Law 120: Canadian Criminal Law

**1. Introduction**

What kind of harm is the criminal law designed to address?

* Offences against the state, public order, public security, etc.

R v William Edward Grant (1965)

* F: Grant knowingly misused a relief fund for housing and development
* I: Should Grant face criminal conviction, given the just nature of his act?
* L: *Financial Administration Act*: wilfully falsified returns = indictable offence
* R: Cannot condone a clear breach of statute enacted by Parliament

*Sources of the criminal law*

* Federal power to regulate criminal law: S. 91(27) of the *Constitution Act, 1867*
* Provincial power to “fine, penalize, imprison”: S. 92(15)
  + Summary conviction, up to one year
* Abolition of common law offences: S. 9 of the *Criminal Code* 
  + Contempt of court exception
* Preservation of common law defences: S. 8(3) of the *Code* 
  + Some defences codified, others remain CL
* Definitions of terms: S. 2 of *Code* and Index
* All federal and provincial laws must comply with the *Charter* 
  + S. 8 unreasonable search/seizure; 9. Arbitrary detention; 10. Rights upon arrest; 11. Rights upon charge (d. presumed innocent; g. not to be charged retroactively; h. double jeopardy); 13. Self-incrimination.

*Classification of Offences*

* Summary Conviction: Lesser offences, trials take place in provincial court without jury. Max 6 months/$5000 fine.
* Indictable: Federally created, in *Code* and other statutes. Three types of trials for indictable offences:
  + Offences listed in S. 553 of the *Code* 
    - Provincial jurisdiction. Trial held in provincial court before judge alone
  + Offences listed in s. 469 of the *Code* 
    - Superior court jurisdiction (e.g. BCSC)
    - Preliminary inquiry
    - Judge and jury (unless both parties consent to judge alone)
  + All other indictable offences
    - Accused may elect mode of trial
      * Provincial
      * Superior court by judge alone
      * Superior court by judge and jury
* Hybrid offences: Crown elects summary or indictment. Indictment = more complex procedure, may burden victim.

**2. Proving the Crime**

*Evidence*

Evidence must be relevant, material, and admissible:

* Relevant: makes a proposition somewhat more likely
* Material: probative of a live legal question
* Admissible: meet rules of evidence, complies with *Charter*

\*Not all admissible evidence is credible or sufficient. This is to be considered by the trier of fact. Juries make findings of fact and apply the law set out by the judge.

*Burdens of Proof*

* Crown’s legal burden: to prove each element of the offence
* Crown’s persuasive burden: to do so beyond a reasonable doubt
* Crown’s evidentiary burden: to introduce some evidence on each element of the offence that, if believed, could lead to a conviction.
  + Sometimes, this burden is placed on the accused. (Reverse-onus, statutory presumptions, certain defences).
  + “No evidence motion”: argue the Crown failed to meet evidentiary burden, cannot rule on guilt or innocence.
  + If evidentiary burden not met at preliminary inquiry, accused discharged.
  + “Permissive presumptions”: allow, but don’t require, inferences from one fact to another.

R v Lifchus (1997) SCC *BARD = a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence.*

* I: How should BARD be explained to a jury?
* A: Presumption of innocence, burden of proof on Crown to prove every element; Not proof beyond any doubt; higher standard than civil trials.
* D: Verdicts may be set aside if charge read to jury likely led the jury to misapprehend the standard of proof.

R v Starr (2000) SCC *When instructing jury on criminal standard, it is important to contrast BARD with the civil standard and to explain the proximity to absolute certainty.*

* F: Jury told that ‘reasonable doubt’ to be used in everyday, ordinary sense
* I: Was the jury misled as to standard of proof?
* A/R: Necessary to contrast BARD with civil standard, explain proximity to absolute certainty.
* Diss: All relevant legal information was present, *Lifchus* is only broad standard.

R v JHS (2008) SCC *Lack of credibility must not be considered proof of guilt; jury must be under no misapprehension as to the standard of proof to apply*

* F: Determining credibility of witness vs. Crown’s burden of proof
* I: Was the principle of reasonable doubt, as it applies to witness credibility, properly explained at trial? Court considered *W(D)* instructions which deal with “credibility contests.”
* A: Burden *never* shifts from Crown to prove *every* element of offence. Lack of credibility must not be considered proof of guilt.
* D: Instructions to jury were sufficient, no misapprehension of standard.

R v Oakes (1986) SCC *Imposing a legal burden (to “establish”) on accused violates s. 11(d); four-part test for whether violation justified under section 1.*

* F: Section 8 *NCA*: if found in possession, accused required to “establish” that he was not in possession for trafficking.
* I: Does this reverse onus violate S. 11(d) of the *Charter*? Can it be justified under S. 1?
* L: *R v Appleby*: the term “establish” imposes a legal burden on the accused to prove his case on the balance of probabilities.
* A: S. 8 violates *Charter*. Justifiable under section 1? **(Oakes Test):**
  + Standard of proof under s. 1 is BOP; high degree of probability req’d.
  + Must satisfy four-part test:

1. Objective of sufficient importance (pressing & substantial)
2. Rational connection between objective and means
3. Minimal impairment of right
4. Proportionality between impairment of right and importance of objective

* D: S. 8 fails rational connection test; no inference of trafficking warranted.

Reverse Onus Clause: allows the Crown to prove one thing and, by doing so, presumptively proving another. Presumptions must then be rebutted by accused. “Establish” means to prove on the BOP; this could lead to situations in which there exists a reasonable doubt as to guilt, but conviction is none the less required. Since *Oakes*, the rational connection test has shifted, allowing some reverse onus presumptions to withstand the test.

R v Downey (1992) SCC *Makes Oakes test more flexible, weakening rational connection and minimal impairment test; imposing an evidentiary burden on the accused violates s. 11(d), but may well be saved by section 1.*

* F: *Code* s. 195(2) [now 212(3)]: in the absence of evidence to the contrary, proof that a person lives with/habitually accompanies a prostitute is proof that person lives on the avails of prostitution.
* I: Does evidentiary burden violate *Charter* 11(d)? Justifiable under s. 1?
* A: Evidentiary burden could result in conviction despite reasonable doubt, therefore violates s. 11(d). However, justifiable under s. 1 (no unreasonable inferences made, impairment of right is relatively non-intrusive).
* RO clause contains lower burden than in Oakes, accused required to provide only enough evidence to raise a doubt.
* Rational connection test shifts in *Downey*: focus not on logical inconsistencies but on whether an unreasonable inference has been made.
* In dissent, Iacobucci and McLachlin apply version of RC test in *Oakes*; La Forest argues that the clause is overly broad and does not pass minimal impairment.

R v St-Onge Lamoureaux (2012) SCC *If a reverse onus clause leaves open a possibility of conviction despite the existence of a reasonable doubt, s. 11(d) is violated;*

* F: *Code* 258(1): breath analysis results = proof of accused’s BAC @ testing.
* I: Does this presumption of accuracy infringe *Charter*?
* A: did not violate ss. 7, 11(c); did violate s. 11(d), according to *Downey* reasoning. Trier of fact could have reasonable doubt, required to convict.
* Diss. (Cromwell & Rothstein): inexorable link between proven fact and presumed fact. Test showing BAC > .08, barring evidence to the contrary, is conclusive proof that BAC was indeed over .08.
* The tension between the majority and dissent is over when a presumption is acceptable. The majority seems to think that nearly every reverse onus provision will violate s. 11(d), while the minority argue that sometimes presumptions are so basic that, absent evidence to the contrary, it would not be reasonable to doubt that presumption.

**3. The Elements of an Offence**

The elements of a criminal offence are divided into two parts: the *actus reus* and the *mens rea*. The Crown must prove both elements, in addition to the alleged facts.

* The AR has three parts:
  + Conduct: what is the guilty act? May be a failure to act or omission. Must be voluntary.
  + Circumstances: in which circumstances (or absence of circumstances) must the guilty act take place?
  + Consequences: sometimes, certain consequences are required to find criminal liability. If this is the case, the Crown must prove that the acts of the accused legally caused the prohibited consequences.
* Use definitions in s. 2 and index to clarify *Code* provisions.
* Gaps in the statue are filled by consulting case law, interpretation, and argument.
* *Di Minimis*: “The law does not concern itself with trifling things.”
  + The *de minimis* principle has never been recognized by the SCC as a valid defence. (e.g. stealing one nail from Canadian Tire could be argued *de minimis* or “trifling”).
* The MR:
  + Fault may be evaluated subjectively or objectively
    - Subjective: accused’s conduct was intentional or recklessness; accused had knowledge of or was wilfully blind towards the circumstances; accused intended or was reckless towards the consequences.
    - Objective: considers what a reasonable person in the circumstances would have done. If the accused’s conduct departs from this standard, there may be an inference of fault.
  + Some offences specify mental element (e.g. “without colour of right”)
  + The Crown must prove a that AR and MR were concurrent in time

Included offences: an accused cannot be convicted of an offence that is not charged on the information; however, he may be convicted of any charge ‘included’ in the one charged. Three ways in which an offence may be included, set out in s. 662(1) of the *Code*:

1. “As described in the enactment creating it”: Necessarily committed in the commission of the offence charged (e.g. assault included within assault causing bodily harm)
2. “As charged in the count”: determined by wording of indictment
3. “An attempt to commit” the charged offence is always included

**4. The *Actus Reus***

Principal of legality: one cannot be convicted for behaviour that was not criminal at the time of offence. *Charter* s. 11(g).

Frey v Fedoruk (1950) SCC *Only Parliament shall develop new criminal offences*

F: Plaintiff caught peeping through defendant’s mother’s window

I: Guilty of offence at common law?

L: No law against being a “peeping tom”

R: Offence must be found in provision of *Code* or in established case authority. Only Parliament shall develop new criminal offences.

R v Boudreault (2012) SCC *For the purposes of impaired driving, “care and control” requires a “realistic risk of danger to persons or property”; drunk behind wheel is not enough, but threshold is not high to find “realistic risk”*

F: while drunk, accused sat waiting in driver’s seat of truck for cab

I: did accused have “care and control” required for impaired driving?

R: Inebriation and occupation of driver’s seat is not sufficient: required “risk of realistic danger.”

Diss. (Cromwell): This approach undercuts the preventative purpose of the provision; risk of danger is not an element of the offence; ability to set vehicle in motion is sufficient.

