

## Departures from Subj MR

	True crimes (subj MR)	True crimes (obj MR)	Strict liability	Absolute liability
AR	Crown BRD	Crown BRD	Crown BRD	Crown BRD
MR	Crown BRD	Crown BRD	No MR	No MR
Defence of due diligence	N/A	N/A	BoP defence; burden on A	No defence
Other defences	Defence = air of reality; Crown BRD	Defence = air of reality; Crown BRD	? depends on nature of defence	No defence

**R v Sault St Marie:** (city garbage dump polluting stream) Presumption of subj MR for true crimes; presumption of strict liability for public welfare offences. Dumping offences = strict liability.

### Strict or absolute liability:

- **Overall regulatory pattern**
  - prohibitory = absolute; regulatory = strict
- **Subject matter of legislation**
  - Inherently dangerous, bad for public welfare = absolute
  - Social value with some risks (i.e. driving, fishing) = strict
- **Gravity of penalty**
  - Possible imprisonment/serious penalty = strict interpretation (presumption of constitutionality)
- **Precise language used**
  - may identify strict/absolute, possibility of due diligence

Defence of due diligence: did A take all reasonable care in the circumstances to avoid the offence (BoP std)?

**R v Chapin:** (duck hunting, shooting in baited area) Regulatory offence, social value of hunting, seriousness of penalty = strict liability. Due diligence applies; would be unreasonable to expect hunter to search the area.

### CRIMINAL NEGLIGENCE (Tutton, JF)

- Will always be identified in offence-creating section
- Defined in s.219 = **marked and substantial departure, obj MR**

**R v Tutton:** (belief in faith healing, manslaughter of diabetic child) Obj test for crim negligence = marked and substantial departure from the conduct of a reasonable person in the circumstances; possible defence of an honest though mistaken belief in a set of facts, jury must decide if this was honest and reasonable.

- Recall **Thornton**- omissions are not usually criminalized; s.215 creates a positive duty to act
- “Reckless” when used in respect of obj MR does not = subj foresight

**R v JF:** (A guilty of crim negligence, not guilty of failing to provide necessities) Similarity of offences, higher MR std for crim negligence = inconsistent verdicts, manslaughter by crim negligence charge dropped. \*Modified obj std for crim negligence- follows AR/MR analysis from Beatty.

### 2-step analysis:

- 1) Did A have a duty to protect the child (s.215- provide the necessities of life), and did they fail in that duty?
  - If so = failure to provide necessities = penal negligence
- 2) Did A, in failing to provide the necessities of life, show a wanton or reckless disregard for the life or safety of the child (s.220- death by criminal negligence)?
  - If so = criminal negligence. Note MR consequences from **Creighton**.

**PENAL NEGLIGENCE (Hundal, Beatty, Roy)**

- Identified by the word “**dangerousness**” (i.e. s.249)
- = **marked departure, obj MR**

**R v Hundal:** (dump truck accident, dangerous driving causing death) Due to licensing/automatic nature of driving/social harm, a modified obj test satisfies fault requirement for s.249 = obj assessment of MR in the context of events surrounding the incident.

**R v Beatty:** (loss of awareness, crossing centre line and killing 3 ppl) Momentary inadvertence not a marked departure from std of care; must focus on risks created by manner of driving, rather than consequences

- **S.249:** AR = operates vehicle in a manner that is dangerous with regard to all the circumstances; MR = marked departure from the std of care expected of a reasonable person

**S.249(3):**

	<b>AR</b>	<b>MR</b>
<b>Conduct</b>	Operating a motor vehicle	Voluntary (ch.4- AR)
<b>Circumstances</b>	Dangerous, with regard to circumstances listed in 249(1)	A’s act was a marked departure from std of care expected of RP in the circumstances (2-step analysis from Beatty)
<b>Consequences</b>	Bodily harm	N/A (DeSousa, Beatty)

Modified obj test:

- 1) **What would a reasonable driver have done in A’s circumstances?** (based on what was observed)- conduct was a marked departure
- 2) **Is there an explanation for A’s behavior? Reasonable person in similar circumstances could not have anticipated that risk?** (i.e. sudden and unexpected illness)- if RD, then acquittal

**R v Roy:** (motorhome pulling onto highway struck by tractor-trailer, passenger killed) Momentary error in judgment in difficult conditions not a marked departure from std of care.

