cause of it
  - As element of *actus reus,* causation determines whether accused should be held liable for particular harm; sometimes the links b/w conduct at heart of the offence (assault) and consequence that results (bodily harm) are controversial
- Causation concept: moral concern regarding how responsibility should be apportioned for effects arising from criminal act: responsibility can be attributed broadly, narrowly or in-between
- **Two separate components:**
  - Factual – evidence-based analysis using ordinary proof BRD to determine accused's actions provided factual foundation for consequence that followed
  - Legal - point at which law is willing to attribute part. Result that is factually establish to the conduct of the accused
    - Protective mechanism to ensure someone is not improperly "labelled
    - A corrective mechanism for the small number of offences whose MR and AR don't match up
      - SCC has decided that the standard for causation is v low
- Problems can arise when it's clear that accused's actions are not the *sole* cause of the consequences in question pretty rare in practice
  - Bc AR of causation is only one aspect of overall inquiry into guilt

- Prosecution also has to prove *MR* □ usually requiring objective or subjective foreseeability of harm caused

R v Lucas

- A prison inmate, Mr. X, is attacked by another inmate and stabbed in the arm
- Moments later he is stabbed in a separate incident in the chest by a different inmate
- There is NO evidence the inmates acted together
- The evidence shows that only the chest stabbing killed X
- Mr. A is found with a bloody knife. Clear he did one of the stabbings. Charged with manslaughter (which requires proof that A "caused death")
- **Can't be convicted of manslaughter**
- One inmate caused death, but we can't say which one
- On the facts, clear that whoever stabbed the victim in the arm played NO part in causing death
- Factual causation unsatisfied

Smithers v the Queen, [1978] 1 SCR 506

Facts:

- After a hockey game in which feelings ran high, the appellant approached the victim, Cobby, outside the rink. He punched him twice in the head and delivered a kick to his stomach. Cobby groaned, staggered, and fell to the ground, grasping for air. Within five minutes, he appeared to stop breathing and was dead upon arrival to the hospital.
- The doctor who performed the autopsy testified that death was due to the aspiration vomit. This was held to be a rare and unusual cause of death in the case of a healthy teenager like Cobby, since usually the epiglottis folds over to prevent vomit from entering the air passage.

Issue: Did appellant unlawfully kill Barrie Cobby by kicking him? **Yes (factual cause of death)**

Ratio: An unlawful act may remain a cause of a person's death even if the unlawful act, by itself, would not have caused that death, provided it contributed beyond *de minimis* to that death (i.e., in a manner that is more than trivial).

Analysis:

- Issue of causation fells to be determined by jury on whole of evidence, not just medical
- Manslaughter is the **causing** of death of a human being by an unlawful act – but not an intentional act
- Causation as fact can only come from witnesses' evidence, incl. expert witnesses
- **Crown had burden of showing factual causation, that BRD the kick caused the death**
    - **Factual causation: did he spontaneously throw up**
- An unlawful act may remain a factual cause of a person's death even if the unlawful act, by itself, would not have caused that person's death, provided it contributed beyond de minimis to that death.
    - The fact that Cobby may have been susceptible to failure of the epiglottis does not absolve the appellant from liability for kicking him in the stomach, as the kick contributed to the death beyond *de minimus*.
    - Even if the unlawful act alone would not have caused the death, it is still a factual cause of death so long as it contributed in some way to the death.
- The perpetrator must take his victim as he finds him: i.e., the "thin skull" doctrine applies.

Holding: appeal dismissed

Notes:

- "immaterial whether he intended to cause death" -- everyone agrees to this

Factual causation: did he spontaneously throw up

- Lawyer argues that he threw up from fear (factual question for the jury)
- Thin skull rule: whether or not you intended to kill your victim, you **take them as you find them**

- Contributing condition of malfunctioning epiglottis does not break chain
- *But for the kick, would he have died?*

Legal causation:

- Very low threshold

Why isn't Smithers saved by MR?

- Manslaughter doesn't required subjective foresight of death
- All that's required is objective foresight of harm
- **Manslaughter is a situation where causation remains important**
    - Big discrepancy b/w AR and MR

***Smithers:* Low Standard - THE PLUSES**

- No need for jury to worry about WHAT exactly caused harm. Some = GUILT
- A low standard makes people responsible for unforeseen consequences
- Take victim as you find them
- Nuance can be dealt with in sentencing

***Smithers:* Low Standard - THE MINUSES**

- Do they deserve the stigma? Does labelling matter?
- Can they always be saved by sentencing flexibility? (ex, mandatory minimums)
- Combination w/objective foreseeability (MR) can lead to unusual (and unfair) results
    - Eg. Smithers - sure bodily harm from kick was foreseeable, but death was unforeseeable

R v Maybin, 2012 SCC 24

Facts:

- Victim affronted appellant in a crowded bar. Appellant violently punched his face and head in quick succession.
- Victim, unconscious, fell face forward onto pool table. Bar bouncer came over and after asking who started the fight, struck the victim in the back of the head.
- Victim died as result of brain bleeding

Procedural History:

- TJ: all three accused had assaulted victim and had either directly or indirectly caused bodily harm
    - But, couldn't be sure BRD which assault killed the victim so all 3 acquitted
- CoA: TJ erred by focussing narrowly upon the medical cause of death and failing to address broader issues of factual and legal causation
    - Assaults factually a contributing cause of death; "but for" their actions, the victim wouldn't have died
    - Legal causation: majority concluded that risk of harm from the intervening act was reasonably foreseeable; dissenting said it wasn't and that the intentional act of an independent person severed legal causation

Issues:

1. Did trial judge err in failing to address whether the appellants' assaults were in fact a cause of death?
2. Was it open to the trial judge to find that the appellants' assaults remained a sig 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?

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

Analysis:

- *Smithers/Nette* causation standard test: "were the dangerous, unlawful acts of the accused a **sig contributing cause** of the victim's death?"
    - Two aspects:
        - Factual causation

- Legal causation – narrowing concept which funnels a wider range of factual causes into those which are sufficiently connected to a harm to warrant legal responsibility
    - Question of whether the accused person should be held responsible in law for the death that occurred \

Factual causation:

- Appellants factually caused victim's death
    - TJ needed to go beyond the medical evidence when considering this

Legal Causation

- "Intervening cause" – some new event that results in accused's actions not being a significant contributing cause of death
- Breaking chain of causation:
    - 1. Whether the intervening act was objectively or reasonably foreseeable
        - *Majority concluded that trier of fact could find that it was reasonably foreseeable to the appellants that their assault on the victim* ***would provoke the intervention of others***
    - 2. Whether the intervening act is an independent factor that severs the impact of the accused's actions
        - *Dissent's view*
- Intervening act that's reasonably foreseeable will usually not break the chain of causation so as to relieve the offender of legal responsibility for the unintended result
    - Manitoba CoA: in order for *novus actus interveniens* to apply to sever legal causation, intervening act had to be "extraordinary" or "unusual"
- From perspective of moral responsibility, sufficient if the general nature of the intervening act and risk of non-trivial harm are objectively foreseeable at the time of the dangerous/unlawful act
    - Some degree of specificity about the nature of the intervening act must be foreseeable in order to invoke a moral response
- **Intervening acts and ensuing non-trivial harm must be reasonably foreseeable in the sense that the acts and the harm that actually transpired flowed reasonably from the conduct of the appellants**
- **If the intervening act is a direct response or is directly linked to the appellants' actions, and does not by its nature overwhelm the original actions, then the appellants cannot be said to be moraly innocent of the death**

Rationale: (Karakatsanis J)

- The trial judge erred by not considering the contribution of the appellants to the victim's death by asking whether the deceased would have died "but for" the actions of the appellants.
- It was open to the trial judge to conclude that it was reasonably foreseeable that the fight would escalate, and other patrons would join the fight or that the bouncers would use force to seek to gain control of the situation.
- It was open to the trial judge to conclude that the actions of the bouncer were not independent of those of the Maybins, instead being closely connected in time, place, circumstance, nature, and effect with the appellants' acts and that the effects of the appellants' actions were still "subsisting" and not "spent" at the time the bouncer acted.

Holding: appeal dismissed

NOTES:

R v Romano, 2017 ONCA 837

Facts: Romano acquitted by jury of the charge of dangerous operation causing death. Carla Abogado was on her way home from a part-time job when she was struck and killed by a Ford F-150 truck being operated at high speed by Mr. Romano; she was jaywalking. He was speeding aggressively.

Issue:

1. did the trial judge err in law in failing to leave the included offence of dangerous driving with the jury?
2. did the trial judge misdirect the jury on the elements of the dangerous driving component of the offence of dangerous driving causing death?

Analysis:

Included Offence Issue:

- An "included offence" is a separate offence that is necessarily committed where the charged offence has been committed
- Generally necessary for trial judge to charge the jury about included offences
- Included offences that can't lead to legally appropriate verdicts should not be left with juries
- I agree with the trial judge…. While Ms. Abogado was herself acting in a dangerous manner by jaywalking, there was no realistic scenario on the evidence that would enable a properly instructed jury to acquit Mr. Romano of the offence of dangerous driving causing death, yet convict him of the included offence of dangerous driving…
- Agree w/TJ's application of these tests to keep dangerous driving from the jury
- Doctrine of intervening act – applies where an event independent of the accused's conduct occurs that severs the chain of factual causation b/w the accused and consequence
    - TJ was correct to find that there was no air of reality to the prospect that Ms. Abogado's jaywalking could qualify as an intervening act
- Any jury properly instructed, accepting the dangerous driving theory of the Crown in this case would have had to find that Mr. Romano's dangerous driving caused death.
- **Decline to give effect to this ground of appeal**

Jury Charge

- the trial judge's jury directions specifically contemplated the very factual outcome that he had previously ruled was not legally available — a finding that dangerous driving occurred without causation
- since the jury was only given the offence of dangerous driving causing death, the charge also contemplated a complete acquittal if the jury found facts that would support the offence of dangerous driving *simpliciter*
    - **This was an error**
- [after] deciding to remove the included dangerous driving offence from the jury, he should have discharged his obligation of advising them of the elements of the offence that would have to be found for a conviction, but then made it clear to them that causation was not, in law, a live issue in the case that can properly attract reasonable doubt…
- Would therefore allow the appeal, set aside verdict of acquittal and order a new trial on the charge of dangerous driving causing death

Holding: appeal allowed

PARTIES TO OFFENCES

Categorical distinctions – before:

- Actual perpetrators of a crime: 'principals in the first degree'
- Aiding and abetting at the crime scene: "principals in the second degree"
- Conspired w/principal in the first degree or aided/abetted not at the scene: accessories before the fact
- Intentionally aided principal to escape: accessory after the fact

Parties to an offence: treated as having committed the crime itself

- Differences wrt participation: dealt with in sentencing

Section 21 of the *Code:*

(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.

Section 21(1)(a) – Actually Commits It

- Recognizes there may be more than one person who actually commits a crime
    - A principal is a person who has both the *mens rea* and the *actus reus* that is necessary for the offence
- **"innocent agency**" when one person uses another to commit an offence for them. Happens in 2 ways:
    1. Agent is incapable of knowing what they are doing is wrong
    2. 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.
- In either case, at common law it's accepted that the **user *is the principal* –** used in *Berryman*
    - Parl intended to include this doctrine w/in this section by the words "actually commits it" person who committed an offence by means of an innocent agent "was deemed to be the actual perpetrator"

Section 21(1)(b) – Aiding or Abetting

- Most cases, easy to satisfy AR
- **MR**:
    - KNOWLEDGE of what the other person will do (recklessness not enough – WB is)
    - INTENTION that the act or omission will help
    - Must have BOTH (only exception predicate offences)
- Abetting: "instigating, promoting or procuring" a crime to be committed
- Aiding: assisting or helping without necessarily encouraging or instigating the actor
- Person will be a party where they do or "omit to do anything" to assist another party
- Acquittal = lack of KNOWLEDGE
    - = lack of INTENTION TO HELP rarer but still possible (eg, know what's going to happen, try to stop him/actively not help)

Examples:

- *Coney:* accused present at illegal prizefight and charged w/aiding & abetting a battery bet on fight/shouted encouragements
- *Dunlop and Sylvester:* "gang rape" -- accused stated that they had done nothing more than bring some beer to the scene of the crime.
    - No personal involvement but omitted to do something to hinder or prevent the offence
    - ***BUT, SCC* said there had to be more than "mere presence" at least, encouragement of principal offender**
    - Subtle forms of action amount to encouragement
- *Lai:* victim attacked by mob – accused in question weren't primary petretrators but were part of group that entered the hallway
- *Laurencelle:* victim kidnapped and held in a house. Accused came home with her daughter, was unaware of the kidnapping plan.
    - Sole participation: give victim water and a cig
    - TJ: convicted; BCCA: acquitted because she had no power over the principals and acts of kindness towards the victim didn't amount to a/a
- *Halmo:* car owner let his chauffeur (v drunk) to drive and then was the cause of an accident that killed 4. Owner convicted of a/a offence of reckless and dangerous driving since chauffeur drove car w/consent of owner

- *Kulbacki:* test to determine who is an aider or abettor in the driving cases would therefore seem to be an ability to control followed by a failure to exercise that control.
    - That failure to act is encouragement to the other party and amounts to abetting the offence in question
- **Section 21 imposes *mens rea standard***
    - Should be concerned solely w/intention for the assistance provided
    - *Hibbert:* accused provided assistance to another party who attempted murder against third individual
- **"Purpose" in 21(1)(b) means the same thing as intent**
    - When a person acts under duress, it's not that they had no choice by to act, only that they had no real or acceptable choice
- To be liable: need second mental component: **knowledge**
    - 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
    - General details are sufficient
- *Kirkness:* accused was charged with murder by virtue of being a party to that offence
    - He didn't participate in the sexual assault and attempted to dissuade Snowbird from choking the victim
    - SCC said that "requisite intent that the a/a must have to warrant a conviction for murder must be the same as that required of the person who actually does the killing"
        - Aka: subjective foresight of the forbidden consequences

Jackson

- SCC – test for manslaughter set out in *Creighton* should also apply to ss 21(1)(b) and (c)
    - Aka: person could be convicted as a party where they knew that their assistance was being provided for an inherently dangerous act that was obj likely to cause non-trivial or non-transitory harm
- Act of assisting criminal negligence causing death required focus on 2 sep elements:
    1. Crown needed to show that the accused "do something w/intent to assist conduct that is criminal negligent and know sufficient details of the assisted conduct to render that conduct crim negligent"
- Possible to have situation where the person who actually kills has the *MR* for murder, while the party assisting is only guilty of a lesser offence
    - Converse situation – Can B be convicted of being a party to the offence of murder while A is only convicted of manslaughter? Two views:
        - 1. *actus reus* is the killing of the victim, which is common to both accused and it is that which B aids or abets. Given the *actus reus*, precisely which offence *he* is guilty of depends upon his *mens rea* and if that suffices for murder it would seem to follow that he can be guilty of murder even though the person actually doing the killing is only guilty of manslaughter.
        - 2. Secondary liability is regarded as derivative of principal liability wrong for the party to be convicted of an offence that was never convicted/attempted
        - *For now, first option seems possible in cases where AR of two offences is the same and the party charged under 21(1)(b) has appropriate* MR *for the more serious offence*

Abetting in 21(1)(c) -- guilt will accrue to anyone who "abets any person in committing" the offence

- Cannot be abetted unless accessory intends to abet him

21(1)(a) – JOINT
21(1)(b) – participation have to KNOW what the other person is going to do
21(1)(c) – abet
21(2) – joint intention, working together w/assistance

- ought to have known what the other person is going to do (second part is objective)
- Courts have held that the objective element is constitutional, but can't be applied to MURDER or other HIGH STIGMA offences

COMMON INTENTION – 21(2)

- Where 2 or more persons form intention to carry out unlawful purpose … and any one commits offence, each of them who knew or ought to have known commission of offence would be **probable consequence** are parties to offence
- **KEY: high MR**
    1. Intention to carry out unlawful purpose (predicate law problem)
- A & B must have clear and common intention (if A&B have different intentions, 21(2) doesn't apply)
    - Can differ in the "means" committed, but must share a common intention to commit an offence
    - Must intend to assist each other
    - Then if A does something ELSE that was intended or reasonably foreseeable, and a probably consequence, B also liable
    - Based almost entirely on MR
- Subsection 2 extends liability to offences that may not have been intended or desired
    - "broader than (1)"
- Culpability is based on knowledge that another would commit the act arising from an agreement to a common unlawful purpose
    - Depends on the foreseeability, actual or implied, of the probability that one party to the joint venture would commit that offence in the course of pursuing the common design
- Accused may be charged as a party with the Crown relying upon either section 21(1) or (2)[1] depending upon whether the evidence discloses that the offence was intended by the accused or was a probable consequence even if not intended
- To find liability under 21(2), four elements must be proven:
    1. The formation of an intention in common to
    2. Carry out an unlawful purpose and
    3. To assist each other in that unlawful purpose
    4. Offence committed is known or ought to have been known to be a probable consequence of the carrying out of the common purpose (*subject to Charter considerations)*

1. **Formation of Intention in Common (*most critical)***
- 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.
- Further requirement that they must intend to assist each other therein, as well as that they must form an intention in common, which requires a fairly high degree of *mens rea*.
- If there is no agreement to assist, liability won't attach until (2)
- "intention" must not be confused with motivation
    - In *Paquette*,[2] the Supreme Court of Canada held that duress was a defence to a charge of murder or robbery where the accused's liability depends upon the application of section 21(2)
    - In *Hibbert*,[3] the Court revisited this reasoning and rejected it. Writing for the Court, Lamer C.J.C. held that "intention in common" means only that they "have in mind the same unlawful purpose" and not that they have the same motive.[4] Therefore, the *mens rea* for section 21(2) cannot be negated by duress.
    - *Similar problem to duress may arise when accused is drunk*

2. Unlawful purpose
- Unlawful, aka criminal offence — indictable or summary conviction — under federal legislation

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1 *Savard and Lizotte*, [1945] S.C.J. No. 42, [1946] S.C.R. 20 (S.C.C.).
2 [1976] S.C.J. No. 62, [1977] 2 S.C.R. 189 (S.C.C).
3 [1995] S.C.J. No. 63, [1995] 2 S.C.R. 973 (S.C.C.).
4 See on this point *Caddedu*, [2013] O.J. No. 5523, 304 C.C.C. (3d) 96 at paras. 56-58 (Ont. C.A.).

- Not the offence that's the subject matter of the charge. If that's the case, then charge under 21(1)
- Offence must be committed "in carrying out the common purpose"

3. To Assist Each Other Therein

- What is *not* required is proof that the accused actually helped in carrying out the unlawful purpose, as "section 21(2) requires a common intention to assist in carrying out the common unlawful purpose, not the rendering of actual assistance in carrying it out
- assistance given before the carrying out of the unlawful purpose will satisfy the requirements of section 21(2)

4. Knew or Ought to Have Known Would be a Probable Consequence

- If the accomplice knows that such offences are probable, given the plan, circumstances and character of the other party, his or her *mens rea* is not much different from that of the person who actually commits the offence
- "Ought to have known" imports degree of objective foreseeability
    - E.g.: *Logan,* where the accused and another were parties to a common purpose of robbing the clerk of a convenience store. During the robbery, a third accomplice shot and severely wounded the clerk but did not kill her. That third accomplice was convicted of attempted murder, the jury having found that he intended to kill the victim. Logan and the other party were also convicted of attempted murder by the application of section 21(2).
    - In *Jackson,* SCC determined that reach of 21(2) depended substantially on how the foreseeability requirement is measured
- In those cases where the words "or ought to have known" are still applicable, a conviction will follow where "a reasonable person in the circumstances would know that one of the participants in the original agreement would probably commit the offence in carrying out the original agreement

ABANDONMENT

- necessary to consider whether it is possible to commit such acts and nonetheless avoid liability by terminating the criminal aspect of one's participation
    - *can you abandon a criminal act that's still committed by another party?*
- For 21(2), the moment the purpose "ceases to be common, the provision no longer applies"
- *Whitehouse* framework for defence of abandonment in 21(2)
    - 1. Intention to abandon or withdraw from the common purpose;
    - 2. Timely communication of the abandonment or withdrawal; and
    - 3. Notice to the other participants
- *Gauthier:* the Supreme Court accepted that a defence of abandonment should extend to parties charged under section 21(1), but that it should be far more difficult to utilize it in this scenario, as compared to s. 21(2)
- In order to raise the defence, an accused must take "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
    - Court vague on what this actually means

COUNSELLING

Crim liability for someone who counsels can be imposed in 2 distinct ways:

1. as party a criminal act under section 22, where the counselled person goes on to commit an offence
2. as a distinct offence under section 464 where no crime is actually committed ***most***

- high AR and MR
- different from abetting, which tends to occur at the scene
- recommending or urging someone to commit an offence

- "the ***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 (*Hamilton)*
    - Intention or recklessness (recklessness is enough bc AR is so high)
- In practice, the key to counselling is precision (are they vague or precise?)
    - Vague allusions to unlawful conduct not enough

Sec 22(2): any person who counsels in the manner described is also a party to any offence that the other person 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.

Primary Elements

- **22(3):** counselling includes procuring, soliciting or incitement (procuring and incitement said to have same meaning)
- Incitement: recommending or urging someone to commit and offence no actual participation or assistance to be rendered
- *Hamilton*: Fish J. stated that "the ***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
- Possible to counsel an offence that someone else has already considered putting into action (*Glubisz)*
- A final element of the ***actus reus*** requires that whatever the accused counsels actually amounts to an offence
    - Counsel to do an act that is an offence
- ***Mens Rea:***
    - *Hamilton:* SCC – MR consists of nothing less than an accompanying *intent* or *conscious disregard of the substantial and unjustified risk inherent in the counselling*
    - 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.

Where the offence is different from the one counselled, however, presumably it will fall to the prosecution to show that the offender was in some way influenced by the counselling

R v Cowan, 2021 SCC 45

Facts: Police investigating robbery

- They suspect Cowan. There is some evidence tying him to robbery.
- Give a statement. Tells police that four guys (TFLR) were present, and he told them how to do a robbery like the Subway one.
- Points to T&L as the guys who did it, but also suggests F and R involved
- He is accused: a) he was the masked robber; or b) he abetted or counselled the commission of the offence

Procedural History:

- TJ acquits: RD he was the robber; Crown did not satisfy him that T & L were the guys who did it
- Crown appeals – SCC: new trial ordered
    - TJ erred in focusing on two-part offenders "Crown is not required to prove the identity of the other participants, or the precise part played by each other in order to prove guilt as a part"
    - Only required to prove that any one of the indiv encouraged went on to participate either as a principal offender or as a party

Sankoff:

- Factual decision
- Where there are several possible offenders counselled, Crown not required to prove which one committed, so long as Court satisfied BRD that at least one involved (*Thatcher)*

Difference b/w s 21(1)(c) and s 22 -> When is abetting not counselling and vice versa?

- **s 21(1)(c) - Abetting has a <u>lower AR</u> and a <u>higher MR</u>**
- Must encourage a <u>principal (not a party)</u> – "go do it!" can't abet a secondary party
    - Not a high threshold, cheering on as event occurs
- Must have INTENTION to abet and KNOW that the principal intends to commit offence
- Can't be used where person only assists in offence

- **S 22: Counselling** tends to be more distance from commission of actual offence
- **AR is higher** – "deliberate encouragement or active inducement in the commission of the offence"
- Can apply to anyone who participates (as AIDER/ABETTOR or PRINCIPAL)
- **MR is lower**. Must either intend the offence be committed or be reckless to that
- Moreover, 22(2) allows for further liability where additional offences committed if counsellor "ought to have known that offence was likely to be committed as a consequence"

Application to Cowan:

- Encouragement was significant – met test for both counselling or abetting
- Intention that one of four commit the offence met (according to TJ)
- Only remaining issue was AR – did one of the four commit offence as a principal being one of two robbers in store (abetting), or
- Did one of the four assist anyone else in committing the crime (counselling)?
- TJ focus on TWO specifically was in error
- Lot of respect for dissenting judgement. See Jackson JA in CoA

Holding: SCC: new trial ordered

OVERCRIMINALIZATION

A crime can't be:

- Enacted by the Provinces
- Any wrongdoing that's not criminalized by statute (s. 9 of CC)
- Any wrong not in statute at time of
- Adfadfadsfadf
- Overly restrictive of individual freedoms (religion, expression)
- Discriminatory in impact (eg: restriction on anal sex)
- Arbitrary
- Overly broad in its reach
- Grossly disproportionate in terms of effect vs the importance of the objective

Is democracy enough?

<u>Ashworth:</u>

- "Politicians and others express themselves as if the creation of a new criminal offence is the natural response to a particular event"
    - Sometimes they do need to be addressed: distribution of intimate images
- Explosion of penal laws includes a huge growth in regulatory offences
- Equally problematic is that we can't enforce the crimes we have – we do so selectively (discrimination)
- Affects who we choose to prosecute
- We don't think about resource issues when we decide which crimes to deal with/prosecute
- The aim should be to punish a set of criminal wrongdoing that penalize substantial wrongdoing and with full enforcement

- Definition of crime helps establish who is targeted – focus on prosecution changes the dynamic

Moldaver J, post retirement:

- Trials take much longer now. Problem.
- Suggestion: reserve criminal trials for the most serious matters

- ^double edged sword: lessen punishment (eg impaired becomes driving suspension), lessen procedural fairness impacts still HUGE
    - Removes the right to dispute problematie in society founded on rule of law

Professor Husak:

- Arrest and punishment – more criminal law, more people's lives affected
- More power to the State/police
- Costs to all of us – financially?
- And to us as a society that believes in justice?

R v Jordan

- Excessive delays
- Stay of proceedings will be imposed for unreasonable delay (has become a strategy for some)

R v Jackson, 2018 ONSC 2527

Facts:

- Discussed of Jackson's life and criminal history
- Experiences of anti-Black racism in Canada
    - African Nova Scotians: systemic discrimination, marginalization, systemic recruitment
- Arrested as result of Operation Sizzle, targeting an "ethnic criminal organization"

Analysis:

- Sentencing judge must take judicial notice of matters like the history of colonialism, slavery, intergenerational trauma, etc *provides necessary context*
    - Clear connection b/w racism and over-representation of young Black people in crim justice system
- *Trying to determine how much jail time to give him* 6 years
    - **Sentence that best applies the restraint principle**

Drug Decriminalization

- Can't prosecute out of the opiod crisis, made worse by pandemic
    - Most users are trying to cope with trauma, have substance-abuse disorders, and are not making any real choice to use drugs, which makes criminalizing drug addicts useless and cruel. Opioid addiction is a compulsive disorder consisting of a strong desire to stop or cut back, but an inability to do so despite the risks and consequences
- Response to the opiod crisis must involve:
    - Widespread naloxone availability
    - More supervised drug-use sites
    - Overdose prevention sites
    - Drug testing services
    - Low-barrier, regulated "safe supply"
- Offer more support to Indigenous, front-line peer-based organizations and families

Mistake of Fact / Mistake of Law

"mistake": way to express the fact that a mental element of the offence hasn't been established

- Ex: if someone picks up a gun, thinks it is a toy and squeezes the trigger, causing it to fire and injure another, he or she is operating under a faulty assumption commonly referred to as a **mistake of fact**
    - Normally not punished under crim law bc no MR
    - Always a defence when they go to relevant aspects of the *AR*

Mistake of fact is nothing more than an absence of MR whether you have a relevant mistake depends upon the AR

Not every mistake is capable of affecting culpability mistake must be relevant to the offence depends on how the offence is defined

- If Parliament chooses to define an offence in a way that removes an essential element from that definition, a mistake as to that element would not be a defence because it would then be irrelevant.

