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# Introduction to Criminal Law

DEFINITION OF CRIMINAL LAW

**Criminal law** is that branch of law which deals with wrongs that are **punishable by the state.**

* 2 issues with this **definition:** 
  + (1) There are certain forms of conduct that can attract state punishment but do not form part of the criminal law 🡪 can be jailed for **civil contempt**
  + (2) Difficult to **predict** types of wrongs that are subject to state punishment

# A crime is any public wrong that causes harm to the public (in addition to the victim) and is subject to criminal proceedings, criminal rules of evidence, and criminal punishments.

* Focus on the **harm** arising from the wrong (community harmed by it)
* Focus on the **interest** engaged by the wrong (community values affected by it)

# *Why do we need a clear definition of what constitutes a crime?*

# Helps us decide whether application of criminal law is appropriate to a given set of facts or problem

# Provides a basis for discussions about the proper scope of the criminal law and questions of criminal law reform

**Crimes vs. Torts:** While **criminal law** sets out apportion blame and **punish** certain types of wrongs, **torts** looks to **compensate victims** for harm arising out of certain types of conduct.

**True crimes** constitute conduct that is abhorrent to the basic values of human society (ie. murder) while **Regulatory crimes** are imposed because unregulated activity would result in dangerous conditions being imposed upon members of society (culpability less important).

FUNCTIONS OF CRIMINAL LAW

1. **Instrumental** (***consequentialist***) **Functions:** Aimed at bringing about some (positive consequence).

* Promoting order by setting out clear rules for individual behaviour (and prohibiting conduct that it likely to harm others);
* Protecting the individuals and the public at large (by deterring potential offenders and incapacitating convicted offenders); and
* Limiting and resolving conflicts between individuals

1. **Moral Functions:** Aimed at promoting or defending a particular moral position

* Acting in accordance with certain moral principles (such as punishing those who have committed moral wrongs);
* Promoting a particular set of morals or community values by punishing those who do not act in accordance with those morals or values; and
* Reasserting the moral claims (and moral rights) of victims by punishing offenders who fail to respect those claims or rights

SOURCES AND LIMITS OF CRIMINAL LAW

**The primary basis for Criminal Law in Canada is S. 91(27) of the *Constitution Act 1867*, which states that power to make criminal law is federal power. The main source of criminal law is the *Criminal Code.***

Federal Parliament also has the authority (under **s 91 (28))** to establish, maintain, and manage **penitentiaries.** Other sources of criminal law include ***YCJA* (2003)**& ***Controlled Drug & Substances Act* (1996)**, and case law.

Criminal law is limited by **S.1** of the ***Charter*,** which “guarantees the R&F set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Courts can strike down inconsistent legislation (**s. 52**) or order remedies for ***Charter*** violations (**S.24(1)**).

**3 essential characteristics of a crime:**

**(1) Crimes prohibit certain types of conduct;**

**(2) Crimes are accompanied by a penalty for violating the prohibition set out in (1); and**

**(3) The prohibition and penalty must be directed to a “public evil” or some other behaviour that can cause harm to the public at large (*Margarine Reference Case* (1949))**

Criminal prohibition must also be enacted with a **public purpose** (ie. Public peace; • Order; • Security; • Health; and • Morality)

ELEMENTS OF AN OFFENCE

1. The ***actus reus***is the prohibited act (e.g. the actus reus of theft is the taking of property belonging to someone else without their consent).
2. The ***mens rea*** of the offence is the required mental element(s) of **fault** (e.g. mens rea of theft is the intention to take the property and the knowledge that you are not entitled to take it).

BURDEN OF PROOF

The **burden of proof** is on the Crown to establish that a crime has occurred **beyond a reasonable doubt** by establishing:

(1) That the elements of the offence charged have been made out (proven actus reus & mens rea)

(2)  The particular / relevant facts alleged in the charge – such as the identity of the accused and the time and place of the offence.

**Permissive presumption:** courts **may** draw an inferenceof the presumed fact(ie. If A (basic fact) is established, then the court is **permitted** (but not required) to assume that B (presumed fact) is true

**Mandatory presumption:** courts **must** draw an inference of the presumed fact (ie. If A (basic fact) is established, then the court is **required** to conclude that B (presumed fact) is true

**If a presumption is rebuttable, there are 3 potential ways the presumed fact can be rebutted.**

1. **Accused may be required to raise a reasonable doubt as to its existence**
2. **Accused has evidentiary burden to adduce sufficient evidence to bring into question the truth of the presumed fact.**
3. **Accused has legal/persuasive burden to prove on a balance of probabilities the non-existence of the presumed fact.**

# READING THE CODE

KEY INTERPRETIVE PRINCIPLES

**(1)**Must give meaning and effect to each and every word in the relevant provision(s).

**(2)**Always look to the Code for the definition of terms used in relation to a given offence. When looking for a definition, you should work through the Code in the following order:

1. **Start with relevant CC section**
2. **If the term isn’t defined in the section, move to the relevant Part**
3. **If term isn’t moved in the Part move to section 2 (general definitions)**
4. **Where relevant, look to the applicable case law for judicial interpretations of meaning**

**(3)** Where there is no statutory definition (or definition in the relevant case law), then apply the general rules of **statutory interpretation**.

General Rules of Statutory Interpretation

1. **Key Principle:** “The words of the statute must be considered in context, in their grammatical and ordinary sense, and with a view to the legislative scheme’s purpose and the intention of Parliament.” (SCC in ***Canadian Foundation for Children (etc.) v Canada****,* 2004 in interpreting *Code*)
2. Begin by looking at the **context** in which the word is used, then use “**ordinary**” dictionary meaning
3. If ordinary meaning does not provide an answer to the question of how to define the word, you can then look to other rules and aids to interpretation such as:
   * History of the provision
   * Purpose of the provision
   * Comparison with the version in the other official language
   * The rule that the word may take its meaning from words with which its associated
   * The rule that the expression of one excludes the unexpressed

Principles Worth Noting

1. Accused can only be convicted of the offense they’re charged, except in the case where the initial charge contains within it an additional charge
   1. **Ie**: charge of first degree murder contains within it ability to charge for second degree murder
   2. The crown tends to charge the most serious of possible charges on the assumption that if the initial charge cannot be sustained, they can convict for the lower offences.
2. **Attempt** to commit is always included in the definition of the offence

# CRIMINAL COURT SYSTEM IN BC

1. **Provincial Court of BC**

* Deals with **95%** of criminal matters except murder (committed by adults)
* Appointed by the **provincia**l government

1. **BC Supreme Court**

* Has power to deal with all **indictable** offences, **jury trials**, and **appeals** from Provincial Court
* Appointed by the **federal** government

1. **BC Court of Appeal**

* 3-5 judges hear **appeals** based on **law** from BC Supreme Court
* Appointed by the **federal** government

1. **Supreme Court of Canada**

* 9 judges hear **appeals** from Court of Appeal based on **law**
* **Highest court** of appeal; decisions **final** and **binding** on all other levels of court

**Criminal Justice Process:** Investigation 🡪 charge assessment 🡪 prosecution 🡪 sentencing 🡪 appeals

ROLE OF THE CROWN (*CC S.*4)

* Executive branch appoints prosecutors: both a federal and provincial prosecutor’s office
* Role is to approve and conduct all prosecutions and advise the government on criminal law matters
* ***Quasi-judicial function***: Independent officers of the court (protected from outside influence)
* Primary responsibility to be fair and preserve integrity of judicial process by accurately presenting evidence, not searching for a win (***Boucher v the Queen***)

***Boucher v the Queen***

**PROSECUTOR HAS PUBLIC DUTY TO BRING BEFORE COURT ALL CREDITABLE EVIDENCE RELEVANT TO CRIME**

WJ Stuntz “Pathological Politics of the Criminal Law” (pp. 272-273)

* Argues that **criminal law** does not serve as a mechanism for distinguishing between those who should be punished and those who should not, but rather acts to grant **authority** to **prosecutors** to determine who should be exposed to the criminal law.
* Claims that criminal law outcomes are not determined by the substance of the criminal law, but rather according to decisions of agents who administer it 🡪 Emphasizes influence of **prosecutorial discretion**

Prosecutorial Discretion (PD)

All charges laid and evidence against alleged offender are determined at the **discretion of the prosecutor.**

**COURTS BEGIN WITH PRESUMPTION OF JUDICIAL NON-INTERFERENCE FOR MATTERS OF PD (*R v Anderson*).** PD may be reviewed under **court tactics** or **abuse of process** (***R v Anderson***).

***Anderson***: “[A]buse of process refers to Crown conduct that is egregious and seriously compromises trial fairness and/ or the integrity of the justice system. 🡪 “improper motives” and “bad faith” (***Nixon***

**Sanctions** may include orders to comply, adjournments, and extensions for the defence based on:

* Failure to observe court rulings or orders
* Inappropriate behaviour (such as tardiness, incivility, abusive cross-examination, improper opening or closing addresses or inappropriate attire)

Assumption of Judicial Non-Interference (**Deference:** Idea that we should not presumptively review)

1. Reflects respect for the competency of crown prosecutors🡪 they are in better position to make such decisions than the courts are
2. Review of prosecutorial decision would (a) slow the judicial process (efficiency argument) and (b) would be too hard on prosecutor (may be less likely to prosecute if every move is heavily reviewed)

***Why does the Court start from a presumption of “judicial non-interference” when it comes to matters of prosecutorial discretion?* (*Anderson*)**:

**(1)** Doctrine of **separation of powers** – prosecution is an executive function / responsibility; and

**(2) Efficiency and integrity** – judges and other parties are not well-equipped to review decisions of the AG.

However, there needs to be transparency and accountability in prosecutorial discretion because they hold such power 🡪 prosecution not required to give **rationale** of their decision-making, **unlike** judges

***What is meant by “no contest” in the context of a criminal trial?*** 🡪 Where the defendant makes a plea of no contest (*nolo contendere*), in effect they are accepting the charge and facts as set out by the prosecution. Allows court to enter guilty verdict and proceed to sentencing stage.

***R v Kriger*** (Referenced in ***Anderson***)

Helps clarify definition of what **prosecutorial discretion** is:

* “… Refers to the use of those powers that constitute the core of the AG’s office and which are protected from the influence of improper political and other vitiating factors by the principle of independence.” (p. 275)
* “Prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the AG’s participation in it.” (p. 275)

***Miazga v Kvello Estate***

**Importance of PD lies in its role in advancing the public interest – prosecutors**

Crown Disclosure

***R v Stinchcombe* [1991]**

**WITHOUT FULL DISCLOSURE, DEFENCE IS PUT AT A CONSIDERABLE AND INHERENT DISADVANTAGE.** All **relevant** information must be disclosed subject to the reviewable discretion of the Crown. Police and Crown have the best access to evidence of a crime 🡪 defence lawyer usually becomes involved later on in the life of a case, and therefore relies on much of their evidence from Crown disclosure.

