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# Parsing Procedure

## Before you start

The burden is at all times on the Crown needs to prove all of the following elements beyond a reasonable doubt.

* CITE ***Lifchus*** and ***Starr*** for BRD, ***Woolmington***for the proposition that the burden is always on the Crown.

## After you finish parsing

Immediately lay out the defined terms and their statutory definition below the parsed section.

## *Actus Reus*

**Voluntariness:** a conscious decision to act or refrain from acting (CITE ***Ruzic***), can place as Intent in MR conduct.

**If Causation is in question:**

* Factual causation: Established a logical link between A’s conduct and the prohibited consequence. “But for the act,” would it have occurred? On the facts, was it ***a*** cause? (***Winning***)
* Legal causation: is the causal connection sufficiently strong to support criminal liability?
  + ***Smithers*** *–* beyond *de minimus* range
  + ***Nette –*** layperson (jury) version: significant contributing cause
  + ***Maybin –*** test for intervening acts: (1) reasonably foreseeable? (2) did it overtake original act?
  + ***Blau***and ***Smith*** – you take your victim as you find them. Just because *other* factors may have contributed to the outcome (e.g. poor medical response) does NOT necessarily mean that A’s actions were not operating cause.

**If Contemporaneity is in question:**

* Cite ***Cooper***for proposition that it is sufficient that the AR and MR were contemporaneous at ***some point*** during the act.
* Cite ***Miller***for the proposition that if someone commits AR without being aware of it, and upon becoming aware they fail to remedy, their decision not to remedy takes the place of the AR, and contemporaneity is achieved.

## *Mens Rea*

* Basic presumption is that true crimes require subjective MR **in absence of clear language to the contrary OR necessary implication** (***Gaunt & Watts, ADH***).
* No absolute requirement of symmetry between AR and MR (***De Sousa, Creighton***)**.**
* People can generally be taken to intend the natural consequences of their actions, **in absence of evidence to the contrary** (***Gaunt and Watts***).
  + When discussing the importance of “evidence to the contrary” look to the jury instructions in ***WD****.*
* Deviations from the basic presumption:
  + Deviation within subjective MR:
    1. What does the **policy objective** of the statute demand in terms of blameworthiness of mind?
       - ***Theroux*** – the “fraudulent” nature of the mischief parliament sought to address required that A had knowledge (not merely recklessness) of the circumstances that it was false.
    2. Particular language may require higher subjective MR standards (e.g. ‘wilfully’ in ***Buzzanga***)
    3. Grammatical requirements of the words in the statutes
       - adverbs = potential red flag for intention in circumstances
    4. Statutory definitions of words in the statute
  + Deviating to objective MR:
    - Key trigger words:
      * **Reasonable**
      * Dangerous (***Hundal, Beatty, Roy***)
      * (Criminal) Negligence
      * Careless
      * Unlawful Act (***Creighton***)
      * Unlawfully [SOMETIMES]
        + (***De Sousa*** – it triggers objective, ***ADH*** it did not)

USE DEFINITIONS BELOW TO EXPLAIN WHAT NEEDS TO BE PROVEN

|  |  |  |
| --- | --- | --- |
| **Word** | **Associated AR** | **Defined** |
| Intention | Conduct | Synonymous with *voluntariness* in *actus reus* – ie a conscious decision to act or refrain from acting (**CITE *Ruzic***) |
| Intention | Consequence | “The exercise of a 'free' will to produce a particular result” (**CITE *Lewis***)   * **CITE *Hibbert****:* it is just "will," not 'free.'   + - Duress does not negate intention for consequences. |
|  |  | Intention for consequences can be shown whether the underlying conduct is an act or an omission (**CITE *Bottineau***) |
| Reckless | Circumstance or consequence | Shown where A knew of the “likely consequences” and chose to proceed anyway (***Theroux***, but DIFFERENT in ***Sansregret***)   * ***Theroux*** leaves ambiguity as to whether or not that the "likelihood" of the risk is determinative of whether recklessness is present |
|  |  | “One who, aware that there is danger that his conduct could bring about [the prohibited consequence] … nevertheless persists, despite the risk.” (***Sansregret***)   * **HOW TO CHOOSE**    + Based on similarity of circumstance   + ***Sansregret*** *-* more recent, higher court |
| 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.” (**CITE *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.” (**CITE *Sansregret***) |
| Motive | Consequence | **Rarely required, always relevant**  “That which precedes and induces the exercise of the will” (**CITE *Lewis***)   * The *reason why* someone acted (NOT what they intended to do or make happen) |

# INTRODUCTION

## A.   Sources of Criminal Law

### Constitution Act, 1867

Allocates exclusive jurisdiction to Parliament of Canada in s. 91:

* **s. 91(27) criminal law and procedure, but not criminal courts**; and
* s. 91(28) penitentiaries

Allocates exclusive jurisdiction to provincial parliaments in s. 92:

* s. 92(6) public prisons and reformatory prisons;
* s.92(13) property and civil rights (regulations);
* **s.92(14) administration of justice, including courts of criminal jurisdiction (BCSC & BCCA)**
* s. 92(15) punishments (including imprisonment) for contravening provincial laws that within provincial constitutional jurisdiction

### Canadian Charter of Rights and Freedoms

Sets out constitutional rights and freedoms, and the limits to those rights and freedoms. These are all significant to criminal law. Focus on:

* s. 1 subject only to demonstrably justifiable reasonable limits prescribed by law (*Oakes*);
* s. 7 protects right to life, **liberty and security of person**, and right not to be deprived of these things except in accordance with fundamental justice;
* s. 11 rights that arise when a person is charged with an offence,
  + **11(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.**

### Criminal Code, 1985

Codifies the criminal law, on terms set out in ss. 8 and 9:

* s. 8(3) preserves common law excuses or defenses except where “altered by or inconsistent with” the *Code* or another Act; and
* s. 9 common law offences, UK criminal law, pre-federation provincial criminal law can no longer form the basis for a criminal conviction. (note exception for contempt of court).

### Certainty, Vagueness, and Over breadth

#### Definitions:

* **Vagueness**: Means its hard to ascertain when the law will apply;
  + **Certainty**: Opposite of vagueness. Has to be certain or its in breach of s. 7 and principles of fundamental justice.
* **Over breadth**: A law captures more than what is necessary to obtain its objective. (Q to ask: are the means necessary to achieve the State objective?)

#### R v Heywood

F: Heywood had previous charge of sexually assaulting minors. Was charged for loitering around public park with young children, which is prohibited under s 179(b) of code.

L: *CC* s 179(b): everyone commits vagrancy who … (b) with specified previous conviction is found loitering in or near school ground, playground, public park, or bathing areas (see code for exact wording).

A: Cory J differentiates between vagueness and over breadth. In this instance section is found to be over broad rather than vague. Found over broad in two aspects:

a) temporal application (applies for life), and b) geographic scope (applied to any public park etc. regardless of presence of children). Cory also deemed it over broad b/c of pple it applies to (any one convicted of SA regardless of circumstances). Additional problem: it can be enforced without any notice to the accused.

**Dissent**: section doesn’t encompass too many people; the purpose is fit to the restriction as it only applies to sexual offenders. “Notice” not a PoFJ.

C:­ s. 179(b) deemed over broad.

Ratio: Offence that is overbroad violates s. 7, not in accordance with principles of fundamental justice (PoFJ).

#### Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)

F: CFCYI claimed s 43 of CC violates rights of Children under *Charter* s 15 and 2, and is overly vague/broad.

I: Does s 43 violate s 7 due to vagueness or over breadth?

L: *CC* s 43 justifies parents and teachers using corrective force against children that does not exceed what is “reasonable under the circumstances”.

*Charter* s 7

A: CJ M: **Over breadth**—use of words “corrective” and “reasonable” create a specific category in which s 43 applies.

**Vagueness**—*s* 43 clearly defines who is protected (parent/teacher/guardian). Less clear under what circumstances (purpose of force must be corrective or educational) but is not too vague b/c *s* 7 does not require absolute certainty so long as law sets an intelligible standard to delineate a risk zone for committing an offence. The intelligible standard was based on expert testimony of when force is corrective vs. harmful.

C: s 43 does not violate s 7. It is not over broad or vague.

R: An offence is not too vague so long as it creates an intelligible standard from which a risk zone can be delineated (by a reasonable person in the circumstances).

Comment: This specific standard and risk zone is suspect as to whether a reasonable person could determine.

## B.    Statutory Interpretation

* Where not expressly worded in a statute, statutory interpretation is necessary to determine the elements of the mens rea and (less often) actus reus;
* Looking to case law will determine how to interpret the AR and MR of offences where statutory language is silent;
* To convict, the Crown must prove beyond a reasonable doubt (BRD) every element;

Actus Reus

* You determine AR by finding:
  + Conduct;
    - Conduct must be voluntary (*Killbride v Lake*; *R v Ruzic*).
  + Circumstances; and
  + Consequences;
    - Conduct must be causally connected to consequences.
* The offence creating provision generally begins with the language “everyone who…” and ends with “… guilty of”.

Mens Rea

* Fault may be measured on either a **subjective** or an **objective** basis;
* If statutory language is silent the presumption is subjective MR applies (*ADH*);
* **Subjective fault** means that the accused had the actual intention, knowledge or recklessness to commit an act, in a particular circumstance, or bring about a consequence. Considers what accused intended or knew.
* **Objective Fault** asks what an ordinary person should have known or would have intended in the circumstances. Conduct must show a **marked departure** (*R v Beatty*) from that of a reasonable person in circumstances.

## C.    Elements of an Offence

## D.    The Role of the Prosecutor and Defence Counsel

### The role of the Prosecutor

#### Boucher v The Queen

I: What is the role of the crown counsel in criminal prosecution?

R: Purpose of crown counsel is not to obtain a conviction, but to have a neutral attitude and lay before a jury all credible evidence relevant to the alleged crime.

#### R v Anderson

F: If crown is seeking a mandatory minimum, they must give warning (the Notice) to accused of intention to seek a greater punishment by reason of previous convictions; must provide proof at sentencing that the Notice was served.

I: Are crown prosecutors constitutionally required to consider the Aboriginal status of an accused when deciding whether or not to seek a mandatory minimum sentence for impaired driving?

C: Not required by s 7 to consider Aboriginal status when tendering the Notice b/c matter of prosecutorial discretion.

Ratio: Prosecutorial discretion is only reviewable based on abuse of process (egregious and seriously compromises trial fairness and integrity of justice system; e.g., malice).

### Disclosure

#### R v Stinchcombe

F: Witness gave favorable evidence for the accused at preliminary hearing, and was interviewed by the Crown. Crown counsel did not call the witness at trial, defense requested disclosure, and Crown refused. Trial and Appeal courts found no obligation on Crown to disclose, held can be done at Crown’s discretion.

I: Does the Crown have an obligation to disclose to the defense even when it’s not part of the evidence the Crown is bringing?

L: *Boucher v The Queen*

A: The ability of the accused to make a full defense (protected by s 7) is impeded by failure to disclose. No distinction should be made between inculpatory and exculpatory evidence. *Boucher* applies 🡪 role of Crown as neutral arbiter.

Ratio: Crown has a legal obligation to disclose all relevant information to the defence. Crown does have limited discretion with respect to timing and relevance of information.

### Defence Counsel

* CBA Code of Conduct
  + 10. Must protect the client from being convicted as far as possible, unless evidence is sufficient to support conviction.
  + 11. If the lawyer comes to know that something is true, they cannot represent it as false in court. E.G. if A admits that they had sufficient AR and MR, defense can argue against conviction on things like the “form of indictment” or the jurisdiction of the court, BUT they cannot make any arguments that refute the truthfulness of the admissions they have heard.
* Counsel’s knowledge concerning the guilt of the client frequently comes from confidential information, most often in the form of a client confession. In such a case, counsel is bound by the duty of confidentiality and cannot share the information with anyone. To do so compromises fair fact-finding and confidentiality. (*Tuckiar v The King* is an example of such a breach).
* You do not have to continue to rep a perjuring client, however, you cannot break confidentiality and must advise them to not commit perjury.

Exceptions to solicitor-client privilege:

* It is the only way to demonstrate accused’s innocence;
* When the communication is criminal; and
* In case of risk of serious harm to an identifiable person or group of people.

## E.    The Quantum and Burden of Proof

## Burden of Proof

#### Woolmington v DPP

F: Accused went to estranged wife’s house to reconcile. Brought a sawed off shotgun with him. Gun fired and wife killed. Accused sawed off, concealed, and then disposed of gun. Accused claimed it was an accident. The trial judge misdirected the jury by implying that once voluntary AR proven, burden on accused to disprove MR (malice).

I: Did the trial judge err in charging to jury that burden of disproving MR rested on accused?

Ratio: Burden is on the Crown at all times prove every aspect of a crime including MR BRD.

Comment: For acquittal it is enough for accused to raise a reasonable doubt, but never has to go so far as to prove innocence. Crown can rely on inference to prove subjective mens rea based on conduct.

3 types of rebuttable presumptions:



#### R v Oakes

F: Oakes caught with a small amount of hash oil and charged with possession under s 4(2) of *Narcotic Control Act*. Under act, mandatory assumption that possession implies the intent to traffic. Accused is required to rebut this presumption.

I: Does s 8 of the *NCA* violate the presumption of innocence contained in 11(d) of the charter? If so, is the infringement justified under s 1 of the charter?

A: s 8 establishes a rebuttable mandatory presumption, which places a legal burden on accused to disprove purpose of trafficking on balance of probabilities. Violates 11(d) unless saved by s 1.

**Ratio:** Infringement of s 11(d) can only be justified under s 1 when:

1) The objective of the law must be fundamentally important to society;

2) The infringement must be:

a) ‘rationally connected’ to the objective of the law,

b) ‘minimally impair’ the charter right, and

c) the benefits and drawbacks must be proportional.

## Presumption of Innocence

* *R v Whyte*: Whether the presumption arises in relation to a defence or an element of the offence, it will violate 11(d) if it gives rise to the possibility that the accused will be convicted despite the existence of a reasonable doubt.

#### R v Keegstra

F: Accused charged with hate speech under s 319(2). Accused argued that 319(3)(a) violated s 11(d), burdened him with onus to prove truth of his statements.

I: Whether the reverse onus violates charter and, if so, is it saved by s 1?

A: 11(d) breach b/c reverse onus leads to the possibility accused will be convicted despite existence of reasonable doubt as to guilt. However, saved by s 1 b/c small possibility of truthfulness is outweighed by the harm of willful promotion of hatred.

Ratio: The reversal of burden of proof is saved by s 1 when provision is reflects fundamental importance to society, is rationally connected to parliament’s objective, means chosen is proportional to objective, and a minimal infringement on charter rights.

