LAW 120: Criminal Law

# Chapter 1 – Introduction to Canadian Criminal Law

## A. Purposes of the Criminal Law

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| R v Grant |
| Facts – Grant was employed as an Indian Agent in the Indian Affairs Branch. He used money from a “relief fund” to build housing in the Yukon, using First Nations men to do construction work for free. Grant was able to build 45 houses, set up a store, build a power line, and sponsor a beauty pageant entry. He diverted $70,000 in total.  Procedural history – Grant was charged with 6 counts of making a false return to the department of Indian Affairs. He was convicted at trial but fined only $10/count. The Crown appealed to the Yukon Territory Court of Appeal.  Who won? Crown  Issue – Can civil servants reallocate funds to create a better outcome or must they comply strictly with directions laid down by Parliament?  Holding – It is not acceptable for civil servants to reallocate government funds without authorization.  Reasoning – Grant knew the funds were being used in ways they were not intended for. He also knew that the use of the funds was not authorized by Parliament (the Minister had rejected a recommendation from Grant). Grant also made false returns to deceive a government official. |

## B. Sources of the Criminal Law

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

* Divides the powers of federal and provincial legislatures
* Section 91 – Federal Powers
  + Criminal law
    - Procedures to be followed in criminal trials
    - Establishment, maintenance, and management of penitentiaries
      * For sentences >2 years
* Section 91 – Provincial Powers
  + Establishment, maintenance, and management of prisons
    - For sentences <2 years
  + Property and civil rights in the province
  + Administration of justice in the province
    - Procedures in civil matters
    - Creation of the courts
    - Staffing courts
  + Impose punishment by fine or imprisonment for provincial laws

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

* Contains most criminal offenses
* Contains most procedure followed in criminal cases
* Sections 8 and 9 – principle of codification
  + Section 8 – common law defences are preserved
  + Section 9 – abolished common law offences (except contempt of court)

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

* Contains list of basic rights that accrue to individual
* Often used to exclude evidence

## C. The Commencement of Criminal Proceedings

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

## D. Classification of Offences

* **Summary Conviction Offences**
  + No right to jury
  + Trial will take place in lowest level of court
  + No right to evidentiary trial
  + Maximum penalty – 6 months in jail/$5,000 fine
* **Indictable Offences**
  + Generally more serious
  + Created by federal government (usually by *Criminal Code*)
  + Three different types of trials

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

* Offences in the absolute jurisdiction of the provincial court
* Held in provincial court before judge
* No preliminary inquiry

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

* Offences in the exclusive jurisdiction of the superior court
* Usually the accused will have a preliminary inquiry
* Trial before judge and jury

1. All other indictable offences

* Accused may elect the mode of trial
* **Hybrid Offences**
  + Crown decides whether to proceed on summary conviction or on indictment (e.g. Sexual assault)

## E. Outline of a Criminal Trial

1. Arraignment (formal reading of the charge to the accused)
2. Plea Entered (“Guilty” or “Not Guilty”)
3. Crown Case (Crown calls witnesses and documentary and real evidence is entered)
4. Crown case is closed
5. Defence may choose to make a “No Evidence Motion”
6. Defence Case
7. Defence Case is closed
8. Closing Arguments
9. Judge’s Ruling

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| R v Moyer (1994)(SCC) |
| Facts – Moyer and young “skinhead” took neo-Nazi photos in a Jewish cemetery. Moyer choreographed the photo shoot by supplying the props and directing the actions of SB (including exposing his penis towards a gravestone and simulating urine pouring down in front of the gravestone).  Procedural history – Trial judge charged Moyer with offering indignities to human remains contrary to s 182(b) of the *Criminal Code*. The Court of Appeal overturned his conviction.  Who won? Crown  Issue – Does ‘offering indignities’ require physical contact with human remains or does the offence capture indignities to monuments?  Holding – Physical interference with a dead body of human remains is not necessary under s 182(b) and the indignities must be offered to a dead body or human remains (as opposed to monuments). However, where monuments mark the presence of human remains, offering indignities to the monuments constitutes offering indignities to the human remains that are marked by the monuments.  The Court of Appeal may amend a charge where it considers it to be in the interests of justice, unless the accused has been misled or prejudiced in his defence or appeal.  Reasoning – Parliament intended that indignities offered to the gravesite and the monument should be considered indignities offered to the human remains. |

# Chapter 2 – Proving the Crime

## The Adversary System

* Judges are largely passive members
* Each side is represented by council
  + Council introduces evidence
* Distinguished from the inquisitorial model of civil law system

## B. An Introduction to Evidence

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

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

* The Crown bears the burden of proving the guilt of the accused
* The standard of proof is ***“beyond a reasonable doubt”***
  + If the Crown proves each element beyond a reasonable doubt it has met it’s ***legal burden***
* The Crown also has an initial ***evidentiary burden*** that it has to meet

Evidentiary burden – to introduce some evidence on each element of the offence that, if believed, could prove it beyond a reasonable doubt

* The purpose of the preliminary inquiry is to determine whether the Crown has satisfied their initial evidentiary burden
* There are two kinds of provisions that place one or more evidentiary or persuasive burdens on the accused instead:

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

* ***Oakes***

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

* ***Downey***
* **Permissive presumptions** – allow, but do not require, the trier of fact to infer the existence of one fact from the existence of another
  + For example, that the accused knew that property in his possession was stolen, once it is proved beyond a reasonable doubt that the accused was in possession of recently stolen goods
* An evidentiary burden is place on the accused when he/she advances a defence
  + Necessary for the accused to give an “air of reality” to the defence before it will be left with the jury to consider

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| R v Lifchus (1997)(SCC) |
| Facts – Lifchus, a stockbroker, was charged with one count each of fraud and theft both over $1,000 for allegedly defrauding his employer of a large sum of money by misrepresenting the value of a bond.  Procedural history – Lifchus was convicted of fraud and acquitted of theft by a jury. He appealed, arguing that the judge erred in instructing the jury on the meaning of “proof beyond a reasonable doubt”. The Court of Appeal allowed the appeal. The Crown appealed to the SCC.  Who won? Lifchus  Issue – Should a trial judge explain “reasonable doubt” to the jury? How?  Holding – The trial judge erred by not defining “reasonable doubt” and by telling the jury to evaluate the term as ordinary, everyday words.  Ratio – It is essential that the trial judge provide the jury with an explanation of the expression “beyond a reasonable doubt”.  BARD should not be explained as:   * An ordinary expression * The standard of proof applied to important decisions in juror’s own lives * A moral certainty * A “substantial” or “haunting” doubt * Being “sure” the accused is guilty   BARD should be explained as:   * A doubt that has to be rooted in evidence or lack of evidence * Not an absolute certainty * A burden that rests with the Crown (and not the accused) * Higher than a balance of probabilities   Reasoning – Juries frequently ask for guidance with regard to the meaning of BARD. |

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

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

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| R v Oakes (1986)(SCC) |
| Facts – Oakes was charged with unlawful possession of a narcotic (8 one-gram vials of cannabis resin in the form of hashish oil) for the purpose of trafficking, contrary to s 4(2) of the *Narcotic Control Act*. The section provides that if the court finds the accused in possession of a narcotic, he is presumed to be in possession for the purpose of trafficking unless the accused proves (on a BOP) otherwise.  Procedural history – Oakes was convicted at trial, but the Ontario Court of Appeal held that the provision constitutes a “reverse onus” clause and is unconstitutional. The Crown appealed to the SCC.  Who won? Oakes  Issue – Is the “reverse onus” clause in the Act (placing a legal/persuasive burden on the accused) inconsistent with s 11(d) (the presumption of innocence) of the Charter and thus of no force and effect?  Holding – The Act violated s 11(d) of the Charter and is not a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society for the purpose of s 1 of the Charter.  Ratio – The *Oakes* test to establish that a limit is reasonable and demonstrably justified in a free and democratic society (s 1).  Test – The *Oakes* test\*   1. The State must have a **pressing and substantial objective** 2. There must be a **rational connection** between the objective and the measures that are being taken 3. There must be **minimal impairment** of the accused 4. There must be **proportionality** between the effects on the accused and the goal   \*This requirements of the test must be satisfied by the Crown  Reasoning – The reverse onus clause does not survive the rational connection test because it would be irrational to infer that a person had an intent to traffic on the basis of his/her possession of a very small quantity of narcotics. |

## Presumptions

* Presumptions without basic facts – conclusions which are to be drawn until the contrary is proved
* Presumptions with basic facts – conclusions drawn upon proof of basic facts
  + Permissive presumption – leaves it optional as to whether the inference of the presumed fact is drawn following proof of the basic fact
  + Mandatory presumption – requires that the inference be made
* Rebuttable presumptions – three ways the presumed fact can be rebutted

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

* Irrebuttable presumptions
* Presumptions of law – involve actual legal rules
* Presumptions of fact – frequently recurring examples of circumstantial evidence

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| R v Downey (1992)(SCC) |
| Facts – Reynolds owned and operated an escort agency. Downy answered the agency’s phones, made up receipts, and did the banking. Some of the escorts had sex with their clients. Section 212(3) of the *Code* provides that evidence that someone lives with a prostitute or is habitually in the company of prostitutes is proof that the person lives on the avails of prostitution (which is an offence) in the absence of evidence to the contrary.  Procedural history – Reynolds and Downey were convicted at trial and their appeals to the Alberta Court of Appeal were dismissed. They appealed to the SCC.  Who won? Crown  Issue – Does the evidentiary burden placed on an accused contravene the right to be presumed innocent in s 11(d) of the Charter? If so, can it be justified under s 1?  Holding – The presumption infringes s 11(d) but is justified under s 1 of the Charter.  Ratio – When there is a possibility that an accused may be convicted while a reasonable doubt exists, there is a breach of the presumption of innocence.  In order to establish a rational connection pursuant to the *Oakes* test, it is now enough that it is reasonable to assume that one thing leads to another (where the presumed fact leads inexorably from the proven fact).  Reasoning – Under s 212(3), if the Crown adduces evidence that the accused is living with a prostitute, and the accused calls no evidence, a judge may still have a reasonable doubt at to whether the accused is living on the avails of prostitution, but the presumption would force the judge to convict anyway. However, the infringement of the Charter is relatively minor. Under the *Oakes* test, the pressing and substantial objective, rational connection, minimal impairment (the burden is an evidentiary burden), and proportionality criteria are met. |

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

## D. Appellate Review

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

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

# Chapter 3 – The Elements of an Offence

* The elements of the offence are divided into
  + ***Actus reus*** – the prohibited act
  + ***Mens rea*** – the required mental elements of fault

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

1. *How to determine the actus reus*

* The actus reus will be specified within the offence creating section of the *Criminal Code*
* Terms used within the offence creating section are often defined in
  + The same part of the Code
  + Section 2 (general definitions)
  + Index

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

1. *How to determine the mens rea*

* The *mens rea* of a particular offence may correspond to one or more elements of the *actus reus*, and may also include additional fault requirements that do not correspond directly to any aspect of the prohibited act
* Fault may be measured on either a **subjective** or **objective** basis
  + **Subjective fault** – the accused had the actual intention, knowledge or recklessness to commit an act, in a particular circumstance, or bring about a consequence
    - *What did the accused intend/know?*
  + **Objective fault** – what the ordinary person should have known or would have intended in the circumstances
    - Higher than civil negligence – **a marked departure from that of the reasonable person in the circumstances**
* Where mens rea is required, it must be concurrent with the actus reus (*Fagan*)
* Start your analysis with the wording of the statute
* Where the statute is incomplete or silent, start from the presumption that true crimes requires to Crown to prove a subjective mens rea BARD in relation to at least some element of the actus reus

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

## B. Use and Interpretation of Statutes

## C. Included Offences

* General rule – the accused can only be convicted of the particular offence with which he/she is charged
* Exception to this rule:

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

* How can you tell whether there are included offences contained within a charge?

1. ***Criminal Code*** specifies that there is an included offence  
   *Example – second degree murder is an included offence of first degree murder*
2. **Section 662(1)** – A count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count, includes the commission of another offence, the accused may be convicted
   1. Of an offence so included that is proved, notwithstanding that the whole offence that is charged is not proved; or
   2. Of an attempt to commit an offence so included

No

No

No

No

Yes

Yes

Yes

No

Yes

Is A guilty of the principal offence?

Has the Crown included a lesser offence through the indictment?

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

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

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

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

No need to proceed – A is guilty as charged.

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

Consider whether Crown has proven elements of lesser included offence.

A must be acquitted.

A is guilty of lesser offence.

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| The Entartistes |
| Do the actions of the pie throwers meet the definition of assault in s 265(1)?  Actus reus:   * Conduct – applying force to another person, directly or indirectly * Circumstances – without the consent of another person * Consequences – none   Mens rea:   * Conduct must be intentional (not accidental) * Must have knowledge that the other person didn’t consent (this can be inferred from the circumstance)   The actions of the pie throwers would meet the Code’s definition of assault. They intentionally applied force (indirectly through pies) without the consent of their targets.  Should the actions of the pie throwers attract criminal sanction?   * *De minimis non curat lex* – the law does not concern itself with trifling things (de minimis principle) |

# Chapter 4 – The Actus Reus

## A. The Principle of Legality

* Charter, s 11(g)
  + Any person charged with an offence has the right
    - Not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations

No one can be convicted for behavior that was not recognized as an offence at the time they committed it

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| Frey v Fedoruk (1950)(SCC) |
| Facts – Fedoruk’s mother saw Frey peeping into her window when she was getting undressed at night. Fedoruk seized a butcher knife and ran outside, should at Frey, and chased him. Fedoruk took Frey back to his house and called the police. A police constable arrived and told Frey he was under arrest for committing an action likely to lead to breach of the peace and took Frey to the police station. Frey sued for damages for false imprisonment.  Plaintiff – Frey  Defendants – Fedoruk and Stone (police constable)  Who won? Frey  Issue – Do judges have the power to decide anything to be an offence?  Holding – Frey’s conduct did not amount to a criminal offence.  Ratio – No one should be convicted of a crime unless the offence is recognized in the *Criminal Code*, or can be established by the authority of some reported case as an offence known to the law.  No common law offences will be created in the future. |

## B. Statutory Interpretation and the Actus Reus

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| R v Boudreault (2012)(SCC) |
| Facts – Boudreault was too drunk to drive when he was asked to leave Dubois’ apartment. Dubois called him a taxi and Boudreault went outside and waited for the taxi in his car with the engine on. Boudreault fell asleep and when the taxi driver called him he called the police. The police arrived and arrested Boudreault, charging him with having care of a motor vehicle while his ability was impaired by alcohol.  Who won? Boudreault  Issue – Is risk of danger an essential element of the offence of care or control under s 253(1)?  Holding – Risk of danger is an essential element of the offence of care or control.  Ratio – The actus reus of an offence can be interpreted differently. For example, Fish believes that a realistic risk of danger is an aspect of the offence, whereas Cromwell does not. |

## C. Omissions

* General rule – the criminal law does not punish acts of omission (failures to act) absent a specific criminalization of the omission or some kind of duty to act that can be imported to a criminal offence
* But, there are circumstances when the criminal law will impose liability for a failure to act