Crown disclosure is subject to the **discretion** of Crown counsel, which extends both to the withholding of information and to the timing of disclosure 🡪 ie. for the protection of informants or to respect rules of privilege or exclude irrelevant information

# ABORIGINALS AND JUSTICE SYSTEM

* High numbers of Aboriginal individuals incarcerated
* Generations of negative relationship between CJS and Aboriginals (***R v Kikkik,* 1958**); (***R v Marshall***)

Disparity Between Indigenous and Non-Indigenous Incarceration Rates

* Criminal law is heavily socially constructed (product of human decisions)
* Long-standing socio-economic disparities and the relationship between poverty and incarceration
* Selective policing and prosecution of Indigenous communities
* Cycle of poverty and alcoholism in isolated communities
* Inadequate protections/available legal resources (for systemic and economic reasons)

### WRONGFUL CONVICTION

***R v Marshall* (1983)** *(stabbing-during-robbery-wrongfully-convicted*)

**LANDMARK CASE EXAMPLE OF SYSTEMIC DISCRIMINATION AND WRONGFUL CONVICTION.** Marshall *accused of stabbing Sealey after 2 eyewitnesses testified that he had gotten into an altercation with him. Marshall turned out to be innocent and was wrongfully convicted, serving an 11 year sentence before he was exonerated. Had been involved in an attempted street robbery with Sealey where the guy Sealey was trying to rob ended up pulling out a knife and stabbing him.* Court did not compensate Marshall much for his wrongful conviction and blamed him for inconsistent accounts in his testimony.

1. **Shortcomings of justice system**
   1. Issues associated with **fact finding**
      1. Justice system geared to finding legal not factual issues
   2. Issues surrounding the **denial of bail**
      1. Balance of society’s right to feel secure vs. the accused’s right to ease of access of lawyer/familiar surroundings
   3. Issues of **false confessions**
      1. System provides huge incentives for guilty pleas that have reduced sentences from initial charge
2. **Systematic discrimination**
   1. Quick decision making = more reliance on stereotypes = creditability issues
   2. Not all remedies in legal justice system can substantively fix discrimination issues (i.e. redefining reasonable doubt)
3. **Professional Responsibility** 
   1. Failure of defense lawyers
      1. Subtly indicating that Marshall is guilty but he should get a break
      2. Didn’t bother conducting independent investigation to ascertain facts
   2. Vendetta of Constable Macintyre against Marshall
      1. Seeking out false testimony for Marshall facts
      2. Did not disclose McNeil’s confession that he witnessed the two other men stabbing Seale, not Marshall, week after Marshall was convicted – he had obligation to give that info to the crown, who would disclose to the accused
   3. Role of prosecutors
      1. Not supposed to be concerned with winning but with the truth, and presenting all evidence to the court
      2. Danger of “tunnel vision” – confirmation bias
   4. Court of Appeal 1983
      1. Defended justice system at expense of Marshall
         1. Asserted accused was responsible for own wrongful conviction because did not disclose to lawyers he was attempting a robbery
         2. Marshall was blamed for wrongful conviction and received no damages
      2. Judge at 1983 appeal served as AG when Marshall was initially convicted in 1972 (conflict of interest)

***R v Stinchcombe* (1991)**: requires Crown disclosure before trial of all relevant and non-privileged info

***Burns v Rafay* (SCC)**: Extradited to face death penalty violates s. 7

# CONSTITUTION AND CRIMINAL LAW

Criminal law is limited by **S.1 of the *Charter*,** which “guarantees the R&F set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Courts can strike down inconsistent legislation (**s. 52**), order remedies for *Charter* violations (**S.24(1)**) or exclude evidence from the trial (**S. 24(2)**).

ELEMENTS OF THE *CHARTER* AND CRIMINAL LAW

**S. 7 -** right to life, liberty and security of the person

**S. 11 –** right to presumption of innocence, fair trial and public hearing by an independent & impartial tribunal

***R v Oakes* (1986)**(*possession-hash-accused-prove-not-trafficking*)

**SETS TEST FOR S. 1 LIMITATION APPLICATION (OAKES TEST); REVERSE ONUS VIOLATES S. 11.** *Oakes found in possession of 8 vials of hashish oil and $600+ in cash. Told police hash was for personal use and money was worker’s comp. Charged with “possession of drugs for the purposes of trafficking” under s. 8 of the Narcotics Control Act, which requires accused to prove on a balance of probabilities that they were* ***not*** *in possession for the purposes of trafficking. Convicted at trial, but overturned on appeal based on the section being unconstitutional and reverse onus violating s.11.* ***Does s. 8 of the Narcotics Control Act violate s. 7 and s. 11 of the Charter? If so, can it be saved under s. 1?* S. 8 of the *NCA***establishes a **rebuttable mandatory presumption** upon Crown proof of possession beyond a reasonable doubt. Once the Crown has established that the accused was in possession of a narcotic according to the Act, the **accused** is then required to **disprove** the purpose of trafficking to the balance of probabilitie. 🡪 **reverses** onus of proof. Reverse onus violates presumption of innocence under s. 11(d) and cannot be saved under **S.1**: *NCA* too **broad** (not proportional to objective) and **over-inclusive** (captures possession of small or negligible quantity of narcotics)

**OAKES TEST:**

1. Objective must be **pressing** and **substantial** in free and democratic society
2. Means adopted must be **reasonable** and demonstrably justified
3. Infringement must be **proportional** (Proportionality test:)
   1. **Rational connection** between objective and harm (not arbitrary) (***R v Laba,* 1994 SCC**)
   2. Impairs right as little as possible (cannot be over broad*)*
   3. Proportional between means that limit the *Charter* right and effect

***R v Downey* (1992 SCC)**

**FURTHER ESTABLISHES S. 11(d) JURISPRUDENCE (CORY J.)**

1. Presumption of innocence is infringed if A is liable to be convicted despite existence of reasonable doubt.
2. If A is required to prove or disprove on balance of probabilities an element of the offence or an excuse, that provision violates s. 11(d) for the reason given in (1).
3. Even a rational connection between the established fact and the presumed fact is insufficient to make the presumption valid.
4. Where the proven fact is such that it would be unreasonable for the trier of fact to be unsatisfied beyond a reasonable doubt of the presumed fact, there is no violation of s. 11(d).
5. A permissive presumption does not violate s. 11(d).
6. A provision that offers a minor path to relief from conviction may nonetheless violate s. 11(d).
7. Statutory presumptions that violate s. 11(d) may still be justified under s. 1 (eg. ***Keegstra***).

***Canada (AG) v Bedford* (2013 SCC)** (*prostitution-legality*)

**DEPRIVING SOMEONE’S S. 7 RIGHT VIOLATES *CHARTER* IF VIOLATION IS ARBITRARY, OVERBROAD OR GROSSLY DISPROPORTIONATE.** *Prostitution itself is legal while activities surrounding it are illegal (ie.* **S. 210(1):** *keeping a bawdy-house,* **S. 212(1):** *living off prostitution, &* **S. 213(1):** *communicating in public*). Restrictions surrounding prostitution put safety and lives of prostitutes at risk (violate s. 7) and are therefore **unconstitutional.**

**OAKES’ TEST:**

1. Absence of a **connection** between the law’s **purpose** and the deprivation of a S. 7 interest violates the *Charter* if it gives rise to **arbitrariness** and **over-breadth**;
2. Depriving someone of a S. 7 interest violates the *Charter* if done in a manner that is **grossly** **disproportionate** to the law’s **objective**.

**Arbitrariness**: Direct, **rational** connection between purpose of law and the impugned effect on the individual

**Over-breadth**: So **broad** that it includes activity that has no relation to the **purpose** of the law. (*Obiter:* An overbroad law might be justified under **s. 1** on the basis of enforcement practicality.) (***R v Haywood***)

**Disproportionality**: Law’s effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported. Does not consider the benefits of the law for society, it balances the negative effect on the individual against the purpose of the law.

# ACTUS REUS

STRUCTURE OF ACTUS REUS

Accused acquitted If any element of Actus Reus not established

1. **Conduct: Voluntary** act or omission that forms the basis of the crime
   1. Proof of positive acts (***Killbride v Lake,* 1962***;* ***R v Ruzic,* 2001 SCC**)
   2. Criminal omission – liable only when there is legal duty to act and accused does not fulfill this duty (***R v Browne; R v Thornton***)
2. **Circumstances:** Material & surrounding circumstances of the case
3. **Consequences:** Consequences of the voluntary conduct **🡪** Where consequence is necessary, Crown must also prove **causation**

**Note**: **Conduct** not required for violations under **253(1), 335(1)**, and **351(1)** of ***CC***

REQUIREMENTS OF ACTUS REUS

**CHECKLIST for Actus Reus:**

1. Was there **voluntariness?**
   1. *Physical* – accused’s control over their body
   2. *Moral* – accused’s desire/willingness to commit conduct
2. Was it a **positive act**?
3. If not, was harm caused by an **omission**?
   1. If omission, was there a duty of care?

Voluntariness

**Criminal responsibility is only ascribed to acts that resulted from the choice of a conscious mind and an autonomous, free will. (*R v Ruzic,* 2011 SCC)**

Examples of **involuntary** conduct: Reflexes, sleepwalking, accident (***Lucki,* 1955**)

***R v Lucki (*1955)** (*accused-car-slid-ice-wrong-side-road*)

**CERTAIN ACCIDENTS CAN BE INVOLUNTARY CONDUCT.** *Accused driver was trying to make a right-hand turn on an icy street, and through no fault of his own his car skidded on a sheet of ice and ended up stopping on the wrong side of the road.* Charged with being on the wrong side of the road. Court **acquitted** him on the grounds that the act was clearly **involuntary**.

***R v Larsonneur* (1993)** (*convicted-as-alien-beyond-control*)

**IMPROPERLY IGNORED ISSUE OF VOLUNTARINESS.** *Convicted of being an alien beyond her control after landing in a country she had been deported from.*

***Killbride v Lake* (1962)** (*accused-parking-pass-lost-when-parked*)

**PROHIBITED CONDUCT CANNOT BE FOUND IF IMPUGNED ACT WAS NOT COMMITTED VOLUNTARILY.** *A drove a car and parked it in Auckland. He received a ticket for driving without a current warrant of fitness. Warrant had been in its correct position when parked and become detached and lost or removed while he was away from the car.* ***Can the accused be found liable?* No;** aperson cannot be held criminally responsible for an act or omission unless it was done or omitted in circumstances where there was some other course open to him.

