Criminal Law Outline

CRIMINAL PROCEDURE

CODIFICATION REQUIREMENT

- **Every charge must come from CC //** ***CC s. 9:*** no new common law offence, exception: contempt of court)
- **Pre-existing common law defences continue to be good //** ***CC s. 8(3)*****,** *exception: contradict CC*

CLASSIFICATION OF OFFENCES

Summary offences

- Provincial court // Judge alone // No preliminary hearing // Max 6 m and $5,000 fine (***s. 787 CC***)

Indictable offences

- ***s. 553 Offences:*** Provincial court. Judge alone. No preliminary inquiry
- ***s. 469 Offences:*** Superior court. Judge and jury. Preliminary inquiry
- ***Elective Offences:*** Other than 553 or 469 // A may select mode of trial: (1) Provincial court, judge alone, no preliminary inquiry or (2) Superior court, judge or jury, preliminary inquiry in PC

Hybrid offences

- Crown's discretion – summary or indictable

APPELLATE REVIEW (ss. 812–839 of *Criminal Code*)

Test for Successful Appeal: (1) Was there an error in law? **(2)** Is there a reasonable possibility that error affected outcome of the case? (i.e. would/could the error reasonably affect the outcome at trial?)

New trial or substitute different verdict (*if verdict necessarily would have followed based on application of law*)

Error in Law
Evidentiary ruling // Error in explanation of law to jury // Misstatement of law in reasons for judgement –> New trial or substitute verdict

Unreasonable Verdict
[Defence only] Used when MR or element of AR lacking – No reasonable jury, properly instructed, could have convicted A on evidence presented –> usually conviction overturned and acquittal entered

Miscarriage of Justice
[Defence only] Was there a failure in the justice process which gave rise to an unsafe verdict?
Crown engaged in misconduct // Jury not impartial –> New trial or acquittal

Note: Appeal courts are deferential to TJ in findings of fact unless overriding or palpable error on the part of TJ.

BURDEN OF PROOF

Crown must prove all elements of offence BRD (entrenched in s. 11(d) of Charter)

Model Charge (***Lifchus***)

- Charge should **avoid:** "ordinary" (RD ≠ ordinary) // "moral certainty" (moral certainty ≠ evidentiary certainty) // Do not qualify "doubt" except with "reasonable"
- Charge should **include:** RD = doubt based on reason and common sense, which must be logically based upon evidence or lack of evidence // Model charge re BRD

Degree of Certainty

- RD ≠ ordinary (***JHS***) // Degree of certainty is between balance of probabilities (50%) and absolute certainty (100%) but it is closer to certainty (***Starr***)

Credibility of Accused (***JHS****, elaborating on* ***W(D)****)*

1. If jury believes A – must acquit
2. If jury does not believe parts of A's evidence (not all) **but** A's evidence raises RD
   (if jury does not believe ANY of A's evidence – cannot acquit)
3. If jury does not believe A **and**
   A's evidence does not raise RD **but**
   Crown's evidence does not prove offence BRD – must acquit
4. If the jury does not know who to believe – must acquit

ACTUS REUS

CONDUCT

- Act // omission [must be voluntary (***Wolfe***)]

OMISSIONS – Liability for omission may arise:

1. Where the omission is really part of a continuing act, which corresponds in time with MR (***Fagan***, *get-off-my-foot)*
2. Court may imply a duty (***Moore*** *– cyclist-won't-give-cop-his-name) – status is uncertain*
   - Duty to act may be implied from corresponding duty in statute (***Moore*** *majority)*
   - Duty to act can only come from established ***common law duty*** or ***express statutory language*** (***Moore*** *dissent, followed in BCCA 2004)*
3. Where a statute expressly imposes a duty to act
   - Where statutory language criminalizes an omission (failure to perform duty, including duty at common law) or imposes a legal duty to act (***Thornton***, *HIV-blood-donation*)
- **NB: Assault** requires intentional act: mere omission cannot amount to assault (***Fagan***)

VOLUNTARINESS – General principle: there can be no finding of guilt unless offence committed voluntarily

- Voluntariness is a minimum requirement for finding A guilty of a crime (***Lucki***, *skidding-crash*)
- Example of involuntariness = reflex action (***Wolfe***, *reflex-hit-with-telephone-receiver*)
  - Intent is necessary in assault causing bodily harm (***Wolfe***)
  - Voluntariness is an aspect of AR (***Wolfe***)

CIRCUMSTANCES

- Presence/absence of
- Hints: while // when

CONSEQUENCES

- Consequences = must prove causation
- Hints: causing // result // by // [attempt – no causation issue]

CAUSATION – Relationship between wound and death:

- A caused V's death if the wound was still an operating and substantial cause at the time V died (***Smith – Eng CA***, *soldier-stabbed-dropped-misdiagnosed*)
- Refusal to consent to medical treatment does not break causal connection ***if*** wound is operative cause of death (***Blaue – Eng CA***, *J's-witness-refuses-transfusion-dies*)
- Not limited to physical causation – may extend to moral/through behaviour causation (***JSR***)

Homicide Offences:

1. **AR of homicide s. 222**
   - Crown must prove BRD (***Lifchus***, ***Starr***)
   - Conduct**:** an act [must be voluntarily performed (***Wolfe***)]
   - Circumstances**:** NA
   - Consequences**:** directly or indirectly, by any means, caused the death of another person
2. **Elevating homicide to murder 1 [s. 231(2) and s. 231(5)]**
   Two paths to murder 1:
   a) Murder was planned and deliberate s. 231(2)
      - Same standard of causation – Crown must prove planning and deliberation BRD
   b) Death was caused by A while committing an offence listed in s. 231(5)
      - Requires additional proof of **causation** – A's acts or conduct were a substantial and integral part of V's death (***Harbottle***, ***Nette***)
   - Terminology for murder 1: substantial cause (higher degree of participation) (***Harbottle***) >>

Non-Homicide Offences:

- Crown must prove BRD that A's act or omission **caused** the requisite consequence
- More than a *de minimis* cause or a significant contributing cause

- ***Smithers*** standard should apply in non-homicide cases unless wording to the contrary (***Moquin***)
  - *Moquin* – court used standard of causation from *Smithers* for assault causing bodily harm
  - *Harbottle* – court adopted different standard because statute used different wording

- **Causation:** general standard for causation = outside *de minimis* range (***Smithers***)
- "*de minimis*" may be confusing, when directing jury, preferable to express it as significant contributing cause (***Nette***) [note: "outside *de minimis* range is still good law]
- **Dissent:** majority formulation unreasonably **raises standard of causation** above that which is set out in ***Smithers –*** formulation should be: "a contributing cause that is not trivial or insignificant" (***Nette*** *dissent*) [argue: not presenting to jury = no confusion]

LEGALITY

Cannot be convicted of a new crime, unless that crime is enacted by Parliament

- No one should be convicted of a crime unless the offence is recognized as such in the provisions of the CC, or can be established by the authority of some reported case as an offence known to the law – Parliament has sole authority to criminalize conduct that was not previously criminalized (***Frey***, *peeping-tom*)

AR and MR must correspond in time

- Distinction b/w acts which are complete (though results may continue to flow) and acts which are continuing – MR can be imposed on ongoing AR, need not arise at the start of the AR but MR cannot be imposed on a completed AR (***Fagan***, *get-off-my-foot*)

STATUTORY INTERPRETATION

Interpretation of the meaning of "access" in context of "public place" [s. 173(1)(a) defined in s. 150]

- Words are to be read in their entire context and their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (***Driedger, in Clarke***)
- Ordinary meaning will vary with the context (***Clarke***)
- In this context, "access" used in s. 150 (defining public place) means physical access. Parliament has distinguished between physical access and a place exposed to public view (s. 174).
- Open to Parliament to change wording of section but Court cannot depart from statutory language, nor mix elements from distinct offences in ss. 173(1)(a) and (b) (***Clarke***, *living-room-m'bation*)

Interpretation of the meaning of "bodily harm"

- Bodily harm caused where complainant suffers discomfort that is more than trivial or trifling. Bodily harm need not impair functioning. (***Moquin***)
- Not necessary that the injury affect **both** comfort and health (s. 2 uses "or") (***Dixon*** BCCA)
- **Serious bodily harm** requires hurt or injury that interferes in a grave or substantial way with the physical integrity or well-being of the complainant (***McGraw***)

INCLUDED OFFENCES

Accused may only be convicted of: (a) offence charged for (b) included offence

1. Language/wording of charge
   - **Wording?** (charge of "attempting to murder w/ knife" = assault w/ weapon)
   - **Necessarily included?** (assault causing BH includes assault) // **Attempt?** (always included)
2. Criminal Code section – **Specified?** (s. 622(2) murder 2 included in murder 1)
3. Case law – Has section been **interpreted** to include offences within it?

MENS REA

If offence is a true criminal offence, Crown must establish a mental element – intention, recklessness or willful blindness. Starting presumption is that a true crime requires subjective MR (***Beaver, Sault Ste. Marie***) – this can be modified by clear statutory language

Types of subjective fault correspond with components of AR:

- Conduct – intention or recklessness
- Circumstances – knowledge or recklessness / willful blindness
- Consequences – intention or recklessness as to consequence

- AR and MR must correspond in time (***Fagan***)

INTENT

Intention: intention to carry out *act* /purposely / deliberately / with foresight or intention to cause *conseq*

- Satisfied if A's intended the consequences (promoting hatred) ***or*** A's foresaw that the consequence (promotion of hatred) was a substantially certain consequence, but nonetheless proceeded (**recklessness**) (***Buzzanga***)

Willfully*:* meaning depends on context

- Intentionally / recklessly / importing an act that is done intentionally.
- In this case, willfully = intentionally (does not include recklessness) (***Buzzanga***)
  Held: Intention to create a controversy ≠ intention to promote hatred

RECKLESSNESS

Recklessness: foreseeing that a *consequence* might occur but choosing to proceed regardless

- Requires subjective foresight of the consequences and a decision to proceed regardless
  Subjective knowledge of risk (*possibility* of harm*)* + decision to proceed (increases risk) (***Sansregret***)
- In some cases, subjective awareness of consequences can be **inferred** from act itself (barring some explanation casting doubt on such inference) (***Theroux***)
- **Fraud:** MR is subjective awareness that one is undertaking a prohibited act which *could* cause deprivation – may be satisfied by recklessness where A had subjective foresight that prohibited consequence is likely (***Theroux***)

