LAW 525 (99A): Canadian Criminal Law and Procedure

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Introduction to Criminal Law

Sources of Criminal Law

* ss. 91 & 92 *Constitution Act* 1867
* 1982 *Canadian Charter of Rights and Freedoms*

Constitution Act, 1867 ss.91 and 92

| Federal | Provincial |
| --- | --- |
| 91 (27) Criminal Law + Criminal Procedure (except the Constitution of Courts of Criminal Jurisdiction) | 92 (6) the Establishment, Maintenance, and Management of Public and \*Reformatory Prisons in and for the Province |
| 91 (28) establish, maintain, and manage penitentiaries for the detention of persons serving prison terms of 2+ yrs | 92 (14) the Administration of Justice in the Province, including the Constitution, Maintenance, and Organisation of Provincial Courts, both of Civil and of Criminal Jurisdiction |
|  | 92 (15) the Imposition of Punishment by Fine, Penalty or Imprisonment for enforcing any Law of the Province in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section |

**\*Reformatory Prisons:** the place of detention for persons serving terms of imprisonment for less than 2yrs

Appointment of Judges

* federal gov appoints judges of higher superior trial courts (s.96 Constitution Act 1867) & appeal court judges (including SCC)
* provinces appoint judges to provincial courts where most trials are held

All criminal offences in Canada are codified, no new ones may be created: **S.9 *Criminal Code***

Criminal defences are still found at common law: **S.(3)**

* ***Amato v The Queen***: the law must not deprive a person of a defence merely because it is one which has not yet been thought of where the consequence would be that an innocent person is condemned

**Homicide**: S.222(1), (6)

* **Culpable Homicide:** S.222(2), (5)
* **Murder**: ss.222(4), 229, 230, 235
* **1st Degree Murder**: s.231(1)-(6.2)
* s.231(2) planned and deliberate
* S.231(5)while committing a list of predicate offences ex. sexual assault

1. murder
2. contemporaneity
3. predicate offence

* 25yrs of parol ineligibility
* **2nd Degree Murder**: s.231(1), (7)
* murders other than 1st degree murder
* usually about 10-15yrs of parol ineligibility
* **Manslaughter**: ss.222(4), 232, 234, 236
* **Infanticide**: ss.222(4), 233, 237
* **Non-Culpable Homicide** (not an offence): S.222(2), (3)

**Causing Death by Criminal Negligence:** ss. 219, 220

Statutory Interpretation

**Strict Construction** involves a literal approach to interpreting a statute

* if it is unclear what Parliament meant when they wrote a provision, the ambiguity is interpreted in favour of the accused

***R v Paré* (1987)**

* the SCC moved away from Strict Construction
* literal meaning (strict construction) is what would be assigned if there were no context, or if Parliament’s intentions weren’t known
* instead, the SCC adopts the **Modern Approach** of **Purposive (or Contextual) Interpretation**

***Bell ExpressVu v Rex:*** courts should only resort to strict construction of criminal law if there is an ambiguity after the law has been interpreted in a purposive manner

* a court should take the Modern Approach laid out in *Paré*
* BUT if after looking at context and parliamentary intention, the court STILL finds that the provision is ambiguous or that there are multiple possible interpretations, THEN the court can resurrect the old **strict construction** method to resolve the ambiguity
* ***Charter* values** only receive application where there is ambiguity as to the meaning of a provision
* where either an English or French version of the Criminal Code is broader than the other, the broader version should not be taken by the court

Criminal Justice and Procedure

1. The Burden and Standard of Proof in Criminal Law

**Presumption of Innocence**: puts the burden on the state to prove the guilt of individuals it seeks to punish: **S.11(d) *Canadian Charter of Rights and Freedoms***

**Onus of Proof:** who must prove something

**Burden of Proof:** a question of who has the *onus* of proving something in law

* ex. the Crown “has the burden” of proving an accused committed an offence
* burdens, however, can shift back and forth during the course of a trial
  + ex. s.91 Unauthorized Possession of a Firearm makes it a criminal offence to possess a firearm without being the holder of a license
  + under this section, the Crown would “bear the burden” of proving that the accused was indeed in possession (in the legal sense of the word) firearm
  + once this is done, “the burden then shifts” to the accused under s.117.11 to prove that he/she is the holder of such a license

**Standard of Proof:** how much evidence is required

* can be described as how much evidence a party must produce to meet its burden
* it is a threshold
* the highest standard of proof is proof beyond a reasonable doubt
* Crown must meet this standard to secure a criminal conviction
* like burden, different standards come into play during the course of a trial
* ex. if the accused argues that his *Charter* rights were breached by the police during the investigation he/she has the lesser burden of proving the breach on a balance of probabilities (sometimes called the civil standard)

**balance of probabilities = the civil standard**

Framework for Analysis of a Claim under the *Canadian Charter of Rights and Freedoms:* ***Oakes* (1986)**

1. Has a *Charter* right been limited/violated?
2. Is the limitation constitutional by S.1 of the *Charter?*
3. Is the limit “prescribed by law”?
4. Is it “demonstrably justified in a free and democratic society?
5. Is it “reasonable” ?
6. Is the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, of sufficient importance to warrant overriding a constitutionally protected right or freedom?
7. If yes, is the limit proportionate?
8. ~~measures must be rationally connected to the objective~~ ***Laba* (1994):** Was there a rational connection between the limit on the presumption of innocence and the legislative objective?
9. Was the violation/ limit the least restrictive means of acheiving an objective?: ***Laba* (1994)**
10. Was there an overall balance between the limitation of the right and the advancement of the legislative objective?: ***Laba* (1994)**

* Proof
* burden of proving a limit on a right or freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and democratic society rests on the party seeking to uphold the limitation
* the standard of proof is the civil standard: proof by a preponderance of probability

**Proof Beyond a Reasonable Doubt:** inextricably intertwined with the presumption of innocence, the burden of proof rests on the prosecution throughout the trial and never shifts to the accused: ***Lifchus* (1997)**

* based upon reason and common sense
* logically connected to the evidence or absence of evidence
* *more is required than the accused is probably guilty-> such a conclusion would require a jury to acquit*
* *NOT based upon sympathy or prejudice*
* *NOT proof beyond any doubt*

*Canadian Charter of Rights and Freedoms* S.11(d)

* *“Any person charged with an offence has the right…to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.”*
* if this right is infringed, the party seeking to uphold the infringement has the burden of proof (on a balance of probabilities) to seek to justify it under S.1 of the *Charter*
* *“The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”*

Presumptions

**permissive presumption:** leaves it open as to whether the inference of the presumed fact is drawn following proof of the basic fact

VS

**mandatory presumption:** requires that the inference be made

**irrebuttable presumption**

VS

**rebuttable presumption:** 3 potential ways the presumed fact can be rebutted

1. the accused may be required merely to raise a reasonable doubt as to its existence
2. the accused may have an evidentiary burden to adduce sufficient evidence to bring into question the truth of the presumed fact
3. the accused may have a legal or persuasive burden to prove on a balance of probabilities the non-existence of the presumed fact

**presumptions of law:** actual legal rules

VS

**presumptions of fact:** frequently recurring examples of circumstantial evidence

Summary of the Principles that emerged from the S.11(d) Presumption of Innocence Jurisprudence to date: ***Downey* (1992) *Per* Cory J**

1. the presumption of innocence is infringed whenever the accused is liable to be convicted despite the existence of a reasonable doubt
2. if by the provisions of a statutory presumption, an accused is required to establish, that is to say to prove or disprove, on a balance of probabilities either an element of an offence or an excuse, then it contravenes s.11(d)-> such a provision would permit a conviction in spite of a reasonable doubt
3. even if a rational connection exists between the established fact and the fact to be presumed, this would be insufficient to make valid a presumption requiring the accused to disprove an element of the offence
4. legislation which substitutes proof of one element for proof of an essential element will not infringe the presumption of innocence if as a result of the proof of the substituted element, it would be unreasonable for the trier of fact not to be satisfied beyond a reasonable doubt of the existence of the other element i.e. the statutory presumption will be valid if the proof of the substituted fact leads inexorably to the proof of the other-> however, the statutory presumption will infringe s.11(d) if it requires the trier of fact to convict in spite of a reasonable doubt
5. a permissive assumption from which a trier of fact may but not must draw an inference of guilt will not infringe s.11(d)
6. a provision that might have been intended to play a minor role in providing relief from conviction will none the less contravene the Charter if the provision (such as the truth of a statement) must be established by the accused: ***Keegstra***
7. BUT statutory presumptions which infringe s.11(d) may still be justified pursuant to s.1 of the Charter: ***Keegstra***

Keegstra

* **Facts:** an Alberta high school teacher who was charged under s.319(2) of the Criminal Code with wilfully promoting hatred against an identifiable group by communicating anti-semetic statements to his students-> in essence he taught his students that the holocaust never happened and that it was fabricated by Jews to gain sympathy
* **Issue 1:** whether s.319(2), which makes it illegal to incite hatred against an identifiable group, infringed upon Keegstra’s Freedom of Expression
* **Issue** **2:** the “truth defence”
* S.319(3)(a) affords a defense of “truth” to the wilful promotion of hatred but only where the accused proves the truth of the communicated statements on a balance of probabilities (the accused has a *burden of proof*, and the *standard* to which he must prove it is a balance of probabilities)
* **Constitutional Question:** whether the reverse onus provision in the Initing Hatred section of the Code

1. violates the presumption of innocence, and
2. if so, whether the violation is justified under s.1 of the Charter?