1. **Statute specifically criminalizes an omission**

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

1. **Duty to act**
   1. **Duty imposed by statute**
   * Example – firefighters have a statutory duty to enter a burning building
   1. **Duty imposed by common law**
   * *Thornton*

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| Fagan v Commissioner of Metropolitan Police (1968)(England CA) |
| Facts – Fagan was asked by Constable Morris to park curbside. While parking, Fagan drove on Morris’ foot (perhaps unintentionally). Morris told Fagan to get off his foot, and Fagan said “Fuck off, you can wait” and turned off his engine. Fagan eventually reversed his car.  Who won? Commissioner of Metropolitan Police  Issue – Was Fagan’s act complete when the car wheel came to a rest on Morris’ foot or was his act continuing until the wheel was removed?  Holding – The actus reus was a **continuing act** during which Fagan formed the necessary intention to constitute the mens rea.  Ratio – The elements of actus reus and mens rea must be present at the same time. However, it is not necessary that mens rea be present at the inception of the actus reus; it can be superimposed upon an existing act. But, subsequent mens rea cannot convert an act completed without mens rea into an assault. |

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| R v Moore (1978)(SCC) |
| Facts – Moore ran a red light on his bike. Constable Sutherland asked Moore to pull over so he could ticket him, but Moore continued riding and refused to identify himself. Moore was charged with the indictable offence of obstructing a peace officer in the performance of his duty. The Crown argues that the actus reus of the offence includes failing to stop and identify oneself to a police officer (an omission).  Who won? Crown  Issue – Was Moore under a duty?  Holding – The officer was under a duty to arrest Moore in order to establish identity. Moore was under a reciprocal common law duty to assist the officer in this process.  Ratio – Duties can be found at common law even if they do not exist in statutes.  Reasoning – Minimal interference with any freedom of a citizen is preferred over a major inconvenience and obstruction to the police in terms of public interest. |

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| R v Thornton (1991)(ONCA) |
| Facts – Thornton knew he had tested positive for HIV twice and that the Red Cross would not knowingly accept donations of his blood, but donated blood anyway. The Red Cross detected the blood in the screening process, but Thornton was charged with committing a common nuisance endangering the lives or health of the public (s 180(2)(a)).  Who won? Crown  Issue – Was Thornton under a legal duty?  Holding – Donating contaminated blood constitutes a breach of the legal duty within the meaning of that term in s 180(2).  Ratio – A duty exists at common law that requires everyone to refrain from conduct that could cause injury to another person. |

## D. Voluntariness

* General principle – there can be no finding of guilt unless the offence was committed voluntarily
  + Recent decisions view involuntariness as negating the actus reus
* Categories of involuntariness:
  + Under the influence of drugs or alcohol at the time of the offence
    - **Voluntarily consumes alcohol or drugs**
      * Must meet the **defence of intoxication**
    - **Consumption of intoxicants was involuntary** and the intoxication was sufficient to render criminal actions involuntary 🡪 acquittal
  + Suffering from a disease of the mind
    - Must meet the defence of **mental disorder**
  + State of automatism
    - Must meet the defence of **non-mental disorder automatism**

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| R v Jiang (2007)(BCCA) |
| Facts – Jiang fell asleep while driving home from Stanley Park and killed two children in a parking lot. Jiang was not diagnosed with any disease prior to the accident.  Ratio – Acts committed while in an automatic state of mind cannot form the actus reus of dangerous driving. A sleeping driver is in a sate of non-insane automatism. |

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| R v Lucki (1955)(Sask Police Court) |
| Facts – Lucki was driving his car when it skidded to the wrong side of the road due to the road conditions and collided with another car.  Who won? Lucki  Issue – Does the offence require no mens rea?  Holding – The offence requires mens rea.  Ratio – A person cannot be found guilty for an involuntary act.  Reasoning – If mens rea was not an essential ingredient of the offence, a person who drove carefully and whose car was pushed to the left side of the road by a drunken driver would be guilty. |

# Chapter 5 – Causation

* When the actus reus includes consequences, the Crown must prove that the actions of the accused **caused** those consequences
* Can distinguish between
  + **Factual causation/”But for” causation**
  + **Legal causation**

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| R v Smith (1959)(England CA) |
| Facts – Smith, a soldier, stabbed another soldier, Creed, during a fight. Creed was dropped twice and given bad treatment, and eventually died. A doctor testified that he would have had a 75% change of recovery if he was properly treated.  Who won? Crown  Issue – Did Smith legally cause Creed’s death?  Holding – The original stab wound was still an operating cause and a substantial cause at the time of Creed’s death, so his death can be said to be the result of the wound.  Ratio – Only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound.  Reasoning – In the intervening time between Creed being stabbed in the back and his death, there was no time for a careful examination. |

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| R v Blaue (1975)(England CA) |
| Facts – Blaue attacked a girl with a knife after she refused to have sexual intercourse. The girl was a Jehovah’s Witness and refused a blood transfusion for religious reasons. She died, and her refusal to have a blood transfusion was a cause of her death.  Who won? Crown  Issue – Did Blaue **cause** the girl’s death?  Holding – The stab wound cause the girl’s death and the fact that she refused to stop this end from coming did not break the causal connection between the act and death.  Ratio – **Thin skull rule**: Those who use violence on other people must take their victims as they find them.  Reasoning – An assailant cannot say that his victim’s religious beliefs, which inhibited him from accepting certain kinds of treatment, were unreasonable. |

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

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| R v Smithers (1978)(SCC) |
| Facts – A confrontation occurred after a hockey game involving Smithers. Smithers kiced the victim once in the stomach and the victim collapsed and died. The victim had asphyxiated after aspirating his own vomit and his epiglottis had malfunctioned.  Test – Causation of Death   * A contributing cause of death, outside the *de minimis* range   Manslaughter   * Actus reus – some kind of unlawful act (usually an assault) that causes a death * Mens rea – reasonable person would foresee that the act could lead to bodily harm * Includes a “single drunk punch” * Flexible sentencing range   Murder   * Actus reus – same as manslaughter * Mens rea – intent to kill * Mandatory sentence of life imprisonment   **Second degree murder** – any murder that’s not first degree   * Penalty – life imprisonment with eligibility of parole at 10-25 years   **First degree murder** – involves a circumstance which elevates murder to first degree   * Examples - murder for hire, murder of police officer or prison guard, planned and deliberate murder * **Aggravating factors** make murder first degree * **Section 231(5)** creates a category of first degree murder where murder is committed while committing another offence (crimes of domination) * Penalty – life imprisonment with eligibility of parole at 25 years |

* *Criminal Code* has sections dealing with causation (ss 224, 225, 226, 227)
  + These sections codify the idea that there is a very expansive definition of legal causation

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| R v Harbottle (1993)(SCC) |
| Facts – Harbottle pinned down a victim’s legs while his co-accused strangled her (after both had sexually assaulted her). He was charged with first degree murder under s 231(5).  Section 231(5) – murder is first degree murder if the death was “caused by that person while committing or attempting to commit” one of a number of offences, including sexual assault  Ratio – The Crown must prove that the accused “committed an act or series of acts which are of such a nature that they must be regarded as a **substantial and integral cause of death**” (a stricter test than the “contributing cause” test of *Smithers*)  Note – It’s not clear after this decision whether the new substantial and integral cause test was meant to apply to causation for all offences, for all forms of murder, for all forms of first degree murder, or just for the definition of first degree murder in s 231(5) and (6) |

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| R v Nette (2001)(SCC) |
| Facts – A victim died after she was robbed and left hog-tied to her bed with a ligature around her neck. Nette admitted to his involvement in the robbery and the murder to an undercover officer, but later denied his involvement at trial. The Crown’s doctor concluded that the victim’s death was caused by asphyxiation, and the factors leading to this included the hog-tying, the ligature, her age and lack of muscle tone, heart failure, and asthma. Nette was charged with first degree murder.  Procedural history – The trial judge charged the jury on three options (first degree murder, second degree murder, and manslaughter). He said that in order to meet the standard of first degree murder, the “substantial and integral cause of death” test should be used (*Harbottle*), but that in order to meet to the standard of manslaughter or second degree murder, the “contributing cause, beyond the *de minimis* range” test should be used (*Smithers*).  Who won? Crown  Issue – What test of causation should be used for second degree murder?  Holding – The trial judge correctly charged the jury on the applicable standard of causation for second degree murder (one in which the accused must have been more than an insignificant or trivial cause of the victim’s death).  Ratio – The causation standard expressed in *Smithers* is valid and applicable to all forms of homicide and may be expressed as a “significant contributing cause”, “beyond *de minimis*”, or “more than a trivial cause”.  The “substantial cause” terminology in *Harbottle* is used to indicate the increased degree of participation in the killing that is required to raised the accused’s culpability to first degree murder under s 231(5). *Harbottle* did not raise the standard of causation that applies to all homicide offences.  Both the *Smithers* and the *Harbottle* test must be considered to convict an accused of first degree murder.  Note – It is unclear whether the *Harbottle* test applies only to s 231(5) first degree murders or all first degree murders. |

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| R v JSR (2008)(ONCA) |
| Facts – A gun battle broke out on street in Toronto on Boxing Day, killing one victim. JSR (the southbound shooter) was part of a gang involved in the gun battle, and was in possession of a loaded handgun. An altercation occurred between JSR’s gang and another gang earlier. Another shooter (the northbound shooter) may have fired his gun first, and shot the victim.  Who won? Crown  Issue – Did the northbound shooter’s act constitute an intervening cause severing any causal link between JSR’s actions and the victim’s death?  Holding – A reasonable jury probably instructed could conclude that JSR caused the victim’s death because the mutual gunfight scenario is possible (in which case JSR’s act would be part of the joint conduct that caused her death).  Ratio – An intervening, independent act by a third party that is a more direct cause of a victim’s death than the prior act of an accused may sever the legal causal connection even though the prior act remains a factual/”but for” cause.  In a mutual gunfight scenario, the causal connection may not be severed.  Reasoning – The mutual gunfight scenario is analogous to street racing cases in which each driver bears equal responsibility for the consequences of the race. |

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| R v Maybin (2012)(SCC) |
| Facts – Maybin brothers repeatedly punched a victim in the face and head after he touched a ball in their pool game at a bar, knocking him unconscious. The bar bouncer struck the victim’s head when he arrived on the scene. The medical evidence was inconclusive about which blows caused the victim’s death.  Who won? Crown  Issue – When does an intervening act by another person sever the causal connection between accused’s act and the victim’s death?  Holding – It was open to the trial judge to find that the Maybin brother’s assault remained a significant contributing cause of death.  Ratio – If the risk of harm caused by an intervening actor is **reasonably foreseeable** to the accused(s), the intervening act will not break the chain of causation.  Reasoning – The physical intervention of the bar staff, with a risk of non-trivial harm, was objectively foreseeable. |

# Chapter 6 – The Mental Element (Mens Rea)

* The nature of the fault requirement may take a number of forms, depending on the wording of the offence and the component of the actus reus to which it attaches
  + Intention
  + Knowledge
  + Willful blindness
  + Recklessness
* Intention is distinct from motive (*Lewis*)
* Problems that arise when determining the mens rea of an offence:

1. The mens rea of criminal offences is often not stated in the offence itself
2. The mens rea may not apply to every element of the actus reus
3. Partial states of fault may exist (ex. an objective measure of whether a reasonable person would have known)

## A. The Subjective Approach

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

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

## B. Intent and Recklessness

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| R v Buzzanga and Durocher (1980)(ONCA) |
| Facts – Buzzanga and Durocher, both French-Canadians, created a document slandering French-Canadians. Their purpose in doing this was to show the prejudice directed towards French-Canadians and expose the truth about the real problem that existed with respect to a school that was supposed to be built. They hoped the document would provoke a government reaction that would lead to the building of the school. They were charged with willfully promoting hatred against an identifiable group by communicating statements (s 281.2(2)).  Who won? Buzzanga and Durocher  Issue – What does “willfully” mean?  Holding – Buzzanga and Durocher did not have the requisite intent.  Ratio – In general, the accused must have intended to bring about a particular consequence or have foreseen a particular consequence (recklessness) to be found guilty.  Reasoning – The insertion of the word “willfully” was not necessary to import mens rea, therefore Parliament intended to limit the offence to the intentional promotion of hatred. |

## C. Fraud and Mens Rea

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| R v Théroux (1993)(SCC) |
| Facts – Théroux was convicted of fraud for representing to investors that their deposits for a building project were protected by insurance. No deposit insurance had been purchased, but Théroux believed that the projects would be completed, and the risk of the loss of deposit would not materialize. The project failed and many people lost their deposits.  Who won? Crown  Issue – What kind of mental state is required of the offence of fraud?  Holding – The actus reus was clearly established (Théroux committed deliberate falsehoods which caused deprivation), and the mens rea was established (Théroux knew that he was depriving the depositers of something they thought they had, namely insurance protection, and it can be inferred that he knew he was placing the depositors’ money at risk).  Ratio – To establish the mens rea of fraud the Crown must prove that the accused knowingly undertook the acts which constitute the falsehood, deceit or other fraudulent means, and that the accused was aware that deprivation could result from such conduct.  Reasoning – People should not be acquitted based on their fanciful belief that everything will work out. |

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| R v Kingsbury (2012)(BCCA) |
| Facts – Kingsbury had an honest but mistaken belief that he had a proprietary interest in a trailer and honestly believe that he had a right to seize and secure it until a debt was paid. He used fraudulent means to seize the trailer (claiming to be someone else and signing a work order).  Who won? Crown  Issue – Can an accused’s honest but mistaken belief negate the mens rea for fraud?  Holding – An honest mistake about whether an accused is entitled to take property or put another’s economic interests at risk is irrelevant to the mens rea of fraud.  Ratio – An accused’s honest but mistaken belief that he is entitled to property is not relevant to the mens rea respecting deprivation.  Reasoning – A mistake of law is not a defence, and Kingsbury’s honest but mistaken belief was a mistake about the law, not the underlying facts. |

## D. Willful Blindness

* The concept of willful blindness is used in some cases to satisfy a mens rea requirement
* In cases where proof of knowledge is required, deliberately choosing not to know something is seen as tantamount to knowing it
* Deliberately choosing not to know something when given reason to believe further inquiry is necessary can satisfy the mental element of the offence

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| R v Briscoe (2010)(SCC) |
| Facts – Nina Courtepatte (13-year-old) was raped and beaten and stabbed to death by Laboucan and others. Briscoe previously knew the group was talking about killing people and had knives. He also knew that Laboucan was looking for a girl to have sex with and that something was going to happen to the girl. He witnessed her rape and beating, but did not want to know what was happening.  Who won? Crown  Issue – Can you be convicted of murder without full knowledge, but instead, willful blindness?  Holding – Briscoe may have been willfully blind to the kidnapping and sexual assault.  Ratio – Willful blindness (suspicion aroused to the point where the accused sees the need for further inquiries, but would prefer to remain ignorant) can substitute for actual knowledge whenever knowledge is a component of the mens rea.  Willful blindness is distinct from recklessness (consciousness of the risk and proceeding in the face of it).  Reasoning – Briscoe deliberately chose not to inquire because he did not want to know. |

