CRIMINAL

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THE ADVERSARIAL SYSTEM

The Role of Crown Counsel (CB 271)

Rand J in ***Boucher v The Queen*** 1955 SCC (CB 271): "It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; *it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime*" (emphasis added).

Prosecutorial Discretion (CB 273)

"Prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it." (The Court in ***Krieger v Law Society of Alberta*** 2002 SCC, quoted in ***Anderson***, *infra*)

R v Anderson 2014 SCC (CB 274)

***Ratio* (Moldaver J)**: Prosecutorial discretion "is reviewable by the courts only for abuse of process."
F: **A** is an Aboriginal man charged with an offence with a mandatory minimum sentence. The Crown was able to lay this charge because **A** had prior conviction 21 years prior. Under s 7 of *Charter*, judges must consider an **A**'s Aboriginal status when sentencing.
I: Should the Crown be obliged to consider Aboriginal status when charging defendants with crimes with mandatory minimum sentences?
A: The abuse of process doctrine is only available where there's evidence that the Crown's decision "undermines the integrity of the judicial process", "results in trial unfairness", is made for "improper motive" or in "bad faith" (from *R v Nixon*).

R v Stinchcombe 1991 SCC (CB 281)

***Ratio* (Sopinka J)**: The Crown has the duty to disclose all relevant information (whether or not it is part of their tactical approach) to the defence.
I: Must the Crown disclose information to **A**?
A: Results of the Crown's investigation are "property of the public to be used to ensure that justice is done." **A** has the constitutional right to the disclosure of all relevant information under s 7 right to full answer and defence. [N.B. the differing roles of prosecution and defence means this isn't reciprocal.]

Plea Bargains (CB 283)

Rosenberg JA in ***R v Hanemaayer*** 2008 ONCA: "to constitute a valid guilty plea, the plea must be voluntary, unequivocal and informed".

However, according to ***R v Kumar*** 2011 ONCA, even if a plea meets that threshold the Court can overturn it at its discretion if new evidence explains the circumstances under which it was elicited. (In that case, a prominent pediatric forensic pathologist had recently been shown to be a fraud—the guilty plea was made because there did not appear to be a way to overcome expert testimony that was later shown to be false.)

The Role of Defence Counsel (CB 287)

No case law about this for obvious reasons. CBA *Professional Conduct* says that a defence lawyer much 'protect the client as far as possible' from being convicted except in a court of competent jurisdiction and upon sufficient evidence. Defence lawyers cannot rely on false or fraudulent strategies—esp. important where the client admits some or all of the elements of the crime to counsel.

Where the A has admitted to defence counsel the factual and mental elements necessary to constitute the offence, counsel may take objection to the jurisdiction of the court, to the form of the indictment, or to the admissibility or sufficiency of the evidence, but must not suggest that some other person committed the offence, or call any evidence that the lawyer believes to be false.

It is improper for counsel to disclose privileged communications or to undermine their client with insinuations or suggestions. Not clear if a lawyer can disclose that his or her client has committed perjury.

BURDEN & QUANTUM OF PROOF

Burden of Proof (CB 313)

The burden of proving the **A**'s guilt falls on the Crown at all times, and never shifts to the **A**. Every element of the crime (both *AR* and *MR*) must be proven by the Crown (***Woolmington v DPP***, 1935 HL). [Crown responsible for movement from presumption of innocence (0%) to BRD (close to 100%)]

Quantum of Proof (CB 324)

In Canada, BRD is considered a term of art of which juries must be given a definition. BRD is not comparable to everyday doubt, even the most important decisions in ordinary life. BRD is inextricably connected to the presumption of innocence. It should not be characterized in moral language (Cory J in ***R v Lifchus***, 1997 SCC).

Iacobucci J in ***R v Starr***, 2000 SCC: TJ's instruction to jury should characterize BRD as "much closer to absolute certainty" than BoP. BRD standard is unique to the legal process.

L'Heureux-Dubé J's dissent in ***Starr***: TJ's instruction to jury should be read as a whole, and its message read holistically. It should not be treated like a checklist.

When credibility is important (i.e. where we want to avoid a "credibility contest"), use Cory J's ideal jury charge in ***R v WD***: **(1)** If the jury believes **A**, they must acquit; **(2)** If they jury does not believe **A** but are left in RD by it, they must acquit; **(3)** Even if the evidence of the **A** does not leave the jury in RD, they must ask themselves whether the evidence they do accept leaves them convinced BRD of **A**'s guilt. **(4**—added by Binnie J in ***R v JHS***) If the jury does not know whether to believe **A**'s testimony or not, they must acquit.

Woolmington v DPP 1935 HL (CB 313)

***Ratio* (Viscount Sankey LJ)**: The prosecution must prove **A**'s guilt. This burden never shifts to **A**.
F: **A** killed his wife and testified that it was accidental. Statement **A** made to police and other behaviour suggested it was an intentional killing. TJ instructed the jury that once it is proven that **V** died through the act of **A**, it is assumed to be murder unless **A** can prove it is not.

