Proving the Crime

***BARD:*** Crown must prove all elements of the offence BARD.

Juries: *Lifchus* 97 – instruct juries on BARD. Not moral certainty; doubt ground in reason+ common sense. *Starr* 2000: Ask; is it likely jury applied wrong standard? BARD is much closer to 100%. *J.H.S.*08 (sex. ass. of stepdaughter): **[W. (D).] principle-** Must acquit if (1) you believe the evidence of the accused; (2) if you do not believe the testimony of the accused but are left in reasonable doubt by it; (3) Even if you do not believe evidence of accused, must be convinced BARD by evidence of acc. guilt

**General intent** = intentional or reckless commission of AR is enough, **Specific intent** = extra intent – MR required, often subjective

**Offences:** Summary max: 6m/5kfine,Pct,nojury,noprelim inquiry – Indictable: accused has 3 options, P (proceed like summary) or Superior(w/prelim inquiry), jury or not. – Hybrid: crown choice

**Evidence must be:** (1) relevant (2) material/probative, admissible (meets the rules of evidence); (3) credible (judge makes findings of fact, jury makes findings of fact)

**Evidentiary Burden:** Crown must present evidence for every element of the offence that, *if believed* could prove offence BARD.

**Legal/Persuasive Burden:** Crown must prove each element of the offence BARD (standard jury must apply to evidence at end of trial)

**Reverse onus:** evidentiary or persuasive burden on accused in statutory provisions. Either on balance of probabilities or to point to “some evidence to the contrary” to rebut a presumption. *Oakes* 86 test for reverse onus: 1) press/subs. 2) rational connection 3) minimal impairment 4) proportionality b/t effects on rights & objectives.

*Downey*92 living on the avails of prostitution. Presumed guilty if living with prostitute. Disprove on BOP. Applied *Oakes* test and maj. say it passed. Rev. Onus=OK.

**Note:** From Downey + Oakes: Placing evidentiary burden or persuasive burden on accused will violate s. 11(d) unless presumed facts flow inexorably from proven facts.

*St. Onge-Lamoureux* 2012: Assumption w/ breathalyzer. 1. BAC at test =BAC driving, 2. Machine correct. Presumpt: Not possib. to convict w/ Reas. Doubt.

*Actus Reus*

 “The Crown is required to prove the following elements of the offence BARD”:

*Actus Reus* [define the *actus reus*… Conduct, Circumstances, Consequence]

***CONDUCT?*** [*Frey v. Fedoruk* 50*:* CONDUCT – Peeping Tom , not in CC- NoCL offences for crimes. *Boudreault* 2012: Accused sitting behind wheel of parked car, drunk, keys in ignition. No intent, no capability of setting vehicle in motion. **Dissent:** the point of this law is preventative, ‘placing in a position of risk’

***OMISSIONS*** ie. Law creates Duty to Act. Affects the **Conduct**. *Not* performing conduct can be a crime. Few provisions require positive action, with following exceptions:

Continuing act doctrine: *Fagan* 68UKCA car on officer foot, fails to move it, assault by omission? no. **Cont.Act** – *MR & AR* didnt occur same time but combined as it was a ***continuing act.*** Bridge dissent: F did nothing once car on foot. Not assault. Assault is not a crime of omission.

Legal duties at common law: *Moore* 78: no CL duty at offence, cannot introduce now. *Thornton* 91CA: know& donate HIV+ blood. CL Duty to act to not harm neighbour.

***CIRCUMSTANCES?*** Must act/omission be committed in particular crcmstncs? APPLY FACTS. **Words to look for:** -“Likely to cause”…is it reasonable/truly likely that the circumstance is valid? May include **absence** of other circumstances.

***CONSEQUENCES?*** [*Moquin:* 2010 MbCA – domestic violence (CA- clear bodily harm) TJ: Assault v Assault causing BH, uses wrong defn of bodily harm, convicts just assualt. CA: TJ err.law. Aslt.BH

***CAUSATION*** must be proven when there are consequences.

**Test for Murder:** If pass *Harbottle,* then first degree. If *Harbottle* not met, apply *Smithers*/*Nette* for second degree and manslaughter.