*Omissions*

Three circumstances in which criminal law will impose liability for failure to act:

1. Where a statute criminalizes omissions
   * E.g. failure to remain at scene of accident
2. Where there is a duty to act imposed by statute
   * E.g. firefighters have an obligation to attempt rescue
3. Where there is a duty to act imposed by the common law

* How do we reconcile this with the inability of the courts to develop common law offences?

Fagan v Commissioner of Metropolitan Police [1968] ALL ER (CA) *Mere omission cannot constitute assault, AR must overlap MR; ongoing act may become criminal by way of omission.*

F: defendant accidentally drove car onto foot of police officer

I: did failure to move vehicle off foot constitute assault?

A: Mere omission cannot constitute an assault; here, an *ongoing* act became criminal when the defendant became aware of the harm being inflicted.

Diss. (Bridge): no positive action; car remained on foot by its own weight.

* General principle of the criminal law is that the AR and MR must overlap in time. The act was unintentional, and the intent was not connected to any positive act. To circumvent this conclusion, the court concludes that the act was continuous. Should omissions like this be squeezed into the code? How should we deal with them?

R v Moore (1978) SCC *Police officer’s duty gives rise to a reciprocal duty to cooperate with police requests under that duty; strong dissent, Dickson argues that a duty must be independently grounded in statute or the common law (i.e. no “reciprocal duties”).*

F: Moore rode bike through red light, refused to give name when officer stopped him

I: Guilty of obstruction? Did Moore have a legal duty to provide his name to the police officer?

R: reciprocal duty exists: police officer had a duty to identify, giving rise to Moore’s duty to respond. Failure to do so was obstruction.

\*\*Diss. (Dickson): right to remain silent is absolute. Omission will result in criminal liability only when imposed by statute or common law; duties must be independent, cannot be grounded in officer’s legal duty to identify.

* Dickson presents the modern approach. Case likely would not be decided the same way today.

R v Thornton (1991) OCA *Common law duty to refrain from conduct which could foreseeably injure another person in a serious manner; SCC found no such common law duty exists.*

F: accused aware of HIV+ status, donated blood without disclosing

I: can he be charged under CC provision for “common nuisance”? (Unlawful act or failure to discharge legal duty)

A: not an offence to donate contaminated blood, no statutory duty; Court finds a common law duty to refrain from conduct which could foreseeably injure another person in a serious manner

D: conviction, common law duty exists.

Is the court effectively creating a common law offence via its creation of a common law duty? Supreme Court upheld decision, but did not find common law duty; instead, found a statutory duty in s. 216 of the code.

*Voluntariness*

AR must be voluntary for criminal liability to follow. Debate as to whether involuntary behaviour negates the *mens rea* of the offence (making it unintentional) or negates the *actus reus* (because the acts themselves are not really the acts of the accused). There are certain categories of involuntariness:

* Intoxication:
  + If the consumption was involuntary, the accused will be acquitted
  + If the consumption was voluntary, the requirements of the defence of intoxication must be met
* Suffering from a disease of the mind:
  + Must meet requirements of the defence of mental disorder
* State of automatism:
  + Caused by extreme shock, sleepwalking, hypnosis, etc.
  + Must meet defense of non-mental disorder automatism

R v Jiang (2007) BCCA *Acts committed while asleep at the wheel cannot form the AR; driving with knowledge of fatigue may result in different conclusion.*

F: accused fell asleep behind wheel, drove into two kids, killing one.

I: voluntary?

D: accused in state of non-insane automatism, cannot be convicted. However, cases in which the accused ought not have driven due to fatigue may end differently.

**5. Causation**

If consequences must be proven, the Crown must also prove BARD that the accused’s actions caused those consequences. Two types of causation:

* Factual causation (“but for” causation): but for the stab wound, she would not have died. Factual causation.
* Legal causation: acts of the accused caused the criminalized consequences to occur (morally blameworthy). Conviction requires legal causation.

The Criminal Code has sections dealing with causation, beginning at s. 224.

R v Smith [1959] ALL ER (CA) *Only when the original wound is “merely the setting” for subsequent causes can it be said that death does not result from the original wound.*

F: defendant stabbed fellow soldier; soldier later died. Between stabbing and death, insufficient (even improper) medical treatment was given.

I: given poor treatment, was the stab wound the cause of death?

A: Only if the second cause is “overwhelming” will the first cause be negated.

D: Stab would cause of death, regardless of poor medical treatment.

R v Blaue [1975] ALL ER (CA) *Following an assault, unreasonable actions by a victim will not break the chain of legal causation.*

F: D stabbed girl, punctured lung. Girl refused life-saving blood transfusion, died.

I: Did the defendant cause death?

A: stab wound brought about bleeding that caused death; those who use violence must take their victims as they find them; victims have no obligation to act reasonably.

*Smithers* [1978] SCC Leading Canadian case on causation. Dickson J. held that *any contributing cause outside the di minimis range (“not insignificant”) would suffice for legal causation.*

* Sections 224-228 of the *Criminal Code* deal with causation of death.

R v Nette (2001) SCC

F: D robbed old woman, left her hogg-tied; woman died, partly due to poor muscle tone and health.

I: What is the standard of causation for second-degree murder?

A: criminal responsibility for death requires both factual and legal causation; *Harbottle* standard for causation of first-degree murder under 231(5): “substantial and integral cause;” Arbour prefers to describe *Smithers* test as “significant cause” as opposed to “not insignificant.”

* *Smithers* stands, but this decision leads to uncertainty as to the standard.
* Arbour J.’s two-step process for murder conviction: 1) *Smithers* test for legal causation of death; 2) *Harbottle* test to determine whether 1st degree.
* Second degree murder is any murder not falling into 1st degree category
* Manslaughter:
  + AR: unlawful act causing death (*Smithers* standard)
  + MR: objective foresight of bodily harm

JSR [2008] OCA *Engaging in dangerous joint enterprise that causes death could be sufficient to for both factual and legal causation; physical causation not required for legal causation.*

F: footlocker shootout, JSR shot bullets but not the bullet that killed victim.

I: Could JSR be convicted for causing death of bystander?

A: “mutual gun fight scenario” in which all parties responsible for outcome; factual causation could be found; legal causation about deciding which of factual contributors should be held responsible.

R v Maybin (2012) SCC *intervening acts that are linked to the acts of the accused, and which do not overwhelm accused actions, will not sever chain of causation; court rejects additional test for intervening acts,* Smithers *remains benchmark.*

F: Maybin brothers assaulted bar patron; bouncer dealt last blow.

I: Could the brothers be held legally responsible?

A: objective foreseeability or independence of third-party actions may be taken into consideration; intervening acts that are linked to the acts of the accused (reasonably foreseeable), and which do not overwhelm accused actions, will not sever chain of causation.

* Policy focus: ensuring that those who are morally responsible are punished, and those who are morally innocent are not.
* Intervening acts that are reasonably foreseeable will not rupture chain of legal causation

**6. *Mens Rea***

* The fault requirement may take a number of forms, depending on the wording of the offence and the component of the AR to which it attaches.
* These forms include:
  + Intention (pertaining to conduct and consequences)
  + Recklessness (as a substitute for intent)
  + Knowledge (of circumstances)
  + Wilful blindness (as a substitute for knowledge)
* Unlike the AR, the MR is often hidden or implied. It is often difficult to decide which elements of the offence require a mental element and what that mental element may be.
* There is an important distinction between intent to commit and motive (*Lewis*)
* There is a general presumption that people know what they are doing and intend the natural and probable causes of their actions; when all circumstances point of favour of a certain mindset, it will be difficult to deny the presence of a guilty mind.

The Subjective Approach

R v Beaver (1957) SCC *Possession requires knowledge of posession*; *Court makes it clear that Parliament could create absolute liability offence.*

F: D sold package of drugs to undercover cop, did not know what was in the package.

I: How does accused’s mental state affect criminal liability?

A: no possession of illegal substance without knowledge of possessing that substance.

R v Sault Ste. Marie (1978) SCC *presumption that true crimes require a subjective MR*

A: presumption that true crimes require a subjective MR; Crown must establish: 1) **intent** or **recklessness**; 2) with **knowledge of the facts** constituting the offence or with **wilful blindness** towards them; negligence is insufficient; only absolute liability offences due away with fault element all together.

Intent and Recklessness

* Intent requires a desire to bring something about
* Recklessness is an awareness of a risk and a decision to proceed anyways

R v Buzzanga and Durocher (1980) ONCA *MR typically includes intent or recklessness; in this case, “wilfully” requires subjective intent.*

F: D convicted for “wilful promotion of hatred”; wrote and published defamatory handbill, poster was intended to be satirical and promote political action.

I: Did D wilfully promote hatred (as per 281.2(2))?

A: Generally, either intent or recklessness will satisfy subjective MR; In this offence, “wilfully” means the intention to promote hatred and does not include recklessness; **intent**: a person foresees that a consequence is certain or substantially certain to result from a course of action; all circumstances should be canvassed to determine intent.

* In short, intent can be described as either one’s subjective purpose or one’s subjective foresight.
* “The greater the likelihood of the relevant consequences ensuing from an act, the easier it is to draw the inference that he intended those consequences.”

Fraud and *Mens Rea*

R v Theroux [1993] SCC *Fraud requires a dishonest act that causes economic deprivation. Both elements require subjective MR.*

F: Businessman told investors that deposits would be protected by deposit insurance, knowing no insurance had been purchased.

I: What is the *MR* for fraud?

A: AR for fraud: 1) (objectively) dishonest act (deceit, falsehood, etc.); 2) That causes economic deprivation (or risk of) to another; *mens rea*: 1) subjective knowledge of the dishonest act; 2) subjective foresight that economic deprivation could occur; sharp business practices or negligent misrepresentation do not suffice.

R v Kingsbury (2012) BCCA *Subjective belief that acts are not deceitful is irrelevant; sufficient that D has awareness of situation causing deprivation.*

F: D had honest but mistaken belief that he had a property interest in someone else’s trailer; repossessed the trailer at auto shop by way of misrepresentation.

I: Can honest but mistaken belief negate MR for fraud?

A: Subjective belief that act is not deceitful is not relevant; sufficient that accused intend or foresee the circumstances that constitute deprivation.

*Wilful Blindness*

* In addition to intention (with respect to acts/ommissions/consequences), knowledge (with respect to circumstances), and recklessness (with respect to all three possible components of an AR), the concept of wilful blindness is used in some cases to satisfy a *mens rea* requirement. Where proof of knowledge is required, deliberately choosing not to know something is tantamount to knowing it.
* Wilful blindness is described as a state of “deliberate ignorance”

R v Briscoe (2010) SCC *Whenever knowledge is a component of the MR, wilful blindness (“deliberate ignorance”) will suffice.*

F: D transported girl to golf course, where she was killed; claimed he didn’t know what was going to happen to her.