KNOWLEDGE / WILLFUL BLINDNESS

Knowledge – knowing a *circumstance* exists/doesn't
including willfully refraining from confirming a suspicion about circumstance (willful blindness)

Willful blindness can substitute for knowledge – where proof of knowledge is necessary, proving that A deliberately closed his eyes to that knowledge is adequate to establish MR (***Briscoe***)

- Suspicion is aroused to the point where s/he sees the need for further inquiries but chooses not to make them (recklessness only requires suspicion, WB requires something more – more concrete risk, knowledge that something *will* happen)

MOTIVE

Motive ≠ intention (MR), not an element of a crime (except where statutory language requires) (***Lewis***)

- 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.
- Motive is always relevant, and therefore always admissible
- Motive is not a required part of the crime, therefore it is not an essential part of the Crown's case at law but TJ should address motive in instruction to jury if it comes up in trial (case specific)
- Motive is a question of fact and evidence, and TJ duty to charge **depends on whether motive is essential in arriving a just conclusion**
- Proven absence of motive is important fact in favor of A, therefore worthy of note when charging jury
- Proved presence of motive important in circumstantial case/where identity/intention at issue (***Lewis***)

TRANSFERRED INTENT

Two ways to transfer intent: (1) Statute (2) Common law prior to 1955 based on common law principles (continued by s. 8) – if common law would allow for transfer of intent, then transferred intent is permissible

- Where B, D, E did not die and A intended to kill C, what is the appropriate conviction: Aggravated assault or Murder? – in relation to B, D, E, A ***is*** convicted of something – aggravated assault (***Gordon***)

DEPARTURES FROM SUBJECTIVE MENS REA

If it doesn't say *willful, intent, purpose, knowledge*, it won't be true crime, only look at absolute/strict liability

1. **Provincial:** assume public welfare // starting presumption is **strict liability** // apply (***Sault Ste. Marie***)
2. **Federal:** is it regulatory or true crime?
    a) If true crime (i.e. in CC): starting presumption is **subjective MR** (unless modified by statute)
        - Punishment – how serious is it?
        - Purpose – is it prohibiting something or just regulating it?
    b) If regulatory: assume public welfare // starting presumption is **strict liability** // (***SSM***)

ABSOLUTE / STRICT LIABILITY

Starting presumption for public welfare offences is **strict liability** (***Sault Ste. Marie***)

- Burden is on Crown to establish AR BRD // no MR necessary
- Defence of due diligence available – A may prove on BoP that he took all reasonable care (involves consideration of what reasonable person would do in circumstances)
- **The reverse burden of proof in strict liability** does not breach the ***Charter*** (***Wholesale Travel***)

To decide if its **absolute liability** vs. strict liability consider: (***Sault Ste. Marie***)

1. The over-all regulatory pattern or scheme
2. The subject-matter of the legislation
3. The gravity of the offence (super important // deal breaker)
    - Absolute liability and imprisonment can *never* be combined, violates s. 7 (***MVA Reference***)
4. The precise language used in the offence creating section
    - When interpreting legislation, the **court will presume a parliamentary intention to comply with the constitution** if legislation can reasonably be interpreted in a manner that preserves its constitutionality (*i.e. where imprisonment is a potential sanction, court will try to interpret offence as strict liability*) (***Raham***)
    - In considering 'the precision of the language used', a **court is entitled to have regard to the potential availability of the defence of due diligence** (as a practical matter) – the question is whether it might be open for an individual to argue that s/he took all reasonable steps to avoid committing this offence and not whether s/he took all reasonable steps to avoid illegality. (***Raham***)

- Burden is on Crown to establish AR BRD // no MR necessary
- Defence of due diligence not available (*Regulations concerned with public welfare: want to provide incentive to try to avoid harm. If no defence of due diligence, no incentive to take precautions*)

So will always be strict liability unless its a really minor penalty or there is clear statutory language that it should be absolute liability // courts are slow to shift out of strict liability into absolute liability (***Sault Ste. Marie***) – scheme for deciding whether a public welfare offence is strict liability or absolute liability continues to apply in Charter era (***Raham***)

Example: R v. Chapin
The offence is not a true crime (seemingly partly judged by severity of penalties) and does not contain words that would indicate an intention to import subjective mens rea. It doesn't prohibit duck hunting; it regulates it. The offence is enacted to protect public and duck welfare. The fact that the penalty is significant and conviction carries serious consequences works in favour of a strict liability standard. It is not persuasive to suggest that imposing a ***strict liability*** *standard would render enforcement difficult. Feasibility of compliance – due diligence should be available. The regulatory pattern also supports the strict liability standard (particularly s. 14(4)).*

Crime	Burden of AR	MR Starting Presumption	Displace MR presumption?	Defence of DD?
True crimes	Crown // BRD	Subjective –> Crown // BRD	Yes –> statutory language (***Buzzanga***)	NA –> need MR
PWO	Crown // BRD	No proof needed	Yes –> statutory language (***Sault Ste. Marie***)	Yes if strict PWO NA if MR (stat lang)
PWO strict	Crown // BRD	No proof needed	NA	Yes (***S. Ste. Marie***) Burden on A // BOP
PWO absolute	Crown // BRD	No proof needed	NA	No

OBJECTIVE MENS REA FOR TRUE CRIMES

True crime: presumption of subjective MR stands until displaced by **clear statutory language** (***Beaver***, ***SSM***)

- "criminal negligence": subset of objective MR (definition of criminal negligence in ***s. 219***)
- "dangerous" // "without reasonable care" // all manslaughter
- **s. 215(2) CC** imposes objective MR despite lack of words signaling displacement (***Naglik***, *SCC*)

Negligence:

1. Civil standard: requires **any** breach from standard of care expected of a reasonable person (torts) In criminal law, there is a constitutional dimension because of the possibility of criminalization, so a greater departure from standard of care is required than in civil standard (***Beatty***)
2. Penal negligence: requires **marked** departure from standard of care expected of RP (***Beatty***, ***JF***)
3. Criminal negligence: requires a **marked and substantial** departure from the standard of care expected of a reasonable person (***Tutton***, ***JF***) // definition of criminal negligence in s. 219

Penal negligence (***Hundal***) and criminal negligence (***JF***) are judged on a **modified objective standard**

CRIMINAL NEGLIGENCE (***Tutton***)

"***Wanton or reckless disregard***" (man // s. 215) – interpreted as "marked and significant" departure
"*Reckless*" with respect to objective MR does not connote subjective foresight

s. 202 (now s. 219) restrains conduct and its results; punishes consequence of mindless action, not state of mind // therefore, objective test must be applied

If Crown proves MR BRD, it is open to A to bring up **defence of honest and *reasonable* mistake of fact**
A's honest and reasonably held perception of facts may affect trier of fact's assessment of the reasonableness of A's actions // in this case, it was honest, but not reasonable

Test for determining when there has been a marked and significant departure? (***Tutton***)

1. The test is that of reasonableness (objective standard)

- Conduct which reveals a marked and substantial departure from the standard which could be expected of a reasonably prudent person in the circumstances will justify a conviction of criminal negligence

2. In applying the objective standard, there must be allowance for **surrounding circumstances and the accused's perception** of those facts must be considered in order to determine whether or not his conduct was reasonable (youth, mental development, education)

- An **honestly** and **reasonably** held perception of facts may affect the trier of fact's assessment of the reasonableness of A's actions (*Ex. Here, the jury should consider respondents' belief their son had been cured by divine intervention in light of the whole background of the case in order to determine if the belief was honest and reasonable – honest, but not reasonable*)

- The jury would then have to determine if their conduct represented a marked and significant departure from the standard to be observed by reasonably prudent people.

Example: R v. JF

Charged with two alternative offences:

1. Manslaughter by criminal negligence (engages higher standard) –> found not guilty
2. Manslaughter by failure to protect (engages lower standard of penal negligence) –> found guilty

Where criminal negligence and failure to provide the necessaries of life are alleged:

1. Jury should first consider whether accused failed duty to provide necessaries of life –> If so, jury is bound to find accused guilty of that offence
2. Jury should then consider whether accused, *in failing to provide necessaries of life*, showed wanton or reckless disregard for life or safety of the child –> If so, jury is bound to find accused guilty of criminal negligence // If not, jury could still find accused guilty of failure to provide necessaries of life, but *not* of criminal negligence

PENAL NEGLIGENCE (***Hundal***)

Negligence-based criminal offences: must use modified objective test to determine requisite MR

Nature of driving is routine/automatic, so it's almost impossible to determine particular state of mind

s. 233 (now ***s. 249***) requires **modified objective standard** (according to what reasonable person would have done – but in the circumstances that the accused finds himself) – there is a subjective element in requisite MR

The basis of liability for dangerous driving is negligence; therefore the question to be asked is not whether the accused subjectively intended consequences of his actions, but **whether, viewed objectively, the accused exercised appropriate standard of care** but **in context of events/circumstances around incident**

Explanation such as a sudden/unexpected onset of illness: the trier of fact, to convict, must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk/danger involved in the conduct manifested by the accused (para 39)

Honest and reasonable belief in a set of facts could negate MR assumption of a reasonable person – ex. welder who asks if there is anything flammable in the basement, is told there isn't and proceeds with welding

Test for determining when there has been a marked departure? (***Hundal***, clarified in ***Beatty***)

1. **Consider external circumstances:** was A's conduct a marked departure in the circumstances? (without thinking of any evidence that A might have about that) // purely objective test at this stage (outsider's pov) If yes: go to step 2 // if no: pack your bags and go home
2. **Consider internal circumstances:** is answer to question (1) modified by what A reasonably understood?
   - What the accused honestly knew and understood + whether it was reasonable // (accused's pov)
   - Welder in the basement // honestly and reasonably believing something that is untrue

Re: Mens Rea (***Beatty***)
Fundamental principle of criminal justice requires that the law on penal negligence concern itself not only with conduct that deviates from norm, but also with offender's mental state // modified objective test established in ***Hundal*** is appropriate test to determine requisite MR for negligence-based criminal offences

The standard against which the conduct must be measured is the conduct expected of the reasonably prudent person in the circumstances

In making objective assessment, trier of fact should be satisfied on basis of all the evidence—including evidence about accused's actual state of mind, if any—that the conduct amounted to a marked departure from standard of care that a reasonable person would observe in accused's circumstances // If an explanation is offered by accused, then in order to convict, trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct manifested by the accused.