## E. Recklessness as Sufficient Knowledge

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| R v Schepannek (2012)(BCCA) |
| Facts – Schepannek agreed to bring tobacco to her husband in a correctional facility, although it was contraband. Her husband told her to meet a man to receive the tobacco. She did not know the man, but she took a package in a sock from him and delivered it to her husband (without opening the package). It contained hashish and marijuana.  Who won? Crown  Issue – Did Schepannek have the requisite mens rea of the offence?  Holding - Schepannek was reckless as to the contents of the package.  Ratio – Recklessness is defined as the conduct of one who sees the risk and takes the chance.  Reasoning – Schepannek knew there was a risk that the package contained illicit drugs and took the chance. |

## F. Motive

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| R v Lewis (1979)(SCC) |
| Facts – Lewis and Tatlay were charged with the murder of Tatlay’s daughter and son-in-law. An electric kettle rigged with dynamite caused their death. Lewis sent the kettle in the mail. Lewis claimed that he was an “innocent dupe”.  Who won? Crown  Issue – Is it necessary to charge the jury on motive?  Holding – There is no clear obligation to charge the jury on motive, so the trial judge did not err.  Ratio – Necessity of charging a jury on motive may be looked upon as a continuum (between motive being necessary for the Crown and absence of motive being necessary for the accused). In between the two end points there are cases where the necessity depends upon the course of the trial and the nature of the evidence, and discretion is left to the judge.  Reasoning – The case falls squarely in the middle of the continuum. |

## G. Transferred Intent

* In some situations, the accused intends one offence but another one occurs because of a mistake or accident
* The common law doctrine of transferred intent occurs when

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

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

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

# Chapter 7 – Departures from Subjective Mens Rea

## A. Absolute and Strict Liability

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| Full Subjective Mens Rea | Objective Mens Rea | Strict Liability | Absolute Liability |
| Crown has to prove subjective mens rea BARD | Crown has to prove objective mens rea BARD | Crown has to prove actus reus BARD  Accused may prove defence of due diligence (objectively not negligent) on BOP | Crown has to prove actus reus BARD  No mens rea is necessary |

Steps for deciding the mens rea of any offence:

1. Read the actual offence
2. If the statute is silent/ambiguous on the question of mens rea, go to general principles of interpretation

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| R v City of Sault Ste. Marie (1978)(SCC) |
| Facts – The city of Sault Ste. Marie was charged with violating the *Ontario Water Resources Act*, a provincial statute, for the offence of causing or permitting pollutants to be discharged into a clean water source.  Who won? City of Sault Ste. Marie  Issue – What mens rea, if any, is required for the conviction of public welfare offences?  Holding – The offence is a public welfare offence, and therefore the mens rea required is that of strict liability.  Ratio – Public welfare offences are prima facie strict liability offences.  In strict liability offences:   * The Crown has to prove exactly the same thing as in absolute liability (just the actus reus BARD) * But, there is an opportunity for the accused to offer a defence (the defence of due diligence) * The accused must disprove the mens rea on a balance of probabilities * The accused has to prove that he/she wasn’t negligent to an objective standard (that they took all reasonable steps to avoid the outcome that occurred) * The accused must say “I didn’t know and I ought not to have known” (as opposed to simply “I didn’t know”)   Reasoning – The offence is not criminal in the true sense, and the words in the Act fit into an offence of strict liability. |

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| R v Chapin (1979)(SCC) |
| Facts – Chapin went duck hunting in a privately owned hunt club. There was a small pile of bait on the side of the road, and grain in a marsh, but Chapin did not notice the bait. *The Migratory Bids Regulations* makes it an offence to hunt for migratory birds within ¼ mile of a place where bait has been deposited.  Who won? Chapin  Issue – Is the offence one of absolute liability, strict liability, or subjective mens rea?  Holding – The offence is a strict liability offence.  Ratio – The test for strict liability offences established in *Sault Ste. Marie* applies. When a statute does not mention mens rea (by including words like “willfully” or “with intent”), and was enacted for the welfare of the public, and contains serious penalties (imprisonment or large fines), the offences created are likely strict liability offences. |

## B. Crimes of Objective Fault

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| R v Tutton (1989)(SCC) |
| Facts – The Tuttons were loving and responsible parents, but believed in faith healing. Their child was diagnosed as diabetic and the mother was given instructions and attended seminars about diabetes. The mother stopped giving the child insulin once and he had to be hospitalized. The Tuttons promised their doctor they would not withhold insulin again. The mother stopped insulin again and the child died. The Tuttons were charged with criminal negligence causing death (a kind of manslaughter) and failure to provide necessaries of life. The Tuttons claimed they had an honest belief that their son didn’t need insulin anymore.  Who won? Tuttons  Issue – What is the mens rea of the offences of criminal negligence and failing to prove the necessaries of life? If the mens rea should be measured on an objective standard, how many personal characteristics of the accused should be taken into consideration?  Holding – The jury should instructed that they must be satisfied BARD that the Tuttons were under a duty to provide the necessaries of life and they failed to do so without lawful excuse.  Ratio – In criminal negligence offences, the Crown must prove mens rea BARD on an objective standard, using the objective test.  Test – Objective Mens Rea  The test is that of reasonableness, and proof of conduct that reveals a **marked and significant departure** from the standard that could be expected of a reasonably prudent person in the circumstances will justify a conviction of criminal negligence.  Reasoning – The application of the objective test cannot be made in a vacuum. For example, a welder who was told there was no explosive material nearby cannot be faulted for causing an explosion.  Note – The judges split 3:3 on this judgment, so although the appeal was dismissed, there was no majority opinion on the law. |

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| R v JF (2008)(SCC) |
| Facts – JF’s foster child was killed by his spouse, and JF did not intervene. JF was acquitted of failing to provide the necessaries of life and convicted of criminal negligence by the same jury. JF argued that the verdicts were inconsistent.  Who won? JF  Issue – Was it possible for the jury to convict on failure to provide the necessaries and convict on criminal negligence?  Holding – The jury could not acquit on one count and convict on the other.  Ratio – The mens rea requirements of failure to provide necessaries and criminal negligence are similar, but the criminal negligence count is more serious. Failure to provide necessaries required a marked departure and criminal negligence requires a marked and substantial departure.  Where criminal negligence is piggy-backed onto an alleged failure to provide necessaries, the analysis proceeds in two stages:   1. Did the accused have a duty to protect the child (to provide the necessaries of life) and did the accused fail in that duty? 2. Did the accused, in failing to provide the necessaries of life, show a wanton or reckless disregard for the life or safety of the child?   If both criteria are met, the accused is guilty of both criminal negligence and failure to provide necessaries. If the second criterion is not met, the accused may still be guilty of failure to provide necessaries. |

#### Dangerous Driving

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

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| R v Hundal (1993)(SCC) |
| Facts – Hundal killed a man when he went through a red light in his dump truck and struck a car. Hundal believed he could not stop in time. He had previously driven through an intersection as the light turned red, and was driving between 50-60 km/hour.  Dangerous driving causing death   * Conduct – operating a motor vehicle * Circumstances – in a manner that is dangerous * Consequences – death   Who won? Crown  Issue – What is required to establish the mens rea for the offence of s 233 (dangerous driving causing death)? Is there a subjective element to the mens rea?  Holding – Hundal’s conduct amounted to a marked departure from the standard of care  Ratio – A modified objective test is appropriate to apply to dangerous driving. A trier of fact may convict if satisfied BARD that, viewed objectively, the accused was driving in a manner that was “dangerous to the public, having regard to all the circumstances, including the nature, condition and use of such place and the amount of traffic that at the time is or might reasonably be expected to be on such place”. The accused’s conduct must amount to a marked departure from the standard of care that a reasonable person would observe in the accused’s situation.  It’s open to the accused to raise a reasonable doubt that a reasonable person would have been aware of the risk of the accused’s circumstances.  Reasoning – A modified objective test is appropriate because of:   1. The licensing requirement 2. The automatic and reflexive nature of driving 3. The word of s 233 4. Statistics |

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| R v Beatty (2008)(SCC) |
| Facts – Beatty crashed into a car and killed three people when his pick-up truck cross the centre line on the highway. He believes he went unconscious while driving. He had not been driving dangerously prior to the accident. He was charged with three counts of dangerous operation of a motor vehicle causing death in violation of s 249(4).  Who won? Beatty  Issue – Can the mens rea of dangerous driving offences be made out by objectively dangerous driving, including momentary lapses of attention?  Holding – The trial judge’s decision that Beatty’s momentary lapse of attention was insufficient to found criminal culpability was correct.  Ratio – Momentary lapses of attention may be insufficient to found criminal culpability.  The modified objective test requires:   1. A “marked departure” from the standard of care expected of a reasonable person in the circumstances of the accused.  The degree of negligence is the determinative question.   Some departures from the reasonable standard of care may not be “marked” or “significant” but are nonetheless undeniably dangerous.   1. If an explanation is offered by the accused, such as a sudden and unexpected .onset of illness, then in order to convict, a trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused. |

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| R v Roy (2012)(SCC) |
| Facts – Roy was driving a motorhome in poor visibility and on snow-covered roads. He pulled his motorhome out and was hit by a tractor-trailer who could not stop in time. Roy’s passenger was killed.  Who won? Roy  Issue – Was the required objective fault element proven?  Holding – The trial judge failed to conduct an inquiry into whether Roy displayed a marked departure from the standard of care expected of a reasonable person in the circumstances.  Ratio – Proof of the actus reus of dangerous driving, without more, does not support a reasonable inference that the required objective fault element was present.  Reasoning – The manner of driving does not support the inference that Roy’s standard of care was a marked departure from that expected.  Note – The courts definition of a reasonable driver is getting closet to an ordinary driver. |

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| R v ADH (2013)(SCC) |
| Facts – ADH, not previously knowing she was pregnant, gave birth in a Wal-Mart toiler. She thought the child wad dead and left him in the toilet, but the child was found alive. A doctor testified that a woman in ADH’s state of mind might act the way she did. ADH was charged with the offence of child abandonment under s 218.  Who won? ADH  Issue – Does the offence of child abandonment require subjective or objective mens rea?  Holding – Subjective fault is required for the offence.  Ratio – The offence of child abandonment requires subjective mens rea. The offence differs from failure to provide necessaries (which requires objective mens rea) because child abandonment is broader and can apply to anyone.  Five types of objective fault offences:   1. Dangerous conduct – for example, dangerous driving (*Hundal, Beatty, Roy)* 2. Carless conduct – for example, carless storage of firearms (*Finlay*) 3. Predicate offences – for example, offences such as unlawful act manslaughter and unlawfully causing bodily harm which require the commission of an underlying unlawful act 4. Criminal negligence – requires a marked and substantial departure from the conduct of a reasonably product person in circumstances in which the accused either recognized and ran an obvious and serious risk, or alternatively, gave no though to that risk (*JF*) 5. Duty-based offences – includes s 215, but does not include s 218   Reasoning – The text of s 218 and what is not in the text (the structure of the offence, compared to s 215, for example) suggests the fault requirement is subjective. |

# Chapter 8 – Mens Rea and the Charter

## A. Absolute Liability and the Charter

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| Motor Vehicle Reference (1986)(SCC) |
| Facts – *Motor Vehicle Act*, s 94(1) A person who drives a motor vehicle on a highway or industrial road while (a) he is prohibited from driving a motor vehicle… or (b) his driver’s license or his right to apply for or obtain a driver’s license is suspended… commits and offence and is liable, (c) on a first conviction, to a fine of not less $300 and not more than $2,000 and to imprisonment for not less than 7 days and not more than 6 months, and (d) on a subsequent conviction, regardless of when the contravention occurred, to a fine… and to imprisonment…  (2) Subsection (1) creates an **absolute liability offence** in which guilt is established by proof of driving, whether or not the defendant knew of the prohibition or suspension.  Issue – Is s 94(2) of the *Motor Vehicle Act* consistent with the Charter?  Holding – Section 94(2) is inconsistent with the Charter.  Ratio – **Absolute liability and imprisonment cannot be combined.**   * The combination of imprisonment and absolute liability violates s 7 and can only be salvaged if under s 1 such a deprivation of liberty in breach of those principles of fundamental justice is, in a fee and democratic society, under the circumstances, a justified reasonable limit to one’s rights under s 7. * A law enacting an absolute liability offence will violate s 7 only if and to the extent that it has the potential of depriving of life, liberty or security of the person. Obviously, imprisonment (including probation orders) deprives persons of their liberty. * There is no need that imprisonment, as in s 92(1), be made mandatory.   The term “principles of fundamental justice” is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right. Sections 8 to 14 address specific deprivations of the “right” to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s 7.   * Many of the principles of fundamental justice are procedural in nature, but the principles of fundamental justice are not limited solely to procedural guarantees (some include substantive components). * **That the innocent not be punished is a principle of fundamental justice.**   Reasoning – Section 94(2) offends s 7 and is not salvaged by the operation of s 1. |

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| R v Raham (2010)(ONCA) |
| Facts – Raham was charged with stunt driving or racing under s 172(1) of the *Highway Traffic Act* (punishable by a fine, a term of imprisonment, or both) after clocking 131 km/hour in an 80 hm/hour zone (over 50 km/hour above the speed limit). Raham argued that the section violated her s 7 rights because it created an absolute liability offence with imprisonment as a possible punishment.  Who won? Crown  Issue – Is the offence created b s 172(1) an absolute liability offence.  Holding – The offence of stunt driving by speeding creates a strict liability offence.  Ratio – The Charter dictates that if legislation can be reasonably interpreted in a manner that preserves its constitutionality, that interpretation must be preferred over one that would render the legislation unconstitutional.  The proper categorization of speed-based offences as absolute, strict, or full mens rea offences will depend on the outcome of the *Sault Ste. Marie* analysis.  **Stunt driving could admit of a due diligence defence.**  The due diligence defence relates to the doing of the prohibited act with which the defendant is charged and not to the defendant’s conduct in a larger sense. The defendant must show he took reasonable steps to avoid committing the offence charged, not that he was acting lawfully in a broader sense. It is not necessarily lost by virtue of actions surrounding the prohibited act, legal or illegal, unless those actions establish that the defendant, in committing the prohibited act, failed to take all reasonable care.  Reasoning – *Sault Ste. Marie* analysis:   1. The overall regulatory pattern of which the offence is party  * Does not assist in classifying the offence  1. The subject matter of the legislation  * Speeding – suggests a classification as an absolute liability offence  1. The importance of the penalty  * Availability of incarceration – suggests strict liability  1. The precision of the language used  * Language does not clearly point to a categorization |

#### Finding Fault: post-Charter

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

1. **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*)

1. **If no, interpret and classify the statute.**
2. Look for (binding) cases interpreting the provision.
3. If there are none, or if the case law is unclear, classify the statute as a true crime or a public welfare offence.
   1. If the statute is a true crime, it is presumed to have a mens rea that must be proved by the Crown BARD. Try to figure out what it is by relating the mens rea to the elements of the actus reus and the purpose of the statute. Consider whether the presumption that the mens rea of true crimes is subjective (*Beaver*) should be displaced, and the mens rea measured objectively (*Tutton*, *Creighton*). Consider which elements should have a mental element attached to them or if there are some intent requirements that do not have an associated actus reus (like an intent to bring about a consequence where the consequence itself need not be proven.) Consider whether the mens rea is best expressed in terms of intent, recklessness, knowledge or some combination of these.
      * If there’s no binding case, you have to make an argument (perhaps an argument with some degree of uncertainty)
   2. If the statute is a public welfare offence, it is presumed to be an offence of strict liability (*Sault Ste. Marie*). Look at surrounding sections and the overall statutory scheme to see if this presumption should be displaced and the offence interpreted as one of absolute liability or one requiring proof of subjective fault (*Chapin*, *Raham*).
   3. Once you have established the mental element or lack of mental element, remember to consider whether it is consistent with the Charter. If not, the mental element of the offence must be reinterpreted to conform with the Charter where possible.