* **Holding:** Keegstra’s freedom of expression WAS infringed, but that this infringement was justifiable under s.1 of the Charter

2.The Neutral Impartial Trier (Judge or Jury)

Intro

* Criminal proceedings in Canada are presided over by independent judges who are appointed to their positions
* Judicial independence and impartiality are considered central to our democracy and have been recognized as having constitutional status
* our system of criminal law also uses juries in some instances during trials

Judicial Independence

* judiciary is independent from other branches of government meaning they cannot be fired for making unpopular decisions
* independence is essential to fostering public confidence in the fairness and objectivity of the justice system
* judges must also be seen to be independent meaning they cannot say or do things that may make them seem biased or disrespectful
* judges cant socialize with lawyers or people connected to the cases they hear outside the courtroom otherwise risk being accused of favouritism
* judges will declare a conflict and withdraw if assigned to cases involving friends or relatives
* judges cant participate in politics be it as a party member or fundraiser or donor
* judges cannot be paid to do anything other than their job as judge

Role of a Judge in a Criminal Trial

* a criminal trial is always presided over by a judge and has 2 aspects:
* determining whether the accused is guilty of the offence(s) that they are charged with and
* *if guilty,* a sentencing phase
* most criminal cases in Canada are decided by judge alone, meaning that the judge will determine whether the accused is guilty and, if so, what sentence should be given to them

Role of a Jury in a Criminal Trial

* some cases involve juries composed of individuals selected from the jurisdiction in which the trial is occurring
* in a jury trial, the jury decides the facts of the case and ultimately, whether the accused is guilty
* in making their determination, the jury has to apply the instructions that they received from the judge
* if the jury finds the accused guilty of one or more offences, then the judge will determine the appropriate sentence

Distinctions: ***R v Gunning***

* it is for the judge to decide all questions of law and direct the jury accordingly
* the jury, who must take its direction on the law from the judge, is the sole arbiter on the facts
* the judge also has the duty, insofar as it is necessary, to assist the jury by reviewing the evidence as it relates to the issues in the case
* the judge is also entitled to give an opinion on a question of fact and express it as strongly as the circumstances permit, so long as it is made clear to the jury that the opinion is given as advice and not direction
* the verdict is the exclusive domain of the jury!
* EXCEPT where the judge is satisfied that there is no evidence upon which a properly instructed jury could reasonably convict, in which case, it is the judge’s duty to direct the jury to acquit the accused
* the purpose of the exception is to avoid wrongful convictions
* there is NO corresponding duty or entitlement to direct a jury to return a verdict of guilty
* a judge should withdraw a defence from the consideration of the jury when there is no evidence upon which a properly instructed jury acting reasonably could find in the accused’s favour - **air of reality TEST**
* has no application in respect of the question of whether the Crown has proved beyond a reasonable doubt each essential element of the offence
* it is never the function of the judge in a jury trial to assess the evidence and make a determination that the Crown has proven one or more of the essential elements of the offence and to direct the jury accordingly
* the test applies in respect of affirmative defences that may or may not arise depending on the particular facts

Identify when an Accused has a Constitutional Right to a Jury

* S.11(f) of the *Charter* gives an accused the right to a jury trial for serious offences:

1. ***Any person charged with an offence has the right***
2. *except in the case of an offence under military law tried before a military tribunal,* ***to*** *the benefit of* ***trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment***

3. Role and Responsibilities of a Crown Prosecutor

Introduction

* Canadian criminal law is adversarial in nature meaning that evidence and submissions on the facts and law are made by lawyers representing the Crown (the Prosecutor) and the accused (Defence Counsel)
* obligations and responsibilities of these lawyers are not limited to their respective clients
* our system of criminal justice only works if the Prosecutor and Defence Counsel both play their proper and ethical roles, otherwise miscarriages of justice can (and will) occur
* Crown Prosecutors and Defence Counsel are bound both by judicial decisions on their roles, as “officers of the court”, and by the rules of professional conduct of the law societies that they are regulated by

Explain the Role, Duties and Responsibilities of a Crown Prosecutor: ***Boucher v The Queen* (1955) SCC**

* a public duty to help the court arrive at a just result
* NOT to secure convictions
* to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime

**Disclosure**: one of the duties of a Crown Prosecutor is to ensure full and timely disclosure of all potentially relevant information to the accused person, subject to certain limitations

***Stichcombe* (1991)** TEST for Disclosure

* **Crown must disclose everything in its (and the police’s) possession that might be relevant to the accused’s ability to make “full answer and defence”**
* if the Crown chooses not to disclose some materials, it must have a basis for not doing so
* for instance, that disclosure of the materials might reveal the identity of a confidential informant
* however, Crown must make the Defence aware that this material has been “vetted” from the disclosure
* then the Defence may make an application to have that material disclosed

**Inculpatory evidence:** evidence that shows, or tends to show, a person’s involvement in an act, or evidence that can establish guilt

**Exculpatory evidence:** evidence favourable to the defendant in a criminal trial that exonerates or tends to exonerate the defendant of guilt

4. Role and Responsibilities of Defence Counsel

Role Duties and Responsibilities of Defence Counsel

* duty to protect the client as far as possible from being convicted except by a court of competent jurisdiction upon legal evidence sufficient to support a conviction for the offence charged
* notwithstanding the lawyer’s private opinion as to credibility or merits, the lawyer may properly rely upon all available evidence or defences including so-called technicalities not known to be false or fraudulent
* admissions made by the accused to the lawyer may impose strict limitations on the conduct of the defence and the accused should be made aware of this
* ex. if the accused clearly admits to the lawyer the factual and mental elements necessary to constitute the offence, the lawyer, if convinced that the admissions are true and voluntary, may properly take objection to the jurisdiction of the court, or to the form of the indictment, or to the admissibility of evidence, but must not suggest that some other person committed the offence or call any evidence that, by reason of the admissions, the lawyer believes to be false
* nor may the lawyer set up an affirmative case inconsistent with such admissions
* ex. calling evidence in support of an alibi intended to show that the accused could not have done, or in fact had not done, the act
* admissions will impose a limit upon the extent to which the lawyer may attack the evidence for the prosecution

Exceptions to Solicitor Client Privilege: ***Smith v Jones* (1999)** & ***R v McClure* (2001)**

1. when it must be revealed as the only means to demonstrate the innocence of the accused
2. when the communications themselves are criminal in nature

* ex. when client commits perjury

1. for public safety reasons relating to a clear and serious risk of serious harm to an identifiable person or group of people

Describe what a Defence Counsel may do to Defend their Client when they have Admitted Guilt

* defence counsel may take objection to the jurisdiction of the court, or to the form of the indictment, or the admissibility or sufficiency of evidence
* the lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but the lawyer should go no further than that

5. Classification of Offences

**Summary Offences:** less serious criminal offences which follow a more simplified “summary” procedure

* the trial of these offences will be held in a provincial court-> BC Provincial Court
* the trial takes place without a jury and there is no preliminary inquiry
* simplified procedure is set out in *Criminal Code* Part XXVII (aprox 50pgs)
* the max penalty for this type of offence is 6 months jail time and/or a $5 000 fine unless the offence prescribes a different penalty: **S.787**
* “super summary offences” have a max sentence of 18 months imprisonment

**Indictable Offences:** created by the federal Parliament and not the provinces-> found in the Criminal Code and other federal statutes

* more serious than summary offences
* max penalty will vary with the offence as does the mode of trial

**Hybrid Offences:** offences where the Crown may “elect” to proceed either summarily or by indictment

* when an accused is charged with a hybrid offence, it is deemed to be indictable, unless and until the Crown elects to proceed by summary conviction: *Interpretation Act* s.34(1)(a)

6. Overview of Pre-trial and Trial Procedure

How Criminal Proceedings are commenced in Canada

* criminal proceedings may begin when a police officer witnesses an offence being committed, or where an individual makes a complaint to the police, which is then investigated
* if the officer believes that there is evidence that would justify a prosecution, he will fill out a formal charging document
* the officer appears before a justice of the peace (JP) and swears under oath that he or she has reasonable grounds to believe that the offence has occurred
* the officer will summarize the evidence supporting this belief
* if the JP decides that there are reasonable grounds to proceed with the charge, he or she will *issue process*
* **issue process:** the means by which the JP can compel an accused person to come to court to answer the charge against him
* this can be done in a number of ways-> the JP may
* confirm an earlier promise to appear in court made by the accused to the police officer
* issue a summons for the accused to appear (this will be served on the accused in writing)
* order that a peace officer arrest the accused and bring him before the court
* if held in custody, the accused may then make an application for bail, to be released pending his or her trial

