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# 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;

s.92(14) administration of justice, including courts of criminal jurisdiction; and

4

s. 92(15) punishments (inc. imprisonment) for contravening provincial laws that within

provincial constitutional jurisdiction

## Criminal Code, 1985

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

s. 8(3) preserves common law justifications and 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)

## Charter of Rights and Freedoms, 1982

Sets out constitutional rights and freedoms, and the limits to those rights and freedoms. These are all

significant to criminal law. The ones we will focus on this year include:

s. 1 subject only to demonstrably justifiable reasonable limits prescribed by law;

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 (particularly **s. 11(d**) the right to

be presumed innocent until proven guilty in a fair trial)

## Constitution Act 1982, Part VII

s. 52 sets out principle of constitutional supremacy and processes for amendment

# The Commencement of criminal proceedings

1) Police officer witnesses an offence being committed or a citizen makes a complaint to the police which is investigated 

2) formal charging document (*Information)* 

3) appearance before justice of the peace and swears that he has reasonable grounds to believe an offence has occurred 

4) JP will *issue process:* can compel an accused person to come to court and answer the charge against him- can be done in an number of ways- a) confirm an earlier promise to appear in court made by the accused to the police; b) issue a summons that the accused appear in court; c) order that a peace offer arrest the accused

# Classification of Offences

Summary Offences**:** are tried by judge alone in provincial court with no preliminary hearing. Usually

carry a maximum of six months’ imprisonment and $2,000 fine (s. 787 *Code)* but offence creating

section may vary this

Indictable offences**:** are generally more serious and may only be created by federal Parliament. Place and mode of trial vary with type of offence:

s. 553 offences are within the absolute jurisdiction of the provincial court (e.g. theft under

$5000)

s. 469 offences are within the absolute jurisdiction of the superior court, and involve a

preliminary hearing. Trial is by judge and jury, unless both parties consent to a trial by judge

alone (s. 473)

*Elective offences* include all indictable offences not listed in either s. 553 or s. 469. The accused

may elect the place and mode of trial- in provincial court; in superior court by judge alone; or in

superior court by judge and jury

Hybrid offences**:** may be tried as summary or indictable offences, at the Crown’s choice. The offence-creating section will usually make the hybrid nature of the offence clear. Place and mode of trial are established by the Crown’s decision.

# Trial Process

**1) Preliminary hearing:** test for committing A to stand trial

Has the Crown introduced some evidence on each element of the offence upon which a

reasonable jury, properly instructed, could convict?

If this test is not met, A is discharged (not acquitted)

**2) End of Crown case**

Defense may make “no evidence” motion: crown has failed to introduce some evidence on each element of the offence that, if believed, could prove it beyond a reasonable doubt.

If this motion is successful, A is acquitted.

**3) General legal/ persuasive burden of proof**

Crown must prove all elements of the offence beyond a reasonable doubt. This emerges from

common law, and is enshrined in s. 11(d) of the *Charter*

**4) Reverse onus provisions (need to consider s. 11(d) *Charter)***

Place an evidentiary burden on A to adduce some evidence on an issue, and a legal burden to

establish the proposition on a balance of probabilities (For example, *Oakes* and *Whyte*)

**5) Mandatory statutory presumptions (need to consider s. 11(d) *Charter)***

Place an evidentiary burden on A to displace a statutory presumption by pointing to “evidence

to the contrary” that will raise a reasonable doubt about whether the presumption is correct (for example, *Downey)*

**6) Permissive presumptions**

Allow, but do not require, the jury to infer one fact from another (for example, jury may infer

knowledge that goods were stolen from fact that accused possessed stolen goods.) May also be

displaced by accused’s evidence

**7) Defenses**

Accused must give “an air of reality” to the defence before it will be left to the jury. (That is,

bring some evidence that has the potential to raise a reasonable doubt.) If this evidentiary

burden is met, the Crown must disprove the defence beyond a reasonable doubt. (Possible

defences: self-defence, provocation, entrapment, automatism)

*Some defences operate as reverse onus provisions, and require the accused to prove the defence to a balance of probabilities. These raise* ***s. 11(d)*** *Charter issues*

## Criminal Trial Timeline

* + - 1. Arraignment – formal reading of the charge
      2. Plea Entered – if Guilty, accused is sentenced. If not guilty, continue on
      3. Crown case – calls witness, crown examines, then Defence can cross examine
      4. Crown case closed
      5. Defence may make a motion of No Evidence
  + Crown may reply
  + If Judge rules in favour of motion, accused acquitted
  + If Judge denies motion, Defence may go to step 6 or may choose not to call evidence and go to step 7
    - 1. Defense case – defence calls witness, defence examines, then crown cross examine
         * Documentary/real evidence may also be entered as evidence
      2. Defence case closed
      3. Closing arguments – If defence called evidence then Defence goes first.
      4. Judge’s ruling

## Appeals

* Both Crown and accused may appeal on the ground that there was an err in law, this can happen when:
  + Judge makes an incorrect evidentiary ruling
  + Errs in explanation of the law to the jury (in trial by jury)
  + Misstates the law in reasons for judgment (in trial by judge alone)
    - Error must be sufficiently important to result that there is a reasonable possibility that the verdict would have been different
    - Accused may also *an unreasonable verdict* that is unsupported by evidence
  + Accused asking CA to find no reasonable jury, properly instructed, could have convicted the accused based on the evidence
  + Finding of unreasonable verdict – conviction overturned/accused acquitted
* Accused can appeal on basis of miscarriage of justice – eg. when Crown engaged in misconduct, or when jury was not impartial, or when expert witness given false evidence.
  + If successful – court may order new trial or acquit the accused

# Burden of Proof

## R v. Lifchus [1997]

Facts and grounds: L was a stockbroker convicted of Fraud at trial. L appealed on the grounds that the trial judge erred in directing jury that proof beyond a reasonable doubt was to be determined in its ordinary everyday meaning. Manitoba Court of Appeal granted L’s appeal, and ordered a new trial. The Crown appeal to the SCC. A’s appeal to the SCC succeeded, because TJ mis-directed the jury regarding proof.