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

*R v Vaillancourt*

* The SCC held that s 213(d) (later s 230(d) violated ss 7 and 11(d) of the Charter, since it did not require proof of foresight of death, even on an objective standard (i.e. that the accused ought to have known that death would result)
  + **At a minimum, there has to be proof of objective foresight of death to convict someone of murder**
* This suggests that the principles of fundamental justice require some level of proportionality

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| R v Martineau (1991)(SCC) |
| Facts – Martineau, a young offender, and his friend, Tremblay, went out with a pellet pistol and rifle to commit a “b and e”. Martineau knew they were going to commit a crime, but did not know Tremblay would kill the McLeans. He was charged under (now) s 230(a).  Who won? Martineay  Issues – Does s 230(a) of the Code infringe or deny the rights or freedoms guaranteed by s 1 and/or s 11(d) of the Charter? If so, is s 230(a) justified by s 1?  Holding – Section 230(a) infringes both ss 7 and 11(d), and cannot be justified under s 1.  Ratio – Section 230(a) violates the principles that **punishment (stigma/penalty) must be proportionate to the moral blameworthiness of the offender.**  A special mental element with respect to death is necessary before a culpable homicide can be treated as murder. It is a principle of fundamental justice that **a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight of death**.  Reasoning – Murder has long been recognized as the “worst” of peacetime crimes. It is therefore essential that to satisfy the principles of fundamental justice, the stigma and punishment attaching to a murder conviction must be reserved for those who either intend to cause death or who intend to cause bodily harm that they know will likely cause death.  As regards s 1, it is not necessary, in order to achieve the objective of deterring the infliction of bodily harm during the commission of certain offences, to convict of murder persons who do not intend or foresee death. The more flexible sentencing scheme under a conviction for manslaughter is in accord with the principle that punishment be meted out with regard to the level of moral blameworthiness.  L’Heureux Dube J (dissenting) – The argument about stigma is circular—offences don’t have freestanding stigmas.  Note – The practical result of this decision:  Section 230(a) is still in the code; (d) was repealed; (b) and (c) are still there (but they are not valid). **The offence of constructive murder no longer exists.** |

### Note: Unlawful Object Murder

* *Martineau* – The phrase “ought to have known” in s 229(c) of the Code (the “unlawful objective” murder provisions) is unconstitutional in its reliance on objective foresight as sufficient for conviction. The remainder of the definition was not question.
* *Shand* (2011)(ONCA)
  + *Martineau* should be interpreted as holding that subjective foresight of death is the constitutional minimum *mens rea* for murder, and not an intent to cause death.
  + To meet the requirements of s 229(c), the Crown must prove:

1. The intention to carry out the unlawful object
2. An additional component of mens rea – the intent to commit the dangerous act, knowing that it is likely to cause death

## C. Application to Other Offences

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

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| R v DeSousa |
| Facts – Santos was struck by a piece of glass that was thrown by DeSousa during a fight at a party. DeSousa was charged with unlawfully causing bodily harm contrary to s 245.3 (now s 269). DeSousa brought a motion to have s 269 struck down as being contrary to s 7 of the Charter.  Who won? Crown  Issues – Does s 269 violate s 7 or 11(d) of the Charter? If so, is s 269 a reasonable limit justified by s 1?  Holding – Section 269 complies with the requirements of s 7.  Ratio – **It is not a principle of fundamental justice that each element of the offence must have a mental element attached.**  The mental element of s 269 has two separate aspects:   1. An underlying offence with a constitutionally sufficient mental element 2. The bodily harm caused by the underlying unlawful act was **objectively foreseeable**   Reasoning – Section 269 does not create a special stigma offence that would required subjective fault.  Note – DeSousa’s unlawful act is probably mischief of property. |

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| R v Creighton (1993)(SCC) |
| Facts – Creighton was convicted of unlawful act manslaughter (the unlawful act being trafficking), arising from the death of Martin, who died as a result of an injection of cocaine given by Creighton.  Who won? Crown  Issue – Does the common law definition of unlawful act manslaughter violate s 7 of the Charter?  Holding – Unlawful act manslaughter is entirely consistent with the principles of fundamental justice and it conforms to the Charter.  Ratio – The appropriate standard of care on the objective test in manslaughter and in crime of negligence is that of the reasonable person in all the circumstances of the case.   * Personal factors are not relevant, except on the question of whether the accused possessed the necessary capacity to appreciate the risk. * This does not mean that the question of guilty is determined in a factual vacuum. The legal duty of the accused is particularized in application by the nature of the activity and the circumstances surrounding the accused’s failure to take the requisite case (e.g. a welder who lights a torch causing an explosion may be excused if he has made an inquiry and been given advice upon which he was reasonably entitled to rely, that there was no explosive gas in the area).   The care required by some activities is greater than the care required by others.   * A person may fail to meet an elevated *de facto* standard of care in two ways:  1. The person may undertake an activity requiring special care when he/she is not qualified to give that care. 2. A person who is qualified may negligently fail to exercise the special care required by the activity.  * The higher *de facto* standard flows from the circumstances of the activity, not from the expertise of the actor.   Test – Mens rea of unlawful act manslaughter   1. Objective foreseeability of the risk of bodily harm that is neither trivial nor transitory, in the context of a dangerous act. Foreseeability of the risk of death is not required.   Test – Penal negligence   1. **Actus reus** – Requires that the negligence constitute a marked departure from the standards of the reasonable person in all the circumstances of the case. This may consist in carrying out the activity in a dangerous fashion, or in embarking on the activity when in all the circumstances it was dangerous to do so. 2. **Mens rea** – The standard is that of the reasonable person in the circumstances of the accused. If a person has committed a manifestly dangerous act, it is reasonable, absent indications to the contrary, to infer that he/she failed to direct his/her mind to the risk and the need to take care. However, the normal inference may be negated by evidence raising a reasonable doubt as to lack of capacity to appreciate the risk.   Reasoning – Creighton commited the unlawful act of trafficking in cocaine, and was guilty of criminal negligence, using the standard of the reasonable person (the reasonable person in the all the circumstances would have foreseen the risk of bodily harm.) |

### Note: *Wholesale Travel Group*

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

# Chapter 9 – Mistake

## A. Mistake of Fact

* 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, for example by negating an element of the actus reus.
  + Thus, every time that knowledge of a particular set of circumstances is part of the mens rea of the offence, the defence of mistake of fact may be available.
    - *Example* – *the offence of theft requires the Crown to prove that the accused acted with knowledge that the property was not his own and that he had no right to take it*

**Defence of mistake of fact**

1. Common law defence
2. Evidentiary burden on the accused to give the defence an **air of reality**, once that is proven the burden shifts back to the Crown to disprove BARD
3. All offences?

* Only applies to offences in which part of the mens rea is knowledge of some set of circumstances

1. Result if successful:

* Sexual assault 🡪 acquittal
* Other offences 🡪 might be guilty of an attempt

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| R v Kundeus (1976)(SCC) |
| Facts – The accused were calling out “Speed, acid, MDA, or hash” to passers by and a police constable asked for hash or acid. They said they were all sold out and offered the constable mescaline. The police constable bought two “hits”, which were actually two capsules of LSD. Kundeus was charged with unlawfully trafficking in a restricted drug (LSD) contrary to provisions of the *Food and Drugs Act*. LSD is a restricted drug; mescalqine is not.  Who won? Crown  Issue – Has the necessary mens rea been proven?  Holding – No evidence having been tendered by the accused, it is not possible to find that he had an honest belief amounting to a non-existence of mens rea.  Laskin CJC (dissenting) – Where mens rea is an element of an offence, it cannot be satisfied by proof of its existence in relation to another offence uncles the situation involves an included offence of which the accused may be found guilty on his trial of the offence charged. The **actus reus** and the **mens rea** must relate to the same crime.  The Crown should have laid a charge of attempting to traffic in mescaline. Such a charge is supportable under s 24 of the Code that makes it immaterial whether it was possible or not to commit the intended offence. |

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| R v Pappajohn (1980)(SCC) |
| Facts – Pappajohn had sexual intercourse with the complainant who then ran from the house naked and denied there was any consent. Pappajohn testified that the intercourse was consensual, but then they got engaged in consensual bondage the complainant got upset and left.  Who won? Crown  Issue – When does a **mistake of fact defence** have to be left to the jury?  Holding – The defence did not have to be left with the jury and the conviction is upheld.  Ratio – The trial Judge must look for some evidence or matter apt to convey a sense of reality in the argument, and in the grievance to leave the defence of mistake of fact to the jury.  Reasoning – In this case, to convey such a sense of reality, there must be some evidence which if believe would support the existence of a mistaken but honest belief that the compliant was in fact consenting to the acts of intercourse which admittedly occurred.  Dickson J – A defence of honest, though mistaken, belief in consent need not be based on reasonable grounds.   * But, the accused’s statement that he was mistaken is not likely to be believed unless the mistake is, to the jury, reasonable. * Although “reasonable grounds” is not a precondition to the availability of a plea of honest belief in consent, those grounds determine the weight to be given the defence. The reasonableness, or otherwise, of the accused’s belief is only evidence for, or against, the view that the belief was actually held and the intent was, therefore, lacking. |

#### Contemporary Sexual Assault Law (post-Pappajohn)

**The offence of sexual assault requires:**

1. An assault – application of force
   * *Intentional*
2. In circumstances of a sexual nature
3. Without consent
   * *Knowledge*
   * Consent – voluntary agreement of the complainant (as opposed to absence of resistance)

Section 265(4) Accused’s belief as to consent – Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused’s belief, **to consider the presence or absence of reasonable grounds for that belief**.

Section 273.2(b) Where belief in consent is not a defence – It is not a defence to a charge under s 271, 272 or 273 that the accused believe that the complainant consented to the activity that forms the subject-matter of the charge, where the accused did not take **reasonable steps**, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

Consent is not a defence to a charge of sexual assault or related offences where the complainant is under the age of 16. Section 150.1(4) also states that it is not a defence that the accused believed the complainant was 16 years of age or more, unless the accused took “all reasonable steps to ascertain the age of the complainant.”

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| R v Ewanchuck (1999)(SCC) |
| Facts – Ewanchuck asked the complainant (a 17-year-old woman) to come to his van to interview for a job after meeting her in the mall. He then asked if she would to see his work in his trailer, and shut (and possibly locked) the door of the trailer after she entered. He asked for a massage and then massaged her (touching her breasts). The complainant said “No” and Ewanchuck stopped and them resumed sexual intimacies repeatedly until the accused left. The complainant testified that she tried to project a confident demeanor to avoid a violent assault.  Who won? Crown  Issue –  Holding – The accused’s persistent and increasingly serious advances constituted a sexual assault for which he had no defence.  Ratio – There is no defence of implied consent to sexual assault.  Test – Sexual assault  **Actus reus:**   1. Touching  * Objective  1. The sexual nature of the contact  * Objective  1. The absence of consent  * **Subjective** – determined by reference to the complainant’s subjective internal state of mind towards the touching, at the time it occurred   + **Credibility** must still be assessed in light of all the evidence – it is open to the accused to claim that the complainant’s words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place. If, however, the trial judge believes the complainant that she subjectively did not consent, the Crown has discharged its obligation to prove the absence of consent.   + **If the trier of fact accepts the complainant’s testimony that she did not consent, no matter how strongly her conduct may contradict that claim; the absence of consent is established.** * Problem: Asking if someone’s behavior is aligning with someone who had not consented has assumptions imbedded in it.   **Mens rea:**   1. The Crown need only prove that the accused intended to touch the complainant in order to satisfy the basic mens rea requirement.  * However, the common law recognizes a **defence of mistake of fact** that removes culpability for those who honestly but mistakenly believed that they had consent to touch the complainant. * As such, the mens rea of sexual assault contains two elements: **intention to touch** and **knowing of, or being reckless of or willfully blind to, a lack of consent on the part of the person touched**. * The defence of mistake is simply a denial of mens rea. It does not impose any burden of proof upon the accused and it is not necessary for the accused to testify in order to raise the issue. However, as a practical matter, this defence will usually arise in the evidence called by the accused.   + In order to cloak the accused’s actions in moral innocence, **the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question (that the complainant effectively said “yes” through he words and/or actions.)** * Problem: What kind of conduct or words communicate consent?   Reasoning – The trial judge accepted as credible the complainant’s evidence. The accused relies on the fact that he momentarily stopped his advances each tme the complainant said “No” as evidence of his good intentions. This demonstrates that he understood the complainant’s “No’s” to mean precisely that. Therefore, there is nothing on the record to support the accused’s claim that he continued to believe her to be consenting, or that he reestablished consent before resuming physical contact. The evidence does not disclose an air of reality to the defence of honest but mistaken belief in consent to this sexual touching.  L’Heureux Dube (concurring) – Stereotypical assumptions lie at the heart of what went wrong in this case. |

## B. Mistake of Law

* In general, a person charged with an offence cannot rely on a mistake of law as a defence.
* Section 19 – Ignorance of the law is no excuse.
* It is possible, however, to make a form of mistake of law argument, through the common law defence of “officially” induced error of law.