**Substantial and integral cause of death** *Harbottle 93*(Accused lures, pins girls legs down for rape. Subst & integ. Guilty. ).

Previously in *Smither*s 78 (hockey fight, thin skulled stomach kick; malfunctioning epiglottis): **contributing cause outside the *de minimis* range.**

For all offences, except first degree murder, the test for causation is whether the accused’s actions were **a significant contributing cause** *Nette* 01(robbery tied up old lady, died due in part to weak neck). Deemed it was easier to charge jury with “significant” rather than “not insignificant” from *de minimis* in Smithers

Rejected causation arguments: Military camp, stab, dropped, bad care: Intervening act doesn’t make act “mere history” *Smith '*59 UK CA, *Blaue* 75 UK CA (treatment refusal caused death… Jehova W refusing transfusion). ***“But for”*** accused’s actions, victim would be alive.

Other rules: even where causation cannot be proven (i.e. the accused actions resulted in the harm), it can be inferred through agreement *JSR* 08– Eaton center shooting/which bullet hit the victim. ***“But for”*** JSR’s actions, she would be alive. Look at surrounding evidence. Joint Conduct.

Intervening Act: Maybin 12 – bros bar fight, bouncer punches, dies – Manslaughter. Who is resp for death? Were they a significant contributing cause? “But, for” their acts, victim would not have died. Approaches at CA: 1) “reasonably foreseeable”? (SCC – not determinative for causation, but incorporates issue of moral blamew) or 2) “intentional, independent act” severs chain causation?(how connected to result is 1st act, causal chain may not break). Says it’s up to TJ, upholds 3 acquittals.

***VOLUNTARINESS:***“Further, the Crown must prove that the acusd committed the act voluntarily.” & Reflexive actions are considered ***involuntary***.

Loss of control of vehicle, icy roads: ***involuntary*** (*Lucki*) '55 Sask Police Court– *R v Jiang 05* BCCA: J driving home, falls asleep. Not foreseeable/diagnosed: Not guilty

*Mens Rea*

“The Crown will also have to provide the following *mens rea* [define the *mens rea*, knowledge, intent, objective / subjective… look to cases for examples] BARD”

Can be knowledge or intent, or be substituted by willful blindness or recklessness.

***SUBJECTIVE KNOWLEDGE***: For true Criminal offences requiring knowledge, there must be a ***subjective*** *mens rea*: the accused must know or intend their action. An honest but mistaken belief will not meet *mens rea*. MR mirrors AR *Beaver* 57sugar of milk drugs not abs. liab., no moral blamew. Just convicted for sale. Held to be drug.

However, a **subjective awareness that an act could cause deprivation is sufficient.**

***FRAUD:*** Focus on the accused’s subjective knowledge of the prohibited act and prohibited consequences. Honest belief that conduct is not dishonest is irrelevant. (*Théroux* 93 *–* building fraud, told invstrs. proj. was insured). *R v Kingsbury* 2012 BCCA: Expands on it. No colour of right. Unjust seizing the trailer. Belief or right.

***INTENTION & RECKLESSNESS***: (Intention includes recklessness). foresees a consequence as certain or sub. certain to result from his / her actions *Buzzanga* 80 Ont.CA*–* willfully promoting hatred, recklessness alone insufficient, willful=intent or knowledge/(moral) certainty of likely result. Recklessness: Awareness of a risk that prohibited consequences may occur and proceeding in the face of that risk (*Buzzanga and Durocher* – hate speech, willfully promoting hatred).

***WILLFUL BLINDNESS***: can substitute knowledge component of murder. "Willful blindness: suspicion aroused to need for further inquiry, but deliberately chooses not to make those inquiries” (*Briscoe* 10 *–* abduction, sexual assault, murder, Edmonton mall) & *Blondin* 71 scuba tank filled with hash– knew there was something illegal in it, chooses not to ask/look. = willful blindness. *R v Schepanek 2012 BCCA* Smuggles drugs into prison. Says she didn’t know what it was, could have contained anything. Not a valid excuse. Found guilty of recklessness (Mens Rea). Makes WB look like recklessness. Willful, where undefined, means intention **not** recklessness (*Buzzanga*)

***MOTIVE*** ≠ mens rea. No intent in motive, precedes exercise of will. Motive is part of evidence, not the mens rea of the crime. *Lewis* 79 *–* mails bomb to Tatlay’s daughter for him & she dies.