* Explaining the meaning of BRD is an essential element of the instructions given to a jury, and is inextricably linked with the presumption of innocence- connection to wrongful convictions (fair trial, fundamental justice)
* The test for appellate review is whether it is *reasonably likely that the instruction left a misapprehension as to the correct burden and standard of proof*
* Certain analogies should be avoided when describing RD to a jury. Instead RD is a doubt based on reason and common sense, which must be logically based upon the evidence or lack of evidence. Has a specific meaning in the legal context, may not correspond to the meaning in ordinary usuage (Cory J proposed an appropriate instruction)
* RD is not based on sympathy or prejudice, nor it is an imaginary or frivolous doubt. It requires more than a balance of probabilities, and is much closer to an absolute certainty.
* Verdict ought not to be disturbed if the charge, **when read as a whole**, makes it clear that the jury could not have been under any misapprehension as to the correct burden and standard of proof to apply. But if the charge as a whole gives rise to the reasonable likelihood that the jury misapprehended the standard of proof, then as a general rule the verdict will have to be set aside and a new trial directed
* **Note**: **Establishes that TJ has to tell jury what beyond a reasonable doubt means. Provides a potential script for instructing jury about RD. Don’t need exact words**

## R v. Starr [2000]

Facts and Grounds: A appealed from his conviction for two counts of first degree murder. One ground was that TJ had not properly instructed the jury regarding RD. Iacobucci J. allowed the appeal on this ground; while L’H-D J. dissented

**Per Iacobucci J. at 2-15:**

• TJ instruction *must distinguish proof BRD from proof to balance of probabilities*. Best way to do this is to describe it has “*much closer to absolute certainty*” and to articulate that the

standard is more than a BOP.

* RD must be defined as unique to legal process, *not be analogy with ordinary or everyday reasoning,* or by synonym, or using language of morality.

**Per L’H-D J at 2-18 (dissent!):**

• TJ’s instruction in this case was adequate to convey the principle that the standard is much

closer to absolute certainty than to BOP

• Appeal courts should not isolate single phrases from the context of a broader charge, and

order new trials on the basis o these single phrases. Instead, read the entire charge “akin to a

work of literature that must be studied in its entirety” and not as a checklist or multiple

choice exam

## R v. J.H.S. [2008]

Facts – JHS convicted of sexual assault, but NSCA set aside conviction because of misdirection about “beyond reasonable doubt”. Crown appealed to SCC. Appeal allowed, JHS’s conviction reinstated.

* + - Affirming *R v. W(D)* [1991] SCC, where credibility is a central issue at trial, TJ must explain relationship b/w credibility and Crown’s burden of proof.
    - *W(D)* sets out three rules when A’s credibility at stake:
      1. If jury believes A, then must acquit
      2. If jury doesn’t (wholly) believe A but is left with RD after hearing evidence, must acquit
      3. If jury doesn’t believe A and A’s evidence doesn’t raise a RD, but accepted evidence does not prove offence BRD, then must acquit.
* JHS elaborates on these rules based on subordinate courts:
  1. First rule, applies when jury believes exculpatory explanation
  2. Second rule, applies when jury disbelieves parts, but not all, of A’s exculpatory explanation, or does not know who to believe. **It can’t support acquittal if A’s exculpatory evidence is disbelieved**.
  3. When jury doesn’t know who to believe, the jury must acquit (**New to JHS**)
     + Test for whether instructed jury about RD well enough: could the jury be under any mis-apprehension about correct burden of proof. Take instructions as a whole.

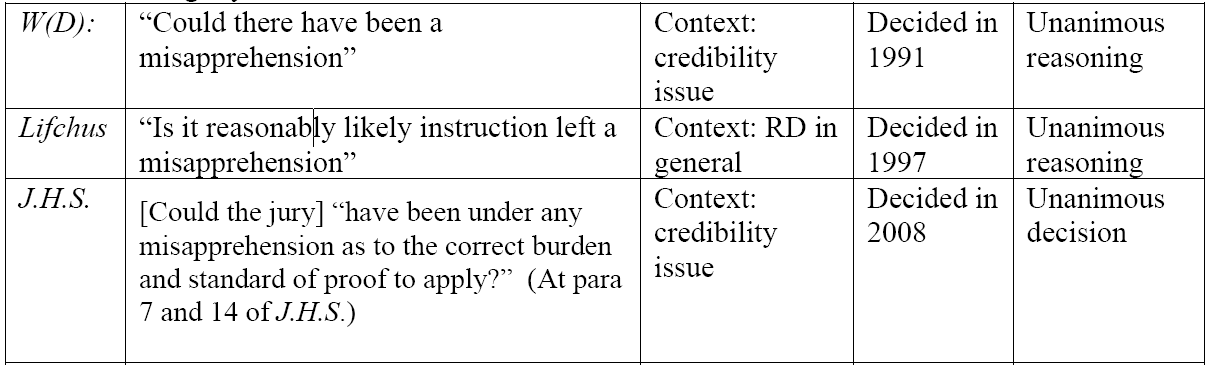
**Note:** This reasoning only applies to elements the Crown proves BRD not to reverse onus provisions (not to situations where P has to prove something to balance of probabilities)

**What is the threshold for appellate reversal in *W(D),* as explained in *J.H.S.?***

[Could the jury] “have been under any misapprehension as to the correct burden and standard of proof to apply?” (At para 7 and 14 of *J.H.S*.)

