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| **Ch1: Intro to Canadian Crim Law** |

**A. Purposes of Crim Law:** *Grant*🡪 Indian agent; what =crim? Penalty =? **B. Sources**🡪*Constitution, Code, Charter*; *Moyer*, 1994🡪‘offering indignities’ =?; Stat interp

**C. Commencement of Criminal Proceedings 🡪**police, information, JP issues process to bring accused to court to hear charges

**D. Classif. of Offences**🡪 Sum Conviction: prov ct; no PI; max 6ms/$5G); Indictable: 1) **s.553** theft under $5G prov ct w/ J, no PI 2) **s.469** murder, sup ct, PI, J + jury (unless both agree to J) 3) Elective a) prov ct, no PI b) sup, J, PI c) J + jury; Hybrid: Crown elects to proceed on either SC or Ind.

**E. Outline for a Crim Trial 🡪**arraignment, plea entered, Crown/D cases, closing arguments, ruling; **App Rvw:** Error in law; unrsnble verdict; miscarriage of justice

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| **Ch2: Proving a Criminal Case** |

**A. The Adversary System 🡪**criminal (civil is inquisitorial) **B. Intro to Evidence** **C. Evidential burden/BoP 🡪**BoP on Crown; SoP=BARD; Evidentiary burden @ prelim inq (sufficiency not credibility of evidence); Legal/persuasive burden @ trial – on Crown

*Lifchus* 1997 🡪 Explain “**BARD**” to jury: Use common sense, no sympathy/prejudice, not *absolute* certainty, higher than Bal/P, BARD not in “ordinary” terms, not same as moral certainty, BoP *always* on Crown, no everyday analogies, presump of innoc; (new trial ordered, trial J erred)

*Starr* 2000 🡪*Lifchus* as template not checklist, applies it strictly; new trial directed, trial J erred in instructing jury re: SoP; gang killing +1; closer to certainty than Bal/P

*JHS* 2008🡪Lack of accused’s **credibility** ≠ proof of guilt BARD; conviction restored, trial J instructed jury properly on relationship b/t accused’s credibility and Crown’s BoP (credibility not choice b/t POVs); *W(D)* BARD & credibility; trial not about competing cred; 4-step test: believe D acquit, RD acquit, don’t know acquit

*Oakes* 1986🡪In possession of narcotic, presumed to be trafficking; Test for **legal/persuasive** **reverse onus** on D to “*(dis)prove/establish*” on Bal/P, as violation of s.11d of *Charter*, justified as reasonable limit under s.1? No, fails rational connection; (higher onus than *Downey*); rebuttable presumption (//*Chaulk*, sanity RO but OK there)

**OAKES TEST: (1) Pressing/substantial objective (2) rational connection (3) minimal impairment (4) proportionality**

*Downey* 1992 🡪 RO (“*in absence of evidence to contrary*”), **evidentiary** **burden** on D to raise RD (lower onus than *Oakes*) re: living on avails **s. 212(3)** (was **s. 195(1)(J)**); uncons’l under s.11d, justified (min imprmnt and proportionate, passes *Oakes*); more deferential 🡪 RO/law saved under s.1

*St Onge Lamoureux* 2012 – Impaired driving; **rebuttable presumption** of ID, accuracy of breathalyzer; applies *Downey*, conviction upheld

**\*\*VIOLATES s. 11(d) IF CAN BE CONVICTED DESPITE EXISTENCE OF RD:** Only valid if proof of basic facts lead inexorably to proof of other

- Placing burden on A to disprove presumed fact violates *Charter*:

* If it is an evidentiary burden (may be justified: *Downey*); Where it is an AL offence
* Where presumption does not relate to essential element of offence (SCC has rejected distinction b/t essential elements)

- Does NOT violate *C* if would be unrsnble to conclude that presumed fact exists (*Downey*: presumed fact flows inexorably from proven facts; e.g. ID in drunk driving)

- Presumptions (ROs; ev or legal) violate *Charter* b/c allows s/t necessary for guilt to be presumed rather than *proven* by Crown BARD (some justified)

- **Legal burden on D on Bal/P**: RO in O to rebut presump(*Oakes* trfkg, NO; *Chaulk* sanity, OK; *Boudreault* C&C, OK); Ds (CL MoL: *Levis*; *extr* intox; MD/autom)

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| **Ch.3: Elements of Offence** |

**A. AR & MR**: AR=conduct; circumstances; consequences; MR=mental elements attached: subj (intent/knowledge/reckless) or obj (neg, mrked dep)

**B. Use/Interpretation of Statutes:** *Code*, **s. 2** definitions AND index; language, if no, go to case law, if no gen princ’s (true crime? public welf? etc)

**C. Included Offences:** **S. 662** E.g. 2nd ° murder included in 1st; accused can convicted of any offence charged/“included” in info/indictment

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| **Ch.4: The *Actus Reus***: Conduct (act/omission), Circ’s (presence/absence), Conseq’s (causation) |

**A. The Principle of Legality:** Can only be convicted of offence that existed at time committed (non retrospective); **no CL offences (s. 9)**, source of/know Os (policy)

*Frey v Fedoruck* 1950🡪 peeping in window, can judge ID new offence? NO, only Parliament (all prior CLOs abolished 1955) 🡪 all in *Code*, no excuse not to know

**B. Statutory Interpretation and the AR:** What act or omission must the Crown prove? What circ’s must be present/absent? Any consequences (causation?)?