Mistake of Law

S. 19 of the *Code*: belief that an act is lawful, however much it might affect one's punishment, doesn't affect liability

- designed to encourage citizens to be responsible & aware of Canadian law

Not true that ignorance of the law is never an excuse:

1. could argue the maxim is overly broad some offences include legal fact as AR element and its unclear why knowledge of such facts shouldn't also form part of MR
2. A can always raise mistake of fact as valid defence it is not always easy to determine whether a mistake made by the accused relates to a matter of fact or law
3. Strict approach to mistakes of law can breed injustice, as the law is not always clear, ascertainable, and brought to the public's attention

Courts have not definitively said whether the law can ever be a relevant fact upon which a mistake can be presimed

- Mistakes about relevant facts that cause a person to unknowingly breach their legal obligations can be raised, but the situation gets complicated where some legal circumstance is a required element of the *AR*
    - In *Prue,* A was convicted of *Code* driving offence by virtue of which his license was automatically suspended under provincial law. He was then charged with driving while his license was suspended. He claimed that he did not know his license had been suspended.
- SCC held that whether there had been a license suspension was a question of fact
    - Dissenting justices distinguished b/w ignorance of administrative action (mistake of fact) and ignorance of the law enacted (mistake of law) and they would have allowed Crown appeal
- This decision is more respectful of the accused's mental state than that of *MacDougall*
    - In *MacDougall,* similar facts to *Prue*, SCC said that the A's mistake was one of law that couldn't be excused. It distinguished *Prue* on the basis that the contravened law was prov, and the offence was one of strict liability
- Placed responsibility for knowing the law firmly on the accused
    - In *Pontes,* similar facts again, Cory J agreed that the two previous decisions were hard to reconcile, but didn't resolve dispute
- Case leans toward *MacDougall* but cautions that refusing to allow mistakes of law in certain contexts could have the effect of imposing strict liability upon individual accused
    - Judges will often massage the facts to determine that a particular mistake was of fact or mixed fact and law to permit A a defence
    - In *Aryeh*, the accused brought gemstones, rings, vases and other objects into Canada contrary to the *Customs Act*, and claimed that he believed he was entitled to bring the goods into Canada as household effects in his wife's name. A majority of the Ontario Court of Appeal had little difficulty in

rejecting his defence, MacKay J.A. stating "that his defence was based on ignorance of the law and that defence therefore fails by reason of section 19".[5] Justice Brooke dissented, however, reasoning that:

- The trial Judge found what happened here was the result of an error that was made by the appellant. His findings are clear that he believed the appellant's evidence in this respect and they show that he was free of any blameworthy state of mind of any intention to break the law. He was charged with a crime here. His defence was no *mens rea* and in my view that defence should have succeeded on the findings of the trial Judge and I would have acquitted him.

Incorrect subjective interpretations of elements of the AR normally do not amount to defences

- **Belief is irrelevant MISTAKE OF LAW IS NO EXCUSE**

R v Custance (2005), 194 CCC (3d) 225 (Man CA)

Ratio: Erroneous belief that one's conduct conforms with a recognizance order is, regardless of how honestly it's held, not a defence to breaching that recognizance order

Facts: A was released from pre-trial detention on the condition that he reside at 100-865 Sinclair St, home of Ivan Gaudet, his AA sponsor, and present himself at that address for curfew checks. However, after release, the accused found out that Gaudet had not obtained the keys to the apartment.

- Thus, the accused stayed in the parking lot of the apartment building until the date of his preliminary inquiry. Unknown to the accused, the police attended the apartment between his release and his preliminary inquiry. When the accused attended court, he was arrested and convicted under s. 145(3) for failing to reside at the address indicated and present himself for curfew check. The accused argued that he lacked the mens rea required under s. 145(3), which requires that the accused knowingly and voluntarily perform or fail to perform the act or omission which constitutes the actus reus of the offence.

Issue and holding:

- Assuming A truly believed he could still comply with the recognizance by resideing in a car in the apartment building's parking lot, does this negate the *MR?* **NO**

Analysis:

- *AR* of s. 145(3) demands that the rec order exists and that the accused fail to comply
- *MR* of s. 145(3) requires that accused know the order existed and that they knowingly or recklessly infringe the conditions of the undertaking
    - Crown does not have to prove that the accused intended to breach the recognizance, only that they intended to commit the *AR*

Rationale:

- Belief that staying in a car in the parking lot would constitute compliance with his recognizance order is a mistake of law that doesn't negate the *MR*
    - Whether the parking lot is the same as the building is a legal issue to be determined by the court
    - The interests of the justice system are not best served by allowing individuals to decide for themselves the legal parameters of compliance with the conditions of a recognizance

Note:

- In Beaver, the accused thought that the drugs were sugar—a factual mischaracterization. However, in this case, Custance knew where he was, but thought that it was legal to be there.
- Incorrect subjective interpretations of elements of the actus reus normally do not amount to defences.
- The reasonableness of the mistake has no impact on the ability to rely on a mistake of law

R v Phillips (1978), 44 CCC (2d) 548 (Ont CA)

5

Facts: Officers raided a bar in casual clothes. As they entered a large room, A was observed to be holding a knife at waist height. A claimed he had the knife because he was making a sandwich. The knife fell into the *Code* definition of a "prohibited weapon," as it was a switchblade knife that could be opened by centrifugal force.

- However, A testified that the knife was purchased at a well-known sporting goods store and that it was given to him as a present. He also said that he always opened it manually and never with centrifugal force.
- A was tried for 1) possessing a knife for a purpose of dangerous to the public peace contrary to s. 83 (now s. 85) of the *Code* and 2) possession of a prohibited weapon contrary to s. 89(a) (now s. 88(1)(a) of the *Code*).

Issue and holding:

- Did the TJ err by not instructing the jury that, if they had a reasonable doubt whether A knew that the knife had the requisite characteristics required to make it a prohibited weapon, they should acquit? **YES**
- Can it be inferred that A did not know that his knife had the req characteristics required to make it a prohibited weapon. **YES**

Rationale (Martin JA):

- Ignorance of the fact that the knife opened automatically by gravity or centrifugal force is a good defence
    - Upon proof that A possessed a knife which possessed the characteristics of a prohibited weapon, the evidential burden of proving absence of guilty knowledge passed to the appellant
- While the appellant did not expressly state that he did not know that the knife opened by centrifugal force, he did testify to facts which negate the interference of knowledge of the characteristics of the knife
    - The automatic character of the knife was not readily discernable
    - It took considerable practice by an officer before he could open the knife other than manually
    - An officer testified that the normal method of opening the knife was manually

Notes:

- The accused essentially said "I didn't know the knife opened that way," not "I didn't know it was illegal."
    - He testified that did not know the factual characteristics of the knife—a mistake of fact.

R v Lambrecht, [2008] OJ No 1328 (SCJ)

Facts: A was charged, *inter alia*, with possession of an illegal weapon—a handheld crossbow—without a license. He had made an inquiry in the past to a police officer about the law on crossbows, since he had concerns about their legality, but she said she did not know. He made no other inquiries before his appeal. As such, his position was that he did what he could to determine the legality of his possession and therefore, not knowing what the law was as it pertained to this weapon, he had no criminal intent in possessing it.

Issue and holding:

- Did the appellant's failed efforts to ascertain the legality of his crossbow excuse his possession of it. **NO**
- Were the elements of the offence satisfied? **YES**

Rationale:

- Not knowing what the law was in respect to the possession of the weapon does not constitute a defence
- A knew that the item was a crossbow, which constitutes the *MR* of the offence; he also acknowledge being in possession of the crossbow, which constitutes the *AR*

Notes:

- The appellant in this case was fully aware of the features of the weapon that made it illegal, he just did not know that the weapon was prohibited.
    - On the other hand, in Phillips, the accused claimed that he did not know the qualities of the weapon that made it prohibited—a mistake of fact.
- The fact that Lambrecht may have made reasonable inquiries makes no difference with respect to his culpability.

Statutory exceptions to the mistake of law doctrine

- Needs to mean something other than MF something *extra*

- Code makes clear that intention to deprive is required
- Permits ML defence
- Must be <u>honest</u> belief that the law allows you to do this
    - (+ knowledge – not so/so about the law) does not extend to belief in moral claim to the object
- Measured subjectively

1. Property law are complex disputes common minor violations (like *Howson*) not deserving of criminal sanction
2. Basic principle of s 19 know law before you act
3. Property crimes lower risk of harm (only deprivation of harm)
4. Would never endorse "colour of right" with VIOLENCE offences

- The norm is that s. 19 governs (mistakes of law are no excuse), but courts may permit mistakes of law to operate as an excuse when a stat provision explicitly/implicitly makes it a relevant factor
    - Colour of right defence is the clearest example of this; where this defence is afforded by statute, A is permitted to raise certain mistakes of law as a way of avoiding culpability
- A "colour of right" is a genuine misconception of fact or law, measured subjectively
- Where knowledge itself is a component of the req MR then absence of that knowledge must be a good defence
    - In ***Docherty***, A was found intoxicated behind wheel of a parked car to sleep it off. Charged with *wilfully failing to comply* with a probation order for being in control of a motor vehicle "over 80." SCC held that he could not be said to have **wilfully** failed to comply w/his probation because he had an honest belief that he was not breaking the last by sleeping in his car.

Klundert

ONCA held that a mistake of law negates the fault element of **wilfully** evading the payment of taxes on the frounds that one cannot wilfully evade taxes w/o knowing all the complexities of the tax laws; the term "wilfully evade" implies knowledge of what one's legal obligations were, thus overruling s. 19

- How do you evade if you don't know what the law is? criminal whether you **evade** or **try to evade** the law
    - *Language of statute has to override presumption of s 19*
- Crime committed only if you **wilfully** evade compliance with taxes "evade" adds that something extra, according to the courts
- Since Revenue Canada usually issues civil judgments, court reasoned that criminal sanction required some knowledge of the law

    - On the other hand, in ***Aryeh,*** the accused brought gemstones, rings, vases, and other objects into Canada contrary to the Customs Act and claimed that he believed he was entitled to do so. The ONCA had little difficulty in rejecting this defence as being based on ignorance of the law.

R v Howson, [1966] 3 CCC 348 (Ont CA)

Facts:

- The accused was an employee of a towing company who acted upon instructions from his boss to remove a vehicle from the street. He stated that he believed he had a legal right to retain the car until the towing charges were paid and produced a letter from the building superintendent to that effect. However, the company had no claim to it.
- Theft is defined as taking something "without colour of right" with intent to deprive the owner thereof.
- Under law, he was wrong mistake of law

Procedural history:

- The magistrate said that because the accused was asked to give up the car and refused and given that the company had no claim to the car, the accused was wrongfully withholding the car. He thus convicted the accused.

Issue/holding:

- Did the accused have, under the circumstances, a colour of right sufficient to justify his refusal to release the vehicle? **YES**

Analysis:

- MF or ML is only relevant if it deprives person of MR required for element of the offence
- s 19 only applies when there is an offence; there is no offence where there is colour of right (a genuine misconception of fact/law that, if proven, provides the accused with a defence to theft)
    - specific clause always overrides general clause (s 19)
    - here, s 429 applies to all crimes in property section "it's an excuse if you have colour of right"

Rationale: (Porter CJ)

- If one takes something intending to deprive, but under the mistaken belief that they have the legal right to take it (a mistake of law), the offence of theft has not been committed.
    - In this case, it was obvious that the accused did not believe that the accused was trying or intending to steal the car; under these circumstances, the magistrate should have acquitted the accused.

Mistake of law as a defence

1) Starting point (s 19) ML not a defence
2) Overrules CL presumption of MR for every element
3) "Without lawful excuse" – does not required MR for legal element
4) "without lawful authority" – does not require MR for legal element
5) Offence must make it explicit
6) "colour of right" = mistake of law a defence
7) Eg: *Klunder* = wilfully evade (the statutory requirements of the *Income Tax Act*)
8) These are rare

Mistake of Law

1) Start with s 19 ML ≠ excuse
2) Generally speaking, reasonableness of the mistake makes no difference. Nor do attempts to comply.
3) **Parliament can alter this**
4) Treatment of ML should be cut and dry (*Custance*)
5) But Courts become concerned sometimes when people are convicted in situations where "they didn't really do anything wrong"

R v Tavares (1996), 44 Nfld & PEIR 154 (NLCA)

Facts:

- KL didn't follow CAD regs
- Broke regulations (AR) if vessel was CAD
- Ship bought in CAD – captain knew this ***would be MF if captain didn't know it was bought in CAD***
- Reg'd in Panama believe it was Panamanian
- Court concludes AR breached CAD ship by virtue of having been bought in CAD

Defence argued that the vessel was reg'd in Panama and that Canada had no jurisdiction over it or its crew members

- & that D reasonably and honestly believed that the Kristina Logos was not a Canadian vessel and that s. 78.6 of the *Fisheries Act* was available to him by way of defense
    - "Reasonably and honestly believed in the existence of facts that, if true, would render the person's conduct innocent"

Issue and holding:

- Was the appellant's boat a Canadian vessel? **YES**
- Did the appellant have a reasonable and honest belief in a state of facts that would render his conduct innocent? **YES**

Analysis:

- Appellant: when he joined the Kristina Logos he knew it had been bought in Canada but believed it was now Panamanian
- Despite being registered in Panama, the ownership of the vessel never changed; the boat had not ceased to be a Canadian ship by virtue of its registration elsewhere.
- Contrary to the holding of the trial judge, to require that the appellant demand of his employers proof positive that the vessel was Panamanian is placing much more onerous a burden on the appellant than was contemplated by or expressed in the Fishing Act

Notes:

- The accused in this case held that he reasonably and honestly believed that the ship was Panamanian, but this is not a fact, but a legal characterization.
    - **He could raise the defence of mistake of fact if he honestly did not know the ship was purchased in Canada.**
- The Court of Appeal says that it would be expecting too much of the appellant to determine whether the vessel was Canadian—this does not matter for mistake of law.
- The Court of Appeal says that the appellant was not a party to the deliberate efforts to skirt the rules—this does not matter to mistake of law.
- The court in this case got it wrong; they massaged the facts to ensure that a just result was obtained.
    - *Not how ML is supposed to work but it happens because ML rule is too harsh*

Officially Induced Error

Jorgenson

- Accused convicted at trial for knowingly selling obscene material
- AR satisfied – material was obscene
- The OFRB said this film is "ok" – (not obscene)
- The accused said "I thought this film was OK because OFRB said so"
    - "it's not obscene because OFRB said so"
- But OFRB cannot bind the courts definition of obscene
- **Thus, A made mistake of law**
- Conviction requires KNOWLEDGE of facts that make it obscene
- Crown never proved accused knew of facts
- Majority of SCC acquits on that basis
- Lamer CJC goes on to discuss if A had a defence "need new one: officially induced error"
- Based on the idea that it provides an exception to s. 19 to ensure that the morally blameless aren't made criminally responsible for their actions.

Elements of the defence:

1. Error of law was made
2. A considered legal consequences of their actions
3. Advice obtained came from appropriate official
    a. why though: simply no need to impose strict reqs about who can be considered an "appropriate official" as the ability to rely upon advice provided remains conditional on A's "good faith" efforts and the reasonableness of any info provided
4. Advice was reasonable

5. Advice was erroneous
6. Accused relied on the advice

Officially induced errors do not negate the *MR* of an offence

7. Treated as a procedural defence rather than excuse. Two primary ramifications:

1. A who successfully raises this defence is entitled to a stay of proceedings rather than an acquittal
2. **Accused bears the burden of proving the defence on a BOP**

No good reason for treating the defence as a procedural matter, akin to entrapment.

- A person who relies upon officially induced error does everything they can to avoid bc of the Crown's improper actions
- Imposing liability is inappropriate not because of the Crown's improper actions but because the actor is not morally culpable in the circumstances

8. Only the clearest of cases *why*….

Is a broader defence required?

- Some academics propose a broader defence in situations where "the reasonable person could not have been expected to act in accordance with the law in the circumstances."
- People should have a duty to understand the law. But why punish them when they make a reasonable mistake in deciphering complex rules?

Sexual assault

Conceptual Framework for Sexual Assault

Predicate of Sexual Assault is "Assault" – s. 265 proof of 4 elements

1. **Must apply force (AR)**
    a. Any degree of force – including touching (*Ewanchuk)*
    b. In a sexual manner – s. 271
2. **Intentionally (MR)** – exactly the same as for assault
3. **Without consent (AR)**
    a. What is consent? (*Ewanchuk/Hutchinson*)
    b. Advance consent? (*J.A.*) not a thing
    c. Consent can be vitiated – s. 265(3)/273.2
        i. Fraud vitiates consent – s. 265(3)
            1. Nature and identity of sexual conduct
            2. Failing to disclose disease (*Mabior*)
            3. Lying about contraception (*Hutchinson*)
        ii. S. 273.2 – other areas where consent can be vitiated
            1. Agreement expressed by someone else
            2. **Incapable of consenting (drunk, mentally disabled, eg)**
            3. **Induced by abuse of trust, power or authority**
            4. Complainant EXPRESSES lack of agreement
            5. Complainant EXPRESSES lack of agreement to continue
        iii. Common law – policy (*Jobidon/Welch*) – bodily harm (ex: BDSM)
4. **Knowing consent not present (MR) – mistaken belief**
    a. Mistake of fact or law?
        i. Is consent vitiated by law? If so, mistake must go to characterization of facts
            1. Ex: "I didn't think they were drunk"
        ii. Mistake of fact regarding communication of consent
            1. Ex: You thought the person was telling you yes, but they were telling you no
        iii. S. 273.2 – mental states

1. Intoxication – no mistaken belief
2. Recklessness & WB

b. S. 273.2(b) – did you take reasonable steps in circumstances (known to you) to ascertain consent?
   i. If you do take reasonable steps and you're still mistaken, then you should be okay

There are aggravated versions of sexual assault which carry a higher penalty

- Where a sexual assault occurs and the accused used or threatened to use a weapon, threatened to cause bodily harm, or is party to the offence with more than one person, the offence is aggravated [s. 272].
- A person commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant [s. 273].

Sexual assault of a minor

The Code makes a division between complainants who are minors and those who are adults, even though sexual offences against children can be prosecuted using the adult provisions.

The above elements don't make sense when it comes to children The defence of consent is not available in cases with complainants under the age of 16, though there are exceptions for minors of a similar age [s. 150.1].

- Mistaken believe in consent is no defence
- Where "consent" present, can raise mistaken belief IN AGE defence – s. 150.1(4)
    - Must take reasonable steps to learn age – s. 150.1(4)

While an invitation to touch for a sexual purpose is not criminal when an adult is invited to do so, it is a crime to invite, counsel, or incite a child to touch oneself or someone else for a sexual purpose [s. 152].

It is a crime for someone to touch sexually someone under the age of 16 when in a position of trust or dependency with them or when in an exploitative relationship with them [s. 153].

Assault vs Sexual Assault

Section 271: any person who commits a sexual assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years, or on summary conviction for not more than 18 months.

- Does not define assault s. 265(2) applies

- Test to be applied in determining whether the impugned conduct has the req sexual nature is **objective**
- Sexual aspect of the assault is effectively an element of the *actus reus*, and there is no need for proof of a corresponding mental component

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.

- Parliament's clear intention was to criminalize sexual assault as an unacceptable intrusion upon, or violation of, the victim's sexual privacy or integrity
- Aggressive act of domination that violated his son's sexual integrity and constituted a sexual assault even if there was no clear sexual purpose for the conduct

Alceus

Violence that occurs in a broader sexual context can also amount to sexual assault.

- the accused was charged with a number of counts under s.271, one of which related to his striking the complainant in the face after she refused to perform fellatio upon him

Motive/purpose is highly relevant to the correct characterization of the assault and not merely the objective circumstances

Chase

- Clearly correct in finding that the 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 of the victim, deliberately inflicted
- In such a case, where the assault takes the form of the deliberate application of force in such a way as to violate the sexual integrity of the victim, the motive or purpose of the accused is not a consideration.
- If there is a deliberate application of force that, objectively considered, involves a touching of the sexual organs of another without that other's consent then the assault is sexual regardless of the purpose or motive of the accused.

R v JJ, 2022 SCC 38

Facts: Parliament has made a number of changes to trial procedure, attempting to balance the accused's right to a fair trial; the complainant's dignity, equality, and privacy; and the public's interest in the search for truth.

- Bill C-51 introduced ss 278.92 to 278.94 designed to protect the interests of complainants in their own private records when an accused has possession or control of the records and seeks to introduce them at a hearing in their criminal proceeding

First set of legislative changes sought to expose/eliminate "twin myths":

1. less worthy of belief and/or
2. more likely to have consented to the alleged assault

Parliament enacted legislation to govern the use of evidence relating to complainants' prior sexual history

Second set of legislative changes sought to restrict what had become a routine practice -- defence counsel seeking production of complainants' private records in order to engage in invasive attacks on their character

- *O'Connor* procedure: CL procedure governing production of complainants' private records by 3rd parties

Also no legislation governing admissibility of a C's private records in the hands of the accused

Bill C-51: extended the protections provided to complainants in sexual offence trials in two ways

1. It created a new procedure to determine whether the complainant's private records in the hands of the accused are admissible as evidence at trial ("record screening regime").
2. It provided complainants with additional participation rights in admissibility proceedings under the new record screening regime and the pre-existing s. 276 regime for prior sexual history evidence ("complainant participation provisions").

JJ and Shane Reddick brought pre-trial application challenging the constitutionality of the impugned provisions: right to silence and privilege against incrimination under ss. 7 and 11(c); the right to a fair trial under ss. 7 and 11(d); and the right to make full answer and defence under ss. 7 and 11(d)

Analysis:

1. First, the impugned provisions force the defence to disclose both its strategy and the details of its proposed evidence to the Crown prior to trial, thereby violating the right to silence and the privilege against self-incrimination.
2. Second, the impugned provisions provide complainants with advanced notice of defence evidence and the purposes for which it is being adduced. As a result, complainants will be able to tailor their responses during examination-in-chief and cross-examination. This detracts from the right to make full answer and defence and from the truth-seeking function of trial.
3. Finally, complainant participation in *voir dires* threatens trial fairness, as it disrupts the structure of a criminal trial, inserts a third-party adversary into the process, and undermines the role of the Crown.

Holding: appeal dismissed

Dissent: Brown:

- Impugned provisions represent an unprecedented and unconstitutional erosion by Parl of the fair trial rights of the presumptively innocent (ppl are sometimes *actually* innocent)

- the majority cannot plausibly claim that regimes which are designed to deal with production, or with evidence that is inherently prejudicial, can be applied across the board to deal with admissibility or with evidence that will often be relevant and highly probative

Infirmities of the legislation:

1. It forces accused persons to reveal their defence before the Crown has made out a case to meet, contrary to the principle against self-incrimination, the right to silence, and the presumption of innocence
    a. Even if the records are ultimately admitted, A's rights have been limited
2. It restricts the accused's ability to cross-examine Crown witnesses by giving the complainant a role in pre-trial admissibility determinations
3. It makes private records presumptively inadmissible when tendered *by the defence*, but presumptively admissible when tendered *by the Crown*
4. It sets a stricter test for admitting defence evidence than is warranted or constitutionally permissible. The accused must establish, in advance of the complainant's testimony, that the records have *significant* probative value, meaning some relevant and probative evidence will necessarily be excluded. Combined with the broad scope of "record", this limits the presumption of innocence and the right to full answer and defence

Regime interferes significantly w/A's ability to avoid self-incrimination, effectively cross-examine prosecution witnesses, and adduce relevant and probative evidence during a proceeding that will decide their liberty.

Myths, Stereotypes and *JJ* (Sankoff)

SCC has effectively invited Parl to create new vetting regimes that impose disclosure obligations over the defence

Actus Reus: Lack of consent

Ewanchuk was a turning point for SA law in Canada altered the focus of the law, with the clear objective of recognizing that most sexual assault cases are about **CONSENT, NOT BELIEF IN CONSENT**

The legal focus on whether an absence of consent existed is exclusively focused upon **what the complainant wanted**

Consent:

- As a matter of law: defined solely by C's state of mind didn't agree: no consent
- As a matter of fact: whether C agreed is a question of fact to be determined BRD
- If it didn't look like "no consent", may have an MR defence
- Agreement can be set aside where obtained in conflict with s 265(3) or 273.1(2)

R v Ewanchuk, [1999] 1 SCR 330

Ratio: consent as an element of the *AR* is determined wrt C's subjective state of mind toward the touching when it occurred, not to how A perceived C's state of mind;

- ***AR* of sexual assault requires proof of:**
    - **Touching (objective)**
    - **Sexual nature of contact (objective)**
    - **Absence of consent (subjective) determined by reference to C's subjective internal state of mind towards the touching, at the time it occurred**
- **The actual state of mind of C is determinative**

Facts: A met the complainant (C) in a parking lot so he could "interview her for a job" for his business. They went into A's trailer to see some of his work. First talked about his work. A began touching C and asked to give her a massage – she said yes. A kept making more sexual advances, stopping when C said no. After, C called the police and A was charged with sexual assault

Procedural History:

- TJ concluded that C's conduct could be "objectively construed" as constituting consent to sexual touching of the type performed by A – "implied consent"
    - TJ concluded that the Crown hadn't proven the absence of consent BRD – acquitted
- CoA majority dismissed appeal on grounds that it was fact-driven acquittal

Issue: did TJ err in its approach to the *AR* of sexual assault? **YES**

Analysis:

- *AR* of sexual assault requires proof of:
    - Touching (objective)
    - Sexual nature of contact (objective)
    - Absence of consent (subjective) determined by reference to C's subjective internal state of mind towards the touching, at the time it occurred
- The actual state of mind of C is determinative
- **If TJ believes C subjectively didn't consent, the Crown has discharged its obligation to prove absence of consent**
    - **TJ erred on topic of consent he believed that she subjectively didn't consent and that should have been conclusive**
- **If trier of fact is satisfied BRD that C didn't consent, the *AR* of sexual assault is established, and inquiry must shift to A's state of mine**

Holding: appeal allowed; conviction entered

Concurring (L'Heureux-Dubé J):

- Case is about myths and stereotypes in dealing with sexual assault complaints, including that women fantasize about being raped, that "yes" means "no," that women can successfully resist rapists if they want to, that the "sexually experienced" suffer less harm when raped, that women deserve to be raped on account of their conduct, dress, and demeanour, that rape by a stranger is worse than rape by an acquaintance, and that women are disposed submissively to surrender to sexual advances
    - Seen in the language of the CoA judge McClung repeated statements suggesting adherence to these myths
    - Comments reinforce myth that under such circumstances, either C is less worthy of belief or her sexual experience signals consent to further sexual activity

R v Kirkpatrick, 2022 SCC 33

Facts:

- Met online, complainant agreed to sex only with condom. They had sex once with condom. Second time she thought he did, and he made motion as if he did
- She realized after he ejaculated there was no condom
- She went through lengthy preventative treatment that affected her day to day life and ability to work

Analysis:

- s. 273.1 – directed to sexual assault offences
    - requires "voluntary agreement … to engage in the sexual activity in question"
- focus should be on the specific sex acts, defined by reference to the *physical* acts involved (examples in *Hutchinson*)
- Parliament specified situations where no consent would be obtained in relation to SA offences in s. 273.1(2)
    - S. 273.1(2)(d) and (e) provide there can be consent if C expresses a lack of agreement to engage in the activity or continue to engage
- All persons entitled to refuse sexual contact at any time and for any reason fundamental principle of Canadian SA law

The new Law:

1. Consent does not extend to "qualitatively different physical acts"
2. Direct skin contact different from non-direct skin contact
3. Condom use cannot be irrelevant "when expressely conditioned consent on use" (para 48)
4. Person's ability to set boundaries and conditions is part of sexual conduct
5. Consent must be specifically renewed "and communicated" for each and every sexual act
6. A form of sexual violence (para 60)
7. Right to choose whether penetrated by bare penis, or condom covered. Over/under clothing; "where and how penetration can occur"

Stare Decisis?