R v Lifchus 1997 SCC (CB 325)

***Ratio* (Cory J)**: BRD is a term of art of which criminal juries must be provided a definition.
F: TJ instructed jury that "reasonable doubt" should be understood in its "ordinary, natural every day sense". SCC held that this was an error.
A: "The standard of proof of BRD is inextricably intertwined with…the presumption of innocence". A RD is based on reason and common sense, and is logically connected to evidence or its absence. A RD is not an imaginary doubt, nor must the jury be completely certain.
Avoid moral language, comparisons to everyday life, and adjectives other than "reasonable".

R v Starr 2000 SCC (5-4 decision) (CB 326)

***Ratio* (Iacobucci J)**: BRD should be described as "much closer to absolute certainty" than BoP.
F: TJ instructed jury that "reasonable doubt" had no special connotation. TJ said that BRD did not require absolute certainty.
A: BRD does not require absolute certainty, but it is unique to the legal process.
Diss. (L'Heureux-Dubé J): TJ's charge to jury, when examined in its entirety, properly communicated the concept of BRD. *Lifchus* does not provide a checklist that TJs must read off of. It tells us to read TJs' instructions holistically.

CONSTITUTIONAL DIMENSIONS OF THE BURDEN OF PROOF

Charter Provisions

s 1: The *Charter* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
s 7: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
s 11: Any person charged with an offence has the right…**(d)** to be presumed innocent until proven guilty according to law in a fair and public hearing by and independent and impartial tribunal.

Oakes Test (CB 320)

Apply Oakes test whenever proving that a limit on a Charter right is justified under s 1.
1. The limit must secure an objective which is pressing and substantial in a free and democratic society.
2. The means adopted must be reasonable and demonstrably justified:
- **(a)** The measure adopted must be carefully designed to achieve the objective (i.e. rationally connected to the objective). (**NB** w/r/t s 11(d), changed to rational connection between the limit of presumption of innocence and the legislative objective in *R v Laba* at CB 321.)
- **(b)** The means chosen by the legislature should impair the right as little as possible in order to achieve the objective (**NB** this requirement is v. watered down at this point).
- **(c)** There must be proportionality between the effects of the measure which limits the *Charter* right or freedom and the objective identified in stage 1.

Dickson CJ in ***R v Whyte****,* 1988 SCC: Distinction between elements of the offence and other aspects of the charge are irrelevant to s 11(d) *Oakes* inquiry. The real concern is whether an accused may be convicted despite the existence of a RD. So reverse onus re: a defence subject to same inquiry.

Dickson CJ in ***R v Keegstra****,* 1990 SCC: Placing a reverse onus on **A** to prove the truth of statements proven BRD to wilfully promote hatred passes the *Oakes* test.

McLachlin J (ASTW) diss in ***Keegstra***: Reverse onus places burden on the party least able to meet it and undermines Parliament's intention to make falsehood a part of the crime of wilfully promoting hatred.

R v Oakes 1986 SCC (CB 316)

***Ratio* (Dickson CJ)**: To prove that a limit on a *Charter* right is justified under s 1, the party seeking to uphold the limitation must show on BoP that it passes the *Oakes* test.

F: s 8 of *NCA* says once possession of narcotic is proven, **A** is assumed to be trafficking unless **A** establishes otherwise. **A** was found with 8 vials of hash oil and $619.45. **A** alleged that hash was for personal use and $$$ was from worker's comp.

I: (a) Does s 8 of *NCA* violate s 11(d) of the *Charter*? (b) If so, is it saved under s 1 of the *Charter*?

L: s 8 *Narcotic Control Act* & ss 1, 11(d) *Charter*.

A: (a) s 8 of the *NCA* establishes a rebuttable mandatory presumption upon Crown proof of possession BRD. Mandatory because provision says **A** 'shall' establish otherwise. Rebuttable because **A** can rebut it by establishing otherwise. (NB: establish means 'prove on BoP'.) This shifts the burden of (dis)proving an important element of the crime to **A** and thus violates s 11(d) of *Charter* because it raises the risk of there being a conviction despite the existence of a RD.

(b) *Oakes* test, *supra*, determines whether limitations of *Charter* rights are saved under s 1. In this case, stage **1** is satisfied, but **2(a)** is not. The provision is over-inclusive, as there is no rational connection between the proven fact of (potentially) negligible possession and the presumed fact of trafficking. (**NB** altered in *R v Laba*).

R v Downey 1992 SCC (CB 324)

Cory J: List of principles from s. 11(d) jurisprudence:

I. Presumption of innocence is infringed if A is liable to be convicted despite the existence of a reasonable doubt.
II. If A is required to prove or disprove on BoP an element of the offence or an excuse [defence], that provision violates s. 11(d) for the reason given in I.
III. Even a rational connection between the established fact and the presumed fact is insufficient to make the presumption valid.
IV. Where the proven fact is such that it would be unreasonable for the trier of fact to be unsatisfied BRD of the presumed fact, there is no violation of s. 11(d).
V. A permissive presumption does not violate s. 11(d).
VI. A provision that offers a minor path to relief from conviction may nonetheless violate s. 11(d).
VII. Statutory presumptions that violate s. 11(d) may still be justified under s. 1 (*Keegstra* supplies an example).