***TRANSFERRED INTENT***: cannot be used for attempted murder. Unclear whether no transferred intent for attempts in general.*Gordon*09ONCA – sawed off shot gun, shoots crowd, injuring others as well as intended victim – charged w/ attempts for all. SCC doesn't work, 1 attempt M, 3 agg.assault. Inchoate crime: only **intent.**

Departure From Subjective Mens Rea

***ABSOLUTE LIABILITY:*** Crown does not need to prove any elements of fault and the accused cannot rebut this with any proof.

***STRICT LIABILITY:*** For regulatory / strict liability offences, the *mens rea* is presumed, but the accused can rebut the presumption by proving due diligence on a BoP.

*Sault Ste Marie* 78*:* pollution – public welfare offence, look at the language in the statute & classify the offence i) true crimes = subjective MR, ii) public welfare = strict liability. Look at: indictable vs summary, weight of the penalty, generally regulatory rather than prohibitory.

*Chapin79*: hunting w bait. Low threshold for D to show due diligence, depending on offence. Should be strict rather than absolute liability.

***CRIMES OF OBJECTIVE FAULT:*** Non-CN offences: look for carelessly, dangerously for objective fault

*Criminal Negligence*: 2 types – *causing bodily harm*, *causing death*. **Crown must show BARD that accused should / ought to have known that the prohibited consequence would result** *Tutton* 89 son dies b/c stop insulin injections because of divine vision. Argue mistake of fact –

AR: act/omission (where duty to act)  consequences  bodily harm, MR: intent to act ... bodily harm/death  **marked and significant departure** from standard of reasonable person.Test for CN is **objective:** that which could be expected of a reasonably prudent personin the circumstances of the accused. Welder example (*R v Tutton,*89 - CN death)  affirmed & expanded in *JF* below. **Welder:** Welder has reasonable perception of no explosives. This perception is taken into account for obj. test.

Further test for CN causing death = “**marked and substantial departure** from conduct expected of a reasonable person.” (*JF* 08 - failed to intervene in foster child’s abuse from spouse. Convicted at trial of CN, but acquitted of failure to provide necessities. **Court:** should be acquitted. FTP is same conduct, lower threshold to prove.) **Note:** substantial=significant. Failure to provide (necessities)/ all other offences of objective fault: **marked departure.** *JF* 08

For ***dangerous driving***, a modified objective test for *mens rea*: “**marked departure** from std of care obs by reasonable person, but taking into account the cntxt of evnts surrounding the incident. Licensing; everyone should know the rules and know how to drive. (*Hundal* 93)– overloaded dumptruck, runs thru intrsxn dt.Van rush-hour kills driver in car). Automatic, reflexive nature of driving. Cory- objectively bad driving cld be rslt of sudden onset “human frailties” (eg. Disease, phys.disability (myb ppl on meds w/o knowledge of effects) in these circumstances they have a complete defence ← McLachlin says these egs actually mean there is no AR b/c involuntary.)

AR (subjective): Was accused driving dangerously; MR (objective). Was accused driving marked departure from standard of reasonably prudent driver; **momentary negligence does NOT meet this standard** *Beatty,* 08 drifts into oncoming traffic, momentary lapse in awareness, not enough evdnce to ground crm.lblty fr ngl. Applied “marked departure test *Roy* 12 acquit trailer pulls into trfc, passenger dies – SCC **post *Beatty***is basically looking for **fault**, not sufficient here. Driver’s licenses suspd. Argue that he still has knowledge of licensee. Cannot infer MR from AR. Wasn’t marked departure.

*ADH* 2013: Wal-Mart baby. **Subjective fault** is required for elements of abandoning a child under 10. Look at broader content/text of statute to determine fault requirement. Presumption of subjective fault for true crimes. Subjective fault ensures the criminal law does not “reach too far”.