\*Note that dangerousness/departure from std of care is not enough; marked departure is required.

<b>Marked Departure</b>	<b>Not a marked departure</b>
-Running red light in high traffic area (Hundal) -pattern of dangerous driving (Hundal) -subj intent to drive dangerously, i.e. playing chicken (Beatty) -ignoring warnings from others, esp. experts (Tutton) -state of vehicle, overloaded (Hundal)	-pattern of prudent driving (Beatty) -brief mistake/inadvertence (Beatty) -decision to pull out onto highway after stopping in bad weather (Roy) -suspended licence (Roy) -heatstroke/tiredness (Beatty- 2 <sup>nd</sup> stage of analysis)

Policy and constit dimensions:

- **Martineau, Vaillancourt-** must be commensurability btwn moral blameworthiness of A and the offence of which they are convicted
- **Beaver, Sault St Marie-** moral blameworthiness is part of MR
- **Creighton-** it is not unconstitutional to have asymmetry between the AR and MR consequences; obj MR std is not unconstitutional
- **Beatty, Hundal-** it is particularly appropriate to have an obj MR std for driving because of licensing requirements, reflexive nature of driving and the social harm involved in car accidents

- **Beatty, Roy**- The word “marked” is there for a particular reason- in tort, a mere departure is sufficient to satisfy negligence; in crim law, a higher std is required (due to the stigma associated with criminal convictions, must meet the moral blameworthiness of the crime). \*cannot assume that dangerousness = marked departure

### Mistake of Fact

- Negates MR where knowledge of circumstances is an element of the offence, A must discharge evidentiary burden to give air of reality to honest belief
- For sexual assault- no burden of proof on A, no requirement to testify (**Ewanchuk**)

**R v Kudeas**: (drug dealer offering LSD, then offering mescaline and actually selling LSD) Rebuttable presumption that A had MR/knowledge of what he was selling, he failed to rebut the presumption. Mistake of fact does not apply. Dissenting- scale of seriousness for drug offences, must respect Parliament’s intention; cannot convict A of an offence without MR.

- Recall **Beaver**- no possession at law without knowledge of what you possess

**R v Pappajohn**: (sexual assault of real estate agent, bondage) Jury must consider mistake of fact defence, no requirement for A to bring evidence. Belief in consent must be honest, does not need to be reasonable; requires credibility assessment.

**R v Ewanchuk**: (sexual assault of teenager in van, repeatedly said “no”) **AR** components = touching, sexual in nature, no consent; what victim subj desired. **MR** = possible mistake of fact; what A subj believed, must point to some aspect of C’s communication on which they can found that belief OR must explain reasonable steps taken to ascertain consent. Silence, ambiguity- cannot raise defence.

### S.271(1):

	<b>AR</b>	<b>MR</b>
<b>Conduct</b>	Assault (s.265) = apply force; touch ( <b>Ewanchuk</b> )	Intention to touch- knowing, reckless, or willfully blind about absence of consent
<b>Circumstances</b>	1. Sexual (no definition in CC) 2. without <u>consent</u> (s.273.1)= voluntary agreement of victim to engage in sexual activity in question, subject to s.273.1(2) + s.265(3)- fear, fraud, duress	1. No MR ( <b>Ewanchuk</b> ) 2. Can Crown prove BRD that A had no honest belief in consent? OR honest belief in consent but absence of reasonable steps to ascertain consent (s.273.2(b)- <b>Ewanchuk</b> )
<b>Consequences</b>	none	