## Policy Concerns

There is ambiguity in the standard:



* Standard was stricter in *W(D)*, difference between “reasonably likely” and “is there is a possibility”
* Contradictory decisions from the same court, so when dealing with a related issue, point out the ambiguity- say that there are cases that point to different conclusions
* Can reason that the court has established a different standard when credibility is concerned compared to when other issues are concerned (RD in general)… So when the issue of credibility of a witness is an issue, apply the *J.H.S.* standard
* Go to policy to resolve the issue: ask whether “there could have been a misapprehension” (the stricter standard), if the answer is “no” then its ok… but if the answer is “yes”, and its“no” to whether “its reasonably likely” than it would be inefficient to hold judges to the higher standard

# Constitutional Dimensions of Proof

(The burden of proof and s. 1 of the *Charter*)

## Charter analysis:

1) Is there a *Charter* breach? (Re. burdern of proof, consider ss. 7 and 11(d)- per *Oakes,* any law which raises the possibility that A might be convicted despite the existence of a reasonable doubt will breach s. 11(d). *Oakes* and *Whyte* demonstrate that this includes a reverse onus provision, *Downey* reflects that it also includes a mandatory statutory presumption)

2) If so, is the law saved by s. 1 of the *Charter?*

## Oakes Test

Onus to prove constitutionality rests on the party seeking to uphold the provision, to “very high degree of probability”. Evidence is generally required, and should be “cogent and persuasive and make clear…the consequences of imposing or not imposing the limit.”

Is there a pressing and substantial objective, i.e. one of sufficient importance to justify

overriding a constitutionally protected right or freedom?

Is the law proportionate to the desired objective?

i)🡪 Is the measure carefully designed to secure the objective? Is there a “rational connection

between the objective and the impugned provision? (at minimum, the provision must be

“internally rational”- e.g. there must be a rational connection between possession and

trafficking)

ii)🡪 Does the measure minimally impair the *Charter* right? *Oakes* said that measure should

impair the right “as little as possible” citing *Big M Drug Mart*

iii)🡪 Is there proportionality between the effects of the measure and the objective?

## R. v. Oakes (1986)

Facts – Appeal concerned s.8 of the *Narcotic Control Act*, which was a reverse onus provision that if the accused was in the possession of a narcotic, he is presumed to be in possession for the purpose of trafficking. Ontario CA held that this was unconstitutional b/c it violated the presumption of innocence in 11(d), the crown appealed.

Issue – Can the violation of the *Charter* be justified?

R easoning– Court establishes a test (*Oakes Test*):

1. Is there a substantial and pressing objective, i.e. one worth overriding constitutionally protected right or freedom?
2. Is the law proportionate to the desired objective?
3. Is the measure carefully designed to secure the objective? (Is there a “rational connection” b/w the two?)
4. Does the measure minimally impair the *Charter* right?
5. Is there proportionality b/w the effects of the measure and the objective?

Analysis –

1. Decreasing narcotics trafficking is a substantial and pressing objective.

1. Is the law proportionate to the desired objective?
   * 1. *NCA* fails this step b/c it is overinclusive (eg. possession of a small/negli-gible amount of narcotics doesn’t support an inference of trafficking)

C onclusion – *NCA* violates the *Charter* and isn’t saved by s.1

**Note:** Oakes about stopping stigma attached to being charged. Wants to stop innocent people from being charged, prevent wrongful convictions.

# Elements of an Offence

## How to determine the AR

1) **Conduct:** what act(s) or omission(s) must the Crown prove for this offence?

* Sometimes many acts can satisfy the requirements of the offence (murder)
* The act or omission must be voluntary for criminal liability, must be the product of a conscious mind

2) **Circumstances:** many criminal offences require proof that the relevant act or omission was committed in particular circumstances.

* May include not only the presence of particular circumstances, but also the absence of others

3) **Consequences**: many criminal offences prohibit certain conduct in various circumstances regardless of the consequences of that conduct. Other offences require proof of particular consequences as part of the AR (murder requires proof of death)

* Whenever a consequence forms part of the AR, causation must also be proven- it must be proven that the accused brought about the prohibited consequence by means of the prohibited conduct

## How to determine the MR

May be measured on either a subjective or objective basis:

* *Subjective fault*: accused had the actual intention, knowledge, or recklessness to commit an act in a particular circumstance, or bring about a consequence, what they knew or intended
* *Objective fault*: whether the ordinary person should have known or would have intended in the circumstances- gross negligence: a marked departure from that of the reasonable person in the circumstances
* Start with the wording of the statute. If the statute is silent or incomplete, start from the presumption that true crimes require the Crown to prove subjective MR beyond a reasonable doubt in relation to at least some element of the AR

## Subjective Mental states:

**1) Intent**: a person intends to carry out an act when they do so purposely or deliberately, in other words not accidentally. A person intends the consequences of his act when he acts for the purpose of bringing about that consequence, or where he is substantially certain that the consequence will result from his act

2) **Knowledge**: an actual awareness that a particular circumstance exists or does not exist.