Why Charges don’t make it to Trial

* in Canada, very few criminal charges proceed to trial
* the accused may
* admit their guilt and proceed to sentencing without a trial (often involving a plea agreement with the Crown Prosecutor that the judge must ultimately approve or depart from); or
* the Crown Prosecutor withdraws the charges due to there not being a reasonable likelihood of conviction (or substantial likelihood of conviction in BC); or
* it is not in the public interest to proceed

Describe the basic steps in a Criminal Trial in Canada

* cases that proceed to a full trial occur where the accused denies their guilt and the Crown Prosecutor believes that a conviction will likely be secured and it is in the public interest to proceed
* typical trial

1. **Arraignment**: formal reading of the charge to the accused (and entering of a plea)
2. Plea Entered

* if pleading “Guilty” -> accused is sentenced
* if pleading “Not Guilty”-> go to step 3

1. Trial scheduling and interim appearances
2. Crown Case

* the Crown calls a witness to give evidence
* after the Crown has examined (questioned) the witness, the Defence may cross-examine the witness
* documentary and real evidence (ex. a gun) may also be entered as evidence

1. Crown Case is closed
2. Motion for Directed Verdict

* the Defence may choose to make a Motion for Directed Verdict, arguing that the Crown has led insufficient evidence, which even if believed, could not support a conviction
* the Crown may reply to the motion
* if the judge rules in favour of the motion-> the accused is acquitted and the trial is over
* if the judge denies the motion, the defence may go to step 6 or may choose not to call evidence and go to step 7

1. Defence Case

* the Defence calls a witness to give evidence
* after the Defence has examined (questioned) the witness, the Crown may cross-examine the witness
* this process is repeated with all Defence witnesses
* documentary and real evidence (ex. a photograph) may also be entered as evidence

1. Defence Case is closed
2. Closing Arguments

* if the Defence called evidence under step 6-> the Defence will make its closing arguments first
* if the Defence did NOT call evidence, but skipped to step 7-> Crown makes its closing arguments first

1. Judge’s (or Jury’s) **Ruling**: Guilty or Not Guilty

* in a jury trial, the judge will provide the jury with instructions
* if guilty-> the accused will be sentenced by the judge after hearing sentencing submissions, receiving any victim impact statements, and giving the accused an opportunity tot address the court

1. Sentencing - TO BE CONTINUED… later in the course

Actus Reus

1. Introduction

**Charter S.7:** every criminal offence must have an *actus reus* & a *mens rea->* the crown must prove the *actus reus* element beyond reasonable doubt

***Actus Reus:*** a physically voluntary act or omission causing the prohibited outcome

1. Voluntariness

**Voluntariness:** conscious control of action

* an element of the *actus reus*
* ought to be considered prior to *mens rea*
* ***R v Ruzic* (2001):**criminal responsibility is only ascribed to acts that resulted from the choice of a conscious mind an a controlled body

Explain why physical voluntariness is an essential element of the *actus reus* of every offence

* the theory of agency
* it is unjust to punish someone for conduct that is not truly their own, in the sense of not being fairly attributed to the accused’s free choice

**Physical Voluntariness:** requires a conscious mind and a controlled body: ***R v Ruzic* 2001**

* D’s control over his body
* NOT a defence-> an element of the *actus reus*

**VS**

**Moral Voluntariness:** TBC unit 6

* D’s desire/willingness to commit conduct
* a concept that operates only through established defences such as duress or necessity
* will result in an accused being acquitted

Voluntariness VS *Mens Rea*

* Is the person in control of what their body is doing?
* **No**: physical involuntariness
* **Yes**: *Mens Rea*

1. Acts and Omissions

Identifying the “Acts” in the Criminal Code

* look for action words (verbs) in the offence to identify such prohibited acts ex. break or sell or communicate
* sometimes acts are explicitly defined in the code-> otherwise look to the common law
* courts should only resort to strict construction of criminal law if there is an ambiguity after the law has been interpreted in a purposive manner: ***Bell ExpressVu v Rex***

**Omission**: failure to act

**Omission Offence:** can incur criminal liability for an omission only where one is under a legal obligation to act and fails to do so

* legal obligations/ duties may be found in statute or common law: ***Moore v The Queen* (1979)**
* **specific omission offences:** built right into the code ex. S.129(1)(b) which makes it an offence not to assist a peace officer
* **general omission offences:** sections in the Code that criminalize a duty which is undefined-> the legal duty can come from either statue or common law
* Statutory duties are written right into the Code itself or another piece of legislation
* Common law duties are created when someone undertakes to do something in the nature of a binding commitment-> the commitment must be expressed clearly and others must place reliance on it: ***R v Browne* (1997)**

Explain the arguments for, and against, limiting criminal liability for omissions to legal duties set out in the *Criminal Code*

* Why should we criminalize omissions?(Policy Argument)

1. there is no moral difference between an act and an omission
2. criminalizing omissions helps reinforce that we owe obligations of social responsibility to each other

* Arguments against criminalization of omissions

1. impingement on individual liberty
2. forces people to “be good” rather than stopping them from “doing wrong”-> violates individual autonomy and prevents individuals from developing as moral actors

EXAM TIP - Answering Omission Questions

1. Does the duty apply to the accused? What conditions/ requirements must be in place for this duty to apply to someone and was that the case in this scenario?
2. Is the failure to perform this duty criminalized? Are there other conditions/ requirements for this criminalization to apply? (i.e., perhaps death must result) If you have established that the accused was bound to perform a duty and that a failure to do so is a criminal offence?
3. Did the accused actually FAIL at performing that duty?

Spend prep time considering what tests/considerations are for these elements.

1. Status Offences

**status offences:** offences involving criminal liability which are based neither on actions nor omissions by the accused-> liability for a state of being (very rare)

* ex. Vagrancy(before the offence was declared void for overbreadth)

What are the problems with *status offences?*

1. they run afoul of the requirement of physical voluntariness, which violates s.7 of the Charter *“everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”*
2. they may undermine individual autonomy and the general requirement that a person is only responsible for their acts/omissions
3. there are concerns about arbitrariness with respect to status offences
4. status offences may not serve the purposes of criminal law, including deterrence and rehabilitation, because they relate to who or what a person is, as opposed to what that person has done or failed to do
5. Consequences and Causation

**Causation:** the link between the act or omission & the consequence/ result-> *causation* is necessary to incur liability

* a criminal offence may explicitly use the word “cause” OR may be implied through other words in the offence

**Factual Causation:** whether some logical link can be drawn between the accused’s conduct and the prohibited consequence: **Prof**

**Factual Causation:** how V came to death in a medical, mechanical, or physical sense and D’s contribution: ***Nette***

* factual causation can only come from *witness evidence*, it has nothing to do with intention, foresight or risk: ***Smithers***
* *expert evidence* can help establish factual causation: ***Smithers***
* use the ***‘***BUT FOR’ TEST: ***Winning* (1973)**

**VS**

**Legal Causation:** whether the causal connection is *sufficiently strong* to support criminal liability: **Prof**

**Legal Causation:** concerns the accused’s responsibility in law and is informed by legal considerations such as the wording of the offence and principles of interpretation: ***Nette***

* these consideration reflect fundamental principles of criminal justice such as the principle that the morally innocent should not be punished
* in determining whether legal causation is established, the inquiry is directed at the question of whether the accused person should be held criminally responsible for the consequences that occurred
* analysis of intervening acts/ *novus actus interveniens*

General Legal Causation TEST

* ***Smithers* (1978)**: Was the unlawful act (kick) ~~a contributing cause, more than de~~ *~~minimis?~~*(very low threshold!)
* ***Nette* (2001):** ~~de minimis~~-> a significant contributing cause?
* ***Harbottle*** only applies to 1st degree murder

1st Degree Murder Causation TEST

* ***Harbottle* (1993):** the actions of the accused must account for an essential, substantial and integral part of the killing-> requires the accused to play a very active role, usually a physical role, in the killing
* **Substantial Causation TEST:** an accused may be found guilty of first degree murder pursuant to s.214(5) if the Crown has established beyond a reasonable doubt that

1. the accused was guilty of the underlying crime of domination or of attempting to commit that crime
2. the accused was guilty of the murder of V
3. the accused participated in the murder in such a manner that he or she was a substantial cause of V’s death
4. there was no intervening act of another which resulted in the accused no longer being substantially connected to the death of V
5. the crimes of domination and murder were part of the same series of events

* applicable to s.231(5)
* *possibly* applicable to ss.231(6), 231(6.01), 231(6.1), 231(6.2), the other first degree murder offences where the same language is used “when death is caused by that person”

How to Answer a Causation Question on an Exam (we will NEVER be examined on murder)

1. **Factual Causation** (see pg.375 of text/***Nette***summarized above) Did the acccused’s actions factually contribute to the prohibited outcome? (i.e. ‘but for’ TEST)

* if YES

1. **Legal Causation** (see pg.375 of text/ ***Nette*** summarized above) Did the accused’s actions legally contribute to the prohibited outcome?
2. Cite the legal causation test set out in ***Smithers***
3. Discuss how ***Smithers*** was interpreted in ***Nette***. If you think yes (I do) explain why.