### Quantum of Proof

*WD* Rules instructing Jury on Reasonable Doubt:

1. If you believe the evidence of A, you must acquit.
2. If you do not believe the evidence of A but are left with a reasonable doubt by it, you must acquit.
3. Even if you are not left in doubt by the evidence of A, you must asked whether on the basis of the evidence which you accept, you are convinced BRD by the evidence of the guilt of the A.
4. If the jury does not know who to believe, they must acquit (***JHS*** adds).

#### R v Lifchus

F: Trial judge instructed jury to phrase “reasonable doubt” in its ordinary every day sense”.

I: Did the trial judge err in his charge to the jury?

Ratio: It is essential that the trial judge give a charge to the jury that accurately represents the meaning of BRD. Refer to Lifchus if you need clarification of what BRD is.

**Definition of BRD SHOULD contain:**

- Always intertwined with presumption of innocence;

- Burden of proof always rests with the Crown, never shifts;

- A doubt has to be rooted in evidence or lack of evidence;

- Not an absolute certainty, nor proof beyond any doubt, nor is it frivolous/imaginary doubt;

- Based on reason and common sense, not sympathy or prejudice;

- Higher than a balance of probabilities - probable guilt must acquit.

**Definition of BRD SHOULD NOT contain:**

- Reference to an ordinary expression w/o special meaning;

- Same as standard of proof applied to important decisions in juror’s own lives;

- Equating proof beyond RD to “a moral certainty”;

- Don’t use colourful language in place of reasonable (e.g. Haunting, or substantial), may be leading;

- Being “sure” the accused is guilty.

#### R v Starr

F: Trial judge told jury that brd had no special connotation and did not require absolute certainty.

I: Did the judge err in his charge to the jury?

L: *R v. Lifchus*

A: Trial judges seemed to suggest a BoP rather than showing special legal significance of BRD.

Ratio: Trial judge must use instructions that situate the standard of proof as **much closer** to absolute certainty than to probability.

## G.    Constitutional Dimensions of the Burden of Proof

#### R v Downey

Provides a summary of principles that emerged from the s 11(d) jurisprudence up to 1992:

- Presumption of innocence is infringed if accused is liable to be convicted despite the existence of a reasonable doubt;

- If the accused is required to prove or disprove on BoP an element of the offence, or an excuse, that provision violates s 11(d) for reasons above;

- A rational connection between an established fact and a presumed fact is not enough to reverse onus to accused;

- 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 11(d);

- A permissive presumption does not violate 11(d) [example: may vs. shall/must] E.G. The *Buzzanga* inference;

- A provision that offers a minor path to relief from conviction may nonetheless violate section 11(d) if the provision must be established by accused – you can’t shift the burden! (see *Keegstra*);

- Statutory presumptions that violate 11(d) may still be justified under section 1. (see *Keegstra*).

#### R v Oakes

See Above

#### R v Keegstra

See Above

## H. Constitutional Limits of Substantive Criminal Law

#### Canada v Bedford

F: Deciding on constitutionality of s 210, 212(1)(j), and 213(1)(c).

I: Do they violate section 7 of *charter*? If so saved by s 1?   
A: Trial judge was not bound by *Downey* b/c new evidence was introduced, additionally it had been 20 years since *Downey*. What s 7 says is that everyone has right to life liberty and security of person, and right not be deprived thereof except in accordance with principles of fundamental justice. Trial Judge ruled impugned sections were unconstitutional b/c they not in accordance with PoFJ (PoFJ can be undermined by:

- **arbitrariness** [means not rationally connected to objective of law];

or **over breadth** [*some* effects don’t have anything to do with objective of the law. Always involves arbitrariness];

- or **gross disproportionality** [Intrusion is connected to purpose of law but the impact on s 7 is grossly disproportionate to purpose).

C: 210 (bawdy house) found grossly disproportionate (dead sex workers trumps neighborhood pleasantness);

212(1)(j) (avails) overbroad 🡪 while objective to target pimps, overbroad because also captured non exploitative relationships (e.g., security or driver);

aim of 213(1)(c) to prevent public nuisance 🡪 grossly disproportionate (safety of sex workers seriously impacted by 213, again, security of person trumps neighborhood nuisance).

Ratio: Where the values underpinning the PoFJ (law not arbitrary, overbroad, or grossly disproportionate) are violated by a law infringing on section 7 rights, the law is unconstitutional (except possibly where a section 1 argument may be made).

# II.    ACTUS REUS

## A.    Voluntariness

The Actus Reus requires voluntary conduct which is conscious control of action.

1. Consciousness: is awareness of your actions ie. If you are sleep walking while you commit a crime, you are not conscious.
2. Control – physical control of your actions ie. Slipping on ice does not count as “control” of your action.

Voluntariness in AR is *physical* voluntariness as the product of a **conscious** choice.

#### R v Larsonneur

F: A was put on a boat after deportation, and returned to the place she was deported from and arrested.

C: Bad law – this case ignored the voluntariness component of the actus reus

#### Killbride v Lake

F: A drove car and parked. Received ticket for driving w/o “warrant of fitness”. At trial, parties agreed warrant was there when A parked, but became detached while he was away from car.

I: Can A be convicted for an offence caused by something beyond his control of which he is unaware?

R: There must be a choice available to act or not act to establish AR. No AR without voluntary act.

#### R v Ruzic A defense that act is involuntary entitles A to complete and unqualified acquittal.

F: A charged with importing heroin to CAN. She did so because her family was threatened with death if she didn’t. Argued that this WAS NOT voluntary

I: Can an act be considered involuntary if performed under threat?

A: Court accepted the act was not morally voluntary, but ruled AR requires only *physical* voluntariness and therefore the offence was committed [Defense of duress would apply for moral voluntariness].

R: Moral voluntariness is not necessary to establish criminal responsibility, but may be used to establish the defense of duress. However, physical voluntariness is a necessary component of the actus reus.

## B.    Acts and Omissions

#### R v Browne Begin at the offence creating s. 219 – legal duty leads to s. 217.

F: GF begins overdosing and A says he “will take her to hospital” and calls her a taxi instead of 911. She gets to the hospital and dies real fast. Crown argued that his statement was beginning an “undertaking” of saving her, and only calling taxi breached undertaking.

I: Was it an undertaking?

L: Undertaking – s. 217 CC

A: A relationship (ie bf/gf) doesn’t necessarily give rise to legal duty, neither does a mere expression of words of willingness. Has to be something in the nature of commitment upon which reliance can reasonably be said to have been placed. Test is “was there an *undertaking* in the nature of a *binding commitment*.”

C: Held there was no undertaking.

R: In order for an act to be undertaking giving rise to legal duty, there *must* be a binding commitment with clear intent to follow through.

#### R v Thornton

F: A **knows** he has HIV, and chooses to donate blood and knew they did not want HIV blood.

I: Did he have a legal duty to disclose HIV status or refrain from blood donation

C: (Appeal court) A legal duty can be found in statute or in common law – the offence has to come from statute but the definition of “legal duty” can be imported from common law. Tort: duty to refrain from conduct that could cause injury.

SCC found a statutory duty (s.216) imposed a duty of care on A using the same offence creating section of nuisance and therefore dismissed the appeal. SCC did not comment on Appeal court reasoning importing a common law duty.

## C. Circumstances

## D.    Status

## E.    Consequence and Causation

You need to know whether the consequence was indeed caused by the accused’s conduct. Causation in the criminal law is composed of 2 elements:

**Factual Causation**: Is there a logical link b/w the accused’s conduct and the prohibited consequence (can use “but for”)

**Legal Causation**: Turn to common law test and rules for legal causation. Legal causation narrows factual causation (avoid infinite ‘but for’ regress).

#### R v Winning

F: A applies for credit card and lies about income. Charged with obtaining credit through false pretenses. Store issued card without looking or relying at all on income.

I: Did she obtain credit under false pretenses?

A: She could not have obtained credit under false pretenses if the “false” information was never looked at – it did not contribute to her obtaining credit.

C: The consequence was NOT *caused* by conduct/circumstances.

R: There must be factual causation linking the conduct to the prohibited consequence.

#### Smithers v The Queen Smithers establishes a very low standard for causation

F: Accused and victim on opposing hockey teams. Accused subjected to racial slurs. Both players ejected from game. Accused challenges V to a fight – V declines. Accused punches V twice in head and kicks in stomach. V died from choking on his vomit. Epiglottis likely failed. Expert doctors testified vomiting likely caused by the kick in the stomach.

I: did the accused’s actions cause the prohibited consequence? Is there a distinction b/w factual and legal causation?

L: Manslaughter = unlawful act where a person dies as a result

A: Factual causation has nothing to do with intention or foresight. 2 possibilities: kick caused V to vomit or V spontaneously vomited unassociated with kick. Evidence **suggests that kick is contributing cause of death outside the de minimis range**. No defense that death would not ordinarily result from this act (take your victim as you find him). Factual causation is established, court must determine whether legal causation is present.

C: It is enough that the kick is a *contributing* cause (to the death) beyond de minimis, it does not have to be the *only cause*.  
R: The unlawful act only needs to contribute in *some way* to the prohibited consequence (beyond de minimis).

Note: beyond DM means - a contributing cause that is not trivial or insignificant

#### R v Harbottle

Different causal threshold for 1st degree murder:

Must be a “significant contributing cause of death”

Note: higher threshold than *Smithers*

#### R v Nette

F: Victim (old woman) died of asphyxiation after being hogtied around head and neck by robbers. Accused admitted to having a role in the robbery. Doctor testified a number of factors lead to V’s death, including ligature around her neck, but also age, asthma, etc. Accused charged with 2nd degree murder

I: What is correct standard of causation for 2nd degree murder?

L: *Smithers* (beyond DM), *Harbottle* (substantial cause)

A: *Smithers* test is the correct one to apply. However, test should be reworded for jury as “whether A’s actions were *significant contributing cause* of V’s death”. Not intended to increase the standard.

C/R: *Smithers* remains correct causation test to apply to culpable homicides more serious than manslaughter, but *Harbottle* is applied to 1st degree murder. *Smithers* test now can be expressed positively as “significant contributing cause”.

Dissent: L’Heureux-Dube says this reformulation unreasonably increases the Smithers standard. Says it should be “was the accused’s action a contributing cause that was not trivial or insignificant?”

Note: contributing cause not insignificant = significant = beyond de minimis in current law.

#### R v Maybin

F: Maybin bros punched V several times in head after dispute at pool table. V was unconscious when bouncer came and struck V again in the head. V died. Pathologist unsure whether bouncer’s blow was fatal strike.

I: When does an intervening act sever the chain of causation between accused and V’s death?

A: There is no single test for intervening cause sufficient to interrupt criminal liability. You must ask: 1 – Was risk of the intervention reasonably foreseeable as consequence of the accused actions? What’s reasonably foreseeable is the generic risk, not the particular results 2 – Was the intervening act an independent factor overtaking the accused actions in contributing to the consequences? The Accused’s act and the intervening act *must be closely connected in time place and circumstance*. [Did they merely set the scene, or *trigger* the intervening act?]

R: Test for intervening act severing the chain of causation is 1&2 above. If the IA is a direct response or is directly linked to the accused actions, then the accused cannot be said to be blameless in regards to the consequence of the IA.

## F.    Contemporaneity

There must be some point of intersection between the prohibited act and the requisite mental state. These do not need to coincide for the entire duration of the offence (***Cooper***).

#### Fagan v Commissioner of Metropolitan Police

F: Fagan is pulled over for traffic infringement. Fagan stops on foot of police officer *unknowingly*. Officer tells him “get off my foot!” Fagan says “Fuck You!” turns off the car, and remains inside it, still on officer’s foot. Charged with assault for not moving vehicle.

I: Was there contemporaneity b/w the AR/MR?

A: When Fagan drove onto the Officer’s foot, the actus reus began and did not stop. When he became aware of the fact, the MR for the offence began and coincided with the continuing actus reus. Related actions were interpreted as a *continuing* act.

R: MR does NOT need to be present at the inception of the AR. If AR can be viewed as a *continuing act,* it can be used to achieve contemporaneity with the MR arising at a later point in time.

#### R v Miller (English Case)

F: Accused fell asleep while holding a lit cigarette. Woke up and mattress was smoldering. He was *aware* of this, moved to a different room, but chose not to do anything about it [ie. extinguish or raise alarm]. He was charged with arson.

I: Is an unintentional act followed by an intentional omission to rectify the consequences considered in total as an intentional act?

A: The decision to not act once you become aware of the original act, leads to the adoption of the original act and its MR (intention of the original act).

Appeal was dismissed for different reasons (rather than a continuing act): When accused becomes aware of the initial act, he has a responsibility to act, and the choice to not rectify the initial act and its consequences completes the offence if at that time you have the MR requisite for the offence.

**R:** If A is not aware of actions at the time AR is committed, but then later becomes aware, their conscious decision NOT to take actions within their power to remedy the situation will replace the original AR and MR, and contemporaneity is satisfied.

#### R v Cooper

F: In car, wife says something making the accused angry. He claims he remembers putting hands on her neck and shaking her. Does not remember anything else. Wife dies, accused is charged with murder.

I: Is there contemporaneity?   
A: It is not necessary for the MR to be present at the inception of the AR – it can be superimposed on an existing act. But at some point the AR/MR must collide. An act that was innocent may become criminal at a later stage when an accused becomes aware of the act and does not change his course.

R: It is sufficient that the intent and the act of strangulation coincided at some point.

#### R v Williams [No Contemporaneity]

F: man had been having unprotected with GF before and after learning he was HIV+. GF got HIV. Accused charged with aggravated assault (knowingly transmitting HIV)

I: Did AR/MR coincide?

A: reasonable chance she contracted HIV before accused *knew* he had HIV. Therefore reasonable chance of no recklessness/intent when accused transmitted HIV

C: Reasonable doubt of contemporaneity.

R: if accused raises reasonable doubt that AR/MR at all coincided, must acquit

# III.    MENS REA

## A.    Subjective Mens Rea

## Subjective Standards of Fault

#### R v ADH

I: In what circumstances is subjective mens rea presumed?

L: *Gaunt & Watts*: subjective mens rea will be presumed in the absence of clear statutory language or necessary implication to the contrary (pre *Charter*).

A: Parliament is presumed to know that the presumption, in absence of clear language or implication to the contrary, is subjective mens rea. This presumption incorporates the value that the morally innocent should not be punished. Unlawful is not clear statutory language, does not trigger application of objective mens rea.

R: There is a presumption of subjective mens rea without clear statutory language or necessary implication to the contrary.