*Boudreault* 2012🡪 Drunk asleep in car; Risk of danger = essential element of O of care and control? YES (min MR, conduct w/ vehicle *intentional* not accidental); acquittal restored (Dissent, provision preventative, risk of danger ≠ element); **s. 258(1)(a)** RO on D to rebut presump of C&C on Bal/P (*Whyte*: viol’s s. 11(d) but OK)

**C. Omissions** 🡪 Only criminalized 1) By statute (prov or *Code*: **s.215-218** duties) or 2) If there is *duty to act* (comm law); crim law reluc to pun Failure to Act

*Fagan* 1968 All ER 🡪 AR and MR must coincide in time at some point (duty to remove car) – contemporaneity; AR (accident + omit to remove) cont’d until removed

*Moore* 1978🡪 Bike/red light; duty to ID self? Majority deferential to police, PO duty to arrest/ID, Moore reciprocal CL duty to assist; Dickson dissent (likely view now but never overturned) omission to act only criminal where duty to act arises at CL or by statute

*Thornton* 1991 ONCA 🡪 Know’y donated HIV+ bld – Omission/fail to dischrg legal duty? No, but *CL* duty to refrain from conduct that could cause RF injury to others

**D. Voluntariness** – AR must be voluntary; *source* of involuntariness important (alcohol, mental disorder, automatism, sudden onset); **phys vs moral invol’ss**

**Debate:** Involuntariness as negating MR (making behavior unintentional) OR negating AR (b/c not truly act of D) 🡪 important distinction for AL offences (no MR)

*Lucki* 1955 SK 🡪 Car skidded/collided; failure to keep to right; being in left lane *involuntary*; guilty finding would be unjust; no AR

*Jiang* 2007 🡪 Asleep behind wheel, killed 1, dangerous driving; involuntariness negates AR, no requisite intent

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| **Ch.5: Causation**: If AR includes *consequences*, Crown must prove BARD that D’s actions *caused* them |

*Smith* 1959 ER🡪Stab, drag, drop, bad treatment – legal causation chain broken? No, req’s s/t truly extraneous, **more than mere setting**, still op’ve cause (**Ss. 224, 225**)

*Blaue* 1975 ER🡪Stab V refused blood transfusion; factual (“but for”) causation **&** legal causation; take victim as found **(‘thin skull’**), guilty; V has no duty to mitigate

**Causation of Death: Canadian Homicide**

*Smithers* 1978🡪Hockey fight/death; Cause **outside *de minimus***(//*Smith, Blaue*; not insignificant, significant); leading case on causation in Canada; low threshold

*Harbottle* 1993🡪Held legs @ SA = guilty 1DM? Std of causation > *Smithers* (**substantial & integral cause** – just **s. 231(5)** or *all* 1DMs?); got 2DM

*Nette* 2001🡪Hog-tied; 2DM Std of causation=? **Signif contributing cause**, restates *Smithers* (*Harbottle* **S&I** only for 1DM); 5-4 raises causation std (wrdg +)

*JSR* 2008🡪TO shooting, gun battle = joint endeavor, JSR causal responsibility (he anticipated, stayed, = responsibility // car racing); “but for” him

*Maybin* 2012🡪bar fight: bouncer = **intervening act** severing causation? Reasonable foresee’y & intentional, independent act useful but not determinative, test = *Smithers* beyond *de minimus*, signif contributing cause – guilty of MS (bouncer acquitted); how indep are interv acts from orig? Unfrsblty and indep for severance

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| **Ch.6: The Mental Element (*Mens Rea*) = Fault Requirement** |

**A. The Subjective Approach:** (higher penalties = more likely to be true crime/full subj MR)

*Beaver* 1957🡪Crim O w/ **serious conseq’s = subj** **MR** (*knowledge* that AND *what* you possess, not RP test) rather than AL (If Parliament wants to create AL offence w/ no MR, must do so *explicitly*: not done for possession); poss. charge quashed, selling conviction upheld; **Presumption: MR of true crimes is subjective** (“Full MR”)

*Sault Ste Marie* 1978🡪Pub welf off = **strict liability**; shifts emphasis from protection of indiv to society; C proves AR BARD, D prove DD on Bal/P

**B. Intent & Recklessness:** *Buzzanga and Durocher* 1980🡪MR promotion of hatred: “**willfully**” =?: Intention, *higher std* than recklessness in this case (R insufficient) (limitation vs. **s. 429**); *‘willfully’ tied to consequences not conduct*, high MR; **s. 429** definition (willful as *including* reckless) covers **ss. 429-447**; subj awareness that a circumstance does/not exist; subj knowl can sometimes be inferred from nature of act or its circumstances

**C. Fraud and *MR*:** *Theroux* 1993🡪Lie re: insurance; **Fraud** AR: 1. Dishonest act (obj) 2. Risk of/depriv; **MR** must map on to each – **Subj knowl** of: prohibited act, that it could have conseq/risk of depriv’n of another (reck’ss enough); HB of success not enough to negate MR; *Kingsbury* fraud MR: subj knowl of: Prohd Act & depriv

**D. Wilful Blindness** (deliberate ignorance; *suspect* s/t’s true, choose not to know, tantamount to knowledge)

*Blondin* 1971🡪scuba tank w/ hashish; MR of importing narcotic=? Knew or suspected s/t illegal in tank, didn’t know what, didn’t ask; Also, no possession w/o knowledge: *Beaver* + *Blondin*; WB is more than failure to inquire; deliberately shut eyes to s/t; MR must match offence (importing *narcotic*), not specific facts; G

*Briscoe* 2010🡪Luring/rape/murder; he drove, handed pliers, ° of participation =AR of Party to Murder; MR=?; ‘Didn’t want to know,’ WB sufficient to equate to/substitute for knowledge, distinct from recklessness, can be applied to murder

**E. Recklessness as Sufficient Knowledge** (Sees the risk, takes the chance; ≠ WB); aware of risk (but don’t necessarily have a *suspicion*)

*Schepannek* 2012🡪Wife brings contraband to jail=trafficking; Did she have requisite knowledge: Recklessness established/sufficient MR

**F. Motive:** *Lewis* 1979🡪rigged kettle; motive not element of offence, not required for conviction, ≠ MR or intent; circumstantial evidence only; absence of motive good for accused, presence may be important for Crown case; maybe be considered at sentencing but not necessary to prove guilt

**G. Transferred Intent** – *Attempted* murder resulting in injury to 3rd parties; can’t have MR for intended victim and AR on another; intent can be transferred if actual harm arises, and harm that arises is same as that which was intended (one V can be subbed for another in Os where harm occurs: A intends to kill B, kills C instead)