* **Wilful blindness:** one actually suspects the existence or non-existence of a

particular circumstance but deliberately refrains from confirming hat suspicion, is

equated with knowledge

3) **Recklessness:** a person is reckless to a particular act or consequence occurring where she foresees that it may occur, but chooses to proceed in the face of the risk. Although something less than full intention or knowledge, is sufficient to satisfy the requirement of subjective mental fault

## How mens rea corresponds to the components of the actus reus:

*(The AR and MR must correspond in time)*

1) **Conduct**: must be intention or reckless act or omission

2) **Circumstance**: must have knowledge of the circumstance, or be reckless or wilfully blind to its existence

3) **Consequence**: must intend or be reckless as to the consequence

## Included offences

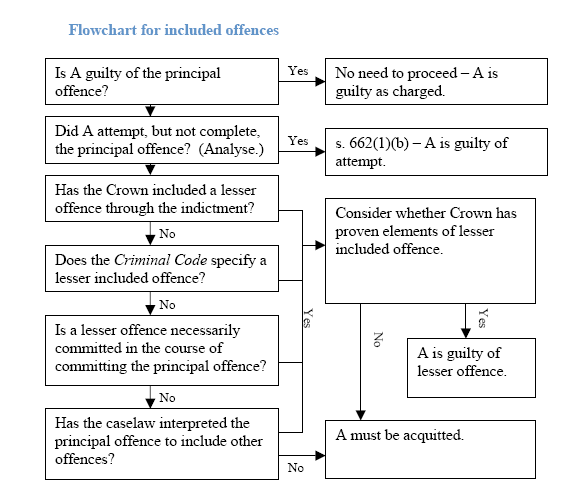
Accused may only be convicted of:

(a) an offence with which s/he is charged; or

(b) an offence that is included within the charged offence.

Included offences may be:

* specified in the *Criminal Code* – see for example s. 662(2); or
* included by the operation of s.662(1) *Criminal Code*:
  + because the Crown has phrased the charge in a way that incorporates a lesser offence (for example, assault with a weapon as a lesser alternative to attempted murder)
  + because the lesser offence is necessarily committed in the process of committing the greater offence (eg. ss. 266 and 267(b)); or
  + because the accused attempted to commit the charged offence, but did not complete it (s.662(1)(b)).



# Actus Reus

## Principle of Legality

* *Charter* **s. 11(g)** enshrines the right not to be found guilty of a criminal offence unless the relevant act or omission was, at the time, an offence under Canadian or international law or criminal according to the general principles of international law.

**Effect:** Establishes constitutional limits to criminalisation. (Remember s.1.)

* *Criminal Code* **s. 9** provides that common law offences, U.K. criminal law, pre-federation provincial criminal law can no longer form the basis for a criminal conviction. Exception for contempt of court.

**Effect:** Expresses federal parliamentary intention to codify criminal law within C.C. and other statutes.

## Frey v. Fedoruk (1950)

Facts – Frey was caught peeping into the window of Fedoruk’s house. Fedoruk caught Frey, brought him back, called the police and Frey was arrested and charged with violating the CL offence of breaching the peace.

Analysis– Frey’s conduct not a criminal offence, but said to be criminal at common law at trial.

Decision:

* There is no crime unless it is in the criminal code, or by authority of previous case, or enacted by Parliament
* Anything becoming crime has to be enacted statutorily first.

## R. v. Clark (2005)

Facts: The accused was observed masturbating in his living room by neighbours . A was charged under ss. 173(1)(*a*) and 173(1)(*b*) of the *Criminal Code*.  Section 173(1) - wilfully do an indecent act (*a*) “in a public place in the presence of one or more persons”, or (*b*) “in any place, with intent thereby to insult or offend any person”.  TJ convicted A under s. 173(1)(*a*) after finding he had converted his living room into a “public place” but acquitted him under s. 173(1)(*b*) after finding that it did not appear the accused knew he was being watched or intended to insult or offend any person.

* SCC quashes the conviction on grounds the TJ/CA erred in determing that Clark’s living room was a public place.
* Case demonstrates the judicial process of reading the text of the code, looking at translation and plain meaning of words to determine how to interpret (“public place”)

## R. v. Moquin (2010)

Facts: A accused of assault causing bodily harm under s. 267(b) and uttering threats under s. 264.1(1)a. TJ found Moquin guilty of common assault, acquitting him of assault causing bodily harm and uttering threats.

* Decision overturned on appeal. Found that TJ had erred in the test for bodily harm that he applied.
* Manitoba CA cites *McGraw* in determining that bodily harm is different/less substantial than “serious bodily harm” as set out in *McGraw.* TJ was enforcing a standard more akin to serious BH.

## Omissions

Liability for an omission may arise:

* + - Where the statute expressly imposes a duty to act;
    - Where it is clear that the offence can be committed by a failure to perform a duty, but the statute does not spell out the duty (*Thornton*)
    - Where the statute may be interpreted in a manner that imposes liability for an omission (*Moore*)

## Fagan v. Commissioner of Metropolitan Police [1968]

(English case!)

*A stopped car on police officer’s foot, initially refused to move vehicle. A was charged with assault.*

Per majority: “To constitute the offence of assault some intentional act must have been performed: a mere omission to act cannot amount to an assault. … a distinction is to be drawn between acts which are complete – though results may continue to flow – and those acts which are continuing.”

**Effect:** Requires contemporeity between *actus reus* and *mens rea*. Reflects judicial reluctance to punish omissions in absence of clear statutory language or precedent. **Note** one way to circumvent requirement is to interpret related actions as a “continuing act” as the majority did in *Fagan*.

## R. v. Moore [1978]

*A ran red light on bicycle, then refused to stop when requested to do so, was charged with obstructing police.*

Per majority: s. 450(2) *C.C.* (today s. 495(2)) imposes a duty on police officers to try to ascertain A’s identity in order to issue a ticket. A’s failure to identify himself obstructed police effort to discharge that duty.

Per Dickson J. in **dissent**: common law should not impose a duty to identify self upon anyone in the absence of express statutory provision. “Omission to act in a particular way will give rise to criminal liability only where a duty to act arises at common law or is imposed by statute.” [At 4-13.] No duty to identify oneself in A’s circumstances arises from statute or common law. Followed by BCCA in *Greaves* [2004].

**Effect:** a duty to act may be implied from statute. Note that *Moore* may no longer be followed.

## R. v. Thornton [1991]

*A donated blood to Red Cross, knowing he was HIV+*

The common law duty to refrain from acting in a way that is reasonably foreseeably likely to cause serious bodily harm to another person is a “legal duty” or “duty imposed by law” for purposes of *C.C.* “Unlawful act” means an act proscribed by legislation.