Presumption that all true crimes have subjective fault req. is rebuttable.

Mens Rea and the *Charter*

Charter limits absolute liability offences and crim negl offences. 1) What is the MR? 2) Does MR violate s7? 3) s.1

***Motor Vehicle Reference, 86:*** Absolute liability with imprisonment violates s. 7. **POFJ** that morally blameless should not be imprisoned.

***R v Raham, 10***: Strict liability offences can have imprisonment terms (due diligence test). **Presume** strict liability, not absolute.

***R v Martineau, 91***: No constructive murder- s 230 (a)(i/ii) is unconstitutional, no murder without **subjective foresight of death**, not proportional to moral blameworthiness. *Stigma+stiff punishment require subjective MR.* Can still charge w/ manslaughter. **Note:** Diff from s 231 (5) classifying 1st or 2nd deg. ***R v Vaillancourt***: Repealed 230(d) ***R v Shand, 11:*** “Ought to know” (objective foresight) is constitutional (229(c)) ***R v DeSousa, 92***: Unlawfully causing bodily harm only requires: 1) **unlawful act (AR/MR), 2) objective** **foresight of harm**- constitutional b/c it is not a crime of high stigma. **Note:** No need for matching AR/MR? -Link to unlawful act manslaughter (same but with death) and CN causing death ***R v Creighton, 93***: (injecting drugs into gf). **NO Personalizing accused/circumstances**, so long as accused can appreciate nature/quality. For unlawful act manslaughter, 🡪objective foresight of **bodily harm** (DeSousa). Cite the **‘thin-skull’ rule** for the cause of death: Impossible to make distinction of causing death or harm… what if you objectively wouldn’t have caused death? Must take victim as you find them.

Mistake

Mistake of Fact: Mainly sexual assault- Honest but mistaken belief of consent- not obj. Must have an ‘air of reality’ for jury to hear it.

Steps: 1) Crown proves AR/MR BARD (Sex. Assault: MR presumed from evidence), 2) D submits defence of consent, must meet ‘air of reality’, show evidence of *concurrent* express/implied consent. 3) Crown disproves air of reality, \*) Can apply to any crime where knowledge part of MR

Mistake of Law: Doesn’t apply to CC offences, but can reduce sentence. Officially induced error applies for Non-CC offences.

***R v Kundeus,76***: Dealing drugs, mistakes which one he gives, MR can be adduced from GI to deal drugs. Dissent: AR/MR must match. Acquit in this case, but parl should “catch this” in leg’n (drugs). ***R v Ladue, BCCA 65***: If you have *extra* MR, OK to convict (sex w/dead woman, though it was rape).

**Sexual Assault Progression:** Now is all-encompassing (no exception for married women), easier’ to prove, onus for consent on D. Accused must take reasonable steps to obtain consent, intoxication does not apply. ***R v Pappajohn, 80***: Led to changes in sexual assault prov. Only proof of **honest belief** of consent, reasonableness can help w/ evid. ***R v Ewanchuk, 99***: Sexual assault case: No presumed consent, must have honest belief of honest consent, cannot be reckless/wilful blind. ***R v Campbell and Mylnarchuk, 73 ABDC***: Stripper laws, Edmonton. Mistake of law is not an excuse. Reduces sentence. ***Levis(City) v Tetrault, 06***: Officially induced error of law: 1) Mistake of law, 2) legal consequences considered, 3) officially induced (likely has to be government), 4) reasonable/erroneous advice, 5) relied upon. Defence on **BOP** 🡪SOP. ***R v Khanna, 09 ONCJ***: Officially Induced- Info from Imm officials

Intoxication & Provocation

**Intoxication:** Common Law Defence. Only applies to Specific Intent crimes🡪 convict of lesser off. Or acquittal for crimes w/ only SI. **General vs. Specific Intent- *Leary Rule*:** Specific (“with intent to”, “for the purpose of”). **Extreme Intoxication:** Must be proven on BOP, applies to GI crimes, except those in s 33.1: Does not apply for offences violating physical integrity or when the accused has departed markedly from the standard of care (response to *Daviault*). **Provocation:** Stat. defence: only applies to reduce murder to manslaughter: 1) wrongful act/insult causing accused to lose control (objective), 2) Acted on the sudden (subjective). Air of Reality

