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Step 2 Go through the facts and apply to each element 49

LAW 120: Criminal Law

# Chapter 1 – Introduction to Canadian Criminal Law

## A. Purposes of the Criminal Law

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| --- |
| R v Grant, Yukon CA |
| Facts – Grant was employed as an Indian Agent in the Indian Affairs Branch. He used money from a “relief fund” to build housing in the Yukon, using First Nations men to do construction work for free. Grant was able to build 45 houses, set up a store, build a power line, and sponsor a beauty pageant entry. He diverted $70,000 in total.  Procedural history – Grant was charged with 6 counts of indictable offence of making a false return. He was convicted at trial but fined only $10/count. The Crown appealed to the Yukon Territory Court of Appeal.  Who won? Crown – FINE INCREASED to $500 or 1 yr in jail  Issue – Can civil servants reallocate funds to create a better outcome or must they comply strictly with directions laid down by Parliament? NO  Holding – Laws must be followed regardless of moral choices. It is not acceptable for civil servants to reallocate government funds without authorization.  Reasoning – Grant knew the funds were being used in ways they were not intended for. He also knew that the use of the funds was not authorized by Parliament (the Minister had rejected a request from Grant). Grant also made false returns to deceive a government official. Trial judge’s sentence was inadequate. |

## B. Sources of the Criminal Law

1. ***Constitution Act*, 1867**

* Section 91 – Federal Powers
  + Criminal law
    - Procedures to be followed in criminal trials
    - Establish, maintain, and manage federal prisons
    - For sentences >2 years
* Section 92 – Provincial Powers
  + Establishment, maintenance, and management of prov prisons
    - For sentences <2 years
    - Provincial offences aren’t true criminal offences, no record
  + Property and civil rights in the province
  + Administration of justice in the province
    - Procedures in civil matters
    - Creation of the courts
    - Staffing courts
  + Impose punishment by fine or imprisonment for provincial laws

1. ***Criminal Code*, RSC 1985, c C-46**

* Contains most criminal offenses – **definitions** and **offence creating provisions**
* Contains most procedure followed in criminal cases
* Sections 8 and 9 – principle of codification so public knows laws
  + Section 8 – common law defences are preserved
  + Section 8(3) common law offences NOT permitted because of s 9 but common law **defences** are allowed – **principle of fairness to the accused**
  + Section 9 - all criminal offences created by **statute** (except contempt of court)

1. **Canadian Charter of Rights and Freedoms 1982**

* Rights the individual can exercise against the State
* Constrains power of the State
* Often used to exclude evidence, challenge laws, or violation of rights
* Sections 7-10 legal rights (ie right to jury trial if liable for prison > 5 yr)

## C. The Commencement of Criminal Proceedings

* After an investigation has been conducted, a police officer fills out a formal charging document called an ***information***
  + Police officer swears that he/she has reasonable grounds to believe the offences have been committed in front of justice of the peace (JP)
  + JP signs the information
* If JP decides that there are reasonable grounds to proceed with the charge, he/she will ***issue process***
  + JP can compel an accused to come to court to answer the charge

## D. Classification of Offences

* **Summary Conviction Offences**
  + Trial will take place in provincial court by judge only
  + Appeals go to supreme court by judge only
  + No right to preliminary inquiry
  + No minimum sentence
  + Maximum penalty – 6 months in jail/$5,000 fine
  + **Super-summary offences** - sentences have a higher penalty -usually part of a hybrid offence (S787 sentences don’t apply)
  + LIMITATION PERIOD S 78.2 6 months to charge with offence unless both parties consent (might be in your interest if charged with hybrid offence)
* **Indictable Offences**
  + Generally more serious criminal offences
  + Created by federal government (in *Criminal Code* and other statutes)

**Three different types of trials**

1. Offences listed in **s 553** of the *Code* (e.g. Theft under $5,000)

* Tried in provincial court by **judge alone**
* Like summary convictions but more leeway in punishment
* No preliminary inquiry

1. Offences listed in **s 469** & **468** of the *Code* (e.g. Murder)

* Tried in superior court
* Usually the accused will have a preliminary inquiry
* Trial before **judge and jury**

1. Electable offences (almost all are hybrid offences)

* Majority of indictable offences fall here
* Accused may elect the mode of trial , prov or superior court
* **Judge alone or judge and jury**, accused decides
* **Hybrid Offences**
  + Crown decides whether to proceed on summary conviction or on indictment (e.g. Sexual assault)
  + Penalties different by how they proceed
  + Accused can choose between trial by jury and trial by judge alone
  + Virtually always **electable** offences

## E. Outline of a Criminal Trial

1. Police lay an **information** to Justice of Peace
2. Justice of Peace decides whether to proceed
3. Arraignment (formal reading of the charge to the accused)
4. Plea Entered (“Guilty” or “Not Guilty”) 🡪 guilty straight to sentencing
5. Plea not guilty 🡪 Trial
   1. Opening statements
   2. Crown Case (Crown calls witnesses and documentary and real evidence is entered)
   3. Crown case is closed
   4. Defence may choose to make a “No Evidence Motion”
   5. Defence Case
   6. Defence Case is closed
   7. Closing Arguments
6. Charge to jury by trial judge (if applicable)
   1. Summarizes evidence in case
   2. Set out positions of accused and Crown
   3. Give instruction re burden of proof
   4. If exceptions re burden of proof, instruct jury
   5. Will tell jury options of verdicts if choices available
   6. Will tell jury what you have to find to find any of those verdicts
   7. CAN NOT tell jury what sentence is or will be subject to
7. Verdict

JURY DECISION DECISION OF FACT CAN NOT BE APPEALED

JUDGE DECISION DECISION OF LAW and FACT LAW CAN BE APPEALED

**Grounds of appeal:**

**Trial judge erred in LAW**

**Trial judge given deference in FACT finding unless egregious error**

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| R v Moyer (1994) 2 SCR 899 INTERP OF OFFENCE |
| Facts – Moyer and young “skinhead” took neo-Nazi photos in a Jewish cemetery. Moyer choreographed the photo shoot by supplying the props and directing the actions of SB (including exposing his penis towards a gravestone and simulating urine pouring down in front of the gravestone).  Procedural history – Trial judge charged Moyer with 6 counts offering indignities to human remains contrary to s 182(b) of the *Criminal Code*. Trial judge entered conviction. The Court of Appeal overturned his conviction 🡪 offering indignities needs physical contact with remains (dissent: no direct contact required).  Who won? Crown, **conviction restored, sent back to trial judge for sentencing**.  Issue – Does ‘offering indignities’ as per s 182 of CC require physical contact with human remains NO or does the offence capture indignities to monuments YES?  Can the Court of Appeal amend a charge in the interests of justice? YES  Ratio  Physical interference with a dead body of human remains is not necessary under s 182(b) if a person acts in such a way as to interfere with a dead body or remains OR offer an indignity to a dead body or remains.  Where monuments mark the presence of human remains, offering indignities to the monuments constitutes offering indignities to the human remains marked there.  The Court of Appeal may amend a charge where it considers it to be in the interests of justice, unless the accused has been misled or prejudiced in his defence or appeal.  Reasoning – In s 182(b) Parliament intended the language ‘**whether buried or not’** to include indecent interference with buried bodies. |

# Chapter 2 – Proving the Crime

## The Adversarial System

* Judges are largely passive members, impartial decision makers
* Judge (and jury) make findings of **fact** based on assessment of **evidence**
* Each side is represented by opposing council 🡪 assumption truth will come out from opposing views
* Distinguished from the inquisitorial model of civil law system

## B. Evidence

* The common method of introducing evidence is through the oral testimony of witnesses under oath to matters within their knowledge (***testimonial evidence***)
* Evidence must be…
  + **Relevant** – the evidence makes a material proposition somewhat more likely
  + **Material** – probative of a legal question in issue in the case
  + **Admissible** – meets the rules of evidence
    - Evidence may be inadmissible if
      * There are reasons to doubt its reliability
      * It was obtained in violation of Charter rights
      * It’s so inflammatory and prejudicial it might not be good for the Court
      * The witness is not competent to testify
* ***Real (tangible) evidence*** may be admitted through
  + A witness
  + Special statutory provisions (ex. breathalyzer certificate)
* Evidence can be admissible but not **credible**
  + The trier of fact must consider whether to accept or believe each item of evidence, and whether the evidence is sufficient

## C. The Evidential Burden and the Burden of Proof

* ***Charter s 11(d) Presumption of innocence –***
* *Constitutional rights*
* *Avoids wrongful convictions*
* *Protects rights of freedom and liberty to accused*
* *System should find those who are guilty guilty, and those who are not not*
* *Courts have final say – any legislation that offends the presumption of innocence can be made invalid by the Courts*
* **The Crown bears the burden of proof of the guilt of the accused** 
  + **Legal burden –** proves each element of offence BARD ***Lifchus 1997***
  + **Evidentiary burden – must have evidence on each element of offence that a reasonable jury might prove BARD**
    - Preliminary inquiry set to determine if evidence exists on each element
    - No evidence motion by defense if Crown did not prove evidence of each element 🡪 if successful accused is acquitted
    - Then evidentiary burden shifts to accused
    - Defense can then raise defences to offences – has evidentiary burden
    - Crown can disprove defences BARD
* **Evidentiary burden on the accused – 2 kinds**:

1. **Reverse onus provisions** – place both an initial evidentiary burden and a legal burden to prove it on a **balance of probabilities**

* ***Oakes***

1. **Evidentiary burden** on the accused to displace the presumption by pointing to “some evidence to the contrary” that could raise a reasonable doubt about its correctness

* ***Downey***

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| R v Lifchus (1997)(SCC)BURDEN OF PROOF, JURY INSTRUCTION |
| Facts – Lifchus, a stockbroker, was charged with one count each of fraud and theft both over $1,000 for allegedly defrauding his employer of a large sum of money by misrepresenting the value of a bond. Who won? Lifchus  Procedural history – Convicted of fraud and acquitted of theft by a jury. He appealed, arguing that the judge erred in instructing the jury on the meaning of “proof beyond a reasonable doubt”. The Court of Appeal allowed the appeal. The Crown appealed to the SCC.  Issue – Should a trial judge explain “reasonable doubt” to the jury? How?  Holding – The trial judge erred by not defining “reasonable doubt” and by telling the jury to evaluate the term as ordinary, everyday words.  Ratio – BARD should not be explained as:   * An ordinary expression with no special legal meaning * The standard of proof applied to important decisions in juror’s own lives * A moral certainty * A “substantial” or “haunting” doubt * Being “sure” the accused is guilty   BARD should be explained as:   * Fundamental principle to presumption of innocence * Based on research and common sense * Logically connected to evidence or lack of evidence * Not a standard of absolute certainty, must be more than ‘probably guilty’ (higher than a balance of probabilities) * A burden that rests with the Crown (and not the accused)   Reasoning – Juries frequently ask for guidance with regard to the meaning of BARD. |

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| R v Starr (2000) (SCC)BARD, JURY INSTRUCTION |
| Facts – Starr was convicted of two counts of first-degree murder for shooting to death Bo Cook and Darlene Weselowski by the side of a Winnipeg highway in 1994. Who won? Starr  Procedural history – Starr was convicted at trial and appealed to the Court of Appeal. The appeal was dismissed. Starr appealed to the SCC, arguing that the Crown failed to prove identity.  Issue – Was the reasonable doubt instruction misleading to the jury?  Holding – The reasonable likelihood that the jury applied the wrong standard of proof raises a realistic possibility that Starr’s convictions constitute a miscarriage of justice.  Ratio – BARD is much closer to an absolute certainty than to a balance of probabilities. A trial judge cannot tell the jury to use ordinary, everyday language in determining what proof BARD is.  Reasoning – Nearly all of the instructions the jury was given weakened the content of the reasonable doubt standard in such a manner as to suggest that probability was indeed the requisite standard of proof. |

