# Law 120 – Criminal Law – CAN

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Table of Contents

[Law 120 – Criminal Law – CAN 1](#_Toc290360303)

[Exam 3](#_Toc290360304)

[Criminal code stuff 6](#_Toc290360305)

[Classification of offence 6](#_Toc290360306)

[ **Summary=**less serious—prov court 6](#_Toc290360307)

[ **Indictable=**more serious, more procedural safeguards, longer sentences 6](#_Toc290360308)

[ **Hybrid=**can be indictable or summary @ crown’s choice which is charged 6](#_Toc290360309)

[Appeals 6](#_Toc290360310)

[Proving the Crime 6](#_Toc290360311)

[Crown’s Burdens 6](#_Toc290360312)

[Reverse Onus Burdens (ALWAYS RAISE A CHARTER ISSUE UNDER S 11 D. APPLY OAKES) 6](#_Toc290360313)

[BRD 7](#_Toc290360314)

[CREDIBILITY 7](#_Toc290360315)

[DISTINGUISH BETWEEN BRD AND BOP 7](#_Toc290360316)

[Lifchus/Starr/JHS/ - Reconciling the Cases: 7](#_Toc290360317)

[Oakes Test 8](#_Toc290360318)

[Actus Reus 8](#_Toc290360319)

[LEGALITY 8](#_Toc290360320)

[ ***Charter s 11 (g)*** 8](#_Toc290360321)

[OMISSIONS 8](#_Toc290360322)

[VOLUNTARINESS 8](#_Toc290360323)

[STATUTORY INTERPRETATION 9](#_Toc290360324)

[Causation 9](#_Toc290360325)

[English Cases 9](#_Toc290360326)

[Moral Blameworthiness 9](#_Toc290360327)

[Motive 10](#_Toc290360328)

[Transferred intent 10](#_Toc290360329)

[Public Welfare Offences: Absolute and Strict Liability 11](#_Toc290360330)

[To Determine True Crime from Public Welfare Offences 11](#_Toc290360331)

[4 Factors To Determine Whether it’s Absolute or Strict Liability *Sault Ste MArie* 11](#_Toc290360332)

[Steps for when it is NOT a True Crime *Sault Ste Marie* 12](#_Toc290360333)

[Crimes of Objective Fault 12](#_Toc290360334)

[TYPES OF NEGLIGENCE 12](#_Toc290360335)

[Steps when attacking a question that might be OBJECTIVE MR 13](#_Toc290360336)

[RECONCILIATION 13](#_Toc290360337)

[Penal negligence test 14](#_Toc290360338)

[Criminal Negligence test 15](#_Toc290360339)

[Policy Discussion 15](#_Toc290360340)

[Predicate offences 15](#_Toc290360341)

[Predicate Offences 15](#_Toc290360342)

[Manslaughter Specifically *Creighton* 16](#_Toc290360343)

[Mens Rea and the Charter 16](#_Toc290360344)

[How can you tell if something is a principle of Fundamental Justice? 16](#_Toc290360345)

[Important principles of FUNDAMENTAL JUSTICE 16](#_Toc290360346)

[R. v. Martineau (1991, SCC) 17](#_Toc290360347)

[Defences 17](#_Toc290360348)

[Mistake of Fact: Common Law 17](#_Toc290360349)

[How it Operates 17](#_Toc290360350)

[Air of Reality Test (There must be AOR to EACH ELEMENT) *Cinous PappaJohn* 17](#_Toc290360351)

[Test for mistake of Fact 18](#_Toc290360352)

[Sexual Assault 18](#_Toc290360353)

[Test for honest but mistaken belief in Sexual Assault 18](#_Toc290360354)

[Provocation: Statutory Defence 232 19](#_Toc290360355)

[Elements of s. 232 of CC affirmed in *Tran* 19](#_Toc290360356)

[Mental Disorder: Statutory Defence s 16 20](#_Toc290360357)

[Presumption and Burden of Proof 20](#_Toc290360358)

[Test for section 16 21](#_Toc290360359)

[6. Relationship between mental disorder and automatism 22](#_Toc290360360)

[Non-Mental Disorder Automatism 22](#_Toc290360361)

[What cannot cause automatism? 22](#_Toc290360362)

[What can cause automatism? 22](#_Toc290360363)

[Burden of Proof 22](#_Toc290360364)

[Steps for Judge to Consider(*Stone*) 22](#_Toc290360365)

[Necessity: Common Law Defence 23](#_Toc290360366)

[How it Operates: 23](#_Toc290360367)

[Burden of Proof 23](#_Toc290360368)

[Elements of necessity 24](#_Toc290360369)

[Duress: Statutory and Common Law Defence 24](#_Toc290360370)

[How it Operates 24](#_Toc290360371)

[Deciding whether to use CL or s17 24](#_Toc290360372)

[STEPS FOR IF OFFENCE IS LISTED IN S 17 25](#_Toc290360373)

[Burden of Proof 25](#_Toc290360374)

[STEPS FOR IF A IS PARTY/ACCESSORY TO OFFENCE 26](#_Toc290360375)

[STEPS IF OFFENCE NOT LISTED AND S 17 CAN APPLY 26](#_Toc290360376)

[IF you decide to apply s17 26](#_Toc290360377)

# Exam

* Remember who has the onus of proof and what the standard is for each portion of the exam.
* There are no gratuitous facts in the fact pattern. What does each mean?

**REMEMBER:**

**IRAC** – demonstrate your work as you go.

* + **I)** Explicitly state the issue.
  + **R)** Talk about the case law
  + **R) and** reconcile.
  + **A)** **(i)** state relevant fact; **(ii)** argue by analogy or distinguish;
  + **P)** use policy (moral blameworthiness-legal causation).
    - Look for the nuance in the fact pattern.
  + **C)** Conclude with, although debatable, BLANK is the better view.

**Step 1) What is the question asking?**

* May begin with defence or actus reus.
* Either way, go to Criminal Code.
* Be prepared for objective or subjective mens rea

**Step 2: Look up Criminal Code Offence**

**IF NO SECTION PROVIDED GO TO INDEX OR TABLE OF CONTENTS TO TRY TO FIND CLOSEST THING TO if unsure say you were debating between two sections**

**READ EVERY WORD CAREFULLY AND UNDERLINE. READ SECTION MORE THAN ONCE. THINK ABOUT EVERY WORD AND HOW TO ACCOUNT FOR IT...THINK ABOUT FACT PATTERN CAREFULLY, PAY ATTENTION TO DETAIL**

**LOOK UNDERNEATH SECTION FOR PRESUMPTIONS\*\*\*\*IMPORTANT FOR CHARTER BREACHES**

The actus reus will be in **offence creating section** of the Criminal Code

**Step 3: Look up DEFINITIONS of important terms**

**1) look at section**

**2) look at sections above or below act**

**3) look at beginning of part**

**4) look at section 2 of criminal code🡪Starts on Page 2**

**5) look at index**

**6) look to cases**

**7) give ordinary an plain meaning of the word , context of the provision, with parliament’s intent in mind...PAY ATTENTION TO “AND” & “OR”...OR means prove only one, AND means prove both [MENTION DRIEDGER’S PRINCIPLES *Clark Moquin*] Driedger’s rule** - **s12 *IA***Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

**Step 4 :Divide Actus Reus into 3 parts (not every offence has all three)**

**STATE THAT CROWN MUST PROVE EACH OF THESE BEYOND REASONABLE DOUBT**

* **Conduct**-Always
  + what act or omission must crown prove? VERB
  + Must be **VOLUNTARY** *(****Lucki, Wolfe****)* (sometimes not explicitly stated...ie “obtaining credit” is a consequence and the conduct may be defined elsewhere in provision)
    - Voluntary presumed subject to evidence to the contrary
* **Circumstances**-Sometimes Present
  + may include presence or absence of facts
  + Look for Words “**while” “when**” **“without” “with”**
  + Qualifies conduct as criminal
* **Consequences**-Sometimes Present
  + the offence *may* require crown to prove that a result came about because of conduct.
  + Look For: “**obtaining” “resulting” “Causing” “by”**
  + Where a consequence is necessary **CROWN MUST PROVE CAUSATION BRD *(Smithers, Harbottle, Moquin, Nette)***
    - Causation ***Smither’s*** *Standard “****not insignificant beyond de minimus”*** *in* ***Nette*** *becomes* “**significant and contributing factor**” for homicide and is used for other crimes ***Moquin (****about assault****)***...**dissent in Nette says it elevates the standard** **but majority says just makes it easier for jury to understand** [SEE CHART]
    - I would use the ***Nette*** approach because the court said it’s the same standard and was used after in ***Moquin,*** and it’s the standard I assume court would use in future
    - Causation- Higher Standard for First Degree murder : “**Substantive and integral cause of death*” (Harbottle)***[SEE CHART]
    - Canadian courts use moral blameworthiness in addition to factual blameworthiness in murder cases ***JSR***

**Step 5: Look at statute for *mens rea* language ;IS IT SUBJECTIVE OR OBJECTIVE?**

**Start your analysis with wording of the statute**

* **Look to words that signal objectivity: NEGLIGENCE, DUTY, UNLAWFUL, REASONABLE, DANGEROUS,**
* **When a statute is silent start with the presumption that mens rea is subjective (*Beaver, Sault Ste Marie)***
* **This can be altered by parliament’s specific wording in the statute *Buzzanga***
* **Some offences explicitly state mental element but others are silent**
  + If there’s language in the statute, use it to interpret
* **If statute has intentionally altered starting presumption, this must be clear and unambiguous *Beaver***

**Subjective mens rea**

**\*** Subjective mens rea is often satisfied by lower forms of MR such as recklessness, without needing to go to higher forms (ie if you meet recklessness, you don’t need to go to intent) unless statute requires it