1. *Hutchinson* still applies to "tampering" cases
2. The sexual conduct was the same – condom was used
3. The "hole-y" condom.

Consent and *Mens Rea*

Mens Rea is governed by HMB/Reasonable Steps must be shown

- Consent is a circumstance element:
  - 273.2 – belief in consent cannot arise from 1) intoxication 2) recklessness or wilful blindness
- **(2) overrides the CL presumption that knowledge is required for circumstance elements (*Beaver*) – <u>recklessness suffices</u>**

In ambiguity situations, need to consider mens rea

- Same process for trier of fact

- **Focus:**
  - MR only becomes an issue if consent not present
- ***Ewanchuk:* "removes culpability for those who honestly but mistakenly believed they had the consent to touch the C"**
  - Must believe that "C communicated consent to engage in the sexual activity:" *Barton*
  - Law developed to find that silence/non-resistance cannot ground belief in consent

- Mistake must be honestly held, but need not be based on objectively reasonable grounds (*Pappajohn*)
  - 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
- Parl enacted restrictions to address this problem – to limit availability of this defence in this context
  - S. 273.2 added to claify the awareness required in relation to the absence of consent
  - Subsection (b) is substantial: it effectively modifies the subjective standard of awareness by placing an objective qualification on A's conduct
  - *No longer permitted for A to argue that he was unaware of C's protests or failed to understand them*

Mistake of Fact or Mistake of Law?

- Where consent is concern, test seems reasonably simple at first glance
  - If A unaware C wasn't consent, they could be said to have an honest, mistaken belief in consent
- Mistake of law though – ***consent means that C has affirmatively communicated by words or conduct her agreement to engage in sexual activity with A***
- **A is only permitted to raise mistakes that a) related to the communication of consent, and b) are permissible in law**

- S. 273.1(2) lists factors that can't be relied upon to establish consent & also to refute basis of an honest but mistaken belief in consent
- Critical to assess whether A had awareness of the facts and nonetheless proceeded with the sexual activity

- Eg: *R(R),* A engaged in sexual acts w/mentally disabled woman w/low mental capacities his claim of honest mistaken belief was rejected because his raising that defence was premised on a mistake of law
  - Most difficult area to distinguish MF from ML involves capacity – esp where capacity is affected by intoxication
- Strict analysis: once A knew woman was intoxicated (and potentially lacking capacity) he would be culpable for any contact ensuing
- Honest but mistaken belief defence is extremely unlikely – would have to convince jury that the intoxicated C was acting in a way to establish apparent consent **and** reasonable steps to establish consent were taken difficult combination

Honest Mistaken Belief in Communicated Consent

Courts are trying to make it difficult to use

- HMB should be narrow because people shouldn't make mistakes where consent is concerned
- Criminal law is trying to lead people to a place where consent is obtained before proceeding
- Concerned that juries/judges will be too soft on HMB, focusing on choices made by the complainant
- If you take away HMB (evidentiary burden), less risk focus on consent
- Cs often freeze or "appear to consent"

Why So Complex?

1. wrapped up in complex policy debate that conflict with traditional MR standards
2. considerable legislative amendments to get away from CL position – but still respect need for MR
3. desire to clamp down on spurious MR claims (evidentiary burden)
4. MF/ML because of statutory amendments
5. Language of the statute

Question: Assume the AR of non-consent is proven. A can only be found "not guilty" if he had a reasonable and honest belief about consent being communicated **False**

Dickson J – *Pappajohn*
"Whether the mistake is rooted in the accused's mistaken perception, or is based upon objective, but incorrect facts, confided to him by another, should be of no consequence"

Reasonable Steps Requirement

- Not an objective test – an imposed **duty**
- Focused is subjective – what A KNEW
- It's not what an RP would know, but what a RP would do, **if they knew what A knew**

- S. 273.2(b)'s purpose: protect security of the person and equality of women who comprise huge majority of SA victims by ensuring as much as possible that there is clarity on the part of both participants to a sexual act
  - **A must act reasonably but only on the basis of what he or she perceives**
    - "reasonable" is highly fact sensitive. Consider words/conduct; relationship between the two, nature of the sexual conduct (*Barton*), whether C is drunk/mentally disabled
- Places evidentiary burden on D to show reasonable steps were taken
  - Onus of proving BRD that these steps weren't taken remains w/Crown

- *Darrach*: subsection B doesn't require A to know or perceive matters an RP would, as the steps that are necessary are premised upon the circumstances to the A at the time
    - Subsection B essentially created additional element of the *AR,* albeit **one that is only triggered where the defence of honest but mistaken belief is being raised**
- **Quasi-objective test:**
- 1) circumstances known to A must be ascertained
- 2) if RP was aware of the same circumstances, would he take further steps before proceeding with the sexual activity
    - If yes, and A hasn't taken further steps then A is entitled to defence of honest belief in consent
- Critical focus in determining what steps need to have been taken will revolve around what was communicated by C
    - Non-verbal behaviours, when relied upon as an expression of consent, must be unequivocal
- When A becomes aware of intoxication, it's up to them to take reasonable steps to ascertain whether C retains the capacity to make a valid choice

Reasonable steps in other contexts (150.1(4))

- Is asking C enough? Can A rely on the way C looks?
- Drinking? (if in a bar that IDs, then yes this can count as a reasonable step)

***Cummer,* 2014 MBQB 62**

- C 14; A 24 – smoked week and drank; A: "C said she was 16. Then 17. Then 18."
- TJ: "crown must prove BRD A did not take all reasonable steps to ascertain C's age, or did not have HMB that C was 16.
- This is an issue which is determined on the basis of all the circumstances, including visual observation as to C's physical appearance, behaviour, ages and appearance of those in whose company C was found, and the activities engaged in, as well as what C and PM told A.
- A testified that C and PM told him they were 16. This evidence was corroborated by the testimony of C.
- Burden of proof not met

HMB and Reasonable steps

- Most SAs are resolved on q of consent
    - He says: "she said yes." ; she says, I said no
- While it's still possible to raise HMB in consent, only very rarely applicable
- Barriers are factual and legal

The Air of Reality Test – interaction b/w physical and mental components of consent

- The jury is not required to even consider a potential defence unless there's evidence to support it in a particular trial issue is not "live" until A can point to evidence giving an "air of reality" to the defence
- Must be some support for the defence that can be pointed to in the admissible facts giving defence "air of reality"
    - Air of reality test has been major battleground in SA law for decades judges too often leave the defence with the jury as an alt to consent – this can confuse jurors and award A a possible defence in cases where it shouldn't be
- In majority of cases, D of honest mistaken belief in consent is not available because there's no air of reality to it
- Way of applying "air of reality" test:
    - TJ should assess whether there's proper evidentiary foundation supporting the taking of reasonable steps and only leave the defence to the jury where the question is answer in the affirmative up to jury to decide whether A actually took reasonable steps

***Pappajohn* (1980)**

- Undisputed facts: A and C had 3 hour lunch to discuss sale of his house, and drank a lot
- She went back to his house
- Three hours later she ran naked out of his house with hands tied tightly behind her back
- She testifies never consent to anything. He assaulted and raped me.
- He says: completely consensual. She started freaking out at the end and ran out of the house.
- McIntyre J for majority:
    - A can't raise HMB in consent
    - "Must be in evidence some basis upon which defence can rest, and it is only where such an evidentiary basis is present that a TJ must put a defence"
    - "The evidence of the accused speaks of actual consent and leave little room for the suggestion that she may not have been consenting but he thought she was"
    - "The two stories are diametrically opposed on this vital issue… the only realistic issue is… consent or no consent"
- **Can't raise mistake of fact because:**
    - IN a trial, jury must be guided by the available evidence
    - "Live issues" are those for which there is a possibility of the jury finding the A's favour
- Eg. Who shot the victim is a live issue in a murder trial… unless…
- The accused testifies he shot the victim in self-defence
    - In such a scenario there's no need to instruct jury to consider the issue of "did A shoot V?"
    - Question for the judge is whether there is **some** evidence that would support defence/live issue (low burden)
    - C says "I resisted in every sense"
    - Pappajohn says "she consented throughout"
    - Mistake required A to be **confused** about some fact (eg. Did C consent)
    - No room for mistake on the facts! It's either consent or no consent. No evidence to support mistake.

Evidentiary Burden

- Crown bears the burden of proving guilt BRD
- Designed to simplify trials
- Before a matter can be brought before a jury, there must be **some** evidence
- Accused bears the burden to show that there's a case for HMB (honest mistaken belief in consent)
- Evidence can come from any witness in the case
- Evidentiary burden applies to 273.2(b)
    - *R v Gagnon,* 2018 SCC, *R v Barton*, 2019 SCC
    - Accused acquitted at trial. HMB left with jury
    - "There was no evidence from which a trier of fact could find that A had taken reasonable steps to ascertain that C was consenting"
    - "It follows that the defence of HMB should not have been left…"

R v Ewanchuk, [1999] 1 SCR 330

Procedural History: TJ held that C's conduct suggested "implied consent"
Issue/holding: did TJ err in their approach to the *MR* of sexual assault? **YES**
Analysis:
MR of sexual assault requires proof of:

1. Intention to touch
2. Knowledge, or recklessness, or wilful blindness to a lack of consent on the part of the person touched

- A may challenge Crown's evidence of *MR* by asserting an honest but mistaken belief in consent

- Defence of mistake is a denial of *mens rea* □ doesn't impose any burden of proof upon A & not necessary for A to testify to raise the issue

- **To "cloak A's actions in moral innocence," the evidence must show that he believed C communicated consent to engage in the sexual activity in question**
  - A belief by A that C (in her own mind) wanted him to touch her but didn't express this, isn't a defence
- In the context of MR for HMB defence, "consent" means that C had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused

Rationale:

- A knew C was not consenting on 4 separate occasions during their encounter
- Nothing on record to support A's claim that he continued to believe her to be consenting or that he re-establishd consent before resuming physical contact
- The accused did not raise nor does the evidence disclose an air of reality to the defence of honest but mistaken belief in communicated consent to sexual touching.
  - The only mistakes present were mistakes of law, namely that unless a woman protests or resists, she should be deemed to consent.
  - Thus, but for errors of law, the trial judge would have found the mental element satisfied.

R v Barton, 2019 SCC 33

Ratio: Since myths about sexual assault victims have no basis in Canadian law, reliance on them is a mistake of law, not a mistake of fact, and thus provides no ground for a defence of honest but mistaken belief in consent.

Issue and holding: Was the defence of honest but mistaken belief in consent available to Barton? **NO**

Analysis:

- To make out the defence of honest but mistaken belief in consent, the accused must have an honest but mistaken belief that the complainant communicated consent, whether by words or conduct.
- Relevant considerations: 1) C's actual communicative behaviour; 2) totality of the admissible and relevant evidence explaining how A perceived that behaviour to communicate consent
- Where an accused's defence rests on a mistake of law rather than a mistake of fact, the defence is of no avail; three consent-related mistakes of law are particularly relevant:
  - *1. Implied consent:* assumes that unless a woman protests or resists, she should be deemed to consent.
    - This concept has no place in Canadian law (*Ewanchuk*); thus, a belief in implied consent is a mistake of law (not fact) and is of no avail.
  - 2. *Broad advance consent*: the idea that the complainant can agree to undefined future sexual activity.
    - Since the definition of consent requires that the complainant consent specifically to each sexual act, a belief in broad advance consent is a mistake of law (not fact) and is of no avail.
  - 3. *Propensity to consent:* the belief that the complainant's prior sexual activities make it more likely that she consented to the sexual activity in question.
    - Since the law prohibits this inference [Seaboyer; s. 276(1)(a)], belief in the propensity to consent is a mistake of law (not fact) and is of no avail.
- s. 273.2 places further limits on the defence, including the need to take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.
  - Rejects the outmoded idea that women can be taken to be consenting unless they say "no."
  - Determining whether reasonable steps were taken is highly fact dependent. Steps based on assumptions about women and consent cannot constitute reasonable steps (e.g., relying on silence or passivity).

- "Testing the waters" by engaging in non-consensual sexual contact is not a reasonable step. The more invasive or risky the sexual activity and the more unfamiliar the parties are (which raises the risk of miscommunication), the more steps are required to ascertain consent.

Rationale:

- Gladue's supposed implied consent, broad advance consent to whatever the accused wanted to do, and propensity to consent based on her sexual past were highlighted to establish the defence of honest but mistaken belief; however, this is a subjective misunderstanding of law, not facts.
    - Therefore, the defence of honest but mistaken belief was not available to him, and the trial judge erred in failing to inoculate the jury against mistakes of law masquerading as mistakes of fact.

R v Cornejo (2003), 181 CCC (3d) 206 (ONCA)

Ratio: A judge should only leave the defence of honest but mistaken belief to the jury where the accused took reasonable steps to ascertain consent.

Facts:

- The complainant and Cornejo were co-workers. Cornejo called the complainant and asked to come over, to which she groaned "mm-hmm." Cornejo took this to be “yes,” and went to her place. Finding the door unlocked, he entered. He approached the complainant, asleep on the couch. She awoke and said "What the hell are you doing here?" The accused sat beside her, ran his fingers through her hair, and kissed her. She protested, but he continued kissing her neck. She did not touch him in return and remained lying with her eyes closed. Cornejo said that when he tried to remove her pants, she lifted her pelvis. When he tried to position her for sex, she said "no" and told him to get out.
- The complainant testified that she got drunk that night, fell asleep on the couch, and awoke to find Cornejo naked, on top of her, trying to penetrate her. Her pants and underwear had been removed. She said she was explicit in asserting that she did not consent. She had no memory of speaking to Cornejo on the phone.

Issue and holding:

- Did the trial judge err in leaving the defence of honest but mistaken belief in consent with the jury? **YES**
    - There is no air of reality to Mr. Cornejo's assertion that he honestly believed the complainant was consenting.
- *Appeal allowed, new trial ordered*

Analysis:

- Any reasonable person in Mr. Cornejo's position, who was aware of the same circumstances, would have taken further steps to ascertain consent before proceeding with sexual activity.
    - The complainant never gave Cornejo any indication that she was interested in a sexual relationship.
        - In fact, whenever the possibility of a sexual relationship was raised, she explicitly rejected it.
    - Cornejo drove to the complainant's house on the basis of an ambiguous groan on her part. o The complainant did not answer the door when Cornejo arrived.
    - When the complainant awoke, she said "What the hell are you doing here?" This was a clear reflection that she had not agreed to his coming to her apartment.
    - Everything said to Cornejo by the complainant amounted to unambiguous rejections of his advances.
    - The complainant never touched Cornejo and Cornejo knew she was drinking that day.
- Cornejo running his fingers through the complainant's hair and kissing her were not reasonable steps to ascertain consent; even if they were, the complainant said no and physically resisted them, which indicated a lack of consent.

VITIATED CONSENT

Consent: the voluntary agreement of the complainant to engage in the sexual activity in question [s. 273.1(1)]

- From *Hutchinson*, the Code sets out a two-step process for analyzing consent to sexual activity.
    - 1. Was there voluntary agreement of the complainant to engage in the sexual activity in question?
    - 2. If yes, was there any reason to vitiate that consent?

- s. 265(3) defines a series of conditions under which the law deems an absence of consent, notwithstanding the complainant's ostensible consent or participation.
- s. 273.1(2) also lists conditions under which no consent is obtained.

Three Ways to Vitiate an Otherwise Valid Consent: Section 265(3), 273.1, Common Law

S. 265(3) – impose force to C or other (almost never comes up)

- Threats or feat of the application of force
- Fraud (most difficult)
- Exercise of authority (practically irrelevant because of s 273.1(2))

s. 265(3)(a) - The application of (physical) force to the complainant or someone other than the complainant

- Determining whether force vitiates consent depends on the degree of force, the relative strength of the parties, and the relationships involved.

s. 265(3)(b) - Threats or fear of the application of (physical) force to the complainant or someone other than the complainant,

- This inquiry is subjective, aimed at determining whether the complainant agrees to engage in sexual activity solely because she honestly believes she will otherwise suffer physical violence. The complainant's fear need not be reasonable, nor must be it communicated.
- e.g., saying "Have sex with me now or else I will break up with you and seek custody of the kids" is unlikely to vitiate consent; these threats are not unlawful and are not physical.

S. 273.1(2) – MISTAKES OF LAW

- *drafting problem here* □ largely redundant because of the way SA has been conceptualized since *Ewanchuk* □ largely cut down on HMB arguments
  - a) Expressed by words or conduct of another
  - b) Incapacity
  - d) expresses by words or conduct a lack of agreement to engage
  - e) lack of agreement to continue
- *R v GF,* 2021 SCC 20
  - "Only s. 273.1(2)(c) vitiates consent" – the rest go to the "conditions of consent"

To limit the defence of honest but mistaken belief, no consent is obtained in the following contexts:

s. 273.1(2)(a.1)-(b) - The complainant is incapable of consenting

- An intoxicated person may still have the capacity to voluntarily agree to engage in sexual activity even if they would not have done so if they were sober or less impaired (***Al-Rawi).***
- For intoxication to deprive someone of capacity, the complainant must be incapable of (1) appreciating the nature and quality of the sexual activity, (2) knowing the identity of persons involved, or (3) understanding that she could decline to engage in the activity (***Al-Rawi).***
- Complainants that suffer from permanent mental illness may or may not lack capacity. Caution must be exercised to avoid the exploitation of a vulnerable individual, with the required level of caution determined by the severity of the mental illness, the nature of the relationship between the parties (particularly, whether there is a relationship of trust, power, or authority), and the nature of the sexual acts and how risky they are.

s. 273.1(2)(c) - The accused induces the complainant to engage in the activity by abusing a position of trust, power, or authority □ key is MISUSE of trust/authority

- The existence of a relationship of authority, power, or trust is not enough to negate consent; **there must be evidence showing that this relationship was abused**. Things are different with minors; there is no need to prove abuse of trust, power, or authority when a minor has sex with someone in a such a position. A fairly strong relationship of power, trust, or authority is required.
    a. in ***Alsadi,*** a hospital security guard was found to be in a position of power over a patient.
    b. in ***L(F),*** the ONCA found a Baptist minister to be in a position of trust with respect to a vulnerable 24-year-old he had been "treating" for 7 years.
    c. in H(A), the ONCA suggested that a drug dealer could be in a position of power over a drug user where there was a relationship of dependency between them.

R v Emerson, 2022 BCCA 5

Facts: A was youth pastor; C was member of the church, friendly with the pastor and family. Knew her since she was 16

- three sexual encounters; two of them found to be consensual. **Judge finds all three induced by position of trust, power or authority**

Analysis:

- A concedes in position of authority, argue no evidence he "induced" consent through this position
- Separate friendship existed. No "subtle pressure" based on authority.
- **Factually this argument fails: before first encounter, told her "having sex with him would help her confront personal issues and reconfigure life with Jesus"**
- Evidence that A held position of trust in C's life
- **Legally also no: no need to prove that A USED subtle or coercive pressure**
- Court can also conclude that position is used to persuade or entice
- If you misuse that position as a means of persuasion, that's enough

***R v Snelgrove,* 2018 NLCA 59** – judge refused to charge on s 273.1(2)(c)

Facts: 23-year-old C; left bar to find taxi. Could not find taxi but found Snelgrove: on duty police officer, in uniform.

- He testified she asked for a ride home; he helped her into apartment

Issue on appeal: judge refused to charge on s 273.1(2)(c)

Analysis:

- She testified she was too drunk to stand up; he started having sex with her.
- A was acquitted.
- No issue with capacity instruction or consent instruction.
- **Only issue on appeal: judge refused to charge on s 273.1(2)(c)**
- Officer failed to follow proper communications policy when having female in his car
- Sankoff: TJ went too far in saying that "C says she was too drunk to remember. It would be unfair to suggest to the jury they can infer inducement when she cannot recall.
- Snelgrove was in position of trust or authority
- TJ erred in suggesting C needed to be "reduced to a state of dependency"
- Requires improper use of authority to induce, persuade or entice sexual activity to occur
- Jury could consider: vulnerable C, officer decision to go into home, failure to comply with police policy

Holding: A convicted

Common Law - Where the accused intended to cause bodily harm and bodily harm was caused. This ground for vitiating consent was created by the common law using policy considerations. ***Extending Jobidon to sexual assault***

1. At least 27 cases have extended *Jobidon* to sexual assault. Leading: *Welch:* "it is an offence to intentionally cause "bodily harm" in a sexual setting, even if consensual
2. In ***Welch,*** the ONCA held that one cannot consent to the infliction of bodily harm upon themselves unless they are acting in the course of a generally approved social purpose when inflicting the harm.

d. Many argue that vitiating consent for this reason is too harsh and ignores the reality of a large community of people who participate in sadomasochistic sexual activity to obtain gratification.
e. A better alternative might be to vitiate consent to very harmful conduct that results in permanent or extended impairment of the body or its functions (e.g., a broken leg). Another approach would be to sanction some degree of harm during sex where the risks are properly controlled.
f. Others have argued that vitiating consent for this purpose is too lenient, and that courts should not require the Crown to prove intent to cause significant bodily harm. Needing to prove consent potentially exposes vulnerable individuals (e.g., sex workers) to exploitation by making it too easy for the accused to argue that there was consent.
g. This is especially problematic where the complainant is not alive to testify.

2. ***Zhao***, 2013 ONCA 293: "the social utility of intimate sexual relationships is significantly different from that of consensual bar fights… As such, the underlying policy reasons for the ruling in *Jobidon* cannot be generally applicable in a sexual context as suggested by the ruling in *Welch*"

s. 265(3)(c) - Fraud which causes the complainant to submit (*Fraud requires KNOWLEDGE*)

Fraud is a question about 1) the **scope** of the criminal sanction; and 2) how much you value informed consent *most protective of individual dignity*

Problem: relationship between dishonesty and sex is strong in society

- ***R v GF***, 2021 SCC
  - "If, as a result of fraud, C engages in sexual activity with someone other than the person they think they are with, then there is no subjective consent"
  - If the fraud is not linked to the conditions for subjective consent, and [not risking bodily harm], then it will not affect the legal analysis of consent. That is why lying about matters such as one's profession or net worth may be immoral, but it is not criminal"
- In ***Petrozzi,*** BCCA held that though the conduct leading up to the sex was dishonest, it did not vitiate the consent, according to the language of the provision, revisited in the next case.
- According to ***Cuerrier*** (1998), fraud can vitiate consent where the accused deliberately fails to disclose information; the two requirements for vitiation in this context are:

1. Dishonesty

Intentional dishonesty - the extent of the duty to disclose increases with the riskiness of the sexual act.

2. Deprivation

Deprivation **must result** in a significant risk of serious bodily harm; it cannot be a trivial harm or risk of harm (e.g., minor scratches, catching a cold, etc.).

In dissent, L'Heureux-Dubé J said that any misrepresentation that has a causal effect on the complainant's decision to participate in the sexual act should vitiate consent. She based this conclusion on the idea that people should have autonomy to choose whether to engage in sexual activity with full knowledge of the circumstances.

Vitiating consent by fraud: Twins – vitiated; exaggeration/misleading – not vitiated; identity fraud – which is it??

R v Brar, 2021 ABCA (modern version of Twins Case)

Facts: A is hotel clerk where C is staying. Sends text using app that anonymizes number. Starts flirting by text. He starts discussion about blindfolding and sexual fantasies. She believes it's someone she like (Jay) and starts using details about this guy. A says "I'm Jay" and plays into the details, adopting the persona. Sex then occurs with blindfoldd. She calls police. Video of room exterior confirms A entered the room.
Issue: Can A raised HMB?
Analysis:

- "If a C agrees to sex with A, who is a specific individual known personally to her, she is not agreeing to sex with B."

- No consent present (different from fraud vitiating consent)
- A "knew that the C through he was someone else; he did all he could not to reveal his identity"
- **There was no mistake**

Difficulties with adopting "pure" approach to informed consent:

1. radical expansion of common law (*Jobidon/Barton* debate)
2. Contrary to the way people act – would criminalize a lot of conduct
3. would increase stigmatization of those with STDs and marginalize them
4. Would deter people from finding out

R v Barton, 2017 ABCA 216

Issue and holding:

- Following the Ontario approach, where death results from consensual sexual activity, should consent be vitiated if the accused subjectively intended the bodily harm? Undetermined (new trial ordered)
    - The Court did not receive assistance from counsel as to how this question should be answered.
- Whether there was the required *mens rea* of sexual assault

Analysis:

- The following comments may assist in resolving this issue:
    - It should not just be assumed that the Ontario jurisprudence from *Zhao* must govern – which was that consent could only be vitiated if the Crown proved the Barton had subjectively intended to cause Gladue serious hurt or non-trivial harm.
        - The context of two men agreeing to fight from *Jobidon*, the shared goal of which was to injure the other, differs from the context of where a man caused the death of a woman who he paid for sexual activity and whose consent to bodily harm was in issue.
        - Courts might recognize the need for added safeguards to protect sex workers and other marginalized populations from violence.
        - Courts would also need to determine an appropriate *mens rea* that should attract criminal culpability that protects the rights of the accused.
        - Courts should consider whether consent is vitiated because the activity is degrading or dangerous.
        - Courts should consider whether consent should be vitiated when there was serious bodily harm, bodily harm as defined in the Code, or some other threshold.

Notes: The facts of this case can be distinguished from Jobidon for several reasons:

- In *Jobidon*, the SCC vitiated consent in the context of a fist fight because fist fights have no social value and have always been illegal; however, rough sex has never been illegal.
- The Code definition of consent for sexual assault is much more extensive than that for regular assault; it is therefore unlikely that Parliament intended courts to vitiate consent where bodily harm is caused.
- There is a difference between two people choosing to engage in a particular type of sex they enjoy and fist fights, which create public disorder.
- Rough sex is part of a lot of people's sexual being; the same likely cannot be said of fist fights.

Barton (2023) argument

1. *Jobidon* relied on existing "fist fight" framework to find that consent did not extend

2. No similar framework existed in 1955, when Parliament eliminated CL crimes
3. This is risky territory
4. Nothing in the law allows Court to start making policy exceptions

R v Hutchinson, 2014 SCC 19

C must agree to the *specific physical act* □ does not include conditions or qualities of the physical act or the presence of STIs □ if agree, move to fraud test

Facts: C consented to sexual activity with a condom. Hutchinson poked holes in the condom and C became pregnant. H charged with aggravated assault.