*Gordon* 2009🡪Bullet spray @ café; TI doctrine does NOT apply to inchoate/incomplete crimes of attempt, only ones where *harm part of AR*

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| **Ch.7: Departures from Subjective MR** |

**A. Absolute and Strict Liability** – SL maintains req’t of guilty mind but *shifts BoP to D* to establish *lack* of guilty intent on Bal/P (e.g. DD) (AL/SL no MR for Crown)

*Sault Ste Marie* 1978🡪Est’s middle category, SL cases (Crown proves AR, open to D to prove no guilty intent: honest reasonable mistake); Defence of **due diligence**: rsnble MoF or took all rsnble steps to avoid O; not negligent to obj std – not enough to est. no subj fault (high level); low BoP (Bal/P); PWO may have MR, obj or subj

**Test for AL: 1) Overall reg pattern (read whole Act together) 2) Subject matter of legislation 3) Importance of penalty 4) Language used**

**Justification for AL:** Protection of social interests requires high SoC (e.g. speeding); administrative efficiency, time and money; OK when legislature makes it clear

*Chapin* 1979🡪Duck hunting; not MR offence, not AL; =**SL**, regulatory/public welfare: accused has *opp to prove no MR* (Crown proves AR, D has burden to prove no obj neg, did DD on Bal/P; defence of DD, necessity, etc.); if Prlmt wants AL offence, must say so explicitly (absurdity if no DD)

**B. Crimes of Objective Fault** (concern with ‘reasonableness’ std – falls heavily on disenfranchised; OP/RP = who?); crim neg = **ss. 219-221**

*Tutton* 1989🡪Diabetic cure by God; **s. 220(b)** **crim neg causing death** (MS): C must prove MR on *obj fault* (*conseq’s* of mindless action punished in crim neg, not state of mind); higher than civ neg std (depart from RP), must be marked and signif depart from RP; *context* imp’t; who is RP? 3-3 dcn; **fail to provide nec’s**: marked depart

*JF* 2008🡪Foster parents; **manslaughter by crim neg** (marked AND substantial departure from RP) & **MS by FtPNoL** (marked departure), gloss on *Tutton*; Same AR, but diff levels of obj fault: MR for CN higher, impossible to convict of CN, acquit on lesser MR (FtPNoL **s. 215(2)**)

*Hundal* 1993🡪Overloaded truck; MR of **dang driv causing death** =subj/obj? **Modified obj test** (*marked* depart from RP, *in context* of surrounding events); consider: licensing rqrmts, auto nature of driving, wording of section (suggests obj MR), stats (tragic, policy reasons); follows *Tutton*

*Beatty* 2008🡪 **S. 249(4)** Momentary lapse/swerve/kill =*marked departure*? (MOT from *Hundal* for DDcD) NO; personal attributes *not* relevant (age, experience); don’t conflate AR w/ MR (MR = marked departure, but AR for ‘dangerous’ drvg just = dangerous in circumstances, viewed objectively)

*Roy* 2012🡪Applies *Beatty*; motorhome pulled out = marked departure from reasonable std of care necessary for MR of dangerous driving causing death? NO; Proof of AR does not necessarily = MR (do not infer MR from consequences); not serious enough to be crim, just SC under prov offence

*ADH* 2013🡪 **S. 218**: Walmart baby, **child abandonment MR** = subj or obj? Court says **subjectively** based on what accused knew; Court looks at broader context of provision: presumed legislative intent, purpose/breadth of offence, text/language, what is absent, etc. – appeal dismissed (ruling for mom; fault subj, thought dead)

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| **Ch.8: *Mens Rea* and the *Charter*** |

**A. Absolute Liability and the Charter** (Note: M v MS, same AR, diff is MR – for M, intent or knowl of subst’l certainty)

*Ref Re MVA* 1986🡪drive w/ suspd lic; **s. 94(2) of *MVA*** enacting AL offence w/ imprisonment violates s. 7, not justified under s. 1 (even though *MVA* pre-dates *Oakes*), contrary to **PoFJ** (crim resp attribute only to acts of free mind, intentional/reckless conduct; *only morally blameworthy to be punished*)

*Vaillancourt* 1987🡪pool hall; **min MR felony M s.230(d)=obj frsght of death** (if no, MS), w/o viol’s s.7, unconstitutional (rpld ‘91); PoFJ = no murder w/o MR

*Raham* 2010 ONCA🡪speeder charged w/ stunt driving, **w/ jail, if AL = unconst’l**; SCC says it’s SL (not unconst’l), new trial to raise due diligence

**B. S. 7 and MR of Murder** – obj foresight of death @ *Vaillancourt*🡪subjective foresight @ *Martineau* (**s.230(a)** violates s.7, not saved under s.1)

*Martineau* 1991🡪subsumes/goes beyond *V*; 15y/o A/A 2DM; **s.230(a)**=cause harm/death in flight; **Min intent for M** (stigma) **= subj foresight** (=PoFJ) – of no force

UOM: **s. 229(c)** kill s/o while trying to achieve UO – “ought to know” struck out (agst s. 7: implied obj); **s.229(a)** mean to/cause death**; s.230** constructive/felony 🡪 no force/effect ((d) repealed); *Shand* 2011 ONCA: s. 229(c) as only prov w/o req’g spec intent to harm/kill (struck out); *Vasil*: fire/kids, intent UO+act so dgr’s RP see death

**C. Application to other offences** – each element of AR has ME attached to it **≠** PoFJ (*DeSousa*); PoFJ = proportionate ° of stigma attached to offence

*DeSousa* 1992🡪NYE party; **s. 269** **MR for unlaw’y causing BH = obj FS** **of BH** (conseq); No viol of s.7, displaces *Beaver* presump; AR: pred O + BH, MR: UA MR +