#### R v Buzzanga and Durocher

A: Generally reasonable for a trier of fact to infer an accused intended the natural consequences of their actions. This permissive inference is always subject to evidence that disproves subjective mens rea and is particular to the accused in question. What a reasonable person should have known helps guide the inference in terms of what the natural consequences of the action could be.

Ratio: Inference available to crown that the accused that intended the natural consequences of their actions, subject to evidence to the contrary.

Note: a la ***Downey*** this is NOT a violation of s 11(d) (See also ***Naccararto*** below)

#### R v Tennant and Naccarato

Where liability is imposed on a subjective basis, what a reasonable man ought to have anticipated is merely evidence from which a conclusion may be drawn that the accused anticipated the same consequences. On the other hand, where the test is objective, what a reasonable man should have anticipated constitutes the basis of liability.

### Intention and Motive

* Exam tip: When you are looking to substantiate intent, search for a motive in the facts to help back it up. **ENSURE** you cite *Lewis* for definition of each.

#### R v Steane

F: Steane read the news on German radio and assisted with the production of films at behest of the Nazi regime during WWII. He was a British subject and was subsequently charged with doing act likely to assist the enemy with intent to assist the enemy. Accused claimed he acted under duress.

I: Were accused’s actions were done with intention of assisting the enemy?

A: Unclear if statute required motive component, however, court conceptualized the statute as requiring intention to the consequences. Court found he did not have intention to the consequences – where intention is an exercise of the free will to use particular means to achieve a particular result.

Ratio: 1) It is often unclear how motive differs from intention of consequences; 2) In this case, intention could not be present in absence of free will (BUT SEE HIBBERT)

#### R v Lewis

R: Difference between intent and motive: **Intent** = “The exercise of a 'free' will to produce a particular result” **Motive** = “that which precedes and induces the exercise of the will.”

#### R v Hibbert

F: Hibbert testified that he was forced by the principle offender to accompany him to the victim’s home and lure the victim into the lobby. Victim was shot and killed.

I: What is the meaning of the word “purpose” in s 21(1)(b), does purpose necessitate motive *or* intention for consequences?

L: s 21(1)(b) at p 29.

A: Purpose as used in 21(2) mean desire, or motive. But in 21(1)(b) “purpose” means intention of the consequences and motive is not necessary to prove subjective mens rea.

R: In order to interpret the mens rea requirement of certain terms, you need to read the whole section in order to contextualize. **Purpose in this section intention to the consequences.** As well, the lack of a “free” will does not stop someone from having intent towards the consequences of their actions. Modifies ***Lewis*** definition.

#### R v Buzzanga and Durocher

F: B and D were charged with willfully promoting hatred against francophone, after they published a pamphlet. This pamphlet appeared to be authored by those who were anti-francophone in order to galvanize the French speaking community.

I: How is willfully interpreted in establishing the mens rea?

L: s 319.2 at p 262.

A: Willfully does not have a fixed meaning. In the context of 319(1) we presume subjective mens rea and in 319(2) the added word willfully modifies the standard—raises standard to only include intention (not recklessness) for consequences.

R: Terms present in one section that are absent in a linked section can indicate modification of mens rea requirements. Willfully modifies the mens rea standard as intention to consequences in 319(2), willfully does not, however, have a fixed meaning.

Parsing 319.2

|  |  |
| --- | --- |
| Communicating (voluntary) | Intention |
| * Statements other than private conversations * Against any identifiable group |  |
| - Promotes hatred | Willfully = intention. |

#### R v Theroux

F: Accused was convicted of fraud when he accepted deposits for a building project having told investors that he purchased deposit insurance when he had not.

I: Does the accused’s honest belief that the consequence would not come about mean that he lacked the necessary mens rea?

L: s 380(1) at p. 295 and s 361(1) at p. 287.

A: The victims were deprived/defrauded of the opportunity to protect themselves (actus reus), and **Theroux subjectively knew the risk of deprivation/defrauding yet proceeded anyways** (i.e., at least recklessness, mens rea). His honest belief that deprivation/defrauding would not happen is not relevant to establish mens rea. The state of the world has been changed as a result of the lie 🡪 victims thought they had x value, but they actually have x-1 value due to lie.

C: It need only be determined that the accused knowingly undertook the acts in question aware that deprivation or risk of deprivation could follow as a **likely consequence**. Did not have to intend deprivation, nor does deprivation have to occur, the risk is enough. Had to subjectively know his statements were false 🡪 look to parliaments purpose, clearly wants to criminalize liars, not just idiots who don’t know what they’re saying is false.

R: Recklessness is shown where accused knows of the “likely consequences” and chooses to proceed any ways. Additionally, the court says that in interpreting MR, look to the purpose of the statute and ask how MR should be framed so it captures specifically the “mischief” parliament wants to curb.

R2: Accused’s definition of “dishonesty” is irrelevant. Analogize here in cases where A doesn’t believe the consequences of her actions “count” as the prohibited consequence (e.g. defeating the course of justice).

### Willful Blindness

#### R v Briscoe

F: Accused drove the car that was used for the kidnapping of the victim. Drove the victim to the crime scene where she was killed. Provided weapon. Accused claimed he did not know precisely what was going to happen. Charged with 1st degree murder.

I: Can willful blindness substitute for knowledge in establishing mens rea for 1st degree murder?

L: *Sansregret v The Queen, R v Jorgensen.*

A: Where the accused’s suspicion is aroused and he or she sees the need for further inquiries but deliberately chooses not to make those inquiries = willful blindness. Accused had enough information to put the pieces together or make further inquiries, but deliberately chose not to.

Ratio: Willful blindness can substitute for knowledge of circumstance, which in turn is a pre-requisite for intent. Willful blindness is defined as having all the requisite information for knowledge but deliberately not putting the pieces together.

-Cunliffe seems to have said in review that the willful blindness could actually substitute for the intention in this case.

### Recklessness

#### R v Sansregret

F: Sexual assault case. The appellant asserts an honest belief that the consent of the complainant was not caused by fear or threats.

I: Was the accused reckless as to whether or not consent was secured?

A: The culpability in recklessness is justified by knowledge of the risk and proceeding in face of it.

C: He was reckless as to the possibility of non consent.

R: Recklessness occurs when one is aware that conduct ***could*** bring about the prohibited consequence, but persists despite the risk. This is a lower standard of recklessness than in Theroux (could as opposed to likely).

## B.    Objective Mens Rea

If the statute uses the word “reasonable” it is purely objective test, **not a modified one.**

* The question therefore for basic objective MR is purely “would the reasonable person know\_\_\_\_ circumstance was the case/\_\_\_\_ consequence was likely or would result”

#### R v Hundal

F: Accused charged with dangerous driving causing death. Accused was driving an overloaded truck, evidence from witnesses was that he was going very fast for several blocks before driving through a red light. Accused claimed he could not be convicted without proof beyond a reasonable doubt of subjective mens rea 🡪 intention to drive dangerously.

I: Is subjective mens rea necessary to prove this offence?

L: s 249

A: Mens Rea for the offence of dangerous driving should be assessed objectively, but in the context of all the events surrounding the incident. The question is whether the accused’s actions were a marked departure from the standard of care that a reasonable prudent driver would observe in accused’s situation (modified objective test).

C: Accused’s driving was a gross departure from the standard of a reasonably prudent driver.

R: Dangerous driving requires a marked departure from standard of care of a reasonable person in the circumstances, a pattern of dangerous driving constitutes a marked departure.

#### R v Creighton

F: Charged with unlawful act manslaughter. Injected cocaine into girlfriend who then died of an overdose.

I: What is the mens rea requirement for unlawful act manslaughter?

L: s 222(5)(a) and s 7 of the *Charter*.

A: First crown needed to prove the underlying unlawful act, used trafficking. Term “unlawful act” may connote objective mens rea. In this case court agreed on objective mens rea, disagreed on whether requisite objective mens rea was foreseeability of bodily harm (majority) or foreseeability of risk of death. Modified objective was the bigger issue, in other words, to what extent do we bring characteristics of the accused into our consideration of the reasonable person standard. Reasonable person standard is modified to include the capacity of the accused to appreciate risk in the circumstances. If the accused is aware of their lack of capacity, the moral fault lies in their choice to engage in the risky behavior.

Ratio: Modified objective test: 1) Was there a marked departure from reasonable standard of care? 2) Was the accused aware of their incapacity and engaged in the risky behavior anyways?

R2: There need not be symmetry between AR and MR (if AR is death, MR can be objective foresight of bodily harm)

#### R v Beatty

F: Accused charged with three counts of dangerous driving causing death. Accused momentarily nodded off at the wheel causing accident. Evidence of witnesses indicated driving up to point of accident had been proper.

I: Is the accused’s action a marked departure from the standard of care required of a reasonably prudent driver?

L: s 249 at p. 205.

A: To establish actus reus for dangerous driving, you only need to establish that the driving was dangerous in regards to the circumstances. To establish objective mens rea, you must show a marked departure from the standard of care expected of a reasonable person. Marked departure indicates a more than momentary lapse in care.

R: Marked departure indicates a more than momentary lapse in care, and is not required in AR of dangerous driving.

#### R v Roy

F: Accused pulled vehicle into path of oncoming tractor-trailer. Visibility was poor. Passenger died, accused had no recollection of events of the accident.

I: Did accused have the requisite mens rea for dangerous driving causing death?

L: *Beatty*

A: Marked departure standard ensures that we only criminalize morally blameworthy behavior. This is why marked departure is placed in mens rea.

R: Simple carelessness is generally not criminal (only in context of marked departure, as per Hundal looking for pattern of carelessness).

## C.    Constitutional Dimensions

## Basic Principle

There are some offences for which the stigma is so great that subjective mens rea is constitutionally required. However, the number of such offences is few (***Logan***)

**But,**

Intention need not extend to all **required consequences** of the AR.

* In ***De Sousa*** A through a bottle, shards hurt V.
  + Charged with “unlawfully causing bodily harm” s 269.
  + Court said s 7 DID NOT require intention as to the bodily harm, objective foresight is enough.
  + “Unlawfully” was trigger word for objective MR (note that in ***ADH*** is was not…)
  + Thus you can mix subjective and objective MR in the same offense.

## Minimum *Mens Rea* for Murder

***Vaillancourt*** (1987), ***Martineau*** (1990) and ***Logan*** (1990) establish that **subjective foresight of death** is required before an accused can be convicted of murder as principal or under s. 21(2)

* ***Vaillancourt*** - In order to convict of murder, A must have at the least subjective foresight of the risk of death
* ***Martineau*** - Struck out "out to know" from murder [229(c)], as well as 21(2) if ultimate offence is murder.

***Creighton*** sets a floor on this: says that the stigma for manslaughter is not so high as to require subjective MR

#### R v Finta

F: Accused was charged with committing unlawful confinement, robbery, kidnapping, and manslaughter that constituted war crimes and crimes against humanity.

I: What is the constitutionally required mens rea for the elevated charge of war crime?

L: s 7(3.71)

A: The stigma of war crimes does increase what is required in mens rea. The elevated mens rea requires that he had been aware of, or willfully blind to, the pattern of facts and circumstances that, if true, would cause his actions to be a war crime. Does not need to be aware that actions constitute war crime or worse, only needs to be aware of factual circumstances.

Ratio: The level of stigma around an offence raises the constitutionally required mens rea to apportion criminal responsibility. Need intention for the aspects of act which raise the stigma, need not believe in/know about the stigma.

# IV.    SEXUAL ASSAULT

## Actus Reus

#### R v Ewanchuck

F: A made sexual advances towards C, who repeatedly said “**no**”. Each time, A stopped his advances and then began again. C was scared but determined not to show it. TJ acquitted based on existence of ‘implied consent.’ CA upheld.

I: What is the AR and MR of sexual assault? Can there be implied consent?

A: **AR**= (1) touching (2) sexual nature (3) without consent. #3 is established if C subjectively did not consent. *No defense of implied consent.*  **MR** = intention to touch, knowing/being reckless of/wilfully blind to a lack of consent. *No MR needed for sexual nature of touching.* Defense of honest but mistaken belief in consent raised at this stage, denying MR, no burden shift. In context of MR “consent” means that the complainant had voluntarily and affirmatively communicated by words or conduct her agreement to engage in sexual activity in question with the accused. Continued sexual contact after someone has said “No” is, at minimum, reckless conduct which is not excusable.

R: No implied consent in sexual assault. Crown need only prove K/R/WB to lack of consent for MR.

L’Heureux‑Dubé – myths about sexual assault informed the courts below. CA: sexually active women are less worthy of belief, invite sexual assault, their experience signals consent for further sexual activity > perpetuates myths re **ideal vs. undesirable victims** of sexual assault and idea that women are “sexually accessible until they resist”, and that men are subject to “uncontrollable hormonal urges.”

#### R v Chase

F: A entered C’s home, seized C around shoulders and arms and grabbed her breasts. She fought back and he tried to grab her again. C eventually managed to make a telephone call to a neighbour and A left but threatened to tell everyone C had raped him.

I: What are the elements of entail?

A: Touching must be sexual in nature. Test for sexual nature = objective: would a reasonable person see it as sexual? Intent of A may suggest sexual nature but is not determinative.

R: ‘Sexual nature’ of touching is determined objectively.

#### R v JA

F: JA choked C to unconsciousness, when she awoke he was performing anal sex which she had not specifically consented to. C gave contradictory accounts to police and in court about whether she had consented to the activity that occurred while she was unconscious. Note: see Cunliffe 2012 SCLR (posted in the Connect library) for more about the facts and circumstances of this case.

I: Can broad/advance consent be given for sexual contact?

A: McLachlin CJ argues that the language of the code makes it clear that the language of the code makes it clear that a person must be conscious throughout. **273.1(1)** - consent as the voluntary agreement of the complainant to engage in sexual activity in question: this shows consent must be specifically diverted to **each and every sexual act**, negating the argument of broad advance consent. **273.1(2)(b)** - no consent is obtained “if the complainant is incapable of consenting to the activity”

Parliament was concerned about the mental capacity to give meaningful consent - which arises also from unconsciousness

**273.1(2)(e)** - it is an error of law for the accused to believe that the complainant is still consenting after she “expresses… a lack of agreement to continue to engage in the activity” Parliament wanted people to be able to revoke their consent at any time during the sexual activity

R: There is no such thing in law as broad consent to a class of sexual acts or advance consent. Consent must be given to specific act and consenting party must be conscious throughout performance of the act.

Fish (dissent): This decision curbs sexual freedom. Would mean that smooching sleeping partner is sexual assault.

Cunliffe: Both judgements lose sight of fact that at this point trier of fact has already found lack of consent for anal.

#### R v Mabior

F: A had sex with 9 complainants. He did not tell them he was HIV+ before having sex. In some instances, he wore condoms, in others he did not. 8 of the complainants testified they would not have agreed to sex with A if they had known he was HIV+. No C contracted HIV.