Momentary lapse of attention ≠ marked departure from SOC of RP // A momentary act of negligence is not sufficient to constitute dangerous operation of a motor vehicle causing death within meaning of ***s. 249(4)***

Stigma: Penal negligence requires greater departure from civil standard because it is aimed at punishing blameworthy conduct and places stigma of criminality on accused (as opposed to civil negligence which is concerned with the apportionment of loss) // "We do not brand somebody a criminal lightly" (***Beatty***)

Consequences not important: Based on wording of provision, it is manner in which motor vehicle was operated that is at issue, not consequences of the driving – a serious consequence (death) may make offence more serious but it has no bearing on the question of whether the offence of dangerous driving has been made out (you can't use the fact that someone died as a reason to conclude that he was driving dangerously)

Policy Question: In what circumstances should we, as a society, be willing to attach a stigma of criminalization because of something that happened while someone was driving – policy question about who is/is not a criminal

CRIMINAL LEGLIGENCE

R v Tutton *SCC 1989*
A (x2) stopped giving their diabetic son insulin because they believed he had been cured by the holy spirit. They were charged with manslaughter under [ss. 215 & 219].

Held: "The test is that of reasonableness, and conduct which reveals a marked and substantial departure from the standard which could be expected of a reasonably prudent person in the circumstances will justify a conviction of criminal negligence." "Reckless" when used in respect of objective mens rea, does not connote subjective foresight. A's honest and reasonably held perception of the facts may affect the trier of fact's assessment of the reasonableness of A's actions.

In applying the "objective norm", there must be allowance for factors particular to A, such as youth, mental development and education.

R v J.F. *SCC 2008*
A was convicted by a jury of manslaughter by criminal negligence and acquitted of manslaughter by failing to provide the necessities of life. Crown theory was that he failed to protect his foster child from abuse by his partner.

Held: The jury's verdict answered '"yes" and "no" to essentially the same question'. On failure to provide the necessities of life, Crown had to prove marked departure from the standard of conduct of a reasonable parent. On criminal negligence, Crown had to prove marked and substantial departure. Convicting JF of the higher mens rea (criminal negligence) while acquitting on the lower is incomprehensible. A must be acquitted.

PENAL NEGLIGENCE

R v Hundal *SCC 1993*
A hit another car and killed the driver after running a red light. His truck was overloaded and he stated that he had been unable to stop for the light but had honked. He was charged with dangerous driving under [s.249].

Held: s. 249 imports a modified objective standard, based on an analysis of the licensing requirement, the nature of driving, the wording of the section, and statistics that demonstrate the excessive road toll. The test should be applied in the factual context. The question is whether A's conduct was a marked departure from the standard of care that a reasonable person would observe in A's situation. If A offers an explanation, the trier of fact must consider whether a reasonable person in A's shoes would have appreciated the risk and danger inherent in that course of action.

R. v. Beatty *SCC 2008*
A was charged with dangerous operation of a motor vehicle causing death contrary to s.249. A's truck crossed the centre line of a highway into the path of an oncoming car, killing all three occupants. A was found to have had a momentary lapse of attention.

Held: the modified objective standard requires a marked departure from the standard expected of a reasonable person in all the circumstances. Personal characteristics are only relevant to the extent that they raise incapacity to appreciate or avoid creating the risk. It's important to distinguish between the *actus reus* (driving in a dangerous manner, having regard to circumstances) and *mens rea* (a marked departure from the expected standard). If both of these elements are made out, the trier of fact should consider evidence of A's state of mind in order to decide whether it raises an honest and reasonable mistake of fact.

[majority in *J.F.* followed this characterisation of the *Actus Reus* and *Mens Rea*].

DEFENCES

RE AIR OF REALITY DEFENCES (*Cinou*)

Initial evidentiary burden is on accused to establish air of reality for the defence (either defence or judge can raise defence) // once air of reality raised, judge is required to put defence to the jury // Crown must disprove 1/+ element BRD // note: if Crown raises credibility issue, refer to ***W(D)***

The defence need not be argued by defence counsel – if judge finds there is an air of reality to a potentially applicable defence, they must leave that defence to the jury

- Judge has a positive obligation to consider whether there are any defences that appear to arise
- Most likely applies to defences with BRD standard / in cases where burden is on accused, you would be most worried when Accused is not represented

"Air of reality": There must be evidence on the record upon which a properly instructed jury acting reasonably could acquit

Two components (*Cinou*)

1. **Evidence** – **evidentiary burden on A** – must identify what *evidence* there is on record
   - If A not represented/does not raise defence and judge thinks it should be raised, then judge must raise it (***Cinou***)
   - If A is legally represented, option of pointing to Crown's case if there is evidence there // if no evidence in Crown's case, defence may need to introduce evidence themselves
2. **Matter of art** – given that that evidence is on record, *could* a properly instructed jury acting reasonably acquit?

Burden then shifts to crown to disprove any **one** element BRD

Not sure if defence should be left to jury? Identify if there is evidence that could bring reasonable doubt to each element (can be raised by either party) // each element requires air of reality

Air of reality defences: Provocation // Self defence // Necessity // Duress

Balance of probabilities defences: Mental disorder // Automatism

RE APPROACH TO REASONABLENESS (*Lavallee*)

Relevant question:"whether, given the history, circumstances, and perceptions of the appellant, her belief that she could not preserve herself from being killed by Rust that night except by killing him first was reasonable"

The question of reasonableness has to be understood in the context of the relationship between A and V and the relevant circumstances

When looking at the question of "reasonable apprehension of death/GBH" have to take into account the knowledge, experience and perceptions of A. Court held that expert evidence can be helpful in putting subjective belief into context (learned helplessness theories, etc.)

Question becomes:

1. **Did A have a subjective belief?**
2. **Was that belief reasonable given the circumstances?**

- In ***Lavallee***, the court held that the surrounding circumstances should be taken into account when looking at the apprehension of death/GBH. Although it was a case of self-defence, analogous reasoning can be used to apply the modification to any excuse-based defence, including duress and necessity.
- In ***Lavallee***, the opportunity to retreat was assessed on a subjective and modified objective standard (not the standard used in ***Creighton***). Although it was a case of self-defence, the modification applies by analogy to any excuse-based defence, including duress and necessity.

MISTAKE OF FACT

- Negates MR when **knowledge of circumstances** is an element of offence (not a true defence)
- Requires A to discharge an evidentiary burden that gives an air of reality to the proposition that he held an honest belief in a set of circumstances that, if true, would warrant an acquittal (ex. consent)

Once Crown proves elements of offence –> presumption of guilt // A must testify to raise honest belief amounting to a non-existence of MR – evidentiary burden to raise reasonable doubt (***Kundeus,*** *SCC 1976*)

- Interpretation: allows "transferred" MR where accused intends to commit offence A but commits offence B [would this hold up post-*Charter*?]

Test for mistake of fact:

- Whether A's belief was ***honestly*** held (***reasonableness is not required***) (***Kundeus, Pappajohn***)
- Jury**: *reasonableness*** can only go to credibility of A's assertion in honest belief (***Pappajohn***)
- A must directly assert mistaken belief in order to engage defence (***Kundeus, Pappajohn***)

Air of reality**:** there must be in the record some evidence which would convey a sense of reality in the submission // there must be some evidence which, if believed, would support existence of mistake of fact // once air of reality is raised, defence must be left to jury (***Ewanchuck***)

SEXUAL ASSAULT

Sexual assault AR = unwanted sexual touching // "touching" and "sexual" determined objectively // "unwanted" determined according to complainant's state of mind

- If C testifies no consent, finder can consider her credibility [no doctrine of "implied consent" but behaviour is relevant to the question of whether, in her own mind, she wanted the conduct]
- If C consented out of fear, fraud or duress, consent is vitiated (***s. 265(3)***)
- If you believe C's testimony that she did not consent, then she did not consent // end of story reconcile: (***W(D)***)

Sexual assault MR = intention to touch complainant, knowing, or reckless as to whether, or wilfully blind to absence of consent // no MR required re "sexual" nature of conduct

A may challenge Crown's evidence of MR by asserting honest but mistaken belief in consent // A does not have burden of proof re this defence and need not testify to raise issue (contra ***Kundeus***) (***Ewanchuck***)

Test for honest but mistaken belief in consent:

- Whether A ***honestly*** believed that C ***communicated consent*** in words or conduct (***Ewanchuck***)
- A is required to take reasonable steps to ascertain consent (***s. 273.2(b) CC***) // dissent: defence of honest but mistaken belief in consent cannot be raised if A has not complied with this (***Ewanchuck***)

Rules re consent: Subjective MR re consent is knowledge of one of the circumstances in ***ss. 273.1***, ***273.2*** // silence, passivity or ambiguous conduct will not found a belief in consent // no air of reality arises where something less than actively communicated consent is the basis on which A seeks to counter MR (***Ewanchuck***) // where complainant expresses lack of agreement, no consent is obtained (***s. 273.1(2)***)

R v. Kundeus *SCC 1976*
A was sitting in a bar, calling out offers to sell drugs. An undercover officer asked for acid or hash, and was offered mescaline instead. A took money and returned with 2 capsules that later proved to be LSD. A was charged with trafficking LSD but argued that he had intended the lesser offence of selling mescaline.

Held: A rebuttable presumption of guilt arises from the facts proven by the Crown. A needed to testify in order to raise an honest belief amounting to a non-existence of mens rea. [Note that this decision has been interpreted to permit a "transferred" mens rea where A intends to commit one offence but actually commits a different actus reus – notwithstanding that the offence actually committed is more serious.]

The evidence put forward by the Crown does not establish mens rea to commit the trafficking offence with which A was charged. Where mistake of fact is raised, it imposes an evidentiary burden on the defence to raise a reasonable doubt. The standard is whether A's belief was honestly held (reasonableness is not required).

R v. Pappajohn *1980 SCC*
A was charged with raping C, a real estate agent. Both testified – C testified that she resisted A's advances throughout; A testified that he believed C consented until bondage, and no intercourse took place thereafter.

Held: The test for mistake of fact is that the mistake must be honestly held, but need not be reasonable. The jury should be instructed that reasonableness can only go to credibility of A's assertion in an honest belief.