*Creighton* 1993🡪Cocaine death; Post-*Tutton/Hundal*, how much to modify obj test for D’s charac’s; **S. 222(5)(a)** **MR of unlawful act MS = obj FS**//*DeSousa* (just diff conseq: death not BH, not practical for C to dist b/t D/BH); *do NOT personalize RP* *for obj fault MR* to fit A; MR consis w/ penalty/stigma (no M label), so no s. 7 issue

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| **Ch.9: Mistake – MoF** = D for Os w/ *knowl of circs*; BoP on D to give **AoR (suff ev, that if blvd, could lead to raising RD)**, full D |

**A. MoF** – CL; negates MR; open to A who holds **hon blf** in circ’s (subj), that if true, would entitle to acq’l (by –‘ing AR or MR); knowl of circs; BoP on D to give AoR

*Kundeus* 1976🡪Drug MoF; rejects defence; Dissent: need AR/MR of *same crime*, maybe attempt instead? But what if it’s MR for *more* serious offence (extra MR); MR subj so MoF also subj (**belief honestly held, not nec rsnble**)

*Pappajohn* 1980🡪MoF @ SA; MR requires intent **&** knowl that victim not consenting 🡪MoF; J must instruct jury on defence if there is AoR (none here), then up to Crown to disprove BARD; def of HbM belief *does NOT* *need to be rsnble* as long as honestly held (subj) – controversial (V must convince no consent; myths rnfcd)

**RAPE LAW:** 1983 chgs, post-*Charter*, species of gen assault law (sex nat), hybrid O (unusual as SC, e.g. of kid, can’t testify; ind: J or jury dep’g on nature of D), restricts Qs re: sex hist; NO: perpet consent, resist/fight, IC, marital exn, corrob ev, immed cmplt, gendered/PiV; def chg: NmN🡪YmY, harder to say MoF (**s. 265(4)**)

\*1992 **Rsnble Steps Provision** **s.273.2(b)** – Can’t raise defence of MoF unless at time took *RSs to ascertain complainant was consenting*, rsnbl =?

*Ewanchuk* 1999🡪SA (**s. 272**) Absence of consent (AR) subj (from cmplnt’s POV); MR: knowl of no consent; no D of implied consent; YmYes; L’H-D: SA as gendered

**CONSENT: S. 265(3)** No consent if due to fear (*Ewanchuk*); SA – AR: touching (vol), sex nat (obj), w/o consent; MR: intent to touch, knowl/WB/rcklsn re: no consent

**B. Mistake of Law** – Statutory, **s.19**, ign’ce of law ≠ excuse, even if unfair (policy), only applies to *Code* offences; MoL *is* poss for reg’y Os (CL) – BoP on D **on Bal/P**

*Campbell and Mlynarchuk* 1973 ABDC🡪Nudity, **s.19**, no MoL D but J discharges conviction (thought she could do it, that ruling overturned)

*Levis v Tetrault; Levis v QC Inc* 2006🡪Reg O = SL (*SS Marie*); court rejects CL D of officially induced error in law (no DD), but says it exists, 6 elements: error in law, D consid’d legal conseq’s, advice from off’l auth; adv was rsnbl/erroneous; D rsnbly relied on advice; BoP on accused on Bal/P

*Khanna* 2009 ONCJ🡪D of OIEoL successful; accused charged w/ concealing material circ. from CIC (per instructions of immigration official)

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| **Ch.10: Defences: Intoxication and Provocation** |

**A. Intox** (CL w/ stat exc’s) – *Leary* rule ÷ crim off’s into 2 categ’s for DoI: general (no DoI) and specific intent (do allow DoI), like murder ( MS); AoR

*Bernard* 1988🡪SA causing BH = gen intent (no DoI, but leaves open D of *extreme* intox); est’s *Leary* rule in Canada; recklessness of getting drunk enough to sub for blameworthiness of GI crime; obiter discussed possibility of DoI for those in state of automatism/extreme intox 🡪 see *Daviault*

*Daviault* 1994🡪DoI for SA (GI) while *extrem intox*? 5-4 yes (BoP on A to prove EI); applying *Leary* in EI violates *Charter*; dissent rejects for policy

\*\***Response by Parliament to *Daviault***🡪 **s.33.1**: Can’t use DoI for crimes where intox = part of offence, only GI off’s *w/o* element of assault (few)

*Drader* 2009 ABPC🡪Drunk B&E; *Daley* categories (mild, medium, extreme); med – diff b/t GI & SI important; B&E=SI, medium lev of intox not met, no DoI

**B. Provocation** – Stat: **s. 232**: Ltd app/part D;  M to MS (Elements: 1. A subj’d to sudden (subj) wrongful act/insult, 2. Would cause OP to lose control (obj)); AoR

*Hill* 1985🡪Homo’l adv murder; personal charac’s of accused? OP has sex/age/race (need to contextualize RP) but no error in not instructing jury; conviction restored; problematic – condones homophobia/constructs OP as homo’c, same-sex advance as wrongful act (but only partial D) (see *Tran*)

*Thibert* 1996🡪M of W’s bf @ parking lot; was there AoR to DoP? Yes, both obj & subj (despite premeditation!); Dissent: no ev of wrongful act to deprive OP of SC (marriage break up NO); fail subj (knew affair, not sudden); *intox not relevant* to ass’t of whether OP would have lost SC for DoP

*Tran* 2010🡪W/bf bed stabbing; no AoR to DoP – no insult, not sudden (knew of rltnsp; prepared!); OP operates under *Charter*, women ≠ property (tried to end rlnsp); D informed by soc norms/values; Don’t take pers factors in to account *too much* (otherwise test of OP in circ’s becomes subj!)