I: Does dishonest non-disclosure of HIV status coupled with deprivation of personal autonomy (choice to avoid **significant risk of serious bodily harm (*Cuerrier)*** = aggravated sexual assault?

L: *R v Cuerrier* - Test for fraud vitiating consent - 1) dishonest act 2) depriving of the complainant of knowledge which would cause her to refuse sexual relations that exposed her to a significant risk of bodily harm

A: Clarifying *Cuerrier:* there needs to be a realistic possibility that HIV will be transmitted, otherwise consent is not vitiated. That means both low viral loads and condoms.

R: Fraud will vitiate consent where there is a (1) a dishonest act (2) deprivation, (2.5) plausible risk of actual harm resulting from that deprivation.

ADD HUTCHINSON

## Mens Rea

#### Pappajohn v The Queen

F

I

L

A

C

#### Sansregret v The Queen

F

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L

A

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#### R v Malcolm

F

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# V. Extensions of Criminal Liability

## Participation

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| Parties to Offence **21 (1) Every one is a party to an offence who**   1. actually commits it; 2. does or omits to do anything for the purpose of aiding any person to commit it; or 3. abets any person in committing it. |

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| Common Intention 21(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence. |

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| ***Person counselling offence***  **22(1)** Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.  **(2)** Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.  **(3)** For the purposes of this Act, “counsel” includes procure, solicit or incite. |

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| ***Accessory after the fact***  **23 (1)** An accessory after the fact to an offence is one who, knowing that a person has been a party to the offence, receives, comforts or assists that person for the purpose of enabling that person to escape. |

### Modes of Participation

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| R v Thatcher R: Jury doesn’t need to be unanimous as to if A was the principal or aided or abetted, it only needs to be unanimous that A ***either*** acted as principal ***or*** participant BRD.    F: A charged with 1st degree murder for unlawfully *causing* death of ex wife.  I: To convict does jury have to be unanimous on one of two paths to conviction: (1) that A was principal offender (2) A’s was participant in wife’s death?  L: *CC* s 21(1) – Parties to an Offence; s 222 – Murder  A: No legal distinction between 1 & 2, either way equally culpable under law. Moreover, policy reason against unanimity requirement—even where evidence clear re A’s culpability, disagreement as to whether A was principal or participant (aidster or abetter) could lead to exoneration. |

* Cunliffe: likely confined to s 21(1), but potentially logic could apply to ss 22-23 because, like 21(1) these forms of participation are treated the same as committing the principal offence

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| R v Pickton R: Charge on participation will be given if there is evidentiary relevance to possible participation. Correct charge = convict if BRD principal OR participant. 3 principles from *Thatcher*:   1. if evidence admitted at trial that has to do with alternate mode of liability, jury must be instructed on it 2. TJ need not relate that law to the evidence of the case 3. Jury does not need to be unanimous on mode   F: Crown only advanced theory that Pickton was principal. TJ instructed jury “if RD about whether or not **he shot her**, must return a verdict of not guilty.” Later corrected to include guilty conviction for participation  I: If Crown has not proposed participation, is it wrong to instruct jury that participation is enough?  A: Charron J: Sure, the crown did not bring evidence on his participation, but that is what the **defense theory was.** Possibility of participation of participation was on the table, TJ had to instruct on it. |

### Aiding and Abetting

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| R v Greyeyes **R**: being an agent of the purchaser to attain drugs can lead to a conviction of trafficking under 21(1)(b)/(c) as long as it is more than *incidental* assistance. Cory defines aiding and abetting.   * **21(1)(b)**: to assist or to help the actor   + MR: A intended the consequences that flowed from aid, doesn’t need to **desire** or **approve** of them * **21(1)(c)**: encouraging, instigating, promoting or procuring the crime to the committed   + MR: A intended to encourage.   F: A helped undercover pig to buy cocaine by guiding him to place to purchase, negotiating price. Accepted $10 from pig.  I: Can someone acting as an agent for a **purchaser** of drugs or assisting the purchase to buy drugs be a party to trafficking under s. 21(1)?  A: **Cory J [Minority] –** Assisting in any part of the purchase should make A a party to trafficking. While a principal purchaser cannot be charged with trafficking (instead is to be charged with possession or possession with the purpose of trafficking), should not extend this exception to parties (b/c they would escape culpability). Agent to the purchaser assists both the seller and the purchaser.  **L’Heureux-Dube J [Majority]:** Parliament did not intend for any act aiding/abetting a purchaser of drugs to lead to culpability for the seller’s crime. **EX:** BF who drives his GF to get drugs to avoid her walking in the dangerous part of town b/c she is going to do it anyway, and he is doing it for her safety. BUT, in this case, A engaged in a concerted effort to obtain the narcotics for pig and this makes him party to the trafficking as without him, the sale would not have happened.  C: A convicted of abetting trafficking b/c negotiated the price, passed the money to the seller and accepted money for having facilitated the deal |

* Comment: Cunliffe points out that this is a peculiar decision as an agent of the purchaser's actions are clearly oriented towards the purchaser, not the seller. **Greyeyes is not selling drugs**.
* Cunliffe does not see the difference between Greyeyes and the BF example given by L’HD. In *Hibbert*, desire and motivation were said to be irrelevant, but if we accept the BF example, this is rejected. Also interesting to think about entrapment.

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| (aiding trafficking) | ***AR*** | ***MR*** |
| **conduct** | act or omission  selling | intentional / intentional |
| **circumstances** | (designed to assist selling)  narcotic included in a Schedule | knowledge/WB that **P** intends to sell coke OR intent that P sell coke  knowledge/WB |
| **consequences** |  |  |

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| R v Briscoe R: MR requirement for aiding: (1) A must intend to aid, (2) they must know what the principal intends to do. If the facts give evidence of WB, it can substitute for knowledge in MR for aiding.   * For abetting, continue to follow *Greyeyes:* you only need to intend to encourage.   F: 13 y.o. lured, sexually assaulted, and murdered. A helped principal offenders, was held to be willfully blind to principals’ intent.  I: Can WB substitute for the knowledge component of the MR in section 21(1)(b)?  L: *CC* s 21(1)(b)  A: MR requirement for aiding: (1) A must intend to aid, (2) they must know what the principal intends to do. Note that this fits with Greyeyes 🡪 if you intend to aid, and know what the principal is planning to do, then intending “the consequences that flowed from [your aiding]” is intending the offence be committed. **WB is enough to satisfy (2).**  C: A has MR for s 21(1)(b), b/c WB to principal’s intention. |

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| Dunlop & Sylvester v R R:  Being at the scene of a crime (and not doing anything to stop it) is not sufficient to ground culpability for the crime.  F: As convicted of rape of C. Argued they came to deliver beer, saw C having sex with gang member. One of them said they were with her at a bar earlier in the night.  I: Can A’s be convicted as participants for simply ‘being there?’  A: Dickson J (AHTW): ‘***Mere presence at the scene of a crime is not sufficient to ground culpability.*** Need to encourage or facilitate.  C: As acquitted. |

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| R v Nixon R: Failure to do your legal duty [b/c of your position] may be seen as omission for the purpose of abetting. Crown must still prove intention to abet.   * NB: this likely translates to aiding as well.   F: A was chief of lockup. Other cops beat the shit out of the V in typical cop fashion.  I: Was A’s passive allowance of the assault participation?  L: *CC* 21(1)(c) - Abetting  A: Legg JA: “An accused who is present at the scene of an offence and who carries out no overt acts to aid or encourage the commission of the offence may none the less be convicted as a party ***if his purpose in failing*** to act was to aid in the commission of the offence.” A purpose of aiding here was inferred by his failure to perform his occupational duties as chief).  C: Pig goes to jail. |

* Cunliffe: This likely extends only to other clear statutory duties to protect.

### Intention in Common

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| R v Kirkness **R: Elements**   1. 2 or more persons form intention in common 2. To carry out an unlawful purpose 3. To assist one another therein 4. 1 person commits an offence 5. Each person is a party who:    1. Knew or ought to have known    2. That commission of further offence was probable (recklessness - more likely than not)   **F:** A participated in B&E with S. S sexually assault V, while A put chair against door. S started to strangle V A spoke out against that action (abandonment). V dies from strangulation.  **I:** How do you establish liability under 21(2)  **A:** Wilson J (authoritative dissent): **Two part test** (1) show that A formed an intention in common with others to carry out an unlawful purpose and to assist them in achieving that purpose and (2) (i) the commission of the **ultimate offence** must be probable and (ii) the accused must know or ought to have known of this probability.  Cory J (majority): Intention in common was for the b&e, NOT for the sexual assault. A could only be guilty of manslaughter if he was a party to the sexual assault, as death was foreseeable consequence.  **C:** A acquitted. |

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| common intention (breaking & entering>murder) | ***AR*** | ***MR*** |
| **conduct** | (breaks and enters)  act | intentional  intentional |
| **circumstances** | 2 or more persons  commission of murder probable | knowledge/WB/~~ought to have known~~ |
| **consequences** | death of a human  (one person commits an offence—all the elements of murder go in this box, really) | intent (in common) to assist each other in commission of theft (in carrying out unlawful purpose)  intent (in common) to commit theft (to carry out unlawful purpose)  intent to kill |

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| R v Gauthier R: Wagner J: elements of the defence:   1. Intention to abandon or withdraw from the unlawful purpose 2. Timely communication to the person who wished to continue 3. Unequivocal notice to those who wish to continue 4. took **reasonable steps proportionate to participation in the commission of the offence**, to neutralize or cancel out the effects of participation or to prevent the commission of the offence.   **Dissent**: Fish J: this law should not be applied to the A in this case (policy).  F: A entered murder-suicide pact w/ husband to kill children. After supplying husband with the pills used to kill the children, the accused communicated to husband they should not go through with it. Was convicted of aiding/abetting.  I: What are the elements of abandonment and at what point are they satisfied?  C: A convicted, abandonment not made out. |

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| R v Logan R: Party to any offence cannot be found guilty of the offence based on a lesser standard of mens rea than *that which is constitutionally required* for convicting the principal.   * It is not a PoFJ that participation in an offence have the same level of MR as the principal offence. * Participants in an offender, though not lower than any constitutional minimum if there is one attached to the offence   F: A were charged with robbery of a store and wounding a cashier. Two were convicted of attempted murder despite not having been the ones with the gun/pulled the trigger. A challenging the constitutionality of the objective component of s.21(2) (“ought to have known”).  I: Is the objective test in s21(2) of the Code inoperative for attempted murder?  A: In *Vaillancourt* the court held that for a few offences the principles of fundamental justice require that a conviction stand unless there is proof BRD of a minimum degree of mens rea (such as murder)  For these crimes, since principles of fundamental justice require subjective mens rea to convict a principal, the same minimum degree of mens rea is constitutionally required to convict a party of that offence  objective component of 21(2) cannot be applied in these cases  BUT if it is not one of these relatively few crimes where the stigma requires a minimum MR, it is open to convict someone of the sections of 21 with a MR that is less than what the principal requires.  for attempted murder the objective part is inoperative as it carries enough stigma to trigger the constitutional requirement  can only be convicted if knew that the commission of the offence was a probable consequence of carrying out the common purpose |

### Counseling as a Form of Participation

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| R v O’Brien R: Words of encouragement are enough for counselling. In this case A had motive b/c he wanted to sell principal drugs   * NB: why not abetting (use *Hamilton*)   F: A was charged with counselling R to rob a convenience store. A appealed.  I: Was this a case of counselling?  A: R had not yet made up her mind to rob the store at the time O offered his encouragement. Moreover, O had a motive to encourage R because he wanted to sell her drugs. |

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| *CC* s 22 (counselling robbery) | ***AR*** | ***MR*** |
| **conduct** | active inducement of robbery (see s 2, 322) | intentional |
| **circumstances** |  |  |
| **consequences** | **P** intentionally stole from any person while knowingly armed with an offensive weapon | intending that **P** commit robbery |

### Accessory after the fact

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| R v Duong R: WB to whether principal committed offense is sufficient for knowledge in accessory after the fact (BUT use Briscoe definition).   * Principal/Party that A helped does not need to be convicted. But in A’s trial they need to prove that the principle committed that effect.   F: D’s friend L was suspect in a crime: was broadcasted on news as suspect. D let L stay at his place for 2 weeks. D was convicted of being an accessory after the fact to a murder committed by L. Claimed he didn’t ask L anything b/c didn’t want to know.  I: Can wilful blindness substitute for knowledge as MR in the context of 23 (1)?  A: D must have knowledge (MR) of the principal offence that the principal was party to. It could be established on fact that D chose not to make any inquiries because he did not want to know the truth(WB). Such a choice can substitute for actual knowledge as it makes D blameworthy  C: A convicted. |

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| *CC* s 23 (accessory after the fact) | ***AR*** | ***MR*** |
| **conduct** | receiving/comforting/assisting **P** | intentional |
| **circumstances** | **P** has been party to an offence | knowledge/WB that **P** was party to that *particular* offence (recklessness possible but unlikely because of the stat. language) |
| **consequences** |  | intent to help **P** escape (need not be permanent—abandonment irrelevant) |

## Inchoate Offences

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| Attempts **24** **(1)** Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.  **Question of law**  **(2)** The question whether an act or omission by a person who has an intent 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. |

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| R v Cline R: For attempts:   1. Need AR and MR 2. Evidence of similar acts done in the past (if not too remote) may be taken as evidence that A had MR 3. Crown can raise this evidence independently 4. action taken does not need to be a crime or tort 5. must be more than preparation 6. “When … preparation is in fact fully completed, the next step in the series of acts done by the accused for the purpose and with the intention of committing the crime as planned” is the AR for an attempt. |

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| Deutsch v The Queen R: Clarifying part 5 from *Cline:* In terms of offenses involving agreement, ITT is sufficient to constitute attempt, offer is not needed. “The distinction between preparation and attempt is essentially a qualitative one, involving the relationship between the nature and quality of the act in question and the nature of the complete offence, although consideration must necessarily be given … to the relative proximity of the act in question to what would have been the completed offence, in terms of time, location and acts under the control of the accused”  F: Accused had ad for secretary feat. sex-having. Charged with attempting to procure persons to have illicit person sex.  I: When is an act more than preparatory?  L: s 286.8?  A: A argued b/c no offer, all actions were merely preparatory. Court says nah. Holding out of monetary incentive (ITT) is enough to pass preparatory mark.  C: Go to jail bad man. |