Issue:

- Was consent vitiated because C had been deceived about the condom? **Yes**
- **Where should the law be drawn between criminality and non-criminality? Fraud**

Analysis:

Two approaches to the question of what constitutes "voluntary agreement to the sexual activity in question"

1. Defines the "SA in question" as extending beyond the basic sexual activity C thought she was consenting to at the time to conditions and qualities of the act or risks flowing from it □ provided these are "essential features"
    a. "Essential features" determined by **C's subjective conditions for consent to that activity**
2. More narrow definition as the "basic physical act agreed to at the time, its sexual nature, and the identity of the partner."
    a. But holding that deceptions about the qualifications of a physical act are dealt with under s. 273.1(1) relating to consent would render s. 265(3)(c) relating to when fraud vitiates consent redundant
    b. Plain words of the provision support narrow interpretation of consent in s. 273.1(1) □ *just physical act*, nothing about conditions/qualifications

Correct approach: C must agree to the *specific physical act* □ does not include condition or qualities of the physical act or the presence of STIs

Application: (McLachlin CJ and Cromwell J):

- Since the complainant subjectively consented to sex with Hutchinson at the time it occurred, the Crown did not prove that there was no voluntary agreement to the "sexual activity in question."
    - Effective condom use is a method of contraception and protection against STIs; it is not a sex act.
- However, the complainant's agreement to the sexual activity in question was vitiated by fraud.
    - The dishonesty in this case is evident and admitted.
    - Depriving a woman of the choice whether to become pregnant is equally serious as a "significant risk of serious bodily harm" within the meaning of *Cuerrier.*

Concurring (Abella and Moldaver):

- Physical acts matter – birth control less so □ condom use is part of consent
- No consent in the first place, making 273.1(1) the applicable provision
- A person consents to *how* she will be touched, and she is entitled to decide what sexual activity she agrees to engage in for whatever reason she wishes
    - When C does not voluntarily agree to the sexual activity which occurred, consent does not exist within the meaning of s. 273.1(1), and the inquiry for the purpose of the *AR* of sexual assault is complete
- Condom use is not a collateral condition to sexual activity, but a part of the sexual activity; since the complainant never agreed to engage in sex with a sabotaged condom, her right to choose how her body is touched was undermined.

Majority Benefits:

1. Respects Court/Parliament balance; 2. Restraint; 3. Provides protection to **women where pregnancy a concern**

Drawbacks:

1. Creates gendered imbalance to birth control; 2. Provides zero protection where pregnancy not a risk (eg sterile man); 3. "serious bodily harm" is elusive test; 4. Doesn't really get at the nature of the harm

Minority Approach Benefits
1. more consistent with concept of "consent"; 2. Treats gender equally; 3. Doesn't get into murky "bodily harm" issues
Drawbacks:
1. expands concept of sexual assault (no restraint); 2. Risks opening it up even further to other conditions – not just contraception? 3. Qualities of Act idea is unknown limitation

Hutchinson still in effect □ q of pregnancy hasn't be changed

PP v DD, 2017 ONCA 180

A female lying about the use of contraceptives to a male complainant does not vitiate consent, as, unlike motherhood, unplanned fatherhood does not pose a significant risk of serious bodily harm.
Facts:
- PP (female) and DD (male) had consensual sex on numerous occasions. Based on conversations, PP believed DD was taking birth control. However, PP got pregnant and gave birth to a child, of which DD was the father. PP brought a civil action for fraud, deceit, and fraudulent misrepresentation, claiming that PP's deception vitiated his consent.

Issue:
- Did PP's misrepresentation vitiate DD's consent to sexual intercourse?

Analysis:
- From Hutchinson, deception with respect to contraception does not go to the "nature and quality of the act," but that it may vitiate consent to sexual touching where the fraud gives rise to a significant risk of serious bodily harm.
    - To establish fraud, the dishonest act must result in a deprivation that is equally serious as that recognized in Cuerrier, a threshold that financial deprivations or mere sadness or stress from being lied to does not meet

Rationale (Rouleau JA):
- DD concedes that he consented to unprotected sex and was fully informed as to the respondent's identity and the nature of the sexual act in which the parties voluntarily participated.
- DD's consent was not vitiated; his damage is principally emotional harm (hurt feelings and lost aspirations), which is quite different from the physical harm experienced by a woman made to carry a baby or a person exposed to an STI.
    - The deception in this case was not to the nature of the act, but to the likely consequences flowing therefrom

R v Kirkpatrick, 2022 SCC 33

***Hutchinson* remains binding authority for what it decided, but it does not apply to when the accused refuses to wear a condom and C's consent has been conditioned on its use**
Facts:
- Met online, complainant agreed to sex only with condom. They had sex once with condom. Second time she thought he did, and he made motion as if he did
- She realized after he ejaculated there was no condom
- She went through lengthy preventative treatment that affected her day-to-day life and ability to work

Issue: should condom use for part of the "sexual activity in question" to which a person may provide voluntary agreement under s. 273.1(1) **YES**
Analysis:
- There was evidence of a lack of subjective consent by C (element of the AR of sexual assault)
- s. 273.1 – directed to sexual assault offences
    - requires "voluntary agreement … to engage in the sexual activity in question"

- focus should be on the specific sex acts, defined by reference to the *physical* acts involved (examples in *Hutchinson*)
- Parliament specified situations where no consent would be obtained in relation to SA offences in s. 273.1(2)
    - S. 273.1(2)(d) and (e) provide there can be consent if C expresses a lack of agreement to engage in the activity or continue to engage
- All persons entitled to refuse sexual contact at any time and for any reason fundamental principle of Canadian SA law
- The requirement to prove deception and a deprivation misdirects the inquiry and creates gaps which leave many outside the law's protection in relation to sexual assault

The New Law:

1. Consent does not extend to "qualitatively different physical acts"
    a. What does this mean? Only time will tell because SCC hasn't given us much guidance
2. Direct skin contact is different from non-direct skin contact
3. Condom use cannot be irrelevant "when expressly conditioned consent on use" (para 48)
4. Person's ability to set boundaries and conditions is part of sexual conduct
5. Consent must be specifically renewed "and communicated" for each and every sexual act
    a. No specific law about consent being *communicated* matters that it is **present** (Sankoff)
6. A form of sexual violence (para 60)
7. Right to choose whether penetrated by bare penis, or condom covered. Over/under clothing; "where and how penetration can occur"

Question: Can the MR of sexual assault avoid convictions? no

Deception about HIV Status and contraception

HIV SA v Ordinary SA

- HIV SA involves consensual sex between two adults; ordinary SA involves a forcible violation of person's most intimate bodily integrity

Is "sexual assault" the right crime for this?

- Person who fails to disclose HIV, even while using condom is a sexual offender

Non-disclosure may be immoral, but is the SCC's treatment consistent with our notion of punishing real risks of harm?

R v Mabior, 2012 SCC 47

Where a dishonest act exposes someone to a realistic possibility of HIV transmission, consent is vitiated; a realistic possibility of HIV transmission is negated where the accused has a viral load is low and the accused wears a condom

Facts: Mabior had sex with women even though he was HIV-positive. He told these women that he did not have any STIs. On some occasions he wore condoms, but on others he did not. 8 of the 9 complainants testified that they would not have slept with Mabior had they known he was HIV positive. None of them contracted HIV. Mabior called evidence that he was under treatment for HIV and that he presented only a low risk of infection.

Issue:

- whether an HIV-positive person who engages in sexual relations without disclosing his condition commits aggravated sexual assault & whether consent was vitiated?
    - **Exposed ¾ Cs to significant risk of serious bodily harm**

Analysis:

- *Cuerrier* test:
    - **1. Intentional** dishonest act (falsehoods or failure to disclose HIV status)

        - SCC: no principled distinction between active lying and passive deception by non-disclosure
    - **2.** Deprivation (denying C knowledge which would have caused her to refuse sexual relations that exposed her to a significant risk of serious bodily harm)
        - **"Significant risk of serious bodily harm": where there is a *realistic possibility of transmission of HIV***
            - This is negated if 1) accused's viral load at the time of sexual relations was low, AND 2) condom protection was used
                - ***o*** This is not set in stone could evolve and change with future advances

This Case:

- A had low viral load at time of intercourse with 3 of the 4 but did not use a condom conviction maintain
- Fourth used a condom and low viral load conviction reversed

R v Thompson, 2018 NSCA 13

Facts: HIV, some viral load (not undetectable). No proof of ejaculation. Finds "psychological harm based on worry and uncertainty".

Analysis:

- To establish fraud, dishonest act must result in a deprivation that is equally serious as the deprivation recognized in *Cuerrier* and in this case. For example, financial deprivation or mere sadness/stress from being lied to will not be sufficient
- "Stress from being lied to, however despicable the deception may be, is simply not sufficient." Reinforces the HARM based model

R v Boone, 2019 ONCA 652

- HIV, high viral load. Insufficient proof of ejaculation.
- 1 in 1000 chance is enough!
- Sufficient to impose guilt, even absent transmission

R v Murphy, 2022 ONCA 615

Procedural history: TJ found that consent was vitiated by fraud because appellant did not disclose her HIV-positive status and a condom was not used (as per *Mabior*)

Issue: whether C's consent to the sexual act was vitiated because A did not disclose her HIV-positive status and a condom was not used

Analysis:

- *Mabior* made it clear that its holding – that the combination of low viral load plus condom use negates a realistic possibility of GIV transmission – was based on the factual record before the court, and was not written in stone
- Developments in the science in relation to HIV transmission since *Mabior* undermine the TJ's conclusion that the act of vaginal intercourse between the appellant and the complainant that constituted the offence posed a realistic possibility of transmission of HIV
- This conclusion is based on the science, which is consistent with the law as stated in *Mabior* that the implementation of the "realistic possibility of transmission" test, which is the legal standard, <u>can evolve as scientific knowledge about HIV transmission evolves</u>

ACTUS REUS, VITIATING, MR – WHERE DOES THAT LEAVE US?

- AR is exclusively what subject of touching wanted
- Based on mental state, but proven by all evidence
    - Because of the way the burden of proof in our justice system favours the accused

- Based on each sexual activity and qualitative aspects of act
- You can be mistaken about consent but:
- Advance consent is not consent (too drunk, asleep = no consent)
    - Sankoff thinks this should be a bit more flexible & that it *can* be in certain situations
- Implied consent is not consent (ML/MF issue)
- Consent for another act is not consent
- Can people "test" boundaries?
- Can people assume what boundaries are based on the past?
    - Little trickier maybe yes to a certain extent
    - HMB based on what you've done in the past, could inform your understanding of what's being consented to in this present sexual encounter
- If not, is that a problem? *Policy question to consider*

Realities of Sexual Assault – why is it so hard?

- **Cultural:** blame the victim, disbelief – many offenders are "fine young men"
- **Personal:** women fear the costs of sharing (personal & what happens if a prosecution occurs)
- **Institutional:** an institutional belief that SA convictions are difficult to win, prosecute
    - not so much the case here in AB (great!)
- **Structural/nature of the crime:** burden of proof BRD/ he said, she said
- **Myths:** continue to be exploited by defence/courts
- **Evidentiary:** often difficult to prove bc of complainant conduct or intoxication/drug use/nature of victim

Backlash?

- New measures have increased conflict in these cases
- Difficult/time consuming to litigate
- Concern expressed by defence about trial by judge alone (after the Judge Camp affair)
- Appeal courts have been very active on these issues, often reversing acquittals

Crime and punishment

Sentencing tools

Judge always responsible for sentencing, regardless of whether it was a judge alone or jury trial

- Crown and defence can submit, or joint submit their sentence preference if joint submission, judge should take it (unless *manifestly inadequate*)

Discharges (s. 730): lowest form of penalty available

- **Absolute discharge:** only for crimes that have max penality of 14 years or less. Court is saying yes you committed a crime but you're discharged without **any** conditions deemed to have one free pass, essentially
    - To recognize people make mistakes; for crimes that are v minor small time offending, 1st time
- **Conditional discharge:** form of probation order – conditions imposed
    - At the end of those conditions which can be onerous, get the discharge, deemed not to be convicted
        - One of the most common charges in our system is "breach of condition"
    - S. 731(2) – suspended sentence: probation order with condition – conviction continues to exist

Fines (s. 734) may be imposed on their own or in addition to some other form of punishment

- s. 734(2) - a court may fine an offender only if it is satisfied that the offender is able to pay the fine
    - because if offender can't pay, they may be imprisoned

Restitution (s. 738) may be directed towards the wronged party as opposed to a fine from the state

Imprisonment is a potential punishment for every crime in the *Code*

- All *Code* offences have maximum sentences, and many have minimum sentences that trump the sentencing judge's ability to hand out fines or discharges instead
- Parole ineligibility - Parole is not dealt with by the sentencing judge; parole is granted by parole boards.
    - For the vast majority of offences, the period of parole ineligibility is 1/3 of the total sentence.
    - For first degree murder, the period of parole ineligibility is 25 years.
    - For second degree murder, the period of parole ineligibility is 10-24 years.
- Dangerous and long-term offenders can be detained for longer than allowed if justified, though the threshold is high super complex provisions that require hearings (essentially new trials, reserved for the Paul Bernardos of our community)

Conditional sentence (s. 742) which are served in the community, are available to non-dangerous/non-serious offenders who would have otherwise been sentenced to less than two years for offences with no minimum sentence

- This tool was made available to combat overincarceration

"Royal Prerogative of Mercy" (s. 748) – mercy/pardon, apply to government very erratic, occasionally used

PURPOSE AND PRINCIPLES OF SENTENCING

718 The…purpose of sentencing is to protect society and to contribute…to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that [(a) denounce unlawful conduct, (b) deter the offender and others from committing offences, (c) separate offenders from society, where necessary, (d) help rehabilitate offenders, (e) provide reparations to victims or the community, and (f) to promote a sense of responsibility in offenders].

718.01–718.04 [When a court imposes a sentence for an offence against a minor, a justice system participant, a law enforcement animal, or a vulnerable person (including Indigenous women) it shall give primary consideration to the objectives of denunciation and deterrence of such conduct].

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

- Gravity concerns how serious the harm caused by the offending was; it is measured both numerically (e.g., how many victims there are) and in terms of severity (the type of harm).
- The degree of responsibility encompasses **intention** (i.e., intentional actions warrant more serious consequences than reckless ones), **motivation**, whether the accused was operating under a mistaken belief, and what the accused's role was (e.g., was the accused a party, or did they commit the crime itself?).

718.2 A court that imposes a sentence shall also take into consideration the following principles:

a) sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances…, and,…[aggravating factors shall include whether the offence (i) was motivated by prejudice (ii) involved abuse of an intimate partner or family member, (ii.1) involved abuse of a minor, (iii) involve abused a position of trust or authority, (iii.1) had a significant impact on the victim, (iv) was committed for the benefit of a criminal organization, (v) was a terrorism offence, or (vi) was committed while the offender was subject to a conditional sentence order…or released on parole].
b) a sentence should be similar to [those] imposed on similar offenders for similar offences…in similar circumstances;
c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh; d
d) an offender should not be deprived of liberty, if less restrictive sanctions [are] appropriate in the circumstances; and 144
e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, [particularly] Aboriginal offenders.
    a. "other than imprisonment" *Gladue*

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

Starting Point – *Arcand* 2010

- guidance in the form of a statement of typical cases and what penalty this should receive
- judge can then deviate from starting point

A common law sentencing principle is that individual deterrence and rehabilitation are the key considerations for sentencing non-violent, younger offenders (Priest).

R v M(CA), [1996] 1 SCR 500

1. **"Delicate art" not a science**
2. **TJ have a lot of discretion to choose**
3. **within range, sentences should be upheld unless they are a "substantial and marked departure" from the norm**
4. **variance across the country**
5. **variance by moral blameworthiness and personal circumstance**

Analysis: (Lamer CJ)

- The duty of a sentencing judge is to draw upon sentencing principles to determine a "just and appropriate" sentence which reflects the gravity of the offence committed and the moral blameworthiness of the offender.
    - Note: therefore, similar cases can have different results, as judges apply different principles.
    - The respective importance of the various principles will vary according to the nature of the crime and the circumstances of the offender (Lyons); sentencing is a delicate art, not a science.
- Retribution represents the principle that criminal punishment, in addition to advancing utilitarian considerations related to deterrence and rehabilitation, should also reflect the moral culpability of the offender, having regard to their intentional risk-taking, the harm they caused, and the normative character of their conduct.
    - It thus frequently operates as a principle of restraint, as utilitarian principles alone may direct exemplary punishments which unfairly exceed the culpability of the offender.
    - Retribution is not the same as vengeance, which represents an uncalibrated act of harm upon another, often motivated by anger, as a reprisal for harm inflicted upon oneself by that person.
        - Retribution, by contrast, is an objective, reasoned determination of appropriate punishment.
    - Retribution is also not the same as denunciation, which is a symbolic act that is meant to communicate society's condemnation of that particular offender's conduct.
- Sentences are owed deference on appeal unless they are a "substantial and marked departure" from the norm; i.e., unless there is an error of law or the sentence is clearly disproportionate.
    - There is no requirement that sentences have to be the same across the country; sentences are allowed to reflect community values.

MENTAL ELEMENTS OF THE ACTUS REUS: VOLUNTARINESS

CLASS NOTES:

- Relevant in absolute/strict liability cases and impairment/mental disorder cases
- Must prove BRD that voluntariness
    - *Larsonneur*:
    - Charged with "being found in the UK when leave to land refused"
    - "found" in the UK

- But she had been physically brought there after having been deported from Ireland
- Court found it was voluntary…
- It was a regulatory offence so no MR required but being carried over the border took away her voluntariness

Voluntariness

- A "mental" component of the physical element (*AR*)
- Even if ACT is performed, AR is not satisfied where it was unvoluntary
- In MOST cases, not necessary to deal with voluntariness
- Issue of voluntariness arises most often where an offence does not have a mental element

Intention Swallows Voluntariness

- Voluntariness requires a minimal conscious volition (essentially, brain function or autonomous will);
- Intention requires conscious choice;
- To prove assault you need to show intentional application of force
- How could you prove this, yet still have the force be involuntary?
    - Impossible
- Since the overwhelming maj of crimes req proof of intent, voluntariness is CONCEPTUALLY important, but not practically so
- Practically important only where proof on intent not required

Where does this get challenging?

1. where one's mental state is temporarily affected? – eg epilepsy, or drugs that put you in a state where you don't know what you're doing (*King*)
    a. only first question
    b. whether A can rely on drugs or intoxication is different matter
2. where lack of voluntariness is become of a mentally impaired state (discussed when we come to mental disorder)
3. If we start to think of voluntariness as being representative of "willpower" or "choice"
4. But "morally involuntary" is never a voluntariness issue
    a. Eg: forced to do an act where you have no choice (like at gunpoint)

Summary

- Vountariness (proof of AR) is important
- For crimes that don't req proof of any mental intention (strict and absolute liability)
- For understanding the waytemporarily affected mental states are addressed (intoxication/drugs)
- For understanding the "defences" of mental disorder and automatism
- Voluntariness is not so importance when offence has a clearly required mental element

In *King,* Taschereau J stated that there could be no actus reus unless it is the result of a willing mind having the capacity to make a definite choice or decision.

- One cannot be convicted of an involuntary act
- In *Luedecke*, the ONCA said that voluntariness is a question of whether the accused is able to decide whether to perform and act and unable to control the performance of the act.
- This mental element of the actus reus is limited in scope; it only requires that the conduct be the product of a willing mind.
    - Once the conduct in question has been willed, it matters not what the accused intended to follow from the act, nor the surrounding circumstances.
    - e.g., if you accidentally run over your neighbour's phone with your lawnmower, this act is voluntary but not intentional.

- While another, tidier approach would be to make voluntariness part of the *mens rea*, this would cause difficulties in those offences that require no mens rea (i.e., absolute liability offences).
    - e.g., in *Larsonneur*, the appellant left the UK the day an expulsion order against her came into effect. As soon as she landed in the Irish Free State, she was deported back to the UK and was charged and convicted with being an alien to whom leave to land in the country had been refused. On appeal, the court seemed to ignore entirely the problem of voluntariness and upheld the conviction

Moral involuntariness: in *Ruzic,* the SCC said PFJ that only those who act voluntarily in the moral sense should be culpable of a criminal offence

- If the Crown can prove intention, there is no need to address involuntariness, as one cannot commit an act that intentionally but involuntarily.
- That said, voluntariness can be practically important only where proof of intent is not required (i.e., in regulatory offences).

Kilbride v Lake, [1962] NZLR 590 (NZ High Court)

One cannot be made criminally liable for an act or omission unless it involved the free and conscious exercise of will.

- **Note: one can be charged for unintentional acts, but not involuntary acts**

Facts:

- The appellant parked his wife's car on the street. He returned to find a traffic offence notice stuck to the inside of the windshield saying that a current warrant of fitness was not displayed. The warrant, which was current, had been in the right position when he left the vehicle, but was gone upon his return. The appellant was charged and convicted for failing to display a current warrant of fitness in the prescribed manner.

Issue/holding:

- Was the *AR* of the offence established? **NO**

Analysis:

- Even with absolute liability offences, the accused must be shown to be responsible for the physical element of the offence, which involves free and conscious exercise of will in the case of an act, or the opportunity to choose to behave differently in the case of omissions.
    - If this condition is absent, any act or omission must be involuntary, unconscious, or unrelated to the forbidden event in any causal sense.
    - This requirement is distinct from the mens rea, which is the intention or knowledge behind an act.
        - Voluntariness, on the other hand, is the spark without which the actus reus cannot be produced.

Rationale: (Woodhouse J)

- It cannot be said that the actus reus was the result of the appellant's conduct, whether intended or accidental.
    - There was no opportunity to take a different course, and any inactivity on the part of the appellant after the warrant was removed was involuntary and unrelated to the offence.

STRICT AND ABSOLUTE LIABILITY OFFENCES

Dispensing with requirement of MR does not abolish the need to prove AR BRD

- Requires demonstration that a voluntary act was undertaken, which reqs at least a minimal mental process
- regulatory offenses (parking illegally) don't need moral condemnation, need sanctioning to deter future transgressions

In ***Sault Ste Marie,*** SCC asked to choose between MR offence and absolute liability

- Court declines, creates new **strict liability** offence
- No MR required, but liability avoidable where A showed due diligence or acted on reasonable MF
- Crown must prove AR BRD

- **It's for the defence to show on a BoP that they shoed due diligence or acted on reasonable MF**
- **For both crimes and offences, unless statute says otherwise, Crown must prove AR BRD**

Dickson J held that there are three categories of offences:

1. Offences in which *MR* must be proven by the prosecution
    a. Criminal offences would fall here
2. ***Strict liability offences****:* regulatory offenses (parking illegally) don't need moral condemnation, need sanctioning to deter future transgressions
    a. 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 event (due diligence).
    b. The presumption of *mens rea* can be overcome with clear statutory wording, unless the statute included words like "wilfully," "with intent," "knowingly," or "intentionally."
3. ***Absolute liability offences****:* offences in which there is no necessity for the prosecution to prove the existence of *mens rea* and it is not open to the accused to exculpate himself by showing that he was without fault.
    a. Include only those offences for which the legislature has made it clear that guilt would follow proof of the proscribed act, meaning that due diligence and reasonable mistake of fact are not defences. Voluntariness is still a defence, though.
    b. Crown must prove AR BRD
        i. Lack of voluntariness is still a defence due diligence and RMF NOT defences
    c. Courts have never liked them – that's why SSM created strict liability category

- #2 and #3 are "regulatory offences," whereas #1 is a "true crime."

Classification: criminal or regulatory offences

In Canada there are roughly 1000 different crimes; over 500,000 different offences

- *Constitution Act:* Fed govt has power to enact criminal law; both jurisdictions have the ability to impose penal liability to ensure compliance with regulations

Regulatory Offending:

CL presumption of MR for elements doesn't apply to public welfare offences

- Designed to ensure that people take every precaution to avoid doing the things that are being regulated
- Advantages: Less stigma, lower penalties, less due process required (interests not as high), less expensive to run and investigate
- Disadvantages: less due process required, stigma changes over time, innocence more often likely, punishments remain high for some types
- Examples of provincial regulatory development
    - Until recently, governance over treatment of animals was exclusively federal; *CC* prohibited cruelty. Now, prov legislation protects animals in "distress". Punishments almost as high; no *MR* required
    - Impaired driving without harm – regulatory regime only

- *Sault Ste Marie* provided little guidance on this task other than to say that regulatory offences relate to "everyday matters [like] traffic infractions, sales of impure food, violations of liquor laws, and the like."
    - Given the lack of a clear purpose grounding existing criminal law, it is unlikely that any unifying theory for distinguishing regulatory offences from true crimes will ever be found.
- Legislation enacted under s. 91(27) must be treated as crim law and subject to an *MR* requirement
    - Provincial legislation: normally public welfare offences – presume strict liability / no MR
- Offences that include the words "knowingly," "wilfully," or "intentionally," require proof of mens rea.
    - But the absence of these words will not necessarily mean the opposite.

    - Similarly, if a statute includes words like "whether or not the accused knows," this clearly shows that we are dealing with a strict liability offence.
- Offences that target corporations more than individuals are more likely to be public welfare offences.
- Offences with high penalties are more likely to be criminal offences.
    - However, not all our laws have been enacted with this approach in mind; some regulatory offences carry heftier penalties than Code offences.
    - e.g., s. 194(1) of the *d* imposes a penalty of not more than $5,000,000 and/or not more than 5 years imprisonment; this penalty is greater than most crimes.

R v Pierce Fisheries Ltd. [1971] SCR 5

Issue/holding:

- Are *Lobster Fishery Regulations* which prohibit persons from having undersized lobsters in their possession criminal offences? **NO**

Rationale (Ritchie J):

- The regulations are intended to protect lobster beds from depletion and conserve supply for an important industry
- The stigma of being convicted of a crime should not attach to a person found to be in breach of these regulations
- The regulations contain no such words as “knowingly,” “wilfully,” “with intent” or “without lawful excuse” – whereas these do appear in the *Fisheries Act*
- If the regulations were criminal offences, and it were necessary for the Crown to prove *mens rea*, it would be virtually impossible to secure a conviction (i.e., an accused could always say "the lobster looked like it was a good size")

Dissent (Cartright J):

- The express finding of fact that the respondent had no knowledge that any of the lobsters on its premises and under its control were undersized leads to a finding of not guilty.
    - Parliament could provide with clear words that anyone having an undersized lobster should be guilty of an offence absent knowledge that it was undersized, but no such words have been used, and no such intention can be implied from the words which have been used.

Distinguishing absolute and strict liability

If a court determines that a particular statute creates a regulatory offence, as opposed to a true crime, the next stage issue is to resolve whether the offence will be regarded as one of strict or absolute liability.