I: Did he have the requisite MR for murder?

A: Wilful blindness can be a substitute for knowledge whenever knowledge is part of the MR; wilful blindness is a deliberate failure to inquire when a need to inquire exists.

*Recklessness as Sufficient Knowledge*

R v Schepannek (2012) BCCA *Recklessness is consciousness of a risk and proceeding in the face of that risk*.

F: D passed package to prisoner containing drugs; claims not to have know what was in package, thought it was tobacco.

I: Did Scheppannek have legal knowledge that illicit drugs were in the package?

A: Recklessness is defined as consciousness of a risk and proceeding in the face of that risk; D knew package likely contained contraband, and admitted it could have contained drugs or a weapon.

* There seems to be a lack of conceptual clarity between wilful blindness and recklessness. What is the difference between the two? When should they be applied? Is this case also an example of wilful blindness?
* Recklessness is defined as consciousness of a risk and proceeding in the face of that risk; wilful blindness is a deliberate failure to inquire when a need to inquire exists.

*Motive*

* Motive is the “why” of a criminal offence

R v Lewis (1979) SCC *Motive is irrelevant to findings of criminal liability, though it may be entered as evidence that speaks to the likelihood that the crime was committed.*

F: D suspected of mailing package; question as to whether he knew what was in package.

I: Did the trial judge need to define “motive” for the jury?

A: Two kinds of motive: 1) emotional prompt; 2) desire/end; motive is irrelevant to findings of criminal liability; motive makes it more likely that a crime was committed.

*Transferred Intent*

* “Inchoate crimes” are crimes of intent: all that is required is intent and some act beyond mere preparation.
* 229(b) allows for transferred intent in homicide crimes. If an accused intended to kill a human, and did kill a human, then that is enough.
* Though not recognized by the code, transferred intent can be used in other offences, so long as the intended harm and the actual harm are the same (e.g. intended to break A’s window, but broke B’s window).

R v Gordon (2009) ONCA *MR of attempted murder is intent to kill; transferred intent does not apply to attempted murder, or to other “attempt” crimes.*

F: D intended to kill A, missed and shot and injured a number of bystanders.

I: MR for attempted murder? Can transferred intent be applied to attempted murder?

A: MR of attempted murder is intent to kill; transferred intent does not apply to attempted murder, or to other “attempt” crimes.

**7. Departures from Subjective *Mens Rea***

* Not all offences have a subjective MR requirement
* Absolute liability offences do not require the Crown to prove a mental element. Once the AR is established, no defence is available.
* Strict liability offences also do not require the Crown to prove a mental element; however, the defence of due diligence is available, to be established on a balance of probabilities.
  + This defence requires proof that, on an objective basis, the defendant “took all reasonable care” to avoid the offensive action or reasonably believed in a justifying, but mistaken, set of facts.
* Absent indication to the contrary, public welfare offences are presumed to be offences of strict liability.
  + Public welfare offences are not criminal offences; their goal is to regulate and prevent events that are against the public welfare. The goal of criminal offences is to prohibit and punish an alleged social evil.

R v City of Sault St Marie (1978) SCC *Criminal offences are presumptively MR offences; public welfare offences are presumptively strict liability offences; clear language required to create an absolute liability offence.*

F: city charged with violating Ontario *Water Resources Act*

I: What kind of offence is this?

A: The Crown does not have to prove MR of public welfare offences; public welfare offences are presumptively ones of strict liability; defence available if all reasonable care taken to avoid offensive action.

R v Chapin (1979) SCC *With strict liability offences, the defendant will be absolved of liability if they can prove that they were in no way negligent (i.e. took all reasonable steps)*

F: D charged with regulatory offence for hunting within quarter mile of bait

I: Full MR, strict liability, or absolute liability offence?

A: No language indicating MR, no clear language indicating absolute liability; offence is a public welfare offence of strict liability; demonstration that the defendant was in no way negligent would be a valid defence.

D: not checking for bait was reasonable in the circumstances, therefore defendant absolved of liability.

*Crimes of Objective Fault*

* This category of fault requires the Crown to prove what a reasonable person should have done, foreseen or known.
* Some crimes of objective fault are defined as such in the *Code*, others are identified by case law.
* The *Code* contains a definition of criminal negligence, as well as two specific offences of criminal negligence causing bodily harm and death.
  + The definition contains the word “reckless,” making it unclear as to whether there is some subjective element that needs to be proven.

R v Tutton (1989) SCC *criminal negligence is conduct which reveals a marked and significant departure from the standard expected of a reasonably prudent person in the circumstances.*

F: Mother of diabetic son believed God told her that her son would be cured, stopped giving him insulin.

I: What are the requirements for criminal negligence?

A: Criminal negligence offences do not require subjective MR; criminal negligence is conduct which reveals a marked and significant departure from the standard expected of a reasonably prudent person in the circumstances; objective test, but one that is sensitive to the facts existing at the time of the event and the accused’s perception of those facts.

* In order to raise a reasonable doubt on the question of objective fault, the defendants must have had an honest and reasonable belief that their child was cured.
* Who is the reasonable person? How do we accommodate differing views of reasonableness? How personalized should the objective test be?

R v JF (2008) SCC *Distinction between objective fault standards of criminal negligence and failing to provide necessaries (Marked + Substantial Departure vs. Marked Departure)*

F: D charged with criminal negligence causing death and failing to provide necessaries of life, causing death; convicted at trial of former, not latter.

I: fault element of both charges is objective; failing to provide necessaries: respondents actions represented a “marked departure” from conduct of a reasonably prudent person; Criminal negligence: “marked and substantial departure” from same standard; criminal negligence requires more fault.

* Be sure to read cases carefully when dealing with objective fault: is this a “marked and substantial departure” or only a “marked departure.”

R v Hundal (1993) SCC *Fault requirement for dangerous driving is a modified objective standard that is sensitive to the factual circumstances as the accused perceived them.*

F: D ran red light in overloaded dump truck, struck vehicle and killed driver.

I: Is there a subjective element to the offence of dangerous driving?

A: modified objective test appropriate for dangerous driving; Test: conduct that amounts to a marked departure from the standard of care that a reasonable person would observe in the circumstances; intent not required. Reasoning for objective test: difficult to prove subjective intent of driver, wording of section, nature of driving as a licensed activity.

* “Modified objective” in the sense that the test is flexible as to circumstances. Sometimes, driving will be objectively dangerous but the test will not be satisfied (e.g. if driver had heart attack)
* Facts as they existed and as the accused perceived them must be taken into consideration when determining what a reasonable person would have done

R v Beatty (2008) SCC *Modified objective standard of fault must take into consideration the circumstances of the offence*

F: D driving truck, momentary lapse of consciousness resulted in truck crossing centre line, killing 3.

I: Momentary lapse in judgement sufficient to prove MR for dangerous driving?

A: Modified objective test applies to negligence-based criminal offences; modified in 2 ways: 1) departure from reasonableness standard must be “marked; 2) the actual mental state of the accused cannot be completely ignored; circumstances are relevant. If a reasonable person could not have been aware of or avoided the risk, then there is no fault.

* AR of dangerous driving: viewed objectively, is the *manner* of driving dangerous?
* MR of dangerous driving: did the conduct amount to a marked departure from the standard of care that a reasonable person would have observed in the circumstances?

R v Roy (2012) SCC *only driving that represents a marked departure from the standard of a reasonable driver in the circumstances will support an inference of objective fault.*

F: D driving motor home, turned right onto highway, struck by truck, passenger killed.

I: Requisite MR for dangerous driving present?

A: only driving that represents a marked departure from the standard of a reasonable driver in the circumstances will support an inference of objective fault.

D: Fatal misjudgement, but not a marked departure from the modified objective standard.

* The Crown must still prove the fault element of dangerous driving. BARD The only difference is that the fault element is measured against an objective standard
* If the conduct does represent a marked departure from the norm, the judge must consider evidence from the accused as to his state of mind, and consider whether a reasonable person in the circumstances would have acted differently.

R v ADH (2013) SCC

F: D gave birth to child in Wal-Mart washroom, didn’t know she was pregnant.

I: Offence of child abandonment require subjective or objective fault?

A: offence requires subjective fault (recklessness or wilful blindness at a minimum); majority discusses factors that can be considered when determining fault element: language of offence, comparison to other sections, purpose of offence, presumption of SMR; 5 categories of objective fault offences identified:

* Offences defined in terms of “dangerous” conduct
* Offences defined in terms of “careless” conduct
* Predicate offences (e.g. “unlawfully” causing bodily harm)
* Offences based on criminal negligence
* Duty-based offences (e.g. failing to provide necessaries of life)

**End of Semester 1**

**8. *Mens Rea* and the *Charter***

* This chapter considers what limitations s. 7 of the *Charter* places on the ability of Parliament to define the *mens rea* of a criminal offence.
* In *Beaver* the Court said that Parliament could make absolute liability offences, so long as the intent to do so was clear. After the Charter, there was uncertainty as to whether limits exist on Parliament’s ability to enact certain offences (e.g. given section 7, could Parliament ever make murder an absolute liability offence?).
* **Section 7:** 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.

Reference Re: s. 94(2) of the Motor Vehicle Act (1986) SCC *The combination of absolute liability offence and imprisonment violates s. 7. Principle of fundamental justice that the morally innocent not be punished.*

F: Section 94 concerns driving without a license or while suspended or prohibited. 94(2) makes the offence of absolute liability: guilt is established by proof of driving, whether or not the defendant knew of the prohibition or suspension.

I: Does this absolute liability offence withstand *Charter* scrutiny?

A: In section 7, “in accordance with the principles of fundamental justice” qualifies the rights in that section. The “principles of fundamental justice” are broad and include the basic tenants of our legal system. One such principle is that the morally innocent must not be punished.

D: Combination of imprisonment and absolute liability violates section 7; in this case, not saved by s. 1.

R v Raham (2010) OCA *If legislation can reasonably be interpreted in a manner that preserves its constitutionality, that interpretation is to be preferred. Whether or not a due diligence defence could ever reasonably be raised is a factor.*

F: Charged with stunt driving, passing another vehicle on highway, exceeded speed limit by 50kph for a few seconds.