* yes it did change the law in a subtle but important way
* “More than de minimis" is a very low threshold where as “a significant contributing cause” is a somewhat higher threshold
* I agree with the reasoning of the majority in that the use of Latin is not particularly helpful with respect to instructing a Jury
* I also believe that the original *Smithers* wording was probably to low a threshold to base culpability so I am happy with the change

1. Apply the test of legal causation to your facts (briefly).
2. Deal with any other issues that relate to causation - such as intervening factors, bad medical treatment etc.

When can an accused be liable for the conduct of third parties?

* ***Paggett* 1983 (UK):** where the chain of events is broken by the natural consequence of D’s actions, D will not be absolved of responsibility
  + a *novus actus* will absolve the accused of criminal responsibility only if it is a *free, informed and deliberate* act
  + when D, by his wrongful act or omission, places V in a situation where he is killed by the justified conduct of T, responsibility for the fact of V’s death is attributed to D as a principle offender
* **joint endeavour:** acts by T who is not acting independently but is acting in furtherance of a joint activity undertaken by D and T, will not sever the legal causal connection: ***R v JSR* 2008**
* an intervening, independent act by T that is a more direct cause of V’s death then the prior act of D may sever the legal causation connection between V’s death and the prior act of the accused even though the prior act remains a factual or ‘but for’ cause of V’s death

**Thin Skull Rule:** he who inflicts an injury which results in death cannot excuse himself by pleading that his victim could have avoided death by taking greater care of himself -> those who use violence on other people must take their victims as they find them: ***Blaue* (1975 UK)**

* Jehova’s witness refused blood transfusion

**S.225 Death from Treatment of Injury:** where D causes a human being a bodily injury which is dangerous in and of itself and from which death results-> D causes the death of V notwithstanding that the immediate cause of death is proper or improper medical treatment applied in good faith

* this section preserves the causal nexus between D’s conduct and v’s death where medical treatment is an intervening and immediate cause of death
* BUT! ***Reid & Stratton* (2003):** the accused does not, in law, cause the death if the independent intervening cause so overwhelms the unlawful act by the accused as a cause that the unlawful act becomes merely the background or setting for the independent intervening cause to take effect-> in that case, the unlawful act is too trivial or insignificant to be a legally significant cause of death
* drunk friends try to resuscitate V with CPR and fuck it up after Reid & Stratton beat up V rendering him unconscious (D acquitted)

**Intervening Act Doctrine:** the law recognizes that other causes may intervene to break the chain of causation between D’s acts and the death-> doctrine used, when relevant, for the purpose of reducing the scope of acts which generate criminal liability: ***Maybin* (2012)**

* approaches to intervening acts grapple with the issue of moral connection between accused’s acts and the death
* an intervening act that is reasonably foreseeable to D may not break the chain of causation, while an independent/ intentional act of the intervener may in some cases make it unfair to hold D responsible-> depends on context
* *Smitthers + Nette* Causation TEST remains: Whether the dangerous/unlawful act of D was a significant contributing cause of V’s death?
* where D undertakes a dangerous act and contributes to a death, D should bear the risk that other foreseeable acts may intervene and also contribute to that death
* the time to assess the reasonable of foreseeability is at the time of the unlawful act, rather than at the time of the intervening act
* precise details of an intervening event do not need to be reasonably foreseeable-> only the general nature & risk of further harm being reasonably likely
* intervening acts ensuing non-trivial harm must be reasonably foreseeable in the sense that the acts/ harm that occurred flowed from D’s conduct-> if so, D’s actions may remain a significant contributing cause of death
* Did D merely set the scene, allowing other circumstances to coincidentally intervene, or did the act of D trigger or provoke action of the intervener?
* if the intervening act is a direct response or is directly linked to D’s actions and does not by its nature overwhelm the original actions, then D cannot be said to be morally innocent of the death

**Remoteness:** the act does not necessarily or immediately produce an event or injury

**Abandonment**

* ***Menezes* (2002):** if A and B are drag racing and B crashes, killing or injuring himself or another, A is a joint cause of the injury or death BUT if A withdraws from or abandons the race before the crash and B is aware of this abandonment and does not slow down then A is not liable
* **there can be more than one cause of death!**

**Contemporaneity:** with regard to all offences that require proof of fault, the offence cannot be proved unless the element of fault, intent (*mens rea*) and the *actus reus* coincide (i.e. temporal overalap): ***Fowler v Padget* (UK)**

Mens Rea

1. Introduction

Recall: every criminal offence must be defined in terms of both the prohibited conduct (*actus reus*) and accompanied by the requisite mental state (*mens rea*)

Mens Rea =

* guilty mind
* mental element
* mental state
* fault

2. Levels of Mental Fault

Levels of Mental Fault (ranging from highest to lowest) define each

* **Intentionally/ Purposely**: D intended to carry out an act purposely and deliberately
* **Knowingly**: D had an actual awareness of a particular circumstance (true belief)
* if an accused claims to be ignorant of something that the whole world knows, the judge may rightly disbelieve the accused and find that there was, in fact, subjective knowledge: ***Ewaschuck***
* **Wilful Blindness:** D subjectively sees the need for further inquiries about the existence of prohibited consequences or circumstances but deliberately fails to make such inquiries because D does not want to know the truth: ***Sansregret***
* a substitute for knowledge
* **Recklessly**: D foresees that something may occur but chooses to proceed in the face of that risk (and it is unreasonable for D to have taken that risk)
* if intention is not specified, recklessness may serve as a substitute for intention
* **Negligently**: D fails to exercise such care, sill or foresight as a reasonable man in his situation would exercise

3. Absolute & Strict Liability

**True Criminal Offences**: involve conduct that is so abhorrent to basic values of human society that it must be prohibited completely

* only federal Parliament has jurisdiction to enact criminal offences
* probably every offence in the Criminal Code falls in this category

**Regulatory Offences:** involve conduct that is not inherently wrong, but if it were unregulated it would present some danger to society

* both federal Parliament and provincial legislatures may enact regulatory offences within their respective areas of jurisdiction
* can still involve imprisonment
* presumed to be **strict liability** unless the language of the offence indicates otherwise: ***Sault St Marie* (1978)**
* offences of absolute liability would be those in respect of which the legislature has made it clear that guilt would follow proof merely of the proscribed act: ***Sault St Marie* (1978)**
* remember, could be absolute liability or involve full *mens rea*

**Absolute Liability:** P does not need to prove *mens rea*-> D is liable solely based on having committed the *actus reus* of the offence & has no chance to exculpate himself by showing he was acting reasonably: ***Sault Ste Marie* (1978)**

* P must prove the commission of the prohibited act beyond reasonable doubt: ***Levis (Ville) v Quebec* (2006)**
* BUT the combination of absolute liability and possible imprisonment violates s.7 of the *Charter* i.e. not permissible*:* ***Re BC Motor Vehicle Act* (1985)**

**Strict Liability:** once the Crown has proven the *actus reus* of the offence beyond reasonable doubt, the burden then shifts to D to prove on a balance of probabilities that they exercised *due diligence->* middle ground between full *mens rea* and absolute liability: ***Sault Ste. Marie***

* ***Stucky* (2009) TEST** the intermediate and *presumptive category* of “strict liability offences” requires

1. that P prove the *actus reus* of the offence (beyond a reasonable doubt) and, if so
2. then it is open to D toprove an “absence of negligence”/ “due diligence” (burden of proof is on D)

* an “objective standard” is applied under which the conduct of the accused is assessed against that of a reasonable person in similar circumstances
* ***Re BC Motor Vehicle Act* (1985):** P need not prove D had *knowledge* of the *actus reus* of the offence unless it is expressly required by statute by clear language

**Due Diligence:** taking the steps that a reasonable person in the circumstances would have done

**Due Diligence Defence:** proving on a balance of probabilities that all due care was taken: ***Sault Ste. Marie* (1978)**

***Sault Ste Marie* (1978)**: there are 3 different types of offences

* **true crimes:** offences that require *mens rea*
* **strict liability offences:** offences in which there is no necessity for the Crown to prove the existence of *mens rea* BUT the defendant can get off by proving that they acted reasonably in the circumstance
* public welfare offences fall into this category, as they are not in the Code, but have the risk of large fines or imprisonment associated with them
* **absolute liability offences:** the Crown does not need to prove *mens rea* and D has no chance to exculpate himself by showing he was acting reasonably
* these are generally only offences with every minor fines as punishment
* offences that are created in provincial statutes can only be absolute or strict liability offences, because provinces have no jurisdiction to enact criminal law

Crimes VS Regulatory Offences: ***R v Wholesale Travel Group* (1991) *Per* Cory J**

* there has always existed a distinction between *truly criminal conduct* and conduct, otherwise lawful, which is *prohibited in the public interest*
* English courts have given effect to policy objectives inherent in regulatory offences
* *mens rea* only applies to true crimes because of the fault and moral culpability which they imply-> acts which in the public interest are prohibited under penalty but not criminal in any real sense, should not need *mens rea:* ***Sherras v De Rutzen***
* ***Sault St Marie*** affirmed distinction between regulatory and criminal offences AND subdivided reg offences into categories of strict and absolute liability
* Why does the distinction exist?
* True Criminal Offences condemn past, inherently wrong behaviour (conduct itself)
* Regulatory Offences are about protection of public and societal interests, rather than protection of individual & deterrence-> prevention of future harm through enforcement of min. standard of care (consequences of conduct)
* grounded in results, not morality