* ***Beaver*** says subjective mens rea presumed for **True Crimes**
* ***Sault ste Marie***says subjective mens rea **does not apply to administrative and regulatory offences.**
* Subjective mens rea can be **inferred from the act *Theroux***
  + **INTENT-**consciously choosing to carry out an act/ ***Act with purpose of accomplishing OR*** **knowing that a consequence is substantially certain and persisting nonetheless** (***Buzzanga)***
    - The subjective presumption of mens rea can **change when parliament includes mention** **of it “intends to” “with the purpose of” “with intent of”, ‘wilfuly” (*Buzzanga****)*
      * Wilfully is context dependent, can be intent or recklessness
      * Wilfully might be used to modify a consequence or conduct
      * May be used to by legislature to elevate mens rea so that its greater than just recklessness
    - Live question after ***Briscoe***  if **Wilful Blindness** can substitute for intent where it is explicitly required by the statute
    - Subjective mens rea has nothing to do with whether a person thinks what they’re doings is right or wrong… good innocent motive doesn’t negate intent ***Theroux***
* **IF TALKING ABOUT INTENTION, MAKE A DISTINCTION BETWEEN MOTIVE AND** 
  + - **CITE *LEWIS (***A and co-accused convicted on murdering co-accused’s daughter by mailing an explosive.)
  + **KNOWLEDGE**- knowing that a **circumstance** exists or doesn’t, includes wilfully choosing not to confirm suspicion (**wilful blindness**)
    - ***Beaver*** gives definition of knowledge – **actual awareness** that a particular circumstance exists or does not exist. Knowledge of the character of the circumstance
    - *(****Briscoe****):* defines **WILFUL BLINDNESS** as when a person is aware of a need for inquiry but making a deliberate choice not to make the inquiry because he **does not wish to know the truth** and would rather remain ignorant. [NOT CLEAR AFTER BRISCOE IF STATUTE SAYS INTENT WHETHER WILFUL BLINDNESS IS ACCEPTABLE]
    - ***Briscoe***- **says WILFULLY BLIND= KNOWLEDGE…live q about intent**
    - ***Briscoe* court charged Briscoe under aiding and abetting which statutorily requires intent, even though the court focused on the fact that Briscoe had the requisite knowledge and wilful blindness. No express mention of whether knowledge and intent can be equated, but the fact that the court proceeded in charging Briscoe under the statute, even though they didn’t expressly deal with his intent, suggests that the court might believe that knowledge is sufficient for intent and therefore that Wilful Blindness is sufficient for intent.**
    - Therefore, where intent is required by statute, one might infer that wilful blindness is enough because of it being equated to knowledge and knowledge with intent
* **RECKLESSNESS**- foreseeing that **risk of consequence occurring but choosing** **to proceed regardless** ***Sansreget***
  + You can be reckless to the **circumstances** as well. Recklessness is the minimum so it’s the easiest to prove
  + *(****Theroux****):* **subjective foresight of the consequences and a decision to proceed regardless.** In **most cases RECKLESSNESS is enough to satisfy subjective** *mens rea*.
  + *In cases where parliament implements the term “wilful” there may be an intention to elevate the mens rea requirement.* Though wilful can mean reckless or intent, it is context dependent ***Buzzanga* [remember that wilful also modifies either a consequence or conduct] you decide**

|  |  |
| --- | --- |
| **Conduct** | **Intentional** or **reckless** act or omission [don’t analyze if there is consequences]. |
| **Circumstances** | **Knowledge** of the circumstance or being **reckless** (***Theroux***) or **willfully blind** to its existence (***Briscoe***). |
| **Consequences** | Must **intend** or be **reckless** or **willfully** as to the consequence |

* STATUTORY LANGUAGE PREVAILS/ if statutory language seems to intend a lower standard of mens rea then common law. ***Beaver says that needs to be clear***
* “intent”, “purpose” “means to” etc : ELEVATE MENS REA, wilful =ambiguous, sometimes intent and reckless, sometimes just intent. IF WE SEE WILFUL, WE NEED TO MAKE A DECISION

**OBJECTIVE MENS REA**

* **Negligence**; **duty**; **reasonableness** [***Tutton***]; **dangerousness** [***Beatty***]; **unlawfully** [***DeSousa***}. These necessarily import an objective MR
* **Unlawfully** – objective MR. There is a predicate offence.
  + Use standard AR/MR analysis but full AR/MR analysis for predicate offence goes under AR circumstances and objective dangerousness/risk of body harm becomes MR circumstances (***DeSousa***; ***Creighton***).
  + **Objective dangerousness** – at 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.

**Step 6:** **Defences**

**\*\*May be more than one possible defence. Argue all of them.**

* **Mistake of fact** (different for subjective and objective MR offences) – must raise an air of reality. ***Cinous (AOR)*** Best to consider under MR. ***Kundeus, Pappajohn, Ewanchuck***.
* **Provocation** – Partial defence applicable only to murder; D raises an AOR at which point Crown must establish BRD that D wasn’t provoked. ***Hill, Thiebert, Neily, Daniels, Tran***
* **Mental Disorder** – Person relying on s. 16 must prove on BOP (can be Crown or A) ***Cooper, Swain, Chaulk***
* **Non-insane Automatism** – D must prove on BOP. ***Rabey, Parks, Stone***
* **Necessity** - A must raise an AOR on every element then the burden shifts to the Crown to disprove defence BRD. ***Perka, Latimer, Ungar Cinous (AOR)***
* **Duress -** A must raise an AOR on every element then the burden shifts to the Crown to disprove defence BRD. ***Hibbert, Ruzic***

**Step 7: Charter Issue:**

* **11 D charter issue is raised when there is a chance of conviction with the existence of reasonable doubt. Look for a mandatory statutory presumption, or reverse onus provision *Oakes* OR**
* **When a law has the potential to convict a morally innocent person, offends the principles of fundamental justice and, if imprisonment, it violates a person’s liberty under s. 7 .In other words, absolute liability and imprisonment (even potential of) can never be combined.**  ***Motor Vehicle Reference***
* **Charter issue also when someone who is morally involuntary could be criminalized, its principle of fundamental justice: *Ruzic***
* State which *Charter* section is violated and how, in relation to the facts, a conviction with reasonable doubt may occur.
* If Charter violated, perform the ***Oakes*** test.

# Criminal code stuff

* ***S8* (3):** allows use of defences previously used in common law...if u can’t find a defence in the code, you might still have one available at common law
* ***S9*:** criminal law will only be based on criminal code and nothing that came before it
  + We always, always begin with the criminal code or another federal act...

# Classification of offence

* **Summary=**less serious—prov court
* **Indictable=**more serious, more procedural safeguards, longer sentences
  + most serious **s469 *Criminal Code*** 🡪Go to Supreme Court
  + Less serious **s*553 Criminal Code***🡪absolute jurisdiction of provincial
    - Trials always by judge alon**e**
  + If not listed **Elective offences** accused decides how to be tried
    - Can choose provincial court no jury no prelim hearing
      * Benefits: tried quicker, case over sooner, you get oral reasons from judge that you can scrutinize
    - Go supreme court, prelim, judge alone
      * Benefit: Judge gives reasons, prelim hearing, maybe wont go ahead
      * Takes longer -bad
    - Go to supreme court, have prelim hearing, have jury
      * Benefit: Tried by your ‘peers’
      * Jury doesn’t give reasons-bad, but you can appeal based on judicial instruction to jury
* **Hybrid=**can be indictable or summary @ crown’s choice which is charged

# Appeals

**Error in Law:**  can be appealed by crown or defence. MOST COMMON BASIS. Only judge makes this error by omitting or excluding evidence or misunderstanding the law. **Was there mistake of law? Did this compromise fair trial?** (***Hamilton****...mistake of law)* Court could substitute new verdict or order a retrial

**Error in Fact:** Unreasonable verdict unsupported by evidence. Only D can make it. Only if accused can say evidence is unsupported. (Usually TJ fact decisions are respected) RARE

**Miscarriage of Justice/Unreasonable :**only defence can bring it up. Was there a failure in judicial process including investigation which gave rise to wrongful verdict? (Dr Charles Smith...autopsies completely wrong)

# Proving the Crime

## Crown’s Burdens

**Evidentiary Burden**: initial burden on Crown to introduce evidence on each element of the offence

**Legal Burden**: Crown must prove each element of the offence **beyond a reasonable doubt**

Statute can shift the burden of proof: will *always* raise s. 11(d) issue/ always raise a constitutional problem as they could lead to a conviction despite the existence of a reasonable doubt (***Oakes***)

 2 types of Reverse Onus Provisions these will both be in the Code

## Reverse Onus Burdens (ALWAYS RAISE A CHARTER ISSUE UNDER S 11 D. APPLY OAKES)

**1) Evidentiary Burden**

       E.g. the proof of one fact leads to the presumption of another, in ABSENCE OF EVIDENCE TO THE CONTRARY = evidentiary burden (raising a reasonable doubt) on **AOR *Cinous***

**2) Legal Burden** to prove on a **Balance of Probabilities**

       E.g. Everyone who without lawful justification or excuse, the PROOF which lies on him (PROOF= ON A BALANCE OF PROBABILITIES)

 2 types of Presumptions:

**1) Mandatory Statutory Presumptions:** trier of fact must draw a presumption

**2) Permissive presumptions**: allow, but don’t require, the trier of fact to infer the existence of one fact from the existence of another

## BRD

***R. v. Lifchus [1997] SCC***

If the explanation as a whole could reasonably be misunderstood by the jury then the explanation cannot be acceptable. There is no magical incantation; a few slips doesn’t negate the instruction, one has to look at the instruction in its entirety.

Judges should explain reasonable doubt as follows to jurors:

Judges should NOT say that RD:

1. has ordinary connotations/not important decisions
2. implies absolute certainty
3. is based on moral certainty [ppl use it differently than was used earlier]

Judges SHOULD say RD:

1. is based on reason and common sense [nothing else]
2. Can’t be based on sympathy
3. Can’t be imaginary or frivoulous
4. is logically connected to evidence or absence of evidence

Requires more than probable guilt but not absolute certainty

## CREDIBILITY

***R. v. JHS. [2008] SCC***

* A convicted of sexual assault. Rules related to credibility.
* ***WD Rules instructing Jury on Reasonable Doubt***:
  + **1)** If you believe the evidence of A, you must acquit.
  + **2)** If you do not believe the evidence of A but are left with a reasonable doubt by it, you must acquit.
  + **3)** Even if you are not left in doubt by the evidence of A, you must asked whether on the basis of the evidence which you accept, you are convinced BRD by the evidence of the guilt of the A.
  + **4)** If the jury does not know who to believe, they must acquit (***JHS adds***).
* The Threshold for appellant reversal: could jury have been under misapprehension for the correct burden and standard of proof to apply. If jury under misapprehension🡪must be reversal
* Different standard than ***Lifchus*** for **credibility** – if the jury could have been under any misapprehension, a new trial is ordered. There is no **magical incantation**; the jury charge is read as a whole.

## DISTINGUISH BETWEEN BRD AND BOP

***R. v. Starr [2000] SCC***

* Judges must distinguish **BRD** from **Balance of Probabilities**. Judges must define the reasonable doubt standard by telling the jury it **falls closer to absolute certainty than to probability**. [adds to lifchus what should be told to juries]
* Reasonable doubt should be expressed as something **unique to the legal process, not as synonymous with ordinary life** [**restatement of *Lifchus if proving this point Cite Lifchus***].
* **Dissent:** Appeal courts should look **at entire charge to jury**, rather than single phrase and shouldn’t use lifchus as checklist

### Lifchus/Starr/JHS/ - Reconciling the Cases:

* ***Lifchus*** and ***JHS*** differ in that ***Lifchus*** (**reasonably likely**) is about reasonable doubt generally whereas ***JHS*** (**any misapprehension**) is about reasonable doubt where credibility is at issue.
* It could be argued difference in general and credibility but better marks are given for going to policy reasons.
  + For example, in ***Lifchus*** it would be inefficient to hold the judge to a higher standard but in ***JHS*** where it is such a he said/she said case, there can be no apprehension – risk of an incorrect verdict is too high.
* Use ***JHS*** (credibility) and/or ***Lifchus*** (general) and distinguish ***Starr*** for picking out phrases and not reading reasons as a whole and for BRD being close to Abs Certainty.
* USE ***JHS/WD*** for credibility.