***R v Bernard, 88***: (Friend’s dad dies, accused drunk, rapes) Sexual assault is GI🡪 No defence of intoxication ***R v Daviault, 94***: (wheelchair victim) Extreme intoxication is a defence to GI crimes, subject to recklessness. (‘overruled’ by s 33.1 for assault) ***R v Drader, 09 ABPC***: Applied the above provision- Shows circumstances for finding EI: sloppiness, passed out, amount consumed, physical skills, must prove air of reality for intox level. ***R v Penno, 90***: voluntary intoxication is not a defence for offences containing intoxication (DUI)

**Provocation:** ***R v Hill, 85***: (Big brother murder, homophobe) Consider personal characteristics for ordinary person- no need to say in charge to jury- anger tolerance and drunkenness cannot be considered as traits.  ***R v Thibert, 96***: (mentally perturbed, tired accused follows ex-wife to work, kills bf) Takes into account some subjective state of D for provocation- air of reality test. ***R v Gill* (ONCA, 09)** (geek): If air of reality, must submit. Allow jury to gauge testimony. Anger makes it hard to argue in conjunction w/ self-defence. ***R v Tran, 10***: No provocation for attempts (wide sentence range), No contextualizing for beliefs that are counter to the provisions in the *Charter*. Maybe not consider culture characteristics Seems to reverse *Hill.* Private behaviour will rarely be provocation. ***R v Nealy* (ONCA, 86)**: Rolled up charge- consider cum. effct

Mental Disorders

NCRMD not a DEF, but applies to all offences in CC. Can be raised by Crown or defence (BaOP)🡪 Not an acquittal. Onus of proof on party that raises the issue. 1) Unable to appreciate nature/quality, OR 2) Incapable of knowing it was wrong. \*Excludes intoxication

***R v Chaulk, 90***: (knew laws existed, thought didn’t apply b/c they were wizards). The definition of ‘wrong’= morally wrong; *M;Naughten Rules:* can go to MR (cutting loaf of bread) or ‘exculpatory’ (wrongness) AR (no control over physical actions),. Reasonable Charter limit under s 1.

***R v Swain, 90***: Instances when mental disorder can be raised: 1) Accused raises it, 2) Accused waits until found guilty, then raises it, 3) Crown can raise it if accused puts their mental state in issue at trial, 4) Crown can raise it after a finding of guilt, but before conviction (never happened).

Non-Mental Disorder Automatism: Incapable of appreciating the nature and quality of the act. Non-mental disorder= acquittal, Mental Disorder automatism= NCR **Factors:** 1) Continuing danger? 2) Expert evidence ***R v Rabey,*** *77* ***ONCA***: Psychological blow does not arise from ordinary stresses of life. is not enough to cause NMDA

***R v Parks, 92***: Is there a **continuing danger** in granting acquittal?

***R v Stone, 99***: (47 stabs) Labelling NMDA: Look at nature of trigger (**internal cause**- what is normal reaction) and likelihood of occurrence (**continuing danger**), policy. Must prove dissociative state on BaOP. Evidentiary burden: Enough evidence that if true proves accused’s point. Automatism is impaired unconsciousness. ***R v Bouchard-Lebrun, 2011***: Dissociative state brought about by drugs🡪 intoxication, not NMDA

**Policy:** Balance between need to protect public and imposing liability only on those who are responsible, blameworthy for their actions.

Self-Defence

Defending self, other person or property. Limited to assault, manslaughter, murder🡪 acquittal. Old provisions were confusing and gave an easier duty to meet for someone who caused death or grievous harm. New provisions: 1) Reasonable grounds to believe force/threat of force is being used against them, 2) That act that constitutes offence is done for protection, **3) Reasonable in the circumstances**. *Air of Reality*. Crown need only disprove **one of the elements** (BARD).