*Gill* 2009 ONCA🡪stargazing; 2DM knife from backpack; anger/fear not mutually excl’ve, DoP should have been left to jury (not just SD); new trial

*Nealy* 1986🡪Dance w/ gf/fight; *Rolled up* chg, M: prov+SD+intox (some of all, no AoR of any); J instruct re: *cum’ve* effs? Crown hates, D loves

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| **Ch.11: Defences: Mental Disorder** – Part XX.1 (p.551), Statutory: **S. 16**, BoP on **Bal/P** on party raising (Crown or D); Result = NCRMD |

**A. Mental Disorder** – NCRMD🡪//system (rvw board/special disposition – acc’d has MD, unable to appreciate nature/quality of act OR incapable of knowing it was wrong; BoP on party who raises issue (whoever trying to show MD has BoP on Bal/P, *not* AoR); excludes self-induced intox

*Swain* 1991🡪*Charter* challenge to old insanity prov; SCC invalidated, enacted new; 4 circ’s when MD can be put before court: **1)**A raises it at outset **2)**Accused waits for guilty fdg, raise MD before conviction **3)**Accused puts mental state in issue during trial **4)**After G/before conv, Crown raises MD

*Chaulk* 1990🡪Psycho teens ‘above law’ M; D of insanity can: negate MR, AR or excuse; does **s.16(4)** RO on A to rebut pres of sanity offend s.11(d)? Yes, but justified

**B. Automatism** – *Source* of dissociative state important (self-induced; alcohol/drugs; MD); **MDA**🡪NCRMD/special verdict; **NMDA**🡪acquittal! BoP on D on Bal/P

*Rabey* 1977 ONCA🡪Rock hit; no DNMDA; **external** cause *not* enough to trig dis’ve st in OP, must be internal cause/MD; new trial, jury decide

*Parks* 1992🡪Sleepwalk; med ev: SW’g ≠ DoM (so =NMDA); **policy** cons’ns: no **continuing danger**, tests ext/int cause distinction; = *NMDA, acquittal* upheld

*Stone* 1999🡪Truck stab; look at nature of trigger, likelihood of recurrence; for all claims of automatism, **A must establish basis for D on Bal/P** (ev burden), violates s.11(d), saved by s.1, trial J decide if condition = N/MDA; no claim for NMDA, only MDA put to jury

**C. MD & Intox:** *Bouchard-Lebrun* 2011🡪Ecstasy/assault; **s.33.1**: extr intox no D; no MD, psycho just sympt of s-i intox, no just’n for exmpn from crim resp under **s.16**

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| **Ch.12: Self-Defence** |

Stat**:** new 03/13 (**ss. 34, 35**), no restr’s, usually for *Os w/ assault*, full D/acq’l; BoP on A to give D AoR , burden shifts to C to disprove BARD; applies to D of 3P/prop

*Lavallee* 1990🡪*Old*: BWS; SD? (Imm’ce? Escape opts? Rsnble appr? proport? subj/obj); gender essential to rsnbleness; rltnsp b/t SD and reality of women in abus rlnsp; MOT: cycle of violence, detect changes/signs (imm’ce); **duty to leave? No**; learned help’ss; BWS≠acq’l, just if justif (psych expln, can apply to DoD, DoN, prov)

*Mallot* 1998🡪Kills ex & gf; lots of ev of abuse; not all BW look alike, D doesn’t fit stereotype, still entitled to SD D, *was* explained/conv upheld; expert ev for psych eff

*Cinous* 2002🡪Gas stn; was there AoR (burden on D) to SD defence to put to jury**? Old SD: 1) assault 2) RA of death 3) RB of no alt’s** **(all on *both subj/obj*)** – not met on 3)obj (could have called for help); **AoR** = ev on record upon which properly instructed jury acting rsnbly could acquit (Q of law, subj to app rvw); conviction affirmed

*Caswell* 2013 SKPC🡪TV/DoProp; **s.35** peaceable possession; believe on rsnble grds re:dmg; act (offence) to prevent; rsnble force; AoR to D

*Urquhart* 2013 BCPC🡪Coastguard; provisions do NOT apply retroactively if affect substantive rights, do if just changes procedure; court applies both; D provoked so old SD not available, but no claim for SD anyway since force used was not defensive but angry, more than reasonable

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| **Ch.13: Defences of Necessity & Duress** |

**A. Necessity** – legal recog of moral (not phys) invol; no RP could have refrained from crim conduct in context; CL defence, applies to all (hard for M); full defence (rarely successful); accused must give each element AoR to be put to jury, Crown must disprove BARD; doing illegal act does not disentitle accused from DoN

*Perka* 1984🡪Drug boat; AR & MR met; Nec = excuse (*not* justif); ob’ce of law precluded by emerg; elements of D: 1. Clear/imminent peril (MOT) 2.No rsnble legal alt (MOT) 3. Proport’y (harm inflicted less than harm avoided) (SOT); illegal activity does not disentitle D from DoN (new trial, jury charge)

\*\***Excuse**: concedes wrongful but circs such that ought not be attrib’d to D (intox, MD, auto, MoF, necess) **vs.** **Justification**: challenges wrongfulness of crime (SD) \*\*

*Latimer* 2001🡪Tracy CP; no fund’l right to a defence; no AoR to *any* of 3 elements of Nec (proportionality unlikely w/ death!); conviction upheld

*Ungar* 2002 ONPC🡪Speeding 1st responder; imminent peril YES, no alt (life or death!), prop’y Yes; court scolds Crown for pursuing charge

**B. Duress** – Stat: **s.17**, req’s threatener be present for crim act, threat = immed to A, some Os excluded; **s.8** preserves CL Ds not incons’t w/ stat; BoP on D to give AoR

*Paquette*🡪**Stat D applies only to princ Os**; CL DoD applies more broadly, doesn’t req threatener be present or threat be immediate (BoP same)

*Hibbert* 1995🡪Aptmt shooting; applies **CL D** to party to offence of agrvtd assault; duress (excuse) does NOT negate MR, just affects motive; requires no RLA/safe ave of escape (MOT); threat does NOT have to be immed, threatener does NOT have to be present but ev of that will help show rsbln’ss

*Ruzic* 2001🡪Yugoslav drugs; underinclusiveness, immediacy, and presence req’s of **s.17** (stat defence) violate s.7 of *Charter*, unjustifiably; only morally voluntary conduct attracts crim liab’y = PoFJ, *MVA* (she has MR, just motive in Q); threat against 3rd party mom; timing issue