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| R v JHS (2008)(SCC)JURY INSTRUCTION: BARD, W(D) TEST |
| Facts – JHS was stepfather of the complainant. The complainant testified that JHS had sexually abused her since she was 4 years old, and she told her mother but her mother didn’t believe her. Her mother testified that the complainant began behaving badly at age 13. The defence claimed that the complainant was lying.  Procedural history – JHS was found guilty at trial. The Nova Scotia Court of Appeal set aside the conviction, concluding that the jury was not clearly instructed that lack of credibility on the part of the accused does not equate to proof of his guilt BARD. The Crown appealed to the SCC.  Who won? Crown  Issue – Was the jury clearly instructed that **lack of credibility on the part of the accused does not equate to proof of guilt BARD as required by *W. (D.)*?**  Holding – The instruction to the jury satisfied the ultimate test in *W. (D.)*.  Ratio – The *W. (D.)* instruction is still useful, and it is:   1. If you believe the evidence of the accused 🡪 acquit 2. If you do not believe the testimony of the accused but are in reasonable doubt by it 🡪 acquit 3. If you are not left in doubt by the evidence of the accused, but are not convinced beyond a reasonable doubt by the evidence you do accept of the guilt of the accused 🡪 acquit   Basically, *W. (D.)* states that juries don’t have to choose between the complainant and the accused (it’s not a **contest of credibility**).  However, there are problems with the instruction:   1. Jury may believe inculpatory elements of the statements of an accused but reject the exculpatory evidence 2. It is confusing that you may believe none of the evidence of the accused, but that evidence could raise a reasonable doubt   Reasoning – The *W. (D.)* instruction does not need to be given word for word as some magic incantation. |

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| R v Oakes (1986)(SCC)REVERSE ONUS \* Oakes Test |
| Facts – Oakes was charged with unlawful possession of a narcotic (8 vials of cannabis resin in the form of hashish oil) for the purpose of trafficking, contrary to s 4(2) of the *Narcotic Control Act*. The section provides that if the court finds the accused in possession of a narcotic, he is presumed to be in possession for the purpose of trafficking unless the accused proves (on a BOP) otherwise. Who won? Oakes  Procedural history – Oakes was convicted at trial, but the Ontario Court of Appeal held that the provision constitutes a “reverse onus” clause and is unconstitutional. The Crown appealed to the SCC.  Issue – Does the “reverse onus” clause in the Act violate s 11(d) (the presumption of innocence) of the Charter? If so is it within a reasonable limit violation under s 1 of Charter? NO  Holding – s 8 of NCA violates s 11(d) of the Charter and is not a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society for the purpose of s 1 of the Charter.  Ratio – Test created to establish that a limit is reasonable and demonstrably justified in a free and democratic society (per Charter s 1).  Test – The *Oakes* test\*   1. The State must have a **pressing and substantial objective** 2. There must be a **rational connection** between the objective and the measures that are being taken 3. There must be **minimal impairment** of the right in question **(if fails, have to remove presumption)** 4. There must be **proportionality** between the measure used to infringe the right and the objective   \* Defense raise, ALL must be satisfied by the Crown  Reasoning – The reverse onus clause does not survive the rational connection test because it would be irrational to infer that a person had intent to traffic on the basis of his/her possession of a very small quantity of narcotics. |

## Presumptions – exceptions to the presumption of innocence – from Oakes

* Presumptions **without** basic facts – presumption until contrary is proved
* Presumptions **with** basic facts – conclusions drawn from proof of facts
* **Permissive presumptions** – allows judge to infer one fact from another
* **Mandatory presumption** – requires that the inference be made
* **Rebuttable presumptions** – three ways the presumed fact can be rebutted

1. Accused may be required merely to raise reasonable doubt
2. Accused may have evidentiary burden to adduce sufficient evidence to bring into question the truth of the presumed fact
3. Accused may have legal or persuasive burden to prove on a BOP the nonexistence of the presumed fact

* **Irrebuttable presumptions**
* **Evidentiary presumptions** – easier to prove than legal presumptions –   
  D must prove element presumed didn’t exist (ie. “In the absence of evidence to the contrary….”) reasonable doubt
* **Legal Presumptions** - must prove or disprove facts arising from other proven facts (ie. “unless it is proven otherwise”) balance of probabilities

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| R v Downey 1992 SCC Evidentiary Presumption can be Rational Connection |
| Facts – Reynolds owned and operated an escort agency and lived with Downey answered the agency’s phones, made up receipts, and did the banking. Some of the escorts had sex with their clients. Section 212(3) of the *Code* provides that evidence that someone lives with a prostitute or is habitually in the company of prostitutes is proof that the person lives on the avails of prostitution (an offence) in the absence of evidence to the contrary.  Procedural history – Trial: convicted, Appeals dismissed  Who won? Crown  Issue – **Does the evidentiary burden placed on an accused contravene the right to be presumed innocent in s 11(d) of the Charter? If so, can it be justified under s 1?**  Holding – The presumption infringes s 11(d) but is justified under s 1 of the Charter.  Ratio – When there is a possibility that an accused may be convicted while a reasonable doubt exists, there is a ***breach of the presumption of innocence***.  In order to establish a rational connection pursuant to the *Oakes* test, it is now enough that evidentiary presumption is reasonable.  Reasoning –The infringement of the Charter is relatively minor. Under the *Oakes* test, the pressing and substantial objective, rational connection, minimal impairment (the burden is an evidentiary burden), and proportionality criteria are met.  **DISSENT**: Fails rational connection test as someone could be in that category but not living on avails and could be found guilty. |

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| R v St-Onge Lamoureux (2012)(SCC)  Presumptions of Basic Fact |
| Facts – St-Onge Lamoureux was charged under s 253(1)(b) with operating a vehicle with a blood alcohol level over the legal limit. A qualified technician took three breath samples, showing blood alcohol levels of 164 mg, 124 mg and 130 mg in 100 mL of blood.  Procedural history –  Trial - convicted - applied two presumptions:  **presumption of accuracy** - evidence of the results of the analysis is conclusive proof of the accused’s blood alcohol limit at the time of testing (presumption that the results are accurate). To rebut the presumption, the accused must point to evidence raising a reasonable doubt that the instrument was malfunctioning  **presumption of identity** - states that the BAC at the time of testing is conclusive proof of the BAC at the time of the offence. St-Onge Lamoureux appealed.  Who won? Crown  Issue – Do the provisions limit the right to be presumed innocent?  Holding – The provisions do not limit the right to be presumed innocent, as they are rules about the burden of proof, as opposed to presumptions with basic facts.  Ratio – Parliament may legislate well-established facts so that they do not have to be proven in every case.  Reasoning – It would be unreasonable to have a doubt about the accuracy of the results unless there was some basis in the evidence. Placing an evidentiary burden on the accused to point to evidence capable of raising a doubt on the issue of identity would readily pass the justification requirement under s1 Charter. |

## 

## D. Appellate Review

* **Error in law** – judge makes an incorrect evidentiary ruling, errs in her explanation of the law to the jury, or misstates the law in her reasons for judgment
  + Crown and accused may appeal on this ground
  + To overturn conviction:
    - Error must be sufficiently important to result that there is a reasonable possibility that the verdict would have been different
    - Court may substitute new verdict or order new trial
* **Unreasonable verdict** – no reasonable jury, properly instructed, could have convicted the accused on the evidence presented
  + Accused may appeal on this ground
  + Conviction overturned and acquittal entered
* **Miscarriage of justice** – the Crown engaged in misconduct or the jury was not impartial
  + Accused may appeal on this ground
  + Court may order a new trial or substitute an acquittal

|  |  |  |  |
| --- | --- | --- | --- |
| **Ground** | **Crown** | **Defence** | **If successful** |
| Error in law | √ | √ | Verdict overturned if there is a reasonable possibility of a different result. Court may substitute new verdict, or order new trial. |
| Unreasonable verdict unsupported by the evidence | X | √ | Conviction overturned and acquittal entered. |
| Miscarriage of justice | X | √ | Court may order a new trial or substitute an acquittal. |

# Chapter 3 – The Elements of an Offence

Must occur at the same time:

* ***Actus reus*** – the prohibited act
* ***Mens rea*** – fault element of offence

Crown pust prove:

* Elements of actus reus and mens rea
* Facts that prove the elements (including identity of accused and time/place)

## A. Analyzing the Actus Reus and Mens Rea of Criminal Offences

1. ***How to determine the actus reus***

* The actus reus will be specified within the offence creating section of the *CC*
* Defined in: same part of the Code, Section 2 (general definitions), Index

|  |  |
| --- | --- |
| **Conduct** | What act(s) or omission(s) must the Crown prove for this offence?  The act or omission must be *voluntary* |
| **Circumstances** | Many criminal offences require proof that the relevant act or omission was committed in particular circumstances |
| **Consequences** | Some offences require proof of particular consequences  *Causation* (conduct 🡪 consequences) must be proven |

1. ***How to determine the mens rea***

* The *mens rea* of a particular offence may correspond to one or more elements of the *actus reus*, there may also be additional mens rea elements in offence provision
* **Subjective fault** – the accused had the actual intention, knowledge or recklessness to commit an act, in a particular circumstance, or bring about a consequence
  + *What did the accused intend/know?*
* **Objective fault** – what the ordinary person should have known or would have intended in the circumstances
  + Lower than subjective, Higher than required in civil negligence – **a marked departure from that of the reasonable person in the circumstances**
* Where mens rea is required, it must be concurrent with the actus reus or can be a continuing act of actus reus *Fagan*
* Start your analysis with the wording of the statute
* Where the statute is incomplete or silent, start from the presumption that true crimes requires Crown to prove a subjective mens rea BARD in relation to at least some element of the actus reus

|  |  |
| --- | --- |
| Subjective mental states | |
| **Intent** | ***Conduct***– A person **intends** **to carry out an act** when he does so **purposely or deliberately** (not accidentally)  ***Consequences***– A person **intends consequences of act** where he acts for the purpose of bringing about that consequence, or where he is substantially certain that the consequence will result from his act |
| **Knowledge** | ***Circumstances*** – **Actual awareness** a particular circumstance does / not exist ***Willful blindness*** (suspecting the existence of non-existence of a particular circumstance but deliberately refraining from confirming that suspicion) is **equated with knowledge** |
| **Recklessness**  **LESS than full intention** | Foresees a particular act or consequence occurring, but **chooses to proceed in the face of the risk**. In most cases, recklessness is sufficient to satisfy the requirement of subjective mental fault |

## B. Included Offences

* Accused can only be convicted of the offence he is charged with
* Attempt to commit included in actually committing
* Exception to this rule:

An accused can always be convicted of any offence that is “included” in the one that is charged

No

No

No

No

Yes

Yes

Yes

No

Yes

Is A guilty of the principal offence?

Has the Crown included a lesser offence through the indictment?

Does the *Criminal Code* specify a lesser included offence?

Is a lesser offence necessarily committed in the course of committing the principal offence?

Has the case law interpreted the principal offence to include other offences?

Did A attempt, but not complete, the principal offence?

No need to proceed – A is guilty as charged.

s. 662(1)(b) – A is guilty of attempt.

Consider whether Crown has proven elements of lesser included offence.

A must be acquitted.

A is guilty of lesser offence.