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| R v Campbell and Mlynarchuk (1973)(Alta Dist Ct) |
| Facts – Campbell performed a nude go-go dance on stage and was charged with s 163(2): Everyone commits an offence who takes part or appears as an actor, performer, or assistant in any capacity, in an immoral, indecent or obscene performance, entertainment or representation in a theatre. Campbell had relied upon a statement informed by a trial judgment (which was later reversed).  Who won? Campbell  Issue – Is mistake of law a defence?  Holding – An absolute discharge (a disposition in which a finding of guilt is made but a formal criminal conviction is not entered) should be given.  Ratio – Mistake of mixed fact and law is a defence, but mistake of law is no defence.  Mistake of law can be defence, not because a mistake of law is a defence, but because of a mistake of law can negative a malicious intent required for that crime. For example, where the law requires that a person willfully, or maliciously, or knowingly, does something wrong, it could be a defence as negativing intention, to show that, because of the mistake in the understanding of the law, there was no willful intent or malice.  Reasoning – Campbell’s mistake was in concluding that a statement of law, expressed by a trial judge, was the law. That is a mistake of law. It is a mistake of law to misunderstand the significance of the decision of a judge, or of his reasons. It is also a mistake of law to conclude that the decision of any particular judge correctly states the law, unless that judge speaks on behalf of the ultimate Court of Appeal.  There is no special intention required for this offence. The only mens rea required here is that Campbell intended to do that which she did. There is no suggestion that she lacked that mens rea.  Note – Section 19 is not a matter of justice, but a matter of policy. |

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| Levis (City) v Tetrault; Levis (City) v 2629-4470 (Quebec Inc) (2000)(SCC) |
| Facts – 2629-4470 Quebec Inc (the “company”) was told by an SAAQ employee that a renewal notice would be sent to it 60 days before the expiry date of its registration fees for its vehicle. The notice never arrived, and the company did not pay the fees. The police stopped the vehicle and observed that its registration had expired contrary to s 31.1 of the *Safety Code*.  Who won? Levis (City)  Issue – What is the nature and availability of the defence of officially induced error?  Holding – The company and Tetreault must each pay the minimum fine of $300.  Ratio – Officially induced error of law exists as an exception to the rule that ignorance of the law does not excuse. The wrongfulness of the act is established. However, because of the circumstances leading up to the act, the person who committed it is not held liable for the act in criminal law. The accused is thus entitled to a stay of proceedings rather than an acquittal.  Test – The accused must prove (on a BOP) six elements of the defence of official induced error of law   1. That an error of law or of mixed law and facts was made 2. That the person who committed the act considered the legal consequences of his/her actions 3. That the advice obtained came from an appropriate official 4. That the advice was reasonable 5. That the advice was erroneous 6. That the person relied on the advice in committing the act   Reasoning – The inflexibility of the rule that ignorance of the law is no defence is cause for concern where the error in law of the accused arises out of the error of an authorized representative of the state and the state then demands, through other officials, that the criminal law be applied strictly to punish the conduct of the accused. In such a case, regardless of whether it involves strict liability or absolute liability offences, the fundamental fairness of the criminal process would appear to be compromised.  The RESP’s allegations of fact do not show conduct that meets the standard of due diligence. Nor has the RESP established that the conditions under which the defence or excuse of official induced error is available have been met in this case. The issues raised related at most to administrative practices, not to the legal obligation to pay fees by the prescribed date. The RESP could not have considered the legal consequences of its conduct on the basis of advice from the official in question, nor could it have acted in reliance on that opinion, since no information regarding the nature and effects of the relevant legal obligations had been requested or obtained. |

### Note: *R v Khanna*

Khanna’s failure to disclose a material circumstance from Citizenship and Immigration Canada was an officially induced error of law based on the advice she received from the immigration officails (that Citizenship Canada was only concerned about serious crimes, like “sexual assault and gun crimes.”

# Chapter 10 – Defences – Intoxication and Provocation

## A. Intoxication

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| R v Bernard (1988)(SCC) |
| Facts – After drinking, Bernard forced the complainant to have sexual intercourse, punched her twice, and his a bloodstained towel and pillowcase in the toilet tank. Before the incident, Bernard was walking straight and talking and was able to put a record on. He was awoken by the police and said he didn’t know why he had forced the sexual intercourse but got off when he realized what he was doing. He was charged with sexual assault causing bodily harm contrary to s 246.2(c).  Who won? Crown  Issues – Is sexual assault causing bodily harm an offence requiring proof of specific, or of general, intent? Is evidence of self-induced drunkenness relevant to the issue of guilty or innocence in an offence of general intent?  Holding – The appeal is dismissed.  Ratio – **The distinction between general and specific intent offences ought to be maintained.**   * **General intent offence:** The only intent involved relates solely to the performance of the act in question with no further ulterior intent or purpose * **Specific intent offence:** Involves the performance of the actus reus, coupled with an intent or purpose going beyond the mere performance of the questioned act   Drunkenness is a general sense is not a true defence to a criminal act. Where, however, in a case that involves a crime of specific intent, the accused is so affected by intoxication that he lacks the capacity to form the specific intent required to commit the crime charged, it may apply. **The defence has no application in offences of general intent.**  The mental element of sexual assault causing bodily harm is only the intention to commit the assault. Section 246.2(c) creates an offence of **general intent**.  Dickson CJC (dissenting – Evidence of intoxication should be admissible for all offences to raise a reasonable doubt as to the mens rea of the accused. |

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| R v Daviault |
| Facts – Daviault grabbed the complainant’s wheelchair, wheeled her into the bedroom, threw her on the bed and sexually assaulted her after consumer seven or eight beers during the day and drinking a bottle of brandy during the evening and early morning. Daviault was an alcoholic. He was charged with sexual assault.  Who won? Daviault  Issue – Can a state of extreme drunkenness that resembles automatism or a disease of the mind (as defined in s 16) constitute a defence for a crime of general intent?  Holding – A new trial is directed.  Ratio – A state of extreme drunkenness can constitute a defence for a crime of general intent.   * Legal persuasive burden: The accused should be called upon to establish it on the **balance of probabilities**. * Expert evidence would be required to confirm that the accused was probably in a state akin to automatism or insanity as a result of his drinking.   Reasoning – The principles embodied in our Charter, and more specifically in ss 7 and 11(d), mandate a limited exception to, or some flexibility in, the application of the *Leary* rule (that the defence of drunkenness can have no application to crimes of general intention). This would permit evidence of extreme intoxication akin to automatism or insanity to be considered in determining whether the accused possessed the minimal mental element requires for crimes of general intent.   * The substituted mens rea of an intention to become drunk cannot establish the mens rea to commit the assault. * Should it be though that the mental element involved relates to the actus reus rather than the mens then the result must be the same.   Lamer CJ (concurring)/La Forest J (concurring) – The mental element involve should relate more to the actus reus than the mens rea, so that the defence is clearly available in strict liability offences. |

**Specific intent crimes:** Allow accused to raise **defence of intoxication** (air of reality test)

**General intent crimes:** Allow accused to raise **defence of extreme intoxication** (legal burden on accused)

### Note: Criminal Code s 33.1 Self-Induced Intoxication

1. It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care described in subsection (2).
2. … a person departs markedly from the standard of reasonable care… and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behavior, voluntarily or involuntarily interferes with or threatens to interfere with the bodily integrity of another person.
3. This section applies in respect of any offence… that includes as an element and **assault or any other interference by a person with the bodily integrity of another person**.

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| R v Drader (2009)(Alta Prov Ct) |
| Facts – Drader had been drinking at a party and then entered a car, took mail from it, and entered a home for the purpose of committing an offence. He was confronted and then fled, but was captured and charged with break and enter and commit theft (s 348(1)(b)); break and enter with intent to commit an indictable offence (s 348(1)(a)); and possession of property, to wit: mail, knowing that it was obtained by an offence (s 354(1)). He submits that his level of self-induced intoxication should lead to an acquittal. All of the witnesses called by counsel for Drader had been drinking themselves.   * Break and enter and commit theft – generally considered an offence of general intent, unless a specific intent indictable offence is alleged   + The indictable offence was theft (a specific intent offence) * Breach and enter with intent to commit an indictable offence – specific intent * Possession of property, to wit, mail knowing it was obtained by an offence – specific intent   Who won? Crown  Issue – Does Drader’s self-induced level of intoxication lead to an acquittal of any of the charges?  Holding – Drader’s self-induced level of intoxication does not lead to an acquittal.  Ratio – The law recognizes three degrees of intoxication:   1. **Mild intoxication** – does not provide a defence and will not absolve an accused of any criminal liability 2. **Medium intoxication** (accused’s ability to foresee the consequences of his/her acts is impaired) – an accused can be acquitted of an offence of specific intent if, due to intoxication, there is a reasonable doubt that he/she lacked the actual intent to commit the offence; this defence is not available for a crime of general intent 3. **Extreme intoxication** (state akin to automatism) – absolves an accused of all common law criminal liability (defence is rare and requires expert evidence)  * Does not apply to offences which involve an element of assault, interference, or threat of interference with the bodily integrity of another person (s 33.1)   Reasoning – Drader was able to physically move around, he was able to dance and he was able to play the guitar and sing. He was able to close the door at the second house and responded exactly how one would expect someone to act who had broken and entered a dwelling with an intent to commit an indictable offence, that is, he immediately ran and existed the premises when confronted by the homeowner. |

### Note: *R v Penno*

Voluntary intoxication cannot be raised as a defence whether the Crown must prove the intoxication of the accused BARD as one of the elements of the offence. For example, voluntary intoxication is not a defence to a charge of impaired driving.

However, involuntary intoxication may offer a defence even to an offence containing intoxication as an element.

## B. Provocation

1. Statutory defence – found in s 232 of the Code
2. Burden on accused – evidentiary (air of reality in order for it to be left to the jury, Crown has to disprove BARD)
3. Limited application – applies only to reduce a conviction for murder to one of manslaughter
4. Does not result in a full acquittal

Applies whenever the accused subjected to a “wrongful act or insult” that would cause the “ordinary person” to lose “the power of self control” (***objective***), and where the accused “acted on the sudden” and before there was time for “his passion to cool” (***subjective***)

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| R v Hill (1985)(SCC) |
| Facts – Hill (a 16-year-old male) was charged with first-degree murder after causing the death of Pegg. The position of the Crown was that Pegg and Hill were homosexual lovers and Hill murdered Pegg after a falling out. Hill stated he was subject to unexpected and unwelcome homosexual advances while asleep, and acted in self defence in killing Pegg or was provoked.  Who won? Crown  Issue – Should the trial judge have instructed the jury to consider whether the wrongful act or insult was sufficient to deprive an “ordinary person” of the age and sex of the accused of his power of self-control?  Holding – The trial judge did not err in failing to specify that the ordinary person, for the purposes of the objective test of provocation, is to be deemed to be of the same age and sex as the accused.  Ratio – It is not necessary for a trial judge to direct a jury that the ordinary person means an ordinary person of the same age and sex as the accused?  Test – Provocation   1. **Objective:** Was the provocation in question sufficient to deprive an ordinary person of the power of self-control? 2. **Subjective:** Was the accused so deprived? What actually occurred in the mind of the accused? Did the accused react to the provocation on the sudden and before there was time for his passion to cool?   Reasoning – Although the instruction that the ordinary person, for the purposes of the objective test of provocation, is to be deemed to be of the same age and sex of the accused may be helpful in clarifying the application of the ordinary person standard, it is not wise or necessary this a mandatory component of all jury charges on provocation. Juries are perfectly capable of sizing the matter up. |

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| R v Thibert (1996)(SCC) |
| Facts – Mr. Thibert knew that his wife had an intimate relationship with Sherren. Mrs. Thibert told Mr. Thibert she was going to leave him, but agreed to meet him, and then did meet with him but refused to return home with him. Mr. Thibert thought about killing himself and loaded a rifle, which he eventually put in his car. Later he followed Mrs. Thibert to a bank and asked her to go some place to talk to him. When Sherren came out of the building, Mr. Thibert removed the rifle from his car. Sherren swung Mrs. Thibert back and forth in front of him and moves towards Mr. Thibert, telling him “Go ahead and shoot me.” Mr. Thibert closed his eyes and shot sherren, and was charged with first degree murder.  Who won? Thibert  Issue – Was the trial judge correct in leaving the defence of provocation with the jury (and therefore incorrect in failing to instruct the jury that no onus rested upon the accused to establish the defence)?  Holding – There was evidence upon which a reasonable jury acting judicially and properly instructed could have concluded that the defence of provocation was applicable.  Ratio – Before the defence of provocation is left to the jury, the trial judge must be satisfied that:   1. There is some evidence to suggest that the particular wrongful act or insult alleged by the accused would have caused an ordinary person to be deprived of self-control  * The wrongful act or insult must be one which could, in light of the past history of the relationship between the accused and the deceased, deprive an ordinary person of the same age, and sex, and sharing with the accused such other factors as would give the act or insult in question a special significance, of the power of self-control.  1. That there is some evidence showing that the accused was actually deprived of his/her self-control by that act or insult  * The background and history of the relationship between the accused and the deceased should be taken into consideration. This is particularly appropriate if it reveals a long history of insults, leveled at the accused by the deceased. This is so even if the insults might induce a desire for revenge so long as immediately before the last insult, the accused did not intend to kill. * This threshold test can be readily met, so long as there is some evidence that the objective and subjective elements may be satisfied. If there is, the defence must then be left with the jury.   Reasoning –   1. Taking into account the past history between the deceased and the accused, a jury could find the actions of the deceased to be taunting and insulting. It might be found that, under the same circumstances, an ordinary person who was a married man, faced with the breakup of his marriage, would have been provoked by the actions of the deceased so as to cause him to lose his power of self-control. 2. There was evidence that the accused was actually provoked.   Were the acts of the deceased ones which he had a legal right to do but which were nevertheless insulting?   * While the actions of the deceased in the parking lot were clearly not prohibited by law, they could none the less be found by a jury to constitute insulting behavior. These actions did not constitute self-defence.   Major J (dissenting) – There is no evidence of a wrongful act or insult sufficient to deprive an ordinary person of the power of self-control. It would be a dangerous precedent to characterize involvement in an extramarital affair as conduct capable of grounfing provocation, even when coupled with the deceased’s reactiosn to the dangerous situation he faced. |

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| R v Gill (2009)(ONCA) |
| Facts – Garavellos called Gill and his friends “fucking geeks” as he drove by them. Gill ran after the car and hit it. Medeiros and Garavellos (both significantly larger than Gill) got out of the car and a confrontation ensued. Gill retrieved a knife. Gill was frightened. Garavellos eventually raised a bottle to Hill’s head and swung at him, and Gill reacted instantly by stabbing Garavellos. Gill denied that he was angry when he did so. Gill was convicted of second degree murder at trial, after the judge declined to leave the defence of provocation with the jury.  Who won? Gill  Issue – Did the trial judge err by failing to leave the defence of provocation with the jury?  Holding – The trial judge erred in holding that there was no air of reality to the defence of provocation.  Reasoning – If the jury rejected Gill’s evidence that he was afraid, there was evidence capable of supporting an inference that he was angry. Similarly, there was evidence capable of supporting an inference that Gill acted in the heat of passion or as a result of a loss of self-control. It was also open to the jury to conclude that Gill was both frightened and angry. The fact that Gill previously retreated from the confrontation, retrieved a knife, and then returned does not undermine the availability of the inference that his conduct was prompted by sudden rage. |

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| R v Tran (2010)(SCC) |
| Facts – Tran entered the locked apartment of his estranged wife and attacked his wife and her boyfriend. He stabbed both parties repeatedly and then phones his godparent and said, “I got him.” He was charged with murder (of the boyfriend) and attempted murder (of his wife).  Who won? Crown  Issue – Was there an air of reality to the defence of provocation?  Holding – There was no air of reality to the defence of provocation.  Ratio – The phrase “legal right” (in the context of the limitation on the defence of provocation) has been defined as meaning a right which is sanctioned by law, such as a sheriff proceedings to execute a legal warrant, or a person acting in justified self-defence.  **The ordinary person standard must be informed by contemporary norms of behavior, including fundamental values such as the commitment to equality provided for in the Charter.** For example, it would be appropriate to ascribe to the ordinary person relevant racial characteristics if the accused were the recipient of a racial slur, but it would not be appropriate to ascribe to the ordinary person the characteristic of being homophobic if the accused were the recipient of a homosexual advance. There can be no place in this objective standard for antiquated beliefs such as “adultery is the highest invasion of property”, nor indeed for any form of killing based on such inappropriate conceptualizations of “honour”.  Reasoning – The conduct in question does not amount to an “insult”; nor does it meet the requirement of suddenness. The behavior of the victims was not only lawful, it was discrete and private and entirely passive vis-à-vis Tran. There was nothing sudden about the discovery. It cannot be said that Tran’s discovery struck upon a mind unprepared for it. |