There was evidence on which the jury could find that A mistakenly but honestly believed that C was consenting and therefore this defence should have been left to the jury.

On these facts, there was no air of reality to the defence of mistake of fact. A must directly assert mistaken belief in order to engage the defence. Conviction affirmed.

R v. Ewanchuk *1999 SCC*
A made sexual advances towards C, who repeatedly said "no". Each time, A stopped his advances and then began again. C testified that she was frightened but determined not to let A see her fear; and that she believed A had locked the door of the trailer where the events occurred. A did not testify.

Held: The actus reus of sexual assault is unwanted sexual touching. Touching & sexual are determined objectively according to the nature of the acts. "Unwanted" is determined according to the complainant's state of mind. Where C testifies that she did not consent, the finder of fact can consider her credibility. However, if the finder of fact holds that C did not want the sexual touching to take place, the actus reus is complete. There is no doctrine of "implied consent" arising from C's conduct. C's behaviour is only relevant to the question of whether, in her own mind, she wanted the conduct. Where A consents as a result of fear, fraud or duress s. 265 (3) provides that consent is vitiated.

The mens rea of sexual assault is intention to touch the complainant, knowing, reckless as to whether, or wilfully blind about absence of consent. No mens rea is required regarding the `sexual` nature of the conduct. A may challenge Crown`s evidence of mens rea by asserting an honest but mistaken belief in consent. A does not have a burden of proof re. this defence, and need not testify to raise the issue (contra Kundeus). The test is whether A believed that C communicated consent in words or conduct. Sections 273.1 and 273.2 of the Code set out additional rules regarding the mens rea of consent (subjective mens rea is knowledge of one of these circumstances). Silence, passivity or ambiguous conduct will not found a belief in consent. No air of reality arises where something less than actively communicated consent is the basis on which A seeks to counter mens rea.

Dissent: Section 273.2(b) requires A to take reasonable steps to ascertain consent, and this provision should have been applied in this case. A defence of honest but mistaken belief in consent cannot be raised if A has not complied with s. 273.2(b). Similarly, s. 273.1(2) provides that where the complainant expresses a lack of agreement, no consent is obtained. This provision also applied on the facts as found at trial.

PROVOCATION

- Can only reduce murder 2 to manslaughter (***s. 232(1)***) // "heat of passion caused by sudden provocation"
- Evidentiary burden on A to raise air of reality (Q of law) // Crown must disprove 1/+ element BRD (***Tran***)
- ***Whether there is air of reality to provocation is a legal question, subject to appellate review (Tran)***

ELEMENTS of s. 232

1. ***No prior incitation by A*** (***s. 232(3)***)
   [if A incites V to provoke A so he can have access to defence // if incitation by A doesn't have anything to do with the provocation by V, then still have access to defence]
   - It would be better to instruct jury to take cumulative effect into account when considering whether A formed intent required of murder // not every case will require this direction but in most cases where these factors accumulate, such a direction should be made (***Nealy***)
2. ***Wrongful act or insult to A*** (***s. 232(2)***) –> ties into "sudden provocation" in ***s. 232(1)***
   [Not something V had legal right to do (***s. 232(3)***)//illegal arrest can =wrongful act (***s. 232(4)***)]
   - Legal right must be an action expressly authorized by law (***Tran***)
3. Act/insult is ***sufficient to deprive ordinary person of self control*** (objective standard) **[#1]**
4. A acted ***on the sudden*** (***s. 232(2)***) **[#3]**
5. A acted ***before time for passions to cool*** (***s. 232(2)***) –> ties into "heat of passion" ***s. 232(1)*** **[#3]**
6. A was ***deprived of self control*** (***s. 232(2)***) (subjective standard) **[#2]**
7. A murdered V (***s. 232(2)***)

Test for provocation: (***Hill,*** *elaborated in* ***Thilbert*** *and* ***Tran***)

1. **Objective standard:** would an ***ordinary person*** be deprived of self control by the act or insult?
   - Ordinary person is different from "reasonable person" in context of objective MR (***Hill***)
   - Ordinary person standard: permits jury to have regard to characteristics that are relevant to the insulting nature of V's behaviour // relevance flows from context of case // but not necessary for TJ to charge jury specifically on this test (***Hill***)
   - Ordinary person will share some relevant characteristics with accused (***Tran,*** *confirming* ***Hill***) but this cannot subvert logic of the objective test // limits of ordinary person's characteristics party informed by Charter (ex. homophobia ≠ ordinary) (***Tran***)
2. **Subjective standard:** did A ***in fact*** act in response to these provocative acts?
   - ***Relationship evidence is relevant to the objective standard and the subjective test*** (leaving one's partner can't constitute provocation without more) (***Thilbert***)
   - **Subjective element is twofold:**
     1. Did A act ***in response*** to provocation?
     2. Did he act on the ***sudden*** and ***before passion had time to cool***
   - Focuses on A's subjective perception, including what he believed, intended or knew
   - Note: the provocation must ***cause*** A to commit the homicidal act
   - To put defence to jury, there must be some evidence to establish
     (a) that an ordinary person would lose self control (objective) and
     (b) that A was actually deprived of self-control (subjective) (***Hill, Thilbert***)

   Was A's response ***sudden*** and ***before there was time for passion to cool***?
   - Requirement of suddenness of insult and reaction does not preclude consideration of past events // the incident that finally triggers reaction must be sudden & reaction itself must be sudden // incident may be given meaning only by consideration of prior events (***Daniels***)
   - Note: proper place for considering factors (ex. whether woman is entitled to leave relationship) should be considered under "ordinary person test" (***Tran***)

While the language of ***s. 232*** has not changed since 1892, the context in which it is applied has changed // the court must have regard to contemporary social norms and ***Charter*** values when applying the objective element of whether a wrongful act or insult would cause an ordinary person to lose self-control (*ex. homophobia, racism cannot be used*) (***Tran***)

R. v. Hill *SCC 1985*
A was convicted of 2nd degree murder. Crown theory was that A & V were lovers, had an argument, as a result of which A first hit V over the head then stabbed him. A testified that V had made unwelcome advances and A accidentally hit V in trying to fend him off, then stabbed V when V threatened to kill A. TJ charged jury on provocation, but did not specifically address nature of "ordinary person" test.

Held: Test for provocation is: (1) Would an ordinary person be deprived of self-control by the act or insult? (2) Did A in fact act in response to these provocative acts? (3) Was A's response sudden and before there was time for passion to cool? // Objective person standard permits jury to have regard to characteristics that are relevant to the insulting nature of V's behaviour. This relevance flows from the context of the case. However, it is not necessary for TJ to charge jury specifically on this test.

R. v. Thibert *SCC 1996*
A was convicted of murder after shooting his (separated) wife's lover. A testified that he had gone to wife's work to talk things over and scare wife with rifle, but V insulted and demeaned A by holding wife in front of him and daring him to shoot. TJ did not tell jury that Crown bears burden of disproving provocation, where raised, BRD.

Held: On these facts, it was appropriate to put the defence of provocation to the jury although it is not certain that they would accept the defence. The test (at 10-36) is whether there is some evidence to establish that an ordinary person would lose self control, and whether there is some evidence to establish that A was actually deprived of self-control. Leaving one's partner can't constitute provocation without more (at 10-39). Relationship evidence is relevant to the objective standard and the subjective test.

R. v. Daniels *NWTCA 1983*
A stabbed and killed V, who had been having an affair with A's husband. V & husband had been openly having an affair, and A's husband would beat A regularly. On the night of the killing, A was drunk and went looking for husband and V. A killed V after V told A to "f__ off". TJ directed jury to consider provocation, and limited the events that might constitute provocation to those that occurred in the immediate context of the killing.

Held: "The requirement for suddenness of insult and reaction does not preclude a consideration of past events. The incident which finally triggers the reaction must be sudden and the reaction must be sudden, but the incident itself may well be coloured and given meaning only by a consideration of the events which proceeded it." It was inappropriate to limit jury's consideration to events at the house, and the proper test is the response of an ordinary person to the insult after a long series of assaults and indignities.

R. v. Tran *SCC 2010*
A killed his estranged wife's new partner after breaking into his old apartment. He also harmed his estranged wife. A had told wife that he no longer had keys to the apartment. A was angry and upset at the breakdown of his marriage and because of rumours that his ex-wife had a new partner. TJ acquitted on 2nd degree murder and convicted on manslaughter. Crown appealed on basis that there was no air of reality to the defence.

Held: The focal point for an analysis of provocation must be the wording of s. 232. The subjective & objective elements identified in a variety of cases (including Hill and Thibert) do not vary in substance, but are ways of understanding s. 232 in particular cases.

The ordinary person will share some relevant generic characteristics with the accused (confirming Hill) but this cannot subvert the logic of the objective test. The limits of an ordinary person's characteristics are partly informed by the Charter – for instance, homophobia would not be ascribed to an ordinary person. The circumstances of the accused may be generically relevant but do not shift the standard to the individual accused. // **The subjective element is twofold** – did A act in response to the provocation? And did s/he act on the sudden and before passion had time to cool. This focuses on A's subjective perception, including what s/he believed, intended or knew. The provocation must cause A to commit the homicidal act.

R. v. Nealy *ONCA 1986*
A killed V in a fight outside a pub after V had repeatedly made crude sexual remarks to A's girlfriend. A had been drinking and also testified that he was scared and angry during the fight. TJ did not direct jury on cumulative effect of drunkenness, fear and anger.

Held: It would have been better to instruct jury to take cumulative effect into account when considering whether A formed the intent required of murder. Not every case will require this direction but in most cases where these factors accumulate such a direction should be made.