- This requires considering (1) the requirements imposed by the Charter and (2) principles of interpretation.
- In *Reference re Motor Vehicle Act (British Columbia*) s. 94(2), the SCC held that s. 7 is triggered where an offence proscribes any potential for imprisonment and that absolute liability fails to comport with the principles of fundamental justice.
    - At the very least, if an offence proscribes any potential for imprisonment as a sanction, it cannot be treated as one of absolute liability
    - *So, where there’s a q about if it’s absolute or strict liability, the potential for incarceration is an important interpretive factor*

Three Implications of *BC Motor Vehicle*

- Explained what PFJ were
- AL + imprisonment = s 7 violation
- Set groundwork for future Charter challenges on MR (stigma analysis, overbreadth, gross disproportionality)
- PFJ that “morally innocent” not be punished
- What is “morally innocent” will vary
- But AL allows for NO exceptions

- Section 7 "liberty" interest compromised where imprisonment at stake

Transport Robert
- "Commercial motor vehicles that lose wheel on highway are liable no matter what"
    - Why? People die… dangerous
- *BC Motor Vehicle* only applies where s. 7 is engaged
- *Transport company tries to argue that security of the person engaged*
- CA says no: highly regulated for-profit industry
- Stigma is minimal, more like negligence
- Affirms that AL possible where no imprisonment & consequences reasonable

Three situations where Charter won't dictate matters:
1. It's at least theoretically possible that the state would be able to justify an absolute liability offence w/potential to imprison under s 1
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
    a. In *Polewsky,* ONCA considered an absolute liability offence punishable only be a fine, with jail being a last resort, and held that the unlikely possibility of imprisonment was sufficient to avoid constituting a deprivation of liberty under s. 7.
3. Best way to ensure constitutionality of an absolute liability provision is to remove any possibility of imprisonment.
    a. *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 they failed to pay a fine

In *Sault Ste Marie*, Dickson J held that offences of absolute liability would be those in respect of which the legislature made it unambiguously clear that guilt would follow proof of the proscribed act (e.g., a clause stating that due diligence is no defence).
- As with *Levis,* need **clear and unmistakable indication of legislative intent**

Defences to strict liability

1. ***Reasonable mistake of fact*** **(**A reasonably acted on the basis of a mistake of fact that, if true, would render the act/omission innocent)
    a. Mistake must be both honest *and* objectively reasonable
2. ***Due diligence*** (taking all reasonable steps to avoid the particular event)
    a. Offenders should not be excused simply because their mistake was not egregious, because it was unintentional, because any resulting prejudice was small (*MacLeod*), or because there was a reasonable explanation for the failure to comply (*g*); the focus is upon measures taken to prevent the offence.
        i. To constitute a defence, the person charged must establish that the due diligence exercised was exercised to prevent the breach of the statute that gives rise to the offence.
            1. If an accused has a good reason to commit the offence but does not take all reasonable steps to avoid committing it, they cannot claim due diligence.
    b. Not a standard of perfection: it's about reasonableness
    c. Not a standard of correctness (fact that offence committed does not disentitle)
    d. What is required will vary: how dangerous was the activity? How significant the impact? What do other similarly situated individuals do? (Compliance with industry standards); was the outcome unusual?
3. ***Alt defences***

a. ***Necessity:*** *Klem:* BCCA held that due diligence defence was unavailable because couldn't be used in cases where the prohibitions had been deliberately breached
    i. no defence for acting reasonably; question is: did you try to prevent the breach of the statute

R v Precisions Diversified Oilfield Services Corp, 2018 ABCA 273

Facts: Frazier Peterson suffered a fatal head injury caused by an unanticipated object while working on a drilling rig operated by Precision. Precision was charged under the Alberta OHSA, s. 3(1), which requires employers to ensure the health and safety of their workers "as far as it is reasonable practicable…"

Issue:

- what's the nature of the offence?
- Who bears the BoP? □ who should have to prove what?
- "that health and safety not ensured where reasonably practicable?"

Analysis:

- D argued that the statutory language placed BoP on Crown, not them, to show DD
- The prosecutor in *Precision* treated the offence as a strict liability offence, with the accident being prima facie proof of breach and shifting the burden to the defendant.

Majority:

- The ABCA found "as far as it is reasonably practicable" to be a part of the actus reus that the Crown had to prove given the way the statute was worded (as opposed to just stating the defence of due diligence).
    - The **minority** said that this wrongly shifted due diligence to the Crown, and that the company should have had to prove that they were duly diligent.
    - "requiring Crown to prove what was reasonably practicable would involve mastering complexities of each industry" (para 99)
- *Precision* is an example of imposing on the regulatory world criminal-like requirements when the two worlds, criminal and regulatory, are not the same.
    - In the regulatory field, employers are in the best position to bear the burden of proving due diligence given their knowledge and expertise
    - Criminal law reflects fundamental values and collectively speaks out when egregious wrongs are committed while regulatory law safeguards the public interest and creates a safe place for us to live by providing the right kinds of incentives without severely impacting real benefits of their socially useful activities (an idea foreign to criminal law)

OMISSIONS

Omissions are treated differently from over acts □ challenges wrt certainty/restraint

- Law generally does not punish failure to do an act
- Only punishable where a **legal duty to act (**has to be a clear duty)

Rationales for Limiting Omissions

1. exposing people to danger
2. libertarian belief structure
3. scope of liability

Where do we put obligations?

- clear duty to others already undertaken
    - **o** eg: parent duty to child until they're not longer in your care
- some duties to the state (ex: paying taxes)
- Act undertaken that has put others in danger (ex: neglect to block hole in ice from ice fishing)

In general, the law does not impose liability for failing to act, even when it would come at little or no cost.

- *Sometimes criminal to fail to act if significant harm in failure to act and a valid reason why person should be required to act*
- There are at least three objections raised with regards to the criminalization of omissions:
    - It is very difficult to enact limits regarding omissions; most limits focus on the "reasonable" steps that must be taken but what is reasonable is not always clear.
        - e.g., if 10 people are standing by watching someone drown, should all of them be charged?
    - It forces people to do something, which is far more intrusive than prohibiting acts.
    - Compelling people to do something might put their own well-being at risk.

Culpability: The Need for a Duty

Criminal Code – most common source of legal duties

- Special relationships like parent/child etc [215] □ AR is such a case is in the failure to provide the child w/necessities of life
- Anyone who directs, or has the authority to direct, how a person does work must take reasonable steps to prevent injury to that person (217)
- A person who undertakes to do an act is under a duty to perform it if the failure to do so would be dangerous to life [s. 217].
- *An 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*.

Provincial legislation and federal legislation other than the Criminal Code.

- In *Nixon*, the accused was a cop in charge of the lockup facility. A detainee was assaulted by several officers, and the accused was convicted of aggravated assault (even though he could not be directly linked to the beating) because he failed to perform his duties under the provincial *Police Act,* which required him to protect those under his care and uphold the law. I
- In *Phillipon,* the accused was the manager of a bar who failed to intervene when a drunken brawl broke out. He was charged as a party to the assault for failing to stop the fight on the grounds that the *Alcohol Control Act* stated that "no licensee ... shall permit quarrelsome, violent or disorderly conduct to take place on the licensed premises."
    - Gerein J held that the section was directed to controlling quarrelsome conduct generally and did not create a duty to intervene in altercations (which would place licensees in considerable danger).

Also common law created duties:

- Miller**: "where a person has, by accident, created a state of affairs that would be punishable as a crime if that person had had the req MR at the time, then he or she is under a duty to take measure to counteract dangers created by such an act"**
- The ONCA in *Thornton* recognized that people are under a common law duty to refrain from harming their neighbour and translated it into criminal law obligations.
    - The SCC did not explicitly accept or reject this proposition, leaving us with uncertainty about whether the breach of a general common law duty of care can be the source of liability for an omission.
    - No other case has adopted this principle in Canada, as it **would fail to develop the common law incrementally and would expand the scope of criminal liability**

Future of Omissions □ v haphazard & crim law has for centuries resisted the notion that a person must act to save in those relatively narrow circumstances

R v Browne (1997), 116 CCC (3d) 183 (ONCA)

The mere expression of willingness to do an act is not an undertaking and cannot trigger legal duty under s. 217. There must be a commitment, clearly made and with binding intent, upon which reliance can reasonably be said to have been placed.

Facts:

- Greiner and Browne were drug dealers stopped by police on the street after coming out of a house under police surveillance. After no drugs were found on their person or at the house, they were released. Greiner had swallowed a small plastic bag of crack to avoid detection and tried unsuccessfully to throw it up before they went back to Browne's family home. There, Greiner started shaking and sweating. Browne called a taxi, and 10 to 15 minutes later when it showed up, her lips were purple, her mouth was foaming, and her face was pale. They arrived at the hospital 15 minutes later. Greiner was pronounced dead 35 min after arriving at the hospital.
- s. 217 of the Code states that: "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."
- . 219(1) of the Code (criminal negligence) says that "Everyone is criminally negligent who. . . 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."

Issue/holding:

- Had Browne committed an "undertaking" under 217? **NO**
    - **Therefore, no legal duty and no breach of s. 219**

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.
    - *TJ should have looked for undertaking first*
- The threshold definition of "undertaking" must be sufficiently high to justify the serious penal consequences accompanying criminal negligence relative to civil negligence.
    - The mere expression of willingness to do an act cannot trigger the legal duty; there must be a commitment, clearly made and with binding intent, upon which reliance can reasonably be said to have been placed.

Rationale (Abella JA):

- The evidence does not disclose any undertaking of a binding nature.
    - Browne's words to Greiner when he first found her shaking and sweating—"I'll take you to the hospital"— hardly constitute an undertaking creating a legal duty under s. 217.
- Browne did not fail to take reasonable steps to prevent harm to Greiner.
    - These were two drug dealers who were used to swallowing drugs to avoid detection by the police.
    - Browne immediately called a taxi when there was indication that Greiner was in a life-threatening situation.
    - There is no evidence that a 911 call would have resulted in a significantly quicker arrival at the hospital at that hour, or even that had she arrived earlier, Greiner's life could have been saved.

Notes:

- What's the meaning of the duty in s. 217? □ design to address contracts or near contractual relationships
- Brown didn't **do** anything that caused the victim's death. □ would have to punish him by omission, which would be failure to bring her to the hospital
- Abella JA: duties are limited □ moral obligation ≠ legal one
    - Clarity/restraint/not imposing unfair obligations

H(AD)

- Cements *Browne*
- 2 ways to expose/abandon a child to harm

- 1) deal with child in a manner that leaves them exposed to risk
- 2) omitting to take charge where there is a duty to do so

- Moldaver J: you must take active steps (approves of ruling in *Browne*)

Omissions: What is Clear?

- Duties found in CC can be basis for crim sanctions
- *Browne* suggests strict interpretation of duties
- There are clearly defined provincial duties (ex: police officer) and can form basis to act

RECAP OF OMISSIONS

- Basic rule: omissions only punishable where there is a duty to act set out in the law
- Duties can arise in two ways: (1) by the crime in question; (2) through another duty imposed by law
- CC duties clearly impose liability
- Express provincial duties (ex: *Police Act* duty to protect people in custody; medical practitioner duty to take care) also seem to
- *Browne:* suggests strict reading of duty – high level of commitment. Won't ascribe duties lightly
- Duties help narrow the scope of criminal liability helps people **know** their obligations – limit the "terrible choice" (on one hand do nothing, risk jail, on other, do something risk danger to self)

OBJECTIVE STANDARDS IN CRIMINAL LAW

MR elements to this point:

- Subjective is the standard for crimes
- Obj liability only permissible where element is **aggravating feature of unlawful act (predicate offence)**
- Consequences (eg was bodily harm foreseeable?)
- Strict liability offences do not require proof of mental fault at all. Only allow accused to raise defences.

R v Stephan and Stephan

Facts:

- Ezekiel became v sick; parents used homeopathic remedies
- Never called for medical assistance until he stopped breathing
- Several people told Stephans to take him to hospital had meningitis and needed medical care
- They have three other kids

Analysis:

- This was MF they thought they could fix him, they were wrong

Makayla Sault

Facts:

- From Ontario, member of New Credit First Nation; diagnosed with severe form of cancer in March 2014
- Given 75% chance of survival with full course of chemo. Received 11 weeks of it, until her parents pulled her off, believing it was killing her.
- Perused traditional indigenous medicine instead
- Doctors said without chemo she would die died Jan 18 2015

Objective standards impose criminal liability even where the accused acted without intent to cause harm, without foresight of the consequences, or without knowledge of the relevant circumstances, but where a reasonable person would not have conducted him or herself in the same manner.

- Comparing the accused to a "reasonable" person is bound to punish the stupid or inept instead of the ill-motivated person who made the deliberate choice to break the law.
- Laws focused upon what a reasonable person would have done have less of a deterrent effect, as those who cannot live up to such standards will be unable to abide by the law in any event.
- Objective standards include in the *mens rea* what amounts to an absence of a mental element, which may seem inappropriate in the criminal law context.
- The more we use objective fault standards, the greater the risk that we will be criminally sanctioned.

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.

The terms “reasonable”, “careless” and “negligent” are found throughout the Code, and some provisions, by the absence of a requirement of subjective fault and a context that seems related to negligence, might be read as importing an objective fault standard.

- For a time, courts grappled with whether moral culpability requires a subjective recognition of the risk or whether it may be satisfied where the accused did not put their mind to it.

Where Parliament has adverted to it, objective fault can be imposed (except for high stigma offences), but only if it is a heightened standard of negligence (a marked departure from the standard of the ordinary, right-thinking person).

- This does not specify a precise standard, only that the threshold is higher than that in negligence law.
- There is one exception to the requirement of a marked departure: criminal negligence, where we require a marked and substantial departure from the standard of care that a reasonable person would observe.
- This is because criminal negligence carries a higher penalty than other negligence-based offences, and this was the SCC’s way of distinguishing criminal negligence

Why consider objective liability?

- *Tutton:* well meaning parents who killed their child
- *Hundal:* driver who is no “ordinary criminal” but kills others
- *Westray:* mining disaster the cause of poor business practice – not intentional harm
- Humboldt crash (*terrible form of negligence)*
    - All he wanted was to atone; got 10 years because he refused to defend himself and would not appeal

CRIMINAL NEGLIGENCE

One Term, Two Concepts

1. **S. 220/221: it’s a crime where it causes bodily harm or death**
    a. No such thing as the “crime of criminal negligence”
    b. Crime negligence causing bodily harm or death: **marked and substantial departure** □ has to do with the higher penalties for criminal negligence
2. **Standard** of liability □ whenever an offence includes what can be viewed as an obj standard
    a. **Eg:** dangerous driving; careless use of a firearm

marked departure standard has constitutional significance: regarded as the bare minimum that satisfies what the Charter requires (*Beatty*)

1. What does negligence mean?

- *Beatty*: civil standard ≠ test for penal blameworthy conduct
- Real concern that judges/juries will “leap from the consequences of the driving to a conclusion about dangerousness … even good drivers are occasionally subject to momentary lapses of attn”
- *Romano*: “the focus should be on the manner of driving, not the consequences or cause of those consequences”

2. What does the reasonable person look like? *It's complicated… (Creighton)*

- *Lamer CJ:* "generous allowance for factors which are particular to the accused, such as youth, mental development, education, should be considered"
- McLachlin J: "this approach … personalizes the objective test to the point where it devolves into a subjective test, thus eroding the minimum standard of care."
- Sankoff thinks they're both right:
    - Lamer: where person has elevated skills, take that person there
    - McLachlin: but minimum bottom line is important
- The benefits of McLachlin J's standard include:
    - Society is best protected when those undertaking dangerous activities are held to a uniform standard. Any other approach would be incredibly unwieldy.
    - Subjectivist concerns about punishing those who could not have foreseen the risks of their conduct are met by the high standard required to convict someone for criminal negligence. •
- The problems with McLachlin J's standard include:
    - It lacks understanding regarding those who act negligently through no fault of their own.
    - It recognizes that there are some cases in which it is unfair to hold a person to an inflexible standard. •

While McLachlin J labels these as extreme cases in which the accused lacks capacity, the sole example she gives of this is illiteracy, which sounds a lot like the "peculiarities of the accused."

Goal of Criminal Negligence not to treat everyone equally it's to set minimum standard for people to act responsibly

- Need for "marked departure" provides some measure of protection
- Standard not actually "reasonable person" but "very unreasonable person"

The law is technically the same standard for all, but as Lamer CJ suggested "reasonable person should be invested with ENHANCED foresight **seems to have been adopted (though quietly)**

3. Is negligence part of the AR/MR or both?

MR of negligence:

- McIntyre in *Tutton*: "it is the conduct of the accused, as opposed to intention, which is examined"
- McLachlin in *Creighton*: there is an MR element
- Must conduct an MR analysis, even though it's almost always there

Courts began using "objective" mental fault to respond to supposed need for MR

- The problem: objective MR is almost a contradiction in terms
- McIntyre in *Tutton*: "negligence connotes the opposite of thought-directed action
- Criminal negligence is aimed at socially blameworthy activity with high risk (AR)

R v Tutton and Tutton, [1989] 1 SCR 1392

Facts:

- Carol and Arthur Tutton were the deeply religious parents of a 5-year-old with diabetes. Against the advice of their doctors, Carol stopped giving her son insulin in the belief that he was going to be healed by the Holy Spirit. Within two days, the child became dangerously ill, and upon admonishment from their doctor, Arthur promised that they would not withhold insulin from their child again. A year later, insulin was stopped after Carol believed she had a vision in which God told her that her son had been cured. Two days later, the child was taken to the hospital where he was pronounced dead. Arthur and Carol were charged with manslaughter by criminal negligence.

Issue/holding:

- Is the test for wanton or reckless disregard for the lives or safety of others an objective or subjective test? **objective**

Analysis:

McIntyre J:

- Objective test has nothing to do w/mental state
  - Conduct as opposed to intention
  - Negligence connotes opposite of thought-directed action
- **"marked and significant departure" *beyond what ordinary person would do***
- s. 219(1) specifies that "Everyone is criminally negligent who (a) in doing anything, or (b) in omitting to do anything that it is his [legal] duty to do, shows wanton or reckless disregard for the…safety of other persons.
- Where criminal negligence is considered, it is the **conduct of the accused, not his intention or mental state, which is examined negligence connotes the opposite of thought-directed action**
- This is apparent from the Code, which makes criminal conduct which shows wanton or reckless disregard. o If acts coupled with mental states were punished by criminal negligence, the dividing line between the traditional mens rea offence and the offence of criminal negligence becomes blurred
- 202 has created a separate offence: one that makes negligence (the *exhibition* of wanton or reckless behaviour) a crime itself and w/own terms
  - *Therefore, A's perceptions of the facts is not to be considered for the purpose of assessing malice/intention only to consider whether A's conduct, in view of his perception of the fact, was reasonable*

Lamer (concurring): (subjective/objective)

- McIntyre J's analysis is correct, but when applying the objective test for criminal negligence, a generous allowance must be made for factors which are particular to the accused, such as youth, mental development, education.
  - With high-risk conduct, using a subjective or an objective test will often produce the same result.

Wilson/Dickson/La Forest (subjective)

- The phrase "reckless disregard for the lives or safety of other persons," in criminal law, requires the Crown to prove subjective awareness of the risk that the prohibited consequences will come to pass.
  - The court should give the provisions the interpretation consonant with the broader principles of criminal law.
  - Holding that criminal negligence requires proof of the mental advertence to the risk or wilful blindness to the risk will not undermine the policy objectives of the provision (i.e., deterrence and social protection).
  - Plus, a subjective standard would offer protection for accused who are not morally blameworthy.

Notes:

- Sankoff likes McIntyre **objective test has nothing to do with mental state**

R v Hundal, [1993] 1 SCR 867

The majority held that the mens rea of criminal negligence is based on an objective standard that does not consider the subjective mental state of the accused.

- This objective standard, in criminal law, entails a marked departure from the standard of care that a reasonable person would observe.
  - The greater the risk created, the easier it is to conclude that a reasonably prudent person would have foreseen the consequences.
- This objective test allows the individual's human frailties and personal situation to be considered (by use of the marked departure test) while preserving an objective standard.

Notes:

- Where Parliament has adverted to it, objective fault can be imposed (except for high stigma offences), but only if it is a heightened standard of negligence (a marked departure from the standard of the ordinary, right-thinking person).
    - This does not specify a precise standard, only that the threshold is higher than that in negligence law.
    - There is one exception to the requirement of a marked departure: criminal negligence, where we require a marked and substantial departure from the standard of care that a reasonable person would observe.
- This is because criminal negligence carries a higher penalty than other negligence-based offences, and this was the SCC's way of distinguishing criminal negligence (R v FJ, 2008 SCC 62).

Modified reasonable person standard

R v Creighton, [1993] 3 SCR 3

Issue and holding: Can the reasonable person assume characteristics personal to the accused? NO
Rationale: (McLachlin J)

- A uniform reasonable person standard that does not consider the individual characteristics of the accused is best.
    - This is subject to one exception; the only relevant characteristic of the accused any incapacity to appreciate the nature of the risk which the activity in question entails.
    - *Note:* McLachlin J did not elaborate on how best to distinguish between qualities that went to "capacity" and those that were irrelevant aside from implying that the frailty would have to be significant. •
- Lamer CJ's approach personalizes the test to the point where it devolves into a subjective test, eroding the minimum standard of care.

Dissent: (Lamer CJ)

- The reasonable person test must make a generous allowance for the individual characteristics of the accused such as youth, mental development, education, etc.; it must be adjusted where the accused possessed capabilities or deficiencies that might have affected their conduct.
    - Where someone is unaware that the likely consequences of their conduct would create risk of death because human frailties made them lack capacity to turn their mind to those consequences, and a reasonable person with the capacities of the accused would not have made themselves aware, the accused must be acquitted.
    - While frailties can lower the threshold, people must compensate for frailties as much as possible. o
    - Temporary frailties (e.g., intoxication) have no relevance.

Notes:

- McLachlin J's standard is the one used today, but there is one big caveat: since criminal law is about setting minimum standards of conduct, those with "enhanced foresight" may be held to a higher standard.
    - Those who are below the reasonable person standard must reach it, but those who are above it (i.e., those with special skills) do not need to be held to the ordinary standard.
- This is recognized in *Romano*, where the accused is held to the standard of the reasonable police officer, and in *Javanmardi*, where the accused is held to the standard of the reasonable naturopath.
- In ***Gosset,*** the accused was a police officer shot a fleeing suspect in the back. The evidence established that the gun went off accidentally during the chase.
    - Lamer CJ wrote that the accused must be subjected to a higher standard: that of a reasonable police officer in the circumstances.
- In ***Naglik*****,** where the accused was convicted for failing to provide the necessaries of life to her child, the majority held that only those personal characteristics which deprived the accused of the capacity to appreciate

the risk posed by her conduct were relevant, but that the accused's youth, inexperience, and lack of education did not deprive her of the capacity to appreciate the risk associated with neglecting her child.

- The different outcome in this case, with respect to Gosset, can be explained because the accused's conduct fell below the standard, and she thus did not have enhanced foresight.

MARKED DEPARTURE – MINIMUM STANDARD FOR CRIMES OF NEGLIGENCE

Hundal and cases decided around the same time failed to address whether the marked departure test was a matter to be considered as part of the actus reus or as part of the mens rea.

Test: AR + MR Negligence Crimes

1. Is the language of the section met? Was the driving "dangerous" in the circumstances?
    a. For crim neg "did the act show wanton or reckless disregard for others?
2. Was failure to foresee the risk a marked departure from what RP would observe?

Beatty and Roy Messages:

1. It is the manner in which the motor vehicle was operated that is in issue, not the consequence of the driving
2. **Restraint:** if every departure from the civil norm is to be criminalized, regardless of the degree, we risk casting the net too widely and branding as criminals persons who are in reality not morally blameworthy
3. **The fault component is critical:** must separate AR + MR
4. **Dangerous driving example:**
    a. AR: was the driving dangerous?
    b. MR: was degree of care exercised by A a marked departure from the standard of care that RP would observe in A's circumstances?

R v Beatty, 2008 SCC 5

- The accused's pickup truck, for no apparent reason, suddenly crossed the solid line into the path of an oncoming vehicle, killing all three occupants. The accused's vehicle was being driven in a proper manner prior to the accident. The accused's vehicle had not suffered from mechanical failure. Intoxicants were not a factor. The accused stated that he was not sure what happened but that he must have lost consciousness or fallen asleep. The accused was charged with dangerous operation of a motor vehicle causing death under s. 294(4) of the Code.

Issue: was A's momentary lapse of attention sufficient to constitute dangerous operation of a motor vehicle causing death? **NO**

Analysis:

- *AR* of dangerous drive measured exclusively at the conduct undertaken by A and determining whether, viewed objectively, A's driving was dangerous
- *MR* focuses on whether A's conduct amounted to a marked departure from the standard of care that an RP would observe in A's circumstances

Rationale: (Charron J)

- While A's driving was dangerous (AR), not clear that it constituted marked departure from conduct of an ordinarily prudent driver, as it's not uncommon for drivers to have momentary lapses in attention

Concurring: (McLachlin J) •

- The actus reus requires a marked departure from the normal manner of driving.
- The mens rea is generally inferred from a marked departure in the nature of driving, but the evidence in a particular case may negate or cast a reasonable doubt on this inference.

Notes:

- Two-stage inquiry was driven by the desire to classify negligence as a culpable "mental" state

R v Roy, 2012 SCC 26

Facts:

- With visibility reduced by fog, the appellant pulled his motor home out from a stop sign onto a highway and into the path of an oncoming tractor-trailer. In the collision that resulted, the appellant's passenger was killed. The appellant suffered from memory loss.
- Insurance on Roy's other vehicle had recently run out so they were driving his motorhome back and forth to the worksite

Procedural History:

- The appellant was convicted with dangerous driving causing death under s. 249(4). The trial judge held that that his actions were objectively dangerous, and then immediately concluded that the appellant's driving had constituted a marked departure from the standard expected of a reasonable person in the circumstances.