ACTUS REUS

Voluntariness (CB 334)

Voluntariness is the conscious control of action and is required for someone to be responsible for their conduct. Physical voluntariness is necessary under s 7 of the *Charter*, per LeBel J in ***R v Ruzic*** 2001 SCC.

Voluntariness is part of *AR*, per Taschereau J in ***R v King*** 1962 SCC (in which **A** was found innocent of impaired driving because his dentist had given him an anaesthetic **A** didn't know would cause impairment) and Woodhouse J in ***Kilbride v Lake*** 1962 NZSC (in which **A** didn't have to pay a ticket for driving without a warrant of fitness because it had become detached when **A** was away from the car).

Omissions (CB 340-2)

Criminal law will only punish someone for failing to act if the person was under a legal duty to act in those circumstances. Legal duties can be imposed by statute or CL.

"Undertaking" in s 217 (criminal negligence) generally requires that someone relied on the commitment to undertake in order to trigger a legal duty, per Abella JA (ASTW) in ***R v Browne*** 1997 SCC.

Underlying duty can come from CL (***Thornton***—duty imposed by tort)

Status (CB 355)

Problematic under s 7 of *Charter*. Usually require some underlying offence or omission.

R v Browne 1997 ONCA (CB 343)

***Ratio* (Abella JA (ASTW))**: "Undertaking" in s 217 generally requires that someone relied on the commitment to undertake. (VERY BROAD: When an omission is criminalized, our threshold definition for the duty omitted must be high enough to justify the penal consequences.)
F: **A**'s partner swallowed a bag of crack to avoid detection by police. She tried to throw up but couldn't. **A**'s partner began to shake and **A** said "I'm going to take you to the hospital" and called a taxi. The taxi arrived after 10-15 minutes. Partner died at the hospital. TJ found that **A** had undertaken to take his partner to the hospital, and thus was under a legal duty to complete that act under s 217 of *CC*. Fell short of duty by calling taxi instead of ambulance. Based on **A**'s words and on underlying relationship between **A** and partner.
I: What constitutes "undertaking to do an act" in *CC* s 217?
L: *CC* ss 217 (persons undertaking acts have legal duty to continue undertaking if omission may be dangerous to life) & 219 (OCS: criminal negligence).
A: TJ erred in finding that this constituted an undertaking. Criminal negligence causing death can result in life imprisonment. Threshold for 'undertaking' should reflect those possible consequences. With that in mind, 'undertaking' should be a "commitment, generally, though not necessarily, upon which reliance can reasonably be said to have been placed." Criminal standard higher than civil standard. Test: was there an undertaking in the nature of a binding commitment?

R v Thornton 1991 ONCA (upheld at SCC on different grounds) (CB 347)

***Ratio* (Galligan JA)**: Legal duties / duties imposed by law can stem from common law.
F: **A** donated blood to Red Cross, knowing he'd tested HIV+ twice. **A** aware that HIV transmitted by blood and that the Red Cross wouldn't knowingly accept blood from people who had tested HIV+. Charged with common nuisance under s 180 of *CC*.
I: Did **A** have a legal duty to either disclose HIV+ status or refrain from attempting to donate blood? [Can a legal duty in criminal law be one imposed by the common law?]
L: *CC* s 180 (OCS: common nuisance).
A: Tort law imposes duty to refrain from conduct that could harm another person.

Causation (CB 361)

When *AR* has a consequence element, the Crown must prove that **A**'s conduct caused the consequence. This requires proof of both factual and legal causation.

Factual causation is an inquiry into how the consequence came to be medically, mechanically, or physically, and how **A** contributed to that consequence (***Nette***), and requires that there be a logical link between the act and the consequence (***Winning***).

R v Smith (*Private **A** stabbed **V** from another regiment; **V** given bad medical treatment; **V** died; **A** still guilty of manslaughter*) & ***R v Blaue*** (Lawton LJ, *__A__ stabbed __V__; __V__ refused blood transfusion because __V__ was Jehovah's Witness; __A__ guilty of manslaughter*) & ***Maybin*** **(**Karakatsanis J**, *infra*):** The independent actions/decisions of another person are not enough to sever the causal chain between conduct and consequence. Question is whether **A**'s actions were an operating and substantial cause at the time that the prohibited consequence came to be.

Use Karakatsanis J's 'analytical aids' in ***Maybin*** for questions with intervening acts: **(1)** Was the intervening act foreseeable? If **A** could have foreseen the intervening act (as the **A**s did in *Maybin*), then the act is less likely to break the chain of causation. **(2)** Was the intervening act independent of **A**'s actions? If **A**'s actions were completely separate from the intervening act (unlike in *Maybin*), then the act is more likely to have broken the chain of causation.