## Oakes Test

* To violate the Charter, there must a chance a person will be convicted with the existence of a reasonable doubt.
* Party seeking to uphold infringement must prove on BOP. T
* **(1)** Pressing and substantial objective (***Oakes***).
* **(2)** Proportionality.
  + **(i)** Rational connection between objective and measure (***Oakes***).
    - ***Oakes*** says between measure and harm.
  + **(ii)** Minimal impairment – no alternative measure (***Oakes***).
  + **(iii)** Proportionality between effects measure and objective.
    - More marks for saying the more deleterious the effects the more important the measure must be (***Oakes***).

# Actus Reus

## LEGALITY

* ***Charter s 11 (g)***
  + *11. Any person charged with an offence has the right*
    - *G. Not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under* ***Canadian or international*** *law or was criminal according to the general principles of law recognized by the community of nations*
  + Is relevant for people **committed for offences from years ago** [war crimes of past]...11g has power to protect person
  + **11g applies where a crime is not also a crime in Canadian law**
* ***Criminal Code s9:*** offences have to be made by statute. Common law offences no longer be basis for criminal conviction. Except contempt of court.
* It is broader than section 9 of the criminal code, but it is **ok because section 9 is within section 11** of the Charter. Section 9 just limits the scope even more.
* The power to create offences does not exist at common law; criminal conduct must be declared by Parliament (**s 9 *CC)*** (***Frey and Fedoruk—****guy tries to arrest peeping tom*).

## OMISSIONS

**Liability for omission may arise:**

* **Where a statute expressly imposes a duty to act**
* **Actus reus and mens rea must be contemporaneous It is not necessary that mens rea is present at inception of mens rea, it can develop during the course of a continuing act, making the act a criminal offence. But, the inception of it cannot convert an act that has been completed into a criminal act. *(Fagan…A drove over Police’s foot and didn’t move and was happy after he was on)***
* **Common law doesn’t like criminalizing omissions**
* **A reciprocal duty to act can be inferred from an explicit statutory duty thus making an omission to act criminal.** Omission to act in a particular way will give rise to criminal liability only where 1) a duty to act arises at common law; 2) is implied by statute; 3) if its expressly stated in a statute **(*Moore…guy on bicycle woundt pull over for police officer and give his name)…***
* **NOTE MAY NOT BE GOOD LAW ANYMORE: Dissent**: **Common law should not impose a duty** to identify self upon anyone **in the absence of an express statutory provisio**n. **Dissent later followed in BCCA (*Greaves*).**
* **A Common Law duty can constitute the basis for Criminal Liability. An omission can be criminalized by statute but the manner in which it is criminalized can vary (*Thornton…A donated Blood and omitted to say that he had HIV. Charged with committing a common law offence s180 “common nuisance”)***

## VOLUNTARINESS

* Voluntariness is the minimum requirement for finding A guilty of a crime (***Lucki…guy lost control while driving***).
* A reflex action constitutes involuntariness (***Wolfe…guy accidently hit dude with phone***).

## STATUTORY INTERPRETATION

**Bodily harm is more than transient or trifling but less than “serious bodily harm” [injury that interferes in a substantial way with physical integrity or wellbeing of complainant]. This case illustrates statutory interpretation. Importance of “and” v. “or”. (*Moquin A assaulted V was convicted of assault but not Assault causing bodily harm)***

# Causation

**Consequence Crimes** :– Issues **of Causation only arise in consequence crimes** (when the actus reus includes more than one consequence) [don’t have to be homicide]

Crown must prove beyond a reasonable doubt:

The consequence occurred

The Act or Omission of the Accused Caused the consequence

**Causation is All-or-None** – if two people found **jointly responsible, they’re both responsible 100%**

**Common Law** – Rules of causation **come out of the common law, not statute**

You can’t consent to death or bodily harm

## English Cases

* If the original wound is, at the time of death, the operating and substantial cause of death, it is held to be the cause of death unless the original wound is merely a setting wherein a more substantial and operating cause of death occurred (***Smith…soldiers fought and dropped guy after stabbing him on way to hospital***).
* A victim’s refusal to accept treatment does not absolve A of causation if, at the time of death, the wound inflicted by A remains the operating and substantial cause of death (***Blaue…*** *Accused attacked victim with a knife after she refused to have sex with him, Victim refused blood transfusion but would have lived if she had it.*).
  + The thin-skull rule.

|  |  |
| --- | --- |
| ***R. v. Smithers* (1978)** | Causation test asks if “not insignificant” or “beyond de minimus” for juries. A lower threshold. |
| ***R. v. Harbottle* (1993)** | Were actions **“substantial and integral cause of death**?” Stricter test in regard to level of **participation** for 1st degree murder. |
| ***R. v. Nette* (2001)** | **1) *Smithers*** applies to all murder. And other cases as well ***Moquin***  **2)** ***Harbottle*** to go to 1st degree (**process of unlawful act**) or could be planned and deliberate.  **3)** ***Smithers*** standard was reworded: was act **significant contributing cause**?  NOTE: minority in Smithers said rewording **elevated the standard unnecessarily**…,MAKE SURE TO SAY WHICH TEST YOU ARE USING AND WHY |

## Moral Blameworthiness

* Moral blameworthiness is a **policy question about where to draw the line from criminalization**. It’s a distinctly Canadian concept.
* Test for **manslaughter and 2nd degree should be the same and different from the test for 1st degree because it has a higher degree of moral blameworthiness.**
* When **arguing a different crime by analogy to murder, use moral blameworthiness to decide what test to use**.

**In joint activities all parties might be found to cause consequence that results from the actions of one particular party to the activity. *R. v. JSR* [2008] ](Toronto shooting not sure who’s bullet killed V)**

**CAUSATION DOESNT ONLY STAND FOR PHYSICAL CAUSATION IT CAN STAND FOR MORAL CAUSATION AS WELL. “it is entirely appropriate that all who participate in inherently very dangerous conduct should be said to have caused the foreseeable results of their conduct”, s 222 says causing death indirectly or directly**

***R. v. JSR* [2008](Toronto shooting not sure who’s bullet killed V)**

**The court in *JSR* returns to the *Smithers* language – test is the same despite wording and it is not a charge to the jury.**

## Motive

***R. v. Lewis (1979) SCC*** A and co-accused convicted on murdering co-accused’s daughter by mailing an explosive. A claimed he had no motive

**Where statute is silent , presumption is that Crown doesnt need to prove motive.. The TJ should charge jury on absence of motive where accused can demonstrate that crown has no evidence of motive**

**2 key principles**

* **1 Motive is DIFFERENT THAN INTENTION : it is THE ALTERNATIVE reason why you kill not whether you intend to kill. It is not routinely element of crime, but parliament can make it part of it (terrorism)**
* **2 Where motive is not an element of the crime. The question of whether jury needs to be instructed on motive, depends on nature of two parties cases. Sometimes yes. Sometimes no.**

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| **Motive is ulterior intent but it is not the intent as related to the criminal act. [ie lewis killed to get money not cause he wanted the people dead]**   * **(1) Motive is always admissible.** * **(2) Motive is not required therefore it is not essential, at law, to the Crown’s case.** * **(3) Proved absence of motive is an important factor for A and thus noteworthy when charging the jury.** * **(4) Proof of motive is noteworthy in a circumstantial case where identity or intention is at issue.** * **(5) Motive is a question of fact and evidence. The TJ’s duty to charge the jury on motive depends on whether it is essential in arriving at a just conclusion.** * **(6) Each case turns on its circumstances.** |

## Transferred intent

* Common law requires intention of committing crime and act of committing a crime to coincide
* Some situations accused intends one offence but a different one occurs by accident
* 2 situations of common law doctrine of transferred intent
  + 1 .A shoots and kills B, believing that B is C (mistake to id of victim)
  + 2. A aims at C, but by chance or lack of skill shoots and kills B (accident)
* Both cases A has intent to kill C but kills B instead (fulfils mens rea in relation to C and in relation to B actus reus is complete)
* Legal issue is coincidence of actus reus and mens rea.
* **Law allows A to be convicted of murder of B even though A has no intent to kill B**
  + **Court holds A morally responsible as if they had accomplished killing who they intended to kill**
* **Intent to kill C is transferred to B (based on pure policy reasons)**
* Codified for murder in **s 229(b)** but may apply to other offences too so long as the harm that happens is the same harm intendend
  + If A wants to commit mischief and hit Bs car, but accidently hits C in leg, A’s intent cannot be transferred to make him guilty of an assault

***R v. Gordon*  2009 Ontario Court of Appeal (*A tried to kill C but instead shot and injured bystanders charged with attempted murder of the bystanders)*. USE IF ATTEMPT CASE**

* **Transferred intent doctrine can’t apply when there the consequence of the offence is not the same as the injury intended.** In relation to attempt crimes, you cannot convict someone with transferred intent. If parliament was to include it in the statute, then it would be decided differently. But because its not included, turn to common law, which doesn’t extend to attempted offences
* **ATTEMPTED MURDER REQUIRES FULL INTENT TO KILL**

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| **1) Every crime requires MR & AR,** but w TI, MR relates to intended victim, while AR relates to actual victim…there’s a disconnect  **2) TI applies only to crimes that require a consequences** as part of AR; no result in attempted murder **3) Applying TI to attempted murder** would unduly extend liability; how far do we extend scope of liability for TI **4) No necessity in forcing TI into realm of anything other than completed murders,** If innocent victim injured, D will already have committed a crime |

***Kundeus*** was interpreted to permit a **“transferred”** mens rea where D intends to commit **one offence** but actually **commits a different actus reus** (notwithstanding that the offence actually committed is more serious). Court found intent to transfer mescaline (a crime) and court chose to transfer this to the offence of trafficking LSD (a more serious crime). However, the **dissent** in Kundeus said that the **Crown cant transfer intention to commit one crime to satisfy the MR requirement of an more serious crime.** In the post Charter era, it is **unlikely that the majority in Kundeus would hold**; the dissent’s interpretation would likely be preferred

# Public Welfare Offences: Absolute and Strict Liability

## To Determine True Crime from Public Welfare Offences

* **Only federal govt can create true crimes**
* **PROVINCIAL CRIMES CAN ONLY BE REGULATORY...so** ASSUME ITS PUBLIC WELFARE AND APPLY THE PRINCIPLES
* **If in CC or any Act in CC still True crime**. If notin CC might still be criminal, but probably regulatory
* **If Regulatory🡪Public Welfare**
* **If Total Ban/Prohibitory🡪True Crime (**thinkabout if its trying to regulate something**)**
* **Pay attention to Mens Rea Language**

**Public welfare offence** – emphasis on society whereas a true crime’s emphasis is on protecting an individual from another individual.