***R v Lavallee, 90***: No duty to leave (home, assault). No way out other than force, examine learned helplessness and circumstances. Must be reasonable to fear death/harm, immediacy has subjective element, consider in context (abuse, brutality). ***R v Petel, 94***: Actual assault not necessary, *just reasonable belief of assault*. Imminence is a factor ***R v Mallott, 98***: Clarifies ‘battered’ is not a defence. Understand the *individual* case, as not all are alike, not trying to replace “reasonable man” with “reasonable battered woman”. Basically means that for the ‘no other alternative’ stage, it is only subjective.

***R v Cinous, 02***: (gang of thieves, thinks he is going to be killed by partner, kills him) For self-defence as a defence for murder, must have subjective/objective air of reality for 1) assault, 2) reasonable apprehension of death, 3) **no other alternative**

***R v Caswell***: Protecting property (s 35 defence)- look to person’s past history of damaging property ***R v Urquhart***: New S-D Prov- Provocation and out of proportion force= no defence. **Note:** There is no proportionality requirement in the new provisions… only ‘reasonable in the circumstances’ and it also isn’t explicitly a bar to the defence if you provoked it... all falls under reasonableness

Necessity & Duress

**Necessity:** CL Defence, leads to an acquittal. Must show moral involuntariness. Air of reality for: 1) Urgrent/pressing peril (MOT), 2) No legal alternative (MOT), 3) Proportionality b/w harms (OBJ). Participation in unlawful activity does ***not*** prevent defence, but if actions are truly not involuntary, disentitled. Unlikely to ever apply for murder (*Latimer)*. **Duress:** Statutory defence (s 17), limited to 1) Person making threat is present during commission, 2) Threat of immediate bodily harm, 3) Threat to the accused, 4) Exclusions (murder, etc.)

***R v Perka, 84***: 1) Urgent and Pressing Peril, 2) No legal alternative, 3) Propoertionality b/w harm caused and avoided

***R v Latimer, 01***: Urgent Peril: MOT, No legal alternative: MOT, Proportionality: Objective. Not likely to apply for murder.

***R v Ungar,02 ONCJ***: Necessity applying even if there is legal alternative for good Samaritan. Defence is most likely to apply for minor offences

Statutory Duress: 1) Threat of death or bodily harm, 2) Accused believes threat will be carried out, 3) Not a party to a criminal association/conspiracy, 4) Not on the list of excluded offences.

Common Law Duress: 1) Threat of violence (MOT), 2) No safe avenue of escape (MOT), 3) Proportionality b/w crime and threat (OBJ), 4) Temporal connection. Principles who commit an offence NOT listed in s 17 can access CL defence.

***R v Paquette, 77:*** Aiders/abettors only use CL defence of duress. ***Hibbert v The Queen, 85***: (leads drug dealer out of house to try to get killed). Duress does not apply to negate MR, so must raise air of reality to all elements. (CL Defence provisions above). ***R v Ruzic, 2001***: “Morally involuntary” should not be punished, section 7 Charter challenges succeeds based on not accounting for immediacy and requiring presence. Principle offenders who commit listed s 17 offence cannot have defence of duress. ***R v Ryan, 13***: (Ryan hires undercover RCMP hitman to kill estranged husband, police have failed to respond to her calls) Duress is not about doing something to the person who is threatening you. This is against the stat. exclusion list so the defence was not available.

Parties and Attempts

**Inchoate Offences**: attempts, conspiracies, counselling, assisting, accessory all impose responsibility.

Attempts: Always an included offence, but with less of a sentence (1/2). Want to provide deterrence, also incentive for not committing crime.

Aiding and Abetting: Assist or encourage the wrongdoer. Abettors are equally as culpable as offender, degree of participation will have effect at sentencing, except for murder (all mand life). For intent to abandon, must have AoR of 1) Intent to abandon, 2) communicated timely, 3) unequivocal, 4) proportional