\*Note that s.273.2(b) may violate s.7 of Charter

### Voluntary Intoxication

- Negates MR intention (note: involuntary intox negates AR)
- Mixture of statutory (s.33.1) and common law
- Std of proof = BoP, burden usually on A

### Specific vs. general intent offences:

- 1) **Corresponding MR consequences = specific intent offence**
  - Note: unlawfully causing BH (**DeSousa**), manslaughter (**Creighton**). sexual assault causing BH (**Bernard**) → no corresponding MR consequences = general intent (only intent to perform the act)
- 2) **Specific knowledge in MR circumstances** (i.e. knowledge of possession, exceeds basic AR conduct) = **specific intent offence**

**Leary v the Queen:** Intox is only available as a defence for specific intent offences. Recklessness of becoming voluntarily drunk can substitute MR for a general intent offence.

- Has been overturned in subsequent cases
- Offends s.7 and 11(d) of Charter- allows A to be convicted despite RD about whether or not he has MR (intent to perform AR) → no inevitable connection btwn intoxication and violence, voluntary intoxication is not a crime (**Daviault**). Cite **Whyte** for reverse onus.

**R v Bernard:** (drunk man sexually assaulted younger girl, caused BH) Sexual assault causing BH = general intent, no corresponding MR for BH. Leary rule is adopted, defence of intoxication cannot apply.

- Basic principle that A intends the natural and probable causes of their actions (**Theroux**)
- Debate btwn judges about whether blameworthiness is demonstrated by voluntary consumption, whether voluntary intoxication can substitute for MR in a general intent offence

**R v Daviault:** (alcoholic man in blackout state sexually assaulted woman in wheelchair) Leary rule is unconstitutional; extreme intoxication akin to automatism can negate MR for general intent offences.

- Argument that symmetry btwn AR and MR is not required (**Creighton**), voluntarily depriving self of capacity to form MR is morally blameworthy, should substitute for MR

**S.33.1 of CC:** may violate s.7 and 11(d), but is justified under s.1

- Extreme intoxication akin to automatism/involuntariness- is only available for offences that do not include assault or interference with the bodily integrity of another person

**R v Drader:** (b&e, theft while drunk) A capable of forming specific intent, intoxication defence cannot apply.

- **s.348.1(b)**- Break and enter and commit theft = specific intent offence
- **s.354(1)**- Possession of property obtained by crime = specific intent

3 levels of intoxication:

- 1) minimal/mild- relaxation of inhibitions; cannot be a defence
- 2) impaired capacity to foresee consequences of actions = defence for crimes of specific but not general intent
- 3) automatism, incapable of directing actions = defence to all crimes (subject to s.33.1), expert evidence required

**R v Penno:** if an element of the crime is intoxication (i.e. driving while impaired), then intoxication cannot be a defence to the crime.

**Provocation (s.232):**

- applies only to reduce conviction of murder to manslaughter
- Does not negate intention to kill; AR and MR for murder have already been established

4 elements (from Thibert):

- 1) wrongful act or insult (obj)
- 2) sufficient to deprive ordinary person of self control (obj)
- 3) A was in fact deprived of self control (subj)
- 4) A acted suddenly before his passion had time to cool (subj)

Note that ordinary person is not the same as reasonable person- provocation defence considers human frailty, how a particular person might act in particular circumstances.

Burden of Proof:

1) Evidentiary burden on defence (A) to raise air of reality- A must point to evidence that would raise RD about each one of the 4 elements (**Cinous**)

- If jury is satisfied that there is RD about each element, can convict A of manslaughter, acquit A of murder

2) Persuasive burden on Crown- must DISPROVE 1 element of defence BRD

- If jury is satisfied that any one element has been disproved BRD, can convict A of murder

**R v Hill:** (Hill's "big brother" made homosexual advances, he stabbed and killed him) Some relevant characteristics should be ascribed to the ordinary person (in this case, male and young); judge is not required to identify these characteristics for the jury.