1. ***Criminal Code*** provision specifies that there is an included offence. Look at specific wording.  
   *Example – 2nd degree murder is an included offence of 1st degree*
2. **Section 662(1)** – A count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count, includes the commission of another offence, the accused may be convicted
   1. Of an offence so included that is proved, notwithstanding that the whole offence that is charged is not proved; or
   2. Of an attempt to commit an offence so included
3. Look at **case law** interpreting the section

# Chapter 4 – Actus Reus – Crown must prove BARD

## A. The Principle of Legality

**Charter s 11(g)**

* Any person charged with an offence has the right not to be found guilty on account of act or omission unless it was an offence under law or was criminal *according to the general principles of law Frey v Fedoruk*
* Must be charged with offence that existed when offence committed
* *Charter* does not apply retroactively
* All offences written in Statute except ‘contempt of court’

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| Frey v Fedoruk [1950] SCR 517 “peeping tom case” **COMMON LAW DOES NOT CREATE OFFENCES** |
| Facts – Fedoruk’s mother saw Frey peeping into her window when she was getting undressed at night. Fedoruk seized a butcher knife and ran outside, should at Frey, and chased him. Fedoruk took Frey back to his house and called the police. A police constable arrived and arrested Frey for committing an action likely to lead to breach of the peace and took Frey to the police station. Frey sued for damages for false imprisonment and malicious prosecution.  Plaintiff – Frey  Defendants – Fedoruk (son) and Stone (police constable)  Who won? Frey   * Trial judge dismissed action for false imprisonment and malicious prosecution. Convicted P for “said offence” at common law. * CA affirmed trial judge, found P guilty of offence at common law, D were justified in arresting without a warrant. * SCC quashed conviction, no offence under CC. D’s did not have justification in false imprisonment of P.   Issue – **Do judges have the power to decide anything to be an offence under common law, if not listed in Criminal Code? NO**  Holding – Frey’s conduct did not amount to a criminal offence recognized by law. Therefore defendants were not justified in arresting without a warrant.  **Ratio – Common law does not create offences – no one should be convicted of a crime unless the offence is recognized in the *Criminal Code*, or can be established as an offence known to the law.**  Imprisonment must be legally justifiable and onus is on D to prove |

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## B. Statutory Interpretation and the Actus Reus

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| R v Boudreault 2012 SCCPURPOSIVE INTERP OF OFFENCE |
| Facts – Boudreault was too drunk to drive, 3x legal limit. Friend called him a taxi and Boudreault went outside and waited for the taxi in his car. Boudreault fell asleep with the engine running and heat on. Taxi driver saw him & called the police. The police arrived and arrested Boudreault, charging him with having care and control of a motor vehicle while his ability was impaired by alcohol per s 253(1)(a) and (b)  Who won? Boudreault   * Trial acquitted – no realistic risk of danger * CA entered convictions – intention to drive not an essential element of the offence * SCC restored acquittals   Issue – Is risk of danger an essential element of the offence of care or control s 253(1)? YES  Holding – *Realistic* risk of danger is an essential element of the offence of care or control.  **Ratio –** Occupying drivers seat does not automatically mean guilty of offence. *Realistic risk of danger* is a (new) required element in s 253(1) care and control. *Intention* to set vehicle in motion creates the risk of danger in care and control of vehicle. Existence or not of a realistic risk of danger is a finding of fact.  Note: Purposive interpretation of CC intent. **Dissent** **Cromwell** **J** argued original meaning interpretation would find Boudreault guilty. Majority should not have added this element to the offence. |

## C. Omissions

* *General rule* – **the criminal law does not punish acts of omission** (failures to act) absent a specific criminalization of the omission or some kind of duty to act that can be imported to a criminal offence – even when the peril is grave and the risk to you would be small.
* *But, there are circumstances when the criminal law will impose liability for a failure to act Fagan*

1. **Statute specifically criminalizes an omission (**ie. *Thornton* **in SCC s 216)**

* Often situations in which someone has created a dangerous situation (ex. failure to maintain at accident scene)

1. **Duty to act**
   1. **Duty imposed by statute**
   * Example – firefighters have a statutory duty to enter a burning building, parent has duty to care for child
   1. **Duty imposed by common law**
   * *Thornton CA– duty to refrain from conduct that harms others*

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| Fagan v Commissioner of Metropolitan Police (1968)(England CA) OMISSION \* ACTUS REUS CONTINUING ACT |
| Facts – Fagan was asked by Constable Morris to park curbside. While parking, Fagan drove on Morris’ foot (unintentionally). Morris told Fagan to get off his foot, and Fagan said “Fuck off, you can wait” and turned off his engine. Fagan eventually reversed his car off officer’s foot. Charged with assault.  Who won? Defendant - Commissioner of Metropolitan Police  Issue – Did Crown prove all elements of assault (including mens rea intent)? YES  Is an act complete when the actus reus and mens rea occur **at the same time** or can they be **continuing acts**? CONTINUING  Holding – The actus reus was a **continuing act** during which Fagan formed the necessary intention to constitute the mens rea.  Ratio – The elements of actus reus and mens rea must be present at the same time. However, it is **not** necessary that mens rea be present at the **inception** of the actus reus; it can be superimposed upon an existing act. But, subsequent mens rea cannot convert an act completed without mens rea into an assault.  **DISSENT**: The act of driving on foot was not **ACTUS REUS it was OMISSION** to move car. Not assault 🡪 the mens rea did not occur at the same time as actus reus |

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| R v Moore 1978 SCC OMISSION \* DUTY EXISTS AT COMMON LAW |
| Facts – Moore ran a red light on his bike. Constable Sutherland asked Moore to pull over so he could ticket him, but Moore continued riding and refused to identify himself. Moore was charged with the indictable offence of obstructing a peace officer in the performance of his duty. The Crown argues that the actus reus of the offence includes failing to stop and identify oneself to a police officer (an omission). Who won? Crown  Issue – **Was Moore under a duty to identify himself to the officer under MVA? YES**  Holding – The officer was under a duty to establish identity in order to arrest Moore for a summary offence (but was charged for indictable). Moore was under a **reciprocal** common law duty to assist the officer in this process.  Ratio – **Duties can be found at common law even if they do not exist in statutes – that can form basis for liability in omission**.  Reasoning – Bicycle not part of motor-vehicle act requirement to identify self. Was under same laws as a driver, but was not charged with driving offence. However, common law expectation to not obstruct police when laying a charge. Minimal interference with any freedom of a citizen is preferred over a major inconvenience and obstruction to the police in terms of public interest.  **Dissent**: A person cannot obstruct police by refusing to answer a question unless he has a legal duty to do so. |

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| R v Thornton 1991 ONCADUTY AT COMMON LAW TO NOT HARM OTHERS |
| Facts – Thornton knew he had tested positive for HIV twice and that the Red Cross would not knowingly accept donations of his blood, but **failed to disclose** to Red Cross and donated blood anyway. The Red Cross detected the blood in the screening process, but Thornton was charged with committing a common nuisance endangering the lives or health of the public (s 180(2)(a)).  Who won? Crown – trial conviction and sentence upheld by CA (later dismissed SCC)  Issue – Did Thornton have legal duty to not endanger lives by donating blood? YES  Can a “legal duty” within the meaning of s 180(2) be one which arises at common law YES or must it first be found in statute NO?  Holding – Donating contaminated blood constitutes a breach of the legal duty within the meaning of that term in s 180(2). **Used tort law definitions of duty to others**.  Ratio – **A duty exists at common law that requires everyone to refrain from conduct that could cause injury to another person.**  **NOTE**: in further appeal to SCC 🡪 dismissed 🡪 relied on s 216 instead of common law duty |

## D. Voluntariness

* Actus reus must be committed voluntarily to be found guilty of the offence
* Involuntariness negates actus reus / mental element of actus reus *Jiang*
* Categories of involuntariness:
  + Under the influence of drugs or alcohol at the time of the offence
    - **Voluntarily consumes alcohol or drugs**
      * Must meet the **defence of intoxication**
    - **Consumption of intoxicants was involuntary** and the intoxication was sufficient to render criminal actions involuntary 🡪 acquittal
  + Suffering from a disease of the mind
    - Must meet the defence of **mental disorder**
  + State of automatism
    - Must meet the defence of **non-mental disorder automatism** *Jiang*

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| R v Jiang 2007 BCCA  NON-INSANE AUTOMATISM \* INVOLUNTARY ACTUS REUS |
| Facts – Jiang fell asleep while driving home from Stanley Park and hit two children, killing one. Jiang was not diagnosed with any disease prior to the accident.  Ratio – If the act was involuntary, must be acquitted. Acts committed while in an automatic state of mind cannot form the actus reus of dangerous driving.  Holding - A sleeping driver is in a sate of non-insane automatism. HOWEVER could be convicted of dangerous driving if embarked on driving with real risk of falling asleep. |

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| Killbride v Luke (1962)(NZLR 590)INVOLUNTARY ACTION OR OMISSION |
| Facts – Luke parked his car and was ticketed for failure to display a current warrant of fitness on the inside of his windshield, however it had become unattached or been taken off by someone – he did in fact have it.  Who won? Luke – at trial and upheld on appeal  Issue – Does an involuntary omission constitute the actus reus of an offence? NO  Ratio – **A person cannot be found guilty for an involuntary act or omission unless he was aware of it. Mens rea does not have to be considered unless actus reus proven.**  Analysis – The omission to carry the warrant of fitness was not within his conduct, knowledge or control, cannot be held liable then of the offence. |

# Chapter 5 – Causation

* Relationship between conduct element and consequence element of actus reus
* The Crown must prove that
  + The consequence happened BARD
  + The accused’s actions **caused** those consequences BARD
* ***Omissions can be causes***
* In most cases, causation is not in dispute.
* Causation law largely derived from common law.
* Moral blameworthiness – punishment for **harm** **you meant to cause** AND **harm you actually cause**
* ***In tort law, causation damages reduced based on apportionment of cause***
* ***In criminal law, you are either fully responsible or you are not at all***

## Intervening Acts in Causation

* Intervening acts can be caused by nature or by other actors
* **Does the intervening act break the chain of causation?**
  + Usually found to NOT break the chain of causation (*Blaue, Nette, Maybin*)
  + Even if there were other causes as well, if accused’s action was more than a trivial cause, they are found to have caused the death notwithstanding the other causes that they weren’t responsible for *Nette*
  + Ie. S 225 If the medical tx is applied in good faith but doesn’t save the person, doesn’t break chain of causation.
  + **Year and a day rule** – s 227 death must occur within one year and a day of the action (repealed 1999 – no longer applies in >1999 deaths)
* Tort damages may be reduced if victim contributes to death by their decisions *Blaue (*pt refused blood which could have saved her)
* **Thin skull rule** – accused must take victim as they find them (whatever problems they already had that contribute to their death don’t break chain of causation) (*Nette*)

## Tests for causation:

* **Factual causation/”But for” test** *Nette*  
  What was the actual scientific/technical/medical cause of consequence?  
  Was the conduct a **significant contributing cause** of the consequence?
* **Legal causation**Was the accused’s conduct **sufficiently connected** to the harm to justify holding the accused responsible? *Smith, Nette*
* ***R v Smithers*** 1978 SCC – set out the test for **causation of** **death** 🡪 whether the actions of the accused were “**a contributing cause of death that is not trivial or insignificant, outside of the *de minimis* range**” 🡪 reason: not trivial and not insignificant are accurate – changing them would RAISE the standard of causation.
* ***R v Harbottle***1993 SCC – **the test for causation for** **1st degree murder** 🡪 SCC used higher standard in the word “cause” in the offence 231(5) than in the *Smithers* “contributing cause” test because of seriousness of 1st degree murder conviction 🡪 “**committed an act or series of acts which are of such a nature that they must be regarded as a substantial and integral cause of death**”
* ***Nette*** 2001 SCC –

*Smithers* test applies to ALL murders **significant contributing cause of death** –

*Harbottle* test applies in 1st degree charge S 231 to raise standard for more serious penalties **substantial and integral cause of death**

**TEST FOR INTERVENING ACTS IN CAUSE OF DEATH**

* ***Maybin*** - No definitive test for deciding when something was an **intervening cause** - overarching question was still whether the accused’s conduct was a **significant cause** of the harm.

**2 analytical aids to consider whether there is an intervening cause of death:**

1. **Whether the intervening act was** **reasonably foreseeable** to the accused at the time he or she committed the conduct. The accused need not foresee the precise way the intervening act took place but rather whether harm was generally foreseeable.