Issue:

- Did TJ err in inferring from the fact that A committed a dangerous act while driving that his conduct displayed a marked departure from the standard expected of an RP in the circumstances? **YES**

R v Mills, 2021 ONSC 6492

Facts:

- Toronto teacher found not guilty of negligence in teen student's drowning

Analysis:

- Under education act, teachers have a legal duty to ensure that all reasonable safety procedures are carried out in the courts and activities for which they are responsible
- I have concluded that a reasonable teacher in these circumstances would have foreseen the risk of a student drowning. The swim site boundaries were unmarked and there were seven to eight students to watch
- The swimming ability of Jeremiah was known to some extent, but his experience in the open water was not well known
- The presence of a lifeguard enhanced safety, but the lifeguard could not watch everyone at all times
- If this were a case of civil negligence, the test would be met. **This is a criminal test. It is not enough for the Crown to prove that Mr. Mills fell below the standard. The Crown must prove BRD that the failure to foresee the risk and take steps to avoid it, if possible, was a <u>marked and substantial departure</u> from the standard of care expected of a reasonable person in the same circumstances**
- As I have said, Mr. Mills made individual decisions that were justifiable such as permitting weak and non-swimmers to attend the trip and permitting students to swim without lifejackets. His conduct fell below the standard when he failed to reassess the risk at the July 4th swim sit where the steep drop-off to deep water added the cumulative circumstances to increase the risk and make the situation unsafe for Jeremiah Perry.
- **The degree of departure from the standard does not reach the significant level of wanton or reckless disregard or a marked and substantial departure from the standard of care of a reasonable person in the same circumstances.**
- **It does not reach the level of moral blameworthiness necessary for criminal liability**

R v Javanmardi, 2019 SCC 54

- Unlawful act manslaughter/unlawful act bodily harm
- Are regulatory acts unlawful? Can they cause death? **YES**
- Para 31: "predicate offences involving carelessness or negligence [including strict liability offences] must be read as requiring a marked departure from the standard of the reasonable person"
- To punish for ordinary negligence would not recognize the stigma of a CC conviction
- Crimes premised on "dangerous", "careless" or general failure to abide by duty – marked departure

- Here: not marked departure not guilty

Confusion about splitting AR and MR continues

R v Gardner, 2021 NSCA 52

Facts:

- Booking officers when detainee comes in charged with public intoxication
  - Left in a spit hood, officers did not do checks on his well-being
  - Vomited and choked under the spit hood
- Convicted by jury; new trial ordered on appeal

Analysis: AR and MR of Crim Neg

- "Wanton and reckless disregard" (AR) must be assessed separately from the marked departure test (MR)
- Disagrees with language from Abella J in *Javanmardi* that suggests otherwise
- Wanton means heedlessly or an "unrestrained disregard for consequences"
- MR is a marked and substantial departure from the standard of care
- Judge in this case instructed on MR, but suggested wanton disregard is "extreme lack of care for wellbeing or rights of others" or a "conscious awareness of danger"

Need to prove the standard:

- Crim neg about a parent or driver, no need for expertise: these are nontechnical matters of everyday common experience
- In civil litigation, must have evidence from someone with expertise
  - "in civil cses, failure to id the appropriate standard of care constitutes legal error. In crim cases with the life and liberty of the accused at stake, it cannot be any less so.
  - *Sankoff thinks this is positive because it sets clear mandate for the crown and will help ensure jury knows what the standard is (though this might be contested)* ***here: confusing bc MR invariably envelops the AR***

The subjective MR

- Crim neg operates on a modified objective test
- "the modified obj test requires the court to be alive to the possibility that A's honestly held and reasonable perception of the circumstances are such that a RP might not have appreciated the risk or could and would have done something to avoid the danger"
- The state of mind of A is not, as in civil cases, irrelevant
- "TJ must be careful to instruct jury on A's perceptions of the situation they faced as they may be capable of raising or contributing to reasonable doubt [about neg]"

All of these cases together designed to show how hard it is to determine crim neg CASE LAW NOT CLEAR

MENTAL DISORDER

How does mental disorder funnel into criminal responsibility

- Also feeds into sentencing (which is concerned with gravity of offence/moral responsibility)
- In some cases, MD can be used to bring down from murder to manslaughter (used to show didn't have element of *MR* for example)

Concerned with A's mental capacity to commit criminal act

- Non-criminally responsible A has to be treated in a special way, tailored to protect public and treating mentally ill offender fairly/appropriately (McLachlin CJ, *Winko*)
- Still subject to restrictions to protect public

Difficulties around qualifying *what* is a mental disorder

- Incredibly selective use (perhaps too selective) of NCRMD
- Deep concern around accountability (fake defences)

CC Section 16 provides test that determines whether offender will be found to have been not criminally resp for offence

- Only concerned with mental disorders that A might have been suffering from *at time of offence committed*
- If "defence" is established, finding is NCRMD
    - Not a defence because the Crown can ask for it too
    - When A raises NCRMD, it can be decided at trial (along with guilt etc) or at sentencing
- No prison – treatment facility where status reviewed only thing that matters at this point is whether danger is gone becoming major area of reform

Test:

1. Disease of the mind (in law – TJ), as found by trier of fact on BOP
2. Unaware of act OR consequence OR
3. Did not know that act was LEGALLY wrong OR MORALLY wrong
    a. Did the delusion set up a scenario whereby situation was "not wrong"?

Limits of the Test

- If ppl know act is wrong, and know what it is, they are guilty – even if mental illness compels them to commit
- Person with "psychotic urge" will not be acquitted
- Person with temporary condition or not a "disease of the mind" not captured
    - Example: stroke, cancer, epilepsy not considered diseases of the mind

Disease of the Mind – 1) exclude certain states that can't qualify as NCRMD; 2) include certain states and preclude A from running an MR defence

How does s. 16 arise?

1. Psychiatric assessment – both sides agree (*Longridge, Li*)
    a. Most common scenario
2. Raised by defence – Crown disputes MD: *Magnotta*
    a. A was unable to prove that he suffered from MD that affected the consequences
3. Defence raises illness to suggest MR or automatism – Crown says MD or guilty
4. Defence raises nothing – Crown wishes to get MD finding

"Cannot appreciate that it's wrong"

- usually because illness affects the factual scenario
- *Landry:* thought friend was Satan and had to die
- *Oommen:* thought friends were going to kill him
    - SCC: focus is on whether mental disorder deprived A of rational choice
    - Defence not available if offenders know it is wrong – but commit it anyways

"Incapable"

- Focus for NCRMD is not the same as focus for MR
    - Focus is on capacity
- About whether they were incapable of knowing that what they did was wrong or that they "appreciated" act/consequences in the circumstances **high threshold**
- S. 16 applies to negligence offences too
- Cannot just apply RP test

Limits of the Test

- If ppl know act is wrong, and know what it is, they are guilty – even if mental illness compels them

s. 16 **is only designed to determine if you have capacity AT THE TIME**
- Solely about whether they're criminally responsible
- Fetal alcohol syndrome
- Psychopathy – the inability to encode and process moral issues
- *If we dealt with everything, system could collapse*
    - Would require difficult and detailed therapeutic assessments

Alcohol/Drugs & Mental Illness
- Critical and difficult task is to find the primary reason for incapacity
- Presumption where alcohol/drugs used is that A was intoxicated
- Can rebut where evidence shows suffering from disease of the mind
- Would normal person on drugs/alcohol have acted that way (yes = intoxication)
- Is A a recurring danger w/o drugs/alcohol? (yes = s. 16)

ML that go to capacity are excused should fall into s. 16

R v Longridge, 2018 ABQB 145

Facts: BRD established that Christine Longridge caused death of her daughter and meant/intended to cause her death.
Issue: Whether by virtue of s. 16(1), Ms. Longridge Caused the death but is not criminally responsible
- Whether at time of offence she suffered a mental disorder and whether that mental disorder rendered her incapable of knowing/appreciating quality of her act/whether they were wrong

Analysis:
- 16(1) renders A "exempt" from crim responsibility A who seeks protection of 16(1) bears the burden of proving the assumption/presumption of sanity doesn't apply to them (on BoP)
    - Longridge has to prove this
- Whether a condition is characterized as a "disease of the mind" is **question of law decided by a judge**, determination based on evidence etc
- Suffered from mental difficulties (bipolar) stemming from her father's death and continuing
    - Some evidence that she thought her son was the Messiah and needed saving/protecting
- She was stable until 2013 when her husband developed throat cancer
    - Evidence that she was taking half the meds she should but also not taking them regularly after her husband died
- 2016, believed that her son was the messiah and her daughter needed to die to save him

Rationale:
- A's mental illness unquestionably a "disease of the mind" and mental disorder under s. 16(1)
    - Her condition poses ongoing risk to the public
- Problem: presents of mental disorder at time of incidenet, without more, doesn't account for what happened that night
    - *Was her mental disorder the cause of what occurred??*
- **Incapacity to Appreciate the Nature and Quality of her Acts:**
    - TJ agrees with the doctors that her mental disorder didn't prevent her from appreciating that her acts would result in daugther's death – she intended to kill
- **Incapacity to know her acts were wrong**
    - She believed the killing was morally justified to save the messiah; her delusions had big impact on her understanding of the moral import of her acts
    - *Capacity to know what was morally wrong was utterly degraded*

Holding:

- **Caused the death of her daughter but not criminally responsible on account of mental disorder**

R v Dobson, 2018 ONCA 589

Facts: A killed his two friends and tried to kill himself. Charged with 2 counts of 1st degree murder. Judge alone trial.
- A advanced "not criminally responsible" defence
- Known at trial that A suffered from significant mental disorder at time he killed his friends

Procedural History: TJ convicted
- ¾ experts agreed that A's mental disorder didn't render him incapable of appreciating the nature of his acts at time of killing – defence didn't take this position
- Experts disagreed on whether A knew his actions were morally wrong

Issue:
- Did TJ err in interpreting "knowing that it was wrong in s. 16(1)? **NO**
- Should the court recognize the partial defence of diminished responsibility?

Analysis:
- Need to focus on ability to recognize right from wrong at the time of the killing and in the circumstances of the killing
- *A's mental disorder must also render him or her* ***incapable of knowing that the acts in question are morally wrong as measured against societal standards****, and therefore incapable of making the choice necessary to act in accordance with those standards.*
- A 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 (*Oommen*)

Rationale:
- A knew acts were legally wrong and did not prove he didn't know acts were morally wrong
    - *Couldn't get up the s. 16 hill*

Holding: appeal dismissed

Chaulk:
- SCC held that s. 16 breaches s. 11(d) but is saved by section 1.

Irresistible impulses

- committing an illegal act while under mental pressure/mental disorder defined as an "irresistible impulse" does not constitute a defence necessarily a high threshold to limit the defence
- today the section 16 test sets such a high threshold because of a concern that every criminal (including pedophiles and the like) would be able to rely on **an involuntariness-based mental disorder defence by suggesting that the compulsion to act arises from their particular psychiatric makeup**
- But limiting the defence is realistic: restricted to claims where the accused had "a total inability to exert control in the circumstances"

Unfitness to stand trial

- Focus on s. 16 is on A's capacity **when act was committed**
- But illness can be issue at trial too (whether or not s. 16 is being raised).
- Does A have a *general* ability to understand what is happening, incl. consequences
- Cannot try A until fit

- Fitness to stand trial is pretty low concerned with fitness to stand trial *when trial is taking place*
- IF NOT FIT: don't hold a trial at all. Persons who are incapable of defending themselves because of a lack of mental capacity simply cannot be tried in any meaningful way
- Fitness to stand trial: 672.22-.33 narrow application

- "does A have a general ability to understand what's happening, incl. consequences"
    - Cannot try accused until fit to stand trial; goal is to see if fit to stand trial
- Presumption that an accused is fit to stand trial, unless a court is satisfied on a balance of probabilities that he or she is unfit
- Section 2 of the *Code* 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 intelligibly to present a defence

- *Jobb*: A had cognitive deficiencies abilities of a child – "easily led"
    - Found to be unfit at trial because might limit his ability to give on-going instructions to counsel in relation to and in response to the trial proceedings
- The capacity to make rational decisions should be an important component in any fitness assessment
- If A is found to be unfit, any plea made is set aside, and a disposition hearing is then held to determine what should be done
- In contrast to the NCR provisions under section 16, the courts must be certain that it is actually possible to hold such a trial before the detention of A under criminal legislation can be justified

An NCR Finding

1. Court can make a first order (or not), but primary responsibility goes to MH boards
2. Is A a risk to the public?
3. Prior to 2014, focus on least intrusive options. No more.
4. Can discharge or keep in custody.
5. Must be able to show A is dangerous before custody ordered
6. Periodic reviews to see how A is doing
7. Can result in periods of detention well beyond what A would have been sentenced if found guilty

Intoxication and mental disorder

In *Beard*, the HL recognized that alcoholism or drug use could induce mental disorder leading to a finding of NCRMD.

- Given how mental disorders are interpreted as excluding temporary diseases of the mind, this type of intoxication is not likely to be relevant to criminal cases very often.

In *Bouchard-Lebrun*, the SCC held that cases involving mental disorder and intoxication are best resolved by attempting to find the source of the mental condition that deprived A of the actus reus or mens rea.

- Where A abnormal mental condition was triggered by alcohol or drugs, it is appropriate to treat the case as one of intoxication, regardless of how unusual the reaction was.
    - Where A is otherwise "normal" and does not present a recurring danger, it makes no sense to characterize the accused as suffering from a mental disorder.
- When difficult cases of interaction between drugs and mental illness arise, the decision of whether to treat a mental state as a mental disorder or as intoxication should centre around protecting public safety.
    - Thus, if the circumstances suggest that a pre-existing condition of the accused is not a threat to others, the court should hold that the accused was not suffering from a mental disorder.
    - If a normal person might also have reacted to similar drug use in the same way as the accused, it would be easier to find that the mental condition was not mental disorder.
        - Conversely, if drug use would not cause an average person to react as the accused did, it will be easier for the court to find that the accused's actions were the result of mental disorder

In *Turcotte*, A, suffering from depression, tried to kill himself by drinking windshield washer fluid. This made him extremely drunk, and he killed his two children so they would not have to discover his body.

- However, the QBCA held that the accused's intoxication did not preclude him from raising an NCR defence; it held that s. 16 could still be in play if there was some reason to believe that the accused's mental state would have been the same notwithstanding the impairment brought on by alcohol.

AUTOMATISM (ANOTHER WAY OF SAYING INVOLUNTARY)

BoP is reversed, just like for s. 16

PFJ that every criminal act be voluntary

- All acts must be "voluntary" in that they were at least mentally "willed"

Problems

- **Result of automatism: acquittal** □ & only need reasonable doubt

Recognized in *Rabey,* the court described automatism as a state of impaired consciousness in which a person is capable of action but not conscious of what he is doing, thus having no voluntary control over their actions.

Plays a small but very interesting role in society / criminal justice system

DISTINGUISHING AUTOMATISM FROM MENTAL DISORDER

Distinguishing between automatism and mental disorder is important because, if mental disorder is proven, the accused is dealt with under the NCR regime, but if automatism is proven, the accused is acquitted.

- A judge must start from the presumption that the automatism originates in a mental disorder (SH)

Rabey v R, [1980] 2 SCR 513

Facts: A was rejected by the complainant and hit her on the head with a rock, knocking her unconscious.

- He raised the defence of non-insane automatism and the judge found that he was not insane within the meaning of s. 16 and that he acted in a state of automatism brought about by an external cause.
- Argued that he suffers from TEMPORARY dissociative state

Procedural History: The ONCA ordered a new trial.

Analysis:

- **The SCC was concerned about policy considerations posed by people skirting the mental disorder provisions, which could result in dangerous people going without treatment**. Their solution:
  - Internal: any malfunctioning of the mind having its source primarily in some weakness internal to the accused (i.e., having its source in one's psychological make-up) may be a mental disorder;
  - External: transient disturbances of consciousness due to external factors do not fall within the concept of mental disorders (e.g., a blow to the head resulting in a concussion).
- If a factor triggers a reaction of the accused that no one would expect from an ordinary person, then it must be because of a mental disorder.
  - The court held that the ordinary stresses of life do not constitute an external factor; since an ordinary person faced with ordinary stress does not dissociate, but the accused did, then it must have been because he was suffering from something "internal" to him.
  - Thus, when one has a condition that produces a dissociative state (e.g., a brain tumour), determining whether NCRMD or automatism applies is a **question of whether the mental condition is a transitory state brought on by external factors or as a malfunctioning of the mind due to a mental disorder**.
    - This determination is not easy to do (e.g., is diabetes internal or external? Epilepsy? Sleepwalking?).

- While it might seem harsh to label an epileptic or diabetic as mentally disordered, the state, while transient during the attack, may be recurrent and the accused may represent a continuing danger.

R v Parks, [1992] 2 SCR 871

Facts: In Parks, the respondent killed his mother-in-law and seriously injured his father-in-law while sleepwalking, which was a sleep disorder that ran in his family

Analysis:

La Forest J found that two different theories had arisen for classifying automatic behaviour:

- The "internal cause" theory, which we have already discussed.
  - He held that this theory was not very helpful, because the internal/external dichotomy is blurred in the context of sleepwalking.
- "Continuing danger" theory, which hold that the absence of a danger of recurrence will not automatically exclude the possibility of finding of insanity

Parks was acquitted, a main reason for which was the fact that he had excellent relations with his parents-in-law prior to the incident, making his actions unexplainable absent automatism.

- These facts are unique, making this case very idiosyncratic.

What came from Parks was a flexible test for determining what would constitute automatism.

- Sleepwalking cases have led to verdicts of both not guilty and NCRMD, though most cases of sleepwalking are classified as mental disorder because recurring danger.

R v Stone, [1999] 2 SCR 290

Facts: Stone argues automatism; mental disorder and provocation aka: involuntary, voluntary but caused by mental illness, intentional but lost control

- Arguing in the alternative always possible
- So long as "air of reality"

Automatism was argued to have arisen as a result of a psychological blow.

- Bastarache J agreed with TJ's decision to take defence of automatism away from the jury
- Bastarache J accepted that psychological shock could trigger the defence of automatism, and that whether an accused suffered from automatism is a question of mixed fact and law.
- Said that **all automatism is either mental disorder automatism or non-mental disorder automatism, and the former is subsumed by s. 16;**
  - thus, **automatism is a separate defence only if it did not stem from mental disorder.**
- when deciding whether automatism was mental disorder or non-mental disorder automatism, both the internal cause theory and the continuing danger theory remained relevant.
  - 1. Is the cause internal? If yes, most likely s. 16
  - 2. If psychological, only "extremely shocking trigger" will suffice to keep out of s. 16
  - 3. Is A a "continuing danger"
- He favoured the position in *Rabey*, concluding that accused's reaction to the alleged trigger must be assessed from the perspective of a similarly situated individual.
  - With psychological blow automatism, **an extremely shocking trigger will be required** to establish that a normal person might have reacted by entering an automatistic state.
  - Aimed to cover cases like "just witnessed extremely shocking event that psychologically scars you"
- Proof of automatism had to be proven by the accused on a balance of probabilities; there were two primary justifications for this shift: (*Sankoff loathes this it's just "court wisdom*)
  - difficult of disproving the defence

- it was the same burden as was imposed for claims of mental disorder automatism and intoxication-related automatism, and that there was value to creating a single legal approach to all three related defences

Some concerns with *Stone* include:

- It severely narrowed the application of automatism from Parks, perhaps even defining it out of existence.
- A psychological blow producing a dissociative state will result in a finding of non-mental disorder automatism only where the blow is of such a nature and severe degree that it would cause the ordinary reasonable person to enter a dissociative state; in other words, rarely.
- It is thus worth asking why the Court even retained the "psychological trigger" at all.
- Sankoff thinks it is a safety valve for abnormal situations.
    - To demand that the average sane person would react to the events in issue in a specified way is to preclude the possibility that this accused actually did react this way

Some concerns about a fuller recognition of the defence of automatism include:

- There exists considerable disagreement in the medical community about whether it is actually possible for a person in an automatic state to engage in complex behaviours.
- Treating behaviour as mental disorder or non-mental disorder automatism may lead to acquittals or findings of NCRMD in situations where a conviction is warranted.
    - Where the accused is aware of the risks of their condition and fails to take steps to avoid risk, there is no reason why they should not be liable for at least criminal negligence if that risk materializes.
- At the same time, the current approach to involuntariness is often overinclusive, unfairly biased against the accused, and may lead to a conclusion that the accused suffers from a mental disorder when it is not warranted.

R v Fontaine, 2017 SKCA 72

The reverse onus applied in Stone does not apply to cases of physical involuntariness like reflex actions.

Facts: Mr. Fontaine struck his common-law partner immediately after she had violently awoken him from sleep. He was charged with assault causing bodily harm.

Issue/holding: Did the trial judge err by finding the defence of automatism was available to Mr. Fontaine even though he failed to call expert psychiatric evidence to the effect that his actions had been involuntary? **NO**

Analysis:

- **In *Stone,* SCC held that in cases involving automatism, D bears the burden of proving involuntariness on BoP with both an assertion of involuntariness and confirming psych evidence**

Rationale:

- TJ made it seem like she was concerned with intention/MR but her decision is best as being based on voluntariness/AR
- However, in *Stone*, Bastarache J did not use "automatism" as a synonym for voluntariness; he defined it as a state of impaired consciousness in which someone, though capable of action, has no voluntary control over that action.
    - Automatism describes one kind of involuntary action that is the product of a mental state in which the conscious mind is disassociated from the part of the mind that controls action.
    - This readily describes conditions such as psychological shock, sleepwalking, and extreme intoxication; it does not describe involuntary actions such as reflex responses.
- Dissociative states resulting from things like sleepwalking are beyond the ordinary experience of a judge or jury; thus, it is important that an accused who relies on the defence be required to call evidence and prove involuntariness.
    - However, reflex actions are a common part of human experience and they can ordinarily be meaningfully understood and evaluated by judges and juries without the assistance of expert testimony.

- Where A pushes B into C and B is then charged with assault, what good would requiring a psychiatrist to testify about involuntariness do?

R v Ghiorghita, 2019 BCCA 59

Facts:

- In 2014, Andra Ghiorghita had an affair with a co-worker, Al Esmail, which she admitted to Mr. Ghiorghita. They planned to make up by taking a trip and attending counselling, but Andra reversed course. Mr. Ghiorghita was not angry and tried to be understanding and accommodating. Mr. Ghiorghita hacked Andra's email and found she was still seeing Mr. Esmail and that she planned to take their son and move in with him. Mr. Ghiorghita had never been more stressed. On July 15, 2014, Mr. Ghiorghita shot Andra 8 times in the bedroom of their townhouse. He did not remember seeing or loading the gun or shooting Andra, only hearing the shot and some screaming.
- Dr. Lohrasbe and Dr. Sheppard opined that Mr. Ghiorghita was in a dissociative state at the time of the shooting caused by cumulative psychological blows that led him to lose the ability to suppress his over-controlled anger. Dr. Murphy did not believe that there was evidence of automatism, as Mr. Ghiorghita had no history of dissociative disorders and there was no immediate shocking behaviour sufficient to trigger an automatic response

Procedural History:

- TJ not persuaded on BoP that he had been in a state of automatism at the time of the shooting, pointing out the lack of any history of dissociative events, the fact that Mr. Ghiorghita had a strong motive to kill his wife, and the fact that Mr. Ghiorghita had engaged in a series of relatively complex goal-directed activities.
- Mr. Ghiorghita appealed, questioning the relevance of the nature and severity of the trigger, the existence of a plausible motive, and whether the victim was also the trigger.

Issue/holding: Did TJ err by failing to find the expert evidence in his case contradicted some of the *Stone* factors? **NO**

Analysis:

- The SCC in Stone provided guidance to assist triers of fact in weighing all the evidence available to determine whether the accused acted involuntarily on a balance of probabilities.
    - Trial judges should refer the jury to specific evidence on the following factors:
        - 1. The severity of the triggering event;
        - 2. Whether there was corroborating evidence of bystanders;
        - 3. Whether the accused has a documented history of dissociative states;
        - 4. Whether the accused had a motive for the crime; and,
        - 5. Whether the alleged trigger of the automatism was also the victim of the violence.
- Bastarache J held that the advancing state of medical knowledge may lead to a finding that other types of evidence are also indicative of involuntariness.
    - There are two principal considerations:
        - 1. The potential that the accused could be faking automatism.
        - 2. The risk of harm to the administration of justice if violent people are acquitted

Rationale:

- Although it may be possible for the factors with which Mr. Ghiorghita takes issue to be present during an automatistic state, these factors are also hallmarks of voluntary criminal conduct, readily identifiable through the lens of judicial experience
    - their absence increases the plausibility that a non-voluntary mechanism was at play
- The factors in Stone are not to be rigidly applied; it is possible for an automatistic state to be present even in the face of one or more of the factors that tend to detract from its plausibility; no one factor is determinative.
    - All that is required is that the factors are weighed along with all the other evidence; the trial judge satisfied this requirement.
        - Sequence of activities leading up to the shooting weighed against a finding that Mr. G acted involuntarily in a state of automatism

Many (but not all) criminal defences exist solely by virtue of the common law; s. 8 of the Code states that these defences continue in place to the extent that they are not altered by or inconsistent with a federal enactment.

- As such, courts can continue to recognize new defences.
- However, certain defences exist solely in statute (e.g., self-defence).

Onus of disproving remains with the prosecution BRD (*Holmes*)

- The Crown is not required to negate every conceivable defence; if the accused suggests a defence because of a circumstance calling for a conclusion contrary to the ordinary inference-drawing process, they must point to some evidence that could support such a conclusion (i.e., there is an evidentiary burden on the accused).
    - This does not mean that the burden of establishing a defence rests upon the accused; 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** (*Holmes*)

Big Picture Takeaways

- Important to understand nature of "defence"
- Affects burden of proof
- How mental elements are measured
- What the focus is (eg. Wrongfulness of activity vs wrongfulness of prosecution)
- Understanding where things fit sets up approached

Six Different Conceptual Types of "Defence" – they each operate very differently

1. **The Non-Defence Defences treat them exactly as AR/MR burden of proof is the same (*Holmes*)** *can't use them for non-criminal offences in most cases, only for CC offences* (these are the three elements)
    a. "defence" of consent = AR of absence of consent not proven not a defence but always called that
    b. "defence" of HMB in consent = MR of consent not proven
    c. "defence" of mistake = MR of an element not proven
    d. "defence" of colour of right = makes legal knowledge relevant, so defence involves honest belief in legal knowledge (MR not proven)
    e. "defence" of accident = MR or AR of an element not proven
        i. In law, to claim smth was an "accident" really amount to denial of a req eelement of the AR (the act was involuntary rather than voluntary) or alternatively, a denial of the required *mens rea* (the A did not intend the consequences of their conduct) – *Barton*, 2017 ABCA 285
    f. "defence" of intoxication = MR not proven
    g. "defence" of physical involuntariness = AR not proven

2. **The Non-Defence Defences with Reversed Burden** only thing that's different is the burden of proof
    a. "defence" of mental disorder = NCRMD
    b. "defence" of automatism = AR not proven
    c. "defence" of extreme intoxication = AR not proven, s 33.1

Where do the real defences come from?

- Statue (eg defence of person, authorized by law, s 43 correction of children)
- Common Law (eg necessity, duress, officially induced error, entrapment)
- Section 8(3) of the *Criminal Code*
    - Basis of the idea: criminal law sets lines not to cross (prohibitions)
    - Morality changes over time as our social values change, we can evolve the defences used

- Means you can technically ask for a new defence in any case have to show that it's in accord with the morality of the time
    - Eg: officially induced error – basic morality: the law is super complicated
    - Necessity (1980s); entrapment (1980s)
- "Every rule or principle of the common law that render any circumstance a justification or excuse for an act or a defence to a charge continues in force… and applied in respect of proceedings for an offence … except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament
- Mental Elements:
    - Most offences are measured on subj liability – you can't be punished for being ignorant or stupid
    - But defences measured MOSTLY objectively goes to every element of an defence that's based on a mental element
    - Idea is that we only EXCUSE or JUSTIFY what is otherwise a crime liable where act was reasonable
    - Defences tend to measure "morality" of action
- What does this mean in practice?
    - Eg: fraud – person unreasonably does not see any risk of deprivation from lie
        - Correct result if RD? acquittal
    - Eg: agg assault – person honestly believes that when someone attacks you, they are a threat until incapacitated through force
        - Correct result if RD? conviction
    - *Unreasonable beliefs do not exculpate*
    - Defences involve a general moral constraint (looked at objectively)
    - What society deems to be justified or excusable
- _____
    - Objective test: MR
        - Purely objective – individual characteristics not relevant
        - Why? Situation where person DID NOT see risk
        - Would RP have foreseen the risk?
        - Only relevant factors going to capacity to foresee risk are considered
        - Young, inexperienced driver? Doesn't matter
        - Illiterate, could not read instructions to avoid risk – maybe
    - Defences: **Modified Objective Test**
        - V different from MR – bc defences are premised on moral entitlement
        - Accused must SUBJECTIVELY believe to warrant the defence
        - But belief must also be reasonable
        - Modified Objective: A must believe element in question + belief must be reasonable
        - Latimer: "can consider circumstances that legit affect A's ability to evaluate"

3. General Defences (real defences now)

a. Apply to every offence – criminal and regulatory (unless prohibited by statute)
    i. Not to absolute liability offences
b. They are the most useful
c. Eg: necessity – I was speeding because of an emergency
    i. Duress – I had to break customs law bc they would kill me otherwise
d. They are not about MR, but every defence has a form of mental element
e. **Statute:** duress (s 17), defence of person (s 34), defence of property (s 35), correction of children (s 43), surgical operations (s 45), authorized by law (reasonable mistakes using force, 25, 27.1)
f. **Common Law:** duress, necessity (can be excuse or justification)
g. **Excuse vs justification**
    i. Justification: you are "doing the right thing"
    ii. Excuse: you're doing the wrong thing but in a situation where it's understandable no one would do differently in the same situation

iii. How does A's mental state get considered

4. **Qualified Defences**
    a. They limit liability rather than excuse conduct entirely
    b. Don't apply to every offence
    c. Normally only relevant where mandatory minimum (murder)
    d. Provocation (s 232)
    e. Infanticide (s 233)
    f. That's it!
    g. Compassionate homicide? not really a defence in Canada
    h. Excessive self-defence?