Importance of Regulatory Offences in Canada: ***R v Wholesale Travel Group* (1991) *Per* Cory J**

* useful for gov to implement public policy objectives
* essential for well-bing as individuals and for the effective functioning of society
* the more complex the activity, the greater the need for regulation

4. Intention & Knowledge

**Subjective Mental Fault:** D actually had the requisite degree of mental fault at the time they engaged in the prohibited conduct

* can be proven through direct evidence, but more often is proved by indirect or circumstantial evidence where inferences lead to that conclusion

**Objective Fault:** what would a “reasonable person” have perceived in the circumstances

where the Crown needs to prove subjective mental fault: ***Buzzanga and Durocher* (1979)**

* courts may endeavour to infer the state of mind of an accused using objective methods (i.e. the reasonable man)-> P can infer D’s state of mind from D’s actions
* **Common sense inference:** a sane and sober person can usually be taken to intend the natural and probable consequences of his/her actions: ***Tennant and Naccarato* (1975)**
* BUT this inference can be rebutted by evidence given by D
* i.e. what a reasonable man ought to have anticipated is merely evidence form which a conclusion may be drawn that the accused anticipated the same consequences: ***Tennant and Naccarato* (1975)**
* BUT D’s evidence as to their state of mind at the time of the offence is not always believable-> there may be stronger evidence to the contrary

**Intention:** D’s purpose to engage in the prohibited conduct and cause the prohibited consequence, if applicable

**Knowledge:** Dis aware of the nature of his/her conduct and that it is “practically certain” to cause the prohibited consequences, if applicable

**Willfully:** intending to cause an outcome, or recklessly causing an outcome for the purpose of S.319(2) “public incitement of hatred”: ***Buzzanga and Durocher***

* including the term “**willfully**” implies that recklessness will NOT suffice to prove the necessary *mens rea,* unless recklessness is also mentioned in the provision

**Recklessly**: denotes a state of mind where the party foresees that his actions may cause the prohibited result, but proceeds anyway: ***Buzzanga and Durocher***

**Intention:** either satisfy the definition: ***Buzzanga and Durocher***

1. **Direct Intention**: desiring to bring about the prohibited outcome: ***Buzzanga and Durocher***
2. **Indirect intention:** foreseeing the prohibited outcome is certain, but not necessarily desiring the outcome: ***Buzzanga and Durocher***

Indirect Intention VS Recklessness

* with **indirect intention** D must be certain that the prohibited outcome will result, whereas
* with **recklessness** D need only realize that the prohibited outcome may result

**Motive:** WHY D engaged in prohibited conduct

* NOT an element of *mens rea*
* EXCEPT S.83.01(1)(b)(i)(A) in the definition of terrorist activities relevant for terrorist offences where it is necessary for P to adduce proof of a religious or political objective

**purpose**: intention NOT ~~desire~~ for the purpose of S.21(1)(b) “parties to an offence”: ***Hibbert* (1995)**

* in practice, “purpose” can usually be interpreted to mean “with the intention of”: **Prof**

5. Recklessness & Deliberate Ignorance (Wilful Blindness)

**Recklessness**: involves D being aware that there is a risk that his conduct could rbing about the prohibited results, but nevertheless persists despite the risk: ***Sansregret* (1985)**

**Willful Blindness**: where D has become aware of the need for some further inquiry, but deliberately chooses not to make such an inquiry b/c D does not want to know the truth: ***Sansregret* (1985) + *Briscoe* (2010)**

* = deliberate ignorance: ***Briscoe* (2011)**
* wilful blindness does not define the *mens rea* for particular offences rather it can substitute for actual knowledge when knowledge is a required component of the mens rea of the offence: ***Briscoe* (2010)**
* ***Briscoe* TEST:** Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?

6. Criminal Negligence

Negligent Conduct

* a person may be held criminally responsible for negligent conduct on the objective test-> this does not violate the principles of fundamental justice that the moral fault of the accused must be commensurate with the gravity of the offence and its penalty: ***Hundal***

**Objective Mental Fault TEST:** whether a reasonable person in the circumstances would have foreseen the risk of harm from their actions: ***Creighton* (1993)**

* if this is satisfied, the necessary *mens rea* has been proven
* do NOT incorporate D’ personal characteristics into the reasonable person standard, as it has to be an unchanging standard that is easy to understand
* only if D lacked the capacity to understand the risk flowing from their actions can they be excused

*Mens Rea* Constitutional requirements: ***Creighton* (1993) *Per* Lamer J**

* there is a general constitutional requirement that a mental element must relate to the consequences of an underlying offence where some mental fault element is required for that criminal offence
* there is no general constitutional principle requiring subjective foresight for criminal offences…an objective fault requirement is constitutionally sufficient for a broad range of offences other than those falling within the relatively small group of offences (the most heinous crimes that carry with them a certain stigma)

***mens rea* TEST for unlawful act manslaughter:** requirement of objective foreseeability of the risk of bodily harm: ***Creighton* (1993) *Per* McLachlin J**

* BUT must also establish capacity:
* Given the personal characteristics of the accused, were they capable of appreciating the risk of harm flowing from their conduct?
* Dissent (Lamer J): objective foresight of the risk of death was needed

Penal Negligence (ex. Manslaughter) TEST: ***Creighton* (1993) *Per* McLachlin J**

1. **Establish *actus reus:*** the activity must constitute a marked departure in the care of a reasonable person in the circumstances

* contemporaneous with

1. **Establish *mens era:*** objective foreseeability of the risk of bodily harm that is neither trivial nor transitory-> the standard is of the reasonable person in the circumstances of the accused

* short of incapacity to appreciate the risk or incapacity to avoid creating it, personal attributes such as age, experience and education are not relevant: ***Beatty* (2008)**

1. **Establish capacity:** Given the personal characteristics of the accused, were they capable of appreciating the risk of harm flowing from their conduct?

***Beatty:*** *Hundal’*s dangerous driving test & *Creighton’s* manslaughter test should be seen as adopting the same penal negligene test, and any ambiguity in the discussion of dangerous driving in *Hundal* should be resolved in the manner suggested in *Creighton*

S.249 Dangerous Driving TEST: ***R v Roy* (2012)** (replaces *Hundal* test)

1. ***Actus reus***: operating vehicle in a dangerous way causing death
2. ***Mens rea:*** marked departure from standard of care that a reasonable person would observe in the circumstances: ***Beatty***
3. In light of all relevant evidence, would the reasonable person have foreseen the risk and taken steps to avoid it if possible?
4. Was the accused’s failure to foresee the risk and take steps to avoid it, if possible, a marked departure from the standard of care expected of a reasonable person in the accused’s circumstances?

* distinction between a *mere* departure (which can ground civil liability) and the *marked* departure (necessary for criminal liability) is a matter of degree and must be identified by the trier of fact
* personal attributes will only be relevant if they go to capacity to appreciate or to avoid risk

7. Constitutional Issues

**stigma/penalty analysis:**the moral fault of the accused must be commensurate with the gravity of the offence and its penalty: ***Creighton* (1993) *Per* McLachlan**

the stigma/penalty analysis under S.7 of the Charter as it is used to determine whether a given criminal offence requires subjective mental fault or not: ***Finlay* (1993):**

* there is no authority for the proposition that the mens rea of an offence must always attach to the precise consequences prohibited as a matter of constitutional necessity as s.7 has been cast more broadly
* no one may be sent to prison without *mens rea* and the seriousness of the offence must not be disproportionate to the degree of moral fault
* provided an element of mental fault or moral culpability is present and provided that it is proportionate to the seriousness and consequences of the offence charged, the principles of fundamental justice referred to in s.7 are satisfied

Subjective Mental Fault is required for the following offences:

* murder: ***Logan* (1990)**
* attempted murder
* war crimes: ***Finta* (1994)**
* crimes against humanity: ***Finta* (1994)**
* theft: ***Peters* (1991)**
* …

***Logan* (1990):** something less than subjective fault will suffice for most criminal offences-> as long as there is a meaningful fault requirement, S.7 of the *Charter* is satisfied

Crimes Against Humanity: ***Finta* (1994)**

* ***actus reus****:* inhumane act (i.e. uncivilized, not humane, destitute of compassion for suffering)
* **inhumane**: some kind of treatment that is unnecessarily harsh in the circumstances
* the standard is viewed objectively-> if in the time of war it would shock the consciences of those people
* ***mens rea*:** D was aware of or wilfully blind to the circumstances that would bring his actions within the definition of crimes against humanity-> subjective test
* NOT necessary to establish that the accused knew/agree his actions were inhumane
* ONLY that D knew this actions were such that, objectively viewed, would shock the conscience of all right thinking people