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| R v Nealy (1986)(ONCA) |
| Facts – Nealy injected “stovetop” into his arm in the afternoon and then drank at taverns in the evening with his girlfriend. Casimiri repeatedly said that Nealy’s girlfriend “had nice tits and that he was going to fuck her.” The two men began pushing and punching each other and went outside. Nealy took a knife before going outside. Nealy eventually stabbed Casimiri several times. The trial judge charged the jury to consider drunkenness, self-defence, and provocation, but did not instruct the jury as to the cumulative effect that the consumption of alcohol and the fear and anger that were experience might have had upon Nealy’s ability to form the requisite intent to commit murder.  Who won? Nealy  Issue – Should a jury be instructed that they should take into account the cumulative effects of the evidence of drinking and the evidence with regard of provocation?  Holding – It would have been preferable if the jury had been advised as to the possible cumulative effect of the evidence?  Ratio – It will be preferable in most cases (and essential in some cases) where the consumption of alcohol and some form of provocation is involved that a specific direction as to the cumulative effect of these factors be given.  **Rolled-up charge** – accused argues at least two defences of intoxication, provocation, and self-defence  Reasoning – The jury should have been told that even if the words spoken by Casimiri coupled with his actions did not raise in their minds a reasonable doubt as to whether or not Nealy had been provoked, or that Nealy was incapable of forming the required intent by reason of the consumption of alcohol, the jury was still to consider all these surrounding circumstances in coming to a conclusion as to whether Nealy possessed the requisite intent needed to commit murder. |

# Chapter 11 – Defences – Mental Disorder

## A. The Defence of Mental Disorder

1. Statutory defence – found in s 16 of the Code
2. Burden of proof on whichever party is trying to prove mental disorder – the presumption of sanity is disproved by proof on a BOP subs 16(2) and (3)
3. Applies to all offences
4. Results in special disposition – not criminally responsible by responsible by reason of mental disorder (NCRMD)

* The Mental Disorder provisions are found in s 16 and Part XX.1 of the Code
* 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)

The defence of “mental dirsoder” is found in s 16

* The defence has two components. The accused must be found to:

1. **Have a mental disorder (defined in s 2 to mean a “disease of the mind,” that**
2. **Renders him unable to appreciate the nature and quality of the act he committed, OR incapable of knowing that it was wrong.**
   * An accused may be aware of the physical character of his action (e.g., in choking) without necessarily having the capacity to appreciate that, in nature and quality, that act will result in the death of a human being.
   * The alternate definition, that of incapacity to know that the act was “wrong,” has generated disagreement among the members of the court.

* The source of the incapacity may be congenital or acquired, permanent or temporary, but it has typically been held to exclude states of self-induced intoxication and transitory mental states, such as a concussion.

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| R v Chaulk (1990)(SCC) |
| Facts – Chaulk and Morrissette (two youths) plundered a home for valuables and then stabbed and bludgeoned its sole occupant to death. A week later they turned themselves in and made full confessions and argued that they were in the grips of a mental disorder (a paranoid psychosis that made them believe they had the power to rule the world and had the right to kill the victim because he was a “loser”).  Who won? Chaulk and Morrissette  Issue – What is the interpretation of the word “wrong” which is found in s 16(2)? Is its meaning restricted to “legally wrong” or may it also be interpreted more broadly to include “legally or morally wrong”?  Holding – The insanity defence was available to the appellants.  Ratio – The presumption of sanity embodied in s 16(4) of the Code limits the presumption of innocence guaranteed by s 11(d) of the Charter. However, s 16(4) is a reasonable limit on the presumption of innocence that can be upheld under s 1 of the Charter, given the importance of the objective that the Crown not be encumbered with an unworkable burden and given that s 16(4) limits s 11(d) as little as is reasonably possible.  **The term “wrong” as used in s 16(2) must mean more than simply “legally wrong”.** A person may well be aware that an act is contrary to law but, by reason of “natural imbecility” or disease of the mind, is at the same time incapable of knowing that the act is morally wrong in the circumstances according to the moral standards of society.  Reasoning – This interpretation of s 16(2) will not open the floodgates to amoral offenders or to offenders who relieve themselves of all moral considerations because:   1. The incapacity to make moral judgments must be causally linked to a diseased of the mind. 2. “Moral wrong” is not to be judged by the personal standards of the offender but by his awareness that society regards the act as wrong. |

### Note: *R v Swain*

* The Crown may in some circumstances introduce evidence of mental disorder **against** the wishes of the accused.

The procedure for introducing evidence of mental disorder is set out in *Swain*. There are four possibilities:

1. **The accused may plead NCR at the outset of the trial.** The evidence of mental disorder will be heard during the trial and the accused prove on a BOP that he had a mental disorder at the time of the offence.
2. **The accused may choose to plead “not guilty” and may advance any defences or other arguments against conviction during the trial.** If those arguments are unsuccessful, and the Crown proves the guilt of the accused BARD, the accused may change his plea to NCR and a hearing on the matter will be held. This occurs **after a finding of guilt** is made, but **before a conviction is entered**. The accused has the same burden of proof as in option 1.
3. **The Crown may raise evidence of the accused’s mental disorder during the trial if the accused otherwise puts his mental state in issue**, for example by introducing evidence that he was seeing a psychiatrist at the time of the offence. The Crown has the burden of proving on a BOP that the accused had a mental disorder at the time of the offence.
4. **The Crown may raise evidence of mental disorder after the finding of guilt is made but before the conviction is entered**, as in option 2. The Crown has the burden of proving on a BOP that the accused had a mental disorder at the time of the offence.

## B. Disposition for those found NCRMD

**Where a court or Review Board makes a disposition for those found NCRMD, it shall**, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, **make one of the following dispositions that is the least onerous and least restrictive to the accused**:

1. Where a verdict of NCRMD has been rendered in resect of the accused and the accused is not a significant threat to the safety of the public, by order, direct that the accused be **discharged absolutely**;
2. By order, direct that the accused be **discharged subject to such conditions as the court or Review Board considers appropriate**; or
3. By order, direct that the accused be **detained in custody in a hospital**, subject to such conditions as the court of Review Board considers appropriate.

* The accused, if found to be NCRMD, does not have the burden of proof at the disposition stage to prove that he/she does not present a significant threat.

## C. Automatism

* The situation in which an **accused person does not have mental control of their physical actions is referred to as a state of automatism**.
* How the criminal law treats the claim of automatism depends on the alleged source of the accused’s dissociate state.
  + Where the alleged automatism is the result of voluntary consumption of intoxicants 🡪 the claim is analyzed according to the parameters of the defence of intoxication
  + Where the source of the alleged automatism is a mental disorder 🡪 the claim is treated like any other mental disorder claim
  + Where the claim is that the automatism is neither the result of voluntary intoxication, nor the product of mental disorder 🡪 the accused is arguing the defence of non-mental disorder automatism
    - If successful, this entitled the accused to a **full acquittal**

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| R v Rabey (1977)(ONCA) |
| Facts – Rabey was emotionally attached to Miss X. He found a letter in Miss X’s notebook that expressed her sexual interest in another student, and that called him and his friend “nothings”. The next day he took a rock from a geology laboratory, which he said he intended to study at home. He later saw Miss X by chance and asked her what she though of him and a mutual friend. Miss X replied “just a friend” to both. Rabey grabbed her around the arms and struck her head with the rock twice, calling her a bitch. Rabey also threatened another student. After being restrained by a professor, Rabey ran to get a nurse and told the nurse he thought he had killed someone. He later said he didn’t know why he started or why he stopped hitting Miss X.  Who won? Crown  Issue – Is a “dissociative state” due to a “psychological blow” a “disease of the mind” within s 16?  Holding – If Rabey was in a dissociative state at the time he struck Miss X he suffered from “disease of the mind”. A new trial must be had.  Ratio – The malfunctioning of the mind, although temporary, is a “disease of the mind”, unless it can be considered as a transient state produced by an external cause within the meaning of the authorities. The ordinary stresses and disappointments of life that are common lot of mankind do not constitute an external cause constituting an explanation for a malfunctioning of the mind which takes it out of the category of a “disease of the mind”.  Malfunctioning of the mind arising from some cause that is primarily internal to the accused, having its source in his psychological or emotional make-up or in some organic pathology 🡪 disease of the mind  Malfunctioning of the mind which is the transient effect produced by some specific external factor (e.g. concussion) 🡪 not a disease of the mind  Reasoning – The emotional stress suffered by Rabey as a result of his disappointment with respect to Miss X cannot be said to be an external factor of any real meaning. The dissociative state must be considered as having its source primarily in Rabey’s psychological or emotional make-up. |

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| R v Parks (1992)(SCC) |
| Facts – Parks killed his mother-in-law and seriously injured his father-in-law while they were sleeping after Parks drove to their home. He then drove to the police station and confessed. He presented the defence of automatism, stating that he was sleepwalking at the time of the incidents. He had had excellent relations with his parents-in-law, but was having problems and was particularly stressed. He always slept very soundly and members of his family suffered from sleep problems.  Who won? Parks  Issue – Should the condition of sleepwalking be classified as non-insane automatism resulting in an acquittal or as a “disease of the mind” (insane automatism), giving rise to a verdict of not guilty by reason of insanity?  Holding – The trial judge did not err in leaving the defence of automatism rather than that of insanity with the jury.  Ratio – Recurrence is but one of a number of factors to be considered in the policy phase of the disease of the mind inquiry. The absence of a danger of recurrence will not automatically exclude the possibility of a finding of insanity.  “Continuing danger” theory – any condition likely to present a recurring danger to the public should be treated as insanity  “Internal cause” theory – a condition stemming from the psychological or emotional make-up of the accused, rather than some external factor, should lead to a finding of insanity (*Rabey*)  The two theories share a common concern for recurrence, the latter holding that an internal weakness is more likely to lead to recurrent violence than automatism brought on by some intervening external cause.  Reasoning – There are no compelling policy factors that preclude a finding that the accused’s condition was one of non-insane automatism.   * It seems unlikely that the recognition of somnambulism as non-insane automatism will open the floodgates to a cascade of sleepwalking defence claims (there is no current problem with specious defence claims; it is very difficult to feign sleepwalking; a comprehensive listing and indicia of sleepwalking can be consulted by both the court and the medical experts. |

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| R v Stone (1999)(SCC) |
| Facts – Stone was charged with the murder of his wife after stabbing her 47 times. The stabbing occurred in his truck after his wife threatened him and berated him because he said they should divorce if she was not going to let him see his sons. Stone remembered a “whoosh” sensation washing over him, and when his eye focused again he was holding a knife and his wife was dead. He claimed insane automatism, non-insane automatism, lack of intent, and alternatively, provocation.  Who won? Crown  Issue – Should the defence of non-insane automatism have been left to the jury?  Holding – The approach taken by the trial judge did not impair Stone’s position.  Test – Determining whether automatism should be left with the trier of fact   1. Assess whether a proper foundation for a defence of automatism has been established  * In order to satisfy the evidentiary burden in cases involving claims of automatism, the defence must make an assertion of involuntariness and call expert psychiatric or psychological evidence confirming that assertion. However, this defence has not been satisfied simply because the defence has met these two requirements. The burden will only be met where the trial judge concludes that there is evidence upon which a properly instructed jury could find that the accused acted involuntarily on a BOP. In reaching this conclusion, the trial judge will first examine the psychiatric or psychological evidence and inquire into the foundation and nature of the expert opinion. The trial judge will also examine all other available evidence, if any. Relevant factors include:   + The severity of the triggering stimulus   + Corroborating evidence of bystanders   + Corroborating medical history of automatistic-like dissociative states   + Whether there is evidence of a motive for the crime   + Whether the alleged trigger of the automatism is also the victim of the automatistic violence * If the trial judge concludes that a proper foundation has not been established, the presumption of voluntariness will be effective and neither automatism defence will be available to the trier of fact.  1. Determine whether the condition alleged by the accused is mental disorder or non-mental disorder (whether or not the condition alleged by the accused is a mental disorder)  * The evidence of medical witnesses with respect to the cause, nature and symptoms of the abnormal mental condition from which the accused is alleged to suffer, and how that condition is viewed and characterized from the medical point of view, is highly relevant, but not determinative, since **what is a disease of the mind is a legal question.** * Trial judges start from the proposition that the condition the accused claims to have suffered from is a disease of the mind. They must then determine whether the evidence in the particular case takes the condition out of the disease of the mind category. * A holistic approach must be available to trial judges dealing with the disease of the mind question. This approach must be informed by the internal cause theory, the continuing danger theory and the policy concerns raised in *Rabey* and *Parks*. * If the trial judge concludes that the condition the accused claims to have suffered from is not a disease of the mind, only the defence of non-insane automatism will be left with the trier of fact. The question for the trier of fact will be whether the defence has proven that the accused acted involuntarily on a BOP. A positive answer will result in an absolute acquittal. * If the trial judge concludes that the alleged condition is a disease of the mind, only mental disorder automatism will be left with the trier of fact. The case will proceed like any other s 16 case.   Reasoning – The internal cause factor and the continuing danger factor, as well as the other policy factors set out in *Rabey* and *Parks* all support the trial judge’s finding that the condition Stone alleges to have suffered from is a disease of the mind in the legal sense. |

## D. The Relationship Between Mental Disorder and Intoxication

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| R v Bouchard-Lebrun (2011)(SCC) |
| Facts – Bouchard-Lebrun assaulted two individuals (possibly based on his belief that one was wearing an “upside-down cross”) while in a psychotic condition caused by chemical drugs (ecstasy) taken a few hours earlier. He had never experienced a psychotic episode before, had no underlying disease of the mind, and was not addicted to a particular substance.  Who won? Crown  Issue – Can a toxic psychosis that results from a state of self-induced intoxication caused by an accused’s use of chemical drugs constitute a “mental disorder” within the meaning of s 16?  Holding – Bouchard-Lebrun was not suffering from a “mental disorder” at the time he committed the assault. Section 33.1 applies and the appeal must be dismissed.  Ratio – A malfunctioning of the mind that results *exclusively* from self-induced intoxication cannot be considered a disease of the mind in the legal sense, since it is not a product of the individual’s inherent psychological makeup.  Section 33.1 applies to any mental condition that is a direct extension of a state of intoxication. No distinction based on the seriousness of the effects of self-induced intoxication is drawn in this provision. There is no threshold of intoxication beyond which s 33.1 does not apply to an accused, which means that toxic psychosis can be one of the states of intoxication covered by this provision.  Reasoning – If everyone who committed a violent offence while suffering from toxic psychosis were to be found not criminally responsible on account of mental disorder regardless of the origin or cause of the psychosis, the scope of the defence provided for in s 16 would become much broader than Parliament intended. |

### Note: Fitness to Stand Trial

* In cases where the ability of the accused to understand the proceedings and to instruct counsel is in doubt, there may be a hearing on the accused’s fitness to stand trial, a term defined in s 2.
* Where the accused is found to be unfit, he must go before the review board for a disposition hearing similar to the procedure used after an NCRMD finding. The accused may be detained or released on conditions. If the accused later becomes fit, he may be tried at that time.
  + Under s 672.58 the Crown may apply to bypass this hearing and instead force the accused to submit to treatment for a period of up to 60 days. This is different than the NCRMD process, which cannot force an accused who is ordered detained to accept treatment.