**Strict liability** –  **the starting presumption for public welfare offences and the** defence of due diligence can be raised.

Crown entitled to conviction after proving AR BRD unless D proves due diligence BOP.

**Absolute liability** – starting presumption is strict liability – legislative body must be very clear about making an absolute liability

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| **Crime** | **AR** | **MR** | **Displace MR presumption?** | **DEFENCE OF Due Diligence** |
| **TRUE CRIME** | **Crown must prove BRD** | **Subjective crown BRD** | **Yes. Statutory language** | **N/A**  **(If you have subj mens rea, you don’t need to think of negligence)** |
| **Public Welfare Offence STRICT LIABLITY** | **Crown BRD** | **No proof needed** | **N/A**  **(Yes. Statutory language (Ste Marie))...If it has this language, than use subj mr approach** | **Yes . Burden of proof on accused Balance of Probabilities**  ***(Sault Ste. Marie)*** |
| **Public Welfare Offence ABSOLUTE LIABILITY** | **Crown BRD** | **No proof needed** | **N/A** | **NO** |

### 4 Factors To Determine Whether it’s Absolute or Strict Liability *Sault Ste MArie*

Starting presumption is that it’s strict liability

* + **(A)** **Overall regulatory pattern/legislative scheme;)].**
    - **Regulatory** suggests strict liability… (***Chapin…duck hunting q of whether true crime or Strict Liability***)?
  + **(B)** **Gravity of penalty; dealbreaker)].**
    - **Serious consequences** suggest strict liability (***Chapin*** *in the chapin context losing hunting license, big fines etc****.***).
      * **If really strict, consider it to be a true crime!!!**
      * WHY? If penalty of imprisonment or heavy fine they should have possibility of proving innocence
      * Could argue that a substantial fine would undermine someone’s livelihood to such an extent that it undermines a principle of fundamental justice.
      * For small penalty adequate enforcement depends on wholesale prosecution
    - Under the **Charter s.** **7, absolute liability and imprisonment can never be combined** (***Motor Vehicle Reference***). A morally innocent person cannot be imprisoned.
    - There is an interpretive presumption that Parliament has intended to pass constitutional legislation (i.e. PRESUMPTION OF CONSTITUTIONALITY)… **i.e. where imprisonment is a potential sanction, court will try to interpret offence as strict liability);.** **(*MV Ref) Raham***
  + **(C) Subject matter of the legislation**
    - Feasibility of compliance important for absolute liability ***Chapin(****ie do you have to search entire forest for bait to comply)*
  + **(D) Precise language used in the offence creating section.)].**
    - “…are guilty of an offence” likely will be **absolute liability.**
    - Consider whether **DEFENCE OF DUE DILIGENCE** expressly provided for. **If so→ strict liability**. BUT ***court in Raham*** says the defence **if not a separate criterion, but considered**. Question is whether **in theory**, it could be **open for a person to argue they took reasonable steps to avoid committing THIS offence?** and not whether they took all **reasonable steps to avoid illegality** (i.e. can be acquitted of stunt racing, but convicted of speeding). If in theory it could be available, is it more likely court will construe as strict liability, but not determinative. But if in no way one could come to such a conclusion, then it is most likely an absolute liability offence

### Steps for if not True Crime *Sault Ste Marie*

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| * **(1)** Is it strict or absolute liability? ***Sault Ste Marie***)]. See test ABOVE   + [presumption is **strict** **liability**(Presumption holds unless Parliament has expressly indicated offence is one of absolute liability * **(2)** Crown must prove AR BRD.: cond circ consq (Crown need not prove MR for absolute or Strict Liability) * **(4)** If Strict Liability, , A may **prove on BOP** that they took **all reasonable care (due diligence)** which involves consideration of what a reasonable person would’ve done under circumstances   + The reverse burden of proof in strict liability is not contrary to Charter (***Wholesale Travel Group***). |

* **Defence of Due diligence if Strict Liability** – Proof on **BOP** that A took all **reasonable care** in the circumstances having regard to what the **reasonable person would have done based on the facts as A reasonably believed them to be** (***Sault Ste. Marie***).
  + **(a)** What facts did A believe?
  + **(b)** Was the belief reasonable?
    - Reasonable **mistake of fact will suffice**.
  + **(c)** Based on those facts what **care would a reasonable person have taken**?
  + **(d)** Did A take such care?

**NOTE: Why Would We have Defence of Due Diligence and Strict Liability Offences?**

* Dickson says if you want to prevent people from causing harm, you want to provide AN INCENTIVE FOR PEOPLE TO TRY TO AVOID THAT HARM. The defence provides the incentive ***Sault Ste. Marie***

# Crimes of Objective Fault

## TYPES OF NEGLIGENCE

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| **CIVIL LAW**  · *Any* breach from SoC expected of a ***reasonable person*** will result in person being liable in damages to the victim of the tortS **DEPARTURE**  (ANY departure enough to trigger liability) |
| |  | | --- | | **CRIMINAL LAW**  **PENAL NEGLIGENCE**, there is a constitutional dimension to penal negligence because of possibility of criminalization. Therefore a **MARKED DEPARTURE** (***Hundal, Beatty***)  When *Code* says everything BUT criminal negligence (e.g. “dangerous” “ought to know” “unlawful”), the standard will be penal negligence   * When *Code* says everything BUT criminal negligence (e.g. “dangerous” “ought to know”), the standard will be penal negligence * Note: dangerousness cannot be measured from the consequences   **CRIMINAL NEGLIGENCE** (as defined by **s.219**) A **MARKED & SUBSTANTIAL/ SIGNIFICANT DEPARTURE** (***Tutton, JF***)   * s. 219: “*Everyone is criminally responsible who…shows wanton or reckless disregard for the lives or safety of other persons” (*marked and significant departure form the SoC) * Any time *Code* says “criminal negligence” (and *only* these words), the standard will be criminal negligence (you’re in realm of s.219). Absent these words, it is penal negligence * For objective true crime, Crown must prove **BRD**. | |

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## Steps when attacking a question that might be OBJECTIVE MR

**ONCE YOU SEE THAT ITS OBJECTIVE MENS REA, MENTION THAT THE STANDARD IS HIGHER THAN THE CIVIL WHICH REQUIRES JUST A MERE DEPARTURE. *Beatty***

* **(1)** Is it a crime of objective or subjective fault? MAKE SURE TO LOOK AROUND THE SECTION TO SEE IF THE CRIME IS THE RIGHT ONE TO CHARGE WITH
* **Note: “Reckless” when used in respect of objective mens rea, does not connote subjective foresight.** [***Tutton***].
  + **(a)** **Is there a decided case?**
  + **(b) Look for these words below**:
  + NEGLIGENCE: “criminal negligence”; ‘duty’; ‘reasonableness’ [***Tutton***]; dangerousness [***Beatty***]]; unlawfully/unlawful act [***DeSousa***] “ought to know” “without reasonable care” “Manslaughter”. These necessarily import an objective MR.

**(2)** Parse **AR**.

* + Example: [**CONDUCT**] driving **must be voluntary *Lucki Wolfe***
  + [**CIRCUMSTANCE**] **ex: “in a dangerous manner”**
    - **FOR PENAL NEGLIGENCE AND CRIMINAL NEGLIGENCE ASK: ASSESS THE CIRCUMSTANCE: WAS THE CONDUCT OBJECTIVELY DANGEROUS ??? even if UNLAWFUL ask if objectively dangerous? *BEATTY* (**having regard to other circumstances or **whatever the act says** (eg weather, road conditions**) and consider if the pattern of events was dangerous if appropriate *Hundal*)  *BEATTY*…**
    1. **The actual ACT MUST BE DANGEROUS/show wanton reckl disrgard...does it pose a risk to the public?**
       1. Dangerousness In ***Beatty:*** the crossing of the line onto other side of the road is dangerous)...
    2. **the dangerousness of conduct can’t be determined by consequences of accused’s actions…DON’T CONSIDER THE RESULT JUST THE ACT *Beatty***
    3. the court in ***Beatty*** CRITICIZED TJ who said because the act was dangerous it must inevitably be a marked departure from SOC...in ***Beatty,*** the court said these are separate issues to consider: dangerous= AR and marked departure = MR

### RECONCILIATION

***Beatty* was Different than *Creighton*, In *Creighton* the court decided to assess marked departure as a matter of AR... Beatty does marked departure at the MR stage but assesses objective dangerousness at AR stage. *Beatty* is a later case, overruled *Creighton* and Followed in *JF*. So I will follow the approach in *Beatty* and assess Marked Departure at the MR Stage**

* + **CONSEQUENCE**: was consequence met

**ASSESS WHETHER A MET THE ACTUS REUS…USE *BEATTY***

* + **After considering dangerousness at AR you have to go on to MR to decide if the departure was sufficiently blameworthy.**

**(3)** **MR** – Determine whether **Criminal** or **Penal Negligence (look at WORDING)**

* + **Conduct: Subjective Intention (IE intended to drive)**
  + **Circumstances: Marked (penal)/Marked Substantial Departure (crim neg) from SOC of Reas Person**
    - See TESTS BELOW
  + **Consequences**
    - You don’t need AR and MR to consequences to be symmetrical ***Creighton***
    - **“CAUSING BODILY HARM”** - **Objective dangerous requires, as a minimum, that a reasonable person would realise that A’s action would subject another person to “the risk of some harm” that is “more than trivial or transitory in nature”.** look to ***DeSousa***
    - **IF it is a “CAUSING DEATH” offence, you can argue that it should be objective foreseeability of the risk of bodily harm is sufficient by analogy to *Creighton***
    - **if MANSLAUGHTER, just cite *Creighton* and say its objective foreseeability of risk of bodily harm**
* **NOTE: Standard** **of care can be breached in more than one way**. Ex: person who is not trained but does brain surgery OR brain surgeon who is trained but doesnt act consistently with standard of care while performing surgery. **One can be excused only if they lack capacity**. ***Creighton***

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| **S 249 (4) Dangerous Driving causing death** | ACTUS REUS | MENS REA |
| Conduct | Operating motor vehicle  (if <3 attack or something, then As act is not voluntary) | Intention to drive [**subjective intention to engage in the conduct**] |
| Circumstances | **Dangerous** having regard to circumstances | Marked departure from standard of care  1:was A’s conduct a marked departure of the standard of care in circumstances  2: |
| consequences | death | Objective foreseeability of risk of bodily harm (*Analogy to* ***Creighton*** *because causing death offence)* |