I: Strict or absolute liability offence?

A: If absolute liability, unconstitutional; if strict, no violation. The offence can reasonably be interpreted as strict liability, therefore that interpretation is preferred and the offence is not unconstitutional.

R v Martineau (1991) SCC *A conviction for murder requires subjective foresight of death. Principles of fundamental justice require proportionality between the stigma and punishment of an offence and moral blameworthiness of the offender.*

F: D and accomplice robbed trailer; accomplice killed two occupants of trailer, D had no intention of participating in a murder. Charged with “constructive/felony murder”, which deals with killings that take place while other offences are being committed. Removes requirement for intention or recklessness.

I: Does constructive murder under 230(1) violate the *Charter*?

L: ***Vaillancourt***said that it is a principle of fundamental justice that murder requires objective foresight of death, at a minimum.

A: A murder conviction requires subjective foresight of death. There must be proportionality between the stigma and punishment attached to an offence and the moral blameworthiness of the offender.

D: 230(a) of the code struck down. Violates 7 and 11(d) of the Charter.

* “Unlawful object murder” is addressed in 229(c), and stems from the idea that unintentional deaths caused during the commission of an unlawful act are treated differently than other unintentional acts. Historically, it was thought that the MR of the felony could be “superimposed” onto the AR of killing.
* In *Martineau* the court struck “ought to know” from 229(c) because it relied on objective foresight as sufficient for conviction.
* In ***Shand***, the court considered whether the rest of 229(c) also violated the Charter. Shand argued that “intent to cause death” is required for murder. The OCA said that intent is not required, subjective foresight of death is the constitutional minimum MR for murder.
* In ***Vasil***, a man set fire to furniture while children were sleeping in a nearby room. The court said 229(c) requires: i) intent to carry out an indictable offence ii) dangerous act that a reasonable person would know is likely to cause death iii) intent to commit the dangerous act, knowing it is likely to cause death. Vasil was convicted.

R v DeSousa (1992) SCC *Unlawfully causing bodily harm (s. 269): AR: predicate offence + causation of harm; MR: MR of predicate + objective foresight of bodily harm*. *No requirement for subjective foresight of consequences or intent to harm.*

F: D threw bottle against wall, broke, shard of glass severely injured victim. Charged with unlawfully causing bodily harm (269).

I: Does 269 violate the Charter by potentially pairing an absolute liability offence with imprisonment?

A: “Unlawful act” is any violation of a federal or provincial statute that is not of absolute liability. Objective foresight of bodily harm means that a reasonable person would understand that the act would likely subject another person to harm.

D: 269 stands. No requirement for subjective foreseeability of consequences or subjective intent to cause bodily harm; example of true crime where presumption of subjective MR is rebutted.

JB: The court says the stigma of this offence does not require subjective fault, thereby backing away from an expansive reading of *Martineau*.

R v Creighton (1993) SCC *Conviction for manslaughter requires the MR of the underlying offence (unlawful act or criminal negligence)* + *objective foresight of bodily harm. Objective test is context-dependant but does not take personal characteristics into account.*

F: D gave cocaine injection to victim, victim died, D charged with unlawful act manslaughter.

I: Does the offence of unlawful act manslaughter violate the Charter?

A: The MR for manslaughter is the MR of the underlying offence (unlawful act or criminal negligence) + objective foresight of non-trivial bodily harm. So long as a fault element is present and proportionate to the seriousness of the penalty the principles of fundamental justice are satisfied. When conducting the objective test, the personal characteristics of the accused are not to be taken into account, with the exception of “incapacity to appreciate the nature of the risk.” What would a reasonably prudent person have done in all the circumstances?

JB: Manslaughter is causation of death without intent to kill. There are two kinds of manslaughter (i.e. two sources of fault): unlawful act causing death and criminal negligence causing death. “Incapacity” probably requires some mental impairment.

Wholsale Travel Group (1991) SCC

* Strict liability offences absolve the Crown of the requirement to prove any mental element. D may prove due diligence on a balance of probabilities (reasonable care or reasonable mistake). SL offences combine objective fault with a reverse onus.
* Court said that objective fault element doesn’t violate charter (no special stigma to offence in question—false advertising)
* Court said that reverse-onus in strict liability is not contrary to Charter, either because it doesn’t violate s. 11(d) or because it is saved by s. 1.

**9. Mistake**

* Mistake of fact is a defence that is open to the accused whenever he holds an honest belief in a set of circumstances that, if true, would otherwise entitle him to an acquittal (e.g. by negating an element of the *actus reus*).
* Every time that knowledge of a particular set of circumstances is part of the MR of an offence, the defence of mistake of fact may be available.
  + *Beaver* is an example of mistake of fact
* Typically, mistake is treated as a defence, not as an element of the offence that the Crown has to disprove. It may result in an acquittal, or in a conviction on a lesser offence (e.g. attempt).
* Mistake of fact cannot be raised when there is no intent required for an offence (e.g. absolute liability offence).
* Note on Defences (four key points):
  + Some defences are statutory (e.g. self-defence) and some are common law (e.g. necessity)
  + Most defences place an evidentiary burden on the accused: they must provide enough evidence to raise a reasonable doubt as to guilt. In some cases, defences must be proven on BOP.
  + Some defences apply to all offences in the code, while others do not
  + Some defences lead to a full acquittal, while others only operate to reduce the severity of a charge (e.g. provocation reduces murder to manslaughter)

R v Kundeus (1976) SCC *Conviction requires that the AR and MR be of the same offence. The MR of one offence cannot be matched with the AR of another.*

F: D caught trafficking drugs by UC cop. Thought he was selling mescaline (controlled drug), actually sold cop LSD.

I: Was the necessary MR of trafficking LSD proven?

A: Mistake of fact raised, but no evidence provided by accused that MR was not present.

**Diss. (Laskin):** Conviction requires AR and MR of the same crime. Mistake of fact is a subjective analysis, the mistake does not have to be reasonable so long as it is honest.

R v Papajohn (1980) SCC *Mistake is a defence when it prevents the accused from having the requisite MR, though he may have committed the AR. Mistaken beliefs do not have to be reasonable, only honestly held. Evidentiary burden on D to raise air of reality.*

F: D charged with rape, brought real estate agent back to his house, made advances, alleges consensual sex or honest belief in consent. Victim denies that sex was consensual.

I: Is the defence of mistake of fact available?

A: Defences require “air of reality” to be established before they are considered by judge or jury. Must be “some evidence” which, if believed, could give rise to the defence.

**Dickson**: Rape **AR**: intentional sexual intercourse **MR**: knowledge of no consent. Mistaken beliefs do not have to be reasonable, they must only be honestly held.

JB: there was criticism of *Papajohn* for not requiring a mistaken belief in consent to be reasonable. The code currently says that mistake of fact cannot be raised if reasonable steps to ascertain consent were not taken (see 273.1 and 273.2)

R v Ewanchuck (1999) SCC *Consent requires subjective intent. Defence of mistake of fact requires the accused took reasonable steps to ascertain consent, and that the belief was based on words or conduct of the victim.*

F: D invited victim for “interview”, proceeded to sexually touch her. Victim was scared but went along with advances because of fear of harm.

I: Implied consent?

A: Sexual assault AR: unwanted sexual touching MR: intention to touch plus knowing/reckless/wilful blindness towards a lack of consent. No implied consent to sexual assault. Silence or passivity is not consent; words or conduct indicating “yes” are required. Reasonable steps must be taken to ascertain consent.

*Mistake of Law*

* Generally, a person charged with mistake of law cannot rely on a mistake of law as a defence. This principle is codified in **section 19** of the code.
* This is a rule of policy, not one of fairness (would be far too easy for people to claim they were not aware of the law)
* It may be possible to make an argument as to “officially induced” error of law, especially in the context of regulatory offences where s. 19 doesn’t apply.

R v Campbell (1973) AB *As a matter of policy, ignorance of the law is not an allowable defence.*

F: Go-go dancer told about recent decision that permitted nude dancing; arrested for nude dancing.

I: Defence for mistake of law?

A: Matter of policy, ignorance of the law must not be an allowable defence.

D: granted absolute discharged due to extenuating circumstnaces

Levis (City) v Tetrault (2006) SCC

F: D charged with regulatory offence for not registering car; insurance company failed to deliver notice of expiry, D argues for defence of officially induced error.

I: What does defence of officially induced error entail?

A: Defence of OIEL has six elements, each of which the accused must prove on the balance of probabilities: i) error of law made ii) person who committed the act considered the legal consequences of his or her actions iii) the advice obtained came from an official iv) advice was reasonable v) advice was erroneous vi) person relied on the advice in committing the act.

D: D knew, or should have know, of renewal date.

JB: It is not enough to raise an “air of reality”. There is a sort of reverse-onus placed on the accused. This may be because the offence is a regulatory one of strict liability. If the defence succeeds, the accused is entitled to a stay of the proceedings, rather than an acquittal. The defence may be available for criminal offences, but it is hard to find examples of this.

R v Khanna (2009) OCA

* D applied for citizenship and swore she was not subject to criminal proceedings, instructed to report if she was.
* Car crash that killed someone; immigration officer told her that this type of incident didn’t need to be reported.
* Charged with failing to reveal her criminal negligence causing death charge, judge found officially induced error of law.

**10. Defences of Intoxication and Provocation**

*Intoxication*

* Much debate over whether consumption of intoxicants should be recognized as a full or partial excuse for criminal conduct.
* The involuntary consumption of intoxicants may allow the accused to argue involuntariness as a complete defence.
* The ***Leary***Rule divides criminal offences into two categories: those of specific intent and those of general intent.
* Traditionally, offences of general intent did not allow for a defence of intoxication, but those of specific intent do.
  + Categorization is not necessarily straightforward.
  + If the offence says “with intent to” or “for the purpose of” then it is probably a specific intent offence.
  + Murder is a specific intent offence. Intoxication will reduce murder to manslaughter.
* D must give an air of reality to the defence of intoxication before it will be considered. Extreme intoxication, alternatively, must be proven on BOP.

R v Bernard (1988) SCC *Specific intent offences are those which require actions that have an intended purpose attached to them. Sexual assault is a crime of general intent, not subject to defence of intoxication.*

F: D drunk a large amount of alcohol, forced victim to have sex with him. D stated that he was drunk and that when he realized what he was doing he stopped.

I: Is self-induced drunkenness relevant to an offence of general intent?