***R v Ruzic* (2001 SCC)** (*charged-importing-narcotics-threats*)

**LIABILITY IS FOUND ONLY WHEN THERE IS MORAL CONNECTION (KNOWLEDGE AND DESIRE TO COMMIT ACT) BETWEEN ACCUSED AND THE ACT – IF ACT IS NOT VOLUNTARY ACCUSED CANNOT BE FOUND TO HAVE DONE ANYTHING WRONG.** *R was charged with importing narcotics into Canada. Testified that she imported the drugs because she had been threatened by a man who knew where she and her mother lived. She lived in Yugoslavia, and at that time there was no effective police service in that country, so it was not possible for her to seek protection from the police.* ***Was her act voluntary?* No;**Criminal responsibility [is] ascribed only to acts that resulted from the choice of a conscious mind and an autonomous will.

***Bouchard-Lebrun* (2011)**

**CRIMINAL RESPONSIBILITY CAN ONLY RESULT FROM THE COMMISSION OF A VOLUNTARY ACT. BASED ON CONCEPTS OF FAIRNESS AND RECOGNITION IN CRIMINAL LAW.** *Actus reus* of a crime cannot be established unless "it is the result of a willing mind at liberty to make a definite choice or decision, or in other words, there must be a willpower to do an act whether the accused knew or not that it was prohibited by law"🡪 Has **physical** and **moral** dimension.

Positive Acts/ Omissions

In order for the accused’s conduct to satisfy the *actus reus* of an offence, the wrongful conduct must be by way of a **positive act** (or criminal omission).

Generally, the criminal law does not punish **omissions**/ failures to act. **However,** the law may hold a person criminally liable for an omission if they are under some **legal duty to act**. (***Moore v the Queen,* 1979**)

***Why should we criminalize omissions?*** (**Policy argument**)

1. There is no moral difference between an act and an omission.

1. Criminalizing omissions helps reinforce that we owe obligations of social responsibility to each other.

***Arguments against criminalization of omissions***

1. Sufficient impingement on individual liberty
2. Forces people to “be good” rather than stopping them from “doing wrong” – violates individual autonomy and prevents individuals from developing as moral actors

***R v Speck* [1977]:** (*Accused-did-not-remove-little-girl’s-hand-from-pants)*

**SOMETIMES AN OMISSION CAN BE A POSITIVE ACT.** *8-yo girl sat on defendant’s lap and placed her hand on his penis (outside of his trousers) for approx 5 mins. Man because aroused and remained inactive during the time, not attempting to remove her hand. Defendant was charged with battery.* ***Was there a positive act?*** Act wrapped up in an **omission**: although not at fault for the initial act, once he failed to stop the child, it became an invitation and therefore an **act**.

***Moore v the Queen* [1979]**

**OMISSION TO ACT IN A PARTICULAR WAY WILL GIVE RISE TO CRIMINAL LIABILITY ONLY WHERE A DUTY TO ACT ARISES AT COMMON LAW OR IS IMPOSED BY STATUTE.**

***R v Browne* (1997)**(*drug-dealer-GF-overdose*)

**CRIMINAL STANDARD FOR NEGLIGENCE (LIABILITY FOR OMISSION TO ACT) IS HIGHER THAN THAT OF CIVIL STANDARD BECAUSE SANCTIONS IN CRIM ARE A BIGGER DEAL.** Deceased, G, swallowed a bag of crack cocaine to evade detection by police. When G & B returned to B’s home, G fell ill. B said ‘I’m going to take you to the hospital.’ When they arrived, B initially denied that G had taken drugs, then admitted it. G was pronounced dead soon after her arrival at the hospital. ***Was there an undertaking in the nature of a binding commitment?*** Mere expression of words indicating a willingness to do an act cannot trigger the legal duty. There was no undertaking established on premise of defendant and plaintiff’s relationship, thus no duty of care. **NO UNDERTAKING = NO DUTY OF CARE = NO LIABILITY FOR OMISSION.**

***R v Thornton* (1991)**(*accused-donates-AIDS-blood-knowingly*)

**FUNDAMENTAL DUTY IN COMMON LAW TO REFRAIN FROM CONDUCT THAT CAN BE REASONABLY FORSEEN TO CAUSE INJURY TO ANOTHER PERSON.** *T donated blood to the Canadian Red Cross knowing that he had twice tested positive for HIV. He was aware that HIV is transmitted by blood and that Red Cross would not knowingly accept blood from those who had tested HIV+.* ***Did T have a duty of care to disclose that he had AIDS when donating blood?* Yes**, duty established through common law (duty to refrain from causing harm to another).

CAUSATION

Code rarely speaks to causation - only in **ss. 224** and **225**. Causation spoken to mostly in common law (asserted by SCC in ***R v Maybin 2012***)

**Basic Steps for Determining Causation in Criminal Law:**

1. Crown must establish that the accused’s conduct was a “**but for**” cause of the harm or prohibited outcome **[FACTUAL CAUSATION]**
2. **Then** Crown must establish that accused’s conduct is a **legal** cause of the harm or prohibited outcome **[LEGAL CAUSATION]**

**(1)  Causation in Non-Homicide Cases:**

***R. v. Winning* (1973):** Ontario Court of Appeal held that the Crown must establish that the accused’s conduct was a contributing cause **outside the *de minimus* range.**

**(2)  Causation in Homicide Cases:**

***Smithers* (1977)*:*** SCC held that the Crown must establish that the accused’s conduct was at least a **contributing cause of death**, outside of the *de minimus* range

***Nette* (2001)*:*** Supreme Court confirmed the test in ***Smithers***, but reformulated the wording of the test (drawing on ***Harbottle* [1993]**) such that the Crown must establish that the accused’s conduct was a “significant contributing cause” of death. Court noted that phrases such as “not a trivial cause” and terms like *de minimus* are rarely helpful

***Maybin* (2012):** Supreme Court confirmed that the key issue is whether the accused actions still constituted a **significant cause of death** (test in ***Nette***)

Factual vs. Legal Causation

**Factual Causation** (“but for” test): **But for** the accused’s conduct, the prohibited consequences would not have occurred. Need to establish whether the accused’s conduct is part of some “**chain of causation**” that led to the prohibited conduct. **(*R v Winning,* 1973)**

**Legal Causation:** (**de minimis** test)**:** Accused’s conduct must be at least contributing to cause death outside of de minimis range (***R v Smithers,* 1977, *R v Winning,* 1973**) 🡪 ***Should the accused be held responsible for the prohibited consequence?***

🡪 ***Nette* (2001)** established that accused’s conduct must be a **significant contributing cause** of death

🡪 **Thin skull** rule applies (take the victim as you find them): victim’s characteristics do not have to be foreseeable (***R v Blaue,* 1975**)

🡪 Higher threshold for **first degree murder** (***Harbottle,* 1993**): In order to establish first degree murder under **S. 231(5) [then 214(5)**], the Crown must prove that the the accused’s participated in the murder in such a way that he was a **substantial cause of the death** of the victim.

***R v Winning* (1973)** (*accused-obtains-credit-false-pretences*?)

**CROWN MUST ESTABLISH THAT “BUT FOR” THE ACCUSED’S CONDUCT, THE PROHIBITED CONSEQUENCES WOULD NOT HAVE OCCURRED.** Accused attempted to obtain credit by false pretences. Credit agency Eatons did not reply on her application form when taking the decision to grant credit. ***Should accused be held causally responsible?*** No; there wasn’t a causal connection between her conduct and the extension of credit.

# *Smithers v the Queen* [1977 SCC] *(accused-kicks-victim-causing-aspiration-death)*

**IF ACCUSED’S UNLAWFUL ACT IS FOUND TO HAVE CONTRIBUTED OUTSIDE THE DE MINIMIS RANGE TO THE VICTIM’S DEATH THEN THE ACCUSED IS GUILTY. ACCUSED MUST TAKE VICTIM AS HE FINDS HIM – THIN SKULL RULE.** *Accused kicked victim in the stomach during a fight, causing aspiration. Malfunction of victim’s epiglottis caused vomit to enter lungs, which eventually caused victim’s death.* ***Was the accused’s kick the victim’s cause of death?*** Yes; Enough evidence that kick contributed to death to establish manslaughter.Sufficient to prove kick contributed to death beyond ***de minimis*** range. One who assaults another must take his victim as he finds him (**thin skull rule** established in ***R v Blaue*** **[1975]**).

***R v Blaue* [1975]** (*victim-stabbed-refuses-blood-transfusion*)

**ESTABLISHED THIN SKULL RULE: THOSE WHO USE VIOLENCE MUST TAKE VICTIMS AS THEY FIND THEM (BOTH PHYSICAL AND RELIGIOUS DISPOSITIONS). VICTIM CHARACTERISTICS DO NOT HAVE TO BE FORESEEABLE.** *A woman was stabbed by the defendant. She was taken to hospital and refused a blood transfusion due to her religious convictions as a Jehovah's Witness. She then died from her wounds.* ***Can the accused be held liable for her death?*** Yes; **thin skull rule** applies. FORESEEABILITY **is not** a defense against this rule. Also 🡪 distinction between *religious conviction* and *psychological conviction* (sense of control over decision-making process differs).

**Moral luck policy considerations:\* Circumstance** determines slight change of events that may or may not result in crime/ worse conditions for the accused.

***R v Nette* (2001 SCC)** (*break-into-home-tied-up-old-lady-died*)

***SMITHERS* “DE MINIMIS” CAUSATION TEST APPLIES TO ALL HOMOCIDE CASES. 🡪 REFORMULATED WORDING OF TEST – “SIGNIFICANT CONTRIBUTING CAUSE.” *HARBOTTLE’S* “SUBSTANTIAL CAUSE” TEST CREATES ADDITIONAL CONSIDERATIONS APPLIED ONLY TO 1ST DEGREE MURDER CHARGES. LEADING AUTHORITY FOR LEGAL CAUSALITY FOR HOMOCIDE CASES.** *95-year old widow was robbed in her home and left hog-tied in her room with ligature around her neck; she was found 48 hours later to have suffocated to death.* ***What is the appropriate threshold of causation required for second-degree murder?*** Standard for 2nd degree murder is ***de minimis,*** in other words, the accused’s action were a “not insignificant” factor contributing to victim’s death. Applies ***Smithers:*** Accused’s actions a **significant contributing cause** of the victim’s death.

***R v Harbottle* (1993)** (*accused-held-victim’s-legs-companion-strangled-her*)

**TO ESTABLISH FIRST DEGREE MURDER UNDER S. 231(5), CROWN MUST PROVE THAT THE ACCUSED PARTICIPATED IN THE MURDER IN SUCH A WAY THAT HE WAS A SUBSTANTIAL CAUSE OF DEATH OF THE VICTIM.** *Appellant & companion forcibly confined a young woman. After his companion brutally sexually assaulted while appellant watched, they decided to strangle her. Appellant held victim’s legs to prevent her from struggling while his companion strangled her.* ***Can Harbottle be convicted of first degree murder?*** Yes; he was a **substantial and significant contributing cause** of her death.