### Penal negligence test

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| **MR CIRCUMSTANCES: PENAL NEGIGENCE** - ***comes from Hundal***, clarified in ***Beatty***  **STEP 1)**Conduct amounted to a **marked** departure from the SOC that a **reasonable person** would do in the **Circumstances? OBJECTIVE** (these are objective circumstances ie road conditions, weather, etc)   * NOTE: If it is not clear that the isolated event was a marked departure, then look at the PATTERN of circumstances… **If incident was so egregious that there is no doubt as to whether is dangerous, then don’t need to consider the pattern of events *Hundal***   **STEP 2)**Is #1 modified by what **A REASONABLY understood** about the **CIRCUMSTANCES** (these are personal perceptions of the accused. Must determine whether these perceptions are REASONABLE)   * Personal characteristics matters only if they raise **incapacity to appreciate or avoid the risk** (***Beatty***).   + Eg: age and experience do not factor in but heart attacks, epileptic fits could be considered, (***Hundal***). * A has **honest** and **reasonably** held belief in what **he’s been told** ***Hundal***   + Eg:“welder example not flammable material” * **NOTE: Standard** **of care can be breached in more than one way**. Ex: person who is not trained but does brain surgery OR brain surgeon who is trained but doesnt act consistently with standard of care while performing surgery. **One can be excused only if they lack capacity**. ***Creighton*** |

### Criminal Negligence test

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| **MR CIRCUMSTANCES: CRIMINAL NEGLIGENCE: s 219-221** –**( comes from *Tutton,* confirmed in *JF*).**  **STEP 1)** MR is a **marked AND substantial** departure from the SOC that a reasonable person would observe in A’s circumstances  **STEP 2)Is #1 modified by A’s honest and reasonably held perception of the facts? *Tutton—these are personal perceptions of A but MUST BE REASONABLE (EG*** *if in Tutton DR said boy would get better)*  **SEE ABOVE…EXAMPLES**   * + - It is open to the defence to say that A was operating under and honest and reasonable mistake of fact. ***Tutton***     - **NOTE: Can’t find someone guilty of “marked substantial departure” without also finding them guilty of “marked departure”...its incomprehensible. *JF*** |

### Policy Discussion

**Policy concern about criminalizing negligence**. The code tries to penalize **morally blameworthy conduct**; something more is required than a momentary lapse of attention. Those who have the momentary lapse could still be liable in civil negligence. (Ex: just because someone drives dangerously, doesn’t mean they’re a marked departure from the norm). ***Beatty***

**Why should there be 2 different standards of negligence?:** There are policy reasons for having a more stringent test. Namely, because criminal negligence has a more severe penalty, an even larger departure from the standard should be required. Otherwise, AR and MR would be the same for serious and less serious offences. The court is rightly, in my view, seeking a principled difference between the approach.

# Predicate offences

### Predicate Offences

* The word **“unlawful”** imports **objectivity into the principle offence**(i.e. in the course of committing another criminal offence) means contrary to a federal or provincial offence (predicate offence) ***DeSousa***
* **Unlawfully** is telling you
  + **(1)** find the predicate offence and parse/prove it like normal**; [could be obj or subj]**
  + **(2)** the mens rea for the rest is objective. Would a reasonable person in the D’s circumstances have seen the principle offence as a likely result of the predicate offence (***DeSousa***).
    - Ex: Prove subj intention to steal but can objectively have caused bodily harm

**Directions for dealing with Predicate Offence**

* **Parse PREDICATE OFFENCE**
  + Use standard AR/MR analysis…assess mr and ar for the predicate offence
  + Predicate offence must be constitutionally valid.
  + Predicate offence cannot be absolute liability if it can leads to imprisonment as per ***Motor Vehicle Reference***.
* **Parse PRINCIPLE OFFENCE**
  + **CONDUCT**  **AR** an “unlawful act…put in whatever it was” act **MR**: subjective intention/reckless/wblindness
  + **CIRCUMSTANCE AR: other circumstances for act goes here and objective dangerousness, *Creighton* says that unlawful act is necessarily dangerous MR TEST= Marked Departure test from *Hundal and Beatty* see above**(***DeSousa***; ***Creighton*** say that this test is obj )
    - It is only modified **circumstances** and capacity to appreciate danger (individual). ***Beatty***
  + **CONSEQUENCES**
    - **AR: x MR:**The rule that **symmetry** (ie mens rea for that specific consequence)usually exists between consequence and requisite mens rea **is not a principle of fundamental justice, it just happens to often be the case If symmetry doesnt exist between CONSEQUENCE AR AND MR, you have to find moral blameworthiness elsewhere ( in manslaughter it’s negligence or unlawful act)**. Parliament is within its rights to impose greater penalties for acts that have more serious consequences. ***Creighton***
    - If consequence is **BODILY HARM,** then must be objective foreseeability of the risk of bodily harm that is more than trifling or transient. ***De Sousa***
    - If consequence is **DEATH, then** must be objective foreseeability of the risk of bodily harm (analogize to ***Creighton***
    - **If MANSLAUGHTER,** then must be objective foreseeability of the risk of bodily harm (analogize to ***Creighton***

**Predicate Offences must be Constitutionally valid** in its own right, BUT it is not constitutionally required for offences less than murder that subjective MR apply to every element of an offence ***De Sousa*** and ***Creigthon***

* However, predicate offences cannot be absolute liability if it can lead to imprisonment as per ***Motor Vehicle Reference***(leads to the possibility that someone who is morally innocent cn be punished without being proved BRD)

### Manslaughter Specifically *Creighton*

* The bottom line is that to be guilty of manslaughter, objective foreseeability of bodily harm is the minimum standard and this is constitutionally ok. Confirms the common law standard. Distinguished from ***Martineau*** because Martineau was murder ***Creighton***
* WHY? McLachlin says Manslaughter is legally understood to be less than intention to kill and is thus very different than murder ***Creighton***
  + It Follows that Manslaughter carries a flexible penalty, and therefore the sentence can be tailored to suit the degree of moral fault. It is open to Parliament to say that where the consequences are greater, the punishment will be greater.  ***Creighton***
  + ***Also,* Deterrence**: demands that a person who embarks on a dangerous course of action be held responsible if death ensues. There’s no problem at a policy level for holding ppl responsible for all consequences of acts.
  + ***AND*** 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
  + **Thin Skull:** 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. ***Creighton***
  + ***This is why objective foreseeability of harm is sufficient***
  + ***Note arguable that public doesn’t know the difference between a conviction of manslaughter and murder and that they would thus carry the same stigma***

# Mens Rea and the Charter

**S. 7 – everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice**

**Language of Charter not given strict interpretation**: It is to be given a purposive interpretation; in interpreting the language, court will consider the purpose for which the right or freedom was given. The rights and freedoms guaranteed by the Charter should be **interpreted** **liberally, not narrowly** (***Hunter v. Southam).***

## How can you tell if something is a principle of Fundamental Justice?

* Whether a 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 (***Motor Vehicle Reference***).

### Important principles of FUNDAMENTAL JUSTICE

* A must be presumed innocent till proven guilty BRD (absolute liability offences get into trouble); Before someone can be punished, they must be proven by the state to be morally blameworthy ***Charter 11d Oakes***
* **Morally innocent ppl should not be punished. Must be morally blameworthy *Martineau; Vaillancourt***
  + **Absolute liability** offends this principle becauseit imposes the **possibility criminal liability absent a guilty mind. The combination of Imprisonment and absolute liability violates section 7 of the *Charter* *Motor Vehicle Reference***
* **A** law that has the potential to **criminalize** someone who has acted ina **morally/normatively involuntary manner** also violates aprinciple of fundamental justice and is thus **contrary to s7 of the *Charter* *Ruzic***
* **Can’t be convicted of murder without subjective foresight of death.*Martineau***
  + **As a result ss 229c and 230a *CC* are unconstitutional**

### R. v. Martineau (1991, SCC)

(A was convicted of 2nd degree murder under s.213(a) of the Code reenacted as 230(a))., which raises culpable homicide to murder where A intends to inflict bodily harm to facilitate the commission of a crime listed in s.230 . A’s friend shot two people in the course of a B&E.)  
**• Raises the question of whether the Charter imposes requirements in relation to murder.  
• HELD:The principles of fundamental justice (s.7 of Charter) require that a conviction for murder cannot rest on anything less than proof BRD of subjective foresight of death. Any lesser mental state cannot give rise to a conviction for murder.**  
• **Stigma of criminalization requires that the label attached is commensurate with the level of moral blameworthiness of the offender (stigma of murder should be reserved for those who intentionally or recklessly cause death)**

* **(this elevates the *Vaillancourt* standard)**
  + **NOTE:** **Mandatory** life sentence – imprisoning someone for life without subjective mens rea arguably breaches fundamental justice.
    - Could make strong argument that every time there is a **mandatory** life sentence **subjective** mens rea is required because …

# Defences

**ASK:** who has **burden of proving** defence? Is it a **statutory or a CL** defence?

**Consider after parsing and commenting AR and MR (except mistake)**

**Air of Reality Test (There must be AOR to EACH ELEMENT) *Cinous***

* **It’s an EVIDENTIARY BURDEN** 
  + **1) Must be evidence on record**
  + **2)upon which a properly instructed jury, acting reasonably, could acquit**
    - **When A gives direct testimony, it is assumed to be true enough to be left to jury. Credibility not at issue in Air of Reality Test**
* **Once A raises Air of Reality, LEGAL BURDEN is on the crown to disprove one element BRD**

**AS YOU GO THROUGH EACH ELEMENT OF THE DEFENCE: COULD THE CROWN DISPROVE THIS ELEMENT BRD?ANTICIPATE COUNTER ARGUMENTS**

# Mistake of Fact: Common Law

**Consider to see if NEGATES MR if knowledge of Circumstances is part of MR**

## How it Operates

* Mistake of fact is a  **COMMON LAW** defence **s 8 CC**
* Open to A when A **holds honest belief in circumstances** that, if they were true, would entitle him to an acquittal. Mistake of fact **negates KNOWLEDGE element** of mens rea ***Kundeus (Dissent…the preferred approach)* thus every time knowledge of circumstances is part of MR, the Defence of mistake of fact may be available**.
* **There is a difference between mistake of law and mistake of fact. Ignorance of the law is NOT a defence**. (Eg You can’t have sex with someone who didn’t say no or yes and say that you thought the law allowed you to do it till they said no. This is an argument of mistake of law. Would fail)
* **Presumption is that subjective mens rea** (including knowledge of circumstances) **can be inferred from As actions** ***(Theroux).*** Mistake of fact allows D to **displace this presumption**.
* **It is not necessary for A to testify to displace this presumption *Ewanchuk*,** they can still raise mistake of fact, this is consistent with the *Charter* (and overruled majority in ***Kundeus,*** which held that A needed to testify***). I* will therefore follow the approach in Ewanchuck as it is more recent**
* BUT they still must raise an **air of reality** if mistake of fact is to be left to the jury (***Papajohn, Cinous).***

### Air of Reality Test (There must be AOR to EACH ELEMENT) *Cinous PappaJohn*

It’s an **EVIDENTIARY BURDEN**

**1) Must be evidence on record**

* This evidence needs to be beyond mere assertion of belief (Floodgates)
* **This evidence can be A’s own testimony OR**
* **Other circumstantial evidence…(**There is an Ambiguity: McIntyre doesn’t say what other circumstantial evidence would be)…Dickson Dissented and interpreted majority to require 3rd party evidence, but this is not explicitly said by McIntyre, so is unclear. I will not take this to require 3rd party evidence, but if A doesn’t testify, needs to be something.