5. **Procedural Defences**
    a. Every procedural defence must be proven by A on a BoP
    b. Idea: guilt is provable, but Crown disentitled to a conviction
    c. Entrapment – police caused the creation of the offence, they acted *improperly*
    d. Officially Induced Error
    e. Abuse of process
    f. Unreasonable dealy (s 11(b))
    g. Double jeopardy defences
    h. Two types of stay of proceedings:
        i. Judicial stay: tantamount to an acquittal – can't be relaunched w/o approval of judiciary
        ii. Crown-invited stay: mechanism in the *Code* to allow proceedings to be stayed temporarily (have one year to relay the charge)

6. **The Defence of De Minimus** (on its own cuz could fit into 1,3,5) – "the law does not concern itself w/trifles"
    a. No appellate court has ever confirmed that it exists (just like Loch Ness)
    b. Is it a true defence or procedural defence? WHO KNOWS
    c. Sometimes the breach is just too little to count "I only broke the law a little"
    d. Recognized in dozens of lower court cases across Canada and rejected in others
    e. Supreme Court has never ruled on it: but said in *Hinchey* (1996)
        i. Seems to exist and not exist at the same time

7. Specific Defences for Specific Offences (not talking about these – too *specific*)

There is no burden on the accused to prove that she was drunk or acting in self-defence *etc.* — only a burden at least to point to the existence of sufficient evidence.

- Once accomplished, the persuasive burden to convince the trier of fact that D should not be applied rests with Crown BRD

JUSTIFICATIONS AND EXCUSES

Code speaks not of defences but of "justifications" or "excuses" from A's POV, distinction makes no difference bc successful application of the defence entitles them to an acquittal

"Justification" challenges the wrongfulness of an action which technically constitutes a crime (*Perka*)

- e.g., provides relief to the police officer who shoots the 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 *(Perka*).

- e.g., the person who operates under a mistake of fact or mental disorder.

Classifying a defence as a justification leaves it less open to criticism than if it was classified as an excuse.

Depending upon the nature of the mistake, we might find the accused's actions justified, excusable or neither

- Reading *Perka*, it becomes evident that relying upon this terminology has some ramifications.

R v Yombo, 2023 QCCA 12 – *strongest hint in favour of de minimus recognition*

Facts: A found guilty of assault committed on the occasion of a chance encounter.
Procedural History:

- TJ held that appellant did shout at victim but not convinced BRD that it was a thread not harassment
- Found assault

Issue: should judge have applied maxim of *de minimis non curat lex* "the law does not care about small unimportant things" maxim tries to express the idea that a court can accept a "defence" in the event that the infringement is insignificant and should not entail consequences for its author
Analysis:

- The files which will present the characteristics necessary for the application of the maxim will be rare.
    - The rarity of its application does not mean that it's no longer useful, even in difficult contexts
- The maxim maintains confidence in the administration of justice **Sankoff thinks they're saying it's a procedural defence**

Holding: not a case where the maxim could apply

Sankoff's take

- *De minimus* remains an argument to be relied upon
- This case furthers that
- Don't think it can be a general defence either interpretive principle or abuse of process offence
- No clear why it's applied for certain offences and not others
- Can use it as a negotiating tool for discharges/peace bonds/alt measures

ABUSE OF PROCESS

Definition of abuse of process from *R v Jewett*, [1985] 2 SCR 128 – "violate fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings."

Start with the remedy and then work back to figure out why

Concerned with: state conduct, offending community's sense of fair play and dignity

Stay of Proceedings

- *R v Regan,* 2002 SCC 12 2 categories of abuse of process
    1. Formerly premier of Nova Scotia
    2. Crown proceeded in groups of charges
        - Second one was stayed for abuse of process police made announcement too early in their investigation, some "judge shopping" and some other things
- 1) the "main category" – conduct that renders the trial unfair
- 2) the "residual category" – conduct that, while not affecting trial fairness, undermines the integrity of the justice system

When a Crown gets a file, two considerations: 1) reasonable likelihood of conviction, 2) is the prosecution in the public interest?

Three step test for stay of proceedings:

1. The prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
2. No other remedy is reasonably capable of removing that prejudice
3. If uncertainty remains after 1) and 2), court must balance the interests favouring a stay against society's interest in a final decision on the merits

R v Babos, 2014 SCC 16

Facts: Babos and co-A charged with _____ after a traffic stop.

- Applied for a stay of proceedings; arguing that one of the police changed his evidence and when confronted with the inconsistency, he said "I talked to my partner and he convinced me his perception was correct"
- Crown improperly obtained medical information about the accused
- Crown attempted to extort guilty pleases from the co-accuseds

Analysis: *Babos* talks about the residual category none of these things really went to trail fairness

- **Court talks about how to apply the three step test**
- *Asking "has the state engaged in conduct offensive to societal notions of fair play and decency such that proceedings to trial in light of it would do further harm to the integrity of the justice system?*
- No reasonable alternative remedy (para 39)
    1. Main category: must consider **procedural** remedies to address the prejudice to trial fairness
    2. Residual category: must consider alt remedies to address prejudice to the integrity of the justice system
- Balancing stage (para 40-44):
    1. Main category: rarely determinative – society has no interest in unfair trials. Where no way to remedy unfairness of the trial, a stay should be granted.
    2. Residual category: has added importance: how severe is the conduct? Is the conduct systemic or isolated? Nature of the charges? Windfall concerns concern that A is getting off of something they did

Abuse of Process examples

- Police misconduct:
    1. Coercive tactics; physical violence or threats of violence; acting unlawfully in the course of an investigation
- Crown (prosecutorial) misconduct:
    1. Threatening an A with additional charges if they don't please guilty (*Babos*)
    2. Improper vetting of prospective jurors (*R v Latimer*, [1997] 1 SCR 217)
        - Crown/police did extensive vetting of the 150 people called to jury duty
    3. Intentionally withholding disclosure
    4. Repudiating a plea agreement? (not necessarily – *R v Nixon*, 2011 SCC 34)
- Miscellaneous
    1. Repeatedly re-trying an accused – *R v Keyowski*, [1988] 1 SCR 657
    2. Lost evidence – *R v La,* [1997] 2 SCR 680 (deliberate destruction of evidence…)

Entrapment

- Occurs when police get someone to commit a crime:

1. A) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a *bona fide* inquiry
2. B) although having such a reasonable suspicion or acting in the course of a *bona fide* inquiry, they go beyond providing an opportunity and induce the commission of an offence

Entrapment – "Virtual Spaces"

- *R v Ahmad*, 2020 SCC 11
    1. *Bona fide* inquiry means police have a reasonable suspicion that crime is occurring in a specific location, and a genuine purpose of investigating and repressing crime
    2. "Virtual spaces" present special privacy concerns (paras 37-41) and increased risk of random virtue testing – they must be defined with precision
    3. A specific phone number can constitute a "specific location" for the purpose of *bona fide* inquiry
- *R v Ramselson,* 2022 SCC 44
    1. Police had a reasonable suspicion that s. 286.1(2) [obtaining sexual services for consideration from a person under 18 years] was taking place in the escort subdirectory of the York Region Backpage.com
    2. That subdirectory was sufficiently precise and well-defined to meet the *bona fide* inquiry brand

Delay – s 11(b) □ *right to be tried within a reasonable time*

- Steps to a *Jordan* application:
    1. Calculate total delay from the **laying of charges** to the **actual or anticipated end of the trial**
    2. Subtract **waiver** and **defence delay**:
        - Time where the matter did not proceed because of defence counsel's unavailability, where Crown and court were able to proceed
        - Steps attributable to improper procedural steps by the defence – both the fact of taking a step and (irrespective of whether the step itself was reasonable) the manner in which it is taken
    3. Compare the resulting **net delay** to the applicable "presumptive ceiling"
- Net delay **exceeds** the presumptive ceiling □ unreasonable
    1. Delay is unreasonable unless Crown can prove:
        - Exceptional circumstances
        - Case complexity or
        - Transitional cases
- Net delay is **below** the presumptive ceiling □ reasonable
    1. Delay is **reasonable** unless defence can prove:
        - Defence took meaningful steps to expedite and proceedings took markedly longer than they should have
- **Remedy:**
    1. A stay is the minimum remedy
    2. A right to be tried in a reasonable time = a right **not** to be tried in an unreasonable time (*R v Rahey*, [1987] 1 SCR 588 per Lamer J)

Other delay:

- Pre-charge delay may be a form of abuse of process: *R v Hunt*, 2017 SCC 25
- Delay in appeal proceedings review for abuse of process: *R v Potvin,* [1993] 2 SCR 880
- Sentencing is reviewed under s 11(b) but **not** under the Jordan ceilings

Intoxication

Drinking and MR

- Someone who only gets angry when they're drunk still has the MR for guilt
- Being susceptible to do something you wouldn't do also does not affect MR
- Where drinking is the AR (driving while impaired), no problem either

INCLUDE STEPS

Step 1: How did A become intoxicated?

- Involuntarily?
- Voluntarily?

Step 2: Was A intoxicated enough that alcohol could have affected their mental state?

- **NO:** it makes no difference to liability if …
    1. Being drunk made you more likely to commit offence
    2. "I get more angry when I'm drunk"
    3. "I only fight when I'm drunk"
    4. If intoxication could not have affected physical or mental state, no need to consider it: *Daley*, 2007 SCC
    5. ***Then intoxication generally irrelevant***
- **IF yes, go to Step 3**
    1. Reserve for situations where A truly had no knowledge of what they were ingesting

Step 3: Is offence one of specific intent? (*George* 1960)

- **YES:**
    1. Defining specific intent:
        - Additional purpose or ulterior intent
        - Murder: commit act with intention to kill
        - Theft: commit act with intent to deprive
    2. Usually there is an included offence (eg: murder/manslaughter)
    3. *Tatton*, SCC 2015: the distinction lies in the complexity of the thought and reasoning processes that make up the mental element of a particular offence, and the social policy underlying the offence
    4. ***Intoxication can be raised to show absence of specific intent***
- **No – offence is one of general intent**

Parties to an offence can usually raise intoxication as a defence even where principals can't

Step 4: Section 33.1 Applies – was A intoxication enough to render his/her actions involuntary?

- **No** intoxication is irrelevant to liability can be raised in sentencing
- **Yes**
    1. In a state akin to automatism or insanity
    2. Alcohol alone? *Some things say you can't get to this state w/alcohol alone*
    3. Burden to prove lies on A: *Daviault, SCC*
- **Did the offence interfere or threaten to interfere with the bodily integrity of another person?**
    1. **No** acquittal
    2. **Yes is section 33.1 constitutional?**
        - **No acquittal**
        - **Yes (***weight of authority suggests this***)** intoxication is irrelevant – can be raised in sentencing

Caveat:

- Fact that A was too intoxicated to KNOW about particular fact or consequence IRRELEVANT TO GUILT
- What about situation where reasonable person would not have known? □ reasonable to not punish this person (apply RP standard)
    1. Ex: extremely drunk accused touches woman, thinking it was his wife
    2. Is he guilty of sexual assault if RP would have made same mistake in the circumstances? □ unclear at this point, needs to go to court to see

Involuntary intoxication?

Outcomes are completely different if voluntary or involuntarily intoxicated

- If involuntary, you treat it essentially the same as if they weren't (in terms of *MR*)
    1. A can raise any MR / AR defence; trier of fact must consider intoxication
- Not a defence □ just either relevant or irrelevant

This is actually quite rare but there are three instances:

1. Substance taken against will (drink spiked)
2. Didn't know substance ingested? □ more controversial (eg: meant to take a vitamin, actually a sedative)
    a. Case law generally clear that if you didn't know, it'll count as involuntary
3. No idea of any intoxicating properties? □ more controversial
    a. Ex: told that you were drinking mocktails and didn't know there was booze in there

- Tricky cases involve some awareness, but not full awareness of consequences
    1. Eg: person wants to get intoxicated but strength of drug much more than anticipated
    2. Or person unclear about mixture of drugs/alcohol
- *Judges tend to look poorly over mixtures or desire to get intoxicated gets out of hand* □ **not involuntary**

Not involuntary:

- **I didn't know it would be that strong!**
- **I got a different drug that I asked for!**

If involuntary intoxication:

1. Can raise intoxication for ANY offence;
2. Intoxication can negate any element of MR by establishing that the conduct was not intentional) or actus reus (by establishing that the conduct was not voluntary
3. Where evidence available, Crown must prove BRD either that:
    a. intoxication voluntary or
    b. intoxication did not affect AR/MR

NOT A DEFENCE BUT: it might be possible to raise involuntary intoxication as a defence in some cases, where AR & MR are present

R v Aranovsky, 2021 ONCJ 84

Charged with over 80

- A goes to friend's house; stopped by police after a "hasty lane change" – tells police he had one beer
- Blows 186 mg/100 ml □ officer would have let him go absent breathalyzer, no proof of impairment

Analysis: at trial, A and two other defence witnesses testify

- Host/friend decided to "spike the watermelon" as a joke
- Accused is a heavy drinker who loves watermelon – he ate most of it
- A, to the surprise of host, had to leave to drive a friend somewhere
- Friend testified that A never got drunk; he thought it would be funny

- He also could detect no flavour in the watermelon

Defence Witnesses: "the watermelon appeared perfectly normal in colour and in taste" – friend soaked the watermelon in vodka for 24 hours

Voluntary intoxication

- Law recognizes a "compromise" wrt how alcohol/drugs affect MR (*Beard*)
    1. Drunkenness and insanity (where it causes long term disorder – can argue s16)
- Drunkenness does not ordinarily provide lack of knowledge
- It CAN show that "accused incapable of forming specific intent essential to constitute crime"
    1. (general/specific intent is a legal fiction)
- Means that *we consider impairment for some crimes but not for others*

For some crimes, evidence of intoxication can be raised. For others, it's irrelevant

- "where a specific intent is an essential element in the offence, evidence of drunkenness should be taken into consideration in order to determine whether A formed intent"

Beard (1920) Test

- Beard (1920), a House of Lords decision, was the critical turning point for the defence of intoxication, reflecting a "compromise" between the need to prove a culpable mental state and the need to punish harmful conduct; Lord Birkenhead summarized the conclusions as follows:
    1. Insanity, whether produced by drunkenness or otherwise, is a defence; the law takes no note of its cause.
    2. Intoxication which renders the accused incapable of forming the specific intent for the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent.
    3. Intoxication falling short of a proved incapacity to form the intent necessary to constitute the crime, and merely affecting the mind of the accused so that he more readily gave way to violence, does not rebut the presumption that a person intends the natural consequences of their acts.
        - Intoxication that renders one more susceptible to committing a crime does not negate the mens rea.
            - It follows that mild or ordinary levels of intoxication are irrelevant to guilt.
        - A person cannot avoid liability by claiming that intoxication prevented them from distinguishing between right and wrong because this is not a prerequisite of culpability.

Specific vs General Intent

Beard categories:
1. general intent – intoxication irrelevant
2. specific intent – intoxication relevant

- Not a distinction based on logic; based on policy
- Certain crimes deemed to have a "basic" or "general" intent
- For these crimes INTOXICATION is irrelevant (also for OBJECTIVE MR crimes)
    1. Eg: assault (intent to apply force); sexual assault; pointing a firearm

Specific Intent

- Crimes with an "ulterior" subjective intent or purpose
    1. Murder
        - Intoxication can be used to demonstrate that you lack the subjective knowledge the person is going to die
    2. Theft (s 322) □ if you can show your impairment prevented you from knowing it was yours
- Intoxication *can* negate the "specific" intent
- In some cases, this leads to an acquittal. In others, conviction for reduced offence.

Specific or General?
- 87(1) – general intent crime
- 88(1) – "for the purpose of committing an offence" □ if you can show that you were so drunk that you didn't have this intent

Tatton, 2015 SCC 33

Facts: arson, s 434
Analysis:
- Two considerations: 1) importance of the mental element and 2) social policy underlying the offence
- Mental element refers to complexity of the thought and reasoning processes required for offence
- Specific can include knowledge of circumstance "where the knowledge is the produce of more complex thought and reasoning processes"
- When this analysis fails to yield a clear answer, policy assessment focuses on whether alcohol consumption is habitually associated with the crime in question. If yes, general intent crime.

Intoxication at Trial

- First question: **specific or general intent?**
- If general intent, intoxication is (usually) IRRELEVANT
- If specific intent, accused can raise evidence of intoxication for purpose of showing no MR
- But intoxication is not an excuse
- Trier of fact must focus on MR and whether A had it
- People who are drunk will often still have MR

Doesn't the Charter require MR to convict?

R v Bernard, [1988] 2 SCR 833 – general/specific intent

Summary on *Bernard*
- McIntyre and Beetz JJ say that the *Beard* rule should be preserved: intoxication only relevant to specific intent offences;
- Dickson, Lamer, La Forest JJ say intoxication relevant to all crimes
- Wilson and L'Heureux-Dube JJ say intoxication normally only relevant to specific intent; but in "extreme" cases of intoxication, relevant to all

McIntyre J (Beetz J concurring):
- Voluntary intoxication can negate specific intent and suffice for proof of mens rea for general intent crimes (*Leary*)
- There is no reason under the Charter or otherwise to disturb *Leary*.

1. The rule in *Leary* does not convert general intent offences into an absolute liability offence, as getting so drunk as to lose control is reckless, which supplies an adequate mens rea for general intent offences.
2. The *Leary* rule is not artificial, illogical, or lacking in justification; condemning those who, by consumption of alcohol, recklessly commit acts of violence causing injury to their neighbours is a valid policy concern.

Wilson J (L'Heureux-Dubé concurring):

- Intoxication should generally not be relevant in general intent offences because intoxication is typically not capable of raising a reasonable doubt as to the existence of the minimal intent required for them.
- However, McIntyre J's approach violates the presumption of innocence in s. 11(d) and is not saved by s. 1.
    1. It is unlikely that proof of self-induced intoxication will "inexorably" lead to the conclusion that the essential element of the minimal intent existed at the time the criminal act was committed.
- Therefore, the Leary rule should be maintained but with one modification: evidence of extreme intoxication involving an absence of awareness akin to automatism or insanity is admissible to negate general intent.

Dickson CJ (Lamer J concurring, La Forest J expressing "general agreement"):

- Evidence of self-induced intoxication should be considered in determining whether the prosecution has proved the mens rea required to constitute the offence.
    1. *Leary* imposes a form of absolute liability on intoxicated offenders, which is inconsistent with the s. 7 requirement for a blameworthy state of mind as a prerequisite to criminal sanction.
    2. It treats the deliberate act of becoming intoxicated as culpable, but inflicts punishment based on the unintended consequences of becoming intoxicated. 131
    3. *Leary* also runs counter to the s. 11(d) right to be presumed innocent until proven guilty; guilty intent is presumed upon proof of intoxication, and this presumption is irrebuttable.
    4. *Leary* cannot be upheld under s. 1, as it cannot survive the proportionality inquiry.
        - There is no evidence that the specific intent requirement is required for social protection.
            - To the extent that intoxication removes self-restraint, it would be of no avail to an accused, as such effects do not relate to the mens rea requirement.
            - Intoxication would be of no avail to an accused who got drunk to gain courage for a crime.
            - Triers of fact will weigh all the evidence in a fairly and responsibly, and they are unlikely to acquit too readily those who have committed offences while intoxicated.
        - It has not been demonstrated that risk of imprisonment of a few innocent persons is required to attain the goal of protecting the public from drunken offenders.
- If the law is to be altered in the name of policy that is surely a task for Parliament rather than the courts

R v Daviault, [1994] 3 SCR 63

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, constitute a basis for defending a crime which requires only a general intent?
YES
Analysis:

- Ss. 7 and 11(d) mandate some flexibility in the application of the *Leary* rule permit evidence of extreme intoxication to be considered in determining whether A had mental element needed for general intent crimes

Rationale (Cory J):

- Inconsistent with PFJ to eliminate mental element"
    1. Nor do I agree that self-induced intoxication is a sufficiently blameworthy state of mind.
- Strict application of *Leary* rule offends ss 7 and 11(d)
    1. The intention to become drunk cannot establish the *MR* to commi an assault
    2. To deny that even a minimal mental element is req'd for a general intent offence offends the Charter in such a manner that is so drastic that it cannot be justified under s. 1

- Given the minimal nature of mental element req'd even those who are significantly drunk will usually be able to form req'd MR
    1. *Only those who were in extreme degree of intoxication might expect to raise reasonable doubt*
- Approach adopted by Wilson J in *Bernard* should be adopted: only those who can demonstrate that they were in such an extreme degree of intoxication (akin to automatism or insanity) that might expect to raise a reasonable doubt as to their ability to form the minimal mental element required for a general intent offence.
    1. If adopted, this defence would only be put forward in the rare circumstances of extreme intoxication
        - ***must show akin to automatism/insanity***
            - Expert evidence would be required to confirm

Dissent (Sopinka J):

- Sexual assault is a heinous crime of violence those found guilty of committing the offence are rightfully submitted to a significant degree of moral opprobrium
    1. That opprobrium is not misplaced in the case of the intoxicated
- Furthermore, the sentence for sexual assault is not fixed. To the extent that it bears upon their level of moral blameworthiness, an offender's degree of intoxication at the time of the offence may be considered during sentencing
- *Leary* should be upheld still stands for the proposition that evidence of intoxication can only provide a defence for offences of specific intent, not general intent
    1. Bc sexual assault = general intent, can't use intoxication as defence
- Critiques of the majority's position include:
    1. Leary provided a compromise to cases involving a morally blameworthy offender who may have lacked intent in the ordinary sense, but who were hardly "innocent" in the conventional sense of the word.
    2. Triers of fact may too quickly accept that the accused had reached the Daviault level of drunkenness.
    3. Society deserves protection from those who put themselves in a state that threatens others.
- The threshold for the *Daviault* defence is high, and rarely met.
    1. In *Dow*, the QBSC suggested that current scientific evidence reveals that a state of intoxication akin to automatism cannot be induced by overconsumption of alcohol in the absence of some other condition.

Notes:

Daviault was one of the worst received SCC decisions of the time

SECTION 33.1

First iteration of the law:

- Extreme intoxication is a form of criminal negligence
- Involuntary intoxication does not count
- ANY level of intoxication cannot be raised for offences that involve assault or threat of interference with bodily integrity of other person
- Can be raised for property offences

Still in place:

- Extreme intoxication is a form of criminal negligence
- ANY level of intoxication cannot be raised for offences that involve assault or threat of interference with bodily integrity of other person
- *No longer for property offences*
- *No longer for involuntary intoxication*

33.1(1) 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…
(2) … a person departs markedly from the standard of…care…where [they], while in a state of self-induced intoxication that renders [them]…incapable of consciously controlling their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.
(3) This section applies in respect of an offence…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.

Where the accused commits a crime that includes some element of assault, "interference" or threat of interference with the bodily integrity of another person, the clause removes the defence of extreme intoxication from Daviault.

- s. 33.1 has no application to crimes of specific intent, nor does it affect crimes that are not committed against the person (i.e., property offences).

This is less effective than previous version Sankoff thinks (2) was put in place for political reasons and it strengthens the defence

R v Brown, 2022 SCC 18 – extreme intoxication

Unanimous decision upholding principles of *Daviault*

- Court continues strong attachment to substantive elements of criminal responsibility (eg. *Zora*)

Extreme Intoxication

- Maintains the Court's basic position on intoxication (specific vs general)
- "These reasons say nothing about criminal liability for violent conduct produced by alcohol along"
- Section 33.1 produces a crime of "absolute liability"
- The impugned provision of the CC does not establish a proper measure of criminal faulty by reason of intoxication
- I agree with LeBel J. in *Bouchard-Lebrun* when he said that s. 33.1 applies when three conditions are met: (1) that the accused was intoxicated at the material time; (2) the intoxication was self-induced; and (3) that the accused departed markedly from the standard of reasonable care generally recognized in Canadian society by interfering or threatening to interfere with the bodily integrity of another person
- Instead, s. 33.1 imposes liability for the violent offence if an A interferes with the bodily integrity of another "while" in a state of self-induced intoxication rendering them incapable of consciously controlling their behaviour
    1. s. 33.1 deems a person to have departed markedly from the standard of care expected in Canadian society whenever a violent act occurs while the person is in a state of extreme voluntary intoxication akin to automatism even if risk of harm etc was unforeseeable
- S 33.1 treats extreme voluntary intoxication, foreseeable or otherwise, as a condition of liability for the underlying violence offence and not as a measure of fault based on criminal negligence"

If the effects of the intoxication weren't foreseeable should be treated differently
Court is concerned with reasonable foreseeability of bodily harm

- Interesting for the future
- Brown would certainly be acquitted (SCC makes that clear)
- *Check out paras 91-92:* concern about licit vs elicit, foreseeability of loss of control and also risk of harm (eg: mixing alcohol with dangerous street drugs"

Holding: appeal allowed, acquittal restored

Sullivan/Chan

- S. 33.1 removes the voluntariness aspect of a crime – contravening PFJ
- It substitutes proof of one element (intoxication) for intention to assault
- Does not meet with negligence standard (does not require any link of action with danger)

- There is no real marked departure element
- Section 1? No deterrent value
- Criminal intoxication?