MENTAL DISORDER

Statutory defence ***CC s. 16*** // not necessarily complete defence

Burden of proof: standard**:** to balance of probabilities, burden**:** on party who raises the defence (***CC s. 16(3)***)
(Crown could raise CC s. 16 to get A into mental health system (NCRMD)

Mental health Review Board:

- If they decide you no longer pose a threat, you are released into society
- May decide that you can be released, but you need continuing treatment
- May be held forcibly within a mental health institution for a period of time – someone who is confined is confined for an indefinite period of time (so don't know how long they will be there)

Presumption: A is "not suffering from mental disorder" until contrary is proved to BoP (***s. 16(2)***)
[contravenes Charter s. 11(d) but justified under s. 1 (***Chaulk majority,*** *considering s. 16 in previous form*]

Section 16(1) provides defence if A commits act or omission **while suffering from a mental disorder that rendered person (a) incapable of appreciating the nature and quality of the act *or* (b) of knowing that it was wrong**

ELEMENTS of *s. 16*

1. ***"while suffering from a mental disorder"*** interpreted as "any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding, however self-induced states...as well as transitory mental states" (***Cooper***)
2. ***"rendered person"*** – causation – incapacity must be causally linked to the disease of the mind
3. ***"incapable" generally*** connotes "a purely subjective and personal dimension of the individual" (***Chaulk,*** *citing Fortin and Viau with approval*)
4. ***"incapable of appreciating the nature and quality of the act"*** requires perception "an inability to perceive the consequences, impact and results of physical act" (***Cooper***)
5. ***"incapable of knowing that it was wrong"*** = incapacity to appreciate that the act is wrong according to the ordinary moral standards of reasonable members of society (i.e. even if A knew act was legally wrong, may be acquitted if incapable of understanding it was morally wrong) // full normative comprehension of a rule violation includes comprehension of what violation will mean to others and how they will respond (***Chaulk,*** *overruling Schwartz – if A had capacity to understand act was legally wrong, no access to defence*)

Mewik's categories:

1. A knows act is legally wrong + A knows he should not break the law
   - Section 16 does not apply, guilty as charged
2. A does not know act is legally wrong + A knows most people would condemn actions
   - Ignorance of law is not an excuse, section 16 does not apply
3. A does not know contrary law + A does not know people would condemn actions
   - This is at the heart of mental disorder // section 16 applies
4. A knows act is legally wrong + A does not know that people would condemn actions + does not know should follow the law
   - ***Schwartz:*** *knowledge that this is against the law is enough to deny access to s. 16*
   - ***Chaulk:*** *s. 16 applies (if they can't understand its against the law because there is a moral underlining, then should have access to defence*

How defence operates: (Chaulk, *SCC 1990****)***

- May negate AR on premise that A did not act **consciously**
- May negate MR on premise that A was **incapable of forming the requisite MR** (ex. lack of intent)
- May provide excuse on basis that A's mental condition **prevented him from knowing act was wrong**

Each is predicated on capacity. Jury faced with NCR defence should consider questions in following order:

1. ***Has the accused established NCR under one of the two limbs of s. 16 BOP?***
2. ***Does the evidence of mental disorder negate mens rea in whole or part (e.g. prevent A from forming specific intent for murder)?***

cont'd >>

Relationship between mental disorder and automatism

Mental disorder	**Automatism**
Requires disease of the mind	No disease of the mind required
Mental disorder automatism (where AR is denied)	Non-mental disorder automatism
Verdict is not NCRMD	Verdict is acquittal
May be detained in hospital if board concludes that A is a significant threat.	No continuing supervision but the possibility of a peace bond or civil commitment arises.

Charter Dimension

CC s. 16.2: starting presumption = sanity (not NCR) // can be displaced by proof of ***s. 16.1*** elements BoP
CC s. 16.3: must be discharged by party raising defence // ex. If low max sentence, O will do time and go back into society, Crown may want to keep them away from society due to mental disorder/can raise defence

Charter s. 11(d) is infringed by shifting standard of proof to balance of probabilities and putting burden on accused (**generally applicable** – true of any defence that shifts burden to accused – doesn't apply to "air of reality" standard because that is an evidentiary burden/BRD is legal burden)

But is saved by s. 1 – impairment is justifiable (this is **not generally applicable**, each defence needs its own ***Oakes*** test) // ***Oakes*** test applied – measure of displacing burden of proof is reasonably proportionate to goal of making sure it is only available to those who really suffer from mental disorder (***Chaulk***)

Practically Speaking
When MR attaches to **subjective consequences** (specific intent of murder – note: these crimes will almost always have included offences without the specific intent (manslaughter)), its possible that a reasonable doubt was raised despite not meeting criteria for ***s. 16***

Re Causation – wouldn't have had incapacity **but for** the mental disorder // *Ex*. mental disorder mixed with intoxication – good luck =/

AUTOMATISM

Burden of proof: standard**:** to balance of probabilities, burden on accused [reverse onus contravenes ***Charter s. 11(d)*** but justified under s. 1 (***Stone,*** *easy to fabricate, difficult to disprove*] // air of reality DNA (***Stone***)

Test for establishing automatism (of either variety): (***Stone***)

1. **Establish a proper evidentiary foundation for the defence**
   - **Presumption:** A acted voluntarily // Burden on A to raise evidence sufficient to permit a properly instructed jury to reasonably conclude on BoP that he was automatistic – requires psychiatric evidence and additional evidence such as history of dissociation, corroborating evidence, and absence of motive // Defence only put to jury if judge concludes that sufficient evidence exists.
2. **Consider whether automatism has its genesis in a mental disorder (question of law – judge)**
   - Only once a proper evidentiary foundation is established // Question: whether alleged dissociation originated in a disease of the mind (*legal question, must be determined by TJ* (***Rabey***)) // **Starting presumption: dissociation did originate from a mental disorder**
   - ***Factors:*** internal cause "psychological blow" – if so, more likely to be a disease of mind vs. external cause (concussion) // If A presents a continuing danger, more likely to be disease of mind // Policy factors (ex. need to protect society) may also be identified on case by case basis.

   To stay within legal category of automatism:
   - Cannot be caused by a mental disorder // if it is, ***s. 16*** applies (***Stone***)
   - Cannot be caused by self-induced intoxication (***Rabey***)
   - Acute (extreme) stress // has element of immediacy // must be beyond ordinary emotional blows of life (***Rabey***, ***Stone***) // **internal factors** – psychological reaction to emotional blow/ psychological shock (***Rabey***, ***Stone***)
   - **Sleepwalking – special category:**
     - Whether there is a continuing risk is a relevant factor – would need clear evidence that there is no risk of recurrence // otherwise, would be mental disorder (***Parks***)
     - Why do we care? Because automatism = acquittal, no supervision // mental disorder = continuing supervision in mental health care system
   - Concussion (**external physical cause**) (***Rabey***)

     Note: if the trigger is likely to occur again (something normal), then it would be considered an internal cause, if the trigger is something unlikely to occur again, it would be considered an external cause (***Rabey***)

   - Depending on outcome of this stage, only one defence will be left to jury – both s. 16 and automatism **can never be left to jury** (***Stone***)
3. **Jury determines questions of fact depending on which defence is left to jury**
   - If non-insane automatism: question whether A **acted involuntarily** on a balance of probabilities
   - If a disease of the mind, jury considers defence according to ***s. 16*** framework – *did A suffer from a disease of the mind which rendered him incapable of appreciating the nature and quality of the act.*

Insane automatism vs. non-insane automatism:
- If you are in realm of insane automatism, stop thinking about automatism, go to ***s. 16***
- Starting proposition is that it is best treated as if it is a mental disorder
- Starting presumption: ***automatism = mental disorder automatism***
- To raise automatism then, A must disprove mental disorder
- If non-insane automatism is not proven, must go back to ***s. 16*** and focus on statutory language

Stone suggests that **starting presumption** is that automatism is caused by disease of mind" and **burden of proof is on A** to move away from that // ***Parks*** suggests that **starting presumption** is that automatism is not caused by disease of mind and **Crown has to prove** that automatism is a disease that comes from mind

Challenge after Stone: person who wants to argue non-insane automatism has strong incentive to argue mental disorder // it is unclear who is responsible for showing automatism is caused by disease of mind

R. v. Stone *SCC 1999*
A stabbed wife after she had insulted/yelled at him over several hours. Testified that when he committed violent act, he was unaware of what he was doing and only returned to full consciousness with knife in his hand and wife dead. Two psychiatrists testified – one said A's account was consistent with dissociation, other said it was extremely unlikely that A was dissociated at the time.

Held*:* On current medical understanding, better to describe automatism as **a transient state of impaired consciousness in which A has no voluntary control over his or her actions** // Insane automatism is subsumed by the ***s. 16*** defence, while non-insane automatism is treated separately.

R. v. Parks *SCC 1992*

A killed his parents-in-law. Medical evidence suggested that A was sleepwalking at that time and that ***sleepwalking*** *is not a mental illness. A had a family history of sleepwalking and other sleep disorders, and experts suggested that it was highly improbable that he would be violent again. Sleepwalking had no treatment, but recommended practices to minimize recurrence.*

Held: Upheld acquittal. **On these facts, automatism was not a disease of the mind but a transient state.** It was open to the TJ to leave non-insane automatism to the jury and for jury to acquit.

Dissent: Recurrence is a non-determinative factor in the insanity inquiry. The internal cause approach is not directly applicable to these facts but is relevant to the defence. Additional policy considerations that may assist with distinguishing between forms of automatism.

R. v. Rabey *ONCA 1977*

A hit V on head with a rock and choked her after reading a letter in which V expressed sexual interest in another man. Conflicting psychiatric opinions regarded whether dissociation is a mental illness or not.

CA: the psychological blow could not in law be sufficient to constitute a trigger for an auto state, but expert evidence brought by A supported that he was in an altered state, also supported by witnesses => re-trial with s. 16 available to trier of fact (upheld by SCC)

Held: "Disease of the mind" is a **legal term** and the TJ must determine whether a particular condition fits within that phrase – question whether A suffered from condition is for jury.

The phrase includes **functional disorder**s with no known cause, but excludes **intoxicant-induced disorders**. A distinction should be drawn between automatism with an **"internal" cause** i.e. having its source in psychological or emotional makeup and **transient** automatism which arises from specific **external** factors. "ordinary stresses and disappointments of life which are the common lot of mankind do not constitute an external cause constituting an explanation … [which amounts to non-insane automatism]".