**2) upon which a properly instructed jury, acting reasonably, could acquit**

* When A gives direct testimony, it is assumed to be true enough to be left to jury even if judge disbelieves. Credibility not at issue in Air of Reality Test *Cinous*
* **Once A raises Air of Reality, LEGAL BURDEN is on the crown to disprove one element BRD**

**AS YOU GO THROUGH EACH ELEMENT OF THE DEFENCE: COULD THE CROWN DISPROVE THIS ELEMENT BRD (**ie prove with almost certainty that it is false)***Lifchus*? ANTICIPATE COUNTER ARGUMENTS**

### Test for mistake of Fact

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| **Test For Mistake of Fact *Pappajohn***   * **Did A have a subjectively and honestly held belief? (This DOES NOT need to be REASONABLY held).The jury should be instructed that reasonableness can only go to credibility of A`s assertion in an honest belief**    + **NOTE:** To apply the reasonable standard with mistake of fact, the Court would have had to overrule ***Beaver*** & defy accepted and sound principles of criminal law. |

***Kundeus*** was interpreted to permit a **“transferred”** mens rea where D intends to commit **one offence** but actually **commits a different actus reus** (notwithstanding that the offence actually committed is more serious). Court found intent to transfer mescaline (a crime) and court chose to transfer this to the offence of trafficking LSD (a more serious crime). However, the **Laskin’s DISSENT** in Kundeus said that the **Crown cant transfer intention to commit one crime to satisfy the MR requirement of an more serious crime.** In the post Charter era, it is **unlikely that the majority in Kundeus would hold**; the dissent’s interpretation would likely be preferredREMEMBER IF ARGUING THIS TO TALK ABOUT IF ITS GOING ACROSS ACTS LIKE THE MJ FP

### Sexual Assault

***R. v. Ewanchuk (1999) SCC***

* Sexual assault is the most common situation where mistake of fact arises
* Elements of sexual assault:

|  |  |  |
| --- | --- | --- |
| **SEXUAL ASSUALT** | **AR** | **MR** |
| **CONDUCT** | **TOUCHING (voluntariness)** | **INTENTION/RECKLESSNESS TO TOUCH** |
| **CIRCUMSTANCES** | **1 SEXUAL NATURE**  **2 ABSENCE OF CONSENT or WRONGLY OBTAINED CONSENT (in Vs mind, was she consenting *Ewanchuk)*...not objective** | **1 NO mr *ewanchuk Crieghton***  **2 Knowledge, recklessness, *Sansregret, Theroux* *Ewanuchuck papajohn***  **Wilful blindness *Briscoe*** |
| **CONSEQUENCE** |  |  |

* **There is no such thing as implied consent in Canadian sexual assault law. If in her mind V was not consenting, the actus reus is complete, however Trier of fact can still consider Vs credibility.**
* **2 Types of non-consent in sexual assault cases:**
  + **Lack of Consent in Vs head**
  + **Consent in Vs head but out of fear or duress…consent VITIATED**

**A may challenge Crown`s evidence of *mens rea* by asserting an honest but mistaken belief in consent.**

### Test for honest but mistaken belief in Sexual Assault

|  |
| --- |
| **TEST For HONEST BUT MISTAKEN BELIEF IN SEXUAL ASSAULT *Ewanchuck***  **1) Did A honestly believe that V communicated consent?** (A must point to evidences suggesting consent communicated by V’s words or conduct)   * Silence, passivity or ambiguous conduct will not found a belief in consent. * If V expresses a lack of consent, then no consent is obtained * Once V has clearly communicated lack of consent, in order to touch sexually again, V must clearly communicate positive consent. * A need not testify (***contra Kundeus****)*. BUT AIR OF REALITY MUST STILL BE RAISED [evidence upon which properly instructed jury could acquit) on each element of defence ***Pappajohn Cinous***   + No AIR of reality arises when something less than actively communicated consent is the basis on which A seeks to counter MR ***Ewanchuck***   **2) Was As belief reasonable? (Did A take reasonable steps, in the circumstances known to the A at the time, to ascertain V was consenting)?**   * **’Hereux Dube in *Ewanchuck*** suggested that **A defence of honest but mistaken belief in consent cannot be raised if A has not taken reasonable steps as per in s. 273.2(b) of *CC*.** This could potentially raise a charter issue (s11d or s7) as a person who had an honest but mistaken belief, but did not take reasonable steps, could be imprisoned.   **AS YOU GO THROUGH EACH ELEMENT OF THE DEFENCE: COULD THE CROWN DISPROVE THIS ELEMENT BRD (*Lifchus close to abs certainty)*? ANTICIPATE COUNTER ARGUMENTS** |

# Provocation: Statutory Defence 232

**Consider after parsing and commenting AR and MR for MURDER...lowers conviction to Manslaughter**

* Provocation is a partial defence that relates only to murder. **Prove Murder then apply Defence**
* It does **not negate the intent** to kill required for conviction of murder, but it **partially excuses** As actions because he was provoked into killing.
* It does not apply to manslaughter, however if the provocation defence succeeds, A will be treated as having committed manslaughter.

**Burden of Proof**

D must raise an AOR on each element of the defence in s232 at which point the burden is on the Crown to disprove atleast one element BRD.

**Air of Reality Test (There must be AOR to EACH ELEMENT) *Cinous***

* **It’s an EVIDENTIARY BURDEN** 
  + **1) Must be evidence on record**
  + **2)upon which a properly instructed jury, acting reasonably, could acquit**
    - **When A gives direct testimony, it is assumed to be true enough to be left to jury. Credibility not at issue in Air of Reality Test**
* **Once A raises Air of Reality, LEGAL BURDEN is on the crown to disprove one element BRD**

**AS YOU GO THROUGH EACH ELEMENT OF THE DEFENCE: COULD THE CROWN DISPROVE THIS ELEMENT BRD (*Lifchus close to abs certainty)*? ANTICIPATE COUNTER ARGUMENTS**

## Elements of s. 232 of CC affirmed in *Tran*

* **(1) No Prior Incitement (232 (3))**
* **(2) Wrongful act or insult to the accused (232 (2))** 
  + A wrongful act or insult requires a minimal amount of **moral blameworthiness** (private sexual acts and the decision to leave a relationship cannot constitute a wrongful act or insult)(***Tran, Thibert***).
  + If I need to use “provoking conduct needs to raise to a high and shocking level” from minority CA judgment (***Tran***).
  + **NOT SOMETHING V HAD LEGAL RIGHT TO DO** Something the victim had a legal right to do cannot constitute provocation.
    - **Legal right** – required or expressly permitted by law (***Thibert***).
* **(3) Act or insult must be sufficient to deprive [less onerous than would deprive] an ordinary person of self-control. Modified-objective TEST different than OBJ MR mod-objective test. Less Stringent**
  + In ***Hill*** it seems as though a middle ground between on objective and subjective test is being considered. For policy reasons this makes sense. Different things make different people lose self-control. The provoker may know what makes the victim “tick” outside of what would have the same effect on an ordinary person. This relaxing of the standard is especially understandable in light of the fact that it is not a full defence. If proven, a manslaughter conviction is entered. It is best described as **ordinary person of age and sex of A** that can be further **modified by relevant demographic information**. This approach has been followed in subsequent jurisprudence. However, it cannot slip into subjectivity (***Thibert***).
  + **Personal characteristics** can be considered depending on the facts (***Hill***).
    - For example, a **race**-based insult is more insulting to someone of that race. ***Hill***
    - Being **young** is also considered in ***Hill***.
    - **History of the relationship** and **sleeplessness** are considered factors in ***Thibert***.
    - **An ordinary person can’t have features that are inconsistent with charter values** (eg homophobia racism) ***Tran***
    - **TJ instructions to jury:** Not necessary for TJ to charge jury on personal characteristics, “collective good sense of jury” will lead it to ascribe characteristics to A**, BUT if insult is particularly relevant**, TJ should draw it to jury’s attention. ***Hill***
    - Where there is a case where someone is scared, angry and drunk, subjective MR must be carefully considered. In such a case, the jury should be charged on whether A have requisite subjective MR to be guilty of murder ***Nealy***
  + **The insult must strike a mind unprepared for it/must be unexpected…A can’t seek out the confrontation** (***Tran***). ( Ex: in *Tran* Going into the house to confront, A would have had to be prepared in that case therefore it could not have been sudden.) **Makes sense**.
* **(4) A acts upon the wrongful act or insult** – has been interpreted to mean the person **subjectively** lost control.
  + A had no intention to kill before V acted is sufficient (***Thibert***).
* **(5)** **Acting upon must be sudden and before there was time for his/her passion to cool**.
  + If there is time for passions to cool, the defence will not be available (***Tran***). **Makes sense**.
  + The requirement for suddenness does not preclude a consideration of past events. **The incident that finally triggers the reaction must be sudden and the reaction must be sudden** BUT the **background of the relationship between A and V can be considered**. For example. where there is a fraught history of abuse suddenness requirement might be less. (***Daniels***). **Questionable**. Because ***Tran*** seems to limit Daniels. It says details of relationship are not relevant. ***Tran*** is more recent, should be followed, therefore I won’t give much weight to relationship. Though *Tran* may have had to do with spousal abuse in the reverse way of *Daniels…*
* **(6) A was deprived of self control**
* **(7) A murdered V**

**Policy Concern that Arises from Decision in *Thibert* to allow provocation in the situation where the one provoking was being threatened with death: DISSENT:** The court should be reluctant to set a standard for how a victim of a homicide should be reacting to threats of violence (the victim had a rifle pointed at him when he was ‘taunting’).