Intervening Acts

**General rule (*R v Maybin,* 2012):** If the **intervening act** is **reasonably foreseeable**, then it does not necessarily break the chain and the accused will continue to be responsible for the harm.

Where the intervening act is the **intentional** act of another person, the court is **less likely** to conclude that it is part of the chain and instead hold that it severs the chain and relieves the accused of liability.

Analytical tools set out in ***Maybin* (2012):**

1. Was the intervening act **foreseeable**?
2. Was the intervening act **independent** of the accused’s actions?
3. Are the accused’s actions a **significant contributing cause** of the victim’s death? (***Nette***)

***R v Maybin* (2012 SCC)** (*brothers-beat-up-guy-bouncer-punches-him-guy-dies*)

**REASONABLY FORESEEABLE ACT INTERVENING IN ACCUSED’S CRIMINAL ACTION DOES NOT ALWAYS BREAK CHAIN OF CAUSATION. ANALYTIC TOOLS NOT TEST FOR ANALYZING BREAKS IN CHAIN OF CAUSATION.** *Victim was at pub and moved some pool balls that Maybins were playing with. They punched him repeatedly in the face and head, rendering him unconscious. Bouncer intervened after being told the victim was the instigator of the fight and struck the unconscious victim in the head. The victim died from internal bleeding; brothers and bouncer were charged with manslaughter.* ***Does the bouncer’s conduct constitute an intervening factor that severs the chain of causation between the defendants’ conduct and the victim’s death?*** Brothers caused the victim bodily harm and this was a significant contributing factor in the victim’s death. Judge determined that it was **foreseeable** that a bouncer would intervene in the bar fight; did not sever the chain of causation when applying the causation test appropriately.Sets up two **analytic tools** for measuring causation when there is an **intervening action**:

1. **Foreseeability** – intervening acts that are reasonably foreseeable will usually not break chain of causation so as to relieve offender of legal responsibility for unintended result
   1. Requires an **objective** standard of reasonability (general nature of intervening act and accompanying risk of harm needs to be what can reasonably be foreseen)
2. **Independent act** severing line of causation - did the accused’s act merely set the scene for the independent intervening act or did the accused’s act trigger the intervening act?

Given the decision in ***Maybin***, where an intervening act that contributes to the death of the victim is unforeseeable, it is more likely to be regarded as breaking the chain of causation. Similarly, where the act is independent of the accused, it is more likely to be regarded as breaking the chain of causation.

***R v Sarrazin* [2011 SCC]** (*gunshot-wound-died-from-cocaine*)

**IF ACCUSED’S ACTIONS ARE SIGNIFICANT CONTRIBUTING CAUSE OF DEATH, THEY ARE CAUSALLY RESPONSIBLE.** *Accused shot victim, victim stabilized and was released from hospital with expectation of full recover. 5 days later, victim died from blood clot. Trace amounts of cocaine were found in victim’s blood indicated cocaine consumption within an hour of death. While blood clot was likely the result of the shooting, Crown pathologist conceded it could also have been the result of cocaine.* **Causation** not proven without reasonable doubt. Should have been convicted of **attempted murder**.

***R v Reid* [2003]** (*fight-died-from-botched-CPR*)

*Appellants convicted of manslaughter for death of victim after physical altercation where accused headlocked victim while the other kicked him. When it was apparent that he was unconscious, other members of group attempted resuscitation using CPR. Victim declared dead at hospital, caused by asphyxiation after he aspired on his stomach contents. The botched CPR attempts caused death when the pressure of physical resuscitation efforts forced large quantities of vomit into his lungs.* Appeal allowed on basis of **intervening act.**

CONTEMPORANEITY

Offense cannot be proven unless the actus reus and mens rea coincide – requires **temporal overlap** between actus reus and mens rea

***Fagan v Commissioner of Metropolitan Police* [1969]** (*parks-on-police-officer’s-foot*)

**ACTS CAN BECOME CRIMINAL IF THE NECESSARY MENS REA FORMS DURING THE COURSE OF THE IMPUGNED ACT.** Fagan parks his car “accidentally” on police officer’s foot; at first, ignores officer’s complaints and requests to remove the car off his foot and turns off ignition; finally turns car back on and moves off officer’s foot; charged with assault. Did Fagan’s act constitute a continuing act of assault? Do the *actus reus* and *mens rea* have to coincide? **YES;** The *actus reus* and *mens rea* do not have to occur at the same time; they can be superimposed on each other when there is a continuous act***.***

***R v Miller* [1982]** (*lit-cigarette-fell-asleep-caused-fire-left-room*)

**AN OMISSION CAN BE TREATED AS ACTUS REUS IF A PERSON CREATES A HARMFUL SITUATION AND INTENTIONALLY OR RECKLESSLY FAILS TO TAKE STEPS TO PREVENT THAT HARM.** *Miller lit cigarette and fell asleep without finishing it. When he woke up, the mattress was smoldering but instead of putting out the cigarette, he moved to a different room and fell asleep. House caught fire as a result and Miller was charged with arson.* ***Is an offence present where the accused’s conduct causes a fire without requisite intent and the accused fails to take any steps to stop the offence?*** Yes; Actus reus occurred because Miller created a situation that would result in harm if he recklessly failed to prevent that harm. Aappellant created liability himself and therefore should not be excused from criminal liability🡪 appellant created the duty of care

# MENS REA

STRUCTURE OF MENS REA

* **Fault** element: impugned act is accompanied by **guilty mind** 🡪 moral blameworthiness
* **No uniform definition** of the fault requirement in Canadian criminal law. As a result, the courts have to infer the fault requirement from the **legislative definition** of each offence. 🡪 lack of clarity and consistency between offences
* Can be defined as all of the mental elements (other than **voluntariness**) the Crown must prove to obtain a conviction of a criminal offence.
* **Function:** to prevent the conviction of the **morally innocent**🡪 those who do not understand or intend the consequences of their acts
* Typically concerned with the **consequence** of actus reus (***R v Theroux* 1993**): ie. **dangerous driving🡪** the mens rea may relate to the failure to consider the consequences of inadvertence.

**Mapping Mens Rea:**

**(1) CONDUCT:** Intentional or reckless act or omission

**(2) CIRCUMSTANCE:** Knowledge or reckless of circumstance

**(3) CONSEQUENCE:** Intend or be reckless to consequences

OBJECTIVE VERSES SUBJECTIVE FAULT

**Subjective:** What actually passed through accused’s mind – *What* ***was*** *in the mind of the accused?*

**Objective:** Accused measured by **normative objective** standard (i.e. reasonableness) – *What* ***should*** *have been in the mind of the accused?*

**Forms of Subjective Mens Rea:**

**(1) Intent:** Intending to carry out an act purposely and deliberately

**(2) Knowledge:** Actual awareness of a particular circumstance

**(3) Recklessness:** Foresees that something may occur but chooses to proceed in face of that risk

**Determining Mens Rea:**

(1) Begin with the wording of the statute, and see if the offence specifies a mental element.

(2) Where the statute is incomplete or silent, look to the case law.

(3) If still not specified, presume that true crimes require the Crown to prove a subjective mens rea beyond a reasonable doubt in relation to at least some actus reus element.

***R v ADH*** *(whether fault element for* ***S. 218*** *child abandonment should be assessed subjectively or objectively*)

**PRESUMPTION OF SUBJECTIVE FAULT UNLESS INDICATED BY STATUTE. Based on idea that morally innocent should not be punished.**

***R v Buzzanga & Durocher* [1979]**

**THE GREATER THE LIKELIHOOD OF THE RELEVANT CONSEQUENCES ENSUING FROM ACCUSED’S ACTIONS THE EASIER THE INFERENCE THAT HE INTENDED THOSE CONSEQUENCES.** *Accused charged with wilfully promoting hatred against francophones by publishing a satiric pamphlet in order to combat apathy in the French-speaking community regarding the building of a French school****. Did the accused actually intend to produce the consequence of promoting hatred?*** Inferred intent.

*R V TENNANT AND NACCARATO* [1975]

**REASONABILITY IS MERE EVIDENCE FOR SUBJECTIVE MENS REA; REASONABILITY IS BASIS OF LIABILITY FOR OBJECTIVE STANDARD.**

### SUBJECTIVE MENS REA

Subjective fault requires that the accused had the **actual** **intention**, knowledge or recklessness to commit an act, in a particular circumstance, or bring about a consequence. (***Creighton,* 1993**)

**Key:** Requires the Crown to prove that the accused **chose** to do something wrong. Accused should not be convicted of a criminal offence unless they they:

**(1) deliberately intended** to bring about the **consequences** prohibited by law; **or**

**(2)** subjectively realized that their conduct might produce such prohibited consequences (and proceeded with this conduct despite their actual knowledge of this risk).

“The greater the likelihood of the relevant consequences ensuing from the accused’s act, the easier it is to draw the inference that he intended those consequences.” **(*R v Buzzanga,* 1979)**

\***If not specified as subjective or objective, should assume subjective test (some exceptions, ie. sexual assault and question of consent)\* (*R v ADH* [2013], *R v. Sault Ste. Marie (City)* (1978))**

“**Common Sense Inference:**” A person can usually be taken to have intended the natural and probable consequence of his or her actions (***R v Buzzanga* (1979); *R v Tennant* (1975))**

“You may infer, as a matter of common sense, that a person usually knows what the predictable consequences of his of her actions are, and means to bring them about.” (**SCC in *R v Walle* (2012))**

**\*\*Where there is no mens rea specifically stated in the relevant section of the Code, the court will assume that the mens rea required is intent or recklessness** (***R v Buzzanga***)\*\*

FORMS OF SUBJECTIVE MENS REA

**5 Types of Subjective Fault in Mens Rea:**

1. Intent
2. Wilfulness
3. Actual Knowledge
4. Wilful Blindness
5. Recklessness

Intent

Difference between **intent:** the exercise of a free will/desire to use particular means to produce a particular result & **motive: reason** behind act: that which precedes and induces the exercise of the will (and is **not** relevant to **mens rea**)

🡪 A good motive is no defense to intentional crimes (although it may be a factor that affects prosecutorial decisions or sentencing) (***USA v Dynar (1997)***)

**Purpose** is similar to **intent:** the desire to bring about a certain set of consequences

🡪 General principle that the accused will be held to have intended the **probable consequences** of their act, even if they did not explicitly desire those consequences (***R v Hibbert,* 1995) 🡪 inferred intent**

**Common Sense Inference:** person can usually be taken to have **intended** the natural and probable consequences of his or her actions (***Buzzanga***)

**Transferred Intent:** Accused has intent to hit A but in actuality hits B, accused’s intent is then transferred from intending to harm A to intending to harm B

* Common law principle of transferred intent is codified in **s. 229(b)** of **CC**, which states that the *mens rea* of intentionally or knowingly causing death to one person can be transferred to the killing of the actual victim, even though the accused "does not mean to cause death or bodily harm" to the victim and does so "by accident or mistake.”🡪 (codifies transfer of intent for homicide; ***R v Deakin (1974)*** allows transferred intent for **bodily harm**)

***R v Steane* [1947]** (*worked-for-Nazis-during-war*)

**WHEN A PERSON SUBJECT TO OTHERS’ POWER DOES AN ACT THE COURT SHOULD NOT DRAW INFERENCE THAT PERSON INTENDED NATURAL CONSEQUENCES OF HIS ACT FROM MERE FACT HE DID IT (SIGNIFICANCE OF DURESS ON INTENT).** Actor employed by German broadcasting service during the Nazi regime. He was physically beat and threatened along with the threatening of his family in order to work for them. Charged with doing acts likely to assist enemy with intent to assist enemy. Cannot presume specific intention from prohibited action alone.