Smith, Blaue and ***Smithers*** stand for the thin-skull rule in criminal law. (Although in different ways: in ***Smith*** it was an action by a person other than **A** and **V** that was out of **A**'s control; in ***Blaue*** it was an action by **V** that was out of **A**'s control; in ***Smithers*** it was a physical fact that was out of **A**'s control.)

Smithers v The Queen 1978 SCC (CB 361)

***Ratio* (Dickson J (AHTW))**: For manslaughter, the test for causation is 'were **A**'s actions a contributing cause of the prohibited consequence outside the *de minimis* range?' (low threshold).
F: **A** and **V** on opposing teams in hockey game. **V** made racist taunts at **A**. Both ejected from game. **A** challenged **V** to fight and **V** declined. **A** sought out **V**, punched **V** in the head and kicked **V** in the stomach. **V** died as a result of aspirating foreign material. His epiglottis likely failed to protect his windpipe when he vomited. Doctors who testified suggested that the vomiting was probably caused by kick to stomach.
I: Did **A**'s kick cause the (unlikely) prohibited consequence?
L: *CC* s 222(5)(a) (unlawful act manslaughter) + 236 (OCS: manslaughter).
A: Unlawful act manslaughter only requires that unlawful act cause death. Doesn't matter if the death was unforeseeable. You take your victim as you find them. The cause need only be 'not insignificant'. Factual and legal causation are different. Factual causation is about things in time and space; legal causation is about whether **A**'s contribution is serious enough to warrant legal consequences.

R v Nette 2001 SCC (CB 372)

***Ratio* (Arbour J)**: For homicide, the test for causation is whether **A**'s actions were a contributing cause outside the *de minimus* range. The *Smithers* standard has stood the test of time. Factual causation is concerned with how the consequence came to be physically or medically.
F: **A** broken into **V** (old lady)'s apartment and bound and robbed her. **V** died of asphyxiation. Pathologist found that there were a number of contributing causes, including **V**'s asthma.
I: Post-*Charter* (and *Harbottle*), should the standard for causation in second-degree murder be higher than 'outside the *de minimus* range'?
L: *CC* s 229 + 231(7) + 235(1).
A: Legal causation is a policy question ('should **A** be responsible in law for **V**'s death, and if so, to what degree?'). F Jury should be told to ask 'whether **A**'s actions were a significant contributing cause of **V**'s death'—intended to be the same as *Smithers* standard.
L'Heureux-Dubé J (concurring minority): Jury instruction should be worded more carefully to avoid connoting a higher standard than in *Smithers*. It should be 'Was **A**'s action a contributing cause that is not trivial or insignificant?'

R v Maybin 2012 SCC (CB 387)

***Ratio* (Karatkatsanis J)**: When determining legal causation, we can use analytical aids, but the question remains whether A's actions were a significant contributing cause of the prohibited consequence.
F: **A1** and **A2** (brothers) punched **V** in the head several times in a bar. **V** was unconscious on pool table when a bouncer punched **V** again in the head. Pathologist unsure which blow had been fatal.
I: What does it take to sever a chain of legal causation?
L: *CC* s 222(5)(a) (unlawful act manslaughter) + 236 (OCS: manslaughter).
A: Legal causation narrows 'factual causes into those sufficiently connected to a harm to warrant legal responsibility'. **A**s' actions were a factual cause of death.
Reasonable foreseeability and whether intervening acts severed the impact of **A**'s actions are helpful as analytical aids in determining legal causation, but key question is whether **A**'s actions were a significant contributing cause of death. RE: reasonable foreseeability—generic risk must be foreseeable even if particular results are not. RE: independent acts—did **A**'s actions 'set the scene' that allowed other independent acts to coincidentally intervene, or if **A**'s actions actually triggered other actions. In this case **A**s' actions triggered bouncer's actions.

Contemporaneity of *AR* & *MR* (CB 395)

In ***Fowler v Padget*** 1798 Eng KB, the court said it is a "principle of natural justice" that *AR* and *MR* must coincide in time. Courts have been more flexible since then.

May LJ's 3 step analysis in ***Miller***, for determining whether **A** has a legal duty to ameliorate her act: (1) Did **A** create some danger? (2) Did **A** become aware of that danger? (3) Did **A** fail to ameliorate that danger when it was within her power?

If ***Miller*** analysis satisfied, then **A**'s initially unintentional act takes on the intention of her later omission.

Cooper analysis: *MR* must coincide with *AR* at some point, but when *AR* constitutes a continuing transaction, *MR* can overlap with *AR* at any point to fulfil contemporaneity.

Fagan v Commissioner of Metropolitan Police 1969 Eng CA (CB 396)

***Ratio* (James J)**: Some conduct can be seen as an ongoing act, which overlaps with *MR* when it begins to be intended.
F: **A** accidentally parked his car on **C** (a cop)'s foot. **C** told **A** to move car. **A** swore at **C**, turned off ignition and stayed in car, then **A** moved car off **C**'s foot. **A** charged with assault.
I: Were *MR* and *AR* contemporaneous? If so, are we criminalizing an omission?
L: CL assault—intentional physical touching.
A: This is not an omission, this is an act that continued until **A** moved his car. *MR* began to be present before he moved his car, so *AR* and *MR* were partially contemporaneous.
Bridge J (diss.): Unfortunately, that just ain't right.