**Attempts: *R v Ancio, 84***: (accidental gun discharge on stairs) Recklessness is insufficient for attempted murder, no constructive murder either. Crown must prove intention to complete the harmful act. ***R v Sorrell and Bondett* (ONCA, 78)**: Mere preparation: **Policy-** Want to have it as close to the offence as possible to encourage people backing out, but not so close that at last second, they change mind and are not liable for consequences. Too far down the path, consequences get greater and greater. ***United States of America v Dynar, 97***: ‘Impossible’ crimes can still be attempts- only about MR. ‘Imaginary’ crimes have no attempt. Factual Imp.= would have been crime, Legal Imp.= Even committed, not a crime. **Parties: *R v Briscoe, 10***: AR: Act to assist/encourage can be omission. MR: Assist/encourage for purpose of crime (wilful blindness applies). **Note:** AR/MR have to overlap ***R v Fraser* (BCCA, app SCC), 84**: Intoxication applies for any aiding/abetting, as this is a SI crime. **Note:** section 33.1: Says you cannot do this for violent crimes, but *Fraser* only applies to aid/abet. ***R v Dunlop and Sylvester, 79***: Mere presence is not aiding/abetting. Think of how ‘encouragement’ could come from being part of a ‘gang’. ***R v JSR, 08 ONCA*** : JSR convicted on unlawful objet murder, **not** as aid/abet b/c no shared intention**. *R v Thatcher, 87***: If convicted of murder/aiding and abetting, jury can convict on either🡪same result. Jury unanimity on which one is not needed, so long as they all believe guilt in one sense. **Policy:** ***R v Logan, 90***: Need subjective foresight of death for aiding/abetting murder. ***R v Gauthier, 13***: Incompatible defences can be put to jury. Abandonment for Common Intention: 1) Intention to abandon, 2) Timely communication, 3) Unequivocal communication, **for aid/abet:** 4) Took manner, proportional to participation to neutralize effects of previous participation. ***R v Vu, 12***: Continuing offences- aid/abet applies if offence is not completed in fact.

Sentencing Principles & Parameters

Factors: 1) Proportionality to gravity of offence, moral blameworthiness, 2) Deterrence (General: Society, Specific: Individual), 3) Rehabilitation, 4) Isolation 5) Denunciation, 6) Similar sentences, 7) Aggravating/Mitigating Factors, 8) Restorative Justice, 9) Ancillary Orders (accompany sentence- ex: weapons prohibition)

Mitigating: Aboriginal offenders, past good acts, unfortunate circumstances

Aggravating: Listed in the Code

***R v Nasogaluak, 10***: (police brutality, lost job due to injuries) Proportionality to blameworthiness of offender, wide discretion to TJ, but must pay attention to similar sentences. ***R v Sweeney* (BCCA, 92)**: (DUI, young offender, cleft palate, fleeing police) Criminal justice system probably isn’t best way to stop some issues (DUI). Jail time does not serve denunciation or rehabilitation. In cases of DD causing death, moral culpability is the same. Sentencing principles (2-7 above). ***R v Smith, BCCA, 13***: (woman on crack, angry, aggressive driving) Must abide by Parliament’s rules preventing conditional sentence. CA judge tries to get around this with creative sentencing. ***R v Ferguson, 08***: (accidental discharge, manslaughter) No ‘exceptions’ to a constitutionally valid law (minimum sentence). Can argue that it is invalid based on hypothetical scenario (mandatory minimum). Mandatory minimums are useful for Crown in plea bargains, therefore constitutionality affects all. ***R v Latimer, 01***: No constitutional exemption for him based on mercy killing. ***R v M (L)* 08**: (child pornography, repeated offender) Reasonable sentencing shouldn’t be interfered with. NO Worst offence, worst offender reasoning for max sentence. Consecutive sentences typically arise when accused commits one offence and then something else to make it worse.

Secondary Principles of Sentencing

***R v Gladue, 99***: (drunk, pregnant girl fleas from spouse, stabs him) Must consider aboriginal status of offender. Several factors: 1) Disproportionately high incarceration rate (especially women), 2) High offender rates, 3) Young population, 4) High poverty, 5) High addiction, 6) Time spent in government care, 7) over-policing, 8) More likely to face jail than non-aboriginal. But for violent crimes, less protection **Note:** Is this something that judges can actually remedy through sentencing? After this case, statistics actually became worse.