**R v Thibert:** (man shot wife's lover in parking lot) Leaving someone cannot be a wrongful act in itself; however there is evidence that could raise RD about the wrongful act = air of reality for defence of provocation.

**R v Gill:** (stargazers were called nerds, fought with namecallers) Anger is not a necessary part of the defence. Judge has duty to put any defence with an air of reality to the jury.

**R v Tran:** (found ex-wife in bed with lover, stabbed them both) No wrongful act or insult/no suddenness = no air of reality to provocation. Ordinary person should not be ascribed characteristics inconsistent with Charter values (i.e. homophobia)

**R v Nealy:** (A was drinking/drugging, stabbed victim after he made insulting comments about A's gf) Jury must consider combined effects of fear, anger, intoxication; combination might render someone less capable of meeting high MR threshold for murder.

- s.229(a) requires specific knowledge that death was likely, intent to cause bodily harm, and recklessness about whether death ensues
- Note that manslaughter is always an included offence to murder

#### **Mental Disorder** (s.16)

- Solely a statutory defence (NCRMD)
- Std of proof = BoP; burden rests on the party raising the defence
- Presumption that A does not have a mental disorder (cite **Whyte** for reverse onus)

#### S.16(1):

- 1) A was suffering from a mental disorder (at time of offence, expert evidence required) = any illness, disorder, abnormal condition which impairs the human mind and its functioning, excluding self-induced and transitory mental states (**Cooper**)
- 2) Either:
  - a) A was incapable of appreciating the nature and quality of their act; or
  - b) A was incapable of knowing the act was wrong

#### 2a requirement:

- **may negate AR-** "nature of the act"; A is incapable of appreciating that they are acting at all; or
- **may negate MR-** "quality of the act"; A is capable of understanding their physical action, but do not understand its context or consequences

#### 2b requirement: **provides an excuse-** must distinguish btwn legally and morally wrong

- 1) capable of knowing it was legally wrong and they should not act contrary to law
  - no defence available
- 2) incapable of knowing it was legally wrong, but capable of knowing it was morally wrong
  - no defence available (ignorance of law is not a defence)
- 3) incapable of knowing it was legally wrong, incapable of knowing it was morally wrong
  - defence applies
- 4) incapable of knowing it was legally wrong and capable of knowing it was morally wrong, but believing it was okay in the circumstances
  - defence applies (**Chaulk**)
- 5) capable of knowing it was legally wrong, but incapable of knowing it was morally wrong
  - defence applies (**Chaulk**)

**Chaulk:** (psychotic belief that murder was necessary) Presumption violates 11(d)- conviction can occur where there is RD about A's sanity/capacity to understand their actions. Saved by s.1: objective = allocating appropriate std/burden of proof; intrusion is minimal, alt burdens not necessarily better; court must balance competing values (do not want impossible burden on the Crown, want to convict the guilty, want to identify and treat those who are NCRMD).

- S.16 reflects appropriate balance of values = constitutional

**Automatism** = A does not have mental control over their physical actions, CL defence but interacts closely with statute (s.16 MD).

**Dissociation** = disconnection btwn consciousness and physical actions

- \*either caused by automatism, mental disorder, or intoxication
- BoP std, burden on A to prove they were dissociating at time of act
- A must bring psychiatric evidence

Analysis: (after A has proven on BoP that they were dissociating)

- **External cause** = automatism, not guilty
- **Internal cause** (underlying frailty in psychological makeup) → transient or expected to recur?
  - Transient = automatism, not guilty
  - Expected to recur?
    - mental disorder = NCRMD (s.16)
    - other medical condition = consider evidence/policy

Potential causes for dissociation:

- Extreme psychological blow/trauma → external, automatism
- Concussion/blow to head → external, automatism
- Diabetes → internal, expected to recur, automatism?
- Sleepwalking → internal, transient, automatism (**Parks**)
- Psychosis → internal, may recur, mental disorder
- Delirium (toxic) → internal, transient, automatism
- Vicissitudes (ups and downs) of life → internal, expected to recur (**Rabey**)

**R v Rabey:** (feelings not reciprocated, boy struck girl on head with rock) Evidence could constitute extreme psychological blow, retrial required. Court defines dissociation, distinguishes btwn internal and external causes.