**Effect:** A common law duty constitutes a “legal duty” that may form the basis of criminal liability.

In summary, liability for an omission may arise:

(a) where a statute expressly imposes a duty to act;

(b) where statutory language provides that the offence can be committed by a failure to perform a duty which arises at common law (*Thornton*);

(c) where the “omission” is really part of a continuing act, which corresponds in time with *mens rea* (*Moore*).

## Voluntariness

It is a general principle of the criminal law that there can be no finding of guilt unless the offence was committed voluntarily. Judges and scholars have debated whether involuntary behaviour negates the *mens rea* of the offence (makes the behaviour unintentional) or negates the *actus reus* (because the acts themselves are not really the acts of the accused.) It would appear that while earlier cases, such as *Lucki*, *infra*, assumed the former, more recent decisions view involuntariness as negating the *actus reus.*

The principle of voluntariness is complicated because the source of the involuntary behaviour is also significant. Certain kinds of involuntariness fall into other categories:

**Drugs/Alcohol**: the legal effect of this claim depends on whether the consumption of the intoxicants was voluntary. Where the accused **voluntarily consumes alcohol or drugs**, he must meet the requirements of the **defence of intoxication**. We will discuss this defence later in the course. If the **consumption of intoxicants was involuntary**, for example, through the deception of another person, and where the intoxication was sufficient to render his criminal actions involuntary, the accused will be acquitted. These types of cases are treated the same as the three examples listed above.

**Mental disorder**: When an accused argues that his actions were involuntary because he was **suffering from a disease of the mind**, he must meet the requirements of the special plea of **mental disorder**. We will discuss this later in the course as well.

**Automatism**: (a dissociative or robotic state) caused not by a disease of the mind, but by some other factor (extreme shock, sleepwalking, hypnosis, etc.), he must meet the requirements of the defence of **non-mental disorder automatism**, which we will also discuss during our study of defences.

## R. v. Lucki (1955)

Facts: A’s car skidded onto left hand side of road, collided w/ another car

A on wrong side of road by “involuntary act for which he isn’t to blame.” Offence of driving on wrong side of road incorporates at least as much mens rea as to require voluntariness.

Conclusion:

* requirement that an **illegal act be voluntarily performed is minimum requirement for finding A guilty of this crime** (suggests voluntary is part of mens rea.

## R. v. Wolfe (1974)

Facts: A hit victim w/ telephone receiver in ‘reflex action’ after victim hit A

Some intent is necessary ingredient in assault occasioning bodily harm. Reflex action isn’t voluntary action for this purpose.

* Example of involuntary action; voluntariness analyzed as aspect of AR
* Voluntariness is required before there can be a finding of guilt

Voluntariness becomes defence when:

a) A voluntarily consumes drugs or alcohol and alleges intoxication

or involuntarily consumes drugs or alcohol

b) A alleges he was suffering from disease of mind

c) A alleges he was in state of automatism

# Causation

## Structure of Analysis:

1. Ask whether the AR of the offence includes a consequence. If so, the Crown must prove factual and legal causation.
2. Factual Causation may be analysed by asking “but for the accused’s actions [or omission], would the consequence have ensued?”
3. Legal Causation is sometimes specified in the statute (eg. ss.224-6, homicide). Even if causation is statutorily defined, it may be necessary to consider the CL as well.
4. Common Law: legal causation requires the trier of fact to consider whether the accused’s actions [or omissions] were “more than a trivial cause” of the consequence (*Smithers*). Whether contributing factor beyond *de minimus* range.

* In *Nette*, a slim majority held that these words are equivalent to requiring that the accused’s actions be “a significant contributing factor” to the consequence.
* Minority opinion (L’Heureux-Dube J.) said this elevates the *Smithers* test

1. For some types of first degree murder, there is an additional test for the extent of A’s participation in the killing.

* *Harbottle*: SCC held that to constitute first degree murder under s.231(5), A’s actions must be an essential, substantial and integral part of the killing. This usually requires A take a physical role in the killing.

**When to consider Causation**

* + Analyse AR under the conduct/circumstances/consequences rubric
  + Causation becomes a factor if AR incorporates consequences
  + Be alert, statutory wording may be subtle – it may not use the word “cause”

**Two English cases on causation (Smith/Blaue):**

## R. v. Smith [1959]

*A was involved in a fight between regiments at an army barracks. A stabbed V, who was dropped twice on the way to medical treatment, then misdiagnosed in the disorder upon arrival. V died and the question for the court was whether A’s actions met the test for causation of V’s death.*

Parker C.J. A caused V’s death if that death was still **an operating and substantial** cause at the time V died. The earlier case of *Jordan* should be confined to its facts (V’s injuries had nearly healed when negligent medical treatment caused V to die). No reasonable jury could come to any conclusion other than that V’s original wound (inflicted by A) caused his death.

## R. v. Blaue [1975]

*A indecently assaulted V, stabbing her four times when she refused sexual intercourse. V was a Jehovah’s witness and refused a blood transfusion that would almost certainly have saved her life. A argued that V’s refusal to consent to medical treatment was an* ***intervening*** *act that* ***severed the chain of causation****.*

Lawton L.J. The physical cause of death was bleeding into the pleural cavity arising from a stab wound which penetrated V’s lung. This bleeding was caused by A, not by V’s decision to refuse treatment. The reasonableness of V’s decision is not a question for the jury, and it did not break the causal connection. When V died, the stab wound was an **operative cause of death**.