***R v Hibbert* [1995]** (*forced-to-help-offender-shoot-victim*)

**ACCUSED WILL BE HELD TO HAVE INTENDED THE PROBABLE CONSEQUENCES OF THEIR ACT, EVEN IF THEY DID NOT EXPLICITLY DESIRE THOSE CONSEQUENCES. DURESS MAY BE USED AS A DEFENCE TO NEGATE MENS REA.** *Accused forced by principal offender to accompany him to victim’s apartment and lure victim down to the lobby, where the offender shot the victim. Accused was charged with attempted murder and relied on the defence of duress.*

Wilfulness

Generally held as synonymous with intention; doesn’t have a fixed meaning ***(R v Buzzanga*)**

Knowledge

Lesser form of mens rea than intent or purpose. Generally, refers to accused having **actual knowledge** of a particular set of circumstances. Does not have to be **explicit** – can be **implied** (***Lecompte,* 2000** re: **s. 63**)

**Knowledge** is common form of **mens rea** for **possession-based** offences (***R v Beaver,* 1957**)

🡪 Ie. A person who is in possession of heroin and **honestly believes** it to be baking soda would **not** have the requisite **mens rea** for possession

***R v Dynar* (1997)** sets 2 components of knowledge:

1. **Truth** (of the objective facts) goes to the question of **actus reus**
2. **Belief** (in relation to the objective facts) goes to questions of **subjective mens rea**

***R v Theroux* [1993]** (*fraudulently-sold-houses*)

**WHERE THE CONDUCT AND KNOWLEDGE REQUIRED OF AN OFFENSE’S ACTUS REUS AND MENS REA ARE ESTABLISHED, THE ACCUSED IS GUILTY WHETHER THEY INTENDED THE PROHIBITED CONSEQUENCE OR WERE RECKLESS AS TO WHETHER IT WOULD OCCUR.** *Accused convicted of fraud for accepting deposits from investors in a building project and lying about purchasing deposit insurance.*

Wilful Blindness

Accused subjectively sees the need for further inquiries about the existence of prohibited consequences or circumstances but deliberately fails to make such inquiries because they do not want to know the truth.

🡪 **Imputes knowledge** to an accused whose **suspicion** is aroused to the point where they see a need for further inquiry but **deliberately** chooses not to make those inquires (***R v Briscoe***)

***R v Briscoe* [2010]** (*drove-to-golf-course-others-killed-girls*)

**WILFUL BLINDNESS CAN SUBSTITUTE FOR ACTUAL KNOWLEDGE WHENEVER KNOWLEDGE IS A COMPONENT OF THE MENS REA (DELIBERATE IGNORANCE).** *Accused assisted in the crimes by driving a group to the crime scene, providing a weapon, and holding the victim and telling her to shut up. Accused said he did not know crimes would occur.* ***Does the accused have the requisite mens rea?* Yes;** wilful blindness can be substituted for actual knowledge where accused fails to inquire when he should have.

Recklessness

Accused will be reckless if – having become aware of the risk of the of the prohibited conduct/ consequence – they nonetheless continued with the prohibited *actus reus*. **Lowest (least serious) form of mens rea**.

🡪 When someone who is aware of there is danger that their conduct could bring about the result prohibited by the criminal law nevertheless persists despite the risk (***R v Sansregret,* 1985**)

Different than negligence:

* Fault by **reckless** if you **subjectively** recognized the prohibited risk (consciousness of risk) & proceed anyway
* Fault by **negligence** if **reasonable person** would have recognized the prohibited risk in the same situation (and failed to inquire)

***R v Sansregret*** (*guy-threatens-ex-GF-sleeps-with-him-out-of-fear-believes-consent*)

**WILFUL BLINDNESS AND RECKLESSNESS ARE DISTINCT.** *After breaking up, accused came back and threatened ex-GF who sleeps with him out of fear and to calm him down. Happens a second time. Accused argues consent given.* Court found that the accused willed himself to blindness.

### OBJECTIVE MENS REA

Objective fault asks what the **ordinary** person **should have known** or would have intended in the circumstances, and imputed this knowledge or intention to the accused. (***Creighton,* 1993**)

Objective mens rea is satisfied if the Crown can prove that a r**easonable person**, in the same circumstances and with the same knowledge of those circumstances as the accused, would have appreciated that their conduct was creating a risk of producing prohibited consequences and would have taken action to avoid doing so.

**General test**: Crown must prove that there was a **marked** **departure** from the standard of care expected of a reasonably prudent person.

***When might an objective approach be taken?***

🡪 Where subjective approach is unlikely or unbelievable (ie. **consent**)

🡪 **Public protection** argument against people who cannot assume reasonable person standard

***Why might an objective approach be taken?***

**🡪** Standard is **higher**, and involves holding the individual responsible according to the standards to the ordinary person. Frequently justified on the grounds of **public protection.**

**Fault** is found when accused had the capacity to live up to the standard of care expected of a reasonable person and **failed** to do so.

**Main offences imposing objective liability:**

* 1. Section 249(1) Dangerous Driving *R V BEATTY; R V HUNDAL*
  2. Sections 220 and 221 Criminal Negligence Causing Death and Criminal Negligence Causing Bodily Harm *R V WILLOCK*
  3. Section 222(5) Unlawful Act Manslaughter *R V CREIGHTON*
  4. Section 269 Unlawfully Causing Bodily Harm *R V DESOUSA*
  5. Section 267 Assault Causing Bodily Harm *R V DEWEY*
  6. Section 268(1) Aggravated Assault *R V MACKAY*
  7. Section 219(1) Offences involving Criminal Negligence
  8. Section 220 Causing death by criminal negligence
  9. Section 221 Causing bodily harm by criminal negligence
  10. Section 225(5)(b) and Section 234 Manslaughter by Criminal Negligence

S. 249(1) DANGEROUS DRIVING

**Dangerous operation of motor vehicles, vessels and aircraft**

**249.** (1) Every one commits an offence who operates

(*a*) a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place;

**Punishment**

**(2)** Every one who commits an offence under subsection (1)

(*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(*b*) is guilty of an offence punishable on summary conviction.

**S. 2**

“**motor vehicle**” means a vehicle that is drawn, propelled or driven by any means other than muscular power, but does not include railway equipment;

**Dangerous** definition not in Code 🡪 use **objective** standard based on case law

**Actus Reus for S. 249: Dangerous Driving:**

In cases on S. 249 (dangerous driving), the Courts frequently refer to the fact that the Crown has to establish that the accused has been **criminally negligent**.

**Conduct 🡪** Was the operation of the vehicle dangerous to the public (according to an **objective** standard)?

* This is determined according to the standard of a **reasonable person** (Cromwell J. in ***R. v. Roy* (2012)**: “In considering whether the *actus reus* has been established, the question is whether the driving, viewed **objectively**, was **dangerous** to the public in all of the circumstances. The **focus** of this inquiry must be on the **risks** created by the accused’s manner of driving, not the consequences, such as the accident in which he or she was involved.”

**Circumstances** 🡪 “[I]n all of the circumstances” is relevant to the question of whether the conduct in (i) above was dangerous.

**Consequences 🡪**  None required. Section is silent to the question of consequences, so the Crown does not have to prove harm or damage.

**Mens Rea for S. 249: Dangerous Driving:**

**Modified objective test:** Start with **objective standard** (what would we expect a reasonable person to foresee in terms of the risk), and then modify it according to the subjective knowledge of the accused/with regards to the actual circumstances.

* Judge in ***R v Hundal* [1993]*:*** It would be **impractical** to expect the Crown prove that the accused subjectively appreciated the risk created by his or her driving conduct – because driving is an "automatic" type of behaviour which does not require conscious thought on the part of the driver.
* This test could also provide a **defence** if accused suffers **unexpected** condition (ie. seizure) it would be impossible for them to form the modified objective *mens rea* (because a reasonable person in the same situation would not be able to appreciate or foresee the relevant risk)
  + Unless accused was **aware** of possibility of risk (ie. had previous lapses) 🡪 Driving with an awareness of the possibility of loss of consciousness would involve knowingly creating a risk (which would be a marked departure from the standard expected of a reasonable person).

**Criminal negligence:** Proof of conduct which reveals a **marked** and **significant departure** from the standard that could be expected of a reasonably prudent person in the circumstances. (***R v Tutton,* 1987**)

🡪 More onerous than regular negligence standard 🡪 ***Tutton*** questions whether personal factors (ie. youth, education) should be taken into account when deciding on a “**reasonable person”**

* + This is rejected in ***R v Creighton* (1993) 🡪** these characteristics are only relevant to questions of **capacity**

🡪 Test must be applied with some **flexibility** in the **context** of the events surrounding the incident – requirement is **marked and significant departure** from **reasonable person** standard (***R v Hundal***)

***R v Tutton* [1987]**

**Objective standard** for mens rea needs to **modified** when determining criminal negligence so that it gives allowance for factors that are particular to the accused, such as youth, mental development, education 🡪 followed in ***R v Hundal;*** rejected in ***R v Creighton***

***R v Hundal* [1993 SCC]** (*ran-red-light-killed-driver*)

**S. 249** **IMPORTS A MODIFIED OBJECTIVE STANDARD FOR DANGEROUS DRIVING.** *Accused, while driving an overloaded dump truck, ran a red light at an intersection and killed the driver of an oncoming car (which had entered the intersection on a green light).***TEST FOR OBJECTIVE STANDARD APPLIED IN FACTUAL CONTEXT: (1)** Consider whether D’s conduct was **marked departure** from the standard of care that a reasonable person would observe in D’s situation***;* (2)** HOWEVER if D offer explanation for his actions the trier of fact must consider whether a reasonable person in D’s shoes would have appreciated the risk and danger inherent in that course of action. Judge also noted that the licensing requirement for driving which assures that all who drive have a **reasonable standard** of physical health and capability, mental health and a knowledge of the reasonable standard required of all licensed drivers.