# Mental Disorder: Statutory Defence s 16

**Consider after parsing and commenting AR and MR.**

**If proved NCRMD will be directed to health review board**

**Trier of fact faced with NCRMD defence should consider questions in the following order:**1) Has the accused established NCRMD under one of the two limbs of s. 16 BoP? IF NO→  
2) IF IT IS A SPECIFIC INTENT OFFENCE [one that requires intent of consequence]Does the evidence of mental disorder **nevertheless negate mens rea** in whole or part (e.g. prevent D from forming specific intent/ intending consequences)? That is, does it **raise a reasonable** **doubt doesnt have to be a great doubt...just SOME DOUBT?**

* **Ex: person has severe depression but still understands the quality of the acts. They were capable to form the intention to act but not capable of forming the intention for the natural consequence of the act…this might displace the presumption from *theroux* and *sansregret* that a person naturally foresees the consequences of their act**

## Presumption and Burden of Proof

**S. 16(2)** establishes **a presumption that A is not suffering from a mental disorder** (until the contrary is proved to BoP). \*Contravenes *Charter* s. 11(d) due to the reverse onus. But justified under s. 1 per majority in ***Chaulk* (1980 SCC)**. *Oakes Test*: The measure of displacing burned of proof makes sure it is only accessible to those that actually suffers from a MD; impairs right no more than necessary; it is proportionate to end being sought.

**S. 16(3)** places **burden of proof** on **party that raises the issue** **(must prove on Balance of Probablities=50%+).** This is because there are cases that Crown may want to raise the defence. BUT, usually it is the accused. (not AOR)

**AS YOU GO THROUGH EACH ELEMENT OF THE DEFENCE: COULD THE CROWN DISPROVE THIS ELEMENT BRD (*Lifchus close to abs certainty)*? ANTICIPATE COUNTER ARGUMENTS**

### Test for section 16

|  |
| --- |
| **TEST FOR SECTION 16 (1)**  (1) A commits an ***act* or *omission***  (2) **while suffering from a mental disorder**   * **“While suffering from a mental disorder”** ***Cooper (*1980 SCC)**:  “any illness, disorder or abnormal condition which impairs the human mind and its functioning. It *excludes* self-induced intoxication, as well as transitory mental states ”   (3) **mental disorder must have rendered** (A would not have acted BUT FOR MD) **the person** to b **incapable of** (a) **appreciating the nature and quality of the act** ***OR***   * **Incapable”** *(****Chaulk* 1990 SCC**): “a *purely subjective* and personal dimension of the individual.” “*Rendered*”= incapacity must be ***causally*** linked to the disease of the mind * **Incapable of appreciating the *nature* and *quality* of the *act*” *Cooper* (1980 SCC)**: this requires *perception* “an inability to perceive the consequences, impact and results of physical act”.   (b) **Incapable** **of knowing that it was wrong.**   * **“Incapable of knowing that it was wrong”** (***Chaulk* 1990 SCC**): incapacity to appreciate that the act is wrong according to the ***ordinary moral standards of reasonable members of society***.  That is, **even if the accused knew that the act was legally wrong, he may be acquitted if he was incapable of understanding that it was morally wrong**.   + ***Chaulk*** overruled previous holding in ***Schwartz*** (though this should be narrowly construed; if A had capacity to understand that the act was legally wrong, s/he could not access the defence   + **Scenarios** (***Chaulk***)     - *1)     A knows act is legally wrong + knows most ppl would condemn actions & he should follow law* (GUILTY...NO S16)     - *2)     A doesn’t know it’s legally wrong + knows most ppl would condemn actions* (GUILTY...NO S16—*ignorance of law no excuse*)     - *3)     A doesn’t know contrary to law + does not know ppl would condemn* *actions* (NCRMD, obviously)     - *4)     A knows legally wrong + does* ***not*** *know that ppl would condemn actions & that that he should follow the law* (NCRMD. This is the contentious scenario & was where ***Chaulk & Schwartz*** disagreed. ***Schwartz*** said not NCRMD, but ***Chaulk*** says that if accused knows it’s legally wrong, but don’t follow due to **MD** (e.g. higher power told you so), A should be acquitted |

**If A CAN PROVE ON BoP then A will be found NCRMD and will be discharged to the mental health review board.**

**IF s 16 doesn’t apply, does the evidence of mental disorder negate nevertheless *mens rea* in whole or part (e.g. prevent A from forming specific intent/intend consequence for murder)?**

* + **That is, does it raise a RD?**
  + **This would be where A doesn’t have a mental disorder sufficient for the defence but is enough to raise a RD about specific intent.**
  + **If not…GUILTY**

### 6. Relationship between mental disorder and automatism

|  |  |
| --- | --- |
| **Mental disorder** | **Automatism** |
| Requires disease of the mind | No disease of the mind required |
| Mental disorder automatism (where *actus reus* is denied) | Non-mental disorder automatism |
| Verdict is not criminally responsible by reason of mental disorder | 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. |

* Where both automatism and automatism by mental disorder apply, use s. 16 (***Stone***).

# Non-Mental Disorder Automatism

**Consider after parsing and commenting AR and MR**

* THINK ABOUT MOTIVE…IS THIS AUTOMATISM OR PROVOCATION? ARE U CROWN OR DEF?
* The differing views on automatism that emerge over time are properly due to advances in medical knowledge.
* It is a state of impaired consciousness in which an individual, though capable of action, has no voluntary control over that action (***Stone***).

## What cannot cause automatism?

1)    Mental disorder (if MD, analyze under s.16);

2)    Self-induced intoxicated state (go to defence of intoxication)

## What can cause automatism?

1)    “Internal” cause: Acute and immediate stress that **exceeds that of the ordinary emotional blows of life** (***Rabey***)

2)    **Sleepwalking** (if continuing risk of sleepwalking s. 16 (can be continually supervised); **if no continuing risk**, automatism (acquitted & released into community)) ***Parks***

3)    **“External” cause**: a physical cause—concussion

## Burden of Proof

* + **on A to prove non-automatism Balance Of Probabilities. *Stone***

**AS YOU GO THROUGH THIS TEST JUST ASK IS A CAN PROVE ON BALANCE OF PROBABILITIES? ALSO DON’T FORGET TO ADDRESS THE COUNTER ARGUMENTS**

### Steps for Judge to Consider(*Stone*)

**(1) A must establish an EVIDENTIARY foundation that he acted involuntarily on a Balance of Probabilities**

* + Voluntariness presumed. **Burden on A to prove non-insane-automatism Balance Of Probabilities.**
  + Relevant factors:
    - Psychiatric evidence.
    - History of dissociation.
    - Corroborative evidence – careful because not just expert evidence is relevant. (ex: ppl who saw A after he committed the act and said A looked disassociated)
    - Whether A committed an attack for which he/she had **no motive**.
* If evidentiary foundation established…

**(2) Judge Considers whether to put insane or non-insane-automatism to the jury (ie whether the evidence points to non-insane or insan**

* The **starting presumption** that it is based on a **mental disorder**. A must displace this presumption
* WHY? Deciding whether automatism is non-insane or mental disorder automatism is a **legal rather than a medical question**. Medical knowledge is utilized in the analysis. However, **policy issues** are considered. Because **non-insane automatism** **entitles A to a full acquittal while NCR brings him/her into the mental health system, if automatism results from something inside the mind, s. 16 should be applied** (***Stone***). Further, this protects against the fact that automatism can be feigned (***Parks***).
* **Internal/External Cause:**
  + **Psychological blow** - If there is an internal cause to the automatism, it is a mental disorder and s. 16 applies
    - see ***Rabey***, where an **abnormal response** from an **ordinary** **blow** was evidence that the cause of the automatism was internal and thus mental disorder. Used s. 16
  + **HOWEVER, if** THE PSYCHBLOW IS SO SEVERE THAT IT MIGHT CAUSE AN ORDINARY PERSON TO DISSOCIATE, than non-insane automatism may be applied ***(Rabey***)
    - * + Ex: witnessing death of family, big accident, etc..
  + **An external cause** (concussion, for example) means it is appropriate to consider non-insane automatism.
  + **Sleepwalking** was held, on the facts in ***Parks***, not to be a disease of the mind. It was only a transient state, and thus was **non insane automatism. NOTE this might be decided differently if there was a continuing danger recurrence**
* **Policy: Continuing Danger Theory**
  + **If D presents a continuing danger to society and is likely to encounter the same trigger again, they will be more likely to be considered to have a mental disorder** and will be dealt with under section 16 as they could be regulated within the health system as opposed to the full acquittal they would get from non-insane automatism. ***Stone***

**( 3): Jury/Judge determines question of fact. depending on which defence is left to jury. ONLY CONSIDERS 1**

* **If non-insane automatism, question is: Did A enter into transient state of impaired consciousness and acted involuntarily, on a Balance of Probabilities? IF YES🡪FULL ACQUITTAL**
* **If a disease of the mind, jury considers defence according to s16 framework SEE ABOVE—did A (on a BoP) suffer from a disease of the mind which rendered him or her incapable of appreciating the nature and quality of the act, or of appreciating that his actions were wrong?**

# Necessity: Common Law Defence

**Consider after parsing and commenting AR and MR**

* **Necessity is a common law defence recognized by SCC in *Perka***
* **Courts are allowed to recognize common law defences by virtue of s8 of the CC**

## How it Operates:

* Necessity and duress are defences that EXCUSE criminal conduct
* Necessity: in order to prevent a greater evil from occurring
* Necessity is rarely successful in Canada, however was argued successfully in ***Ungar (below),*** despite the lazy reasoning of the judge
* **Normative involuntariness** – A in a situation of such peril that human weakness dictates that A act unlawfully and that compliance with the law is demonstrably impossible. ***Perka***
  + The act is **not justified** but it is **excused** (concession to human frailty). Based on idea that **people will not be subject to criminality for acts that are normatively involuntary (=moral voluntariness**). Concept that only morally voluntary action will be criminalized is a principle of fundamental justice under s.7 ***(Perka)***

## Burden of Proof

* **A must raise an AOR** on every element then the burden shifts to the **Crown to disprove 1 element of the defence BRD** (***Perka***).