2. **Did the intervening act flow directly from the conduct of the accused or was it an independent act by a third party?** [think of the *Smith* case here]

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| R v Smith (1959) 2 A11 ER 193 (CA) (England CA)CAUSATION \* INTERVENING EVENTS \* DEATH FLOWS FROM ACTIONLEGAL CAUSATION |
| Facts – Smith, a soldier, stabbed another soldier, Creed, during a fight. Creed was dropped twice and given bad treatment, and eventually died. A doctor testified that he would have had a 75% change of recovery if he had been properly treated. Trial: convicted of murder and sentenced for life. Appealed on grounds of causation.  Who won? Crown. Appeal dismissed.  Issue – Did Smith legally cause Creed’s death? YES  Holding – The original stab wound was still an **operating cause and a substantial cause** **(not the Canadian wording)** at the time of Creed’s death, so his death can be said to be the result of the wound.  Ratio –   * Only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound. * If second cause is overwhelming cause 🡪 becomes causation of death * Otherwise original act is cause of death   Reasoning – In the intervening time between Creed being stabbed in the back and his death, there was no time for a careful examination. Accused’s liability shouldn’t rely on the medical treatment received (public policy issue). |

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| R v Blaue (1975) England CADIMINISHED RESPONSIBILITY \* CAUSAL CONNECTION TO ACTTHIN SKULL RULE |
| Facts – Blaue attacked a girl with a knife after she refused to have sexual intercourse. The girl was a Jehovah’s Witness and refused a blood transfusion for religious reasons. She died, and her refusal to have a blood transfusion was a cause of her death. TRIAL: CHARGED WITH MURDER, CONVICTED OF MANSLAUGHTER. ho won? Crown APPEAL DISMISSED  IWssue –   * Did Blaue cause the girl’s death, despite the intervening event of her refusing a blood transfusion? YES * Did her decision to refuse blood break the chain of causation? NO   Holding – The stab wound caused the girl’s death 🡪 the fact that she refused to stop this end from coming did not break the causal connection between the act and death.  Ratio –   * Chain of causation NOT broken by patient refusing blood products. * Tort damages may be reduced by her refusing treatment. * You take the victim as you find them – thin skull rule   Reasoning – An assailant cannot say that his victim’s religious beliefs, which inhibited him from accepting certain kinds of treatment, were unreasonable. |

## B. Causation of Death in the Canadian Law of Homicide

* Civil law standards don’t apply
* Law of causation mostly found in common law, but some in CC
* *Criminal Code* has sections dealing with causation
* ss 224, 225, 226, 227 codify the expansive definition of legal causation
* ss 222(5)(c) and (d) culpable homicide where he causes death by causing the other to take their life or willfully frightening a sick person or child
* ss 229 and 230 define murder
* s 231(5) and (6) first degree murder
* In murder charges   
  1 – determine if guilty of murder 2 – determine degree *Nette*

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| R v JSR 2008 ONCA Intervening cause \* BUT FOR |
| Facts – A gun battle broke out on street in Toronto on Boxing Day, killing one victim. JSR (the southbound shooter) was part of a gang involved in the gun battle, and was in possession of a loaded handgun. An altercation occurred between JSR’s gang and another gang earlier. Another shooter (the northbound shooter) may have fired his gun first, and shot the victim. **Preliminary inquiry, quashed on evidentiary burden**.  **Who won? Crown – restored 2nd degree murder charge, sent back to trial**  Issue – Did the northbound shooter’s act constitute an intervening cause severing any causal link between JSR’s actions and the victim’s death?  Holding – A reasonable jury probably instructed could conclude that JSR caused the victim’s death because the mutual gunfight scenario is possible (in which case JSR’s act would be part of the joint conduct that caused her death).  The BUT FOR analysis – If you hadn’t done the act, the consequence wouldn’t occur  Ratio – **An intervening, independent act by a third party that is a more direct cause of a victim’s death than the prior act of an accused may sever the legal causal connection even though the prior act remains a factual/”but for” cause.** Legal causation is essentially who among those who factually contributed to an event should be held legally responsible.  Reasoning – But for the decision to engage in a gun fight on a crowded street, the victim would not have been killed. In a mutual gunfight scenario, the causal connection may not be severed. |

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| R v Nette 2001 SCCCausation \* Smithers test \* Harbottle test \* Intervening FactorsFactual causation \* Legal causation \* Thin Skull \* Foreseeable |
| Facts – 95 yo woman robbed, hog-tied to bed with ligature around her neck. Nette admitted his involvement in the robbery and the murder to an undercover officer, but denied at trial. Dr concluded that death was caused by asphyxiation, and the factors leading to this included health issues of victim. Nette charged with 1st degree murder. Who won? Crown  Procedural history –  **Charge**: 1st degree murder while unlawfully confining  **Trial**: convicted 2nd degree murder “as long as his action… more than a trivial cause [of the death] and contributed to the death, he has caused the death notwithstanding that there were other causes involved for which he was or may not have been responsible”.  In order to meet the higher standard of causation of first degree murder, the “substantial and integral cause of death” test should be used (*Harbottle*), but that in order to meet to the standard of manslaughter or second degree murder, the “contributing cause, beyond the *de minimis* range” test should be used (*Smithers*).  **CA**: dismissed appeal  Issue – What test of causation should be used for 2nd degree murder? How should the applicable standard of causation be conveyed to a jury?  Holding – The trial judge correctly charged the jury on the applicable standard of causation for 2nd degree murder (one in which the accused must have been ***more than an insignificant or trivial cause*** of the victim’s death).  Ratio – *Smithers* causation test 🡪 valid and applicable to **all** forms of homicide. Suggested changing wording to “significant contributing cause”, instead of “beyond *de minimis*”, or “contributing case that is not trivial”.  **DISSENT:**  Don’t change wording!  The “substantial cause” terminology in *Harbottle* indicates increased degree of participation and blameworthiness in the killing that is required to raised the accused’s culpability to first degree murder under s 231(5) and warrants increased penalty and stigma of 1st degree murder. ***Harbottle* did not raise the standard of causation. Harbottle test applies to first degree, Smithers test applies to ALL homicide offences**  **Thin skull rule**: Those who use violence on other people must take their victims as they find them.  **Factual causation** – Inquiry into how the victim came to die in a medical, mechanical, or physical sense, and how the victim’s action contributed to the death.  **Legal causation** – inquiry into whether the accused should be held criminally responsible for the consequences of his action (death).  Jury must be instructed on the requisite degree of both factual and legal causation that must be found to be guilty.  Both the *Smithers* and the *Harbottle* test must be considered to convict an accused of first degree murder.  Note – It is unclear whether the *Harbottle* test applies only to s 231(5) first degree murders or all first degree murders. |

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| R v Maybin (2012)(SCC)BUT FOR TEST \* INTERVENING ACTS \* FORSEEABILITYFACTUAL/LEGAL CAUSATION |
| Facts – Maybin brothers repeatedly punched a victim in the face at a bar, knocking him unconscious. The bouncer struck the victim’s head when he arrived on scene.  **Trial**: acquitted - evidence was inconclusive about which blows caused the death  **CA** – BUT FOR actions wouldn’t have died – brothers convicted  **SCC** appeal dismissed Due to dissent, there is an automatic right of appeal to the SCC. CA should not have dealt with factual causation. SCC agreed with the CA majority.    **Who won? Crown – upheld CA, sent back to trial**  Issue – When does an intervening act by another person sever the causal connection between accused’s act and the victim’s death? \*\* FIRST CASE TO APPLY INTERVENING CAUSE TEST  Holding – It was open to the trial judge to find that the Maybin brother’s assault remained a significant contributing cause of death.  Ratio – **If the risk of harm caused by an intervening actor is reasonably foreseeable to the accused(s), the intervening act will not break the chain of causation.**   * **Factual causation** established with “but for” analysis * **Legal causation**: narrowing concept from factual causation, funnels factual causes into those which are sufficiently linked to a harm to warrant legal responsibility.   + Reasonably foreseeable consequence and/or intentional, independent act approaches both equally useful tools in determining legal causation.   Reasoning – The physical intervention of the bar staff, with a risk of non-trivial harm, was objectively foreseeable. Trial judge erred in factual causation inquiry. Intervening act does not mean original act did not cause the death or that the accused should not be held legally responsible. |

The most significant part of the judgment is what the say about legal causation and intervening causes.

***Reasonable foreseeability***

* what had to be reasonably foreseeable
* there was consensus that what the bouncer did was not foreseeable
* did the Maybin brothers foresee what the bouncer did
  + just that someone would get involved and that some harm could come to an unconscious man on the pool table
  + **don’t have to see the precise way that harm will ensue**
* this is connected to the mens rea for manslaughter
* should they have reasonably foreseen bodily harm

***The test for legal causation established:***

* whether it was a significant contributing cause
* confusing because it is the test for factual causation
* why divide it up into two parts?
  + Keep this in mind as your overwhelming consideration
  + Was the accused a significant cause ***even given*** the intervening act
* in light of answers to the analytical aids – answer this question

# Chapter 6 – The Mental Element (Mens Rea)

**Mens rea must be shown in *each element* of actus reus of offence – at some point during the action (even for a second, doesn’t have to be whole time or any specific time)**

* Always a question of fact – Crown has to prove both *actus reus* and *mens rea*
* If *actus reus* isn’t proven you don’t even get to the *mens rea* argument
* The nature of the fault requirement may take a number of forms, depending on the wording of the offence and the component of the actus reus to which it attaches
  + **Intention \* Willfullness \* Knowledge** *Beaver, Buzzanga*
  + **Willful blindness**
  + **Recklessness** – knowing the consequence will probably happen or that a circumstance probably exists is not sufficient for crimes that require intention/knowledge.
  + **Specific intent** – can be on its own with no actus reus, defined by provision specific to that provision
* Intention is distinct from motive (*Lewis*)

When the code is silent on fault element – infer knowledge/intention OR recklessness – either is sufficient

* When the code wants ‘willfully’ to exclude recklnessness it will say so!

**DETERMINE HOW THE MENS REA APPLIES TO THESE ELEMENTS:**

**Conduct** - Criminal requires subjective fault – even if u think it might be illegal – don’t have to know entirely

**Circumstances** – you have to know (for sure) or be reckless (had a thought that it might be illegal but did it anyways)

**Consequences** – same fault as lesser charge

## Subjective Mens Rea

* What was actually going on in the accused’s mind at the time he committed the *actus reus*

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| **FORMS OF SUBJECTIVE FAULT** | |
| **Knowledge / intention** | Know that the circumstances exist  Intend the consequences to ensue |
| **Wilful blindness – suspects risk but acts anyways** | **SUBSTITUTES FOR KNOWLEDGE**  Suspicions are aroused and the accused does not make inquiries because he/she does not want to know  Deliberate ignorance  \* consider when statute rules out recklessness |
| **Recklessness-  knows there is a risk** | Aware of a risk but goes ahead and takes the risk anyways Must be aware of the risk when the risky action occurs  **If statute requires knowledge – recklessness is not sufficient – look at knowledge/intention or willful blindness** |
| **Specific intent** | An additional purposive element that may or may not have corresponding actus reus component |

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| R v Beaver (1957)(SCC)SUBJECTIVE MENS REA REQUIRED \* MISTAKE OF FACT |
| Facts – Beaver sold a package of heroin to an undercover police officer. It was open to find that Beaver had no knowledge of the contents of the package and believed it was sugar of milk. He was charged with possession of an unlawful drug and selling of an unlawful drug.  Who won? Beaver cannot be convicted of possession of an unlawful drug because the Crown did not prove his subjective mens rea.  **Issue** – If Beaver thought he was selling sugar of milk, would this matter?  Ratio – In true criminal offences, there is a presumption that **subjective mens rea** is necessary to convict (which must be proven by the Crown).  An accused cannot possess an unlawful drug without knowledge of the nature of the possession. However, there is a general presumption that people know and intend what they’re doing in the absence of any evidence to the contrary.  Reasoning – Unless a statute rules out mens rea as a constituent part of a crime, the court should not find a man guilty unless he has a guilty mind. |

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| **R v City of Sault Ste. Marie (1978)(SCC)**  **ABSOLUTE LIABILITY** |
| Ratio  True criminal offences   * The Crown must establish a mental element (that the accused acted intentionally or recklessly, with knowledge or with willful blindness * Mere negligence is excluded from the concept of the mental element   Absolute liability – NO FAULT ELEMENT   * Conviction on proof that the defendant committed the prohibited act constituting the actus reus of the offence * No relevant mental element |