SELF DEFENCE

Evidentiary burden on A to raise air of reality (Q of law) // Crown must disprove 1/+ element BRD (***Cinou***)

Chronological statutory language (triggers):

S. 34(1)

1. A did not provoke V's assault
2. B *unlawfully* assaults A
3. B's assault causes A to use force against V (reasonable apprehension of assault = use s. 37)
   - No intention to cause death/GBH
   - No more force than reasonably necessary to defend self [more tenuous relationship between what you did and how the person died – ex. A pushes V through a glass window, not intending to cause harm - they bleed to death – question is was it necessary for A to defend by pushing V)

- **V doesn't have to be assaulter**

S. 34(2)

1. A is unlawfully assaulted (bad shooter)
2. A performs an act which causes death/GBH
   - While under reasonable apprehension of death/GBH to self – (which is caused by violence with which assault originally made/purpose pursued)??? – 34(2)(a)
   - A subjectively believes on reasonable grounds that he cannot otherwise preserve self from death/GBH

S. 35

1. A provokes B's assault **OR** A assaults B but with no intent to cause death/GBH and with no justification [so no intention to cause death/GBH at time of provocation]
2. A must (attempt to) quit/decline conflict before necessity of preserving self from death/GBH arises – classic fight in parking lot
3. A has no intention to cause death/GBH until necessity arises
4. A performs an act (does not necessarily have to cause death/GBH unlike 34(2) under reasonable apprehension of death/GBH from violence of B believing on reasonable grounds that act is necessary to preserve self from death/GBH

S. 37 (residual – only go here if none of the other ones work)

1. A reasonably apprehends assault to A or someone under A's protection **OR** A or someone under A's protection is assaulted
2. A uses force to defend himself
   - No more than necessary to prevent the assault or prevent repetition – ie. pre-emptive strike against an assault would probably fall under this section

R v. Cinous *SCC 2002*
A shot V as they were on their way to steal computers. At the time, their van was in a gas station, V was sitting in the van and A was outside it. A testified that he believed that V and a friend were planning to kill him, and that he could not report his fears to police because they wouldn't arrive in time and it would make him an informant.

Held: In this case, A presented evidence to requisite standard on all fronts except reasonableness of A's belief that he had no alternatives. Evidence does not explain why A didn't run away or hide in gas station. Self-defence is intended to be a last resort where A's safety and survival depend on killing V at that moment.

Legal test for whether an air of reality exists: (1) evidence on the record (2) upon which a properly instructed jury acting reasonably could acquit. Second part of test requires TJ to decide if there is direct evidence on each element of the defence, or circumstantial evidence which is reasonably capable of supporting inferences required to acquit A. TJ does not decide whether inference should be drawn, but considers whether it is available. Relevant elements requiring evidence include reasonableness of A's belief. Evidentiary burden is on A.

R. v. Lavallée *SCC 1990*
A killed her partner after he had threatened to kill her "later". At the time A shot V, V had his back to A and was walking out of A's bedroom. Evidence established a pattern of violent physical abuse by V towards A. Expert evidence suggested that A suffered from the psychological effects of ***battered woman syndrome****, explained that she was likely well attuned to the nature and severity V's impending violence, and suggested why she would have disbelieved that she could leave the premises as a way of escaping the violence.*

Held: Two questions arise re. ***CC s. 34(2)*****: (1)** the temporal connection between apprehension of death and A's use of force **(2)** the requirement that A's belief in the need for self-defence be based on reasonable and probable grounds. The common link is the standard of **"reasonableness"** and how it should be judged.

Re the requirement of a temporal connection between apprehension of death or GBH and A's use of force, courts had previously required imminence (the raised knife standard). This is based on a masculine norm that excludes the cumulative effect of V's brutality on A. The cycle of violence begets a predictability to the violence. The test is what A reasonably perceived, given her situation and experience. There is no absolute requirement for A to wait until the knife is raised.

Re the requirement that A's belief that she could not otherwise defend herself be based on reasonable and probable grounds, the expert evidence re. her lack of alternatives ("learned helplessness" – later qualified in *Malott*) is helpful. Relevant question is "whether, given the history, circumstances, and perceptions of the appellant, her belief that she could not preserve herself from being killed by Rust that night except by killing him first was reasonable".

R. v. Pétel *SCC 1994*
A killed R, who was an acquaintance of her daughter.

Held: Under ***s. 34(2)***, A **may make a reasonable mistake** about whether she is being assaulted and have access to the defence. Imminence is only one factor to consider when assessing reasonableness.

R. v. Malott *SCC 1998*
A was convicted of 2nd degree murder of her ex-spouse and attempted murder of his girlfriend.

Held: *Lavalleé* did not establish a defence of being a battered woman – but directed court to consider situation and experience of battered woman in applying legal tests of reasonableness. ***May equally apply to duress, provocation, necessity.*** Court should resist "syndromization" by focusing on reasonableness of A's actions in light of her personal experiences and experiences as a woman. Other material factors, such as a lack of financial resources, may equally apply. This judgment warns against extending the ambit of "battered woman syndrome" without careful research and additional expert evidence.

NECESSITY

Common law defence (***Perka***) // courts have capacity to identify common law defences (***CC s. 8,*** *common law defences are preserved, notwithstanding codification*) // operates as **excuse**, not justification (***Perka***)

Defence must raise air of reality about each element of defence. If properly raised, Crown must disprove BRD

Should be a defence that is **extremely limited in its application** (***Perka*****,** *emphasized again in* ***Latimer***)

ELEMENTS (***Perka,*** *first authority for defence of necessity being recognized, clarified in* ***Latimer***)

1. **A is in a pressing emergency of great peril** (***Perka***)
   Mens rea: assessed on a modified objective standard (taking A's situation and characteristics into account) // A must also honest belief (subjective) (***Latimer*****,** *relying on* ***Hibbert***)
   - *"pressing emergency of great peril":* reflects judicial desire to only apply this in very specific circumstances // not just any emergency, but a *pressing* emergency of *great peril*
   - Disaster must be imminent and harm unavoidable and near – it must be on the verge of transpiring and almost happening (***Latimer***) – *note: opposite of self defence (justification vs. excuse)*
2. **Compliance with the law is demonstrably impossible** – there was no reasonable legal way out (***Perka***)
   Mens rea: assessed on a modified objective standard (taking A's situation and characteristics into account) // A must also honest belief (subjective) (***Latimer***)
   - *"demonstrably":* seems to suggest burden of proof on A, but court left it so that crown had to disprove BRD – court is willing to give A the benefit of the doubt
3. **A's response is proportionate to the threatened harm** (***Perka***)
   Mens rea: purely objective (no modification) – homicide might never be proportionate? (***Latimer***)
   - Some degree of balancing taking place here // Not necessarily that the harm done must be less than threatened harm – but at a minimum, the harms must be approximately equivalent (***Latimer***)
   - Court recognizes this is a moral question – these are moral judgments and ultimately a policy question – what do we expect people to bear, keeping in mind our acceptance of human frailty (***Latimer***)

R. v. Perka *SCC 1984 A (x 4) were on a boat conveying cannabis from one destination in international waters to another. Boat started to have difficulties, so they made emergency landing in a bay on Vancouver Island. Their evidence was that they intended to repair boat, reload drugs, and proceed. Charged with importing cannabis.*

Held: Accepted defence based on expert testimony re boat's engine – A would have drowned if didn't come to shore (*#1*) // threatened harm: death of 4 A + 16 crew members, harm caused by A: bringing 35 tons of pot into Vancouver – no brainer (*#3*) // not relevant that A's preceding conduct was illegal (note: on evidence, what they were doing was not illegal – they were in international waters), but A cannot cause a situation where the clear consequences are what actually ensued, and then seek recourse to necessity

Court recognizes human frailty*, such that anyone in that situation would have done the same thing // as a matter of policy, should excuse, without sanctioning, human frailty*

Defence is confined to circumstances in which A's actions were normatively involuntary // Note: *concept of normative voluntariness has been recognized in s. 7 as a principle of fundamental justice – courts will only hold accountable an act that is morally voluntary as well as physically voluntary*

R. v. Latimer *SCC 2001 A killed his daughter, who suffered from severe cerebral palsy and experienced continual pain. He pleaded necessity in defence to 2nd degree murder, but TJ refused to leave this defence to the jury.*

Held: Necessity is narrow and of limited application. There was no air of reality to the defence in this case.

R. v. Ungar *ONCA 2002 A charged with dangerous operation of motor vehicle. He drove on wrong side of street, broke speed limit with lights flashing while driving to deliver emergency medical assistance to injured woman.*

Held: It was not a reasonable legal alternative to fail to respond to the call for assistance. The defence of necessity succeeds and the Crown should never have pressed these charges.

DURESS

Statutory defence ***CC s. 17*** – "immediacy" and "presence" held to not be compliant with ***Charter s. 7*** and not saved by ***s. 1*** and thus read out of section (***Ruzic***)

There is also a common law defence of duress (***CC s. 8,*** *common law defences are preserved, notwithstanding codification*) – ***Ruzic*** suggests an enlarged sphere of operation for a parallel common law defence of duress – relationship between statute and common law defence is unclear after ***Ruzic*** (discussed below)

Defence must raise air of reality about each element of defence. If properly raised, Crown must disprove BRD // "Court should apply 'reasonable, but strict standards' for purpose of deciding whether air of reality raised (***Ruzic***) A may have to testify, or at least give police statement to provide evidentiary foundation

Ruzic *SCC 2001* suggests that duress is largely an **excuse** based on same principles as necessity // arises because **A responds to some external pressure** (excuses A's conduct without condoning it)

Necessity –> external threat, can be force of nature // **Duress** –> 3rd party puts pressure on A to harm unrelated V // ***key:*** person who inflicts pressure on A is not the one who is ultimately harmed // ***Hibbert obiter:*** requirement that ultimate victim be the one who acts wrongly is a requirement of self-defence (this is not stated in CC section) – live question

ELEMENTS (***CC s. 17***)

1. There has to be a threat of **immediate** death or bodily harm from a person (T) (A must not be in conspiracy or association with T whereby that the person is subject to compulsion)
2. A must **believe** T will carry out the threat // believe = subjective element
3. A must be **compelled** by threat to commit an offence as principal (i.e. A commits the AR – *If you found that it wasn't A who committed the AR, then s. 17 can't apply, but if A is accessory, can still use common law defence (**Hibbert**))* // **causation** issue // offence can't be listed in s. 17 // offence has to be to a person other than T (*not required by statutory language, but **Hibbert** says this*)
4. T must **be present** when offence is committed (*has been interpreted to have spacial connotation, physically present* (***Hibbert***)) and threat must be **capable of being carried out** at the time of the offence (***Paquett***) (*straightforward implication of immediacy requirement*)
5. An offence must be committed (*so only thinking about duress once crown has proven AR + MR*) ***Hibbert*** *SCC 1995* acknowledges that **occasionally duress may negate mens rea**, but this only works **where desire/motive is an element of the offence** and that desire or motive is not present because of the duress.