R v Miller 1982 Eng CA / 1983 HL (CB 399)

***Ratio* (May LJ)**: There is a legal duty to ameliorate one's unintentional act if that act would be illegal if intentional, and that amelioration was within one's power.
F: **A** fell asleep holding a lit cigarette. He woke up and the mattress was smoldering. He didn't put it out. He went into another room and went back to sleep. **A** rescued from fire and charged with arson.
I: Were *MR* and *AR* contemporaneous? If so, are we criminalizing an omission?
L: *Criminal Damage Act* 1971 (UK) s 1, 3 – arson. (Property destroyed – conseq. By fire – circ.)
A: "Time travel theory of intention"—unintentional act + intentional omission = intentional act. 3 questions: **(1)** Did **A** create danger? **(2)** Did **A** become aware of danger? **(3)** Did **A** fail to ameliorate danger?
House of Lords 1983 (Lord Diplock): Affirming, basically: "I see no rational ground for excluding from conduct capable from giving rise to criminal liability, conduct which consists of failing to take measures that lie within one's power to counteract a danger that one has oneself created, if at the time of such conduct one's state of mind is such as constitutes a necessary ingredient of the offence."

R v Cooper 1993 SCC (CB 401-402)

***Ratio* (Cory J)**: *AR* and *MR* need not be completely concurrent. When the *AR* is part of a 'continuing transaction', *MR* need only be concurrent with part of that transaction.
F: **A** became angry with **V** while drunk and began to strangle her. **A** blacked out and when he regained consciousness, **V** was dead. **A** charged with murder by manual strangulation.
I: Must *AR* and *MR* be completely contemporaneous?
L: *CC* s 229(a)(ii) (reckless murder)
A: A series of acts can form part of the same transaction. When MR coincides with any part of a transaction that together constitutes AR, contemporaneity is established.
Lamer CJ (diss.): The intention required by s 229(a)(ii) ('means to cause him bodily harm that he knows is likely to cause his death and is reckless whether death ensues or not') can only be formed once the act becomes likely to cause death.

R v Williams 2003 SCC (CB 403)

***Ratio* (Binnie J)**: Contemporaneity absent in this case. **A** can only be convicted of attempted aggravated assault.

F: **A** was in a sexual relationship with **V** for several months before learning he was HIV+. **A** continued to have unprotected sex with **V** after that time and **V** subsequently tested HIV+.

I: Were *AR* and *MR* sufficiently contemporaneous?

A: There is RD about whether **V** was already HIV+ when **A** learned he was HIV+. Before **A** was tested, there was endangerment (*AR*) but no intent (*MR*). After A was tested, there was intent (*MR*) but a RD about endangerment (*AR*). **A** can't be convicted of aggravated assault because of a lack of contemporaneity.

MENS REA

MR Assumptions

Estey J in ***Gaunt & Watts v The Queen*** SCC 1953: *MR* is an essential element of most criminal offences. Parliament may create a crime in which *MR* is not essential, but this requires clear words or necessary implication (no existing instances of latter).

Cromwell J in ***R v ADH*** SCC 2013: True crimes should be interpreted under the assumption that Parliament intended them to have subjective *MR*. Parliament knows courts do this.

Martin JA in ***R v Buzzanga and Durocher*** ONCA 1979: Generally reasonable to assume that people intend the likely consequences of their actions (except where there is evidence of the contrary—***Gaunt & Watts***) (common sense inference), but the point of this assumption is to determine what the *particular* **A** intended, not to turn subjective *MR* into objective *MR*. Assumption endorsed as jury instruction by Moldaver J in ***R v Walle*** SCC 2012.

In ***R v Tennant and Naccarato*** 1975, the ONCA noted that the 'common sense inference' is to be used as a *heuristic* in subjective *MR* offences, whereas for objective *MR* offences, it is the actual *test*.

Doherty JA in ***R v Bottineau*** ONCA 2011: Whether conduct is an act or an omission is irrelevant when it comes to intention or foreseeability. An omission can be intended to lead to a prohibited consequence, and it can be reasonably foreseeable that an omission will likely lead to a prohibited consequence.

Intention & Motive (CB 456)

Dickson J (AHTW) in ***R v Lewis*** SCC 1979: Intent and motive are distinct in criminal law. Intent is "the exercise of a free will to use particular means to produce a particular result". Motive is "that which precedes and induces the exercise of the will".

Lamer CJ in ***R v Hibbert*** SCC 1995 lowered the standard for intent: the exercise of will to bring about a particular result. Identified with purpose.