## R. v. Nette (2001)

*V, aged 95, died after being left alone in her house. Her arms and legs were tied behind her back, and a garment tied around her neck and chin and she died 24 – 48 hours after being left in this position. A confessed to the murder to an undercover police officer, but denied responsibility at trial. A was convicted of 2nd degree murder. The question at trial was whether a higher degree of causation is required to convict A of 2nd degree murder than that required for manslaughter.*

**Arbour J.** It is necessary to distinguish between factual and legal causation, although only one direction need be given to the jury. Legal causation is a policy question – should A be held responsible in law for the death, and if so to what degree? Causation is, in this sense, a question of fault which is largely common law but also has statutory dimensions (e.g. s. 222(5)). The criminal standard differs from the civil standard of causation.

**The general test for causation of homicide is:**

The standard expressed in *Smithers:* the contributing action must be at least a contributing cause of death, outside the *de minimis* rage

* There is only one standard of causation for homicide offences
* That standard may be expressed using different terminology, but it remains the

standard expressed in *Smithers*

**Where causation is at issue in a homicide trial, the jury should be told to ask:**

Whether the acts of the accused were a “beyond *de minimis”* contribution that triggers criminal liability The question to be asked is whether an act or series of acts consciously performed by the accused is or are so connected with the event that it or they must be regarded as having a sufficiently substantial causal effect which subsisted up to the happening of the event, without being spent or without being in the eyes of the law sufficiently interrupted by some other act or event

* The relevant question is did the accused cause the victim’s death. The fact that other persons or factors may have contributed to the result may or may not be legally significant in the trial of the accused. It will be significant, and exculpatory if independent factors, occurring before or after the acts or omissions of the accused, legally sever the link that ties him to the prohibited result
* Trial judges have a discretion in choosing the terminology they wish to use to

explain the standard

* Causation issues are case-specific and fact-driven, for that reason it is important to afford a trial judge with the flexibility to put issues of causation to the jury in an

intelligible fashion that is relevant to the circumstances of the case

**The test for causation in first- degree murder is:**

In light of *Harbottle,* where the jury must be instructed on first degree murder in addition to manslaughter or second degree murder, the terminology of “substantial cause” should be used to describe the applicable standard for first degree murder so that the jury understands that something different is being conveyed with respect to the requisite degree of participation of the accused in the offence.

The acts of the accused have to have made a “significant” contribution to the victim’s death to trigger culpability for the homicide while, to be guilty of first degree murder under s. 231(5), the accused’s actions must have been **an essential, substantial and integral part of** the killing of the victim.

**The test for causation in second-degree murder is:**

The standard is the same for all homicide cases: the *Smithers* standard applies –the accused must have been more than an insignificant or trivial cause of the victim’s death or at least a contributing cause of death outside the *de minimis* range.

The terminology of substantial cause in *Harbottle* is used to indicate the increased degree of participation in the killing that is required to raised the accused’s culpability to first degree murder. *Harbottle* did not raise the standard of causation that applies to all homicide offences from the standard expressed in *Smithers.*

**L’Heureux-Dube J.** The formulation offered by Arbour unreasonably increases the standard of causation above that delineated in *Smithers.* The better formulation is:

A contributing cause of death that is not trivial or insignificant

* To remove the double negative formulation from the *Smithers* causation test would effect a radical change to the law
* A “significant contributing cause” calls for a more direct causal relationship than the existing “not insignificant” or “not trivial” test, thus raising the standard from where it currently stands
* Something that is not trivial or not trifling is not necessarily something that is important

***Smithers Facts:*** A and V became engaged in a physical altercation following a hockey game. A gave V one or two punches in the head and then, gave the victim or hard, fast kick in the stomach. Within a few minutes of the kick, the victim was dead. An autopsy revealed that death had occurred from aspiration of vomit, which was caused by a malfunctioning of the victim’s epiglottis. Crown argued that the kick had precipitated the vomiting and the aspiration of the vomit, and that A had accordingly caused V’s death. Jury convicted A of manslaughter.

***Harbottle Facts:*** A and his accomplice forcibly confined the victim and A watched as his accomplice brutally sexually assaulted her and mutilated her with a knife. His accomplice then proceeded to kill V, first trying to slash her wrists and, when that proved unsuccessful, strangling her. To stop the victim from kicking to defend herself, A held down her legs so that his accomplice could succeed in strangling her. Cory J concluded that in order for A to be found guilty under s. 214(5), with the increased stigma and sentence a conviction of first degree murder entails, A must play a very active role, usually a physical one, in the killing and his actions must form an essential, substantial, and integral part of the killing of the victim.

## R. v. J.S.R. [2008]

*A was involved in a gunfight, V was shot in the cross-fire. A did not shoot the fatal shot. Question on appeal was whether A could be committed to stand trial for 2nd deg murder.*

The questions for the judge on preliminary hearing were:

1. Could the jury reasonably conclude that JSR’s actions were a contributing cause, beyond *de minimis,* to the death of V?

2. Did the act of the northbound shooter in firing his gun and inflicting the fatal wound on V constitute an intervening cause that severed any causal link that may have existed between the actions of JSR and V’s death?

A should be committed to stand trial for 2nd degree murder.

**1. Mutual gun fight scenario**: evidence a reasonably jury could infer that the gun fight was a *joint endeavor* between two rival groups, both armed with loaded guns, both unwilling to retreat, and both prepared to open fire on a sidewalk crowded with innocent bystanders. The causation is then analogous to causation questions in the car racing cases where one of the participants in the car race hits a bystander and causes injury or death. In such cases, both drivers may be held liable- there is one danger, each driver bears equal responsibility for its continued life span subject to withdrawal or an intervening event.

2. An intervening, independent act by a third party that is a more direct cause of a victim’s death than the prior act of an accused may sever the legal causal connection between V’s death and the prior act of the accused. Acts by a third party who is not acting independently but is acting in furtherance of a joint activity undertaken by A will not sever the legal causal connection. On this view, the northbound shooter’s firing of the fatal shot was not an intervening act but was part of the joint conduct that caused V’s death.