Charter Problem

The words "**immediate**" and "who is **present** while the offence is committed" held to contravene ***Charter s. 7*** and not saved by ***s. 1*** thus read out of s. 17 (***Ruzic***)

- Criminalizing morally involuntary conduct violates a principle of fundamental justice (***Ruzic***)
- ***Moral involuntariness:*** *recognizes that A made a choice to act but also recognizes human frailty and that the circumstances in which A made that choice is one in which we should excuse that choice*
- Having a immediacy and presence requirement runs the risk of an A who commits a morally blameworthy act but in circumstances of moral involuntariness being punished for actions

Problem: *if you take these out, there are too few limits on s. 17 defence – unclear if court is saying s. 17 is replaced with **common law defence** (probably not) or reading some elements of common law defence into s. 17*

Accessory to Offence

A person who is charged as a ***party to an offence*** (did not perform the AR) can raise the common law defence of duress (***Hibbert***, ***Paquette***)

cont'd >>

Re List of Excluded Offences
It is unclear whether the list of excluded offences at the end of s. 17 is constitutional (***Ruzic*** doesn't answer)

Could argue: S. 17 should apply
- **List violates s. 7** because it renders a person who acted in a **morally involuntary** fashion liable to conviction, so it should be read out and s. 17 would apply to these accused (*relying on **Ruzic,** by analogy to Ruzic's reasoning re "immediate" and "presence" requirements*)
- If the list does violate s. 7, it may be saved by s. 1, hhowever, s. 7 violations are almost never saved under s. 1 and given the strong language in ***Ruzic***, this is unlikely

Could argue: common law defence should be available (*easier to do this*)
- Even if list not read out, could argue s. 7 would require defence to be available to A who commits offence under duress
- Words "this section does not apply"**,** coupled with the presumption that parliament does not intend to pass unconstitutional legislation (***Ruzic***, ***Lavallee***) lead to the conclusion that a person charged with an offence listed in s. 17 should have access to **common law defence** (relying on ***Paquette***, ***Hibbert***)

Statute vs. Common Law
Relationship between s. 17 and common law is unclear after ***Ruzic***

If you take out requirements of "immediacy" and "presence", there are too few limits on s. 17 defence – unclear if court is saying s. 17 is replaced with **common law defence** (probably not) or reading some elements of common law defence into s. 17

In ***Ruzic*** SCC confirmed that TJ's use of common law defence in case where s. 17 applied – suggests that **two defences have converged** (but SCC did not explicitly make that ruling)

"*In this case, A is not an accessory, and offence is not on list, so s. 17 could apply. However, since in **Ruzic** the SCC held that the TJ was not wrong in applying the common in a case where s. 17 did apply, and since common law arguably gets read into s. 17, an argument could be made for using the common law defence rather than s. 17.*"

Section 17	**Common law**
A commits an offence other than those excluded by the section	A commits an offence as a party to the principal offender (***Hibbert***)
A is acting under compulsion by threats of death or bodily harm (***to which a person of reasonable firmness would respond (?)*** *from common law*)	A is acting under compulsion by threats of death or serious bodily harm to which a person of reasonable firmness would respond (***Ruzic***)
To A or another person (***Ruzic***)	To A or another person.
Which A believes will be carried out	Which A believes will be carried out
From a person	From a person.
While A has no safe avenue of escape, using a modified objective test (?) (*implicitly read in in **Ruzic***)	While A has no safe avenue of escape, using a subjective and modified objective test (***Hibbert***)
Proportionality (?) *from common law – most likely will be read in* (*implied in **Ruzic***)	And A's criminal act is proportionate to the threat made against A (***Ruzic***) **subjective-modified objective** (contra ***Latimer*** *purely objective standard*)
Immediacy/presence requirements read out – ***imminence*** *requirement read in*? (***Ruzic***)	There is sufficiently close connection in time between threat and execution to overbear A's will (***Ruzic***)
A is not a party to a conspiracy or association	***A acted without voluntarily assuming the risk (?)*** (***Ruzic*** *suggested this requirement in obiter*)

Hibbert *SCC 1995*
A was charged with attempted murder and convicted of a lesser included offence. A was charged as a ***party to an offence*** *where the actus reus was actually committed by B. A testified that he had taken B to V's apartment because B had threatened to kill A if he did not co-operate. A also testified that he had no opportunity to run away or warn V.*

Held: Common law defence of duress is available to parties who are charged under s. 21 *C.C.* A cannot rely on the defence if s/he had an opportunity to safely extricate him or herself. The opportunity to retreat is assessed on a subjective and modified objective standard (using the ***Lavallee*** standard, not the ***Creighton*** standard). **The *Lavallee* modification applies to self-defence and duress (and by analogy as an excuse-based defence, necessity).**

Ruzic *SCC 2001*
A was charged with importing heroin and using a fake passport. She testified that she and her mother had been threatened by M, who had also been physically violent to A. expert evidence supported A's assertion that she did not trust the Yugoslavian police to protect her from M. A claimed duress under s. 17 C.C.

Le Bel J Statutory defences receive no special deference from the court under the *Charter* – they are subject to review on the same principles as other statutory provisions. It is a principle of fundamental justice under s. 7 *Charter* that only voluntary conduct "behaviour that is the product of a free will and controlled body, unhindered by external constraints" attracts the penalty and stigma of criminal liability. The requirements in s. 17 that a threat be one of "immediate" harm and that the crime occur in the physical presence of A violate this principle of fundamental justice and cannot be saved under s. 1. TJ in this case was correct to leave the common law defence of duress to the jury.

SENTENCING

CRIMINAL CODE PROVISIONS

Section 12 of the Charter

- Protects against cruel and unusual punishment
- Interpretation as per courts: accused cannot be given a sentence that is grossly disproportionate to their moral blameworthiness

s.718 – sets out the purposes of sentencing: respect for law and maintenance of peaceful and just society

a) denounce unlawful conduct
b) deter offender and others from committing offence (specific/general deterrence
c) separate offenders from society, where necessary (isolation)
d) assist in rehabilitating offenders
e) provide reparations for harm done to victims or to community (apologize)
f) promote sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community

s.718.01 – provides particular objectives for offences against children (<18) – particular weight to denunciation and deterrence

s.718.02 – provides particular objectives for listed offences (police officer) – particular weight to denunciation and deterrence

s.718.1 **– fundamental principle of sentencing is that sentence should be proportionate**

1. gravity of the offence and
2. degree of responsibility of offender

s.718.2 – sets out other principles court may have regard to

a) sentence increased or reduced due to **aggravating factors** or **mitigating circumstances** relating to the offender or the offence. Aggravating factors:
    1. act motivated by bias, prejudice or hate
    2. evidence that offender abused spouse/CL partner in committing offence
    3. evidence that offender abused person under 18 in committing offence
    4. evidence that offender abused position of trust or authority in committing the offence
    5. evidence that offence was committed for benefit, direction, or association with gang
    6. evidence offence was terrorist offence
b) Similar sentences for similar offences by similar offenders in similar circumstances (*parity*)
c) Consecutive sentences shouldn't be unduly long or harsh (*principle of totality*)
d) Offender shouldn't be imprisoned if less restrictive sanctions appropriate
e) All available sanctions other than imprisonment that are reasonable in circumstances should be considered for all offenders **with particular attention to aboriginal offenders**

s.724 – sets out fact finding requirements for sentencing

s. 787 – sets out the range of sentences for summary offences (where the offence-creating provision does not specify otherwise – up to $5,000 or 6m imprisonment)

ss. 730, 731, 734, 742 – alternatives to imprisonment

TJ has broad, but not limitless, discretion to decide right blend of goals, mitigating and aggravating factors to resolve each case on its facts. Case law sets guidelines for appropriate sentences that provide starting point and help to achieve consistency but TJ can sentence outside these range in appropriate cases (***Nasogaluak***)

Fundamental principle of sentencing: sentence must be proportionate to: (***s. 718.1 CC***)

1. gravity of offence // objective measure – how much harm has this person done?]
2. degree of responsibility of the offender // more subjective/difficult – moral blameworthiness // who is this person? why did they behave this way? what consequences should flow from their behaviour?

- Proportionality (s. 718.1) is central to sentencing process // moral blameworthiness is central (more than gravity of offence) (***Nasogaluak***)
- Consequences of A's actions don't affect his moral culpability // accountable, not punished (***Sweeney***)

Goals of Sentencing: (***Sweeney***)

1. **General deterrence:** Empirical research suggests that general deterrence does not increase as sentences grow longer or more harsh;
2. **Specific deterrence:** tends to be consistent with general deterrence, evidence is required to provide stronger specific deterrence (in this case, isolation i.e. imprisonment must be considered);
3. **Isolation:** is tied to the proposition that an isolated offender cannot re-offend. Given the negative effects of jail, care and restraint should be exercised. Fundamental principle of proportionality is key
4. **Rehabilitation:** cannot generally be achieved through imprisonment. Non-custodial options should be considered where the prospects of rehabilitation are significant.
5. **Denunciation:** should only justify imprisonment where the court is convinced that no other sanction is sufficiently strong to underline the seriousness of the harm. The court should consider the nature, seriousness and circumstances of the offence and the social reprobation re. the offence before imposing denunciation. Note that in 1995, Parliament amended s. 718 to make denunciation the first listed objective of sentencing.

PRIMARY PRINCIPLES OF SENTENCING

Mandatory Minimum Sentencing

Test re whether a mandatory minimum sentence violates s. 12 of Charter:

1. Is the sentence grossly disproportionate to the extent that Canadians would find the punishment abhorrent and more than merely excessive // moral outrage (***Ferguson,*** citing *Smith* and *Wiles*)
2. Principles set out in ss. 718–718.2 should be applied to consider whether the sentence is grossly disproportionate, both in the instant case and on reasonable hypothetical alternative facts.