R v Lewis 1979 SCC (CB 456)

Dickson J (AHTW): Some things about motive:

1. Motive is "always relevant" and thus evidence of motive is admissible.
2. Ordinarily, proof of motive is not an essential element of an offence.
3. Proved absence of motive is a factor in favour of the accused and should be included in charge to jury.
4. Proved presence of motive may be a factual ingredient in the Crown's case, notably for issues of identity and intention.
5. Motive is always a question of fact and evidence.
6. Each case will turn on its own circumstances.

R v Steane 1947 Eng CA (CB 458)

***Ratio* (Lord Goddard CJ)**: The particular wording of the offence makes motive relevant to determining intention. In this case, the fact that **A**'s motive was not to assist the enemy is relevant to determining whether the *MR* requirements of the offence were met.

F: **A**, British, read news on German radio and helped with production of Nazi films during WWII. **A** claimed that he participated under duress. **A** charged with "doing acts likely to assist the enemy with intent to assist the enemy."

A: Whether **A** intended to assist the enemy is a live question because of **A**'s claim that he was participating under duress.

R v Hibbert 1995 SCC (CB 460)

***Ratio* (Lamer CJ)**: 'Purpose' sometimes means 'intention' rather than 'motive'. *CC* s 21(1)(b) is one of those times. Intention is 'the exercise of one's will to bring about a particular result' **cf** *Lewis* required that will be *free*.)

F: **A** testified that he was forced by principal offender (**P**) to accompany **P** to **V**'s home and was forced to lure **V** to the lobby.

A: Carrying out the *AR* of an offence in response to threats does not necessarily mean **A** lacked the *MR*. It depends on the specific *MR* of the relevant offence, and the facts of the case. Most offences cannot be negated by duress. Duress operates as a CL defence, operating through 'excuse' rather than 'negation'.

CC s 21(1)(b) creates liability for anyone who "does or omits to do anything for the purpose of aiding any person to commit" an offence. In this instance, 'purpose' does not require a desire that the consequence come about. It merely means 'intention', here.

Subjective *MR*

Martin JA in ***R v Buzzanga and Durocher*** 1979 ONCA: In the absence of specific *MR* language in a section, intention or recklessness as to the prohibited consequence will be enough.

Defining CL states of subjective *MR*:

Word	Associated AR	Defined
Intention	Conduct	Synonymous with *voluntariness* in *actus reus* – ie a conscious decision to act or refrain from acting (see ***Ruzic***)
Intention	Consequence	"The exercise of a free will to produce a particular result" (***Lewis***)
		Intention can be shown whether the underlying conduct is an act or an omission (***Bottineau***)
Reckless	Circumstance or consequence	Shown where A knew of the "likely consequences" and chose to proceed anyway (***Théroux***)
		"One who, aware that there is danger that his conduct could bring about [the prohibited consequence] … nevertheless persists, despite the risk." (***Sansregret***)
Wilful blindness	Circumstance or consequence	Arises where A's "suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries." (***Briscoe***)
		"[A] person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth." (***Sansregret***)
Motive	Consequence	**Rarely required, always relevant** "That which precedes and induces the exercise of the will" (***Lewis***)

R v Buzzanga and Durocher 1979 ONCA (CB 464)

***Ratio* (Martin JA)**: 'Wilfully' can be 'intentionally', 'voluntarily' or 'recklessly' depending on context. In the context of wilfully promoting hatred, it means 'intentionally' with foresight that the prohibited consequence was certain or morally certain to come about.

F: **A**s published a pamphlet intended to galvanize the Francophone community in Ontario town. Pamphlet appeared to be authored by anti-Francophone people. **A**s charged with wilfully promoting hatred.

I: What does 'wilfully' mean in the context of s 319(2)?

L: *CC* s 319(2).

A: 'Wilfully' does not have a fixed meaning. 'Wilfully' in this context refers to the promotion of hatred, which means that being reckless to whether hatred would be promoted is not enough. In the absence of specific language to the contrary, crimes include a *MR* component. The general *MR* that suffices when no mental element is expressly mentioned is intention or recklessness with respect to the prohibited consequence. The insertion of the word 'wilfully' in this provision should be taken to raise the *MR* requirement above the presumptive minimum.

Interpreting specific statutory language re: subjective *MR*:

Section	Case	Phrase	Interpretation
s. 21(1)(b)	***Hibbert***	"does or omits to do anything for the purpose of aiding any person to commit an offence"	Purpose does not import an element of desire to bring about the commission of the offence. It is synonymous with intention (the exercise of will to bring about a particular result).
s. 21(2)	***Hibbert*** *(obiter)*	"intention in common"	"two persons must have in mind the same unlawful purpose"
s. 319(2)	***Buzzanga & Durocher***	"wilfully promoting hatred"	Insertion of 'wilfully' means suggests Parliamentary intention to elevate *mens rea* above presumptive minimum. Only intention to promote hatred will suffice (A "foresaw the promotion of hatred against an identifiable group was certain or morally certain to result," and decided to proceed).
s. 380(1)	***Théroux***	"by deceit, falsehood or other fraudulent means … defrauds"	Recklessness is enough re the prohibited consequence of defrauding. Subjective knowledge that this act could have as a consequence the deprivation of another, including placing another person's pecuniary interests at risk.