**R v Beatty (2008 SCC)** (guy-drives-over-centre-line)

**MOMENTARY LAPSES OF ATTENTION/CONCENTRATION ARE WITHIN THE SCOPE OF WHAT WOULD BE EXPECTED FROM A REASONABLE DRIVER.** *Accused's pickup truck, for no apparent reason, suddenly crossed the solid centre line into the path of an oncoming vehicle, killing all three occupants.  Witnesses driving behind observed the accused's vehicle being driven properly prior to accident. Accused stated that he was not sure what happened but that he must have lost consciousness or fallen asleep and collided with the other vehicle. Charged with 3 counts of dangerous driving causing death****. Did the accused’s actual state of mind amount to a marked departure from the standard of care that a reasonable person would observe in the accused’s circumstances?* NO.** Court concluded that there was no **marked** **departure** from the standard of care that would be expected of a reasonable person. A r**easonable person**, armed with the knowledge of the circumstance possessed by the accused, would not have foreseen that there would be a momentary loss consciousness and a loss of control of the vehicle. Requisite *mens rea* **cannot** be made out by simple reference to the fact of the accident (ie. consequence).

***R v Roy* (2012 SCC)** (*turns-left-into-truck-passenger-dies*)

**MODIFIED OBJECTIVE STANDARD IS THE MINIMUM FAULT REQUIREMENT FOR DANGEROUS DRIVING.** *Accused convicted of dangerous driving causing death after turning left on a slippery, snow-covered highway with poor visibility and colliding with a tractor-trailer*. Applied test: Would a reasonable person have foreseen the risk and taken steps to avoid it if possible? Was the accused’s failure to foresee the risk and take steps to avoid it a ***marked departure*** from the standard of care expected of a reasonable person in the accused’s circumstances? Judge found a simple misjudgment of speed and distance in difficult conditions/poor visibility with tragic consequences does not constitute a marked departure from reasonable standard of care.

Criminal Negligence

**S. 220 & 221**: Courts have held that **criminal negligence** requires proof that there was a **marked and substantial departure** from the standard expected of the **reasonable person.**

“Criminal negligence in the context of driving-related allegations … requires proof that the accused's conduct constituted a marked and substantial departure from that expected of the reasonable driver and proof that the conduct demonstrated a wanton or reckless disregard for the lives or safety of other persons… may be inferred from proof of conduct.” (***Willock,* 2006**)

* proof of intention or actual foresight of a prohibited consequence is not required\*

*R V WILLOCK* (2006)

In cases of crimes of criminal negligence (such as **S. 220 and 221)**, the Crown must prove that: there was a **marked** AND **substantial** departure from the standard of care expected of a reasonably prudent person. \*\*Is a ***modified objective*** test\*\*

Manslaughter

**S. 222(5):** **Manslaughter** occurs when the accused commits an unlawful act (such as an assault) which results in death, but does not have the requisite *mens rea* for murder as set out in Section 229(a) (intent to kill or intent to inflict bodily harm that the accused knows is likely to cause death and is reckless as to whether death ensues or not).

**Modified Objective** (reasonable person) Test(***Creighton,* 1993**):Objective foresight of the risk of bodily harm that is neither trivial or transitory in nature **(foreseeability** not required)

In terms of establishing the offence, the Crown must prove:

**(1)** Accused had the necessary *mens rea* for the commission of the unlawful act (such as assault); and

**(2)** Reasonable person would have foreseen the risk of bodily harm that is neither trivial or transitory

***R v Creighton* [1993 SCC]** (*drug-user-shoots-up-consenting-friend-dies*)

**REASONABLE STANDARD FOR OBJECTIVE MENS REA IS OBJECTIVE FORESIGHT OF THE RISK OF BODILY HARM THAT IS NEITHER TRIVIAL NOT TRANSITORY IN NATURE.** *Accused charged with manslaughter by means of unlawful trafficking of drugs when he injected cocaine into a (consenting) friend.* SCC affirmed manslaughter conviction using **modified objective test**: reasonable person would have been aware of the risks of non-trivial, non-transitory bodily harm. Evidence of accused’s personal attributes (ie. age, experience, education etc) is **irrelevant** unless it goes to the accused’s **incapacity** to appreciate or avoid the risk.

Assault

**S. 267: Assault Causing Bodily Harm 🡪 Mens rea (*Dewey,* 1999):** Crown must prove that reasonable person would have foreseen the possibility of non-transient, non-trivial bodily harm **(foreseeability** not required)

**S. 269: Unlawfully Causing Bodily Harm 🡪** Crown must prove that a reasonable person would have foreseen the possibility of non-transient, non-trivial bodily harm. Unlawful act must be **objectively** dangerous **(*DeSousa,* 1992)**

**S. 268(1): Aggravated Assault 🡪 Mens rea (*Mackay,* 2005) (W (D.J.), 2012): (1)** Prove *mens rea* for assault (intent to apply force intentionally or recklessly or being wilfully blind to the fact that the victim does not consent) **and (2) Objective** foresight of the risk of bodily harm

***What is the difference between Section 220 Causing death by criminal negligence and Section 222(5)(b) and Section 234 Manslaughter by Criminal Negligence?***

Effectively none. The elements of the offence are the same, and their parallel existence is largely due to historical circumstances. Section 220 offence was added to the Code in 1955 in part to respond to apparent reluctance of juries to convict dangerous drivers (whose actions resulted in death of others) of manslaughter.

**Overcriminalization:** Can lead to uncertainty when 2 different offences criminalize something the same way.

***R v Dewey* (1999)** (**S. 267** *Assault Causing Bodily Harm*)

**TO ESTABLISH *MENS REA,* THE CROWN MUST PROVE THAT A REASONABLE PERSON WOULD HAVE FORESEEN THE POSSIBILITY OF NON-TRANSIENT, NON-TRIVIAL BODILY HARM.** **Note:** Not necessary for the Crown to prove that the specific type of harm inflicted would have been foreseen by a reasonable person.

***R v DeSousa* (1992)** (**S. 269** *Unlawfully Causing Bodily Harm*)

**CROWN MUST PROVE THAT REASONABLE PERSON WOULD HAVE FORESEEN THE POSSIBILITY OF NON-TRANSIENT, NON-TRIVIAL BODILY HARM.** Unlawful act must be **objectively** dangerous.

***R v MacKay* (2005) and *W.(D.J.)* (2012) (S. 268(1):** *Aggravated Assault***)**

*Mens rea* for **aggravated assault** is:

**(1**) The *mens rea* for assault (intent to apply force intentionally or recklessly or being willfully blind to the fact that the victim does not consent); **and**

(2) Objective foresight of the risk of bodily harm.

Constitutional Dimensions of Mens Rea

No constitutional reason to require that fault element include all elements of actus reus (not encompassed by **s. 7** of ***Charter***) (***R v DeSousa*) 🡪** Ie. fault element for manslaughter only require that accused had **objective foresight** actions would cause bodily harm

* However there **MUST** be a **meaningful mental element** demonstrated relating to a **culpable** aspect of the actus reus
* Fundamental justice met if:

1. Element of mental fault is present
2. Mental fault required is proportionate to the seriousness of the offense’s consequences (stigma associated with charge factored into proportionality)

***R v Finta* [1994]** (*senior-officer-concentration-camp*)

**TO ESTABLISH CRIMES AGAINST HUMANITY/WAR CRIMES, ACCUSED MUST ESTABLISH SUBJECTIVE MENS REA FOR AWARENESS OF CONDITIONS RENDERING ACTIONS MORE BLAMEWORTHY THAN DOMESTIC OFFENCES.** *Accused was senior officer in concentration camp in Hungary and was charged with war crimes and crimes against humanity (****s 7(3.71****) of* ***Code****).* ***Does the accused need to be aware (have subjective mens rea) that their actions are within the definition of war crimes or crimes against humanity to be convicted of these offences?* Yes**. Certain crimes require a higher level of mens rea (ie. **subjective**) due to the stigma attached to a conviction, and **war crimes** fall into this category. Mens rea does not require that accused believed those conditions to be inhumane, just that he was aware those conditions existed.

***R v Vaillancourt***

**WHEN DEFINING OFFENSE’S MENS REA COURT MUST DETERMINE WHETHER THE CONDUCT IS SUFFICIENTLY BLAMEWORTHY TO MERIT THE PUNISHMENT AND STIGMA THAT WILL ENSUE UPON CONVICTION FOR THE PARTICULAR OFFENSE.**

K ROACH – “MIND THE GAP: CANADA’S DIFFERENT CRIMINAL & CONSTITUTIONAL STANDARDS OF FAULT”

* Court has held that only certain offenses – murder, attempted murder and war crimes – have enough stigma to constitutionally require proof of subjective fault for all elements of the mens rea
* Courts have limited the necessity to prove subjective fault for all elements of mens rea even though there was common law support for such requirement before the *Charter🡪* Thus, the principles of subjective fault no longer commend the consensual support they once did
* Courts’ reluctance to constitutionalize subjective fault represent a lack of confidence in the wisdom of universal application of subjective fault in favour of a more contextual and selective approach
* The unique treatment of s. 7 (it can only be limited by s. 1 in times of emergency) helps explain why the Court has been to reluctant to constitutionalize criminal law faults of standard

# SEXUAL ASSAULT: INTRO AND ELEMENTS

Sexual assault = **s. 271**

Sexual assault with a weapon, causing bodily harm, with threats, or with accomplices = **s. 272**

Aggravated sexual assault **= s. 273**

Sections on consent = **s.273.1 and 273.2**

Regulation admissibility victim’s prior sexual history = **s. 276**

Regulation of admissibility medical records (including psychiatric care) = **s. 278.9**

**1992 Code Amendments:**

* Redefined **consent** to mean the **voluntary agreement** to engage in the sexual activity in question;
* Removal of spousal immunity;
* Amended the Code so that consent is **withdrawn** if the complainant, having previously agreed to engage in sexual activity, expresses by words or conduct a lack of agreement;
* Restricted the ambit of consent, such that there will be no consent where the complainant is **incapable of consenting,** is induced to consent by abuse of a positon of trust, power or authority, or if a third party purports to provide consent; and
* **Restricted** the circumstances under which **mistake** as to consent can act as a **defence** to a charge of sexual assault.