## B. Intent and Recklessness

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| R v Buzzanga and Durocher (1980)(ONCA)WILLFUL \* INTENT \* RECKLESSNESS |
| Facts – Buzzanga and Durocher, both French-Canadians, created a document slandering French-Canadians. Their purpose in doing this was to show the prejudice directed towards French-Canadians and expose the truth about the real problem that existed with respect to a school that was supposed to be built. They hoped to provoke a government reaction that would lead to the building of the school. They were charged with willfully promoting hatred against an identifiable group by communicating statements (s 281.2(2)). Who won? Buzzanga and Durocher  Issue – What does “**willfully**” mean? – “Not accidentally” – Can be both intentionally or recklessly in some judgments or authors.  Holding – Buzzanga and Durocher did **not** have the requisite intent.  Ratio – In general, the accused must have **intended** to bring about a particular consequence or have foreseen a particular consequence (recklessness) to be found guilty. Wilfully in s. 281.2(2) means with the intention of causing hatred.  Intends means intends a consequence that you:  1) desire 2) know that will happen or iii) know that is substantially certain to result from an action (that may be done for another purpose)  **Presumption of foreseeability of consequences** **connects to intention. The inferences may be so strong as to prove intention – but generally a reasonable objective presumption can’t simply determine subjective intent** - “people are usually able to foresee the consequences of their acts, if a person does an act likely to produce certain consequences it is, in general, reasonable to assume that the accused also foresaw the probable consequences of his act and if he, nevertheless, acted so as to produce those consequences, that he intended them… The purpose of this process, however, is to determine what the particular accused intended, not to fix him with the intention that a reasonable person might be assumed to have in the circumstances, where doubt exists as to the actual intention of the accused”  Reasoning – The insertion of the word “willfully” was not necessary to import mens rea, therefore Parliament intended to limit the offence to the intentional promotion of hatred. “I have concluded that the self-misdirection with respect to the meaning of the word “wilfully”, and the failure to appreciate the significance of the appellants’ evidence on the issue of intent requires a new trial.” |

## C. Willful Blindness

* The concept of willful blindness is used in some cases to satisfy a mens rea requirement
* **Can satisfy that an accused actually knew – equivalent to knowing, meets mens rea for knowledge**
* Deliberate ignorance – suspicious but chooses not to make inquiries because you don’t want to know

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| **R v Briscoe (2010)(SCC)**  **WILLFULL BLINDNESS** |
| Facts – Nina Courtepatte (13-year-old) was raped and beaten and stabbed to death by Laboucan and others. Briscoe previously knew the group was talking about killing people and had knives. He also knew that Laboucan was looking for a girl to have sex with and that something was going to happen to the girl. He witnessed her rape and beating, but did not want to know what was happening. **Trial** judge – Acquitted - In order to have intention, Briscoe would have to have known of Mr. Laboucan’s intention to commit each of the crimes.  The crucial question then became whether he had such knowledge.  The trial judge concluded that Mr. Briscoe did not have the requisite knowledge.  Who won? Crown – new trial ordered, to apply willfull blindness standard.  Issue – Can you be convicted of murder without full knowledge, but instead, willful blindness?  Holding – Briscoe may have been willfully blind to the kidnapping and sexual assault. Deliberately ignorant to the likeliness that he was going to kill her – should have made further inquiries of Laboucan.  Ratio – Willful blindness (suspicion aroused to the point where the accused sees the need for further inquiries, but would prefer to remain ignorant) can substitute for actual knowledge whenever knowledge is a component of the mens rea.  Willful blindness is distinct from recklessness (consciousness of the risk and proceeding in the face of it).  Reasoning – Briscoe deliberately chose not to inquire because he did not want to know. |

## D. Fraud and Mens Rea

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| R v Théroux 1993 SCC FRAUD \* SUBJECTIVE **INTENT** |
| Facts – Théroux was convicted of fraud for representing to investors that their deposits for a building project were protected by insurance. No deposit insurance had been purchased, but Théroux believed that the projects would be completed, and the risk of the loss of deposit would not materialize. The project failed and many people lost their deposits.  Who won? Crown  Issue – What kind of mental state is required of the offence of fraud?  Holding – The actus reus was clearly established (Théroux committed deliberate falsehoods which caused deprivation), and the mens rea was established (Théroux knew that he was depriving the depositors of something they thought they had, namely insurance protection, and it can be inferred that he knew he was placing the depositors’ money at risk).  Ratio – Broad definition of fraud. To establish MR of fraud Crown must prove:   * **subjective knowledge of the** **dishonest acts** which constitute the falsehood, deceit or other fraudulent means – you must know its not true * **subjective knowledge** that the prohibited act **had or could have a consequence** of **deprivation** of another. * *That [actus reus] established, it needs only be determined that an accused knowingly undertook the acts in question, aware that deprivation, or risk of deprivation, could follow as a likely consequence.*   **Test for mens rea is subjective** – what the accused had in their mind at the time of the act – is the accused subjectively appreciated the consequences of their act at least as a possibility. Even if you think there is nothing wrong with your action it can still be wrong. Crown does not have to show it precisely.  Reasoning – People should not be acquitted based on their fanciful belief that everything will work out.  **Minority** – if you honestly believe the harm won’t ensue, you shouldn’t be convicted. |

## E. Recklessness as Sufficient Knowledge

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| R v Schepannek 2012 BCCARECKLESSNESS IN MENS REA |
| Facts – Schepannek agreed to bring tobacco to her husband in a correctional facility, although it was contraband. Her husband told her to meet a man to receive the tobacco. She did not know the man, but she took a package in a sock from him and delivered it to her husband (without opening the package). It contained hashish and marijuana.  Who won? Crown  Issue – Did Schepannek have the requisite mens rea of the offence? YES reckless  Holding - Schepannek was reckless as to the contents of the package.  Ratio – Recklessness - the conduct of one who sees the risk and takes the chance.  Reasoning – Schepannek should have known that there was a risk that the package contained illicit drugs and took the chance – therefore was reckless.  The only issue at trial was whether the Crown had proved that *mens rea:* had the Crown proved beyond a reasonable doubt that Ms. Schepannek had the requisite knowledge that the package she passed to her common law husband at the correctional facility contained the illicit drugs alleged. |

## F. Motive

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| R v Lewis 1979 SCCMOTIVE NOT RELEVANT \* INTENT VS MOTIVE |
| Facts – Lewis and Tatlay were charged with the murder of Tatlay’s daughter and son-in-law. An electric kettle rigged with dynamite caused their death. Lewis sent the kettle in the mail. Lewis claimed that he was an “innocent dupe”.  Who won? Crown  Issue – Is it necessary to charge the jury on motive?  Holding – No clear obligation to charge the jury on motive. **Motive is NOT relevant as an element of the offence, but can strengthen argument to prove the defense or crown’s positions, and helps show what the D knew.**  **Ratio** – **Intent** – The exercise of a free will to use particular means to produce a particular result.  **Motive** – FACT based - That which precedes and induces the exercise of free will. Not an element of every crime. Can go to defences and showing intention.  **Definition of motive:**   1. Evidence about motive is always relevant to identity and to intention - and hence admissible 2. Motive not part of the crime, legally irrelevant to criminal responsibility. Not an essential element of the prosecution’s case as a matter of law. 3. Proved absence of motive is always an important fact in favour of the accused and ordinarily worthy of note in a charge to the jury. 4. Conversely, proved presence of motive may be an important factual ingredient in the Crown’s case where evidence is purely circumstantial. 5. Motive is always a question of fact and evidence of the necessity of referring to motive in the charge to the jury falls within the general duty of the trial judge “to not only outline the theories of the prosecution and defence but to give the jury matters of evidence essential in arriving at a just conclusion. 6. Each case will turn on its own unique set of circumstances. The issue of motive is always a matter of degree.   Any jury instruction on motive would have had to make clear that there was no obligation on the Crown to prove motive. Motive important to instruct jury on if Crown proved motive, or D proved lack of motive (describes a continuum of proving/disproving motive). |

## G. Transferred Intent

* Who the victim is s not necessarily an element of the offence – throwing a bottle, hitting someone other than you meant to – still assault – intent goes to mens rea of throwing bottle and actus reus of throwing bottle – the intent to hit A transfers to the intent to B - the person you actually hit
* In some situations, the accused intends one offence but another one occurs because of a mistake or accident
* The common law doctrine of transferred intent occurs when

1. A shoots B, believe that B is in fact C (as mistake as to identity)
2. A aims at C, but by chance or lack of skill shoots B (an accident)

* The law allows A to be convicted of the murder of B even though A has no intent to kill B
* The harm that arises must be the same kind as the harm intended

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| R v Gordon 2009 ONCATRANSFERRED INTENT |
| Facts – Thompson punched Gordon and his friend for “lowballing” him. Within minutes, Gordon shot three blasts from a sawed-off shotgun towards Thompson. Thompson was not hit, but three other people were injured.  Procedural history – The trial judge told the jury they could find Gordon guilty of attempted murder of the injured victims if they were satisfied that he intended to kill Thompson. Gordon was found guilty, and appealed.  Who won? Gordon  Issue – Can transferred intent apply to attempted murder?  Holding – The convictions of attempted murder of each of the three injured victims cannot stand. Gave him aggravated assault instead.  Ratio – **Transferred intent applies when an injury intended for one falls on another by accident. Transferred intent does not apply to the inchoate crime of attempt, in particular to attempted murder.**  Reasoning – Inchoate crimes don’t require a result of harm as part of their actus reus.  Note – The *Code* talks about transferred intent with respect to murder.  Section 229(a) – causing someone’s death when you mean to or are reckless (you mean to cause bodily harm that is likely to cause death)  Section 229(b) – culpable homicide is murder where a person meaning to cause death or bodily harm that’s likely to cause death, by accident or mistake, causes death to another person |

# Chapter 7 – Departures from Subjective Mens Rea

## A. Absolute and Strict Liability

**Absolute liability arguments** (*Sault Ste Marie*)

* **FOR** – administrative efficiency (to hard to prove the intent of each offence, and would result in violator to escape in almost every case) and protection of social interests by creating a higher standard of care, low stigma offence, minimal punishments
* **AGAINST** – violates fundamental principles of penal liability, higher standard of care may not result, costly and time consuming, public interest in criminal cases still requires mens rea so there should be some mens rea element to public regulatory offences.
* **Courts will interpret as strict liability wherever possible unless the statute clearly states otherwise**

**Strict liability** (*Sault Ste Marie*)

* **Allows an alternative between full mens rea and absolute liability**
* Allows defendant to exculpate himself from a prima facie case by proving he was not negligent, that he exercised reasonable care on a BOP
* Should be used in any case where intent or recklessness is not specifically required
* Prosecution doesn’t prove negligence – Defendant must show due care was taken
* If words willfully or with intent or knowingly or intentionally are in offence creating provision then full mens rea applies

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| Criminal Offences  Crown proves actus reus and mens rea | | Regulatory Offences  Strict liability unless otherwise stated | |
| Subjective Fault Mens Rea | **Objective Mens Rea** | **Strict Liability  *(Sault Ste Marie)*** | **Absolute Liability  *(Beaver)*** |
| * What was actually in the mind of the accused at the moment of the offence is alleged to have been committed (Hundal) * Actual intent or knowledge (or recklessness) * Crown has to prove subjective mens rea and actus reus (omission or conduct) BARD | * Marked departure from the standard of care of a reasonable person (*Hundal*) * Crown must prove objective mens rea and actus reus BARD * **Modified objective test** considers events surrounding incident, but not personal characteristics  - allows defences (Hundal and Creyton) (Beatty) | * Most provincial offences are strict liability * Burden on accused to prove defense of due diligence (objectively not negligent) on BOP * Crown has to prove actus reus BARD | * No mens rea mental element * Crown only has to prove actus reus BARD * Cant include possibility of imprisonment (violates s 7 of Charter Sault Ste Marie) |
| * Special stigma crimes require subjective mens rea * Murder * Child abandonment 218 ADH * Attempted murder R v Logan 1990 SCC | * Failure to provide necessaries 215 (marked departure) JF * Criminal negligence 219 marked and substantial departure (Tutton) * Unlawfully causing bodily harm 269 DeSousa (with additional mens rea of underlying offence) * Manslaughter criminal negligence (marked departure) 222(5b) DeSousa Creighton * Manslaughter unlawful act (foreseeability of harm) 222(5a) DeSousa Creighton * Modified Objective: dangerous driving causing death Hundal, Beatty, Roy | * Causing or permitting pollutants in water (Sault Ste Marie) * Hunting near bait (Chapin)   *Note: The reverse burden of proof in strict liability is not contrary to the charter as it does not violate 11(d) and if it did it would be saved by s 1 (Wholesale Travel Group)* |  |