<u>*R v Briscoe* 2010 SCC (CB 470)</u>

***Ratio* (Charron J)**: 'Wilful blindness' applies when **A** sees the need for further inquiries, could have made those inquiries, but deliberately chooses not to. WB substitutes for knowledge.
F: **A** charged as participant in 1st-degree murder. **A** drove group to the crime scene, provided a weapon, held **V** and told her to shut up. TJ acquitted on the basis that **A** did not know the crimes would occur.
A: Per **Sopinka J** in *R v Jorgensen* SCC 1985: 'Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?'

<u>*R v Sansregret* 1985 SCC (CB 471)</u>

***Ratio* (McIntyre J)**: Recklessness consists in disregard of risk, whereas WB consists in refraining from inquiry one knows he must make.
I: How do recklessness and WB relate?
A: Negligence is a civil concept tested by an objective standard—the RP. Recklessness must have a subjective element. Being <u>reckless</u> is being "aware that there is danger that [one's] conduct could bring about the [prohibited consequence], nevertheless persists, despite the risk." <u>WB</u> is where "a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth". Culpability in recklessness arises from conscious disregard of risk, whereas in WB it comes from deliberately refraining from inquiry where one knows inquiry is necessary.

R v Théroux 1993 SCC (CB 466)

***Ratio* (McLachlin J (ASTW))**: Subjective *MR* is not about **A**'s values or whether **A** thought the act was wrong. It is enough that **A** had subjective knowledge of the act or was reckless toward the consequences.
F: **A** convicted of fraud for accepting deposits for a building project after telling investors he had purchased deposit insurance when he had not.
L: *CC* s 380(1) (fraud).
A: The function of *MR* is to prevent the conviction of the morally innocent 'who do not understand or intend the consequences of their act'. Typically, it is concerned with the consequences of *AR* [**NB**—not always true]. The test for *MR* is subjective, but subjective *MR* is not about whether **A** thought he was doing anything wrong (i.e. **A**'s values) but about whether **A** knew or intended what he did, and whether a RP would consider what **A** did wrong. In the case of fraud, the *MR* is (1) subjective knowledge of the prohibited act, and (2) subjective knowledge that this act could cause the deprivation of another. **A** had both.

CC s 380(1) (fraud)	***AR***	***MR***
conduct	represents as a matter of fact	intentional
circumstances	either past or present / false / words or otherwise / any person / etc	(actually/subjectively) known to be false
consequences	defrauded of property, money, valuable security or any service (deprivation)	fraudulent intent to induce person to act on representation reckless to person's deprivation

Objective *MR* (CB 472)

Cromwell J in ***R v ADH*** 2013 SCC (*supra*): "Dangerous", "[criminal] negligence", "unlawful act" connote objective *MR*.

McLachlin J (ASTW) in ***R v Creighton*** 1993 SCC: Objective *MR* isn't necessarily symmetrical to *AR*; it doesn't always correspond to the actual *AR*—it is not a principle of fundamental justice under s 7 of the *Charter* for *MR* and *AR* to be symmetrical (in *Creighton*, manslaughter doesn't require that a RP would foresee death, it requires that a RP would foresee bodily harm). And the RP test must not consider personal characteristics of **A**, because that would just make the test subjective.

Sopinka J in ***R v DeSousa*** 1992 SCC: s 269 (unlawfully causing bodily harm) requires objective foresight of the consequences of the accused's unlawful act. The underlying offence committed by the accused must not be an absolute liability offence (per ***Motor Vehicle Reference***).

R v Hundal 1993 SCC (CB 472)

***Ratio* (Cory J)**: The *MR* for driving offences should be an objective test that takes all non-personal circumstances (weather, traffic, etc.) into account.
F: **A** drove overloaded dump truck through an intersection against a red light and killed **V**, who had driven into the intersection legally. **A** charged with dangerous driving causing death.
I: What should the *MR* for driving offences that carry serious penalties be?
L: CC s 249(4) (dangerous driving causing death).
A: Operating a motor vehicle is done with very little conscious thought. Requiring subjective MR for driving offences "would be to deny reality". An objective test that takes all the circumstances that are not personal should be used for driving offences, 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" (e.g. RP driving in the rain). The lack of imported personal factors is justified by uniform licencing requirements.

R v Creighton 1993 SCC (5-4 decision) (CB 474)

***Ratio* (McLachlin J)**: The *mens rea* of manslaughter is objective foreseeability of a risk of bodily harm that is neither trivial nor transitory. Manslaughter does not carry such a stigma that subjective *mens rea* regarding consequences is required. AR and MR need not be symmetrical.
F: **A** accused with unlawful act manslaughter for accidentally killing **V** (his girlfriend) with a cocaine overdose. Underlying offence was trafficking drugs.
I: What is the MR requirement for unlawful act manslaughter w/r/t its consequence?
L: CC s 222(5) (unlawful act manslaughter).
A: Objective *MR* tests whether the **A** failed to direct his mind to a risk which the RP would have appreciated. The objective test for manslaughter should not import personal characteristics into the RP. Taking 'human frailties' into account just turns the objective test into a subjective test. Peculiarities of the **A** are considered only when they reach the relatively high standard of *incapacity*. The *MR* for manslaughter is objective foreseeability of bodily harm (that is neither trivial nor transitory).
Lamer CJ (minority, concurring in result): The *MR* for manslaughter should remain objective, but should take into account 'human frailties' like experience in drug use, or knowledge of firearms. The *MR* for manslaughter should be objective foreseeability of death.