**R v Parks:** (sleepwalker drove to in-laws house and killed/injured them) Sleepwalking is considered automatism in this case; analysis = internal or external cause? Recurring danger? Policy factors? Ease with which automatism can be feigned, floodgates argument- not a concern here.

- Lack of motive/quality of evidence is relevant, unlikely for violence to recur.

**Stone:** (argument in car, "whoosh" sensation, man stabbed wife 47 times) Presumption that automatism is caused by MD, A must shift presumption to non-insane automatism.

### Analytical Framework

TJ: Is there evidence upon which the jury could conclude, on BoP, that A dissociated?

- Basic presumption that A acted voluntarily; A must prove that they were dissociating
- Evidence is required (expert, A's testimony, bystanders, any proven history of dissociation, any motive)
- If answer is NO → A will not have access to any dissociation defences
- If answer is YES → assume that MD is proper defence
  - A must establish that dissociation was not caused by disease of mind
  - internal cause, continuing danger and policy considerations = analytical aids
    - **Internal cause:** more likely to be MD

- **Continuing danger:** more likely to be MD; should focus on whether the trigger will recur (**Bouchard-Lebrun**)
- **Policy factors:** i.e. need to protect society, ease with which automatism can be feigned

**R v Bouchard-Lebrun:** (man on ecstasy entered psychotic state, assaulted neighbor) s.33.1 is mutually exclusive from s.16; drug-induced psychosis is not a disease of mind, A does not have access to s.16 or s.33.1 defences for assault charge

- Intox/MD- must ask: does **s.16** apply to this accused?
  - If it could apply, then MD is defence left with jury
  - If not, then s.33.1 is engaged

3 possible scenarios:

- 1) A acted involuntarily because of automatism (external cause, no continuous danger, no policy concerns, no self-induced intoxic)
  - A acquitted
- 2) A acted involuntarily because they meet criteria in s.16
  - A is NCRMD
- 3) A acted involuntarily because of self-induced intoxic
  - Assault or interference with bodily integrity?
    - Yes → s.33.1; A convicted
    - No → Daviault; A acquitted

### **Mental disorder**

Requires disease of the mind

MD automatism (where AR is denied)

Verdict is NCRMD

May be detained in hospital if board concludes that A is a significant threat.

### **Automatism**

No disease of the mind required

Non-MD automatism

Verdict is acquittal

No continuing supervision but the possibility of a peace bond or civil commitment arises.

**Self-Defence** = justification, statutory defence

**Lavallee:** (battered woman shot husband in back of head) **obj std is contextualized:** what A reasonably perceived, given her situation and experience; s.34(2)(a) and 34(2)(b) require both an honest belief (subj) and reasonable belief (obj). Imminence is not required.

- Must ask “whether, given the history, circumstances and perceptions of A, her belief that she could not preserve herself from being killed except by killing first was reasonable”

**Petel:** (A believed she was being assaulted, shot man) Under 34(2), A may make a reasonable mistake about whether she is being assaulted and still have access to the defence. Reasonable belief is enough.

**Malott:** warns against extending the ambit of “battered woman syndrome” without careful research/expert evidence; however, the situation and experience of a battered woman may equally apply to duress, provocation and necessity defences.

**Cinous:** (thief believed his accomplices were going to kill him, stopped at gas station and shot one of them in the head) Air of reality fails on 3<sup>rd</sup> element of self-defence- no obj basis for conclusion that there was no alt to killing; defence should not have been put to jury.