A: **General intent** offences: only relevant intent is that do to the act in question. **Specific intent**: in addition to general intent to commit the act, there must be an intended purpose for that act. Sexual assault is a crime of general intent. Court suggests that proof of voluntary drunkenness may be a proxy for proof of a guilty mind. Wilson J. (Diss.) takes issue with this reasoning and whether it would satisfy Charter scrutiny.

D: convicted

R v Daviault (1994) SCC *Only if the accused was in an extreme state of intoxication (akin to automatism or insanity) could there be a reasonable doubt as to the minimal intent required for a general intent offence*

F: D (chronic alcoholic) drank 8 beers and a 35oz and then sexually assaulted victim. Expert testified that a normal person would have died, and D was probably in a state of alcoholic blackout, likely lost contact with reality.

I: Is extreme intoxication a defence to offences of general intent?

A: *Leary* approach offends the Charter because it permits the substitution of the MR with the voluntary intent to become drunk.

JB: Extreme intoxication may negate either the general intent or the voluntariness of the act. The court decides that the accused must prove extreme intoxication on the balance of probabilities, supported by expert evidence.

* Parliament responded to *Daviault* by enacting 33.1 of the Code:
  + 33.1(1): Self-induced intoxication cannot be raised to disprove general intent or voluntariness where the accused has departed markedly from a standard of reasonable care generally recognized in Canada
  + (2) Explains the standard of care
  + (3) This section applies to offences of assault or bodily harm
* Parliament has essentially said that someone as drunk as Davidault is criminally negligent and liable for his or her conduct.
* Is this section constitutional? It appears to have two problems:
  + 1) The MR of the offence is substituted with the fault for getting drunk (Mixing/Matching AR and MR)
  + 2) Subsection substitutes criminal negligence for subjective MR, which may violate *Martineau* principles of proportionality.

R v Drader (2009) AB Prov. CT. *Considers three different levels of drunkenness and their relation to criminal offences. Large degree of intoxication required to raise intoxication.*

F: Break and enter to commit indictable offence

I: Defence of intoxication?

A: Three degrees of intoxication: 1) Mild alcoholic-induced relaxation on inhibitions 2) Impaired ability to foresee consequences of acts: may give rise to inability for form specific intent 3) Extreme intoxication/automatism: unable to form the requisite awareness to consider actions voluntary. 33.1 says that this is not relevant to crimes of assault.

D: accused very drunk (1.5 bottles of whisky), but not enough to prohibit the formation of specific intent.

JB: Break and enter with intent to steal is a specific intent offence.

R v Peno (1990) SCC

* Voluntary intoxication cannot be raised as a defence where the Crown must prove intoxication as an element of the offence (e.g. drunk driving).

*Provocation*

* Found in **section 232** of the Code. It is a defence of limited application that only applies to reduce murder to manslaughter.
* It applies whenever the accused was subjected to a “wrongful act or insult” that would cause the “ordinary person” to lose “the power of self control” and where the accused “acted on the sudden” before there was time for his passions to cool.
* The defence has the burden of raising an air of reality to the defence. The Crown must then disprove beyond a reasonable doubt.
* The purpose of the defence is to partially excuse the actions of those who acted with an intention to kill, because they were provoked into doing so.
* Who is the “ordinary person”? Would an “ordinary person” ever lash out with lethal force? Should provocation be a recognized defence?

R v Hill (1985) SCC *Three elements of provocation defence under statute. Objective test may take personal characteristics into account, to the extent that they are relevant to the provocation (e.g. race if racial slur)*

F: D, 16 yr. male was the subject of unwanted homosexual advances, killed person making the advances, pled provocation.

I: Should the judge have considered D’s age and sex when considering an ordinary person’s reaction?

A: Three parts to provocation defence: 1) Ordinary person deprived of self control by act or insult 2) Accused acted in response to the insult 3) Response was sudden and before there was time for passions to cool. First question is objective, second two are questions of fact. Whether characteristics of accused are relevant depends on the nature of the provocation.

D: Not necessary for judge to instruct as to age and gender, juries “naturally” take these things into account.

JB: Where is the line between contextualizing the test and not allowing entirely unreasonable beliefs to be a partial defence to murder? Is there a difference between the ordinary person and a reasonable person?

R v Thibert (1996) SCC *Air of reality requires sufficient evidence on each element of the provocation defence that, if believed could established the defence. Defence has objective and subjective component.*

F: Thibert confronted his wife and a man she was seeing in a parking lot. Man began taunting D, D eventually shot him.

I: Provocation?

A: Air of reality: before the defence can be left with the jury, there must be sufficient evidence on both parts of the test that suggest the defence *may* be established. Objective standard is in place so as not to excuse irrational behaviour; however, contextual factors affecting the degree of provocation are relevant. Subjective elements: 1) acted in response to the insult 2) on the sudden before passions cooled.

D: Enough evidence to raise an air of reality.

R v Gill (2009) ONCA *Retreating from a confrontation and then returning does not necessarily bar a claim for provocation.*

F: D stargazing with friends, passerby called them geeks, D confronted victim, victim swung bottle, D stabbed and killed passerby. D had to retreat to grab knife and then return. Argues he acted out of fear.

I: Provocation?

A: Open to jury to conclude that D acted on the sudden as a result of a loss of self control.

D: Retreat and return to confrontation does not rule out provocation.

JB: The defences of self-defence and provocation can work against one another. In the former, the argument is that you were acting out of fear/necessity; in the latter the argument is that you were acting out of a momentary loss of control.

R v Tran (2010) SCC *The “ordinary person” standard must be informed by contemporary standards and Charter values. No room for antiquated beliefs. No individualization beyond necessary context.*

F: Tran entered apartment of estrange wife uninvited; found her with new boyfriend, who he killed. Argued that, within his community, act of leaving husband is deeply insulting.

I: Provocation?

A: Ordinary person is to be contextualized but not individualized. Standard informed by contemporary standards and *Charter* values. While Tran may have been personally insulted, this is not sufficient to meet the ordinary person standard.

D: No air of reality.

Note: court notes that, given the consequences and rigid sentencing regime for murder, provocation is designed to acknowledge human frailty in certain circumstances may provide a partial excuse. Without provocation, the judge would not be able to reduce the sentence.

R v Nealy (1986) ONCA *In Ontario, the jury should be instructed to consider the cumulative effects of intoxication and provocation, even if neither defence has an air of reality on its own.*

F: D drinking with girlfriend and others, man told him his gf has nice tits, fight broke out and Nealy stabbed the man 3 times.

I: Should the cumulative effects of drinking and provocation have been taken into account?

A: In most cases where provocation and alcohol are combined, the jury should be directed to consider the possible cumulative effects of these factors.

JB: Often, intoxication, self-defence, and provocation are all raised. What should be done if there is some evidence of fear, some evidence of provocation, and some evidence of intoxication? Can these factors be viewed holistically when considering whether the defendant is blameworthy? Some argue that if you cannot meet the air of reality test on any one defence, you should have no defence.

**11. Defence of Mental Disorder**

* The defence of mental disorder is found in **section 16** of the Code:
  + 16(1): No person is responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person 1) incapable of appreciating the nature and quality of the act or omission **or** 2) of knowing that it was wrong.
    - S. 2: “Mental disorder” means a disease of the mind
  + 16(2): Every person is presumed not to suffer from a mental disorder until proven on a balance of probabilities
  + 16(3): The person raising the issue has the burden of proof
* Where an accused claims that he had a mental disorder at the time of committing the offence, he can ask for a special verdict of not criminally responsible by reason of mental disorder (NCRMD).
* In *Cooper*, the court defined “disease of mind” broadly: embraces illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding self-induced states caused by alcohol or drugs, as well as transitory states.
* The defence may be raised by the Crown or by the defence
* In *Swain* the SCC outlined four circumstances in which evidence of mental disorder can be introduced:
  + Accused may plead at the outset of trial
  + Accused may plead after the Crown has proven the case BARD but before a conviction is entered.
  + The Crown may raise evidence of the accused’s mental state if the accused first gives such evidence
  + The Crown may raise evidence of mental disorder after guilt but before conviction
* Three possible outcomes from an expert hearing on a person found NCRMD: 1) absolute discharge 3) discharge subject to conditions 3) detained in hospital

R v Chaulk (1990) SCC *At the first branch of the test, the question is whether the accused had the ability to perceive the consequences and results of the physical acts. At the second branch of the insanity test, the question is not whether the accused knew that the act was against the law but whether he knew that it was “morally wrong”*

F: D burglarized home and killed sole occupant. D believed he had power to rule the world, and that killing was a necessary means to that end.

I: Does the reverse onus clause violate 11(d) of the *Charter*?

A: Insanity is best understood as incapacity to formulate criminal intent. Two branches to insanity: 1) inability to understand the causes and consequences of physical acts 2) inability to distinguish between right and wrong. 16(2) violates Charter, but upheld under s. 1. “Wrong”: Formally knowing that an act is against the law is not enough. The test is whether the person is capable of understanding that they are doing something that is morally wrong. “Moral wrongs” are not to be judged by the personal standards of the offender, but by his awareness that society regards the act as wrong.

*Automatism*

* “Automatism” is a state of impaired consciousness in which an individual has no voluntary control over their actions (*Stone*)
* When the state is a result of self-induced intoxication, the claim is analyzed according to the intoxication defence.
* The law classifies non-induced automatism in two ways: mental disorder automatism and non-mental disorder automatism. A finding of the latter will result in an acquittal. A finding of the former will result in a declaration of NCRMD.

R v Rabey (1977) ONCA *Ordinary stresses and disappointments of life do not give rise to a dissociative state. If the cause of the automatism is an “internal” weakness, then mental disorder automatism will be the result.*

F: D struck girl on the head with a rock. Claims that he suffered a “psychological blow” and was in a dissociative state that was not due to a disease of the mind.

I: Distinction between insane and non-insane automatism?

A: “Disease of the mind” is a legal term that contains substantial medical and policy components. Any manfunctioning of the mind that is “internal” may be a disease of the mind if it prevents the accused from knowing what he is doing. The ordinary stresses and disappointments of life do not constitute an external cause giving rise to non-mental disorder automatism

D: D’s dissociative state was a result of internal deficiencies; disease of the mind.

R v Stone (1999) SCC *Two part test for automatism. Burden of proof on defendant, contextual analysis for determining mental disorder or non-mental disorder.*

F: After listening to his wife yell at him and degrade him, Stone says that he lost control of his body and, when he came to, realized he had stabbed his wife 47 times. One psychiatrist said it was likely that he was in a dissociative state, another disagreed.