R v Beatty 2008 SCC (5-4 decision) (CB 480)

***Ratio* (Charron J)**: In s 249(4) of the CC (and, by analogy, all provisions concerning criminal negligence), "marked departure of the standard of care expected of a RP in all the circumstances" is a *MR* requirement—not *AR*.

F: **A**'s pickup truck, for no apparent reason, crossed the solid centre line and crashed head-on with a car in the oncoming lane. All 3 **V**s in that car died. Witnesses behind **V**s' car observed that **A** was driving properly prior. **A** probably lost consciousness or fallen asleep. **A** charged with 3 counts of dangerous driving causing death.

I: Can a momentary act of negligence constitute 'dangerous operation of a motor vehicle'? (i.e. How do we distinguish between the *AR* and *MR* of s 249(4)?)

L: CC s 249(4) (dangerous driving causing death).

A: Both civil and criminal negligence are based on departures from the standard of behaviour expected of a RP, but whereas civil negligence is concerned with apportionment of loss, criminal negligence is concerned with the punishment of blameworthy behaviour. Since the marked departure is what makes the conduct blameworthy (i.e. worthy of criminalization), "marked departure from standard of care expected of a RP in all the circumstances" must be a *MR* requirement.

McLachlin J (minority, concurring in result): As alluded to in *Hundal* and held in *Creighton*, the "marked departure" is properly a part of *AR*.

R v Roy 2012 SCC (unanimous) (CB 490)

***Ratio* (Cromwell J)**: Unanimously upholding *Beatty*. The objective standard of 'marked departure from the standard of care expected of a RP' is modified by the circumstances the **A** was in, although not by the personal characteristics of the **A**.

F: The **A** stopped at a stop sign in bad weather conditions when turning off a minor unpaved road onto a highway. He then turned left onto the highway, colliding with a tractor-trailer and killing pedestrian **V**. He had no recollection of the accident.

I: Can we all be friends now?

L: *CC* s 249(4).

A: The MR analysis for dangerous driving proceeds in 2 steps. (1) Would a RP have foreseen the risk and taken steps to avoid it? (2) Did the **A**'s failure to do so constitute a *marked departure* from the standard of care expected of a RP in all the circumstances? Step (2) serves to narrow civil negligence into negligence worthy of criminalization.

CONSTITUTIONAL DIMENSIONS OF *MR* (CB 492)

Constitutional minima

Lamer J in ***Re BC Motor Vehicle Act*** 1985 SCC: Some level of fault (objective or subjective *MR*) is required prior to the loss (or potential loss) for an **A**'s liberty (demanded by s 7 of *Charter*). [**NB** also means underlying offences of offences that lead to jail time must not be absolute liability.]

Subjective MR & stigma

There are some offenses for which the stigma is so great that subjective MR is required under s 7 of the *Charter*. Per ***Logan*** 1990 SCC, these offenses are very few.

As of now they are murder (subjective foresight of death required, per ***Vaillancourt*** 1987 SCC, ***Martineau*** 1990 SCC), attempted murder (intention to kill required, per ***Logan*** 1990 SCC) and war crimes (knowledge or WB that the facts or circumstances bring the crimes within the definition of crimes against humanity, per ***Finta*** 1994 SCC, CB 496).

Cory J in ***Finta***: the offence of crimes against humanity is "far more grievous" than the offences that underlie it. The minimum MR is thus subjective knowledge or WB re: the facts or crics. That would bring the crime within the def. of crimes against humanity.

When objective MR will do

s 222(5)(a)—SCC ruled out extending the necessity of subjective foresight of death to manslaughter (McLachlin J (ASTW) in ***Creighton*** 1990 SCC*, supra*).

s 86(1) & (2)—using a firearm in a careless manner or without reasonable precautions for the safety of others (Arbour JA (ASTW) in ***Durham*** 1992 ONCA, approved of by Lamer CJ in ***Finlay*** 1993 SCC).

s 434(a)—wilfully setting fire to certain things requires only objective knowledge that property is inhabited (provision repealed, reasoning valid—apply by analogy to s 433(a)) (McEachern CJBC in ***Peters*** 1991 BCCA.)

s 269—unlawfully causing bodily harm requires objective foresight of the consequences of A's unlawful act. Per ***Motor Vehicle Reference***, the underlying offence must not be an absolute liability offence. (Sopinka J in ***DeSousa*** 1992 SCC)