ACTUS REUS OF SEXUAL ASSAULT

**Involves five main parts:**

1. The basic definition of **assault** (**section 265**);
2. Establishing that the assault was **sexual in nature**;
3. Reference to the specific definition of **consent** for the purpose of sexual assault under the Code;
4. Judicial interpretation of the meaning of consent and the role of the **complainant’s subjective views**;
5. Common law restrictions that **vitiate consent**.

***R. v. Ewanchuk* [1999]** established 3 elements for actus reus of sexual assault:

**(1)** **Touching;**

**(2) The sexual nature of the conduct; and**

**(3) The absence of consent.**

**Note:** The charging provision will be either **section 271** (sexual assault)**, section 272** (sexual assault with a weapon, threats to a third party or causing bodily harm) and **section 273** (aggravated sexual assault).

**(1) Touching and the definition of assault:** Crown has to establish that the *actus reus* of an assault under **Section 265(1)** is made out.

**(a)** There has been an application of force, directly or indirectly, to another person without that person’s consent (**s. 265(1)(a)**): or

**(b)** There has been an attempt or threatening by acts or gestures to apply force if it causes the other person to believe upon reasonable grounds that the accused has the ability to effect his or her purpose (**s. 265(1)(b)**).

**(2) The sexual nature of the conduct:** The meaning of sexual for the purposes of **sections 271-273** is **not defined** in the Code. Courts have held that the question is whether the **conduct** in question can be **objectively** viewed as **sexual** (**reasonable person standard**).

* The **intent** or **motive** of the accused to gain sexual gratification from the assault is **not determinative** of the question of whether the conduct is sexual, but can be considered. Code does not require that the touching be for a sexual purpose (***R. v. Lutoslawski* [2010]**)
* In determining whether the assault was **sexual** in nature, the courts will examine **all of the circumstances**, including: “part of the body touched, nature of the conduct, the words and gestures accompanying the act and all other circumstances.” (***R. v. Chase* [1987]**)

**(3) The absence of consent**: According to **s. 273.1(1)**, for the purposes of **s. 271, 272, and 273** consent is defined as the **voluntary** agreement of the complainant to engage in the sexual activity in question

**Principles set out in *R v Ewanchuk* (1999 SCC):**

* **(1) Absence of consent** is “**subjective** and determined by reference to the complainant’s state of mind towards the touching at the time that it occurred.”
* **(2)** If the complainant says that she did not consent, then the court is bound to accept this as true unless she is not a **credible** complainant (if there is evidence that shows she is lying).
* **(3)** The **accused’s perception** of the complainant’s state of mind is **not relevant** when determining if there was consent for the purpose of establishing the *actus reus* of the offence
* **(4)** There is **no defence of implied consent** – consent can not be inferred or implied from the conduct of the complainant (or by reference to some objective standard).

**Factors that can serve to vitiate (invalidate) consent:**

* (1) **Section 265(3):** consent cannot be given in response to an assault or the threat of an assault
  + **Fraud** only invalidates consent when the fraud goes to the identity of the accused or the nature of the act 🡪 **Exception:** ***R. v. Cuerrier* [1998]**: failure to disclose the existence of an STD could serve to **invalidate consent** if the failure to disclose would have “the effect of exposing the person consenting to a serious risk of physical harm.”
* (2) **Section 273.1(2)**
* (3) Application of common law principle that you cannot consent to bodily harm (the ***Jobidon*** principle) to cases of sexual assault.

SCC has held that a complainant cannot give **advance consent** to sexual activity 🡪 ***R. v. J.A*. [2011]:** Wording of **s 273.1(1**) shows Parliament’s intent to define consent to require consciousness throughout the sexual activity in question (otherwise would negate complainant’s ability to withdraw consent at any time)

***Jobidon*** **[1991]** principle: Consent cannot be a defence to an assault if the assault may cause "serious hurt or non-trivial bodily harm." Consent to sexual activity can be invalidated where the accused **intends** to (and causes) serious bodily harm. **(*R v Welch,* 1995)**

***R v K.B.* [1993]** (*father-grabbed-son’s-genitals-as-punishment*)

**SEXUAL CONTACT IS MEASURED BY AN OBJECTIVE STANDARD AND DOES *NOT* HAVE TO BE FOR A SEXUAL PURPOSE.** *Father grabbed his three-year-old son by the genitals (causing bruising and severe pain) in an effort to discipline him. Context was that the son had been grabbing the genitals of others, and so the father was attempting to teach him a lesson.* Court held that because the touching invaded the child’s sexual integrity, it constituted a **sexual assault** (regardless of father’s subjective intent).

***R v Ewanchuk* [1999]** (*guy-interviews-girl-in-trailer-begins-sexual-touching*)

**THERE IS NO DEFENCE OF IMPLIED CONSENT IN SEXUAL ASSAULT. ABSENCE OF CONSENT IS SUBJECTIVE.** *E brought a 17-yo woman into his van for a job interview. Once inside, he started to massage her and then began to make a series of sexual advances. Every time she would say "no" to his advance, he would stop but then continue again. She testified at trial that during her time in the trailer she was very afraid and thus did not take further action to stop the sexual conduct.* ***Does accused have defence of implied consent?* NO.** Court established **actus reus** for **sexual assault:** **(1)** Touching (objective); **(2)** Sexual nature of the contact (objective); and **(3)** Absence of consent (Subjective – determined by reference to plaintiff’s subjective internal state of mind towards the touching at the time it occurred) 🡪 **Consent** must be **freely given** – cannot be result of fear, threats, or submission by force

***R v Chase* [1987 SCC]** (*neighbor-grabs-girl’s-breasts*)

**SEXUAL NATURE OF CONDUCT IS AN OBJECTIVE STANDARD.** *Accused was 15 yo complainant’s neighbor and entered her home without invitation. Chase seized the complainant and grabbed her breasts. She fought back and he tried to grab her privates, but she managed to get away and call a neighbor*. **Objective Test: (1)** Assault is committed**; (2)** Would an outside observer deem the accused’s conduct as being sexual in nature? **🡪** Based on: part of body touched, nature of the contact, situation in which contact occurred, words and gestures accompanying the act and circumstances surrounding the conduct

***R v Cuerrier* [1998]** (*failure-to-disclose-STD*)

**FRAUD INVALIDATES CONSENT WHEN FRAUD GOES TO THE NATURE OF THE ACT OR IDENTITY OF THE ACCUSED.** Failure to disclose the existence of an STD could serve to invalidate consent if failure to disclose would have “the effect of exposing the person consenting to a serious risk of physical harm.” Crown must prove that the complainant would have refused to have unprotected sex with the accused if they had known.

***R v JA* (2011 SCC)** (*guy-had-sex-with-“consenting”-unconscious-GF*)

**CONSENT REQUIRES THE PLAINTIFF TO PROVIDE ACTIVE CONSENT THROUGHOUT EVERY PHASE OF THE SEXUAL ACTIVITY. NOT POSSIBLE FOR UNCONCIOUS PERSON TO SATISFY THIS REQUIREMENT EVEN IF CONSENT IS GIVEN IN ADVANCE.** *Accused and complainant were having consensual sex, they were partaking in erotic asphyxiation and the complainant passed out. While she was passed out he continued to perform sexual acts on her, when she came back into consciousness they continued to have consensual sex.* ***Can one give consent to sexual activity in advance?* No;** otherwise would negate complainant’s ability to withdraw consent at any time as opposed to Parliament’s intended definition of consent.Accused must not only believe the plaintiff had consented, but that he also took necessary steps to ensure plaintiff was consenting to activity at time it occurred.

***R v Morgan* (1976)** (*man-told-others-wife-liked-rough-sex*)

**CANNOT CONSENT ON SOMEONE’S BEHALF.** *Man told strangers he met at bar that his wife likes to have random rough sex with strangers and to ignore her protests because it was all part of the game*.

***R. v. Welch* (1995)** (*severe-degrading-sex-bruises*)

**CANNOT CONSENT TO SEVERELY INHERENTLY DEGRADING/DEHUMANIZING CONDUCT.** *Complainant sustained bruising from a beating with a belt and bleeding from her rectum for a number of days after sexual activity with the accused. The complainant claimed she did not consent to the conduct.***Even if assuming consent was given:** cannot detract from the inherently **degrading**/dehumanizing nature of conduct. Although law must recognize individual freedom/autonomy, when the activity involves pursuing sexual gratification by deliberately inflicting pain upon another that gives rise to bodily harm, then personal interest of individuals involved must yield to the more compelling societal interests which are challenged by such behaviour.

MENS REA OF SEXUAL ASSAULT

Criminal Code **does not** specify the *mens rea* for sexual assault under **s 271, 272, or 273**.

**Elements of Mens Rea:**

* + - 1. ***Intentional touching*** of the complainant (**subjective**)🡪intent to apply force as per **s 265(1)(a)**
      2. Knowledge that the complainant does not consent or being reckless or wilfully blind as to the complainant’s lack of consent. **(*Sansregret v. The Queen* [1985] SCC)**

Consent

**Issue of Consent**

**Actus reus:** Consider the question of **consent** from the perspective of the **complainant**.

**Mens Rea**: Consider the question of **consent** from the perspective of the **accused.**

**Honest Mistaken Belief in Consent:** denial of the second *mens rea* [**Section 265 (4)]**

* *Defense of Mistake of Fact:* Accused who commits actus reus of offense but acts innocently pursuant to flawed perception of the facts🡪 Raises question of whether the accused believed the plaintiff ***had communicated consent*** (through words and/or conduct) in the sexual activity in question
* Mistake need only be **subjective (*R v Pappajohn* [1980])**
  + **🡪** Despite lack of **objective reasonableness** standard, the existence (or absence) of reasonable grounds for the accused’s belief is relevant to the question of whether the belief was genuinely held (**believability**)
  + ***R. v. Park* [1995]**: In order to establish ***honest but mistaken belief***, the defence will need to demonstrate that there is “an **air of reality**” to the claim that there was an honest belief in consent. 🡪 **bare assertion not sufficient**
    - Silence, passivity or ambiguous conduct does not meet the requirements for the defense of mistake
    - Continuing sexual activity after the plaintiff has expressed a “no” is at minimum reckless conduct that is not excusable

This defence is **restricted** under **Section 273.2:**

It is **not a defence** to a charge under **section 271, 272 or 273** that the accused believed that the complainant **consented** to the activity that forms the subject-matter of the charge, where

1. the accused’s belief arose from the accused’s

(i) **self-induced intoxication**, or

(ii) **recklessness or wilful blindness**; or

1. **the accused did not take** **reasonable steps**, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

**(a)(i) Self induced intoxication and sexual assault** 🡪 not a defence to crimes of **general intent** (that is, crimes where the intent does not go beyond the commission of the prohibited act (as opposed to extending to the consequences of that act). Courts have consistently held that **sexual assault** is a crime of general intent because it is a crime of violence that does not require proof of a desire for sexual gratification

* Therefore, evidence of **intoxication** is **not** capable of raising a reasonable doubt as to the general intent required for sexual assault.
* ***R. v. Daviault* [1994]** raised the possibility that the accused in a sexual assault case might be able to raise the defence of extreme intoxication producing **involuntary** conduct 🡪 led to amendments of **S. 33.1 to 33.3 of the Code**

**(a)(ii) Wilful Blindness 🡪 S. 273.2.(a)(ii)** effectively codifies the **wilful blindness** principles expressed in ***Sansregret*** and rules out the defence of honest mistaken belief as to consent in circumstances where the accused was subjectively aware of the need to inquire into consent but then deliberately failed to inquire.