I: Non-insane automatism?

A: Two-part test for automatism: 1) determine whether there is sufficient evidence to conclude that D was in a state of automatism 2) Determine whether it was mental disorder or non-mental disorder. At the first stage, the law presumes that people act voluntarily (D must disprove this on BOP, using psychiatric evidence; relevant considerations include whether there was a “shocking” trigger, motive, past events, medical conditions, and bystander evidence). At the second stage, the starting point is disease of mind. The “internal cause” theory is not dispositive of the issue. The continuing danger of reoccurrence must also be assessed.

D: No extraordinary event that would cause a normal person, in the circumstances, to enter a dissociative state.

JB: This is the most recent and binding case on automatism, and instructs us as to the contextual approach to be taken. There is a full legal burden on the accused to prove automatism on a balance of probabilities. **There are only a few other defences that place such a burden on the accused:** extreme intoxication, mental disorder, officially induced error of law, and due diligence. The first three relate to the lack of volition, while the second two are a claim that D was not negligent.

R v Bouchard-Lebrun (2011) SCC *Malfunctioning of the mind that results exclusively from self-induced intoxication cannot be considered a disease of the mind and must be considered under the intoxication defence.*

F: D consumed ecstasy and then brutally assaulted two people while in a psychotic state. Up to 50% of people who take PCP enter a psychotic state.

I: Can psychosis caused by self-induced intoxication constitute a “mental disorder”?

A: Exclusion of self-induced states can be rebutted if D shows that he was suffering from a disease of the mind unrelated to the intoxication-related symptoms. Malfunctioning of the mind that results exclusively from self-induced intoxication cannot be considered a disease of the mind.

D: Accused was suffering from self-induced state.

R v Parks (1992) SCC *Two policy approaches to “disease of the mind” analysis*: *continuing danger and internal cause. Must also consider broader policy questions, such as likelihood of specious claims.*

F: While sleepwalking, D drove 23km and killed mother-in-law.

I: how does sleepwalking fit within automatism framework?

A: Sleepwalking persons cannot think, reflect, or perform voluntary acts. Considers two policy approaches to “disease of the mind” analysis: 1) Any condition likely to present a continuing danger to the public should be treated as insanity 2) conditions stemming from psychological or emotional makeup should be considered mental disorders.

D: Neither approach is really useful: recurrence is unlikely and sleepwalking is not an internal disease or defect.

**12. Self-Defence**

* Self defence is generally available to any charge that contains an element of assault or violence against the person (such as manslaughter or murder).
* The self defence provisions are found in Section 34-45 of the code, and apply to self-defence and defence of a third person or property.
* New self-defence provisions came into force on March 11, 2013. These provisions represent a substantial change to the law, and it is unclear whether previous case law will stand or whether the provisions operate retroactively.
* The accused must give an air of reality to the defence before it will be considered by the court.
* Each element of self-defence has both an objective and a subjective dimension: the belief must be held and it must be held reasonably (*Cinous*).

R v Lavalee (1990) SCC *When considering whether a belief is “reasonable” the court must look at the circumstances and perceptions of the accused and the history of the relationship between D and the attacker. Test under old self-defence provisions.*

F: D shot boyfriend in back of head as he was leaving the room after threatening to kill her. D was terrorized by her boyfriend and felt unable to escape.

I: Self defence?

A: Under the old provisions, two elements are relevant: 1) Was D under a reasonable apprehension of death or serious bodily harm? 2) Was the accused’s belief that she could not otherwise preserve her life a reasonable belief?

D: the jury should have been instructed to consider self-defence

JB: This case suggests that self-defence can apply to domestic violence situations and that victims do not have to wait “until the knife is raised” to act in self-defence.

R v Petel (1994) SCC

* An accused may make a reasonable mistake about whether she was actually being assaulted. So long as she reasonably believes that an assault was taking place, s. 34(2) can be triggered. “Imminence” is one element of the reasonableness analysis, but it is not a necessary one.

R v Mallott (1998) SCC *Expert evidence of the reasonableness of a battered woman’s belief is relevant to self-defence, provocation, duress, and other defences in which reasonableness is a component.*

F: Accused convicted of second degree murder of former spouse. D suffered years of emotional, physical, and psychological abuse.

I: Self-defence?

A: Confirms approach taken in *Lavalee*, notes that a battered woman’s experiences are generally outside the common understanding of the average judge and juror. Test is not subjective; rather, the reasonableness standard must be infused with the perspectives of a battered woman.

R v Cinous (2002) SCC *Two part “air of reality” test: 1) Is there evidence 2) Upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true.*

F: D killed victim at gas station because D thought victim was about to kill him.

I: Was there an air of reality to self-defence?

A: The air of reality test is whether there is evidence on the record upon which a properly instructed jury acting reasonably could acquit. The air of reality test assumes the evidence to be true and considers where there is sufficient evidence to raise the defence. The key question is whether there is evidence capable of forming the basis for an acquittal.

D: No air of reality.

JB: The AOR threshold requires the court to engage in a limited weighing of the evidence to determine whether an acquittal could ever result.

* The new **section 34(1)** gives us a three-part test for self-defence:
  + Reasonable belief that force or threat of force is being used against them or another person
  + The offence is committed for the purpose of defending themselves or others
  + The act committed is reasonable in the circumstances
* **Section 34(2)** gives a list of factors that can be considered when determining whether the act is “reasonable in the circumstances”, including imminence, proportionality, history between the parties, whether there were weapons present, etc.
* Would *Lavalee* be decided the same under the new provisions?
* Generally, it is presumed that laws affecting substantive rights do not apply retroactively.

R v Caswell (2013) SKPC *Allowing old self-defence provisions to linger would promote uncertainty and delay remedial effects of legislation. New law applied.*

F: D struck complainant in the arm after she threatened to break his television. D raises new self-defence of property.

I: Should the old or new provisions be applied?

A: Unless otherwise indicated, it is presumed that Parliament did not intend legislation to be given retroactive effect. However, to allow the old provisions to linger would put a hold on the remedial goals of the legislation and promote uncertainty.

D: New provisions applied, blow to arm was reasonable in the circumstances.

R v Urquhart (2013) BCPC *Application of both old and new self defence provisions. Considers proportionality of force.*

F: D was squad leader of Richmond coast guard, assaulted claimant after meeting. Bystander saw D taunt victim and punch him while on ground.

I: Self defence?

A: Judge considers both old and new self-defence provisions.

D: Fails under both old and new provisions. Blows were excessive in the circumstances and not objectively reasonable.

**13. Necessity and Duress**

* These are related defences that excuse criminal conduct where the accused was acting under compulsion of threats from another person (duress) or in response to emergency situations (necessity) in order to prevent a greater evil from occurring.
* Necessity is rarely successful in Canada. This defence is a legal recognition of moral involuntariness: it excuses criminal liability in situations where no reasonable person could have refrained from committing criminal conduct.
* Necessity is a common law defence that will result in a full acquittal if successful. The defence must give an air of reality to each element of the defence before it will be considered.

R v Perka (1984) SCC *Three part test for necessity: 1) pressing peril 2) no legal way out 3) proportionality between harm avoided and harm done. Actions or circumstances which indicate that the wrongful deed was not truly involuntary or that there was no imminent risk will invalidate the defence.*

F: D was transporting drugs from Columbia to a drop point in international waters. Encountered rough seas and forced to make port on Vancouver Island, charged with importing narcotics.

I: Necessity?

A: Necessity acknowledges that, in certain circumstances, there is no reasonable alternative to breaking the law. There are three requirements: 1) Pressing/urgent peril or danger 2) no legal way out 3) proportionality between harm avoided and harm done. Engaging in illegal acts does not bar the defence.

D: Trial judge should have considered necessity

JB: if the peril can be avoided through legal means, then that option must be taken. Illegal smuggling does not preclude access to the defence.

R v Latimer (2001) SCC *The first two parts of the necessity test are evaluated on a modified objective standard. The third part is evaluated on an objective standard.*

F: D killed his daughter by way of CO2 poisoning in garage.

I: Air of reality to necessity?

A: For the first two parts of the necessity test a modified objective test must be applied (the beliefs must be reasonable, given the circumstances of the accused). The third part of the test (proportionality) is evaluated on an objective standard.

D: none of the elements of the defence have an air of reality. Legal alternatives existed, including further surgery and the use of feeding tubes.

R v Ungar (2002) ONCJ

F: Hatzoloh ambulance driver sped to scene of accident, breaking several laws and driving recklessly.

I: Necessity?

A: No reasonable legal alternative to D’s actions; he had a reasonable belief that the ambulance would not arrive in time.

D: defence succeeds, no reasonable legal alternative.

*Duress*

* Duress applies when the accused commits a criminal act in response to a threat from a third party.
* Duress is also based on moral involuntariness, but the source of that involuntariness is an external threat.
* There is both a common law defence of duress and a statutory defence. Section 8 of the Code preserves common law defences only to the extent that they are not inconsistent with statutory provisions. In ***Paquette*** the SCC said that a principal offender was limited to the statutory defence while a party to the offence (aider or abettor) could rely on the more flexible common law defence.
* Under **section 17**, a person must be under a threat of immediate death or bodily harm from a person who is present when the offence is committed. There is also a list of excluded offences. If s. 17 is successfully raised a full acquittal will be entered. None of these limitations were present at common law.

R v Hibbert (1995) SCC *Duress will rarely negate the MR of an offence. Duress is an excuse that requires no reasonable legal alternative. The test is evaluated on a modified objective standard.*

F: A shot B in the lobby of B’s apartment; D brought A to B’s apartment, fearful that if he did not A would kill him.

I: Duress?

A: Duress may be raised even if both the MR and AR are made out. Duress can only be invoked when there is “no legal way out”. This is evaluated on a modified objective standard, taking into consideration the circumstances and perceptions of the accused. An accused person cannot rely on the defence if they had an opportunity to safely extricate themselves from the situation.

JB: After *Hibbert*, people criticized the unavailability of the common law defence to principal offenders.

R v Ruzic (2001) SCC *Immediacy and presence requirements of s. 17 defence are severed from the code for violating the Charter. New principle of fundamental justice recognized: morally involuntary must not be punished.*

F: D landed in Toronto with 2 kilograms of cocaine and a false passport. D claims she was acting under duress: a man threatened to harm her mother if she didn’t comply.

I: Duress? Immediacy requirements of s. 17 constitutional?