Extensions of Criminal Liability

Criminal law is not only concerned with a single offender having completed a criminal offences-> principles of extending criminal liability recognize

1. **modes of liability:** different forms of participation in criminal offences, going beyond the direct perpetrator (or principal offender); and
2. **attempts:** liability for incomplete offences

**Principal offender:** person who actually commits the offence

**Co-Principals:** where an accused acts in concert with others to commit an offence, he/she may be liable as a “co-principal”, aider or abetter, depending on the nature of the evidence-> it is legally irrelevant which designation it is and the same conduct can be used for any of those possibilities: ***H.(L.I.)***

**Modes of Participation:**

1. **Parties to offence**

**S. 21(1)** Everyone is party to an offence who

1. actually commits it (**P**);
2. does or omits to do anything for the purpose of **aiding** any person to commit it; or
3. **abets** any person in committing i
4. **Common intention**

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

1. **Person counselling offence**

**S. 22(1)** Where a *person counsels another person to be a party to an offence* and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled

**S.** **22 (2)** Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling

**Counsel**: includes procure solicit or incite: **S.22(3)**

Aiding & Abetting

***Thatcher* (1987) SCC:** Aiders & Abetters are on same legal footing as P

* i.e. it is not necessary for the Crown to separate the (a) (b) (c) in S.21 into different counts
* a jury can convict D if every member of the jury is satisfied beyond a reasonable doubt that D was either P or an aider or abetter
* not necessary for the jury to reach unanimity bout which mode of participation applies

***Berryman***: a person who commits an offence by means of an instrument *whose movements are regulated* by him, actually commits the offence himself

**Aiding or Abetting**: intentional encouragement or assistance in the commission of the offence: ***Thatcher* (1987)**

* **Aiding**: some form of material assistance
* **Abetting**: encouragement

**Aiding & Abetting (*actus reus*)TEST**: providing more than incidental assistance*:* ***Greyeyes* (1997)**

**Presence:** D cannot be considered to have aided or abetted a crime simply by being present/ mere presence at the scene of the crime is not sufficient to ground culpability without more: **Dunlop and Sylvester v The Queen (1979)**

* a person is not guilty merely because he is present at the scene of a crime and does nothing to prevent it
* presence at the commission of an offence can be evidence of aiding and abetting, if accompanied by other factors, such as prior knowledge of P’s intention to commit the offence or attendance for the purpose of encouragement
* it is important to note that this includes an element of mental fault
* a person cannot properly be convicted of aiding/abetting in the commission of acts which he does not know may or are intended

Examples of more than *mere presence:* ***Dunlop and Sylvester* (1979)**

* encouragement of P
* ***Poppen* (1981):** in some circumstances, a person who is present at the commission of an illegal act, which *he has a duty to prevent*, may by mere inactivity encourage the illegal act
* father does nothing re: mother’s inflicting injuries to the child on a number of occasions-> he was not actually present at any of the instances of abuse
* retrial
* keeping watch
* enticing V
* preventing V from escaping
* being on the ready to assist P if needed
* omitting to do something that is one’s duty
* ex, ***Nixon* (1990):** a failure to act in accordance with a statutory duty to act may (as in this case was) be an omission to do something for the purpose of aiding or abetting
* police officer convicted as a party to an offence under S.21 on the ground of aiding and abetting
* police officer in charge of police lockup did nothing while a prisoner was beat up-> he failed to discharge his statutory duty

Examples of more than *mere presence:* ***Jackson (2007)***

* apprehension at the scene-> not determinative in and of itself, only in conjunction with additional circumstantial evidence
* Jackson was arrested at the scene
* Jackson had been there for at least 2 days
* 5 ppl were involved and he was one of 5ppl present
* rejection of D’s explanation for being at the scene
* the particular nature of the offence, the context in which it was committed and other circumstantial evidence of D’s guilt
* Jackson was sleeping in a tent on the site
* there was grow equipment in the tent
* Jackson was wearing rubber boots
* there was nothing else in the secluded area to be done other than grow

**Aiding - *mens rea***: “for the purpose of”: S. 21(1)(b)

* **purpose:** means *immediate intention:* ***Greyeyes* (1997)**
* **immediate intention:** doing something on purpose as opposed to by accident: ***Greyeyes* (1997)**

**Abetting - *mens rea:*** S.21(1)(c)

* the accused must *intend* to encourage P with his words or acts: ***Curran* (1977)**

**Helsdon (2007):** S.21(1)(b)&(c) generally require subjective mens rea

* the more peripheral the accused’s involvement to the completed crime, the more sense it makes to require a higher form of subjective *mens rea*
* no reason to distinguish between aiders/abetters despite different statutory language
* both require intent as a general level of mental fault
* Manslaughter EXCEPTION
* a person may be convicted of manslaughter who aids or abets another person in the offence of murder *where a reasonable person* would have appreciated that bodily harm was the foreseeable consequence of the dangerous act that was being undertaken

***Palombi* (2007)**: *knowledge* is an insufficient substitute for *intent* when it comes to the *mens rea* for aiding and abetting

* an accused can only be liable as an aider/abetter if it is found that they intended their act or omission to aid the commission of the offence
* while knowledge may found an inference of intention, it cannot alone constitute the *mens rea*

Common Intention

RECALL: the subjective *mens rea*for the principal actor in a murder case is the *intent* to kill

Common Intention doctrine

1. P commits some other offence (not necessarily part of the unlawful purpose) that D “knew or ought have known…would be a probable consequence of carrying out the common purpose”
2. ***actus reus:*** “assist each other” in an unlawful purpose

* need not be pre-planned-> sufficient that it arise at the time of the commission of the offence: ***Kirkness* (1990)**
* a causal, but not a temporal connection is required between the unlawful act and the ultimate offence: ***Kirkness* (1990)**

1. ***mens rea:*** “intention” in common between D and P for an unlawful purpose

* **Parties** can be convicted for this offence under either of two standards:

1. **subjective knowledge** that they *knew* the murder was a probable consequence of their common intention; OR
2. an **objective test** of whether they *ought to have known* that the murder was a probable consequence of their common intention

* objective standard is considered an easier standard for the Crown to meet

***Kirkness* (1990):** if the intent of the aiding party is insufficient to support a murder conviction, then that party might still be convicted of manslaughter if the unlawful act which was aided or abetted is one he *knows is likely to cause some harm* short of death-> neither intent was demonstrated by D who put P on “timely notice”:

* **held**: Kirkness, when he formed an intent in common with Snowbird to carry out the break and enter, did not know before entering that Snowbird would either commit a sexual assault or kill V-> not a party to the offence
* abandonment can be a defence for common intention
* **abandonment**: requires more than a mere physical change of place
* where practicable and reasonable there must be timely communication of the intention to abandon the common purpose to those who desire to continue it
* defendants will be held to a different standard depending upon the degree of participation in the crime

Constitutional Issues with Extending Modes of Liability

* the potential for someone to be liable through common intention for an offence that they “*ought to have known…would be a probable consequence of carrying out the common purpose” (Criminal Code,* s.21(1) raises potential constitutional issues due to the objective fault level that it creates
* the parties to the offence are not necessarily helping to commit the offence, they have not agreed to commit it or may not have subjective mental fault to the offence
* ***Logan* (1990) SCC** determined the constitutional validity of the objective “ought to have known” aspect of common intention in S.21(2):
* the objective “ought to have known” standard infringes s.7 of the Charter but is saved by s.1
* for offences carrying a high stigma (ex. murder & attempted murder) based on the stigma/penalty analysis, s.1 does not save the unconstitutionality of the s.21(2) objective *mens rea*
* THEREFORE: if a *Code* section constitutionally requires subjective *mens rea* for the principle offender (determined by a stigma/penalty analysis), then his accomplice cannot be held liable under the “ought to have known” standard as a party under s.21(2)
* AND if the s.21(2) Party to the offence WOULD still apply in situation where

1. the principle offence is one that requires *mens rea;* AND
2. the Party had subjective intention/knowledge

***Jackson* (1993):** if P commits murder, D can be guilty of manslaughter (but not murder) on “an ought to have known” basis

EXAM: How to Answer a Common Intention Problem

1. What is the underlying offence?

* ex. murder

1. Did the s.21(2) Party have subjective *mens rea?* (i.e. Did he know that the murder was a probable consequence?)

* if YES-> he can be charged under s.21(2) as a Party
* if NO-> proceed to step 3.

1. Is the underlying offence (murder) constitutionally required to have a subjective level of *mens rea,* based on a stigma-penalty analysis?

* if subjective *mens rea* is NOT constitutionally required for the principal offender, the potential Party **can** be charged under s.21(2) as a Party
* if subjective mens rea IS constitutionally required (ex. murder) for the Principle offender, the potential party **cannot** be charged under s.21(2) as a Party under the objective component of the test

Attempts

**inchoate liability:** liability for incomplete offences

1. Attempt
2. Incitement/ Counselling
3. Conspiracy

**Section 24** of the *Criminal Code* is the general statutory provision for **attempts** and is applicable to any offence in the Code:

1. Every one who, having an **intent** to commit an offence, does or omits to do anything for the **purpose** of carrying out the intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.
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 he offence, is a question of law.