## Causation and Other Aspects of the Actus Reus

*The AR of homicide s. 222 :*

Crown must prove beyond a reasonable doubt (*Lifchus, Starr*)

Conduct: an Act (must be performed voluntary- *Wolfe*)

Circumstances: not specififed

Consequences: directly or indirecty, by any means

Causation for s. 222 is that A’s act was “more than a *de minimis cause”* (*Smithers*). Per Arbour J. in *Nette,* jury should be directed to convict if they conclude that A’s action was “a significant contributing cause” to V’s death

*Elevating homicide to first degree murder* ***s. 231(2) and s. 231(5) (actus reus only):***

There are two paths to first degree murder:

1) The murder was planned and deliberate s. 231(2) This retains the same standard of causation- Crown must prove planning and deliberation BRD

2) The death was caused by A while committing an offence listed in s. 231(5)

This requires an additional proof of causation- A’s acts or conduct were a substantial

and integral part of V’s death. *Harbottle* and *Nette*

*Causation in non-homicide offences:*

Crown must prove BRD that A’s act or omission caused the requisite consequence. Argue by analogy with homicide- most often, more than a *de minimis* cause.

# Mens Rea

## Subjective Mens Rea

1) Use statutory language where it stipulates *mens rea*

2) If no MR is specified within the statute, presume that a true crime requires subjective MR. The types of subjective fault correspond with components of the AR:

Conduct: must be intentional or reckless

Circumstances: require knowledge, recklessness or willful blindness

Consequences: require intention or recklessness

3) The AR and MR must coincide in time

## R v. Beaver [1957]

*A was a party to sale of heroin, some evidence suggested A believed contents to be lactose. A was charged with possessing and selling heroin. The appeal succeeded in relation to possession.*

Even where the statutory language does not stipulate a MR requirement, that requirement is presumed in the absence of clear language to the contrary which permits no other interpretation. “In a criminal case, there is no possession without knowledge of the character of the forbidden substance”

He was convicted of selling but not possession:

s. 4(1)(d): has in his possession any drug save and except under the authority…

s. 4(1)(f): manufactures, sells…or makes any offer in respect to any drug, or any substance represented or held out by such person to be a drug

s. 17: says that if the person controls the place where the drug is found, they are deemed to be in possession of the drug unless they can prove that the drug was there without their knowledge or consent

A honestly believed that he was not in possession of heroin, and according to a strict interpretation of s.4(1)(d), he did not have possession of heroin as long as he honestly believed the package to contain lactose. On the other hand, based on the wording of s. 4(1)(f) it is irrelevant that he honestly believed the substance to be lactose because all that is required is that he sell a substance held out to be a drug.

**Note***: Beaver* tells us what common law will do where there is no mens rea in statute. If Parliament wants to criminalize people w/out mens rea they must make it very clear/explicit (absolute/strict liability for example), otherwise we read mens rea in, even if the Code is silent.

## R v. City of Sault Ste Marie [1978]

*A was charged with discharging pollution into a water source*

Regulatory offences are more administrative than criminal in nature. (Note that a regulatory offence is intended to deter risky behavior and prevent harm before it happens, rather than punishing intrinsically wrongful or harmful behavior- a key distinction lies in the gravity of punishment for violating the offence.)

If the relevant offence is a “true criminal offence”, the Crown must establish a mental element –intention, recklessness, or willful blindness (mere negligence is excluded)

* This decision confirms the decision in *Beaver.*
* If the relevant offence is a “true criminal offence”, the Crown must establish a mental element.
* Negligence is insufficient to establish MR when presumption of intent read in

## Intent and recklessness

## R v. Buzzanga and Durocher [1980]

*A were charged with willfully promoting hatred against an identifiable group, namely French Canadians in Essex County. They had printed a brochure that (in their testimony) was intended to create “controversy, furor and uproar”. Question was what constitutes willful promotion of hatred.*

The meaning of the word “willful” is context dependant, and the word will not necessarily be interpreted the same way whenever it is used. Its meanings vary from intentionally, to recklessly, to importing an act that is done intentionally. In this particular context, willfully means “with the intention of promoting hatred, and does not include recklessness.” This interpretation reflects parliament’s choice to use a word that connotes a balance between freedom of expression and public order.

“Intention” has been used to include purpose + foresight, purpose or foresight.

* + Foresight “that a consequence is highly probable, as opposed to substantially certain” is not the same as an intention to bring about that consequence
  + **But** where person subjectively foresees that a consequence is certain or substantially certain, intention will generally follow.
  + *Buzzanga*: Intention established where As intended to promote hatred, or where As foresaw that promotion of hatred was a substantially certain consequence, but nonetheless proceeded.
    - “Recklessly” normally (**but not always**) requires subjective foresight of the consequences and a decision to proceed regardless.
  + *Buzzanga*: intention to create controversy, etc. isn’t the same as the intention to promote hatred, and the TJ shouldn’t have equated them.

## R v. Theroux [1993]

*A was convicted of fraud. He promised homebuyers that their deposits would be protected by insurance, knowing that this was untrue but believing that it would never become an issue.*

In most cases, the MR is subjective – this requires proof that A subjectively appreciated the consequences “at least as a possibility”. It is important to distinguish this possibility from knowing that one’s actions are wrong, and also to note that the Crown need not show exactly what is in A’s mind. In certain cases, subjective awareness of the consequences can be inferred from the act itself, barring some explanation casting doubt on such an inference.

In the specific context of fraud, the MR is the subjective awareness that one is undertaking a prohibited act which could cause deprivation (including putting another person at risk of deprivation). This may be satisfied by recklessness, where A had subjective foresight that the prohibited consequence is likely. Where A tells a lie knowing others will act on it and thereby puts their property at risk, the inference of subjective knowledge that the property of the other would be put at risk is clear.