A: Principle of fundamental justice that “moral involuntariness” (no real choice) not be punished. Strict immediacy and presence requirements of s. 17 violate s. 7 of the Charter. Not saved by section 1, severed from the defence.

D: Acquittal confirmed, immediacy and presence requirements of s. 17 are struck down.

JB: Ruzic could not raise the statutory defence for several reasons: the threatener is not present; there is no immediacy to the threat (she is in Canada, the threatener in Europe); and the threat is directed at a third party. To succeed under s. 7, *Ruzic* must show that the restrictions in s. 7 are not in accordance with the principles of fundamental justice. One such principle is that the morally blameless not be punished. However, she is not morally blameless: she knew what she was doing and committed the offence. The court recognizes a new principle of FJ.

R v Ryan (2013) SCC *Duress is only available when a person commits an offence while under threat made for the purpose of compelling the person to commit the offence. Four elements of* ***s. 17*** *defence plus common law considerations that work alongside the section.*

F: D felt her life was threatened by husband; tried to hire someone to kill him.

I: Duress?

A: Duress is not a substitute for self-defence. Four elements of the statutory defence under **section 17:** 1) Explicit or implicit threat of present or future death or bodily harm directed against accused or third party 2) Accused must have reasonable belief the threat will be carried out 3) The offence must not be an excluded offence 4) the accused cannot be a party to a conspiracy or criminal association that causes them to be under duress.

**Three common law considerations**: 1) no safe avenue for escape 2) close temporal connection 3) proportionality between harm threatened and harm inflicted.

**Differences remaining between common law and statute:** statutory applies to principals while CL applies to parties. Statutory defence has a long list of exclusions which may not apply at common law.

JB: This is the authoritative case on duress. Could D have pursued self-defence along the lines of *Lavalee*?

**14. Participatory Limits: Parties and Attempts**

* Criminal law permits individuals to be prosecuted in some situations where they did not personally commit the full offence (i.e. all the elements of the AR and MR). Two such situations are attempts and aiding and abetting the commission of an offence (aka party to offence).
* An attempt may be charged separately or be found as an included offence. Attempts are always included offences when a full offence is charged.
* Penalties are often reduced for attempts (s. 463). Should the accused who shoots and misses benefit from his bad aim?
* The AR and MR of an attempt are set out in **section 24** of the code:
  + 1) Intent to commit an offence
  + 2) Act or omission for the purpose of carrying out that intent (beyond mere preparation)
  + \*Satisfied whether or not it was possible under the circumstances to commit the offence.
* Attempts are essentially crimes of intention. The focus is on whether the MR is present.

R v Ancio (1984) SCC *The MR for attempted murder cannot be less than a specific intent to kill. Recklessness will not suffice.*

F: D arrived at home of estranged wife and her new boyfriend; D had shotgun, which went off in an altercation between D and boyfriend.

I: Attempted murder?

A: Attempts are separate and distinct offences of their own. They require AR and MR.

D: New trial, must find intent to kill

R v Sorrell (1978) ONCA *Evidence of acts constituting the AR of an alleged attempt do not prove the existence of intent. Lack of extrinsic evidence speaking to intent may be fatal to the Crown’s case.*

F: Two men with balaclavas showed up at Aunt Lucy’s Fried Chicken store and banged on the glass, door locked so they left.

I: Attempted robbery?

A: Attempted robbery MR: intent to rob AR: took steps towards carrying out that intent beyond mere preparation. If there is no extrinsic evidence of an intent to rob, the Crown may not be able to prove intent.

D: While the acts had clearly advanced beyond mere preparation, the Crown has not proven intent.

USA v Dynar (1997) SCC *Neither factual nor legal impossibility will bar a finding of criminal attempt. All that is required is intent + act beyond mere preparation.*

F: D caught in FBI sting, accused of money laundering. However, money he was laundering was not the proceeds of a crime, a necessary part of the offence.

I: Is an attempt to do the impossible an offence?

A: Extradition requires double criminality. 24(1) says that you are guilty for an attempt even if it is impossible. The SCC recognizes no difference between factual and legal impossibility: the only requirements are intent + act beyond mere preparation. However, it is not a crime to attempt to do an imaginary crime.

Diss. (Major): Criminal consequences should not be attached to actions that could never be considered crime (e.g. stealing free sample).

JB: part of the MR of the offence is that you must know that the money is the proceeds of a crime. Since the money is not the proceeds of a crime, this requirement cannot be met. The question then became whether he could be convicted with an impossible attempt. Dynar’s counsel argued that “impossibility” in 24 should be read as “factual impossibility” (e.g. giving someone a dose of poison so low that no one could die).

*Aiding and Abetting*

* “Parties” to the offence—e.g. lookouts or getaway car drivers—can be convicted of the same offence as the principal offender.
* **Section 21** says that all parties to an offence are equally culpable. “Parties” to an offence include: a) person who actually commits the offence b) does or omits to do anything for the purpose of aiding any person to commit it c) abets any person in committing it.
  + “Aid” means to assist or help (*Briscoe* )
  + “Abet” means to encourage, instigate, promote or procur (*Briscoe*)

R v Briscoe (2010) SCC *Aiding/abetting requires knowledge that the perpetrator intends to commit the crime and intent to assist the perpetrator in the carrying out of that crime. AR is satisfied by act or omission that aids or abets.*

F: D transported girl to golfcourse where she was killed. Claimed not to know what was happening.

I: Aiding and abetting?

A: **AR** of Aider/Abettor is doing/omitting to do something that aids or abets principal offender. **MR**: they must intend to assist in the commission of the offence and they must know that the perpetrator intends to commit the crime. Wilful blindness satisfies the knowledge requirement. With murder, the Crown must prove that the aider knew the murder was planned and deliberate (intentional), but the aider does not need the intention to kill.

D: New trial

JB: The AR and MR must overlap. If you aid someone without knowledge that they intend to commit a crime then you are not guilty. The aider does not need to know precisely how a crime will be committed, however, in order to have the requisite MR.

R v Fraser (1984) BCCA *Aiding and abetting are “specific intent” offences for which the defence of intoxication is available. Defence of intoxication only available for “abetting” if accused is so intoxicated as to be incapable of understanding the actions and purpose of principal.*

F: D charged with assault with intent to steal, drunk at the time of offence.

I: Intoxication defence available for aider/abettor?

A: 21(b) “aiding” is a specific intent offence because the Crown must prove that the accused acted “with the purpose of aiding”. Therefore, intoxication defence is available. Under 21(c) “abetting” intoxication is a defence only if a person were so intoxicated as to be incapable of understanding the actions and purposes of the principal.

JB: How does this relate to 33.1, which bans the application of extreme intoxication to crimes of assault or bodily harm?

R v Dunlop and Sylvester (1979) SCC *Mere presence at the scene of a crime does not make one guilty of aiding/abetting. Encouragement of the offender or an act or omission that facilitates the offence is required.*

F: D part of gang that raped girl. Ds testified they left to get beer and returned to see a woman having sex with a man they could not identify.

I: Were Ds party to offence?

A: Mere presence at the scene of a crime does not give rise to culpability. Encouragement of the offender or an act or omission that facilitates the offence is required. Failing to prevent or stop a crime is not sufficient.

D: Acquittal

JB: Is there a way to consider the presence of Ds as aiding and abetting? They are part of an audience, they brought beer, they could be keeping watch, etc. Perhaps the court is concerned that a finding of guilt in a case like this could result of a finding of guilt in other scenarios (e.g. riots) in which we do not want non-participating bystanders to be guilty.

R v JSR (2008) OCA *Individuals who act for an unlawful object with subjective foresight of death can be found guilty under 229(c) even if they do not intend to harm the victim. Liability under 21(b) and (c) must attach to a specific crime committed by someone other than aider/abettor.*

F: Gunfight in downtown Toronto, innocent bystander killed.

I: Could JSR be convicted as a perpetrator or party?

A: Liability under 21(b) and (c) must attach to a specific crime committed by someone other than the alleged aider or abettor. JSR cannot be said to have aided/abetted the other shooter in killing JSR. However, JSR could potentially be convicted under 229(c) for unlawful object murder.

D: JSR fits within 229(c)

R v Thatcher (1987) SCC *The court is indifferent as to whether a defendant was a principal or aider/abettor, in terms of guilt. If a jury is convinced beyond a reasonable doubt that D was either, then this is sufficient to found a conviction.*

F: Crown argued that D had killed his wife or, alternatively, had caused someone else to do so. Judge did not instruct jury that it had to be unanimous as to one or the other alternatives.

I: Can a conviction stand even if members of the jury are not unanimous as to the theory of the crime?

A: Strong evidence in relation to the murder weapon and D’s desire to kill his ex-wife; some evidence that suggests D may have done it himself. 21(1) makes no distinction between aider/abettor and principal.

D: The court is indifferent to whether a party aided/abetted or was the principal offender. Every juror was convinced that D did one of these things, that is sufficient.

R v Logan (1990) SCC

* Where a minimum level of MR is required for the commission of a substantive offence, the same level of MR is required for aiding/abetting that offence
* Attempted murder requires, at a minimum, subjective foresight of death. Aiding/abetting this offence requires subjective MR, 21(2) “ought to have know” unconstitutional as it applies to murder.

R v Gauthier (2013) SCC *Three elements of the defence of abandonment. Fourth element if abandonment is raised as a defence to a charge under s. 21.*

F: D charged as party to murder-suicide pact that resulted in death of D’s husband and children. D says she abandoned her intent to kill the children, or alternatively that she acted involuntarily.

I: Requirements for the defence of abandonment?

A: Any defence with an air of reality on the evidence must be put to the jury. Theoretically incompatible defences can both be put to the jury if they meet the air of reality test. Three elements of the defence of abandonment: 1) intention to abandon or withdraw from unlawful purpose 2) timely communication of abandonment to those who wish to continue 3) notice communicated must be unequivocal. Where a person is a party to an offence under 21(1) or forms a common intention under 21(2), a fourth element of the test must be met: 4) the accused took, in a manner proportional to his participation in the commission of the planned offence, reasonable steps to neutralize or cancel out the effects of their participation or to prevent the offence.

D: No air of reality. D did not do enough to neutralize the effects of her participation (e.g hide medication, called police).

JB: Does the fourth element apply to offences other than A/A? Policy reasons for making the defence available include not punishing morally innocent and giving every avenue of withdraw.