- If a minimum sentence violates s. 12 on the facts before a court, it is not open to grant A a "constitutional exemption". TJ must use s. 52 of Constitution Act to strike down minimum sentence and apply the usual sentencing principles in its place (***Ferguson***, *obiter*)
- 4 year mandatory minimum sentence for manslaughter does not constitute cruel and unusual punishment, contrary to s. 12 of Charter (***Ferguson***)
- Where there is a mandatory minimum sentence and police misconduct, it may be open to judge to sentence less than mandatory minimum to account for police misconduct // secondary principle of sentencing – mitigating factor (***Nasogaluak***)

Section 724 confines a trial judge's considerations on sentencing in certain ways (***s. 724 CC, Ferguson***)

1. TJ should start with the instruction s/he gave the jury, and is bound by any facts necessarily found by the jury in reaching its verdict.
2. If there is ambiguity, TJ should consider the evidence and make his or her own findings of fact in accordance with s. 724. Aggravating facts must be proven by Crown BRD.

Mandatory Maximum Sentencing

Finding the correct sentence requires the TJ to weigh the normative principles set out in ss. 718, 718.1 and 718.2. A maximum sentence is exceptional but warranted where it is proportionate to the gravity of the offences and the degree of responsibility of the offender. (***M(L)***)

CONSTITUTIONALITY

CHARTER RIGHTS OF ACCUSED

s. 1 The charter guarantees rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society (in accordance with principles of fundamental justice)

s. 7 Protects right to life, liberty and security of person, and right not to be deprived thereof except in accordance with principles of fundamental justice

s. 11 Rights that arise when a person is charged with an offence

s. 11(d) The right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal

CHARTER VIOLATIONS TEST

1. Does s. *X* violate s. *Y* of Charter?

- Crown must prove all elements of offence BRD (entrenched in s. 11(d) of Charter)
- Is burden of proof shifted?
  - a) Reverse onus provision ("unless A establishes the contrary")
    - Evidentiary burden to adduce evidence on an issue + legal burden to establish proposition on a **balance of prob's** // s. 11(d) – big problemo
    - Establish = prove = legal burden (balance of prob's) = s. 11(d) problem (***Oakes***)
  - b) Mandatory statutory presumption ("in absence of evidence")
    - Evidentiary burden on A to **raise RD** about whether presumption is correct – forces accused to testify // s. 7 + 11(d) – easier to justify, not really a big deal
- Yes –> *Charter* violation [if A has a burden of proof, there is a possibility for A to be convicted despite existence of reasonable doubt (***Oakes***)]

2. Is violation saved by s. 1 of Charter? [Oakes Test]

Onus to prove s. 1 is on invoking party (***Oakes***)

1. Are objectives of the legislation of sufficient importance (substantial/pressing) to warrant overriding a constitutionally protected right/freedom?
[Apply: What is the objective? Is this a big problem? Is it super important? Can look at int'l conventions, legislative debates, statutory provisions in other countries / US]

2. Proportionality Test (balance: interests of society vs. individual rights)

a) Is there a Rational connection between the means and the objective?
- Measures must be designed to achieve objective (at least internally rational)

[Apply: Does the basic proven fact support the inference of the presumed fact?]

b) Minimal impairment: are the means reasonably tailored to meet objectives?
- Measures should impair rights as little as possible

[Apply: Is there a way to impair the rights any less and still achieve the objective? Is the impairment just too unreasonable?

c) Proportionality: Need to balance benefits derived and rights being suppressed
- There must be proportionality between effects of measures (rights being suppressed) and the objective (of sufficient importance)

[Apply: How important is this charter right? Are there other effects (not just violating s. 11(d), but other effects that may arise)? How important is the objective? It may be sufficiently important but is it important enough to violate fundamental rights? More severe effects/impairment = more important objective

MENS REA AND THE CHARTER

ABSOLUTE LIABILITY AND THE CHARTER

Reference Re s. 94(2) of the Motor Vehicle Act *SCC 1986*
s.94(2) of the MVA created an absolute liability offence for driving while unlicensed or suspended. It was punishable by a minimum term of 7 days imprisonment.

Held: The Charter requires courts to consider whether the content of legislation accords with a broader range of values than was previously the case, but not to question the wisdom of policy decisions taken by parliament. The phrase "fundamental justice" imports more than procedural safeguards into the constitutional review. **Where there is a risk that a person will be deprived of life, liberty or security, fundamental justice is engaged** (***s. 7***). "The principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system." Whether any principle is one of fundamental justice "will rest upon an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our legal system".

Here, the relevant principle is that the morally innocent should not be punished. Absolute liability offends this principle because it imposes criminal liability absent a guilty mind.

The combination of absolute liability and imprisonment violates s. 7 and in this case cannot be saved under s. 1. Administrative expediency can only save a violation "in cases arising out of exceptional conditions".

R. v. Raham *ONCA 2010*
A was convicted at trial of stunt racing for driving at >50 km/h over the speed limit. The appeal judge held that stunt racing was an absolute liability offence which raised the possibility of imprisonment, and was therefore in contravention of s. 1 of the Charter.

This case illustrates the manner in which *Sault Ste Marie* and *Motor Vehicle Act Reference* should be merged in the *Charter* era. Points to note:

- The scheme for deciding whether a public welfare offence is strict liability or absolute liability (set out in ***Sault Ste Marie***) continues to apply in Charter era
- When interpreting legislation, the **court will presume a parliamentary intention to comply with the constitution** if legislation can reasonably be interpreted in a manner that preserves its constitutionality (*i.e. where imprisonment is a potential sanction, court will try to interpret offence as strict liability*);
- In considering 'the precision of the language used', a **court is entitled to have regard to the potential availability of the defence of due diligence** (as a practical matter) – the question is whether it might be open for an individual to argue that s/he took all reasonable steps to avoid committing this offence and not whether s/he took all reasonable steps to avoid illegality.

STIGMA AND THE CHARTER

R. v. Vaillancourt *SCC 1987 – Murder*
The SCC held that *it is a principle of fundamental justice that before a person can be convicted of murder there must be proof beyond a reasonable doubt of at least objective foreseeability of death***.**

R. v. Martineau *SCC 1991 – Murder*
A was convicted of 2nd degree murder under s. 213(a) of the Code, which raises culpable homicide to murder where A intends to inflict bodily harm to facilitate the commission of a crime listed in s. 213. A's friend shot two people in the course of a B&E.

- **Held: The common law will not impose liability for murder except where subjective foreseeability of the likelihood of death is demonstrated**. Murder "carries with it the most severe stigma and punishment of any crime in our society." **This stigma requires that a conviction for murder only ensue where the Crown proves moral blameworthiness.**
- ***The minimum mens rea for murder is intending to cause death or inflicting bodily harm knowing that it is likely to cause death.***

S. 213(a) compared with s. 231(5)
Section 213(a) raises manslaughter to murder in circumstances where A meets the mens rea for causing bodily harm. Section 231(5) raises 2nd degree murder to 1st degree murder when A has the mens rea for murder but lacks the planning and deliberation element.

APPLICATION TO OTHER OFFENCES

R. v. DeSousa *SCC 1992 – assault causing bodily harm*
A was charged with unlawfully causing bodily harm (s. 269). A challenged the constitutionality of this section, arguing that it breached s. 7 of the Charter.

- **Held:** ***s. 269*** is constitutionally valid. **The process of interpretation is as follows:**
- ***"unlawful"*** means contrary to a federal or provincial offence (predicate offence), however **this offence cannot be an absolute liability offence**
- Crown must prove that A has committed **the predicate offence**, including satisfying the mens rea element of the predicate offence. The predicate offence must be constitutionally valid in its own right
- ***s. 269*** imposes an **additional mens rea requirement of objective dangerousness.** This is imported through the word "unlawful". Objective dangerous requires, as a minimum that a reasonable person would realize that A's action would subject another person to "the risk of some harm" that is "more than trivial or transitory in nature". The court should not impose liability for mere inadvertence.
- A conviction for ***s. 269*** **does not impose such a grave stigma or significant penalty** that ***s. 7*** requires subjective mens rea. Previous jurisprudence on ***s. 7*** does not extend this far, and it is within parliamentary competence to impose a more grave penalty for an act that has harmful consequences without requiring additional mens rea for that offence.

R. v. Creighton *SCC 1993 – manslaughter*
A was charged with manslaughter. V died after A injected cocaine into her arm. A challenged s. 222 on the basis that it was unconstitutional to confine the objective mens rea requirement to a risk of bodily harm rather than a risk of death.

- **Held:** ***s. 222(5)(a)*** and ***(b)*** are constitutionally valid. Both sub-sections rely on establishing a **predicate offence** (unlawful act as defined in ***DeSousa*** or criminal negligence as defined in ***s. 219***). In addition, both require "reasonable foreseeability of the risk of bodily harm."

Gravity of manslaughter

- The objective mens rea requirement is consistent with the **differential stigma associated with manslaughter and murder** – the fact that someone has died is serious, but manslaughter lacks the connotation of intentional killing
- **The consequences of A's actions** – causing death – demands a greater sanction than an action that only results in harm. Manslaughter carries a flexible penalty, and therefore the sentence can be tailored to suit the degree of moral fault. // **Moral blameworthiness**
- **The penalty imposed** is generally less than for murder, which is an appropriate response to the lower moral fault of manslaughter.

Symmetry between consequence element of actus reus and mens rea

- The principle that A takes his or her victim as s/he finds them requires that A take responsibility for the consequences of objectively dangerous actions, even death.
- The rule that symmetry usually exists between consequence and requisite mens rea is **not a principle of fundamental justice** but a starting proposition to which several exceptions exist. Parliament is within its rights to impose greater penalties for acts that have more serious consequences.

Policy considerations

- **Deterrence** demands that a person who embarks on a dangerous course of action be held responsible if death ensues.
- **Justice** requires that the criminal law account for the concerns of the victim and for the concerns of society – in this case, the fact that someone has died as a result of A's actions.

The objective test of mens rea

- **There is a single standard of mens rea for crimes of penal negligence – reasonable foreseeability of a risk of harm which is neither trivial nor transitory.** The only exception to this rule arises if A lacks capacity to appreciate the risk. "The criminal law imposes a single minimum standard which must be met by all people engaging in the activity in question, provided that they enjoy the requisite capacity to appreciate the danger and judged in all the circumstances of the case, including unforeseen events and reasonably accepted misinformation."

Wholesale Travel Group v. R. *SCC 1991*
The reverse burden of proof in strict liability does not breach the ***Charter*** either because it doesn't violate ***s. 11(d)*** or because it is saved by ***s. 1.***