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| R v Ancio **R**: For s. 24 need the intention to commit the desired offence to satisfy the MR. For attempted murder: need the intention to kill.  **F**: Ancio wanted to speak to his estranged wife and so broke into an apartment building with a sawed-off shotgun. The new bf threw a chair at Ancio and the gun discharged. Charged with attempted murder.  **I**: Did Ancio have the requisite intention to complete the offence? **L: s. 24:** “having an intent to commit an offence” |

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| R v Logan L: *Ancio*: MR for attempted murder as intent to kill. *Martineau*: constitutional requirement because of stigma  A: the minimum MR constitutionally required for attempted murder is *subjective* foresight of death  Dissent: L’Heureux –Dubé thinks that the constitutional minimum MR is subjective intent to kill. |

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| R v Sorrell and Bondett **R**: Where intent is inferred from extrinsic evidence, an otherwise equivocal act can be found to constitute the offence of attempt.  **F**: A knocked on the door of chicken place 15 mins before close with concealed weapons and ski masks. Door was locked and manager said they were closed. The two men turned towards each other and made a gesture of surprise. They left and were later found by cops. TJ found that the Crown had not proven BRD that they had the requisite intent and was not sure whether their activities had crossed the line between preparation and attempt.  **A:** In this case, the A activities had crossed the line between preparation and an attempt and therefore the AR was made out. However, the Crown had not proven BRD that they had the requisite intent. It was open for the TJ to find this because intention could not readily be inferred from the act itself (no extrinsic evidence). Intention is a question of fact.  C: As Acquitted. |

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| USA v Dynar R: Only distinction in Canadian law is between factual impossibility and imaginary crimes. Only the latter will exempt you from criminal liability. The AR for attempts is always deficient in comparison to full offense, so what matters is intention, not whether it could happen.  F: The USA sought to extradite Dynar for attempt to launder the proceeds of crime. It was impossible for him to launder the money because it would never have been drug money (it was an FBI sting).  I: Is the fact that it was impossible for him to launder drug money since it was not drug money (**legal impossibility**) a defence?  A: A argued “**Legal impossibility**”: an attempt that must fail because even if completed no crime would have been committed. This is not recognized in Canada. **But court says** the impossibility A faced was a factual impossibility. He is still criminally liable for attempted laundering even if it was not drug money. What is legally relevant to an attempt is A’s belief that the money is the proceeds of crime, not the truth that it is not. Truth does not vary with the intention of the accused, and is therefore not a part of *mens rea*. **Only if crime is imaginary** (his intended action was not actually illegal) **can it exempt you from liability.** |

### Incitement

* Incitement is counseling an offense was not actually committed.

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| R v Hamilton ***R:* (Fish J +5)**: Elements of incitement. The purpose of criminalizing aiding, abetting, attempting, counselling, inciting or procuring offences is the same: those things increase the likelihood of some harm occurring.  **F**: The **A** skdjgbskjbg. Sjbgskjbg. SLDJKGBSKJG. The **A** was charged with incitement of fraud not committed.  **I**: What are the elements of incitement of an offence not committed?  **L**: *CC* s 464 (incitement of offence not committed), 380 (fraud).  **A**: The *AR* of counselling requires more than description of the offence; it involves *active inducement* or *advocacy*. Counselling an offence is criminalized whether or not the offence is committed, because it increases the likelihood of harm occurring, whether or not that harm actually occurs. For counseling, the level of ‘risk’ required (the risk you must create) for the *AR*, and to satisfy the *MR* recklessness is ‘substantial and unjustified’, which is a standard lower than that in *Buzzanga & Durocher*, above that in *Théroux*, and thus *much* higher than in *Sansregret*.   |  |  |  | | --- | --- | --- | | *CC* s 464 (incitement of fraud) | ***AR*** | ***MR*** | | **conduct** | deliberate encouragement or active inducement of fraud (see s 380 & *Théroux*) | intentional | | **circumstances** |  |  | | **consequences** | ‘substantial and unjustified risk’ that fraud will be committed | reckless (knowledge of S&U risk and proceeding anyway) to commission of fraud  OR  intending that fraud be committed |   **Diss. (Charron +2)**: Recklessness should not be enough. REASONS. |

**Required Risk:**

* *Buzzanga & Durocher*: Certain or morally certain, but did it anyway.
* *Theroux:* Where A knew the “likely consequences” and chose to proceed anyways.
* *Sansregret*: A aware of danger that conduct **could** bring about the consequences and still persists (aware of possibility of consequence)

### Conspiracy

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| USA v Dynar R: Conspiracy is committed when two or more people:   1. intend to come to an agreement (*MR conseq*), 2. come to an agreement on a “common design” to commit an offence (AR conseq), 3. the offence is not imaginary (AR circs), 4. and they have genuine intention to act on that “common design” (MR conseq—no corresponding AR).  * Conspiracy is even more preliminary than an attempt—no act that goes toward commission of the offence is necessary (see element 4). This is in recognition that multiple people acting together can wreak greater havoc than any one person alone. * Thus, the criminalization of conspiracy is almost entirely based on the relevant *MR*, and the argument re: *attempting* to do the impossible, *supra*, is even stronger here.   F: See above  I: Can an **A** be found guilty of conspiracy if the offence they conspired to commit was impossible?  L: *Criminal Code* s 465 (Conspiracy)  C:   * Cite primarily for elements of conspiracy: two or more people intend to come to an agreement to commit a non-imaginary crime, come to that agreement, and intend to act on it. No actual steps need to be taken whatsoever. * The impossibility of committing an offence is irrelevant to conspiracy, unless that offence is imaginary. |

* So long as there is a continuing, overall, dominant plan, there may be changes in methods, operations, personnel, etc.
* If someone conspires with an undercover cop, it does not count as conspiracy because only one party has intention. There must be more than one person to meet all the steps. With undercover cop would fail on the fourth step.

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| *CC* s 465 (conspiracy) | ***AR*** | ***MR*** |
| **conduct** |  |  |
| **circumstances** | 2 offenders (no entrapment)  crime is not imaginary |  |
| **consequences** | agreement on “common design”—“meeting of the minds” | intention to agree  intention to act on “common design” |

### Other Forms of Inchoate Liability

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| R v Dery R: Attempt to conspire is not a crime under Canadian law. **We criminalize harm or clear risk of harm, not shapeless potential future occurrences.**  F: D never actually agrees or attempts to steal anything, but was convicted of an attempt to conspire (theft).  I: Can fruitless contemplation of a crime never attempted bring criminal liability?  A: No agreement = No conspiracy, No steps to do crime = no attempt. There is no actual harm being criminalized, just a very distant possibility. |

* can’t criminalize the increase of a risk of a risk.

### New Statutory Forms of Inchoate Liability

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| R v Legare R: Offence is made out when: (1) Intentional communication by computer (2) with a person the accused knows or believes to be under 14 [16] years of age (3) for the specific purpose (*specific intent*) of facilitating the commission of any of the listed secondary offences. Does not matter if acts of accused were *objectively capable* of facilitating the commission of the specified secondary offence with respect to the underage person concerned.  F: Legislation seeks to close the door on online grooming before any of the underlying crimes are committed. A groomed minor on computer, phoned her to “talk dirty”, child hung up. No actual attempt to meet the child.  I: Does the communication need to actually facilitate an underlying offence?  L: “Luring a child on a computer for the purpose of facilitating a sexual offence” - **s. 172.1(1)(b)** [as it now is]  A: Communication need only be for *the purpose of facilitating* underlying offence |

* This is conduct that precedes the commission of the offence, but parliament is able to criminalize things that have not yet met the threshold for attempts, but must be explicit.

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| *CC* s 172.1(1)(b) | ***AR*** | ***MR*** |
| **conduct** | communication | intentional |
| **circumstances** | by computer  a person of any age  OR (in case of recklessness)  a person under 16 years of age | **A** believes **V** is under 16 years of age  OR  **A** is reckless to **V** being under 16 years of age |
| **consequences** |  | for the specific purpose of facilitating the commission of a specified offence |

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| R v Khawaja F:   Khawaja convicted of conduct that could facilitate/help carry out activities of Terrorist group  I:    Is 83.18 overbroad or grossly disproportionate? (*Charter* s.7)  L: *CC* Part II.1 (Terrorism), specifically s 83.18 (participation in activity of terrorist group), *Déry.*  A: Court heightens MR. Scope of conduct is appropriately reduced by requirement of **specific intent** and the exclusion of conduct that a reasonable person would not view as capable of materially enhancing abilities of T Group to carry out Terrorist activity. Also NOT grossly disproportionate to objective of preventing the vast harm that may come about if an act of terrorism is committed. The conduct is sufficiently proximate to the consequence of terrorism.  R:   83.18 does not violate s.7 of *Charter*, high intent requirement as well as “reasonable person” qualification make risk of harm sufficient merit criminal liability   |  |  |  | | --- | --- | --- | | *CC* s 83.18 | ***AR*** | ***MR*** | | **conduct** | participating in [consequence]  OR  contributing to [consequence] | intentional | | **circumstances** | directly or indirectly  of a terrorist group | knowledge that the group is a terrorist group | | **consequences** | any activity [circ 2]  (per s 83.18(2), it does not have to be a terrorist activity, does not actually have to enhance, and the **A** does not have to know anything specific about the activity) | Objective: [consequence 1] must be *reasonably* capable of materially enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity (para 51)  specific purpose of enhancing the ability of any terrorist group to carry out a terrorist activity  [This element does much of the work, and per paras 45ff, ‘specific purpose’ or ‘specific intent’ is very very similar to motive.] | |

# VI. Defences

## Mental Disorder and Automatism

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| Defence of Mental Disorder **16** **(1)** No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.  **Presumption**  **(2)** Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.  **Burden of proof**  **(3)** The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue. |

### Procedural Elements

#### Fitness to Stand Trial

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| R v Whittle [1994] (p. 794)  * Sopinka J:   + by virtue of s 16 of CC, mentally ill people who fit definition of that section are exempt from criminal liability and punishment.  But, they are not exempt from standing trial.   + Test for fitness to stand trial is different from definition of mental disorder in s 16.  The test developed in common law and codified in s 2 of CC requires that the A have cognitive capacity to understand the process and communicate with counsel.  Does NOT require that A be able capable of making rational decisions beneficial to him.   + Not a prerequisite that A be able to exercise analytical reasoning in making choice to accept the advice of counsel or in coming to a decision that serves his best interests * \*\*Accused only needs to know there IS a trial - but don’t need to know what’s really going on. |

#### Who Can Raise the Mental Disorder Issue?

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| R v Swain [1991] (p. 795) **R**: Both A *and* the CrownTwo instances where Crown is entitled to lead evidence of insanity:   1. After trier of fact has concluded that A otherwise guilty of offence charged, and 2. Where A’s own defense has—in view of TJ—put A’s capacity for criminal intent at issue.   **I**: Can Crown raise evidence of insanity over and above A’s wishes, and would the Crown’s doing so interfere with A’s right at CL to control own defense?  **A: Lamer +2:**   * Where A’s own evidence tends to put his or her mental capacity for criminal intent into question the Crown may put forward evidence of mental disorder and TJ may charge jury on s. 16.  (Even if A does not wish to raise s. 16.) * The **objective** of CL rule that allows Crown to raise evidence of insanity over A’s own wishes in certain cases is twofold:   + To avoid conviction of someone who may not be criminally responsible on account of mental disorder, but refuses to adduce evidence that they were insane;   + To protect public from potentially dangerous persons requiring hospitalization * To prevent unnecessarily limiting *Charter* rights, Crown may independently raise issue of insanity only after   1. the trier of fact has concluded A is otherwise guilty of the offence charged and   2. before a conviction has been entered if A’s evidence has put their capacity at issue. |

#### Burden of Proof

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| R v Chaulk pt. 1 [1990] (p. 798) R: The presumption of sanity embodied in s. 16(4) violates the presumption of innocence. However, given the importance of the objective that “the Crown not be encumbered with an unworkable burden” (to prove sanity of each accused BRD), s. 16(4) is justified under s 1.  F: Who cares  I: Does presumption of sanity violate 11(d)?  L: s 16(4)  A: **Lamer**: Presumption of sanity violates 11(d). Saved under s 1 b/c proportionate.  **McLachlin**: Sanity is not element of any offence, crown does not need to establish sanity BRD.  **Wilson**: Presumption violates 11(d) and is not saved under s 1. Gov’t has not shown objective is real. |

#### Consequences of Mental Disorder as a Defense – NOT EXAMINABLE

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| Winko v BC (1999)  * Part XX.1 does not violate section 7 or 15 – it protects those accused who are NCR on account of mental disorder by requiring that an absolute discharge be granted unless the court or Review Board is able to conclude that they pose a significant risk to the safety of the public. * It does not deprive mentally ill accused of their liberty or security of the person in a manner contrary to the POFJ * It does not violate their right to equal treatment under the law * It does not create a burden or presumption of dangerousness on the accused.   *The Statutory provision that this case was decided under has since been changed. The new provision states that public safety is paramount 🡪 constitutional challenge possible?* |

* Just know: The reason why gov’t wants to put people into the class of NCRMD is for continued supervision (important for distinction between MD and Non-MD automatism)

### Mental Disorder as a Defence

#### Mental Disorder or Disease of the Mind

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| R v Cooper R: In a legal sense, DOTM includes any illness that impairs the human mind and its function, but medical acceptance as disease is not determinative.   * What is a DOTM is a ***legal*** question.   + The “something extra” on top of a medical definition is a question of policy: do we *want* to give access to the defense in those cases? * **Excludes:** self-induced states and transitory states (e.g. concussion, but **not** transient delusions from chronic disease). * To support the defense of insanity it has to be intense enough to distort the A’s concept of the nature and quality of the criminal act.   I: What is DOTM and how should it be determined whether or not accused has DOTM?  A: ONCA (*R v Simpson*) – issue was whether a personality disorder was a DOTM within the meaning of s. 16. Held that DOTM is a question of law, though it contains a medical component:  (1) There has to be medical evidence, doctor can describe the nature of the A’s condition, however  (2) The **judge** is to determine whether condition described by defence is a disease of mind at law (If DOTM, Trier of Fact then decides whether accused has condition described). |