Policy factors: court does not want to condone gang violence, limits defence in this context

**Air of reality test:** (must be applied to every element of BRD defences, both subj and obj; A's evidence is assumed to be true)

- 1) Is there evidence, upon which a properly instructed jury acting reasonably, could acquit if it believed the evidence to be true?
  - A must raise RD for every element of the defence
  - If Crown can disprove one element BRD, then defence will not apply
- 2) Consider sufficiency of the evidence:
  - direct = evidence which, if believed, will resolve a question for the court
  - circumstantial = evidence which requires an inference (i.e. any evidence required for obj elements)

**Necessity** = excuse, solely common law, BRD defence

**R v Perka:** (mechanical difficulties/bad weather led drug smugglers to stop and unload cargo)

Necessity is an excuse- not necessarily the right thing, but what a normal person would do in the situation = moral or normative involuntariness. Air of reality is satisfied for all elements.

**R v Latimer:** (father killed daughter with cerebral palsy) No air of reality to necessity, fails on all elements. MR for each element is established. Homicide might never be proportionate.

3 elements of defence:

- 1) imminent peril or danger (subj + modified obj)
- 2) compliance with law was "demonstrably impossible" / no reasonable legal alternative (subj + modified obj)
- 3) proportionality btwn harm inflicted and harm avoided (purely obj)

**Modified obj std** = obj evaluation that takes into account the situation and characteristics of the particular accused (see Lavallee)

**R v Ungar:** (EMT dangerous driving) Necessity applies. 1<sup>st</sup> element can refer to a 3<sup>rd</sup> party, would not be reasonable to fail to respond to the call.

**Duress** = excuse, statutory + CL defence

**Ruzic:** (mother's life in Serbia was threatened unless daughter smuggled drugs into Canada) **S.17** immediacy and presence requirements- prevented access to duress, were deemed unconstit. Common law principles can be read into the statute; duress applies.

- Normative involuntariness = principle of fundamental justice

**Hibbert:** **S.17** refers to the principal = person who physically commits AR. If A is a party to the offence → must consider common law principles.

**R v Ryan:** (woman hired hit man to kill abusive husband) Duress is only available where the offence that A commits is the one their threatener wants them to commit. This looks more like self defence, court does not want to supplement it.

<b>Statutory (s.17)</b> - if A is principal	<b>Common Law</b> - if A is party to the offence, or offence is in exclusion list
Threat of death or BH to A or 3 <sup>rd</sup> party	Explicit or implicit threat of death or BH against A or 3 <sup>rd</sup> party, may be future harm
A believes that threat will be carried out	A reasonably believes threat will be carried out
Offence is not on list of excluded offences	
A is not party to a conspiracy or crim association that would compel A	A is not party to a conspiracy or association that would subject A to compulsion, in circumstances where A had subj knowledge of risk of compulsion
No safe avenue of escape (Ruzic)	No safe avenue of escape (modified obj)

Close temporal connection btwn threat and harm threatened (Ruzic)	Close temporal connection btwn threat and harm threatened
Proportionality btwn harm threatened and inflicted (Ruzic; Ryan adds modified obj std)	Proportionality btwn harm threatened and inflicted (modified obj)

S.17 lists exclusions- if A is charged with one of those offences, they either:

- A) have no defence
- B) have the common law defence, because s.17 does not apply (**Hibbert**)
- C) have the s.17 defence- list is unconstit because it violates principle that only morally voluntary actions will be criminalized (**Ruzic**)

Self Defence: T → threatens A → A seeks to commit offence against T

Duress: T → threatens A for subj purpose of committing offence → A commits offence

Necessity: Non-human threat → threatens A → A commits offence

- For duress and necessity, the victims are 3<sup>rd</sup> parties (**Hibbert**)

### Sentencing

Ss. 718-718.2:

- fundamental purpose = to maintain a just, peaceful, and safe society
- more specific objectives = deterrence, rehabilitation, denunciation
- **fundamental principle (718.1)** = proportionality- sentence must not exceed what is just and appropriate, given the moral blameworthiness of the offender and gravity of the offence
- subsidiary principles (**718.2**) = analytical aids affecting proportionality; note that aggravating factors must be proven by Crown BRD, all other factors are on BoP std
- sentencing judge has ultimate discretion, but this is restricted by maxes/mins

**R v Nasogaluak:** Proportionality is central to the sentencing process- offenders must be given a sentence that properly reflects and condemns their actions, while not exceeding their moral culpability. Principle of restraint is counterbalanced by “just deserts”, judge has broad (but not limitless) discretion.