R v Vu (2012) SCC

* Kidnapping is a continuing offence that includes both initial taking and ensuing confinement.
* Individuals not involved in initial kidnapping, but who become involved later, are still guilty as parties under 21(1).

**15. Sentencing**

* The Code will set out a maximum sentence for the offence in question (this is the “liable to” part) and will sometimes set out a minimum penalty as well.
* The judge is guided by the general principles of sentencing found in Part XXIII and in the case law.
* Both the Crown and the accused can introduce evidence at the sentencing hearing.
* Prior to the *Truth in Sentencing Act*, a trail judge had broad discretion to give credit (often 2-to-1) for day spent in custody pre-trial.
  + One of the reasons for this was the overcrowding and poor conditions of remand centres
  + Also, time spent in prison before sentencing doesn’t count towards parole, which people are usually eligible for after serving 1/3 of their sentence
* The Purpose of Sentencing is explained in **s. 718**, and includes denunciation, deterrence, isolation, rehabilitation, reparation, and a promotion of a sense of responsibility.
* The Fundamental Principle of Sentencing is explained in  **718.1**: A sentence must be proportionate to the gravity of the offence and degree of responsibility of the offender. **718.2** lists other aggravating and mitigating factors that are to be taken into account.
* When considering a sentence, first consider the universe of possible sentences: What is the maximum penalty? Is there a minimum? Sentences can be combined (e.g. imprisonment and probation or fine and suspended sentence), but no more than two kinds can be combined.

R v Nasogaluak (2010) SCC [Excerpt] *Sentences must be proportionate to the gravity of the offence and the moral blameworthiness of the offender. No one sentencing objective trumps others; judges have broad discretion that is fettered somewhat by case law.*

R v Sweeney (1992) BCCA *Purpose of sentencing is the protection of society as well as the discouragement of re-offending and the deterrence of other offenders.*

F: D, 20 year-old male, fled police while drunk, crashed into motorcycle and killed driver. D comes from dysfunctional home and has learning disabilities; evidence put forth that he regrets his mistake and is working to change circumstances.

I: Was trial judge’s 4.5 year sentence appropriate?

A: Moral culpability of drunk driver is the same, whether a death ensues or not. Wood J. takes issue with the idea that greater sentences will necessarily result in greater deterrence.

R v Smith (2013) BCCA *Trial judge cannot hand down a sentence that is unreasonable in the circumstances. Directions from parliament as to the seriousness of an offence must not be ignored.*

F: D led a tragic life, plagued by abuse, addiction, and mental health problems. Drove her vehicle into another car while drunk and killed the driver.

I: Sentence?

A: Trial judge gave very lenient sentence. Court disagrees that moral culpability of drunk driver is the same whether or not death ensues. Parliament purposely eliminated conditional sentence, the intent behind this must be respected.

D: Sentence increased to 2 years less one day.

R v Ferguson (2008) SCC *If a mandatory minimum sentence is unconstitutional in any situation, it must be struck down. No remedy of constitutional exemption. Test for cruel and unusual punishment is “gross disproportionality”.*

F: D (police officer) was in altercation in jail cell with drunk detainee; shot detainee in stomach and head. Convicted of manslaughter.

I: Does the imposition of a mandatory minimum 4-year sentence for unlawful act manslaughter constitute cruel and unusual punishment?

A: The test for cruel and unusual punishment is whether the sentence is grossly disproportionate (“outrage standards of decency”). Judges are bound by the factual implications of the jury’s verdict. The judge in this case reconstructed facts that may or may not have been in the mind of jurors and developed a theory contrary to evidence.

D: Constitutional exemptions are not to be granted as a remedy for cruel and unusual punishment.

JB: After *Ferguson* there is thought that only an extreme case would see a MMS struck down Several ONCA cases have struck down MMS; they are on their way to the SCC.

R v ML (2008) SCC *Maximum sentences are not only for the worst crimes committed by the worst offender. They are to be imposed when the blameworthiness and actions of the accused warrant it. Appellate courts must show deference to sentencing judges.*

F: D convicted of sexual assault of his daughter and making and distributing child pornography. Trial judge imposed maximum sentence for sex assault and consecutive sentences for pornography charges.

I: Did court of appeal err in reducing sentence?

A: Appellate courts must show great deference to trial judge in sentencing matters. Maximum sentences are not only for the worst crimes in the worst of circumstances; all relevant sentencing factors must be canvassed, and if they warrant the imposition of the maximum sentence the judge must impose it. Sentences for the same types of offences will not always be identical.

D: D’s actions were highly reprehensible. The sentence was proportionate and reasonable.

JB: So long as the sentence is reasonably and not demonstrably unfit, appellate courts must not interfere. Human nature is such that people will always be able to think of a worse offence.

**16. Secondary principles of sentencing**

* **718.2** provides a non-exhaustive list of factors that a sentencing judge may consider when handing down a sentence.
* **718.2(e):** “All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.”

R v Gladue (1999) SCC *718.2(e) applies to all and emphasizes that imprisonment should be the last resort. It is not an auto-discount for aboriginals, the purpose is to allow circumstances and factors unique to aboriginals to be considered.*

F: D (Cree woman) charged with stabbing and killing her boyfriend. When sentencing for manslaughter, trial judge didn’t take aboriginal background into acct.

I: How should 718.2(e) be interpreted?

A: Purpose of section is to respond to overincarceration, particularly that of aboriginals. Traditional sentencing goals of deterrence, separation and denunciation are not necessarily part of Aboriginal perspective. 718.2(e) is not an auto-discount for aboriginals: the point is to allow unique circumstances to be considered, including systemic or background factors that contributed to their circumstance and aboriginal sentencing practices.

D: Three year sentence reasonable.

JB: explanations for over-incarceration: higher rates of poverty, addiction, younger population, historical disadvantage, stereotyping and systematic disadvantage, racial profiling, less likely to secure bail. After *Gladue*, statistics on aboriginal incarceration became worse.

R v Ipeelee (2012) SCC *Gladue principles apply to serious offenders equally to less serious offenders. Offenders are not required to establish a causal link between background factors and the commission of the offence.*

F: D breached Long Term Supervision Order, sentenced to three years’ imprisonment

I: Aboriginal heritage properly considered?

A: Two objectives of LTSO: 1) protect public from risk of re-offence 2) rehabilitate offender and reintegrate into community. Former is not more important than latter. When dealing with aboriginal sentencing, counsel have a duty to bring individualized information pertaining to the background of the offender.

JB: purpose of LTSO was to fill the gap between fixed sentence and dangerous offender status; the former allows dangerous people back on the street while the latter suspends release indefinitely. LTSO allows for supervision for up to 10 years, with conditions that are strictly enforced.

R v Akapew (2009) SKCA *Sentences on co-accused do not have to be the same. Parity is a consideration, but there is no rule that party to offence cannot receive higher sentence than principal.*

F: D has criminal record spanning 25 years with 75 convictions, 22 of which are driving convictions including impaired driving and flight from police. D party to flight from police that resulted in death.

I: 4.5 year sentence fit?

A: No principle that sentences imposed on co-offenders be similar. Sentencing is an individual process. Trial judge erred in believing that she was bound to give D a shorter sentence than co-accused.

D: Sentence increased to 12.5 years, given aggravating factors.

JB: is this an appropriate case for a life sentence? When is it appropriate to hand down a life sentence for repeat offences? Does this case suggest that a maximum sentence is never a fit sentence for an aboriginal offender?

R v Nasogaluak (2010) SCC (note) *Sentencing judge may take into account police violence or other state misconduct while crafting a fit and proportionate sentence.*

F: D punched repeatedly by police officers, who did not report use of force.

I: Can sentencing take consideration of excessive use of force?

A: sentencing judge may take into account police violence or other state misconduct while crafting a fit and proportionate sentence, without requiring the offender to prove that the incidents complained of amount to a *Charter* breach.

R v Draper (2010) MBCA *Denunciation and deterrence must be weighed against rehabilitation. Mitigating factors and personal circumstance must be taken into account when assessing proportionality.*

F: D has fetal alcohol syndrome and several addictions; convicted of four robberies and one theft, sentenced to 6 years.

I: Sentence fit?

A: Denunciation and deterrence must be weighed against rehabilitation. Accused was a first offender with a unique set of mitigating circumstances, as well as community and personal support.

D: Sentence reduced to three years

JB: Mitigating factors must be established BOP by the defence. Can we say that his life challenges—including FASD, ADHD, and a difficulty saying no to others—reduces his moral blameworthiness? Should there be a partial defence of diminished capacity?

**Post-Charter FaultFlow Chart:**

Does the statutory provision specify a mental element or lack of mental element?

* If yes, does the mental element or lack of mental element violate the *Charter*?
  + If yes, the offence is unconstitutional and may be of no force or effect or a mental element may be read in (*Motor Vehicle Reference*)
  + If no, apply the mental element satisfied
* If no, interpret and classify the statute
  + First, **look for (binding) cases interpreting the provision**
    - Don’t re-hash debates that have been decided
  + If there are no cases, or if the case law is unclear, classify the statute as a true crime or a public welfare offence.
    - True crime: in the code or in federal statute with serious penalties
      * If the statute is a true crime, it is presumed to have a MR that must be proven by the Crown BARD.
        + Relate MR to AR and purpose of statute
        + Not every element of the AR necessarily has a MR attached to it
        + Presumption that true crimes require subjective fault (*Beaver*)
        + Sometimes, objective fault will displace subjective fault (*Tutton, Creighton*)
        + Provincial offences are not true crimes, but they may have a subjective MR
      * Consider which parts of the AR should have a mental element attached to them
      * Consider whether the MR is best expressed in terms of intent, recklessness, knowledge or some combination of these.
      * \*\*Your answer will be an argument. There is not necessarily a right answer to this process; highlight how the defence and the Crown would argue.
    - Public welfare offence
      * Presumed to be an offence of strict liability. This presumption is rebuttable.
        + Look at overall statutory scheme to see if this presumption should be displaced and interpreted as absolute liability or subjective fault (*Chapin, Raham*).
        + Defendants may avoid liability by establishing that the “took all reasonable care” to avoid the offence (objective), or that they had a reasonable but mistaken belief that justifies their actions.
    - Clear legislative intent is required to create an absolute liability offence
* Once you have established the mental element or lack of mental element, remember to consider whether it is consistent with the *Charter*. If not, it must be reinterpreted to conform with the *Charter* where possible, or struck down. With the exception of murder and war crimes, the court has not found that the constitution demands subjective MR for true crimes.