The latest caveat

- Can defence exist where only alcohol is drunk?
    1. *Daviault* was alcohol case and decided with only one expert
- Some courts suggesting that only where drugs or/drugs/alcohol used is it possible.
    1. Some experts say that the req' state of "automatism" isn't possible through only alcohol

R v Perignon, 2023 BCSC 147

Facts: A charged w agg assault for stabbing then-wife in the back claims automatism as result of cocktail of prescription drugs and alcohol

- Took opiates as result of medical difficulties no memory of the stabbing

Analysis:

- Legal framework: does he meeting the CL test for automatism has to demonstrate that his conduct was involuntary due to non-mental disorder automatism
- See A as a credible witness, furthermore, his act v difficult to explain in any other way: no argument b/w A and victim, immediately called 911 and was anxious for help to arrive tends to negate suggestions that he consciously intended to cause her harm
- However, victim thought A's behavious was odd at dinner beforehand
- Testimony from him as he talked to 911 suggests that he was constructing a narrative while not fully coherent or aware of what happened
- At minimum, operating in a serverly impaired state of mind at the material time. likely entirely involuntary because he was effectively asleep

Holding: satisfied on BoP that offence was not a voluntary act but committed while in a state of non-mental disorder automatism **not guilty**

Intoxication and Crime Framework

1. Was the intoxication involuntary? If yes, intoxication can be used to show no MR or AR for ANY offence.
    a. If no …
2. Is the crime one of specific or general intent?
3. If specific = intoxication can negate MR for the SPECIFIC intent (leading to acquittal or guilt on lesser offence)
4. If general, is the rime one that involves harm to other person's bodily integrity?
5. If no, then *Daviault* extreme intoxication defence available (reverse onus)
6. If yes, intoxication subject to s. 33.1

Defence of Person

In March 2013, Bill C-26 introduced extensive amendments to the law of self-defence, defence of property and citizen's arrest. Self-defence is s. 34

Now applies to "any act" where force used or threatened against them (previously only "use of force"

- Eg: dangerous driving away from scene where people attacking (used to be necessity)

Three Primary Elements & One Exclusion

1. Belief that force being used against them or someone else: MODIFIED OBJ TEST

2. Response is for purpose of defence or protection: SUBJECTIVE
3. Response is REASONABLE (taking into account accused perceptions)
4. Can't raise self-defence to LEGAL force by police or state agent unless person REASONABLY believes force is unlawful

New defence of person

1. Force can be used pre-emptively, as long as there's a (reasonable) threat of force aginst you (34(1)(a)
2. Can be used to defence ANY offence (not just crimes of violence) so long as act is committed to defence or protect against force (not guilty of offence, 34(10)
3. Focus is on RESPONSE. Law does NOT req that victim be the person that attacked them
4. Focus is on the reasonableness of the act NOT the consequences. The result only relevant in showing whether act reasonable.
5. You can intend to kill, so long as that is reasonable.
6. There is no need to avoid the altercation (though this is a factor to consider)
7. Motive doesn't matter. Only purpose. (You can defend against someone & hate them)
    a. As long as you're undertaking the act for self-defence purpose
8. Reasonable mistakes exculpated
9. Unlike old law, you can protect ANYONE (if reasonable)
10. Responding to lawful force just a factor to consider ("get off my property or I'll throw you off!")
11. How much force?
    a. Can't be expected to measure w/precision. "Courts must be alive to the fact that people in stressful and dangerous situations don't have time for subtle reflection"

Factor in Defence of Person (34(2))

1. Nature of the force (more allows for bigger response)
2. Extent to which use of force imminent (could you avoid it?)
3. Person's role (did you provoke it)
4. Use of weapon (him – more allowed; you – could be trouble)
5. Size, age, gender, capabilities (how real was this threat?)

- Unreasonable mistakes are punished (only considered in sentencing)
- Excessive force, even in defence

R v Khill, 2021 SCC 37

Facts: Khill was an army reservist with military training living in the countryside. One night, he was awoken by his wife about a noise outside. He looked outside and saw that the dash lights of his truck were on, which confirmed the presence of an intruder. He grabbed a shotgun from his bedroom and went outside. Mr. Styres was standing on the ground beside the passenger door leaning into the truck. Khill said "Hey, hands up!" Styres began to turn towards Khill and moved his hands downward toward his waist. Khill, believing that Styres had a gun, shot Styres' twice in the chest. Styres was unarmed. Khill was arrested at the scene and charged with murder.

- He claimed self-defence.

Issue/holding:

- Did the trial judge err in instructing the jury that Mr. Khill's military training was relevant to the reasonableness inquiries under s. 34(1)(a) and s. 34(1)(c)? **NO**
- Did the trial judge fail to instruct the jury that, in considering the reasonableness of Khill's act, they were required to consider his role in the incident? **YES** (new trial ordered)

Analysis (Martin J):

- Self-defence has traditionally been treated as a justificatory defence rooted in the instinct of self-preservation; it treats an act that would normally be regarded as criminal as morally acceptable in the circumstances.
    1. Response is broader than self-defence.

- No longer justification or excuse. Removing the triggering factors "removes any residual boundard between morally justifiable and morally excusable"
- **Self-defence (s. 34(1)) has three elements:**
    1. **1)** A must reasonably believe that force or threat of force is being used against them or someone else (34(1)(a)
        - Question is what <u>RP with similar characteristics and experiences would perceive</u>
            - Personal prejudices/irrational fears toward ethnic group or identifiable culture could never inform obj perception
            - Never considered through eyes of indiv who are overly fearful, intoxicated, v vigilant
        - Can't be based on individual's perception but most of these perceptions are considered
    2. **2) Motive**: under s. 34(1)(b), subj purpose for responding to threat must be to protect 1self or others
        - Motive provision ensures that A's actions aren't done for vigilantism/vengeance, etc
    3. **3) The response:** s. 34(1)(c), A's act must be reasonable in the circumstances
        - Focus must be on what RP would have done in comparable circumstances and not what particular A thought at the time
        - The court must consider the relevant circumstances of the person, the other parties, and the act, signaling that the reasonableness inquiry blends objective and subjective considerations
        - Reasonableness focus on actions – not A's mental state
- **34(2)(c) – person's role in the incident**
    1. Parl deliberately chose broad and neutral words to capture wide range of conduct
    2. Must access whether A's behaviour through the incident sheds light on the nature/extent of A's responsibility for final confrontation
    3. Need to examine A's role in bringing incident about
        - Law should encourage peaceful resolution of disputes not escalation of force
    4. TJ must guide jury by connecting relevant evidence to the factors the jury is called upon to consider
- What is relevant is reasonably apprehended "force" of any kind, including force that is the product of negligence—not limited to defensive use of force defence is more open-ended/flexible;
    1. Assuming the trier of fact is properly alerted to the relevant considerations, there is little direction over how the factors are weighed in any given case; reasonableness is left very much in the eye of the judge or jury.

Rationale (Martin J):

- Khill's military training was relevant circumstance to be considered in assessing the reasonableness of the shooting
    1. Doesn't render the reasonableness inquiry subjective; q wasn't whether Khill, given his characteristics and experiences, regarded his act as reasonable, but rather whether the jury, wrt Khill's characteristics and experiences, considered the shooting reasonable
- Ample evidence in this appeal to support a finding Mr. Khill played a role in bringing about the very emergency he relied upon to claim self-defence *potentially a key factor in assessing the reasonableness of his act in the moment of crisis*
    1. The jury, however, wasn't instructed to consider Khill's role in the incident if they had, might have arrived at different conclusion
        - Under the open-ended and flexible assessment of reasonableness under s. 34(1)(c), once the threshold was met and the trial judge instructed on the legal test and the evidence that related to Mr. Khill's "role in the incident", it was entirely for the jury to determine how much or

little weight to place on Mr. Khill's role when assessing the reasonableness of his decision to shoot Mr. Styres but essential **that his role in the incident be considered**

Minority Concerns (Moldaver and Cote)

- **Cote J: doesn't agree that TJ's error was material to the acquittal, req'ing new trial.**
    1. Functional review of the jury charge reveals that the jury was instructed to consider all of Mr. Khill's actions leading up to the shooting — the exact outcome that an explicit s. 34(2)(c) instruction would have accomplished

R v King, 2022 ONCA 665

Facts: D charged w/2nd degree murder after he shot and killed someone. Issues at trial: self-defence? If not, intention to commit murder?

- There was a situation in the street where D ("to diffuse tension") showed his gun to victim and others there did not diffuse situation
    1. They started running, victim ran after them, and D turned and shot & killed victim

Procedural History: trial said not guilty

Issue/Holding: was there misdirection wrt self-defence? **NO**

Analysis:

- D said everything leading up to the moment he fired the gun made him believe victim had a knife
    1. Was angry; told him during their initial interaction that he liked to jump people; behaving aggressively even after D showed gun; kept one hand in pocket; knew D had gun, ran after him anyways; grabbed the other guy and D thought had weapon
    2. D thought his friend (3d person) was in grave danger and panicked
    3. *Whether these thought processes were reasonable in the circumstances was for the jury to decide.*
- Jury re'd to consider what RP would have done in like circumstances TJ included background which D thought was error

Holding: no reversible error by TJ in terms of jury instruction appeal dismissed

DURESS

Deals with the situation in which a person is compelled to commit a criminal offence because of threats by another individual

- Recognizes that one shouldn't necessarily be forced to put one's own ife at risk to comply with the law
- One who performs criminal act under compulsion can't be said to have acted voluntarily
- **Not an MR defence (*Hibbert*) because motivation and intention are not the same**

Two separate versions of duress: one *Code,* one common law

- Section 17 limitations and benefits:
    1. 1. Threat must be of IMMEDIATE death or bodily harm
    2. 2. Person must be PRESENT when offence is committed
    3. 3. Offence committed cannot cause any bodily harm, sexual contact, arson abduction or a few others
    4. ***No proportionality test no need to show it was avoidable***
    5. **Accused must believe threats will be carried out – but no need for belief to be reasonable**

Duress elements (*Ryan*)

1. Threats of death or bodily harm
2. Reasonable belief threat will be carried out
3. No safe avenue of escape
4. Close connection between threat and offence
5. Proportionality – a few distinctions from necessity
6. Criminal acts – foreseeability

Paquette

SCC limited application of s. 17 to actual perpetrators; those charged under s. 21 could rely on the common law version of the defence

- Guy under duress helps another person commit a killing
- Lower court says section 17 keeps him from any defence
- SCC disagrees: s 17 only applies to PRINCIPAL offenders: recognizes BROADER CL defence that lacks s. 17 limitations

If you are threatened, and commit crime by yourself, only s 17 applies
If you are threatened, and help someone else commit the offence, only CL applies

Ruzic

SCC concluded that "the need for a threat of immediate death/bodily harm & req for person making the threat to be present at time of the offence" were unconstitutional: violated s. 7, not saved by s. 1

- Ordered to smuggle heroin or die
- She is a principal offender and s. 17 applies
- But threatener not present; no threat of immediate death
- A challenges the section as unconstitutional.
  SCC strikes down IMMEDIACY requirement and PRESENCE requirement (leaves the rest for another day)
- List of excluded offences still poses problems for principal offenders
- ***Without immediacy and presence requirement, s 17 is actually too liberal***

Charlie Hebdo Killings:

- Two terrorists arrive at the Charlie Hebdo office armed. Encountered employee outside, threatened w/death if she did not open the door with passcode. She did. They killed 11 people inside. Has the employee "aided" the terrorists? Does she have a duress defence?

Aravena, 2015 ONCA 250

Facts: 8 counts of murder. Warring motorcycle gang. Three "aiders" attempted to raise duress.
Procedural History: TJ said "it is not open to anyone to say to an innocent victim "you will die so I can live."
Analysis:

- The proportionality requirement ultimately separates those society is prepared to excuse for yielding to threats from those society decides should not have succumbed to the pressure.
- Choosing to aid in the murder of another will not always amount to choosing an evil greater than the evil threatened. For example, a person may be presented with a choice between taking the life of an innocent third party and the killing of her own child. The putative victims are equally innocent. Surely, the harms flowing from either choice are "of comparable gravity"
- Proportionality stricter: assist murder might require immediate threat of death.
- Victim's right to life cannot render conduct that is otherwise involuntary punishable under the criminal law. A proportionality requirement which looks to whether an A had any realistic choice is essential component of the moral involuntariness inquiry."
- Seems to be contrary to the strict wording of *Ryan.*
- Only applies to "aiders" □ CL version of duress.
- Court ultimately found no air of reality to the defence.

R v Ryan, 2013 SCC 3

- *Ryan:* added common law limitations to the stat version of the defence **result is that stat and CL** version of the defence are now identical **except s. 17 still only apply to principles and certain offences are expressly excluded from defence of duress under s 17**

Facts: charged w/ counselling the commission of an offence not committed contrary to s. 464(*a)* when she tried to have her abusive husband killed.
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?
Analysis:

- We conclude the CoA erried in law when it found there was no principled basis upon which the respondent should be excluded from relying on duress defence **should have been excluded as defence here**
- Unlike duress, self-defence does not req that any course of action other than inflicting the injury was "demonstrably impossible" or that there was "no other legal way out"
- 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

Common law of duress after *Ruzic:*

1. an explicit or implicit threat of death or bodily harm proffered against the accused or a third person. The threat may be of future harm.
    - Need not be grievous or serious bodily harm
    - Bodily harm merely refers to any injury that interferes w/health or comfort of the person and that is more than merely transient or trifling in nature
2. the accused reasonably believed that the threat would be carried out;
    - modified objective basis (RP similarly situated)
3. the non-existence of a safe avenue of escape, evaluated on a modified objective standard;
    - If a reasonable person similarly situated would think that there *was* a safe avenue of escape, the requirement is not met and defence not available
4. a close temporal connection between the threat and the harm threatened;
    - does not preclude availability of the defence where the threat is of future harm
    - ensure that A truly acted in an involuntary manner; if the threat is too far removed, it will be hard to say that RP similarly situated had no option but to commit the offence
5. proportionality between the harm threatened and the harm inflicted by the accused. This is also evaluated on a modified objective standard;
    - elements to be considered: difference between the nature and magnitude of the harm threatened (harm threatened must be equal/greater than harm inflicted by A) and the offence committed; as well as a general moral judgement regarding A's behaviour in the circumstances
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 this criminal activity, conspiracy or association.

Holding: appeal allowed; stay of proceedings
Dissent: would order new trial

R v Willis, 2016 MBCA 113

A owed money to crime organization over drugs. "Kill this 3rd party or we will kill you."

- S. 17 directly applicable (not an aider) Challenged constitutionality.

Evidentiary burden for defence otherwise met but not permitted to raise duress by statute.

- Relationship of duress to murder is "highly controversial"
- S. 17's aim is to prevent a person from descending into the moral quicksand of trying to determine whose life is more important in a given context.
- It is difficult to see how a certain death is a proportionate response to an uncertain threat of another
- The gap between harm inflicted and benefit accrued by the act of murder is cavernous
- To be clear: duress is available for manslaughter (though not under s. 17 – subject to constitutional challenge)

NECESSITY

Fair system of justice must avoid convicting those who COULD NOT comply with the law

Justification v Excuse belief that calling it one or the other shapes the defence

- Justification: "it's the right thing to do"
- Excuse: "it's wrong but understandable"

Controversy: no clear hierarchy of interests Balances competing moral imperatives: requires acceptance that higher principle can legitimize law-breaking

- Reliance upon the defence of duress requires threats from a third party
- Separate defence of necessity didn't really happen til *Perka*
    1. Writing for a majority of the Court, Dickson J. held that necessity operated by virtue of section 8(3) of the *Code*, which preserves common law defences
- He posited two alternative principles upon which the defence might rest. **The first was 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.**
- **The alternative was 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.**
- Like duress, the focus is on "moral involuntariness", and the injustice of punishing a person who had no other realistic choice but to act in the way they did

Test to apply the Necessity Defence

1. Was there imminent peril or danger? (modified obj test: RP in circumstances of accused") (*Perka*)
    1. *McKay*: "discomfort due to cold and wet ≠ urgent and imminent peril"
2. Was there any reasonable legal alternative? (reasonable person in circumstances of accused) (*Latimer*)
    2. Eliminates many potential claims: ***Berriman, Latimer***
    3. Found in *Desrosiers*: A had been unable to perceive other legal alts available to him due to his frenzied mental state
3. **Proportionality** was there proportionality between the harm caused and the harm avoided? (reasonable person) (*Perka*)
    4. In *Latimer*, SCC expressed doubt that there could ever be a situation that necessitated the intentional killing of another person
    5. In *Dudley and Stephens*, two sailors ate a boy after they had been stranded at sea for many days and were on the brink of starvation. An English court held that necessity could never provide a justification for homicide, but it is not clear that a similar decision would prevail in Canada.
    6. But, in *Re A (children)(conjoined twins: surgical operation),* the Eng CA held that a conjoined twin that could not survive on her own could be killed to save the life of her sister, who could survive on her own. In that case, though, it was not an arbitrary decision regarding who was to die

INCHOATE OFFENCES/ATTEMPTS

Society has a strong interest in deterring certain types of action, notwithstanding the absence of harm, but the law must balance the desire to prevent crime with the need to avoid punishing improper thoughts alone.

- In terms of moral culpability, the person who is inhibited from robbing a bank is in not much of a different position from the one who succeeds. The only distinction lies in circumstances beyond the offender's control.

Law of attempts somewhere on the continuum b/w complete act and unlawful thoughts

- Trade off for the low AR is **high mens rea**

Cousin of inchoate crimes: party liability

Tend to punish attempts less severely the more unlikely the result, the lighter the sentence

- "outcome luck" if your victim dies bc they didn't get a good surgeon, youre charged w/murder instead of attempted murder

***CC*, ss 463, 239, 24**

- No crime of "attempted assault" because s. 265(1)(b) makes attempted assault an assault
- **Attempted crimes are always included offences**
- And then only on the hook for half of the maximum punishment

24(1) Everyone who, having an **intent** (mental element) to commit an offence, **does or omits** (physical element) to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.
(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.

- The punishment clause for attempts is set out in s. 463 of the Code.
    1. With the exception of crimes containing their own penalty for inchoate offending, where the completed offence would be punishable by life imprisonment, the maximum sentence for an attempt is 14 years.
    2. If the maximum sentence for the completed offence is less than 14 years, then the maximum penalty for an attempt is one-half of whatever the available maximum for the completed offence would be

- Means the judge in a case will have to set down where the line is "mere prep" is very fact dependent (more steps away it is, **the more it's just prep and not an attempt this is the test**
- Until you take your first "overt act" it's just prep/talk

Factors:

- Time
- Location
- Acts under accused's control (as opposed to someone else's control)

AR:

- The actus reus of an attempt is the doing or omitting to do anything for the purpose of carrying out what is intended.
    1. In *Cline*, the accused, wearing dark glasses, asked a young boy to carry a suitcase for him up an alley, even though he had no suitcase. The accused had done this several times and had on at least one occasion successfully completed an assault afterwards. Given the knowledge of the accused's intent, the court held that the accused's acts in putting on dark glasses and hanging around a street corner may have been only mere preparation, but approaching the young boy was a criminal attempt.
    2. *Duetsch:* distinction between preparation and attempt is essentially a qualitative one (AR TEST)
        - **If nothing else, the qualitative test compels an examination of the nature and quality of the acts performed in the context of the overall endeavour**
        - **AND proximity of the acts undertaken to the ultimate offence will be regarded as an important factor**

MR:

- In the case of murder, "having an intent to commit an offence" requires nothing less than intent to kill (*Ancio*)
- **The intent to commit the desired offence is a basic element of the law of attempt (*Ancio*)**
    1. *Desire or full knowledge/WB -- recklessness is not enough*

Doctrine of Impossibility

- Can you be convicted of a crime even if there's no possibility of the crime taking place?
- Impossibility is no issue when it comes to the law of attempts
- **Factual and legal possibility**
  - **Factual:** Attempted pickpocket of a wallet even though the wallet isn't in the pocket
  - **Legal:** where it's impossible to commit the crime **in Canada**
- Imaginary crimes intention to do something illegal but what you're doing is not a crime

Abandonment
- once the threshold beyond preparation and into attempt has been crossed, the *actus reus* of attempt will be established
- Deciding not to go through with a plan DOES NOT AFFECT LIABILITY
  1. e.g., in *Goodman*, A was charged as a party to an attempted arson committed by Waters. Waters struck a match to set alight some materials but as he bent down the flame was extinguished. Waters thereupon left without trying a second time. The Court held that the attempt had been completed the first time and that no change of mind could alter the character of the offence.

James Forcillo
- jury must have found intent to kill throughout; first volley justified under ss. 25/34; second volley not justified but the Crown could not prove that Yatim still alive
- attempted murder had the intention and clearly tried to kill him

USA v Dynar, [1997] 2 SCR 462

One can still be convicted for attempt if their actions, if carried out, could not possibly have led to the commission of a crime; all that is required is the intent to commit the crime and actions to further this intent.
- Where an accused attempts but fails to commit a crime by reason of some intervening obstacle that makes it impossible, they are still liable for an inchoate offence.
- Where an accused operates under a mistaken belief that they are committing a crime, they are still be liable for an inchoate offence unless that crime was imaginary.
- **Question is whether they've committed enough of the actus reus**

Facts:
- Dynar, a Canadian citizen, communicated with people in the US about laundering drug money for them. However, those other parties were actually FBI informants. It was agreed that Dynar's associate would meet an informant in 116 Buffalo and would take the money to Toronto to be laundered by Dynar before being returned to the US. Conversations took place in preparation for the transfer of the funds, but the FBI aborted the operation just prior to transfer. The US government requested Dynar's extradition to the US to stand trial for attempted money laundering.

Issue and holding: Would Dynar's conduct have amounted to an attempt under Canadian law if it had occurred in Canada? YES

Rationale: (Cory and Iacobucci JJ)
- The crime of attempt consists of an intent to commit an offence together with an act more than merely preparatory taken in furtherance of the attempt; it does not matter whether committing the offence was possible
  1. Sufficient evidence was produced to show that Mr. Dynar intended to commit the money laundering offences, and that he took steps more than merely preparatory in order to realize his intention.
  2. The only difference between an attempt to do the possible and an attempt to do the impossible is chance, which does not mitigate the culpability of that who attempts to do the impossible.
- The distinction between factual and legal impossibility is not tenable; the law does not recognize "legal impossibility."
  1. There is no legally relevant difference between the pickpocket who reaches into the empty pocket (factual impossibility) and the man who takes his own umbrella from a stand believing it to be some

other person's umbrella (legal impossibility); both have the mens rea of a thief, and each take steps towards stealing but is thwarted by a defect in the attendant circumstances.

2. There is, however, a relevant difference between a failed attempt to do something that is a crime and a failed attempt to do something that is an imaginary crime.
    - It's one thing to attempt to steal a wallet, believing such thievery to be a crime, and another thing to bring sugar into Canada, believing the importation of sugar to be a crime.
        - In the former case, the would-be thief has the *mens rea* associated with thievery.
        - In the latter case, the would-be smuggler has no *mens rea* known to law. (not a crime)

- Because what Mr. Dynar attempted to do falls squarely into the category of the factually impossible -- he attempted to commit crimes known to law and was thwarted only by chance -- it was a criminal attempt within the meaning of s. 24(1).

COUNSELLING AN UNFULFILLED OFFENCE

Counselling is, in itself, a substantive offence under **s. 464** (as opposed to just a party offence); once a person has counselled another to commit an offence, with the necessary mens rea, the offence is complete.

- it is not necessary that the recipient be influenced by the counselling or that they ever have any intent to commit the offence.

R v Hamilton, [2005] 2 SCR 432

Facts: The respondent Hamilton offered for sale access to a credit card number generator for fraudulent purposes. He also offered for sale bomb "recipes" and information on how to commit burglaries. He was charged under s. 464(a) with counselling the commission of an indictable offence that were not in fact committed.
Issue/holding: is recklessness sufficient to establish the MR of counselling? **YES**
Analysis:

- The actus reus for counselling is the **deliberate encouragement or active inducement**—and not mere description—of the commission of a criminal offence.
- The mens rea for counselling demands 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.
    1. Recklessness is sufficient to establish the mental element of counselling because counselling was made an offence to address the fact that counselling increases the likelihood of the occurrence of criminal acts.

CONSPIRACY

The Code, s. 465, divides all conspiracies into four types, depending upon the subject of the conspiracy:

a. Murder, punishable by up to life imprisonment;
b. Wrongfully prosecuting someone for an alleged offence, punishable by up to 10 years' imprisonment;
c. Any other indictable offence, punishable with the same maximum as the offence itself; and
d. Any other summary conviction offence, also punishable as the primary offence itself.

Proof of the agreement is key for conspiracy
Elements of conspiracy have been filled in through CL

- Primary aspects (*O'Brien*)
    1. **It is essential that the conspirators have the intention to agree, and this agreement must be complete**
        - Proving this agreement is harder than you might think usually through wiretaps

- Can't have conspiracy with 1 criminal and undercover officer no intention to agree
    - Unless can prove that the other people also had common intent
- negotiations and discussions do not amount to an agreement (*Mills, Cook*)
- If one party only pretends to agree, there is no agreement, and therefore no conspiracy (O'Brien).
    - In *O'Brien*, the SCC held that an undercover officer who "agrees" with someone to commit an offence (having no intention that it ever be committed) cannot give rise to conspiracy.

2. Mental element: There must be a **common objective** to do something unlawful **TOGETHER**
    - The accused must not only agree to the terms proposed by other co-conspirators; he or she must also intend that the objective in question will be pursued
3. Parties to a conspiracy: existence of at least two parties can't agree to commit alone
    - A conspiracy can be said to be "ongoing" as long as the parties are still working towards the original objective until such objective is fulfilled or abandoned

USA v Dynar

Issue and holding: would Dynar's conduct have amounted to conspiracy under Canadian law if it had occurred in Canada? **YES**

Analysis:

- the mere fact that money was not transferred to Mr. Cohen for laundering by Mr. Dynar would not preclude a finding that a conspiracy existed between them.
- Criminal liability will still ensue, as long as the agreement and the common intention can be proved
- 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
    - The goal of the agreement, namely the commission of the substantive offence, is part of the mental element -- or *mens rea* -- of the offence of conspiracy.
- 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 would be consistent with the law of conspiracy to hold that the absence of the attendant circumstance has no bearing on the intention of the parties, and therefore no bearing on their liability
- a conspiracy to commit a crime which cannot be carried out because an objective circumstance is not as the conspirators believed it to be is still capable of giving rise to criminal liability in Canada

Application:

- The evidence clearly supports the existence of an agreement to launder what the conspirators believed were the proceeds of crime
    1. In recorded conversations, Dynar's associate clearly indicated that he was working for Dynar and demonstrated a basic knowledge of the exchanges that took place between Dynar and the FBI informant.
    2. The fact that Dynar's associate showed up in Buffalo as arranged by Dynar supports an inference that he and Dynar were acting in concert.

R v Dery, [2006] 2 SCR 669

Can't have attempted conspiracy think of conspiracy as like law of contracts

Facts:

- Déry and others discussed possibly stealing liquor stored in trucks outdoors. There was no evidence that anyone had taken any steps to carry out the proposed theft and the trial judge was not persuaded that they had at any point agreed to steal or possess the liquor. Déry was convicted of *attempting* to conspire.

Issue: should "attempting to conspire to commit a substantive offence" be recognized as a crime? **NO**

Analysis:

- In *R. v. Hamilton*, this Court held that "the *actus reus* for counselling is the *deliberate encouragement or active inducement of the commission of a criminal offence"*
    1. This relatively high threshold for the *actus reus* of incitement is an essential safeguard
- The argument in favour of attempted conspiracy is that s. 463(d) governs attempts to commit an indictable offence and conspiracy to commit an indictable offence is itself an indictable offence.
    1. It assumes, but does not establish, that attempt to conspire is an offence under the *Criminal Code*, and it leaves unresolved the question whether the definition of attempt in s. 24 captures, as a matter of law, an attempt to *conspire*
- However, given that conspiracy is essentially a crime of intention, and criminal law should not patrol people's thoughts, it is difficult to reach further than the law of conspiracy already allows.
    1. • It has never been the goal of the criminal law to catch all crime before it has hatched.
- the criminalization of attempt is warranted because its purpose is to prevent harm by punishing behaviour that demonstrates a substantial risk of harm. When applied to conspiracy, the justification for criminalizing attempt is lost, since an attempt to conspire amounts, at best, to a risk that a risk will materialize.