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| R v Bouchard-Lebrun 2011 SCC **R:** In case of toxic psychosis, presumption is that dissociation is caused by intoxication, **not** a DOTM.   * To rebut: A can show underlying DOTM unrelated to the intoxicant, on BoP. Circumstances involving intoxicants are decided case by case. * NB: does not address case where A’s evidence shows (BoP) that intoxication triggered underlying chronic DOTM.   **F:** Appellant brutally assaulted two individuals while in a psychotic condition resulting from chemical drug-use.  **I:** Does a toxic psychosis (TP) resulting from a state of self-induced intoxication caused by person’s use of chemical drugs constitute a ‘mental disorder’ within s. 16 of CC?  **A:** A argues TP is a result of underlying DOTM. There is a test for CC 16 insanity defence :   1. Was A suffering from a mental disorder in legal sense at time of alleged event(s)? 2. Was A, owing to mental condition, incapable of knowing that act or omission committed wrong?   **Framework**   1. The incapacity has to result from a DOTM 2. Characterizing mental condition as disorder is a legal exercise which engages with medical evidence.    * *R v Stone*: question of whether accused actually suffered from DOTM is a q of fact. 3. Toxic Psychosis that results from consumption of alcohol or drugs is generally covered by principles **that temporary psychosis is excluded from defense of NCRMD** (*Cooper)*.    * This is a **rebuttable principle** where A can show underlying DOTM unrelated to the intoxicant, on BoP. Circumstances involving intoxicants are decided case by case. |

#### Appreciating the Nature and Quality of the Act

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| Cooper v R (2) SCC: R: The first branch of the test in CC s. 16, in employing the word “appreciates”, imports an additional requirement to mere knowledge of the physical quality of the act. ***The requirement is of perception (to be able to perceive the physical consequences of the act).***  \* Note 🡪 legislature’s deliberate choice not to use “know” has meaning in interpretation.  I: What is the difference b/w ‘knowing’ the nature and quality, and ‘appreciating’ the nature and quality of an act? |

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| R v Abbey (1982) R: The consequences you are expected to appreciate are the physical consequences of the act, not penal consequences. Where failure to appreciate physical consequences, DOTM must cause the failure in order to rely on NCRMD.  Policy: What is the logic of cutting off MD at understanding physical consequences when s 16 relieves responsibility for offences WITHOUT any physical consequences?  **F:** A charged with importing cocaine. A knew it was wrong but believed himself to be immune to punishment thanks to external power looking out for him. TJ found NCR b/c he failed appreciate nature and quality (N/Q) of act.  **I:** Was A capable of appreciating the nature and quality of his act?  **C:** A was responsible, defense of NCRMD not open to him. |

#### Knowing that the Act is Wrong

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| R v Chaulk pt. 2 **R**: *“*Wrong” incorporates a moral dimension. A needs to be incapable of understanding act is wrong according to **ordinary moral standards**, even if he understands the law forbids the act.  Dissent: McLachlan J [ASTW] writes that it only matters that accused is capable of knowing that act is in some sense wrong; legally wrong suffices (UK and AU approach).  **I:** What is proper interpretation of the word “wrong” in s. 16(2)?  **A:** The term wrong in 16(2) must mean more than simply legally wrong. An interpretation that makes the defense available to defenders who know that they are committing a crime but are unable to comprehend that the act is morally wrong will not open floodgates. The incapacity to make moral judgement must be causally linked to DOTM. Dickson’s CJ dissent in *Schwartz* is adopted by Court as correct approach in this case. |

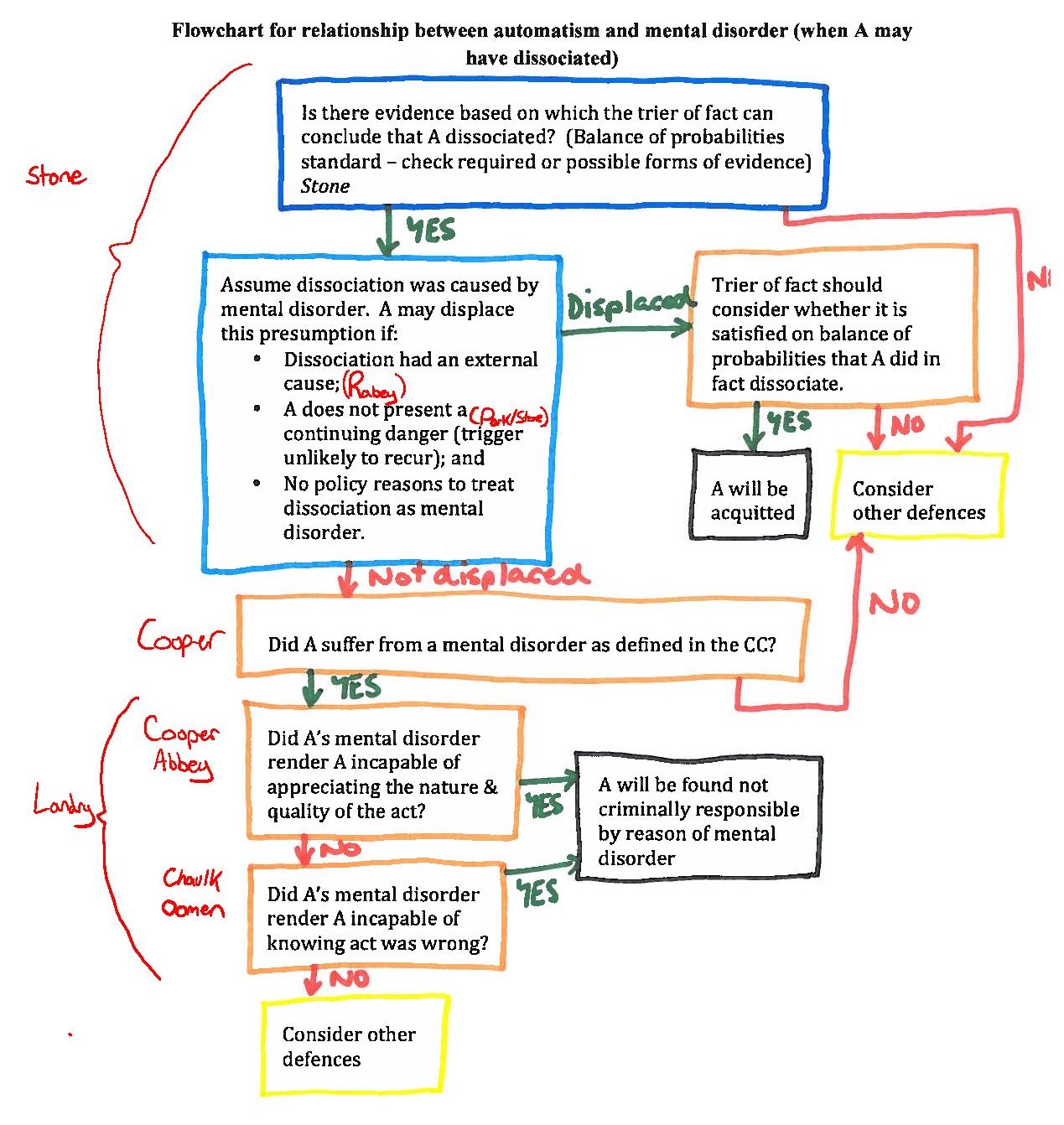
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| R v Oommen 1994 SCC R: The appropriate inquiry is whether A lacks the capacity to rationally appreciate whether the act is right or wrong (in the eyes of society), and hence to make a rational choice about doing the act. A needs to have the capacity to know their *specific act* was wrong.  F: A suffered from a paranoid delusion and believed that the woman he repeatedly shot was part of a conspiracy that was coming into his house to kill him.  I: Was A entitled to mental disorder defense because he believed he would be justified in the murder and the disease of the mind caused his incapacity to know right from wrong?  L: *Chaulk*  A: In sum: A possessed the general capacity to distinguish right from wrong, but his delusions deprived him of the capacity to know that the killing was wrong in this circumstance.  C: A found NCRMD. |

* Note on the first arm (nature and quality of the act) alone, Oomen would have been convicted (see *Abbey*).
* If A has delusions about the nature of their act, and if those delusions were true it would be an act which is not societally immoral, then they have access s 16.

#### Considering the Two Alternatives Arms of Mental Disorder Together

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| R v Landry 1988 (Que CA)/ 1991 (SCC) R: If A is capable of appreciating physical consequences of actions, the ***next stage*** of analysis asks whether A capable of appreciating action would be viewed as morally wrong according to society. They are separate inquiries.  F: A believed he was God and victim was Satan.  A: Que CA: exonerated A under first branch, argued that couldn’t appreciate nature and quality b/c A thought he was God. *SCC* upholds on alternate reasoning. Said that following *Chaulk*, the appropriate question in this case would have been to ask if A had capacity to understand their actions were morally wrong according to society in the circumstances. |

### Mental Disorder and Non-Mental Disorder Automatism



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| R v Parks 1992 2 SCR 871 **PRE-STONE AUTOMATISM RULES**  **R:** Crown must prove that sleepwalking came from DOTM, or else non-insane automatism is result.   * **Note – this has been overturned.**   **What remains:** An important consideration for whether to rebut presumption of MD automatism is the likelihood of dissociation reoccurring (reduced in *Stone* to “triggers” reoccurring).  F: Parks drove 23km to his in-laws house, murdered mother-in-law, injured father in law, all while apparently sleepwalking. Acquitted at trial.  I: Is sleepwalking a disease of the mind?  L: *Rabey* - Sleepwalking not DOTM, rather gives rise to automatism defence. |

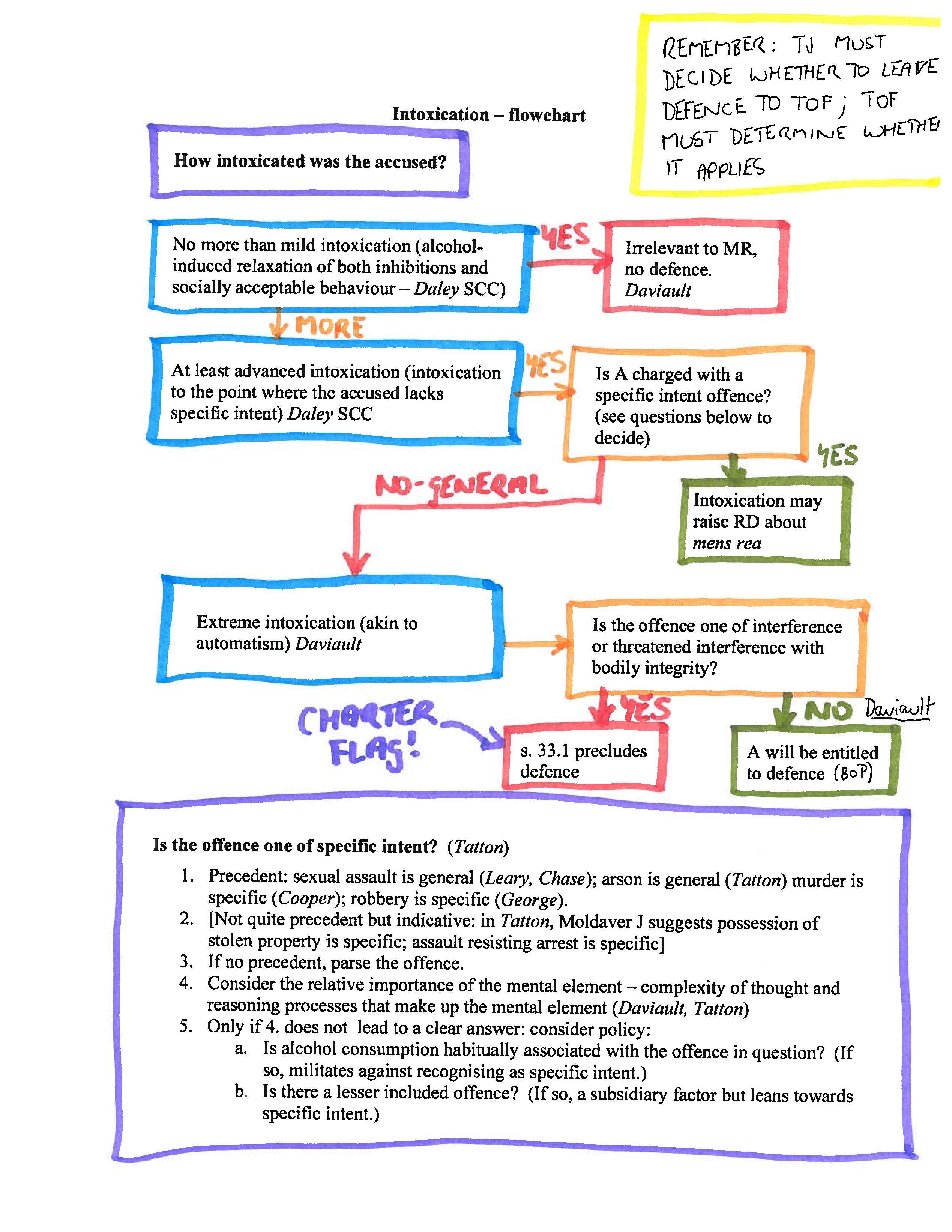
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| R v Rabey 1980 ONCA **R:** Internal cause theory: an internal (chemical) response leading to automatism (often triggered by an event). Internal causes require scrutiny.  **Critical questions for Internal Cause:**   1. was their act direct or random form of violence? If direct, undermines claim of automatism. 2. If reasonable person might dissociate from the magnitude of the shock, suggests non-MD automatism is possible. If not, then undermines claim of automatism.   **If (1) or (2) not satisfied look to MD automatism or consider other defences**   * (Note: stone gives more comprehensive/authoritative test) |

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| R v Stone 1999 2 SCR 290 R: Procedure to determine which defence to leave with Jury:   1. Judge must ask if D has raised evidence on which a properly instructed jury could find D acted involuntarily on BOP. 2. If so, must decide which form of automatism to leave with jury. Presumption is MD Automatism. 3. To decide if presumption is rebutted🡪 decide if disease of a mind    1. Would NORMAL person have reacted to the “trigger” by entering an automatistic state? Psychological blow (internal cause) automatism needs very shocking trigger. If normal person would not → presumption stands. If normal person would, still may find MD, but more likely to rebut presumption.    2. Continuing danger question [POLICY]: Does D present continuing danger to society? Focus should be whether ***triggers*** are likely to re-occur. If so, more likely MD automatism.    3. Other policy concerns are also allowed to be considered as they arise.  * Note on *Cooper*: transient expressions of underlying DoTM can suffice for s 16. Therefore, dissociation can fall under s 16 even though transient.   Binnie J (+3) [Dissent]: PoFJ that criminal acts must be voluntary. There is strong evidence that A dissociated and therefore was not acting voluntarily. If there is *reasonable* evidence of dissociation, non-MD automatism should be left with the jury. Entitled to retrial.  F: A killed wife after she had insulted him intensely. A argued both MD & non-MD automatism and automatism. Judge leaves only MD automatism w/ jury.  I: Should judge have left non-MD automatism to jury?  A: Automatism is best defined as a state of impaired consciousness in which an individual is capable of action but has no voluntary control over that action. Whether to leave MD or non-MD automatism with the jury depends on the application of the definition of a disease of the mind.  C: Non-MD Automatism not left with jury. S 16 left instead. |

* Comment: Cunliffe notes the risk that A might have dissociated, and yet neither defence might be left, because presumption is not rebutted, and then subsequently A is unable to prove DoTM.
  1. If presumption is not displaced, jury must be *carefully* instructed on the **legal meaning** of disease of the mind.