# Chapter 12 – Defences – Self-Defence

* Self-defence is generally available as a **defence to any charge that contains an element of assault or other violence against the person**, such as assault, manslaughter or murder.
* If raised successfully, self-defence entitles the accused to a **complete acquittal**.
* **Statutory defence:** The provisions in the Code are found in ss 34-35. They can apply to both self-defence and to defence of a third person or of property.
* Evidentiary burden on the accused to give the defence an **air of reality**, once that is proven the burden shifts back to the Crown to disprove BARD

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| R v Lavallee (1990)(SCC) |
| Facts – Lavallee, a 22-year-old woman, lived with Rust. The relationship between them was volatile and Lavallee was frequently a victim of physical abuse at the hands of Rust. At a party at their residence, Lavallee and Rust had an argument and Rust gave Lavallee a gun and said “wait till everybody leaves, you’ll get it then” and “either you kill me or I’ll get you”. Lavallee shot Rust in the back of the head, killing him.  Who won? Lavallee  Issue – Can the defence of self defence apply to a situation in which a woman who has been abused by her spouse reacts to that abuse with deadly force?  Holding – The acquittal is restored.  Ratio – Self-defence has to be interpreted and applied in a way that makes sense in the context of the accused’s history of abuse at the hands of the deceased.  Where evidence exists that an accused is in a battering relationship, expert testimony can assist the jury in determining whether the accused had a “reasonable” apprehension of death when she acted by explaining the heightened sensitivity of a battered woman to her partner’s acts.  Reasoning – It may be possible for a battered spouse to accurately predict the onset of violence before the first blow is struck, even if an outside to the relationship cannot.  The requirement that a battered woman wait until the physical assault is “underway” before her apprehension can be validated in law would be tantamount to sentencing her to “murder by installment”. |

### Note: R v Petel

* Facts – The accused was charged with the second degree murder of R. R was involved in drug trafficking with the accused’s daughter’s boyfriend E. E was violent and allegedly beat his girlfriend and threatened the accused. The accused fired at E are she saw he was lunging at her after she fired at E.
* The Court applied *Lavallee* and held that, under the self-defence provisions of s 34(2) an accused could make a reasonable mistake about whether she was actually being assaulted. It is not necessary that the accused actually be assaulted to trigger s 34(2) so long as she reasonably believed an assault was taking place. The jury should consider “whether the accused reasonably believed in all the circumstances that she was being unlawfully assaulted.” The assault need not be imminent: Imminence is only one factor the jury should consider in determining whether the accused had a reasonable apprehension of danger and a reasonable belief that she could not extricate herself from the threat without killing her attacker.

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| R v Malott |
| Facts – The accused was convicted of the second degree murder of her former spouse and the attempted murder of his girlfriend. She appealed the murder charge.  Who won? Crown  Ratio – The legal inquiry into the moral culpability of a woman who is claiming self-defence must focus on the reasonableness of her actions in the context of her personal experiences, and her experiences as a woman, not on her status as a battered woman.  Where the reasonableness of a battered woman’s belief is at issue, a judge and jury should be made to appreciate that a battered woman’s experiences are both individualized, based on her own history and relationships, as well as shared with other women, within the context of a society and a legal system which has historically undervalued women’s experiences. A judge and jury should be told that a battered woman’s experiences are generally outside the common understanding of the average judge or juror, and that they should seek to understand the evidence being presented to them in order to overcome myths and stereotypes. All of this should be presented in such a way as to focus on the reasonableness of the woman’s actions, without relying on old or new stereotypes about battered women.  Reasoning – L’Heureux Dube J and McLachlin J (concurring):   1. The significance of Lavallee reaches beyond its particular impact on the law of self-defence. 2. Women’s experiences and perspectives may be different from the experiences and perspectives of men. A women’s perception of what is reasonable is influenced by her gender, as well as by her individual experiences, and both are relevant to the legal inquiry.  * The perspectives of women, which have historically been ignored, must now equally inform the “objective” standard of the reasonable person in relation to self-defence. |

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| R v Cinous (2002)(SCC) |
| Facts – Cinous was charged with first degree murder of a criminal accomplice (Mike) at a gas station. Cinous thought that Ice and Mike had stolen his gun and wanted no more to do with them. Ice and Mike harassed Cinous, and Cinous began to hear rumours that they wanted to kill him. Cinous agreed to meet them to participate in a theft. Cinous thought they were armed, and while driving to the location of the theft, Cinous pulled into a gas station and shot Mike in the back of the head.  Who won? Crown  Issue –Did the defence of self-defence possess an “air of reality”?  Holding – There is no air of reality to the final element of the defence (the claim that it was reasonable to believe that he had no alternative).  Ratio – Trial judges are required to do some limited weighing beyond simply saying, “Is there any evidence to support the defence?”  Reasonableness should not be understood in the context of criminal behavior.  Test – Air of reality (whether there is an evidential foundation for a defence)   1. There must be evidence 2. Upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true.  * Requires the judge to determine whether the evidence relied upon is reasonably capable of supporting the inferences required to acquit the accused.   The question is not just whether there is evidence in some general sense, but whether there is *evidence capable of forming the basis for an acquittal.*   * The trial judge cannot consider issues of credibility. * The trial judge must not weigh evidence, make findings of fact, or draw determinate factual inferences. * **If there is direct evidence as to every element of the defence, whether or not it is adduced by the accused, the trial judge must put the defence to the jury.** * In cases where the record does not discloses direct evidence as to every element of the defence, or whether the defence includes an element that cannot be established by direct evidence (e.g. where a defence has an objective reasonableness component), the question becomes whether the remaining elements of the defence—those elements of the defence that cannot be established by direct evidence—may reasonably be inferred from the circumstantial evidence (“evidence that tends to prove a factual matter by proving other events or circumstances from which the occurrence of the matter at issue can be reasonably inferred”).   Reasoning – Allowing a defence to go to the jury in the absence of an evidential foundation would invite verdicts not supported by the evidence, serving only to confuse the jury and get in the way of a fair trial and true verdict.  Note – The air of reality test applies to honest but mistaken belief in consent in sexual assault cases, intoxication, necessity, duress, provocation, and self-defence. |

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| R v Urquhart (2013)(BCPC) |
| Facts – At a meeting, Urquhart did not allow McBride to speak and McBride left. Before leaving, Urquhart told him to “go have another drink” and McBride responded “go fuck yourself”. Urquhart followed McBride into the parking lot and what followed thereafter is in significant dispute. McBride was left with injuries. McBride admits that he pushed Urquhart away just before Urquhart struck him.  Who won? Crown  Issue – Has the Crown proven BARD that Urquhart is guilty of assaulting and causing bodily harm to McBride?  Holding – Self-defence under the former s 34(1) and s 37 is not available to Urquhart and self-defence under the new s 34 is not available to Urquhart.  Ratio – Self-defence under the new s 34 no longer requires the proportionality of the force to be fixed (while it’s still a factor). Also, it is no longer a complete bar if the accused provoked the assault.  Under the former s 34(1), in order for the Crown to defeat self-defence it must prove at least one of the following four facts BARD:   1. That the victim did not assault the accused 2. That the accused did provoke the assault  * *Urquhart’s conduct can support a finding that he provoked the assault.*  1. That the accused did intend to kill the victim or cause him grievous bodily harm 2. That the force used by the accused was more than necessary to enable the accused to defend himself  * *Urquhart was excessive in all the circumstances.*   The new s 34 self-defence (in force March 11, 2013) provisions contain three essential elements:   1. A reasonable perception of force or a threat of force against the accused or another person: s 34(1)(a)  * *Urquhart may have believed on reasonable grounds that he was being assaulted.*  1. A defensive purpose for the accused’s act: s 34(1)(b)  * *The blows were not for a defence or protective purpose.*  1. An objective determination of the reasonableness of the accused’s act: s 34(1)(c) applying the factors under s 34(2)  * *The blows were not objectively reasonable.* |

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| R v Caswell (2013)(SKPC) |
| Facts – Caswell and Thomas had been in an on again, off again relationship. The couple got into a verbal argument at Caswell’s house. Thomas demanded that Caswell leave the house and when he refused, she threatened to break his TV, picking up a microwave tray to do so. A struggle ensued and Caswell struck Thomas on the shoulder. He later pulled the phone cord out of the wall. Thomas had destroyed property in Caswell’s home in the past.  Who won? Caswell  Issue – Is Caswell guilty?  Holding – Caswell is not guilty under s 35 of the new law.  Ratio – The applicable overall rule is that Parliament was presumed to have intended that legislation affecting substantive (as opposed to procedural) rights would not be applied retroactively, although that presumption is rebuttable.  Section 35(1) A person is not guilty of an offence if   1. they either believe on reasonable grounds that they are in peaceable possession (property that ownership of which is not in issue) of property…; 2. they believe on reasonable grounds that another person … is about to damage or destroy the property, or make it inoperative, or is doing so; 3. the act that constitutes the offence is committed for the purpose of … preventing the other person from taking, damaging or destroying the property or from making it inoperative, or retaking the property from that person; and 4. the act committed is reasonable in the circumstances.   Reasoning – The new s 34 should be applied immediately because to do otherwise would leave the evils that the legislation was intended to cure for linger.   1. Caswell was in peaceable possession of his personal property. 2. Caswell had reasonable ground to believe Thomas was about to smash his TV. 3. Caswell did what he did for the specific purpose of preventing Thomas from carrying out her intended purpose of destroying his personal property. 4. The blow Caswell directed at Thomas was reasonable in the circumstances. |

# Chapter 13 – Defences – Necessity and Duress

* The defences of necessity and duress excuse criminal conduct where the accused was acting under compulsion of threats from another person (duress) or in response to emergency circumstances (necessity), in order to prevent a greater evil from occurring

## A. Necessity

1. Common law defence recognized by the SCC in *Perka*
2. Evidentiary burden on the accused to give the defence an **air of reality**, once that is proven the burden shifts back to the Crown to disprove BARD
3. All offences
4. Full acquittal

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| R v Perka, Nelson, Hines and Johnson |
| Facts – The appellants were employed to deliver a load of cannabis from a point in international waters to a drop point in international waters off the coast of Alaska. The vessel began to encounter problems while 180 miles from the Canadian coastline, and it decided to seek refuge on the shoreline to make temporary repairs. Eventually the Captain, fearing the vessel was going to capsize, ordered the men to off-load the cargo. The appellants were charged with importing cannabis into Canada and with possession for the purpose of trafficking. They claimed they did not plan to import into Canada or leave their cargo in Canada. Expert witnesses testified that the decision to come ashore was expedient and prudent and essential.  Who won? Appellants  Holding – The trial judge did not bring the question of a reasonable alternative to the jury’s attention.  Ratio – Negligence or involvement in criminal or immoral activity does not disentitle the actor to the excuse of necessity.   * However, if the accused’s “fault” consists of actions whose clear consequences were in the situation that actually ensued, then he was not “really” confronted with an emergency that compelled him to commit the unlawful act he now seeks to have excused. In such situations the defence is unavailable.   Test – Three elements must be present for the defence of necessity (where the accused places before the Court sufficient evidence to raise the issues, the onus is on the Crown to meet it BARD)   1. The requirement of **imminent peril** or danger 2. The accused must have had **no reasonable legal alternative** to the course of action he/she undertook 3. There must be **proportionality** between the harm inflicted and the harm avoided   Reasoning – Necessity is an “excuse”, which concedes the wrongfulness of the action but asserts that the circumstances under which it was done are such that it ought not to be attributed to the actor. It rests on a realistic assessment of human weakness, recognizing that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience. |

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| R v Latimer |
| Facts – Latimer took his daughter’s life by poisoning her with carbon monoxide and was charged with murder. Tracy suffered from cerebral palsy, and was in a great deal of pain. She could have been fed with a tube, an option that might have allowed for more effective pain medication to be administered, but the Latimers rejected the option. Tracy was scheduled to undergo further surgery, which would cause pain and require future surgery.  Who won? Crown  Issue – Was the jury entitled to consider necessity?  Holding – There was no air of reality to any of the elements of the defence, and the trial judge was correct to conclude that the jury should not consider necessity.  Ratio –  Imminent peril and no reasonable legal alternative   * Modified objective standard (an objective evaluation, but one that takes into account the situation and characteristics of the particular accused person) * The accused person must, at the time of the act, honestly believe, on reasonable grounds, that he faces a situation of imminent peril that leaves no reasonable alternative open. There must be a reasonable basis for the accused’s beliefs and actions, but it would be proper to take into account circumstances that legitimately affect the accused person’s ability to evaluate his situation.   Proportionality   * Objective standard (since evaluating the gravity of the act is a matter of community standards infused with constitutional considerations) * The two harms must, at a minimum, be of a comparable gravity. The harm avoided must be either comparable to, or clearly greater than, the harm inflicted. * It is difficult to imagine a circumstance in which the proportionality requirement could be met for a homicide.   Reasoning –   1. Tracy’s surgery did not pose an imminent threat to her life, nor did her medical condition. It was not reasonable for Latimer to form the belief that further surgery amounted to imminent peril. 2. Latimer had at least one reasonable legal alternative: he could have struggled on, by helping Tracy to live and by minimizing her pain as much as possible. 3. The “harm avoided” was, compared to death, completely disproportionate. |

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| R v Ungar (2002)(Ont CJ) |
| Facts – Ungar, a member of Hatzoloh, picked up his son and then received a call that a woman had been hit by a motor vehicle and was not moving. He put his flashing light on his roof and went through several red lights, drove northbound in the southbound land, exceeded the speed limit in heavy traffic, crossed two lanes of traffic quickly, and drove onto the meridian. Constable Wright followed Ungar. Ungar was charged with operating a motor vehicle in a manner that was dangerous to the public contrary to s 249(1)(a).  Who won? Ungar  Issue – Is Ungar entitled to the defence of necessity.  Holding – Ungar is entitled to the defence of necessity.  Reasoning – The driving of Ungar was dangerous in the circumstances, but Constable Wright also drover dangerously. There was no reasonable legal alternative to Ungar’s driving.  Note – This case begs the question: Is proportionality based on what actually happened or what could have happened? |

## B. Duress

* The defence of duress applies where the accused commits a criminal act in response to a threat from a third party.