More Attempt Crimes

* in addition to s.24 below, there are some offences that are already defined as attempts
* s.71 attempting to duel
* s.119 attempting to bribe judicial official
* s.368 attempting to cause a person to act upon forged document
* many terrorism offences

Penalties

* **S.463 sets out the general penalties for attempts-**> applies to any attempted offence unless there is a specific penalty set out for an attempted offence (ex. s.239 attempted murder has a max penalty of life imprisonment or if a firearm is used, a mandatory minimum of four years)
* life-> max 14yrs
* 14yrs or less-> a term half as long as the longest term to which a person guilty of that offence is liable
* punishable on summary conviction-> punishable on summary conviction
* either indictment OR summary conviction-> indictable for a term half as long OR summary conviction

**Attempt** - ***Cline* (1957)**

* need *actus reus* + *mens rea*
* although *mens rea* is of primary importance
* D may be found guilty of attempting to commit a crime even if D did not actually commit the crime so long as D has the necessary ***mens rea*** (intent to commit the offence) and acted to attempt to commit the crime
* the ***actus reus*** must be more than a mere preparation-> however it does not need to be a crime in itself or even a moral wrongdoing

**Attempt - Actus Reus TEST - *Deutsch v. The Queen***

1. identify the *actus reus* for the completed offence
2. determine whether the accused is liable for attempting that offence by analyzing the relationship between:
3. the nature and quality of the act in question (i.e. the conduct of the accused); AND
4. the nature of the completed offence
5. considering the relative proximity of the acts of the accused in relation to the completed offence (i.e. in terms of time, location, and acts under the control of accused remaining to be completed)

* in general, the *actus reus* for attempt must be some step toward the actual commission of the crime that goes beyond mere acts of preparation
* in this case the actual crime could not be committed until the women actually had sex with another person (re: D tried to procure females for illicit intercourse with other persons contrary to s.212 under the guise of a secretarial position)

**Attempt - *Mens Rea:*** the accused must *intend* to commit the offence and their conduct must be for the *purpose* of carrying out this intention: **S.24 CC**

* this is even the case for attempt offences involving lower levels of mental fault (i.e. knowledge/ deliberate ignorance/ willful blindness/ recklessness)
* the ***mens rea* for attempted murder** cannot be less than the specific intent to kill: ***Ancio* (1984)** + ***Logan* (1990)**
* despite the fact that murder can have a lower subjective mental fault which includes the *mens rea* to cause bodily harm knowing that it is likely to cause death: CC
* the few offences which require subjective intent for conviction made the infringement of s.7 to serious and outweigh any legislative objective: ***Logan***

**3 Categories of Impossibility**:for Canada to extradite in this matter, the Court needed to find that the conduct of the accused would have been an offence if committed in Canada-> extradition ordered: ***United States v Dynar* (1997)**

1. **Factual Impossibility:** contemplation of a crime is stopped because of an intervening obstacle
2. **Legal Impossibility**: attempt failed b/c it is not a crime
3. **Imaginary Crimes**: act is not really a crime (ex. D believed he was committing a crime by importing sugar)

A person who believes they are committing a crime has the mens rea of a criminal-> UNLESS it is an imaginary crime

* BOTH factual & legal impossibility fall within S.24(1) CC

Defences

In considering Defences excluding criminal liability:

1. At what stage does it operate?
2. What is the applicable burden and standard of proof?
3. What are the essential elements of the defence?
4. Are there any recognized constitutional standards or principles applicable to the defence?
5. What is the outcome if the defence is successfully raised?

**True Defence:** if the Crown proves that the accused committed the *actus reus* and *mens rea* of the offence beyond a reasonable doubt, the accused can nevertheless be acquitted if they successfully raise the defence (ex. self-defence)

1. Mistake of Fact

**Mistake of Law:** ignorance of the law by a person who commits an offence is not an excuse for committing that offence: **S.19 CC**

* i.e. the mental fault element for criminal offences does not include knowledge by the accused that the offence was illegal
* EXCEPTIONS:
* **Non-publication:** a person may not be convicted of violating a law or regulation that has not been officially promulgated or published-> it would be impossible to ascertain/comply with a law that is not available to the public
* **Fault element**: rarely, certain offences require some aspect of knowledge of the law
* TEST: Did the essential element of the offence itself require some degree of mental fault on the part of the accused with respect to the law or a legal right?
* ex. a legal error about who owns property may be a defence to theft
* **Officially Induced Error:** see below
* ***Jones and Pamajewon v The Queen:*** mistake of law, where an Indian tribe purported to enact laws permitting high stakes gambling on their reserve was contrary to the Code despite their renunciation of the jurisdiction of the federal and provincial governments in relation to gaming on their reserves, NOT a defence

**Mistake of Fact:** may negate the mental fault element of an offence, depending on the offence

1. What is the mental fault of the offence?

* to have a guilty state of mind, the accused must have *knowledge* of the *factual elements* of the crime he is committing as well as hing whatever mental element (i.e. wilful blindness, intent, purpose etc.) applies to the crime

1. Would the mistake of fact negate that mental fault?

* USUALLY requires an **honest**, though **mistaken belief in fact**
* + take reasonable steps
* to ascertain consent (re: sexual assault)
* to ascertain the age of the person (re: online child luring)
* strict liability offences
* a mistake of fact will trump a finding of recklessness: ***Sansregret***
* **recklessness:** where D is aware of a risk of criminality but still persists
* a mistake of fact will NOT trump a finding of wilful blindness***: Sansregret***
* **willful blindness:** where D KNOWS that he should be making enquiries but still persists

**Officially Induced Error:** defence of mistaken law caused by an official: ***Levis (City) v Tetreault* (2006)**

* Requirements of Officially Induced Error

1. an error of law or mixed fact/law was made
2. the accused considered the legal consequences of his/her actions
3. the accused obtained advice from the appropriate official

* someone involved in the administration of the law will generally suffice

1. advice from the official was reasonable in the circumstances

* not a high threshold

1. advice obtained was erroneous
2. the accused must show they relied on the advice

* it is for the judge to determine if officially induced error operate in a given case as an excuse (not the jury)
* if a clim of officially induced error succeeds, this results in a stay of proceedings-> not an acquittal
* the accused must establish the element of officially induced error, set out above, on a balance of probabilities
* officially induced error is not limited to regulatory offences, it is also applicable to criminal offences

1. Self Defence

**Self-Defence:** whether a person is defending themselves or another person or defending property in their possession, the general rule is that they may undertake acts which may otherwise be criminal if they reasonably perceive a threat, they act for the purpose of defending against that threat, and their acts are judged to be reasonable in the circumstances: **ss. 34-35 CC**

**Defence of a Person: S.34 CC**

1. **Defence:** a person is not guilty of an offence if:
2. D believes on **reasonable grounds** that force is being used against him/her or another person or that a threat of force is being made against him/her or another person
3. the act that constitutes the offence is committed for the **purpose** of defending or protecting against the use or threat of force

* Roach interprets this provision as requiring D to be judged on his/her subjective purpose
* this condition serves to screen out acts motivated by vengeance, retribution or some other non-defensive purpose

1. the act committed by D to defend against that force must be **reasonable in the circumstances**
2. provides a non-exhaustive list of factors for a judge or jury to consider in assessing the issue of “reasonable in the circumstances”
3. the nature of the force or threat
4. the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force
5. the person’s role in the incident
6. whether any party to the incident used or threatened to use a weapon
7. the size, age, gender and physical capabilities of the parties to the incident
8. the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat-> any history of interaction or communication between the parties to the incident
9. the nature and proportionality of the person’s response to the use or threat of force
10. whether the act committed was in response to a use or threat of force that the person knew was lawful

**Defence of Property: S.35 CC**

**Defence of Person:** usually requires some proportionality between the harm apprehended by D and the force used by D in response, summary: **David Watt & Michelle Fuerst**

1. **(reasonable) belief;**

* relates to D’s state of mind-> his/her belief that force is being used or threatened against him/her or another person
* subjective + objective test
* the other person need not be under D’s protection as was required under the old s.37
* a mistake by D about the existence or threat of force is not fatal to D’s claim under the section, but the mistake must be reasonable
* the force need not be an imminent attack, but the presence or absence of an imminent threat would seem relevant in a determination of whether D had a reasonable belief as s.34(1)(a) requires
* D need not believe that the force is likely to cause him or her death or grievous bodily harm

1. **purpose;** and

* refers to D’s subjective purpose in doing the act that constitutes the offence
* the inquiry and standard is subjective D’s purpose must be to defend or protect him/herself or another person from the actual or threatened force
* D’s purpose must not be to seek vengeance, visit punishment, or vindicate honour against another who has used or threatened to use force against him/her

1. **(reasonable) response** (i.e. D’s acts must be reasonable in the circumstances)