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| R v Luedecke 2008 ONCA 716 **R:** Applies *Stone* to sleepwalking (like in *Parks,* but has opposite finding), found DoTM. Balance twin goals of fair treatment of A and public safety [Incorporates *Winko*]. If there is a continuing danger (recurrence of triggers a la *Stone*) → policy concerns drive finding MD automatism. Pre-verdict: concern more about society. Post-verdict (Review Board): concern more about individualized assessment.  [**NB:** Review Board must have real evidence that D is still dangerous to continue hold].  **F:** Luedecke acquitted through non-insane automatism after sexually assaulting a woman at a party  I: Should DOTM have been found?  **L:** *Stone, Winko*  **A:** Since stone, starting PRESUMPTION is DOTM - assume DOTM, then D may rebut presumption. Focus on recurrence of triggers, not recurrence of sleepwalking ie. tiredness, drinking, stress …  **C**: A finding of MD Automatism should have been resulted. |

## Intoxication



### The Common Law Defence of Intoxication

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| DPP v Beard, 1920 HL **I**: Is intoxication a defence in criminal law?  **A**: When the **A** voluntarily became intoxicated and then committed a offence, his/her drunkenness can substitute for the voluntariness required for the offence itself (not true in Canada, per Daviault). For crimes that include a specific intent, evidence that the **A** was so drunk that he/she could not form that intent will lead to an acquittal. In such circumstances, the **A** can be convicted of general intent offences. 3 rules emerge from cases.   1. Insanity arising from drunkenness is a defence (disagreement in English law w/r/t whether insanity must be permanent to act as a defence; see Bouchard-Lebrun in Canada). 2. Where the **A**’s intoxication rendered him/her incapable of forming specific intent, this should be taken into account along with the other evidence in determining whether the **A** actually had that intent. 3. Where drunkenness falls short of incapacity to form intent, this does not rebut the presumption that the **A** intended the natural consequences of his/her actions—decreased inhibition is not enough.   **NB**: Written at a time when drunkenness was considered a moral failing. |

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| R v Bouchard-Lebrun, 2011 SCC R: Remember from above that presumption is no DoTM. But where the accused raises a defence of mental disorder alongside evidence of self-induced intoxication, the court must first consider s. 16 and **only if that defence does not apply should it turn** to s. 33.1.  F: A took blue pills and had a strange reaction and got violent.  I: How has Canadian law on intoxication developed since Beard?  L: *Robinson/Daley*: Contra *Beard* the question is whether the accused in fact formulated the *specific intent* in this case, NOT whether they are capable of forming the intent  *Daviault*: substituting the decision to get drunk with the general intent violates the *Charter*. If A is intoxicated to point akin to automatism, general intent negative. |

### Intoxication and Specific Intent

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| R v George, 1960 SCC **R:** For general intent offence, intoxication short of automatism will not displace proposition that people intend probable and natural consequences of their actions. If A charged with specific intent offence, if lesser included offense is GI, they can still be convicted of that.   * Robbery (*CC* s 343) is SI offense * Common assault is GI offense (all that is needed is intent to apply force).   F: TJ acquitted very intoxicated man who robbed/assaulted man b/c reasonable doubt he could form specific intent needed for robbery (specific intent offence). Went to SCC on whether lesser included offence of assault was available conviction.  I: What level of intoxication required for defence for a general intent offence?  A: **Ritchie** **J**: duty of TJ to decide on all included offences for which there’s evidence. Doesn’t matter if Crown makes reference to the offences. Distinction b/w general/specific intent: (1) specific: acts done ‘with the specific and ulterior motive and intention of furthering or achieving an illegal object’. (2) general: acts done ‘to achieve an immediate end’ common assault=general intent b/c intent is to physical act of applying force to another (immediate end). In this case, A knew he was hitting victim (inference that he intended).  **Fauteux J (concurring)**: Short of degree of drunkenness creating temporary insanity, intoxication could not remove intention to apply force. |

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| R v Bernard, 1988 SCC **R:** Sexual Assault is a general intent offence. The distinction between general and specific intent is based on sound policy. **Disagreement**: McIntyre 🡪 In cases of general intent, the choice to get drunk can substitute for the intent. Is constitutional b/c you are still proving a mental element.  Wilson 🡪 W/ general intent offences, substituting the choice to get drunk with the intent would violate s 7 and 11(d). As per *Whyte* and *Vallaincourt*, X can only sub for MR if X inevitably leads to MR (picked up on in ***Daviault***).  **F:** A charged with sexual assault causing bodily harm. Said he forced C to have sex because he was drunk, but stopped when he realized what he was doing. Appeal to SCC about whether sexual assault causing bodily harm is offence of general intent.  **I:** Is sexual assault general intent offence, and can intoxication be defense?  **L:** Leary v The Queen: ruled that former offence of rape was general intent offence and voluntary intoxication is no defense  **A:** McIntyre J: Drunkenness not a true defense and does not apply to general intent offences.  **C:** A convicted as was not extremely intoxicated. |

* The constitutionality of Wilson’s reasoning here has yet to be decided. S 33.1 does not square with her reasoning.

### Extreme Intoxication and General Intent

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| R v Daviault, [1994] 3 SCR 63 R: Where intoxication is akin to automatism, intoxication may serve as defence to GI crime. Where intoxication is not akin to automatism, not a defence to GI.  F: Daviault was extremely intoxicated when he sexually assaulted C.  I: Should extreme intoxication be a defence to a crime of general intent?  L: *R v Bernard* (Wilson J)  A: Link b/w alcohol consumption and commission of crime is not sufficient to substitute moral blameworthiness of getting that drunk for the MR of the crime. Must have expert evidence and intoxication should be akin to automatism. Whether or not akin to automatism decided on BOP standard of proof. |

***Note re Substitution for MR***

*Whyte*: it is permissible to substitute proof of one aspect of fault for proof of an essential element of an offence if aspect of fault being used inevitably leads to the mental element.

*R v Penno:* Where intoxication is an element of the actus reus, the defence cannot apply.

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| R v SN, 2012 NUCJ 2 **S. 33.1** enacted after *Daviault* with a long preamble emphasizing the desire to protect women and children from gendered violence, and recognizing the association between intoxication and violence, especially against women and children.  Excerpt from *R v SN* is of Nunavut judge recognizing that the context he/she will be applying 33.1 in is one in acknowledging where in Nunavut courts, there is hardly a case of violence against a woman where the offender is not intoxicated. |

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| Self-induced Intoxication ***When defence not available***  **33.1** **(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 as described in subsection (2).  ***Criminal fault by reason of intoxication***  **(2)** For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society 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 behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.  ***Application***  **(3)** This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person. |

### Distinguishing General from Specific Intent offences

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| R v Tatton **R:**   1. look to precedent. If the matter has been decided, look no further. 2. consider the crime itself and whether it requires “complex” reasoning    1. if crime is a “complex” one, then it is more likely that it will be one of specific intent    2. if it is not, then it is likely general intent.       * (**things to assess whether a crime is complex:** does it include intent to bring about certain consequences, require actual knowledge of circumstances or consequence? Does it require proof of an **ulterior purpose**?       * This is not exhaustive list ie. the existence of MR consequence does not have to mean a crime will be “complex” and therefore SI). 3. Account for relevant policy considerations    1. Existence of lesser included offences? (if there are lesser included offences, it may be more justifiable to allow a defence of intoxication and classifying a crime as specific intent).    2. What is the crime’s relationship to alcohol? Offences against the person and property are more commonly associated with alcohol and therefore there is a policy reason for perhaps withholding the defence and classifying a crime as one of general intent.   **Comment**: Cunliffe mentioned that this analysis is helpful, however unconvincing when you run it in relation to sexual assault. Sexual assault seems to require a complex reasoning process - and good old-fashioned assault simpliciter is available instead. However it is classified as general intent and the judge does not explain that this is a policy choice and we are drawing the line here that intoxication will not be used as an excuse.  Facts:  Tatton was intoxicated and committed arson … was not Daviault-ed though  Issue: How do you determine whether a crime is one of specific or general intent and whether the defence of intoxication should be available? |

Previously classified offences (from *Tatton*)

* General: assault, sexual assault (Cunliffe argues this one is general intent for policy reasons)
* Specific: murder, robbery, assault with intent to resist arrest (obiter), possession of stolen property (obiter)

## Self Defence

### Section 34

**The three elements set out in sub-section (1) are:**

1. A must believe on reasonable grounds that force is being used against them or another person or that a threat of force is being used against them or another person;
   * Rob Nicholson said that this was building on the SCC's comments in *Lavallee*
     + So it is modified objective.
2. A must commit the act that constitutes the offence for the purpose of defending or protecting themselves or the other person; and
   * This is about ***motive***.
3. the act committed must be reasonable in the circumstances.
   * Based heavily on SCC jurisprudence of what is reasonable

**The relevant circumstances stipulated in s. 34(2) [as an *inclusive* list – ie other factors may also be relevant]:**

1. the nature of the force or threat;
   * Does force mean "against the accused?" … Probably
2. the extent to which the use of force was imminent, and whether there were other means available to respond to the potential use of force;
3. the person’s role in the incident;
4. whether any party in the incident used or threatened to use a weapon;
   * Problem: women usually use weapons.
5. the size, age, gender and physical capabilities of the parties to the incident;
6. the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
   * Directly from Lavallee

(f1) any history of interaction or communication between the parties to the incident;

* Dr. Cunliffe has no idea what this adds

1. the nature and proportionality of the person’s response to the use or threat of force; and
2. whether the act committed was in response to a use or threat of force that the person knew was lawful.
3. Note the particular sub-section (3), which applies when a person claims to have been defending themselves or others from the actions of someone entrusted with the administration or enforcement of law.

### Interpreting and Applying the Self-Defence Provisions

#### Subjectivity and Objectivity

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| R v Cinous, 2002 SCC 29 **R:** There is not an a*ir of reality to EACH element of self defence* in Cinous’s case*.* Cinous believed he had no alternatives, but that belief was***NOT REASONABLE***in the circumstances*.* ***Failed objective component of third element of self-defence****.*   * Cite for proposition that each air of reality defence requires an air of reality be raised by A re: each element, and crown need only disprove one element BRD.   F:    Cinous whacks Mike while stopped at a gas station because he believes that Mike and Ice are planning to kill him. The three committed thefts together and Mike and Ice had been acting suspiciously.  I:    Is there an air of reality to A’s claim of self-defence? What is the test for air of reality?  L:    s.34  A:    TEST: Is there evidence upon which a properly instructed jury could reasonably find accused acted in self-defence and acquit? Burden is on A to show that: **i)** he believed on reasonable grounds (sub&obj) that he (or another) was about to be assaulted **ii)** did A reasonably apprehend death or grievous bodily harm? (sub&obj) **iii)** did A reasonably believe in the circumstances that there was no alternative? (sub&obj).  C: A convicted, no air of reality for self defence. |

* How would this go under s 34?

**S 34(1)**

* 1. Air of reality that subjectively believed on reasonable grounds that a threat of force was being used against him.
  2. Likely air of reality that he committed the act for the purpose of defending
  3. Air of reality that the act was reasonable in the circumstances?

**S 34(2)**

* + 1. Ambiguous as the threat, seen modified objectively, was putting on gloves etc (/)
    2. **Strongly** suggests not reasonable b/c court found there were other means (*Cinous* turned on this) (-)
    3. Perhaps took on some risk of this from being a criminal (-)
    4. Other parties had weapon (+)
    5. 2 large males with a history of violence (+)
    6. A had criminal history with Vs, but it is uncertain whether this history would lead him to expect violence against him (/)
    7. If the court believes the nature of the threat is ambiguous (as in (a)) then the act is out of proportion (-)
    8. Not applicable (/)
    9. Not applicable (/)
* Taken together, *Cinous* would have had the same.

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| Reilly v The Queen, [1984] 2 SCR 396 **R:** A’s intoxication should not normally factor into the modified objective standard because it cannot address the reasonable and probable grounds requirement.  **I:** Should the A’s intoxication be relevant in assessing whether he or she acted in self defence?  **A:** A’s perception that he was being attacked may be mistaken but still must be *reasonable in all the circumstances* . Intoxication may induce an honest mistake but it cannot address the requirement of reasonable and probable grounds . Contrasts this with the honest mistaken belief defence in *Pappajohn* which does not have the reasonable requirement |

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| R v. Kagaan R: Nova Scotia court said an accused’s Asperger’s syndrome should be taken into account by the jury as it made him highly anxious and paranoid. |

#### Proportionality and Other Aspects of “Reasonableness”

*CC* s 34(2)(g) codifies proportionality requirement

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| R v Kong, 2006 SCC 40 **R:** A person is not expected to weigh precisely the exact measure of defensive action. The trier of fact must look to all the circumstances to consider what is proportionate.  **I:** To be said to be reasonable, how should proportionality be measured?  **A:**   * A person is not expected to weigh precisely or (weight to a nicety) the exact measure of defensive action * A may be mistaken about the nature and extent of force necessary or self-defence provided the mistake was reasonable in the circumstances * Trier of fact must look to all the circumstances to consider what a reasonable person might do in the accused’s situation given the threatening attack and the force necessary to defend oneself * Requires a “tolerant approach” |

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| R v Nelson 1992 On CA R: Intellectual impairment should be taken into account in assessing an A’s reasonable beliefs and responses.  I: Should intellectual impairment be taken into account in assessing an A’s reasonable beliefs and responses?  A: An A’s diminished intelligence that affects his or her perception of and reaction to an assault might mean that his or her apprehension and belief could not be fairly measured against the perception of the “ordinary” man |

### Gendered Violence, “Battered Women,” and Self-Defence

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| Sheehy  * Sheehy offers a definition of battering and articulates that trials often descend into competing portraits of women as wholly victimised or undeserving.  Women themselves may reject the label of “battered” for a variety of reasons. * Battering: the systemic use of threats and acts of violence, whether minor or serious, by male partners to get their way   + Minor or serious - the threats and violence we see in the cases below are VERY serious.     - Serious violence tends to be necessary as a key element of the defence for what the courts are looking for   + By male partners - body of empirical evidence is about heterosexual relationships in which there gendered differences in the violence     - In Canada, a woman killed by partner/former partner every 6 days     - BUT, violence can arise in other contexts.  But it is far rarer. * There is a risk with expert testimony that everyone retreats to stereotypical portrayal of women as either completely non-violent until they kill partner, or as violent past the point of reasonableness   + This is too simplistic and ignores the nuances that arise in people’s relationships.  Woman may have stuck out at husband previously - must look at circumstances that give rise to this. * Many women accept a plea of manslaughter because they have difficulty justifying, even to themselves, that they have killed someone and that is was appropriate. * Women who are acquitted or get sentence of manslaughter almost never reoffend!! |

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| R v Lavallee, [1990] 1 SCR 852 R: There does not have to be an immediate temporal connection between A’s perception and A’s acts, and A’s perception of assault does not necessarily have to be accurate. The test is:   1. what A reasonably perceived, given her situation and experience and 2. whether A’s belief that she could not otherwise defend herself is based on reasonable and probable grounds given A’s history, circumstances, and perceptions.  * Expert evidence may be useful in analysing both questions in order to understand what A would have reasonably perceived the alternatives to be in circumstances of a battering relationship.   F: A shot V in back of head. Evidence established that V had been repeatedly and seriously violent towards A throughout duration of relationship. On night in question, V allegedly threatened A, telling her that ‘she would get it later’ and handed her a gun threatening to kill her if she didn’t kill him first.  I: (1) Can expert evidence be used in a claim of self-defence, and if so, to what extent?  (2) What is the required temporal connection between apprehension of death and A’s use of force in order to rely on s 34(2)? (3) How are we to judge ‘reasonable and probable grounds’ required by s. 34(2) in the context of a battered woman acting in anticipation of violence from her partner? |

* How would this go under s 34?