## Analytical template of 4 considerations for proper categorization of an offence (Raham quoting Sault Ste Marie):

1. Overall regulatory patter of which the offence is a part
2. Subject matter of the legislation
3. Importance of the penalty and
4. The precision of the language used

## Five types of objective fault offences:

1. **Dangerous** **conduct** – for example, dangerous driving (*Hundal, Beatty, Roy)*
2. **Careless conduct** – for example, carless storage of firearms (*Finlay*)
3. **Predicate offences** – for example, offences such as unlawful act manslaughter and unlawfully causing bodily harm which require the commission of an underlying unlawful act
4. **Criminal negligence** – requires a marked and substantial departure from the conduct of a reasonably product person in circumstances in which the accused either recognized and ran an obvious and serious risk, or alternatively, gave no though to that risk (*JF*)
5. **Duty-based offences** – includes s 215, but does not include s 218

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| R v Chapin 1979 SCCSTRICT LIABILTY vs ABSOLUTE LIABILITY |
| Facts – Chapin went duck hunting in a privately owned hunt club. There was a small pile of bait on the side of the road, and grain in a marsh, but Chapin did not notice the bait. *The Migratory Bids Regulations* makes it an offence to hunt for migratory birds within ¼ mile of a place where bait has been deposited.  Who won? Chapin  Issue – Is the offence one of absolute liability, strict liability, or subjective MR?  Holding – The offence is a **strict liability** offence. Not absolute liability as the defendant could not control where the illegal bait was placed and shouldn’t be liable for it being there.  Ratio – **Test for strict liability offences established in *Sault Ste. Marie* applies.**   1. When a statute does not mention mens rea (by including words like “willfully” or “with intent”), 2. Was enacted for the welfare of the public, 3. Contains serious penalties (imprisonment or large fines, the offences created are likely strict liability offences. |

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| R v City of Sault Ste. Marie 1978 SCCPUBLIC WELFARE OFFENCES = STRICT LIABILITY |
| Facts – The city of Sault Ste. Marie was charged with violating the *Ontario Water Resources Act*, a provincial statute, for the offence of causing or permitting pollutants to be discharged into a clean water source.  Who won? City of Sault Ste. Marie – new trial ordered to allow defense of due diligence to be heard – trial had applied absolute liability, now strict liability should be used  Issue – What mens rea is required for the conviction of public welfare offences? NONE – BUT IN STRICT D CAN USE DEFENSE OF DUE DILIGENCE  Holding – The offence is a public welfare offence, and therefore the mens rea required is that of strict liability.  Ratio – Public welfare offences are prima facie strict liability offences.  In strict liability offences:   * The Crown has to prove exactly the same thing as in absolute liability (just the actus reus BARD) * But, there is an opportunity for the accused to offer a defence (the defence of **due diligence**) * The accused has to prove not negligent to an objective standard (that they took all reasonable steps to avoid the outcome that occurred) on BOP * The accused must say “I didn’t know and I ought not to have known” (as opposed to simply “I didn’t know”)   Reasoning – The offence is not criminal in the true sense, and the words in the Act fit into an offence of strict liability. |

**Test for strict liability offences**

**(Established in *Sault Ste. Marie*)**

1. Does not mention mens rea (by including words like “willfully”, “knowingly”, or “with intent”), and
2. Was enacted for the welfare of the public, and
3. Contains serious penalties (imprisonment or large fines)

## B. Crimes of Objective Fault

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| R v Tutton 1989 SCCCRIMINAL NEGLIGENCE CAUSING DEATH \* DUTY TO CAREOBJECTIVE MENS REA \* MARKED AND SIGNIFICANT DEPARTURE |
| Facts – The Tuttons were loving and responsible parents, but believed in faith healing. Their child was diagnosed as diabetic and the mother was given instructions and attended seminars about diabetes. The mother stopped giving the child insulin once and he had to be hospitalized. The Tuttons promised their doctor they would not withhold insulin again. The mother stopped insulin again and the child died. The Tuttons were charged with criminal negligence causing death (a kind of manslaughter) and failure to provide necessaries of life. The Tuttons had an honest belief that their son didn’t need insulin anymore.  **Trial** – convicted of manslaughter  **CA**- set aside convictions – confusion re burden of proof on several offences together, ordered new trials  **SCC** – dismissed appeal due to no majority Who won? Tuttons –new trial needed as per CA  Issue – What is the mens rea of the offences of criminal negligence and failing to prove the necessaries of life? WANTON AND RECKLESS DISREGARD – BEING HEEDLESS OF APPARENT DANGER  If the mens rea should be measured on an objective standard, how many personal characteristics of the accused should be taken into consideration?  What is the mens rea for criminal negligence? DIVIDED 3/3 OBJECTIVE/SUBJ  Holding – The jury should instructed that they must be satisfied BARD that the Tuttons were under a duty to provide the necessaries of life and they failed to do so without lawful excuse in order to then find the Tuttons’ guily of manslaughter.  Ratio – In criminal negligence offences, the Crown must prove mens rea BARD on an objective standard, using the objective test.  **Test – Objective Mens Rea**  The test is that of reasonableness, and proof of conduct that reveals a **marked and significant departure** from the standard that could be expected of a reasonably prudent person **in the circumstances** will justify a conviction of criminal negligence. Doesn’t matter is it is an omission or an act – standard of fault is objective.  Reasoning – The application of the objective test cannot be made in a vacuum, surrounding circumstances must be considered. For example, a welder who was told there was no explosive material nearby cannot be faulted for causing an explosion.  Note – The judges split 3:3 on this judgment, so although the appeal was dismissed, there was no majority opinion on the law.  **DISSENT**:   * must consider the personal factors of the accused. * Recommended two prong test that considers a bit of subjective within the objective fault:  1. Determination of the wrongdoing, which proceeds on the basis of a breach of an objective standard; 2. The court must then determine whether it would be fair to hold a particular accused responsible for the act of wrongdoing. This would take mental and physical capacities into consideration. |

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| R v JF 2008 SCCCRIMINAL NEGLIGENCE OBJECTIVE FAULT STANDARD |
| Facts – JF’s foster child was killed by his spouse, and JF did not intervene. JF was convicted of failing to provide the necessaries of life and acquitted of criminal negligence by the same jury. JF argued that the verdicts were inconsistent as mens rea standard higher in crim neg.  Who won? JF – acquitted – since jury acquitted of most serious offence, he should also be acquitted of less serious offence  Issue – Was it possible for the jury to convict on manslaughter on lesser charge failure to provide the necessaries (**marked departure**) and acquit on manslaughter on higher charge criminal negligence causing death (**marked and substantial departure**), when they are the same actus reus? NO  Holding – The jury could not acquit on one count and convict on the other.  Ratio – The mens rea requirements of failure to provide necessaries and criminal negligence are similar, but the criminal negligence count is more serious. **Failure to provide necessaries required a marked departure and criminal negligence requires a marked and substantial departure.**  **Two standards of objective fault:**   * Most offences of objective fault / negligence 🡪 **marked** departure from reasonable conduct * **Criminal negligence** 🡪 **marked** **and substantial** departure from reasonable conduct |

# Dangerous Driving Offences

* The mens rea of the **offence of dangerous driving** is proven on an **objective standard**
* 249 – dangerous driving
  + Everyone commits an offence who operates a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place
  + The offence has a variety of levels based on the consequences that flow from the offence:
    - Summary or indictment – if bodily harm or death is cased the maximum penalty is higher and the offence is indictable

In driving, the consequences may be grave but the acts of dangerousness may be the kinds of mistakes that ordinary drivers make

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| R v Hundal 1993 SCCMODIFIED OBJECTIVE TEST \* DANGEROUS DRIVING |
| Facts – Hundal killed a man when he went through a red light in his dump truck and struck a car. Hundal believed he could not stop in time. He had previously driven through an intersection as the light turned red, and was driving between 50-60 km/hour.  Dangerous driving causing death actus reus   * Conduct – operating a motor vehicle * Circumstances – in a manner that is dangerous * Consequences – causing death   Who won? Crown – trial conviction upheld  Issue – What is required to establish the mens rea for the offence of s 233 (dangerous driving causing death)? Is there a subjective element to the mens rea?  Holding – Hundal’s conduct amounted to a marked departure from the standard of care of a reasonable person in those circumstances  Ratio –   * **A modified objective test is appropriate to apply to dangerous driving - The accused’s conduct must amount to a marked departure from the standard of care that a reasonable person would observe in the accused’s situation.** * **Modified because we don’t consider personal elements EXCEPT when the D can prove an explanation to his dangerous driving (ie sudden illness) which would give a complete defence.** * A trier of fact may convict if satisfied BARD that, viewed objectively, the accused was driving in a manner that was “dangerous to the public, having regard to all the circumstances, including the nature, condition and use of such place and the amount of traffic that at the time is or might reasonably be expected to be on such place”. * **Being held criminally responsible for negligent conduct on the objective test does not violate the principle of fundamental justice that the moral fault of the accused must be commensurate with the gravity of the offence and the penaly** (*Creighton*)   It’s open to the accused to raise a reasonable doubt that a reasonable person would have been aware of the risk of the accused’s circumstances.  Reasoning – **A modified objective test is appropriate because of:**   1. The **licensing requirement** – licensed drivers choose to drive and hence place themselves in a position of responsibility to the public. 2. The **automatic and reflexive nature of driving** – to use a subjective standard is challenging because “it would be a denial of common sense to find a driver was acquitted for not thinking of his manner of driving” b/c most people don’t think a lot when driving. 3. The **word of s 233 “manner of driving”** – we need to compare to objective standard of driving to determine appropriate manner 4. **Statistics** – need stricter test due to high rates of motor vehicle offences – makes it a public welfare offence (and those require objective standards)   **CONCURRING REASONS**: Tries to show that a modified objective test isn’t the best test – we should use a simple objective test. Personal issues such as sudden illness are involuntary and go to actus reus, providing a defense. They are not part of mens rea. Mens rea ought to be based just on a reasonable person standard.  \*\* Finally decided in Creighton \*\* |

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| R v Beatty 2008 SCCMODIFIED OBJECTIVE TEST \* DANGEROUS DRIVING |
| Facts – Beatty crashed into a car and killed three people when his pick-up truck crossed the centre line on the highway. Three people in oncoming car died. He believes he went unconscious while driving. He had not been driving dangerously prior to the accident. He was charged with three counts of dangerous operation of a motor vehicle causing death in violation of s 249(4).  **Trial** – conduct not marked departure from reasonable person – acquitted  **CA** – acquittal set aside, new trial ordered – trial had asked wrong question of what was the action that was departure from reasonable person  **SCC** – Restored acquittal, no new trial  Who won? Beatty – acquittal restored  Issue – Can the mens rea of dangerous driving offences be made out by objectively dangerous driving, including momentary lapses of attention?  Holding – The trial judge’s decision that momentary lapse of attention met civil negl not criminal negl was insufficient to be found criminal culpability was correct.  Ratio – Marked departure from reasonable person standard in objective mens rea. Momentary lapses of attention may be insufficient to be considered **marked departure** and thereby to be found criminal culpability.   * Actus reus and mens rea are not the same   + *Actus reus* – Must be satisfied BARD meets elements in offence – driving in a manner that was dangerous to the public   + *Mens rea* – Must be satisfied BARD that accused’s objectively dangerous conduct was accompanied by the required mens rea – should include accused’s actual state of mind, if any, that the conduct amounted to marked departure from the standard of care that reasonable person would observe in accused’s circumstances. * Don’t confuse civil negligence (minimal departure) with criminal negligence (marked departure)   **The modified objective test requires:**   1. **A “marked departure” from the standard of care expected of a reasonable person in the circumstances of the accused.** The degree of negligence is the determinative question.   Some departures from the reasonable standard of care may not be “marked” or “significant” but are nonetheless undeniably dangerous.   1. If an explanation is offered by the accused, such as a sudden and unexpected onset of illness, then in order to convict, a trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused. |