* standard is a combined subjective + objective test and requires a contextual analysis of all the circumstances including but not only the mandatory factors listed in s.34(2)
* the accused’s belief lies at the core of the defence (subjective) but that belief in the need to resort to force must be based on reasonable grounds and the justifiable amount of force must be reasonable (objective)
* the provisions make no reference to retreat or proportionality although several factors in s.34(2) could include these concepts
* in assessing whether reasonable force was used to defend oneself, the resultant injuries are not determinative-> the nature of the force applied by the accused and the circumstances of its administration must also be considered: ***Matson* (1970)**
* generally the reasonableness of violence resorted to by the accused is to be measured by the “view of the circumstances” taken by the person under attack (D): ***Palmer* (1971)**
* S.34(3) substantially restricts the availability of self-defence and defence of another for conduct against law enforcement officials-> in the circumstances, the defence is only available where D believes, on reasonable grounds that the law enforcement official is acting unlawfully

**Jury Charge:** when the judge instructs the jury on the law and reviews the evidence with them before they go off to deliberate

**Air of Reality Test:** the principle that a defence should only be put to a jury if there is an evidential foundation for it: ***Buzizi* (2013)**

* it is a weighing of evidence done by a judge before charging the jury
* the test is not intended to assess whether the defence is likely, unlikely, somewhat likely, or very likely to succeed at the end of the day
* **TEST**: whether the record contains a sufficient factual foundation for a properly instructed jury to give effect to the defence
* NOT required for all defences
* used for
* intoxication
* self-defence
* duress

1. Necessity

**Necessity**: does not justify what someone has done as being lawful, it excuses them from punishment when the circumstances are taken into consideration: ***Perka v The Queen* (1984)**

* defence of necessity established in ***Morgentaler* (1976)**
* Essential Elements of Necessity

1. **urgency**: at minimum the situation must be so emergent and the peril so pressing that normal human instincts cry out for action and make a counsel of patience unreasonable

* modified objective standard, taking into account the personal characteristics of the accused

1. **no legal way out:** it must be “demonstrably impossible” to avoid the peril or prevent the harm without breaking the law

* modified objective standard, taking into account the personal characteristics of the accused

1. **proportionality:** the harm avoided must exceed the harm caused by the accused to avoid it

* purely objective standard
* negligence or involvement in criminal or immoral activity does not disentitle the actor to the excuse of necessity
* there needs to be an air of reality in all 3 steps of the test for the judge to charge the jury with the defence
* once raised, a burden of disproof is placed on the Crown to show the defence of necessity does not apply
* EXAM: modified subjective + subjective test-> means you need to do the test twice in the exam analysis!!

1. Duress

**S. 17 Duress:** a person who commits an offence under compulsion by threats of ~~immediate~~ death or bodily harm from a person who is ~~present~~ when the offence is committed is excused for committing the offence if the person believes that the threats will be carried out and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion

* BUT NOT where the offence that is committed is high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson or an offence under ss.280-283 (abduction and detention of young persons): **S.17 CC**
* *presence* & *immediacy* requirements struck out for being contrary to Charter S.7: ***Ruzic* (2001)**
* **S.17** only applies to principal offenders: ***Paquette v The Queen* (1977)**
* party offenders can claim the common law defence of duress
* D must raise an air of reality in order to be considered
* duress does not negate *mens rea*, but may result in a finding of moral involuntariness that operates as a defence: ***HIbbert* (1995)**
* combined subjective + objective test: ***Ryan* (2013)**

1. the harm threatened must be equal or greater to the harm inflicted in response to the threat
2. the accused’s choice to inflict harm must accord with what society expects from a reasonable person similarly situated in that particular circumstance

Constitutional Issues

* moral voluntariness is a principle of fundamental justice protected under s.7-> it is required for criminal liability-> it is unjust to penalize a person who acted in a morally involuntary fashion because her acts cannot reasonably be attributed to her: ***Ruzic* (2001)**
* case did not fall into one of the exceptions, based on common law
* the constitutionality of the statutory exclusion in s.17 CC, of certain offences for which P cannot claim duress
* the exclusion of robbery violated Charter S.7: ***Fraser* (2002) NS**
* the exclusions are constitutionally infirm: ***Ryan* (2013) SCC**
* the common law defence of duress is available to a secondary party to murder: ***Aravena* (2015) ONCA**
* b/c moral involuntariness is a principle of fundamental justice pursuant to Charter S.7
* exclusions can only be made if they are consistent with the principle of moral involuntariness
* exclusions may have been completely destroyed by ***Aravena***

**Common Law Duress - *Ruzic* (2001)**

* the threat only has to be made to D or someone else (not included in s.17)
* threat does not need to be immediate
* no easy legal route of escape
* there must be a close temporal connection between the threat and the harm
* combined subjective + objective test: ***Ryan* (2013)**

1. the harm threatened must be equal or greater to the harm inflicted in response to the threat
2. the accused’s choice to inflict harm must accord with what society expects from a reasonable person similarly situated in that particular circumstance
3. Intoxication

**Involuntary Intoxication:** a defence to any offence where it operates to negate *mens rea* or physical voluntariness

**Self-Induced Intoxication**: only a defence in limited circumstances

**specific intent offence**: requires the mind to focus on an objective further to the immediate one at hand

**general intent offence**: requires only a conscious doing of the prohibited act

***Daley* (2007) SCC:** jury may convict an accused where they have the capacity to form the specific intent (despite intoxication), even though there was evidence that they didn't in fact have the intent

* **Mild intoxication:** relaxation of inhibitions and socially acceptable behaviour, this has *never* been accepted as a factor in whether accused had requisite *mens rea,* trial judge not required to give any instruction on mild intoxication
* **not relevant to criminal liability**
* **Advanced intoxication:** to the extent of an impairment of the accused’s foresight of the consequences of his/her act, sufficient to raise a reasonable doubt about the requisite *mens rea*
* **for specific offences, it may negate *mens rea***
* this applies *only* to specific intent offences and the extent of intoxication required to advance it successfully may vary, depending on the type of offence involved
* a jury would be instructed that if they had a reasonable doubt about the requisite level of mens rea because of the advanced intoxication of the accused, then they should acquit for a specific intent offence (not applied to general intent offence)
* **Extreme Intoxication:** like automatism
* **relevant for both specific and general intent offences-> accused may establish on a balance of probabilities that physical voluntariness is negated**
* akin to “automatism” which negates voluntariness and thus is a complete defence to criminal responsibility
* BUT s.33.1 CC limits acquittals to non-violent offences
* evidentiary burden on accused and on a balance of probabilities and generally requires expert evidence
* specific intent offences that have lesser included offences such as murder for example
* an accused may be acquitted of murder based on their advanced stage of intoxication because it raises a reasonable doubt about their ability to form intent to kill but that would be irrelevant to a manslaughter charge which is a lesser included offence
* so a person could be charged with murder in the context of having advanced intoxication and not be guilty found guilty of murder but could still be guilty of manslaughter

|  | Mild Intoxication | Advanced Intoxication | Extreme Intoxication |
| --- | --- | --- | --- |
| Specific intent offence | irrelivant | may raise reasonable doubt as to the mens rea of any specific intent offence | may negate physical voluntariness for any specific intent offence except per s.331 CC |
| General intent offence | irrelivant | irrelivant | may negate general intent or physical voluntariness (per Dalvault), except per s.33.1(3) CC |

1. Mental Disorder

**NCR**: D is neither found guilty, nor acquitted, instead determined not criminally responsible and are not criminally sanctioned-> required to be provided with mental health treatment in secure facility and can only be released based on a process set out in CC s.16

Elements of the Mental Disorder Exemption: ***Cooper v The Queen* (1980):** expert testimony as to whether someone has a “disease of the mind” is not determinative-> it is a question to be answered by the trier of fact

* the Crown must prove beyond a reasonable doubt that the accused committed the crime and would be convicted
* the accused must show that their condition falls under a “disease of the mind”
* the condition must have caused the accused to not have the capacity to appreciate either the “nature and quality” of the act or to know that it is wrong
* the legal consequence is not an acquittal, but a verdict of “no criminal responsibility” under s.672.34

**disease of the mind:** embraces illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion-> it must be of such intensity as to render D incapable of appreciating the nature/quality of act or knowing it is wrong: ***Cooper v The Queen* (1980)**

**knowing that the act is wrong:** it is for judges to decide whether something is a disease of the mind or not, it must render D: ***Simpson***

1. incapable of appreciating the nature and quality of the act/omission; OR
2. that it is wrong

* **wrong:** whether D lacks the capacity to rationally decide whether the act is right or wrong and hence to make a rational choice about whether to do it or not: **Oommen**

**appreciating the nature and quality of the act or omission:** Was D at the time of the offence by reason of disease of the mind unable to fully *appreciate* not only the nature and quality of the act but the natural consequences that would flow from it? Was D deprived of the mental capacity to foresee and measure the consequences o the act?: ***Cooper v The Queen***

* merely lacking appropriate feelings for V of remorse or guilt for what D has done, even though such lack may stem from a disease of the mind, does not suffice-> instead, the absence of such feelings is common of many people who engage in repeated and serious criminal conduct: ***Simpson***
* D does not, by reason of a finding that he fails to appreciate the penal consequences of his actions, fail to appreciate the nature and quality of the act under s.16 CC: ***Abbey***