***R v Ipeelee; R v Ladue, 2012***: Repeat offenders- Dangerous (can lead to indefinite sentencing), Long-term (subject to conditions for 10 years after release). LTO provisions are also for protection of offenders, not just society. Must focus on rehabilitation and always account for aboriginal offenders, even for violent crimes. Reconsider “neutral” factors (education). SCC recommends stricter adherence to *Gladue*. ***R v Akapew, 09***: (accused is 46, steals car w/17 y/o friend) Comparing to principle offender is not a principle of sentencing. Ex: If principal only gets 5 years for first offence, aider can still get 10 for repeat offender ***R v Nasogaluak, 10***: Police misconduct can be a mitigating factor ***R v Draper, 10***: (FAS offender, young, robberies) Must consider youth, first time before court, upbringing conditions (FAS). Lengthy sentence can sometimes be counter-productive.

Policy Issues

Charter: Is it fair to have imprisonment for Strict Liability? Is it easy enough to prove due diligence? What about personalizing the accused? Should stigma of an offence matter for sentencing?

Qualifying Murder: 229(c)- What should happen in cases like *Vasil* (accused burns furniture in house, kids die)? Should the accused have to foresee death? To what degree? What are factors you look to (must look to state of knowledge at that time)? Lamer J(MR): Intent to carry out unlawful object, intent to commit dangerous act

Necessity: Think about the case with the conjoined twins. Necessity applying to murder, such as Latimer? What about breaking into house to stay alive?

Provocation: How much can we personalize this? What about cultural context? Was the line drawn in Tran sufficient? Rolled-Up Charge… Should this be allowed? It kind of lowers the threshold for meeting the AoR test for any one element. Is there too much of a reliance on stereotypes? (*Thibbert*- wife as property, *Hill*-homophobe).

Sexual Assault: Progression- No wife exceptions, must be a ‘yes’, not just not a ‘no’, reverse onus for consent. What about honest, but unreasonable beliefbeing acquitted (*Pappajohn*)? Reasonable steps provisions from section 273.2.

Attempts/Aiders & Abettors: Should they be able to raise intoxication? At what point is mere presence an encouraging factor (*Dunlop*)? Does it make sense to charge them the same way as principle offenders? Should there be some lenience? For attempts, where do we draw the line for mere preparation and for abandonment? We don’t want to discourage abandoning plan, but the further along the timeline it is, the greater the risk and the harm. Legally/Factually impossible attempts? (*Dynar*)

Sentencing Principles: Should judges always be restricted to the conditions in the Code, specifically for no conditional sentencing and mandatory minimums? How do we deal with repeat offenders? What about Long-term offenders; what kind of supervision do they need on release? What about the provisions for time served? Is it right to have these often count for double? Bad conditions in custody, doesn’t count towards parole. What about max/min sentences? Post-release supervision?

Aboriginal Offenders: What do we make of the high incarceration rate? What is the Court’s role? Why have things only gotten worse since *Gladue*? Violent crimes?

Mitigating/Aggravating Factors: For factors such as education, community service, etc. this seems to keep helping the rich/fortunate. Is this fair? How about the flip side, where having a ‘tough life’ can be a mitigating factor? Where do we draw a line when dealing with either to say that it isn’t mitigating. For aggravating factors, consider the same principle- A history of past offences could actually just show that you’ve had this ‘tough life’.

Intoxication: Should this even be a defence? Why isn’t voluntariness treated the same way as DUI crimes? Does s 33.1 do a good job of protecting public safety? Should GI crimes be subject to *involuntary* intoxication? Can we substitute the ‘blameworthiness’ of getting drunk in the first place for the blameworthiness of the act?

Mental Disorders: What is ‘wrong’? Concerns about releasing dangerous offenders? Disposition board now needs to prioritize public safety in decisions. Is this right? Con: Stigma, not treating victim. **Bill C-54**: victims first. Is this right? Burden of proof? Charter? Mand. Min🡪 can’t reduce sentence for unrecognized mental disorder.

New Self-Defence Provisions: What is meant by ‘reasonable in the circumstances’? Is allowing such judicial discretion a good thing? How would cases such as *Lavallee* be interpreted today under the new provisions?