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| R v Roy 2012 SCCMODIFIED OBJECTIVE TEST \* DANGEROUS DRIVING |
| Facts – Roy was driving a motorhome in poor visibility on snow-covered roads. He was driving with a suspended license. He pulled his motorhome out and was hit by a tractor-trailer who could not stop in time. Roy’s passenger was killed.  Who won? Roy TRIAL-Convicted, CA-acquitted, SCC-upholds acquittal  Issue – Was the required objective fault element proven?  Holding – The trial judge inferred marked departure, failed to conduct an inquiry into whether Roy displayed a **marked departure from the standard of care expected of a reasonable person in the circumstances**.  Ratio – Proof of the AR of dangerous driving, without more, does not support a reasonable inference that the required objective fault element was present.  Reasoning – The manner of Roy’s driving does not support the inference that Roy’s standard of care was a marked departure from that expected. No new trial ordered because “no reasonable jury could find the action was a marked departure from a reasonable person”.  Note – Definition of a reasonable driver getting closet to an ordinary driver. |

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| R v ADH 2013 SCCSUBJECTIVE VS OBJ STANDARDS \* CHILD ABANDONMENT |
| **Facts** – ADH, not previously knowing she was pregnant, gave birth in a Wal-Mart toiler. She thought the child wad dead and left him in the toilet, but the child was found alive. A doctor testified that a woman in ADH’s state of mind might act the way she did. ADH was charged with the offence of child abandonment s 218.  **Who won? TRIAL AND CA – ADH, acquitted due to no subjective mens rea;**  **SCC - upholds subjective standard applied**  **Issue** – Does offence of child abandonment require **subjective** or objective MR?  **Ratio** – The offence of child abandonment requires **subjective mens rea**. The offence differs from failure to provide necessaries (which requires objective mens rea) because child abandonment is broader and can apply to anyone.  Reasoning –.218 text suggests the fault requirement is subjective. Can’t abandon a child if there is no child (dead). Presumption of subjectivity for criminal offences. Obj standard could make scope too broad. Wilfull omission requires subj element. |

# Chapter 8 – Mens Rea and the Charter

## A. Absolute Liability and the Charter

* “Special stigma” crimes when subjective fault should be constitutionally required (the crime is so serious that there must be subjective standard, not objective)
* Who gets to decide what the substance of a crime should be, Parliament or the Court?
* Charter in 1982, equality portions added 1985 –
  + Nobody thought the Charter would be used to challenge the substance of laws (ie assisted dying, prostitution)
  + Was thought to be more used about procedural rights that go to having a fair process when charged with a crime
* IF It was Strict Liability there would be a defense of due diligence allowed. No defense allowed in Absolute Liability after Charter

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| Section 1 – ALLOWS CHARTER RIGHTS TO BE LIMITED IN SOME CIRCUMSTANCES 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. |
| Section 7 – RIGHT TO LIFE LIBERTY AND SECURITY 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. \*\* read section 7 as a qualified right – you don’t have a right to life liberty security specifically – you have a right not to have those interests taken away without |
| **11.** Any person charged with an offence has the right(*a*) to be informed without unreasonable delay of the specific offence;(*b*) to be tried within a reasonable time;(*c*) not to be compelled to be a witness in proceedings against that person in respect of the offence;(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; (CROWN MUST PROVE ALL ELEMENTS BARD) |
| **Section 33 over-ride clause** |

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| ABSOLUTE LIABILITY SECTION 7 CHALLENGE(Motor Vehicle Reference) |

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| Motor Vehicle Reference 1986 SCCLEADING CASE FOR CHARTER INTERP LIMIT MR |
| Issue – Is s 94(2) of the *Motor Vehicle Act* consistent with the *Charter*? NO  Holding – Section 94(2) is contrary to the principles of fundamental justice. (Someone could be unaware of license suspension)  Reasoning – Section 94(2) offends s 7 and is not salvaged by operation of s 1.  Ratio   * **Absolute liability and imprisonment cannot be combined.** * **Absolute liability itself doesn’t violate s 7 liberties alone – it only violates s 7 when there is a possibility of imprisonment.** * Can only be salvaged if under s 1 such a deprivation of liberty in breach of those principles of fundamental justice is, in a fee and democratic society, under the circumstances, a **justified reasonable limit** to one’s rights under s 7. * A law enacting an absolute liability offence will violate s 7 only if and to the extent that it has the potential of depriving of life, liberty or security of the person. * Obviously, imprisonment (and probation orders) deprive persons of liberty * There is no need that imprisonment, as in s 92(1), be made mandatory. * Administrative efficiency is NOT a good reason to enact absolute liability unless in exceptional conditions such as natural disasters, outbreak of war, epidemics etc |

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| R v Raham 2010 ONCAABSOLUTE LIABILITY \* DUE DILIGIENCE IN STRICT LIABILITY |
| Facts – Raham was passing a truck on a highway and had to speed to get past. Was charged with stunt driving or racing under s 172(1) of the *Highway Traffic Act* (punishable by a fine, a term of imprisonment, or both) after clocking 131 km/hour in an 80 hm/hour zone (over 50 km/hour above speed limit). Raham argued that the provision violated her s 7 rights because it created an absolute liability offence with imprisonment as a possible punishment.  **Trial**: strict liability offence - convicted  **CA**: absolute liability offence – unconstitutional – acquitted  **SCC**: strict liability – due diligence offence allowed – new trial ordered  **Who won? Crown – acquittal removed, new trial ordered**  Issue – Is the offence created by s 172(1) an absolute liability offence.  Holding – The offence of stunt driving by speeding creates a strict liability offence. **Wherever it is possible to interpret legislation as strict liability to keep it consistent with the Charter, you should**. Due diligence defense is allowed in strict liability cases  Ratio – The Charter dictates that if legislation can be reasonably interpreted in a manner that preserves its constitutionality, that interpretation must be preferred over one that would render the legislation unconstitutional.  The proper categorization of speed-based offences as absolute, strict, or full mens rea offences will depend on the outcome of the *Sault Ste. Marie* analysis.  **Stunt driving could apply a due diligence defence.**  The due diligence defence relates to the prohibited act, not to D’s conduct in a larger sense. D must show he took reasonable steps to avoid committing the offence charged, not that he was acting lawfully in a broader sense. It is not necessarily lost by virtue of actions surrounding the prohibited act, legal or illegal, unless those actions establish that the defendant, in committing the prohibited act, failed to take all reasonable care.  \*\* DUE DILIGENCE DEFENSE CANT BE BASED ON MISTAKE  \*\* ABSOLUTE LIABILITY WITH POSSIBILITY OF IMPRISONMENT WILL NOT BE UPHELD UNDER S 7 subject to an argument based on s 1\*\*  Courts should presume legislature acted within the limits of its constitutional powers and not in violation of the Charter. This presumption does not entitle a court to rewrite legislation to avoid a finding of unconstitutionality.  Reasoning – ***Sault Ste. Marie* analysis**:   1. The overall regulatory pattern of which the offence is party  * Analysis of *Highway Traffic Act* does not assist in classifying offence  1. The subject matter of the legislation  * Speeding – suggests a classification as an absolute liability offence  1. The importance of the penalty  * Availability of incarceration – suggests strict liability  1. The precision of the language used  * Language – some absolute some strict - does not clearly point to a categorization |

## B. Section 7 and the Mens Rea of Murder

222(3) Homicide that is not culpable is not an offence - not always criminal

222(4) 3 classes of culpable homicide:

* Murder Manslaughter Infanticide
* All other forms of culpable homicide fall into residual category of manslaughter s 234 – conduct causing death, fault short of intention to kill – either a) another unlawful act or b) criminal negl

222(5) – culpable homicide – causing death of a human being:

**(a)** by means of an unlawful act;

**(b)** by criminal negligence;

**(c)** by causing that human being, by threats or fear of violence or by deception, to do anything that causes his death; or

**(d)** by wilfully frightening that human being, in the case of a child or sick person.

229 **Culplable homicide is murder**

**(**a) where the person who causes the death of a human being

(i) means to cause his death, or

(ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;

**(b)** **Transferred intent – killed wrong person** where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless … by accident or mistake causes death to another human being… or

**(c)** Where a person, for an **unlawful object** (indictable offence), does **anything** (illegal or dangerous) that he **knows** ~~or ought to know~~ (“unlawful object murder” removed in Martineau - creates objective standard which is not constitutional) is **likely to cause death**, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being. \*\* Only used now for accidental death, most use 229(a)

230 – **all** **unconstitutional**

A-C repealed but still in Code – as principle of fundamental justice, must have subjective foresight of death still in Code until revision (*Martineau*),   
D repealed – deprives of liberty, fails s 1 at minimal impairment stage *Vaillancourt*

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| R v Vaillancourt230 (D) Contrary to S 7 and 11(d) of Charter |
| * Accomplice shoots someone while robbing pool hall, Vaillancourt party to offence, had tried to get bullets out of gun. Tried for murder. * 1st big mens rea case after Motor Vehicle Reference. * **The SCC held that s 213(d) (later s 230(d) violated ss 7 and 11(d) of the Charter, since it did not require proof of foresight of death, even on an objective standard (i.e. that the accused ought to have known that death would result) and deprives of liberty** * **Ratio:**   + **As a principle of fundamental justice, at minimum there has to be proof of objective foresight of death to convict someone of murder**   + Section11(d) mandates that the Crown prove MR beyond a reasonable dout – can substitute another element but only if the substituted element would satisfy jury beyond a reasonable doubt of the essential element   + Section 1 fails at the **minimal impairment** stage – not necessary to convict of murder if death was not foreseeable – other ways to deter use of weapons. * This suggests that the principles of fundamental justice require some level of proportionality in special stigma cases **Mandatory minimum sentences that are attached to murder mean there is no way to effect gradations of sentencing – SPECIAL STIGMA cases (murder most serious)** |

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| SHAND229 (c) OUGHT TO KNOW OBJECTIVE MR |
| * **To constitute murder, accused must have known death was likely**   + Must be more than an awareness of danger or possibility of death   + Must have subjective knowledge that death is likely * 229 (c) is the only surviving murder provision that does not require a specific intention to seriously harm or kill. * 229(c) “ought to know” originally there to convict those who negligently or willfully took serious risks with the lives of others while committing another unlawful offence BUT constitutes objective MR which is not enough for murder * **To meet the requirements of s 229(c), the Crown must prove:**  1. The intention to carry out the unlawful act 2. An additional component of mens rea – the intent to commit the dangerous act, knowing that it is likely to cause death |