**S 34(1)**

1. Air of reality that A subjectively believed on reasonable grounds that a threat of force was being used against her.
2. Air of reality that she committed the act for the purpose of defending herself.
3. Air of reality that the act was reasonable in the circumstances?

**S 34(2)**

* + 1. Nature threat was clear statement of intent to kill (+)
    2. The threat was not necessarily imminent and (a sexist would say) she had other means (-)
    3. Not likely to weigh for or against her(/)
    4. V had a gun, which he said he would use on her, and gave it to her (/)
    5. He was a man and larger (+)
    6. **History of abusive relationship,** makes her actions more reasonable (+)
    7. Given the nature of the threat (death) killing is proportionate (+)
    8. Not applicable (/)
    9. Not applicable (/)
* Taken together, *Lavallee* would **definitely** be decided the same

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| R v Petel, [1994] 1 SCR 3 R**:** An A can still have access to self-defence if they make a reasonable error as to whether they are being attacked. Earlier threats are **very relevant** in determining if an A had a reasonable belief.  F:  E had lived with P, her daughter and her granddaughter. E threatened P frequently and beat her daughter. One day, E and his friend/partner in the drug trade R went to P’s house, forced her to weigh some drugs and threatened her daughter and granddaughter. After doing some drugs, A shot and wounded E and then when she thought R was lunging at her in retaliation, she shot and killed him as well. In the charge to the jury, the TJ said: earlier threats can be used to assess the situation but “the threat or assault that evening, in the context of… the carrying out of an assault, that must be assessed on July 21”  I: Did the TJ err in his charge to the jury?  L: Section 34 / *Lavallee*: imminence is not required for the apprehension of danger  A: The question for the jury to decide on self defence is: *did P reasonably beleive in all the circumstances that she was being attacke*d? This means that P can still have access to the defence if she makes a reasonable mistake as to the assault. The jury **charge suggested that the prior threats should only be used to determine whether there actually had been an assault and not in assessing P’s reasonable belief of the existence of an assault**. This emphasized the victim’s acts instead of the accused’s state of mind and deprived P of the benefit of a ***reasonable* error**. The threats used by E throughout their cohabitation are very relevant in determining if P had a reasonable belief.  C:  TJ erred. Retrial. |

* How would this go under s 34?

**S 34(1)**

* Air of reality that A subjectively believed on reasonable grounds that a threat of force was being used against her.
  + **Cite *Petel* for🡪Reasonableness of perception of threat supported by past abuse/belief that both of them were planning to harm her**
* The rest of the analysis is materially the same as in *Lavallee*

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| R v Malott, [1998] 1 SCR 123 **R:** **Major**: A TJ must inform the jury of how expert evidence may be used in understanding the following:   1. Why an abused woman might remain in an abusive relationship; 2. The nature and extent of the violence that may exist in a battering relationship; 3. A’s ability to perceive danger from her abuser; 4. Whether A believed on reasonable grounds that she could not otherwise preserve herself from death or grievous bodily harm.   **L’Heureux-Dube**: 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 have historically undervalued women. Court should resist “syndromization” by focusing on reasonableness of A’s actions in light of her personal experiences and experiences as a woman.  **F:** A and Malott were previously married and during the marriage M violently abused A and her children. The police declined to act when A asked them for help. After the separation, M still required A to participate in his drug trade and used his new gf to psychologically and emotionally abuse her. A shot M to death and then took a taxi to his gf’s house and shot and stabbed her. |

## Duress

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| Compulsion by threats **17** A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if the person believes that the threats will be carried out and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion, but this section does not apply where the offence that is committed is high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson or an offence under sections 280 to 283 (abduction and detention of young persons). |

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| R v Paquette 1977 **R:** The common law defence of duress is available to a person who is charged as a party to any offence (under 21(1)(b – aiding , 21(1)(c) – abetting, or 21(2) – common intention). This includes the list of offences that principal offenders are excluded from accessing under s 17.  F: P said that he was threatened with a gun to drive C and S to a store so they could rob it. In the course of the robbery an innocent bystander was killed. P was charged under 21(2) for murder.  I: Does section 17 preclude A from accessing the defence of duress?  L: Section 17 (statutory defence of duress), section 8(3) (common law defences still in force)  A: On its face section 17 precludes the possibility of the defence for murder or robbery, but this limit only applies to principal offenders (“a person who commits”). P can therefore rely on the common law defence of duress pursuant section 8(3) as he was charged as a party to the offence under 21(2). |

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| R v Ruzic 2001 **R:** Moral involuntariness is a PoFJ. It is similar to physical involuntariness, as R was not acting autonomously. S. 17’s reliance on proximity and immediacy infringes s.7 of the *Charter*; it is contrary to PoFJ to permit individuals who acted involuntarily to be declared criminally liable.  **F:** R was charged with possession and use of a false passport when she entered Canada. R testified that a man in Belgrade said that if she did not carry heroin to Canada on a fake passport he would harm her mother.  **I:** Is it a principle of fundamental justice that only morally voluntary conduct can attract criminal liability?  **L**: *BC Motor Vehicle Act:* Courts have the power and the duty to evaluate the substantive content of legislation for *Charter* compliance  **A:** Moral involuntariness is a PoFJ because it is analogous to physical involuntariness - a person acting morally involuntarily is not acting autonomously. S.17 does not preclude threats to third parties, it does exclude threats of future harm to the accused or to third parties. Its reliance on proximity and immediacy are contrary to PoFJ because they permit individuals who acted involuntarily to be declared criminally liable. This breach is not saved under section 1. Crown must prove moral voluntariness. |

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| R v Ryan 2013 F: R was the victim of a violent and abusive husband. After the police would not help her, she tried to hire someone to kill him. She contracted with an undercover cop.  A: **Statutory Defence of Duress** (After *Ruzic*):   1. a threat of death or bodily harm directed against A or a 3rd party; 2. A must subjectively believe that the threat will be carried out; (Cunliffe says also consider modified objective) 3. the offence A commits must not be on the list of excluded offences; and 4. A must not be a party to a conspiracy or criminal association.   **In addition, the following requirements were read into s. 17:**   1. A must have no safe avenue of escape from the threats (judged on a modified objective standard); 2. read out immediacy in *Ruzic* and added a weakened form of if: there must be a close temporal connection between the threat and the harm threatened; and 3. the offence committed by A must be proportionate to the threat.   [**NB:** 2, 5, and 6 should be considered holistically together]  **Common Law Defence of Duress**:   1. an explicit or implicit threat of death or bodily harm to A or a 3rd person; 2. reasonable belief (subjective belief that is reasonable) on A’s part that the threat will be carried out; 3. the absence of a safe avenue of escape, on modified objective standard; 4. a close temporal connection between the threat and the harm threatened; 5. proportionality between the threatened harm and the harm inflicted by A (modified objective standard); 6. A must not be party to a conspiracy or association where A knew that threats and coercion to commit an offence are the possible result.   C: stay of proceedings ordered. Statutory defence of duress and common law defence of duress clarified. |

* we will put a table at the top of the defence section that breaks down differences between defences. Differences b/w justifications and excuse.

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| R v Aravena R: Common law defence of duress is available to one who is party to any offence, even murder, b/c it would violate *Charter* and PoFJ convict a morally involuntary. However, defence will not readily be made out. Seems to possibly be reintroducing immediacy requirement for murder.  F: A (x3) had aided and abetted murders that had arisen consequent to internal strife in the Bandidos motorcycle gang. Common law defence because not principal offenders  **A: Doherty and Pardu JJ:** Harms of comparable gravity (eg kill or be killed) satisfy the first limb of proportionality: that the **harm threatened is equal or greater than the harm inflicted in response to the threat**.  A choice to commit the act or assist in a murder will not always fall below the standard articulated in the 2nd aspect of proportionality: **what society expects of a reasonable person similarly situated in the particular circumstances.** Modified objective standard. |

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| R v Hibbert **R:** Duress **does not negate the mental states** in 21(1)(b) and 21(2) but rather duress will excuse the offence. Purpose in section 21(1)(b) is synonymous with intention (NOT desire) and under s. 21(2), intention in common means simply that two persons have in mind the same unlawful purpose.  **F:** Hibbert was charged as party to an offence. Hibbert testified that he was forced by the principal to accompany him to the victim’s apartment and to lure the victim down to the lobby. Principal shot and killed the victim.  **I:** Does the defence of duress negate the MR of an offence?  **A:** Threats of death or bodily harm that affect a person’s state of mind but will not generally negate the MR. This would only be the case if parliament includes purpose (as in desire) as an element. Purpose in section 21(1)(b) is synonymous with intention, and does not require desire to bring the offence about. Under s. 21(2), intention in common means simply that two persons have in mind the same unlawful purpose.  **C**: A acquitted. |

## Necessity

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| Element (*Perka*) | Mens rea (*Latimer*) |
| A is in a pressing emergency of great peril | Subjective (A’s honest belief) and modified objective (taking A’s situation and characteristics into account, relying on Hibbert) (could also cite Lavallee) |
| Compliance with the law is demonstrably impossible | Subjective and modified objective |
| A’s response is proportionate to the threatened harm | Purely objective – no modification. Homicide might never be proportionate. |

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| R v Perka 1984 **R:** Defence of necessity has three elements:   1. A was in a situation of pressing emergency of great peril; 2. Compliance with the law was “demonstrably impossible” – there was no legal way out; 3. There was proportionality between the harm threatened by the situation and the  one inflicted by A’s response.   **Wilson** J: sometimes we should look at necessity as justification   * E.G. if they have a legal duty to stop the emergency, we want them to be able to break some laws in order   **F:** A (x 4) were on a boat conveying cannabis from one destination in international waters to another. The boat started to have difficulties, so they made an emergency landing in a bay on Vancouver Island. Their evidence was that they intended to repair the boat, reload the drugs, and proceed. They were charged with importing cannabis. TJ included the defence of necessity in his charge to the jury.  **I:** Do the A have access to the defence of necessity?  **A:** (1) in Canada necessity is an excuse and this means that the court is not condoning its actions; (2) criterion is the moral involuntariness of the wrongful action, measured on the basis of society’s expectation of the appropriate and normal resistance to pressure; (3) negligence or involvement in a criminal or immoral activity does not disentitle the actor the excuse of necessity; (4) actions or circumstances which indicate that the wrongful deed was not truly involuntary do disentitle; (5) to be involuntary the act must be inevitable, unavoidable and there must be no reasonable legal alternative; (6) the defence only applies in circumstances of imminent risk where the action was taken to avoid a direct and immediate peril.  **C**: Retrial. |

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| R v Latimer R: Must have air of reality to each element of defence of necessity to put defence to jury  **TEST**:   1. Did A honestly believe on reasonable grounds that he faced imminent peril? (In this case the argument would have been that Tracy faced imminent peril. (sug&obj) 2. Did Accused honestly and reasonably believe that he had no legal alternative? (sub&obj) 3. Was the harm the accused inflicted proportional to the harm he sought to avoid? (obj. only)   F: Latimer has 12yr daughter with severe cerebral palsy and kills her by carbon monoxide, appeals. That defence of necessity should have been left with the jury.  I: Did trial judge err in not leaving defence of necessity to jury?  L: *R v Perka*  C: TJ concluded that there was not evidence sufficient to give air of reality to any of the elements. |

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| R v Unger, 2002 ONCA R: It was not a reasonable legal alternative to fail to respond to the call for assistance. Interesting in this case: the judge’s reasoning almost make it sound justified even though this is more an excuse.  F:A was charged with dangerous operation of a motor vehicle. Member of voluntary organization of EMTs that supplemented ambulances. He drove on the wrong side of the street and broke the speed limit with lights flashing while driving to deliver emergency medical assistance to an injured woman.  **C:** The defence of necessity succeeds and the Crown should never have pressed these charges. |

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| Morgentaler v the Queen R: The defence of necessity is applicable where (1) the accused considered the situation so urgent that failure to act *immediately* could endanger life or health and (2) the accused did not have a reasonable alternative to act in compliance with the law  F: M performed an illegal abortion on a young woman because he did not have approval and it was not performed in a hospital. M worried that her determination to have an abortion might lead her to do something foolish if he did not help her.  I: Does M have access to the defence of necessity?  A: To use the defence of necessity a jury must find (i) the accused considered the situation so urgent that failure to terminate the pregnancy *immediately* could endanger life or health and (ii) the accused could not comply with the law. The evidence in this case does not speak of a real and urgent medical emergency and M made no attempts to bring himself within the bounds of the law when performing this abortion. |

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| R v Morgentaler, Smoling and Scott OCA 1985 **R:** Before the defence of necessity is available, the conduct of the accused must be truly **involuntary** and there must be evidence that compliance with the law was **demonstrably impossible.**  **F:** The defendants charged with conspiracy to procure a miscarriage. The defendants acquitted but Crown appealed saying that the defence of necessity should *not* have been left to the jury.  **I:** Did the TJ err in leaving the defence of necessity to the jury?  **A:** Before the defence of necessity is available, the conduct of the accused must be truly **involuntary** and there must be evidence that compliance with the law was **demonstrably impossible.** The defendants consciously agree to violate the law; any kind of planning or deliberating are incompatible with “involuntary conduct”.  **C:** There was no evidence to support the defence of necessity. |