**Air of Reality Test (There must be AOR to EACH ELEMENT) *Cinous***

* **It’s an EVIDENTIARY BURDEN** 
  + **1) Must be evidence on record**
  + **2)upon which a properly instructed jury, acting reasonably, could acquit**
    - **When A gives direct testimony, it is assumed to be true enough to be left to jury. Credibility not at issue in Air of Reality Test**
* **Once A raises Air of Reality, LEGAL BURDEN is on the crown to disprove one element BRD**

**AS YOU GO THROUGH EACH ELEMENT OF THE DEFENCE: COULD THE CROWN DISPROVE THIS ELEMENT BRD (*Lifchus close to abs certainty)*? ANTICIPATE COUNTER ARGUMENTS**

## Elements of necessity

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| --- |
| **Elements** (***Perka***):   * **(1)** **A was in a situation of pressing emergency of great peril**;   + Must be a pressing and **immediate** threat (***Latimer***).   + ***Latimer*** :**Subjective (honestly) modified objective (reasonably) held belief that situation** of great peril   + ***Hibbert* says take As situation** **and characteristics into account**   + ***Lavallee*** says when considering **reasonableness**, the experience, history, perceptions and circumstances of A can be considered.   + ***BUT\*\*Cinous says don’t assess* reasonableness of A’s belief from perspective of criminal subculture because would be antithetical to public order**. * **(2) Compliance with the law was demonstrably impossible; there was no legal way out.**   + **Subjective** **and modified objective dimension**: honestly and reasonably belief: ask did A have honestly believe? Was it reasonable? (***Latimer***). Objective test is different than test for OBJ MR ***Hibbert***   + ***Cinous*** suggests all alternatives must have been impossible   + ***Lavallee*** says when considering **reasonableness**, the experience, history, perceptions and circumstances of A can be considered. * **(3) A’s response was proportionate to the threatened harm**   + Purely objective—Doesn’t need to be exactly proportionate…but roughly ***Latimer***   + might never excuse homicide ***Latimer, Dudley (torts)***     - It can’t be a subjective balancing of the harm because it would always be in favour of the accused ***Latimer*** * **Also, It is not directly relevant that A’s preceding conduct was illegal**, BUT if A **voluntarily embarks on a course of action in which any reasonable person would see would lead to great peril, the defence will not be available** ***Perka***[modified objective]. |

**FOR FACTS REMEMBER *Ungar, 2002***

**Facts:** *A was charged with dangerous operation of a motor vehicle. He drove on the wrong side of the street and broke the speed limit with lights flashing while driving to deliver emergency medical assistance to an injured woman.*

# Duress: Statutory and Common Law Defence

**Consider after parsing and commenting AR and MR BRD**

## How it Operates

* **Duress is both a statutory s17 CC and CL Defence. Courts are allowed to recognize the Common Law Defence of Duress by virtue of s8 of the CC**
* Duress can negate MR (***Hibbert* 1995 SCC)**, but this only works where A’s desire or motive is an element of the offence and that desire or motive is not present because of the duress.
* Duress largely operates as an excuse (***Ruzic***)
* ***Hibbert* 1995** Duress is a threat inflicted from another person. Diff than Self-Defence, because in Duress a 3rd party puts pressure on A to harm V. In SD where the V is the one putting pressure.
* The court in ***Ruzic*** said that the words “**immediate**” and **“who is present while the offence is committed**” contravene ***s. 7 Charter*** and are not saved by s.1. They were thus **read out of s. 17** .They came to the conclusion because they found that the **provisions allowed morraly involuntary people to be criminalized** and criminalizing morally involuntary conduct **violates a principle of fundamental justice**
* The relationship between s. 17 and the common law is unclear after. ***Ruzic****.* It is unclear whether the 2 defences have the same elements. In ***Ruzic,***Le Bel J. confirmed the Trial Judge’s use of the common law defence in a case in which s. 17 applied, suggesting that the two defences have converged. However, the SCC did not explicitly make that ruling.

## Deciding whether to use CL or s17

* IS the offence is on the list of offences in s. 17?
  + If YES, you are in the realm that ***Ruzic*** didn’t decide and you can argue CL (below)
  + If No, Ask was A party/accessory to the offence?
    - **YES**🡪**Use CL** ***Hibbert***
    - **NO🡪**You can **apply s17.** **OR** you can argue that the court in ***Ruzic*** accepted the TJs use of the Common law defence, even though section 17 applied, suggesting that the defences have converged into 1 and it would thus be accepting of such an approach by lower courts and **apply CL**

## STEPS FOR IF OFFENCE IS LISTED IN S 17

* A has committed offences listed in s17. It is unclear about whether or not they have access to the defence of duress. ***Ruzic*** amended s. 17 but didn’t mention excluded offences.
* **This raises the question:** Is the list in section 17 contrary to s7 of the *Charter* and therefore unconstitutional by analogy to the reasoning in ***Ruzic***? i.e. ppl may commit  the listed offences in s17 but nonetheless not act in a way that is morally voluntary AND they could attract criminal liability? As a result, there would be a violation of a principles of fundamental justice that morally involuntary actions should not be criminalized, depriving actors of their section 7 rights
* **There are 2 ways to interpret** ***Ruzic*** and how it could apply to the list of offences in s17
  + That we should go straight to the **common law** as a way of avoiding the criminalization of morally involuntary
  + That we can use s 17 as the list will be struck out for violating s.7 –this raises the question of whether the new elements should be read into section 17 based on ***Ruzic***. The decision was unclear.

 I will do what LeBel did in ***Ruzic*** and apply the CL test as it is more clear in applying than using section 17 given the ambiguities surrounding it after ***Ruzic***

### Burden of Proof

* **A must raise an AOR** on every element then the burden shifts to the Crown to disprove atleast 1 element of the defence BRD (***Perka***).

**Air of Reality Test (There must be AOR to EACH ELEMENT) *Cinous***

* **It’s an EVIDENTIARY BURDEN** 
  + **1) Must be evidence on record**
  + **2)upon which a properly instructed jury, acting reasonably, could acquit**
    - **When A gives direct testimony, it is assumed to be true enough to be left to jury. Credibility not at issue in Air of Reality Test**
* **Once A raises Air of Reality, LEGAL BURDEN is on the crown to disprove one element BRD *Lifchus***

**AS YOU GO THROUGH EACH ELEMENT OF THE DEFENCE: COULD THE CROWN DISPROVE THIS ELEMENT BRD (*Lifchus close to abs certainty)*? ANTICIPATE COUNTER ARGUMENTS**

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| --- |
| **Common Law Defence** (***Hibbert***) – use where a party to the offence (AR caused by other person) or s. 17 no available due to constitutional question.   * **(1)** A commits an offence (as a party to the principal offeder ***(Hibbert.*) A committed offence in 17 *Ruzic))*** * **(2)** A is acting under compulsion by threats * **(3) Threats** of death or serious bodily harm * **(4)** to which a person of reasonable firmness would respond (***Ruzic***). * **(5)** Threat is to A or another person. * **(6)** A subjectively believes threat will be carried out.   + Not sure on objective standard at this point. * **(7)** Threat was from a person * **(8)** At the time of the act, A had no safe avenue to escape [subjective **AND** modified objective test – circumstances and capacity].   + ***Cinous*** says think about reasonable alternatives and whether there’s an opportunity to retreat   + ***Hibert*** tells us to take D’s situation and characteristics into account   + ***Lavallee*** says when considering **reasonableness**, the experience, history, perceptions and circumstances of A can be considered. Less stringent then ***Creighton***   + ***BUT\*\*Cinous says don’t assess* reasonableness of A’s belief from perspective of criminal subculture because would be antithetical to public order**. * **(9)** A’s criminal act is proportionate to the threat made against A. (***Ruzic***) **measured on a subjective-modified objective standard different than obj mr reas person *Hibbert*** (compare ***Latimer***).   + In ***Latimer*** the court says they don’t need to be exactly proportionate, but similar * **(10)** There is sufficiently close connection in time between the threat and its execution to overbear A’s will (***Ruzic***). * **(11)** A acted without voluntarily assuming risk (obiter in ***Ruzic***).   + **Makes sense. It is consistent with** ***Perka***. |

**COME TO A CONCLUSION!**

## STEPS FOR IF A IS PARTY/ACCESSORY TO OFFENCE

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

**APPLY CL DEFENCE ABOVE**

## STEPS IF OFFENCE NOT LISTED AND S 17 CAN APPLY

1 of 2 arguments can be made

If A commits an offence not listed in s 17, then s 17 can apply. **OR** you can argue that the court in ***Ruzic*** accepted the TJs use of the Common law defence, even though section 17 applied, suggesting that the defences have converged into 1 and it would thus be accepting of lower courts using CL when section 17 could apply. **APPLY CL DEFENCE AS ABOVE**

**AS YOU GO THROUGH EACH ELEMENT OF THE DEFENCE: COULD THE CROWN DISPROVE THIS ELEMENT BRD (*Lifchus close to abs certainty)*? ANTICIPATE COUNTER ARGUMENTS**

### IF you decide to apply s17

There is still a question about whether or not the proportionality should be read in to s 17.  **IF I’m arguing on behalf of the D I would argue that proportionality should not be read in. If acting for the Crown, I would argue that Proportionality should be read in after *Ruzic***

**Burden of Proof**

* **A must raise an AOR** on every element then the burden shifts to the Crown to disprove atleast 1 element of the defence BRD (***Perka***).

**Air of Reality Test (There must be AOR to EACH ELEMENT) *Cinous***

* **It’s an EVIDENTIARY BURDEN** 
  + **1) Must be evidence on record**
  + **2)upon which a properly instructed jury, acting reasonably, could acquit**
    - **For each element, A must give subjective testimony. When A gives direct testimony, it is assumed to be true enough to be left to jury. Even if judge disbelieves evidence, must assume it’s true for the sake of leaving to jury. Credibility not at issue in Air of Reality Test**
* **Once A raises Air of Reality, LEGAL BURDEN is on the crown to disprove it BRD**

**AS YOU GO THROUGH EACH ELEMENT OF THE DEFENCE: COULD THE CROWN DISPROVE THIS ELEMENT BRD (*Lifchus close to abs certainty)*? ANTICIPATE COUNTER ARGUMENTS**

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| **Section 17 Defence**   * **(1)** A commits an offence other than those excluded by the section. * **(2)** A is acting under compulsion by threats of death or bodily harm. (query after ***Ruzic*** as to whether there is requirement of: *to which a person of reasonable firmness would respond* ***modified objective)*** * **(3)** To A or another person. (***Ruzic***). * **(4)** Which A believes will be carried out * **(5)** from a person Who A is not a party in conspiracy or association with. * **(6)** While A has no safe avenue of escape, using a modified objective test (read in due to ***Ruzic***)   + ***Hibert*** tells us to take A’s situation and characteristics into account   + ***Lavallee*** says when considering **reasonableness**, the experience, history, perceptions and circumstances of A can be considered.   + ***BUT\*\*Cinous says don’t assess* reasonableness of A’s belief from perspective of criminal subculture because would be antithetical to public order**. . * **(7) Query** **whether proportionality should be read in** if YES measure As threat v Act on subjective and modified objective test (***Ruzic***). IF CROWN SAY YES IF D SAY NO   + In ***Latimer*** the court says they don’t need to be exactly proportionate, but similar * **(8)** Immediacy and presence requirements are read out – **query whether imminence requirement is read in** (***Ruzik***). |

* Defences are subject to Charter review and deserve no more deference than anything else (***Ruzic***).
* Moral blameworthiness does not apply to excuses but moral voluntariness does, as a principle of fundamental justice (***Ruzic***).