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| R v Martineau (1991)(SCC)230(A) STRUCK DOWN \* 229(C) OUGHT TO KNOW REMOVED |
| Facts – Martineau, a young offender, and his friend, Tremblay, went out with a pellet pistol and rifle to commit a “b and e”. Martineau knew they were going to commit a crime, but did not know Tremblay would kill the McLeans. He was charged under (2131&d) now s 230(a).  **Trial**: convicted  **CA**: charge to jury invlaid – quash convictions, new trial ordered  **CA**: Post-Vaillancourt – as the law stood then, charge to jury cant be criticized  **SCC** upheld CA, quashed convictions, new trial ordered Who won? Martineau – got new trial  Issues – Does s 230(a) of the Code infringe or deny the rights or freedoms guaranteed by s 1 and/or s 11(d) of the Charter? YES  If so, is s 230(a) justified by s 1? NO  Holding – Section 230(a) infringes both ss 7 and 11(d), and cannot be justified under s 1.  Ratio – Section 230(a) lacks mens rea “whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being” – no intent required - violates the principles that punishment (stigma/penalty) must be proportionate to the moral blameworthiness of the accused (not upheld in general in courts – just in special stigma cases).  Murder requires an objective foreseeability of death (as in Vaillancourt)  BUT judge’s opinion is that some level of subjective foresight of death is required as well.  **NOW FOR SPECIAL STIGMA CRIMES (murder, theft, treason) – has to be a subjective foresight of death (intention, recklessness, willful blindness).**  A special mental element with respect to death is necessary before a homicide can be treated as culpable homicide / murder. It is a principle of fundamental justice that **a conviction for murder cannot rest on anything less than proof BARD of subjective foresight of death**.  Reasoning – Murder has long been recognized as the “worst” of peacetime crimes. It is therefore essential that to satisfy the principles of fundamental justice, the stigma and punishment attaching to a murder conviction must be reserved for those who either intend to cause death or who intend to cause bodily harm that they know will likely cause death.  As regards s 1, it is not necessary, in order to achieve the objective of deterring the infliction of bodily harm during the commission of certain offences, to convict of murder persons who do not intend or foresee death. The more flexible sentencing scheme under a conviction for manslaughter is in accord with the principle that punishment be meted out with regard to the level of moral blameworthiness.  L’Heureux Dube J (dissenting) – The argument about stigma is circular—offences don’t have freestanding stigmas.  Note – The practical result of this decision: Section 230(a-c) are invalid but still in the code; (d) was repealed. **The offence of constructive murder no longer exists.** Note: Unlawful Object Murder s 229(c)  * *Martineau* – The phrase “ought to have known” in s 229(c) of the Code (the “unlawful objective” murder provisions) is unconstitutional in its reliance on objective foresight as sufficient for conviction. The remainder of the definition was not question. |

## C. Application to Other Offences – Consequence Crimes

* Subjective fault is required for attempted murder, accessory liability for crimes requiring subjective fault, and war crimes and crimes against humanity
* However, the SCC has largely declined to broaden the constitutionalization of subjective fault

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| R v DeSousa 1992 SCC **CONSEQUENCE OFFENCE – CAUSING BODILY HARM/DEATH**  **OBJECTIVE MENS REA \* S 269**  **REQUIRES FORESEEABILITY OF HARM (NOT DEATH)** |
| Facts – Santos was struck by a piece of glass that was thrown by DeSousa during a fight at a party. DeSousa was charged with unlawfully causing bodily harm contrary to s 245.3 (now s 269). DeSousa brought a motion to have s 269 struck down as being contrary to s 7 of the Charter.  **Trial** – pre-trial order - indictment quashed as 269 could include absolute liability so fails s 7  **CA** – 269 complies with Charter and should not be struck down –trial ordered  **SCC** – upheld CA - trial ordered  Who won? Crown – new trial ordered as per CA  Issues – Does s 269 violate s 7 or 11(d) of the Charter? NO  If so, is s 269 a reasonable limit justified by s 1? N/A  Holding – Section 269 requires objective mens rea, and does not include offences of absolute liability therefore complies with s 7.  Ratio – **It is legitimate to punish someone more harshly for the consequence that their action caused**. Conduct may fortuitously result in more or less serious consequences depending on the circumstances in which the consequences arise. The same act of assault may injure one person but not another. The implicit rationale of the law in this area is that it is acceptable to distinguish between criminal responsibility for equally reprehensible acts on the basis of the harm that is actually caused. Page 39  **Unlawful act must include predicate offence that involves a dangerous act, is not offence of absolute liability, and is not unconstitutional**  **It is not a principle of fundamental justice that every consequence of the actus reus must have a mental element attached.** “One is not morally innocent simply because a particular consequence of an unlawful act was unforeseen… in punishing for unforeseen consequences the law is not punishing the morally innocent but those who case injury through avoidable unlawful action”.  **The mens rea element of s 269 has two separate aspects.**   1. An unlawful underlying offence with a constitutionally sufficient mental element – can’t be absolute liability, but could be strict liability 2. The underlying unlawful act is objectively foreseeable to cause bodily harm.   Reasoning – Section 269 does not create a special stigma offence (like murder) that would require subjective fault, as long as there is some aspect of personal fault for the underlying offence.  Note – DeSousa’s unlawful act is probably mischief of property. |

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| R v Creighton 1993 SCCUNLAWFUL ACT MANSLAUGHTER \* S 7 VALID |
| Facts – Creighton was convicted of unlawful act manslaughter (the unlawful act being trafficking), arising from the death of Martin, who died as a result of an injection of cocaine given by Creighton. S 222(5)(a)  Who won? Crown  Issue – Does the common law definition of unlawful act manslaughter violate s 7 of Charter? NO  Holding –   * Unlawful act manslaughter is entirely consistent with the principles of fundamental justice and it conforms to the Charter. * Unlawful act must include predicate offence that involves a dangerous act, is not offence of absolute liability, and is not unconstitutional (*DeSousa*). * Manslaughter has a much lower stigma attached than murder, and is an appropriate stigma for the unintentional killing of another. * Majority and minority both agree mens rea is objective – majority says “of bodily harm” and minority says “of death”   Ratio –   * S 222(5)(a) is consistent with the principles of fundamental justice * Manslaughter for unlawful act only requires **objective** **foreseeability of risk of bodily harm**, not foreseeability of death (*DeSousa*). To require foreseeability of death would mean that someone who killed another might get off on aggravated assault instead of manslaughter… “the terrible consequence of death demands more”. Brings up public policy and deterrence issues – not effective deterrent if you can get away with a lesser charge (ie aggr assault) * Manslaughter for criminal negligence only requires **marked departure** from standards of reasonable person in circumstances, not foreseeability of death * Symmetry isn’t a principle of fundamental justice – there are exceptions where the actus reus and mens rea aren’t proportionate – not everyone is guaranteed the highest possible threshold of fairness for everything. * Applies thin skull rule – take your victim as you find them – do not need to appreciate the specific vulnerability of that individual – some victims may die from the harm where others may not – so Courts must focus on risk of harm, not death * The appropriate standard of care on the objective test in manslaughter and in crime of negligence is objective - of the reasonable person in all the circumstances of the case - personal factors are not relevant, except on the question of whether the accused possessed the necessary capacity to appreciate the risk. * This does not mean that the question of guilty is determined in a factual vacuum. The legal duty of the accused is particularized in application by the nature of the activity and the circumstances surrounding the accused’s failure to take the requisite case (e.g. a welder who lights a torch causing an explosion may be excused if he has made an inquiry and been given advice upon which he was reasonably entitled to rely, that there was no explosive gas in the area).   **The care required by some activities is greater than the care required by others.**   * A person may fail to meet an elevated *de facto* standard of care in two ways:   + The person may undertake an activity requiring special care when not qualified to give that care.   + A person who is qualified may negligently fail to exercise the special care required by the activity. * The higher *de facto* standard flows from the circumstances of the activity, not from the expertise of the actor.   Reasoning –   * Creighton committed the unlawful act of trafficking in cocaine, and was guilty of criminal negligence, using the standard of the reasonable person (the reasonable person in the all the circumstances would have foreseen the risk of bodily harm). * Making mens rea subjective would make it the same as murder basically. * There should be symmetry between the mens rea and the attached elements of the actus reus. * Punishment must be proportionate to moral blameworthiness – manslaughter has a flexible sentencing structure and can be altered by circumstances * Manslaughter has a lower stigma than murder – its not intentional.   **Test – Mens rea of unlawful act manslaughter**   * **Objective foreseeability of the risk of bodily harm that is neither trivial nor transitory**, in the context of a dangerous act. * Foreseeability of the risk of death is not required. * All people held to the same standard of a reasonable person, unless no capacity to appreciate the risk of harm – no other personal factors considered as not a subjective test and doesn’t risk finding morally innocent people guilty   **Test – Penal negligence – (Criminal provision with objective standard) – THE LOWEST FAULT STANDARD FOR CRIMINAL OFFENCES**   1. **Is the actus reus established?** Requires that the negligence constitute a **marked departure** **from the standards of the reasonable person in all the circumstances** of the case. This may consist in carrying out the activity in a dangerous fashion, or in embarking on the activity when in all the circumstances it was dangerous to do so. THIS IS WHERE THERE IS SOME SUBJECTIVE PERSONAL CHARACTERISTICS INCLUDED 2. **Is the mens rea established?** The standard is that of the reasonable person in the circumstances of the accused. If a person has committed a manifestly dangerous act, it is reasonable, absent indications to the contrary, to infer that he/she failed to direct his/her mind to the risk and the need to take care. However, the normal inference may be negated by evidence raising a reasonable doubt as to lack of capacity to appreciate the risk. |

### Wholesale Travel Group

### Regulatory Offence – Reverse Burden of Proof in Strict Liability not contrary to Charter

* A corporation charged with a **regulatory offence** (strict liability) does have standing to assert that a law violates the rights of a non-corporate accused under s 7. If a law is invalid because it violates the Charter rights of any accused, then no accused can be convicted under the law.
* The objective test for mens rea in strict liability offences does not typically violate s 7.
* The reverse burden of proof in strict liability in the context of a regulatory offence is not contrary to the Charter, either because it doesn’t’ violate s 11(d) or because it is saved as a reasonable limit under s 1.

## Principles of Fundamental Justice

That the innocent not be punished is a principle of fundamental justice**.**

* Enshrined in s 7 of the Charter
* ss 8-14 of Charter are examples of principles of fundamental justice *MVR*
* Basic tenets and principals not only of our judicial process but also of other components of our legal system (such as intl conventions, the common law, etc) *MVR*
* Principles that are not public policy but rather in the domain of the judiciary as guardians of the justice system *MVR*
* The term “principles of fundamental justice” is not a right, but a **qualifier of the right not to be deprived** of life, liberty and security of the person; its function is to set the parameters of that right. Sections 8 to 14 address specific deprivations of the “right” to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s 7 *MVR*
* Many of the principles of fundamental justice are procedural in nature, but the principles of fundamental justice are not limited solely to procedural guarantees (some include substantive components) *MVR*
* Do not convict someone who is not of guilty mind *Creighton*
* Moral fault required for conviction should be commensurate with the gravity and stigma of the offence
* Principles of fundamental justice are satisfied if the mental fault and moral culpability are present, and proportionate to the seriousness and consequences of the offence charged *Creighton*
* There does not need to be absolute symmetry between the mens rea and the consequences of the crime – sometimes consequences don’t matter at all (attempts), sometimes the consequences elevate the crime by reason of seriousness while leaving mental element the same (manslaughter) – but fundamental justice principles are still intact *Creighton*
* Being held criminally responsible for negligent conduct on the objective test does not violate the principle of fundamental justice that the moral fault of the accused must be commensurate with the gravity of the offence and the penalty (*Hundal* / *Creighton*)

# Question approach

## Step 1 Go through the elements of the charge

1. Read case
2. Read offence – is there a linked offence creating provision? Included offences?
3. Re-Read Case
4. Who are you, and what is the standard of proof?
5. Identify actus reus elements

Do you need to define any words in the element?

Will Crown be able to prove every actus reus elements?

1. Identify mens rea elements – What fault standard applies?

## Step 2 Go through the facts and apply to each element

1. Go through each element again, apply facts
2. Will Crown be able to prove every mens rea element?
3. What available defences are there?

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| **As the Crown I must prove the following BARD:** | | |
|  | ACTUS REUS | MENS REA  “willful” “with intent”? SUBJ  Special Stigma-SUBJ  Strict/Absolute Liability OBJ |
| Conduct  What act(s) or omission(s) must the Crown prove for this offence? Must be voluntary |  |  |
| Circumstances  Many criminal offences require proof that the relevant act or omission was committed in particular circumstances |  |  |
| Consequence  Some offences require proof of particular consequences |  |  |
| *Causation* (conduct 🡪 consequences) must be proven (not its own mental element) |  |  |

Although the **statute is silent** on the mens rea element of …. It is likely that there is a subjective fault here… given the seriousness of the offence …. Etc OR argue no mens rea, or objective fault

Recklessness is X and wb is Y and I think on the facts they satisfy the test for Recklessness because….

Is symmetry necessary (DeSousa)?