*Ryan* 2013🡪 DV hitman; no DoD (no AoR); could have been abuse of process (bad cops); stay of procdgs; CL/stat DoD merging; Stat defence req’s: **1)** Threat of death/BH, can be agnst 3rd P **2)** A believes threat will be done (MOT) **3)** D must not be party to crim assoc/consp (subj) **4)** O not on list of excl’d, suppl’d by CL: no SAE [MOT], close temp conn, prop’y harm inflicted/threatened; CL defence req’s: Threat of D/BH, RB will be done (MOT), no SAE (MOT), close temp conn, prop’y

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| **Ch.14: Attempts, Aiding & Abetting** |

**A. Attempts** – **S. 24:** AR (beyond mere prep), MR (*intent*); Sep charge (murder) OR implied lesser/incl O; pnshmt *less*, **s.463** (conseq’s, opt to back out); inchoate

*Ancio* 1984🡪Accidental gun discharge/miss; defines **MR of attempted M = Intent to kill** (recklessness *not* sufficient; *higher* than actual murder)

*Sorrell and Bondett* 1978 ONCA🡪Balaclava chicken, attempted rob; MR = intent (none here) so AR = Act beyond mere prep (not met); rltnsp b/t intent & AR

*USA v Dynar* 1997🡪$ launder sting; impossible attempts; no distinction b/t factual (shooting from too far) & legal imposs’y (steal own s/t); reason *why* s/o was thwarted irrel, essence is MR/**intent** (but dist’d from imag’y crime – think s/t is crime, not🡪yes D of imposs’y); **attempts punish *intention*** (can be G of attempted legal imposs)

**B. Aiding and Abetting** – **S. 21:** Princ O & A/A both parties, =ly culpable (unlike attempts), guilty of *same* O; degree of part’n irrel’t; **spec. intent**

*Briscoe* 2010🡪Lure/rape/M; A/A – drove, handed tools, held legs = sufficient particip? Basic elements of A/A: AR = doing/omitting to do s/t to assist/encourage perp to commit O (broad def), MR = intent to render ass’ce *for purpose* of aiding perp to commit O, knowl that perp intends to commit O (*WB sufficient*), AR/MR must overlap

*Fraser* 1984 BCCA🡪Grassy knoll assault/robbery; defence of intox (specific intent; robbery = assault + intent to steal); requires *knowledge* of purpose of principal (very specific intent, so D can raise DoI); trial J erred in not putting it to jury, new trial; A/A is *always* a specific intent crime

*Dunlop and Sylvester* 1979🡪Rape @ dump; Ds saw; simply observing ≠ A/A, must play role/encourage (no ev); Dissent: ev of aid: bring beer, etc.

*JSR* 2008 ONCA🡪TO shoot out; no TI, rejects app of party liab’y (intent was to kill himself?!); inapprop use of party prov; unlawful obj M **s. 229(c)**

*Thatcher* 1987🡪Politician wife murder; some ev as PO, some as A/A; jury unanimity on reasons? No, crim liab’y same, guilty 1DM (same sentence)

*Gauthier* 2013🡪M/suicide movie; incompat Ds to jury? (diss’ve st, no intent, **def of abndmt**); **any D w/ AoR to jury** (even if incomp’ble), no AoR here; **DoA**: **1***Intent* to w/d, **2***timely comm’n* of w/d, **3**notice *unequiv’l* **+** (for A/A) take, in manner prop’l to part’n, **4**rsnble steps to neutralize previous eff’s of particip (encrg to withdraw)

*Fournier*🡪W/hitman cancel; req’s service, provides dtls (H’s address, where/when), calls leaves VM to cancel, claims DoA – enough? No (**4** not met)

*Vu* 2012🡪Kidnapping/confinement moved around; kidnapping = ongoing, s/o who joins after initial apprehension guilty of K not just UC

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| **Ch.15: Sentencing** Part XXIII (p.613) – E.g. Cond’l (house arr), probation (susp’d S), fine, discharge, imprison (can combo 2 max) |

**A. Principles of Sentencing** – set by TJ @ S hrg; based on trial facts but also intro new ev (AFs by C must be BARD); difficult after jury trial (draw inf’s from dcn)

*Nasogaluak* 2010🡪Princ’s guiding S’g: denunc, gen/spec deter, rehab, reparation; ***proportionality* s. 718.1** (grav of O/moral blm’ss of A); non exhaustive, none trumps

*Sweeney* 1992 BCCA🡪DD death; troubled bkgd; Wood JA: re-exam S princ’s; DD as social prob (can’t be solved by CJS), but we accept some (BA lev >0); moral culp’y same w/o death, little weight to VIS (CJS not for retrib/heal Vs), no rehab in jail, no deter from long S; acct’y #1 (req’s tlrg, sanction must serve purp); vs *Smith*

*Smith* 2013 BCCA🡪Abo woman DD/death; trial J//*Sweeney*; CA overturns, low mental capacity *irrelevant*, error to  S, propor’y key, deter/denounce legit

**B. Minimum Sentences** *– Latimer*: D argued min S (2DM LWOP/10yrs) = C&UP under s. 12 (uncons’l), NO, didn’t address indiv. Con exemption

*Ferguson* 2008🡪RCMP kills drunk; 4yr MMS for MS w/ firearm **≠** C&UP; trial J erred re: extra fdgs of fact; can challenge Const’ty for rsble hypo’s too; **rejects CON exemption for MMS** (approp remedy for uncon’l MMS = strike it down) 🡪 CE would go against Parl’s intent in creating MMS (same for all)

**C. Maximum Sentences** – who/what is it reserved for? S’ing as blend of circs of offence and of offender; global S: total should not be unduly harsh

*M(L)* 2008🡪 global S restored: SA 10 yrs + 5 consec for child porn; defer to trial J; **rejects “worst O/O”** (can always think of worse); max S OK in circ’s (not unfit), look at mitig & aggrav Fs (AF: record, rptd nature, V impact, parent rltnsp, pos of trust/auth, quantity, means ’net, violence) must be *rsnble* in circ’s and obj’ves