## Willful Blindness

* The concept of willful blindness is used in some cases to satisfy a MR requirement. In cases where proof of knowledge is required, deliberately choosing not to know something is seen as tantamount to knowing it.
* Where proof of knowledge is necessary, proving that A deliberately closed his or her eyes to that knowledge is adequate to establish *mens rea* (see examples at 6-28).

## R. v. Briscoe (2010)

*A drove co-accused and V to golf course on pretext that they were going to a party. B held V and told her to shut up or be quiet. B stood by while V was raped and murdered. B told police that he had first thought co-A would have sex with V and when they got to the golf course he didn’t want to know what they were doing. He also said that he saw the co-A rape and kill V but didn’t ‘wanna know’.*

**Held** Wilful blindness can substitute for knowledge whenever knowledge is a component of the *actus reus* because it imputes knowledge to an A whose suspicion is aroused to the point where s/he sees the need for further inquiries but chooses not to make them. Culpability arises because A deliberately refuses to inquire when he knows there is reason to inquire (following *Briscoe*). The focus remains on what A actually knew, and what A actually suspected.

**Note:** *Briscoe* also sets out the test of recklessness from *Sansregret* (1985 SCC) as knowledge of a danger or risk coupled with persistence in a course of conduct that creates the risk that the prohibited result will occur.

## Motive

*Motive is legally irrelevant to criminal liability, but it may be useful evidence of intent.*

## R v. Lewis (1979)

*A and co-accused were convicted of murdering co-accused’s daughter and son-in-law. A appealed on basis that TJ failed to charge the jury on motive.*

Motive is not the same as MR, but in relevant cases its presence or absence may help the trier of fact to determine the MR. Motive particularly refers to the reason (or ulterior intention) for which an accused may or may not have performed the prohibited act.

1) Motive is always relevant, and therefore always admissible

2) Motive is not a required part of the crime, therefore it is not an essential part of the Crown’s case at law

3) Proven absence of motive is an important fact in favor of A, therefore worthy of note when charging the trier of fact

4) Proved presence of motive is noteworthy in a circumstantial case, especially where identity and/ or intention are at issue

5) Motive is a question of fact and evidence, and TJ duty to charge depends on whether motive is essential in arriving a just conclusion

6) Each case turns on its circumstances

Neither absence nor presence of motive was proven here, so the TJ had no clear obligation to charge the jury on motive.

## Transferred Intent

## R. v. Gordon (2009)

*A shot at T while several bystanders were nearby. Bystanders (x3) were injured by pellets but intended victim (T) was unharmed. A was convicted at trial of four counts of attempted murder and three counts of aggravated assault (relevantly). A argued on appeal that he should not have been convicted of attempted murder in relation to bystanders.*

Transferred intent describes the circumstance in which “an injury intended for one falls on another by accident.” It is limited to the circumstances in which the harm that follows is the same as the harm originally intended. This case specifically considers whether transferred intent applies to inchoate crimes (such as attempt).

The *Code* provides explicitly for transferred intent in some circumstances (for example, transferred intent in relation to murder is provided for in s. 229(b)). Where the *Code* is silent on transferred intent, the common law doctrine of transferred intent may apply (s. 8(2) of the *Code*).

Common law doctrine of transferred intent does not apply to inchoate crimes because:

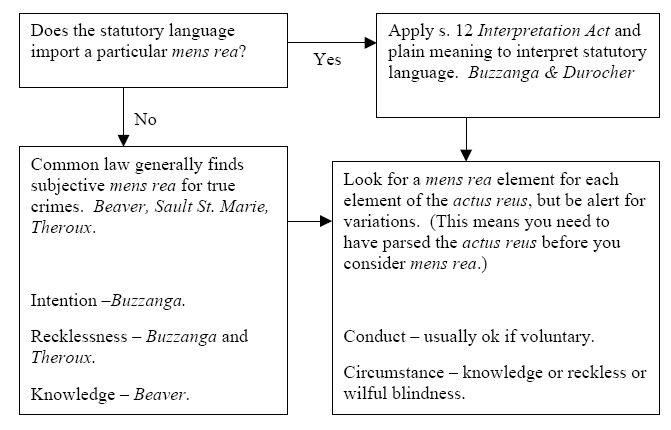
1. Transferred intent connects a culpable mental state in relation to an intended victim with a harm or result visited on another person;
2. Principles underlying transferred intent apply to crimes that require a result as part of the *actus reus* (in this course, we would call this a consequence). Attempted murder does not require a result;
3. Applying transferred intent to attempts would unduly extend liability and foster irrational distinctions (by extending liability based on harm visited to another when this is not required for attempt);
4. In the context of attempt, it is not necessary to prove actual harm in order to punish the wrong – intent coupled with acts that are more than merely preparatory is enough to complete the offence;
5. One should be careful about generalizing from homicide to other crimes.

A’s convictions for attempted murder in relation to bystanders were set aside, and A was sentenced for aggravated assault in relation to these bystanders.

## Establishing Mens Rea

1) Read the offence creating section and other relevant sections to identify the elements of the offence

2) Look at any case law you have on the relevant standard for that offence



## Subjective vs. objective mens rea

Subjective MR is directed to what was in the accused’s mind

* The test is what the accused actually knew/ intended/ thought
* Can be assessed by objective evidentiary measures (what would a person in the accused’s position have intended?) but only as a means to decide what *this accused* thought/ believed/intended
* Is usually inferred from nonspecific statutory wording at common law (exceptions may arise from context and inferred parliamentary intent) unless clear language or necessary implication dictates otherwise.
* Subjective MR constitutionally required for some crimes

Objective MR is directed to what the accused should have known or ought to have done

* The language that imports objective MR includes negligence, gross negligence, a marked departure from the standard of a reasonable person