**R v Sweeney:** (fleeing from police, drinking and driving, hit and killed someone) Importance of rehabilitation, given personal background/circumstances of A. Concurring judgment clarified principles of sentencing- can bolster the statute, may be helpful as obiter in the absence of binding precedent.

5 goals of sentencing:

- 1) **general deterrence** = someone is less likely to offend if aware of a consequence; however, evidence shows that longer/harsher sentences are not more effective
- 2) **specific deterrence** = sentence which acts to make particular offender less likely to reoffend
- 3) **isolation** = physically preventing A from reoffending (by imprisonment)
- 4) **rehabilitation** = helping A to overcome circumstances which led to their offence (non-custodial)
- 5) **denunciation** = society must identify and respond to harm caused; however, must be proportional.

Imprisonment only justified where court is convinced that no other sanction is sufficiently strong.

718 adds:

- 6) to provide reparations to victims for harm done in the community
- 7) to promote a sense of responsibility

Min/Max Sentences:

**R v Ferguson:** (RCMP officer killed drunk man in jail cell with 2 shots, self defence did not apply) Sentencing judge must comply with facts as found by jury (**s.724**), mandatory min sentence is not so grossly disproportionate to be considered cruel and unusual punishment, is not unconstit in this case. A’s duty of care to V = aggravating factor (**718.2**), which overwhelms any mitigating factors.

- Obiter: cannot grant constt exemption on a one-off basis, must use s.52 of Constitution to strike down unconstit min sentence and apply usual sentencing principles in its place

**R v M(L):** (sexual assault of daughter, filmed and distributed on internet) Deference must be given to TJ, sentencing should not be overturned unless clearly unreasonable or error in law/principle. Max sentence must not be reserved for worst possible case in worst possible circumstances. Long-term offender order not relevant to length of sentence, consecutive sentences can apply.

Aboriginal Offenders: 718.2(e)

**Gladue:** (Ab woman stabbed and killed boyfriend, met criteria for manslaughter) Strong connection to culture is not required for 718.2(e) to apply; these principles apply to all Ab offenders.

Judge must consider:

- 1) unique background or systemic factors that may have played a part in bringing the Ab offender before the court
  - i.e. family background, substance abuse, poverty, residential schooling- in relation to deterrence and denunciation
  - primary regard must be had for the needs of the victim, the offender, and the community affected by the crime
  - these factors may reduce moral blameworthiness; however, causal connection btwn factors and offence is not required (**Ipeelee**)
- 2) types of sentencing procedures and sanctions which may be appropriate to the Ab offender because of his/her heritage and connections
  - non-traditional sentence may actually demand more than a typical incarceration
  - This is not a “race-based sentencing discount” (**Ipeelee**)

**Ipeelee/Ladue:** (2 Ab offenders violated LTSO by doing drugs) Gladue principles are applicable for a breach of LTSO, are also applicable in sentencing serious/violent offences. Court has a duty to apply Gladue, must take judicial notice of systemic and background factors for Ab people.

- Whole idea is that Ab people are differently situated and this must be recognized
- Over-incarceration of Ab people is a huge problem in Canada

**Akapew-** question of totality as well as parity

**Nasogaluak-** police misconduct can mitigate sentence if sufficiently related to the charge

**Draper-** stands for the individualization of sentencing, regard for offender’s circumstances

Recall- s.8(3) of CC preserves common law defences, as long as they do not conflict with statute  
-Statutory defences (i.e. self defence)- will not be supplemented by the courts

Principles of Fundamental Justice:

- Only morally voluntary actions will be criminalized (Ruzic)