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| **Ch.16: Aboriginal Offenders & Sentencing – S. 718.2(e)**: Consider alt’s to imprisonment |

**A. Aboriginal Peoples and Sentencing** – high rates of incarc’n, esp for abo’s; **s. 718.2(e)** – fctrs when S’ing abo offender (poverty, add’n, young)

*Gladue* 1999🡪abo woman drunk/stab; sought house arr, got 3yrs; ct must consider **718.2(e)** fctrs, abo’s disprop’ly in jail (*not* auto race-bsd discount)

*Ipeelee; Ladue* ‘12🡪 Brch of LTSO, ind’ble O, 10yr max (1997 LTOD fills gap b/t fixed S & full release and DOD, which is hard to get; prob = worst Os, least supervision); Goal of LTSO: protect publ **&** **rehab**/reinteg; cts must take jud notice of sys’c fctrs; **s.718.2(e)** *not* disc; viol Os not excl’d

**B. Parity/Totality** (**ss. 718.2(b)** and **(c)**) –– Totality: pref for *concurrent* (not consecutive) S’s in Canada (vs. US, “310 yrs”)

*Akapew* 2009 SKCA🡪27yr rec, flee police; no principle req’s S of **co-Os** be similar; indiv consid’s bal’d w/ overall obj’s of S’ing; trial S unfit; “worst offender, worst offence” creates mythical std never reached (could *always* be worse)

**C. Mitigating Factors** (**s. 718.2(a)**) – *R v M(L)*: aggr’g Fs must be proven BARD, mitig Fs must be proven on Bal/P

*Nasogaluak* 2010🡪Police misconduct can = Mitigating Factor in S’g; S’g princ’s: denunc, G&S deter, rehab

*Draper* 2010 MBCA🡪MFs in context of 1st time O (youth, no crim history, mental health, addiction; diminished capacity – AF *or* MF); S reduced

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| **SCC-defined Offences**Fraud 🡪 *Theroux*Sexual Assault s. 271🡪 *Ewanchuk*Unlawful obj M s. 229(c) 🡪 *Vasil, Martineau, JHS, Shand*Unlawful act causing bodily harm s. 269 🡪 *DeSousa*Unlawful act manslaughter s. 222(5) 🡪 *Creighton*Dangerous driving causing death 🡪 *Beatty*Crim Neg causing death s. 220(b) 🡪 *Tutton*Duress 🡪 *Ryan* | **PoFJ**- Morally blameless must not be punished (*Ref Re MVA*)- Moral blameworthiness must be proportionate to stigma and penalty (*Martineau*)- Only voluntary conduct, product of free will and controlled body, unhindered by external constraints should attract liability (*Ruzic*)- Matching AR/MR (can’t sub blameworthiness of getting drunk for GI) (*Daviault*) | **Laws of no force and effect (unconstitutional)**- Constructive M: S. 230(a)(b)(c), (d) repealed (*Martineau*)- Unlawful obj M: S. 229(c) “ought to know” struck (implies obj MR) (*Martineau*) |

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| **CHECKLIST**/FLOW CHART: THINGS TO CONSIDER AND DISCUSS |
| *“In order to prove A is guilty of an offense contrary to \_\_\_, the Crown will have to prove BARD that (****AR****) x, y, z and (****MR****) a, b, c.”* |
| * **Go to the *Code*/offence** (look at language; s.2 and Index under D for definitions) 🡪 Check to see if AR and/or MR are made explicit
* **Burden of Proof (on Crown)** 🡪 Evidentiary @ prelim inquiry; legal/persuasive @ trial 🡪 BOTH on Crown
 |
| * **Standard of Proof (BARD)** 🡪 Beyond a Reasonable Doubt (Jury instructions; credibility issues)
 |
| * **Causation:** *Crown must prove BARD that actions of accused* ***caused*** *consequences of act (connection b/t conduct & consequences of AR)*
* Causation issues usually arises in cases where **bodily harm/death** occur (*Smithers/Nette, Harbottle, JSR, Maybin*)
* Factual (“but for”, phys/mechanical sense) + legal (respons. in crim sense) \***must prove both**\* + intervening act (break chain?)
 |
| * **Reverse Onus? Is it (un)constitutional?**
 |
| * + *Legal/persuasive burden*: Once Crown proves AR, D must (dis)prove MR **on Bal/P** (“establish/prove”)
 |
| * + - s. 11(d)*,* presumption of innocence 🡪 unconstitutional (*Oakes* 4 part test); justified under s.1?
 |
| * + *Evidentiary burden*: “In absence of evidence to contrary”, D must **raise RD** (*Downey*), apply *Oakes* test
 |
| 1. ***Actus Reus* = ?** – Definitions **(USE *CODE*;APPLY FACTS TO EACH ELEMENT);** Check case law, make **interpretive** arguments
 |
| * 1. **Conduct** 🡪 Voluntariness (*Lucki, Jiang*); What act (stat’y) or omission (CL/prov or fed statute: *Fagan, Moore, Thornton*) must Crown prove?
 |
| * 1. **Circumstances** 🡪 Presence or absence (e.g. w/o consent; w/ weapon)
 |
| * 1. **Consequences 🡪** If required, must prove **CAUSATION** (*Smithers/Nette, Harbottle, JSR, Maybin*) 🡪 factual + legal + intervening act?
	2. **[Defences?** Source? (CL or statutory); Scope? (All offences? Exclusions?); Onus? (On whom? On D to prove on BoP?)**]**
 |
| 1. ***Mens Rea* = ?Does it apply to *every* element of AR or just certain ones?** (E.g conduct > intent, circum > knowl, conseq >intent? etc.)