1. Codified in s 17

* Requires that the **person making the threat be present** when the criminal act is committed
  + *Ruzic* – the requirement of presence must be struck down as unconstitutional
* Requires that the threat be of **immediate**, rather than future, **death or bodily harm**
  + *Ruzic* – the requirement of immediacy must be struck down as unconstitutional
* Interpreted as requiring that the threats be to the accused and not to some third person, like the spouse or child of the accused
  + *Ruzic* – Section 17 may include threats against third parties
* *Ruzic* – need for the application of an objective-subjective assessment of the save avenue of escape test
* None of the above limitations were present in the defence of duress at common law
  + *Paquette* – a principal offender is limited to the statutory offence; a person who is a party to the offence by aiding and abetting the principal offender is not “a person who commits an offence” and can rely on the common law defence

1. Evidentiary burden on the accused to give the defence an **air of reality**, once that is proven the burden shifts back to the Crown to disprove BARD
2. Section 17 excludes a number of offences from the defence entirely
3. Full acquittal

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| Hibbert v The Queen (1995)(SCC) |
| Facts – Hibbert was charged with attempted murder and convicted of the lesser included offence of aggravated assault after taking Bailey to the apartment of Cohen and acting as a lure (Bailey shot Cohen). Hibbert said he did so because Bailey threatened him and he feared Bailey would kill him if he did not cooperate. He testified that he had no opportunity to run away or to warn Cohen.  Who won? Hibbert  Ratio – Duress is not based on the idea that coercion negates mens rea. It operates by justifying or excusing what would otherwise be criminal conduct.  Duress and mens rea:   * The fact that a person commits a criminal act does so as a result of threats of death or bodily harm can in some instances be relevant to the question of whether he/she possessed the mens rea necessary to commit the offence. Whether or not this is so will depend, among other things, on the structure of the offence in question (whether or not the mental state specified is such that the presence of coercion can have a bearing on the existence of mens rea). If the offence is one where the presence of duress is of potential relevance to the existence of mens rea, the accused is entitled to point to the presence of threats when arguing that the Crown has not proven BARD that he/she possessed the mental state required for liability.   + *The mental states specified ss 21(1)(b) and 21(2) (“parties to offences”) are not susceptible to being “negated” by duress.* * A person who commits a criminal act under threats of death or bodily harm may also be able to invoke an excuse-based defence (either the statutory defence set out in s 17 or the common law defence, depending on whether the accused is charged as a principal or as a party). This is so regardless of whether or not the offence is one where the presence of coercion also has a bearing on the existence of mens rea. * Duress includes a requirement that **it can only be invoked if there is “no legal way out” of the situation of duress the accused faces.** The rule that duress is unavailable if a “safe avenue of escape” is open to the accused is specific instance of this general requirement.   + Modified objective standard: The question of whether or not a safe avenue of escape existed is to be determined according to an **objective standard**. When considering the perceptions of a “reasonable person”, however, the personal circumstances of the accused should be taken into account. |

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| R v Ruzic (2001)(SCC) |
| Facts – Ruzic, a 21-year-old Yugoslav citizen, landed in Toronto carrying heroin strapped to her body and a false Austrian passport. She admitted to having committed possession and use of a false passport and unlawful importation of narcotics, but claimed that she was acting under duress. Two months earlier, a man had approached her and continued to threaten her and physically assault her and sexually harass her. He strapped heroin to her body, gave her a false passport, a bus ticket, and money. He warned to her that, if she failed to comply, he would harm her mother. Ruzic did not seek police protection because she believed the police in Belgrade were corrupt and would not help her.  Who won? Ruzic  Issue – Is s 17 of the Code constitutionally valid under s 7 of the Charter?  Holding – Section 17 is unconstitutional in part, and the acquittal should be upheld.  Ratio – Section 17 breaches s 7 of the Charter because it allows individuals who acted involuntarily to be declared criminally liable.   * The immediacy and presence requirements exclude threats of future harm to the accused or to third parties.   The immediacy and presence requirements cannot be saved by s 1 (they would not meet the proportionality branch of the s 1 analysis).  The requirements of immediacy and presence must be struck down as unconstitutional.  Reasoning – It is a principle of fundamental justice that only voluntary conduct – behavior that is the product of a free will and controlled body, unhindered by external constraints – should attract the penalty and stigma of criminal liability. Depriving a person of liberty and branding her with the stigma of criminal liability would infringe the principles of fundamental justice if the accused did not have any realistic choice.  Note – Presumably there are constitutional arguments to be made about the list of excluded offences in s 17 as well. |

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|  | **Listed offence** | **Non-listed offence** |
| **Party** | CL | CL |
| **Principal** | X | Section 17 modified by *Ruzic* |

The statutory defence/common law defence of duress post-*Ruzic*

1. There must be a threat of death or bodily harm directed against the accused or a third party

* There must be an explicit or implicit, present or future threat of death or bodily harm, directed at the accused or a third person

1. The accused must (reasonably) believe that the threat will be carried out

* Analyzed on a **modified objective basis**

1. The offence must not be on the list of excluded offences (statutory only)
2. The accused cannot be a party to a conspiracy or criminal association such that the person is subject to compulsion (statutory only)
3. No safe avenue of escape

* The defence does not apply to persons who could have legally and safely extricated themselves from the situation of duress.
* Measured on the **modified objective standard** of the reasonable person similarly situated

1. A close temporal connection between the threat and the harm threatened

* The close connection between the threat and its execution must be such that the accused loses the ability to act voluntarily.
* Once the immediacy and presence requirements were struck from s 17, these requirements became critical
* The accused’s belief that the threat would be carried out must evaluated on a **modified objective standard**

1. Proportionality between the threat and the criminal act to be executed

* The harm caused must not be greater than the harm avoided
* Measured on the **modified objective standard**

## C. Relating Duress, Necessity and Self-Defence

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| R v Ryan (2013)(SCC) |
| Facts – Ryan was a victim of a violent, abusive and controlling husband. He told her that he would kill her and her daughter if she ever tried to leave him. She repeatedly contacted the police for help, but they did not help her. Over the course of seven months, she spoke to at least three men whom she hoped would kill her husband. She was contracted by an undercover officer, posing as a “hit man”, and was arrested and charged with counseling the commission of an offence not committed contrary to s 464(a).  Who won? Ryan – stay of proceedings entered  Issue – Is duress available as a defence where the threats made against the accused were not made for the purpose of compelling the commission of an offence?  Holding – Duress is not available to Ryan, but the uncertainty surrounding the law of duress coupled with the Crown’s change of position between trial and appeal created unfairness to Ryan’s defence in this case.  Ratio – Duress cannot be extended so as to apply when the accused meets force with force, or the threat of force with force in situations where self-defence is unavailable. Duress is an applicable defence only in situations where the accused has been compelled to commit a specific offence under threats of death or bodily harm.  Reasoning – There are significant differences among the defences of self-defence, necessity and duress.   * Self-defence is based on the principle that it is lawful, in defined circumstances to meet force (or threats of force) with force; in duress and necessity, the victim is generally an innocent third party. * Self-defence is an attempt to stop the victim’s threats or assaults; duress is succumbing to the threats by committing an offence. * Self-defence is completely codified; duress is partly codified. * The rationale underlying duress of moral involuntariness; self-defence is a justification. |

# Chapter 14 – Participatory Limits: Parties and Attempts

* The criminal law permits individuals to be prosecuted in some situations where they did not personally commit the full offence
  + Inchoate offence – something other than the completed offence

## A. Attempts

* Individuals may be convicted of attempting to commit an offence where the offence was not completed
* Attempts are included within included offences
* **Section 463** – general sentencing rules for attempts
  + Punishment is typically less than punishment for the offence
  + If an indictable offences’ maximum penalty is life imprisonment, the maximum penalty for the attempt is 14 years
  + If an indictable offences’ maximum penalty is 14 years or less, the maximum penalty for the attempt is ½ of the maximum penalty
  + Summary conviction – maximum penalty doesn’t change, but the expectation is that the actual penalty will be lower
* **Section 24** – general provision that defines attempts
  + 1. Every one who, having an intent commit an offence (*mens rea*), does or omits to do anything for the purposes of carrying out the intention (*actus reus*) is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.
* **Intent to commit the completed offence**
  + 1. The question whether an act or omission by a person who has an interest to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.
* **Some act more than merely preparatory taken in furtherance of the attempt**
  + *Actus reus – some act beyond mere preparation*
  + *Mens rea – intention to commit the offence*

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| R v Ancio (1984)(SCC) |
| Facts – Ancio’s wife left him and was living with Kurely. Ancio broke into a friend’s home and took three shotfuns. He saw off the barrel of one, loaded it, and taking some extra ammunition with him went to Kurley’s apartment and gained entry by breaking the glass door. Kurely came from his bedroom carrying a chair with a jacket hanging on it. The gun went off and the blast put a hole in the jacket. A struggle followed. Ancio was charged with attempted murder.  Who won? Ancio  Issue – What is the intent required for an attempt to commit murder?  Ratio – The mens rea for an attempted murder cannot be less than the specific intent to kill. Recklessness is not sufficient.   * It is not illogical to insist upon a higher degree of mens rea for attempted murder, while accepting a lower degree amounting to recklessness for murder.   Reasoning – The intent to commit the desired offence is a basic element of the offence of attempt.  Note – The mens rea of attempts in general is probably full intention to commit the completed offence. |

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| R v Sorrell and Bondett (1978)(ONCA) |
| Facts – Sorrell and Bondett, wearing balaclavas and sunglasses, came to the entrance of Aunt Lucy’s Friend Chicken at 10:50 pm. One of them rapped on the door and the manager said they were closed. One of them had a gun in his hand. Two officers saw them and saw one throw an article of material towards a snow bank. The men were arrested by the police, with a loaded revolver and shells.  Who won? Sorrell and Bondett  Issue – Did the trial judge err in acquitting the men of attempted robbery?  Holding – Because of the doubt the trial judge entertained that the RESPs had the necessary intent to commit robbery, his error in law in holding that the RESPs’ acts did not go beyond mere preparation could not have affected the verdict of acquittal.  Ratio – In order to establish the commission of the offence of attempted robbery, it is necessary for the Crown to prove that the accused:   1. Intended to do that which would in law amount to the robbery specified in the indictment (mens rea), and  * Question of fact  1. Took steps in carrying out that intent which amounted to more than mere preparation (actus reus)  * Question of law   Reasoning – If the trial judge had found that the RESPs intended to rob the store, the acts done by them clearly had advanced beyond mere preparation, and were sufficiently proximate to constitute an attempt; there was no evidence of the intent to rob other than that furnished by the acts relied on as constituting the actus reus. |

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| United States of America v Dynar (1997)(SCC) |
| Facts – Dynar, a Canadian citizen, entered into negotiations with a FBI informant, in which he offered to launder drug money for a commission. The FBI aborted the sting operation and no money was ever transferred to Dynar. Dynar was indicted in the US, and the Government of the US requested his extradition. The conversion of monies that are believed to be the proceeds of crime but are not in fact the proceeds of crime was, at the relevant time, not an offence in Canada.  Who won? United States of America  Issue – May an accused who attempts to do the “impossible” be guilty of attempt?  Holding – The steps that Dynar took towards the realization of his plan to launder money would have amounted to a criminal attempt under Canadian law if the conduct in question had taken place entirely within Canada.  Ratio – The conventional distinction between factual and legal impossibility is not tenable. The only relevant distinction for the purposes of s 24(1) is between imaginary crimes and attempts to do the factually impossible (one whose completion is thwarted by mere happenstance). The law recognizes no middle category called “legal impossibility” (an attempt which, even if it were completed, still would not be a crime).  Knowledge has two components: truth and belief   * **Truth** – objective; a state of affairs in the external world that does not vary with the intention of the accused (not part of the mens rea; can be one of the attendant circumstances that is required if the actus reus is to be completed) (e.g. the actual vitality of the victim at that moment) * **Belief** – mens rea (e.g. belief that the victim is alive just before the deadly act occurs)   Reasoning – The absence of an attendant circumstance is irrelevant from the point of view of the law of attempts. It will always be the case the actus reus of the contemplated offence will be deficient, and sometimes this will be because an attendant circumstance is lacking.  Major J (dissenting) – It should not be a criminal attempts to do acts that, if contemplated, would not amount to an offence in Canada. |

Examples:

* What if someone stole something that turned out to be a free sample?
  + Majority in *Dynar* says that should be an attempt
* What if someone attempts to do something that he believes is a criminal offence, but in fact is not?
  + Both majority and dissent agree that that’s not an offence (it’s an imaginary offence)

## B. Aiding and Abetting

* An individual may be convicted of an offence for aiding or abetting the principal offender
* We often refer to such individuals as “parties” to the offence, although s 21 states that the principal offender is a “party” as well
* **Section 21** – the principal offender and the aider/abettor are parties and are equally culpable
* The maximum penalty is reduced for someone that’s just assisting the principal
  + Exception – murder (penalty is mandatory life sentence)

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| R v Briscoe |
| Facts –  Who won?  Issue –  Holding –  Ratio –  Reasoning – |

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| R v Fraser |
| Facts –  Who won?  Issue –  Holding –  Ratio –  Reasoning – |

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| R v Dunlop and Sylvester |
| Facts –  Who won?  Issue –  Holding –  Ratio –  Reasoning – |

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| R v JSR |
| Facts –  Who won?  Issue –  Holding –  Ratio –  Reasoning – |

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| R v Thatcher |
| Facts –  Who won?  Issue –  Holding –  Ratio –  Reasoning – |

### Note: *R v Logan*

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| R v Gauthier |
| Facts –  Who won?  Issue –  Holding –  Ratio –  Reasoning – |

### Note: *R v Vu*

# Chapter 15 – Sentencing Principles and Parameters

## A. Principles of Sentencing

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| R v Nasogaluak |
| Facts –  Who won?  Issue –  Holding –  Ratio –  Reasoning – |

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| R v Sweeney |
| Facts –  Who won?  Issue –  Holding –  Ratio –  Reasoning – |

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| R v Smith |
| Facts –  Who won?  Issue –  Holding –  Ratio –  Reasoning – |

## B. Mandatory Minimum Sentences

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| R v Ferguson |
| Facts –  Who won?  Issue –  Holding –  Ratio –  Reasoning – |

## C. Maximum Sentences

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| R v M(L) |
| Facts –  Who won?  Issue –  Holding –  Ratio –  Reasoning – |

# Chapter 16 – Secondary Principles of Sentencing (s 718.2)

## A. Aboriginal Peoples and the Principles of Sentencing (s 718.2(e))

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| R v Gladue |
| Facts –  Who won?  Issue –  Holding –  Ratio –  Reasoning – |

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| R v Ipeelee; R v Ladue |
| Facts –  Who won?  Issue –  Holding –  Ratio –  Reasoning – |

## B. Parity and Totality

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| R v Akapew |
| Facts –  Who won?  Issue –  Holding –  Ratio –  Reasoning – |

## C. Mitigating Factors

### Note: *R v Nasogaluak*

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| R v Draper |
| Facts –  Who won?  Issue –  Holding –  Ratio –  Reasoning – |