\*\*Contemporaneity with AR (*Fagan*) 🡪 presume all *Code* offences = true crimes, i.e. subj fault, but that is rebuttable**\*\***If not explicit in **statute,** see **case law**🡪cases interpreting statute; If making argmt that s/t is(n’t) part of MR, ref *case* it is pursuant to **\*\***\*\*Gen. principles of interp (**clues**): language, **seriousness of penalty** (*Beaver*: higher/sub), analogies to case law on related Os, basic presumptions, etc.**\*\***Look at surrounding context/statutory scheme 🡪 is MR of other offences explicitly ID’d as subj, SL, AL, etc? |
| * + **Subjective** (*Beaver*); true crime presumed full subj MR (usually explicit lang: “willfully”, “w/ intent”, “knowingly”) 🡪 attach to which/all elements?
* Knowledge – actual awareness that circumstances exist or not (*ADH* – what accused *actually* knew at time)
* Intent (*Buzzanga*) – done deliberately/not accidental/**willfully**; *intends consequence* when acts for purpose or certain to result
* Recklessness (*Schepannek*) – sees the risk, takes the chance (usually sufficient to meet MR; recklessness = sufficient knowledge)
* Willful blindness (*Blondin, Briscoe*) – deliberate ignorance (have a suspicion of something, choose not to inquire)
 |
| * **Strict Liability 🡪** PWO presumptively SL (*SS Marie, Chapin*); if surrounding off’s expressly SL, can infer AL if no mention
 |
| * **Objective**
* Crim neg (marked departure), causing death (marked and significant/substantial departure: *Tutton/JF*)
* Dangerous driving (modified obj test: marked departure from RP in context: yes in *Hundal*, no in *Beatty, Roy*)
 |
| * **Absolute liability**/AR only (e.g. speeding; If feds wants to create offense of AL, must say so *explicitly*, *Beaver*; limits on this today)
* **MR maps on/attaches to what element(s) of AR?** (All elements of AR may not have corresponding MR and vice versa; usu subj MR)
* **Is MR *Charter* compliant?** 🡪 Apply s. 7 (e.g. AL offence w/ prison = unCON; M = high stigma/penalty = required subj MR, less for MS)
* Apply **CASE LAW**,dissents, unsettled law, to facts
* ID areas of **difficulty/problems** (***included offences*** if Crown cannot prove full AR/MR, **s. 662**)
* Could accused be charged with an **Attempt?** Could accused be charged as a **Party?**
* Evaluate **chances of success** – will Crown have difficulty proving AR or MR or certain elements? Why/not?
* **Defences** (negate element of O) 🡪 MoF, MoL, Ext/Intox, Prov’n, NCRMD, Automatism (N/MDA), SD, Necessity, Duress, OIEoL
 |
| * BoP: usually D must give ***AoR*** to each element to be left w/ jury, or s/t prove on Bal/P(OIEoL, EIntox) then C must disprove BARD)
* ID elements 🡪 CL or stat? 🡪 Partial or complete?🡪 All or only some Os 🡪Result if successful🡪Evaluate probs/chance of success
* Issues of **Credibility?**
* **Sentencing** 🡪 Universe of S’s avail (max/min)? What is approp range within? (*Code*; Case law/sim facts; cognate Os, ToConcord’ce)
* Proportionality; principles of S; aggrav/mitig factors; offender/circs (abo?); previous time served (ltd by Bill C-25); alt’ves to jail
* Ancillary orders (e.g. weapon prohib, DNA order, SO reg) – Discretionary or mandatory?
 |

***MR* Spectrum:**

1.Crown 2.Crown 3. Strict Liability 4. Absolute Liability

BARD BARD Crown – AR, BARD **No MR**

MR MR Accused – due diligence Crown prove AR

**Subj**  **Objective**  BoP, objectively negligent  (e.g. speeding)

Fault Fault (crimes(*Sault Ste Marie*)

(*Beaver)* of crim neg)

 (*Tutton, JF, Hundal, Beatty*)

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| **Case** | **Provision** | **Offence** | **Subj/Obj** | **MR** |
| *Beaver* |  | True Crimes | Subj | Full MR |
| *Theroux* |  | Fraud | Subj | Subj knowl of proh’d act/depriv (recklessness enough) |
| *Tutton, JF* | s. 215(2) | Failing to provide the necessities of life | Obj | Marked departure from RP |
| *Tutton* | s. 220(b) | Crim Neg causing death | Obj | Marked and significant departure |
| *JF* |  | Manslaughter by crim neg | Obj | Marked and substantial departure |
| *Hundal* | s. 233 (now s. 249) | Dangerous driving causing death | MOT | Marked departure from RP (in context) |
| *Beatty* | s. 249(4) | Dangerous operation of MV causing death | MOT | Marked departure from RP (no personal characteristics) |
| *Roy* |  | Dangerous driving causing death | MOT | Marked departure from RP |
| *ADH* | s. 218 | Child abandonment | Subj | Based on what accused actually knew |
| *Vaillancourt* | s. 230(d) (*repealed*) | Felony Murder | Obj | Objective Foresight of Death (repealed) |
| *Martineau* | s. 230(a) (of no force or effect) | Murder | Subj | Subjective Foresight of Death (=Minimum MR for M) |
| *Raham* | s. 172(1) of *HTA* | Stunt driving/racing | SL | Strict liability: Crown proves AR; BoP on D to show DD (new trial for D to raise due diligence) |
| *SS Marie* | s. 32(1) of *ON Water Resources Act* | Discharging pollution into water source (provincial statutory offence) | SL | Strict liability: Crown proves AR; BoP on D to show DD |
| *Chapin* | s. 14(1) of *Migratory Birds Regulations* | Regulatory offence (hunting on private property) | SL | Strict liability: Crown proves AR; BoP on D to show DD |
| *DeSousa* | s. 269 | Unlawfully causing bodily harm | Obj | Obj FS of bodily harm (consequence) (+MR of predicate O)(displaces *Beaver* presumption of subj MR for true crime) |
| *Creighton* | s. 222(5)(a) | Unlawful act manslaughter | Obj | Obj FS of death (do NOT pers’ze) (+MR of unlawful act) |