**(b) Requirement to take reasonable steps,** in the circumstances known to the accused at the time, to ascertain that the complainant was consenting:

**(1)** The requirement that the accused take reasonable steps is based on what he **subjectively** knows at the time [subjective element]; **but**

**(2)** **S. 273.2** also requires that the accused act as a **reasonable person** would in the circumstances – specifically by taking **reasonable steps** to ascertain whether the complainant was consenting.

* The accused may not have a mistaken belief defence if he only claims **not** to have **heard** the victim say no 🡪 must also take **reasonable steps** to ascertain **consent** (***Ewanchuk***)

**\*\*To make out the defence of honest but mistaken belief in consent (deny the *mens rea* required for sexual assault) defence must establish that the accused believed the complainant COMMUNICATED consent to engage in the sexual activity in question AND took reasonable steps to ensure that the victim had consented to the sexual activity in question\*\***

***R v Pappajohn* [1980 SCC]** (*mistake-of-fact-defence*)

**MISTAKE OF FACT DEFENCE CAN BE SUBJECTIVE BUT NEEDS TO HAVE AN AIR OF REALITY.** *Accused and complainant had lunch, then went back to his house. 3 hours later complainant ran naked out of the house gagged and bound. Complainant denied consent, testifying that she had physically and mentally resisted throughout. Accused claimed that the sexual activity was done with her consent and that the gagging was done for sexual purposes and that she suddenly became hysterical and screamed at that point.* While the defence of mistake uses **subjective** standard, the **mistake** must be a **reasonable** one as their must be an “**air of reality”** in order for the evidence to lead to the raising of this defence. Applied here as testimonies and facts overlapped somewhat.

***R v Hutchinson*** (*guy-pokes-holes-in-condom*)

**CONSENT CAN BE VITIATED BY FRAUD.** *GF refused to have unprotected sex. Accused poked holes in condom and GF got pregnant as a result.* ***Was her consent vitiated by fraud?*** **Yes** (use ***Cuerrier*** test): Dishonesty: use of sabotaged condoms constituted a dishonest act; Deprivation or harm: Hutchinson’s actions deprived a woman of the capacity to choose to protect herself from an increased risk of pregnancy by using effective birth control. Pregnancy causes profound changes to woman’s body and therefore the deprivation was serious as the “significant risk of serious bodily harm”

Sexual Assault in the Context of Fraud

**Section 265(3):** **Fraud** only invalidates consent when the fraud goes to the identity of the accused or the nature of the act 🡪 **Exception:** ***R. v. Cuerrier* [1998]**: failure to disclose the existence of an STD could serve to **invalidate consent** if the failure to disclose would have “the effect of exposing the person consenting to a serious risk of physical harm.”

**(i)  Fraud as to nature of the act: Ex.** A doctor obtains consent from a patient to perform a medical  procedure, and then engages in sexual activity with them.

**(ii)  Fraud as to identity: Ex.** The accused impersonates the partner of the victim while in a darkened room, leading the victim to provide consent to sexual activity.

***R v Cuerrier* [1998]** (*failure-to-disclose-STD*)

**FRAUD INVALIDATES CONSENT WHEN FRAUD GOES TO THE NATURE OF THE ACT OR IDENTITY OF THE ACCUSED.** Failure to disclose the existence of an STD could serve to invalidate consent if failure to disclose would have “the effect of exposing the person consenting to a serious risk of physical harm.” Crown must prove that the complainant would have refused to have unprotected sex with the accused if they had known.

***Petrozzi* (1987)** (*refused-to-pay-for-sex-services-consent-****valid***)

**FOR THE PURPOSES OF S. 265(3), FRAUD IS RESTRICTED TO THE NATURE OF THE ACT OR IDENTITY OF THE PERSON.** *Accused promised to pay a sex worker for sexual services, then refused to pay after the service was provided*. Even though the court was satisfied that the accused never had any intention of paying for the service, the consent was held to be **valid** + he was acquitted of sexual assault b/c there was no fraud as to the nature of the act or the identity of the accused.

Decision in ***Cuerrier*** led to the adoption of a new test for **fraud**. In order to establish fraud, need to prove:

1. The accused committed an act that a **reasonable person would see as dishonest**;
2. There was a **harm**, or a **risk of harm**, to the complainant as a result of that dishonesty; and
3. The complainant **would not have consented** but for the dishonesty by the accused.

Some key **policy** arguments about extending the definition of fraud to include failure to disclose HIV-status:

1. Criminalizing a failure to disclose HIV status may deter some sexually active individuals from getting tested for HIV; and
2. Criminalizing a failure to disclose HIV status may have a negative impact on doctor-patient relationships if doctors fear being compelled to give evidence as to a patient’s HIV status.

***R v Mabior* (2012)** (*HIV-guy-had-sex-without-disclosing-HIV-status*)

**ELEMENTS OF AGGRAVATED SEXUAL ASSAULT ARE MET IF A PERSON HAS SEX WITHOUT DISCLOSING THEY ARE HIV POSITIVE AND THERE IS A REALISTIC POSSIBILITY OF TRANSMISSION.** *Mabior had sex with many ladies at his place without disclosing his HIV positive status. He had a low viral count but did not always wear a condom.* ***Is he guilty of aggravated sexual assault***? Not for cases where he wore condom; low viral count + use of condom does not meet realistic possibility of transmission requirement. Court clarifies elements of test set in *Cuerrier* for fraud vitiating consent: **(1)** a dishonest act (either falsehoods or failure to disclose HIV status); and **(2)** deprivation (denying the complainant knowledge which would have caused her to refuse sexual relations that exposed her to a significant risk of serious bodily harm).

**Rule from *Mabior:*** An accused person must disclose their HIV-positive status is there is a “realistic possibility of transmission of HIV.” Failure to disclose will amount to fraud for the purposes of **S 265(3) + S 273**.

**Policy concerns surrounding criminalizing non-disclosure of HIV-status + unprotected sex:**

* There is always a problem with terms like “low” or “high” that are **relative** terms
* Is it fair to punish people who are victims of “bad moral luck?” (no one develops HIV intentionally)

SCC took the view that failure to disclose is sufficiently blameworthy to justify the use of the criminal law, primarily because subjecting one’s partner to the possibility of HIV infection constitutes a **serious risk to life**.

HOMICIDE

The Code contains **three** homicide offences:

* **Murder** **(s.229)**
* **Manslaughter** **(s.234)**
* **Infanticide** **(s.223(1)**

Note that according to **S. 234**, manslaughter is in effect a residual offence. That is, a culpable homicide that is **not murder or infanticide** is deemed to constitute manslaughter under the Code. Manslaughter generally does **not** include an **intention** to cause death. Mandatory penalty for murder is **life imprisonment.**

**However:** In cases of manslaughter (without the use of a firearm), there is **no mandatory minimum penalty**.

ACTUS REUS OF HOMICIDE

Central to the **actus reus** of all homicide offences is the **death of another human being**.

**Section 223 (1)**

A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother, whether or not

(a) it has breathed;

(b) it has an independent circulation; or

(c) the navel string is severed.

(2) A person commits homicide when he causes injury to a child before or during its birth as a result of which the child dies after becoming a human being.

Causation

**Section 222(1)**

A person commits homicide when, directly or indirectly, by any means, he **causes** the death of a human being

Where the factual situation does not fall within one of the statutory rules of causation in the Code, common law general principles of criminal law apply to resolve any **causation** issues that may arise (***R v Nette***)

**General Principles of Causation in Homicide**

**Factual Causation** (“but for” test): **But for** the accused’s conduct, the prohibited consequences would not have occurred. Need to establish whether the accused’s conduct is part of some “**chain of causation**” that led to the prohibited conduct. **(*R v Winning,* 1973)**

**Legal Causation:** (**de minimis** test)**:** Accused’s conduct must be at least a **contributing cause of death** outside of de minimis range (***R v Smithers,* 1977, *R v Winning,* 1973**) 🡪 ***Should the accused be held responsible for the prohibited consequence?***

* A person can be held liable for manslaughter even if their unlawful acts were not the primary cause of death **and** even if death was not a **foreseeable outcome** of their unlawful act, as long as their actions were a *de minimus* cause
* **Thin skull rule** (take the victim as you find them) applies in the context of homicide (ie. a minor assault followed by a fatal heart attack (which resulted in part from the anxiety caused by the assault) was sufficient to establish causation, even though the victim had a history of severe heart disease (***R. v. Shanks* (1996)**) 🡪 victim’s characteristics do not have to be foreseeable (***R v Blaue***)
* ***Nette* (2001)** confirmed the test in ***Smithers,*** but reformulated the wording (drawing on ***Harbottle* [1993]**) such that the Crown must establish established that accused’s conduct must be a **significant contributing cause** of death. Court noted that phrases such as “not a trivial cause” and terms like *de minimus* are rarely helpful
* ***Maybin* (2012**)**:** Supreme Court confirmed that the key issue is whether the accused actions still constituted a **significant cause of death** (test in ***Nette***)
  + Court confirmed that test applies to all forms of homicide
  + **But** test is different in the context of first degree murder (actions must “form an essential, substantial and integral part of the killing of the victim” as per ***Harbottle,* 1993**)
  + Higher threshold for **first degree murder**: In order to establish first degree murder under **S.231(5) [then 214(5)**], the Crown must prove that the the accused’s participated in the murder in such a way that he was a **substantial cause of the death** of the victim.
* A person is responsible for a death even though it might have been **prevented** by resorting to proper means ie. proper medical treatment (**S. 224**).
* A person who causes a dangerous injury which results in death will be responsible for that death, even if the immediate cause of the death is proper (or improper) treatment provided in good faith.
* (**S 225**) 🡪 ie. Doctor’s treatment, even if negligent, will not break the chain of causation
* Accused can be held to have caused death even if the injury from their act can only be said to have “**accelerated**” the death. (**S 226**)

**Section 222(5)(c) + Section 222(5)(d):**

(5) A person commits culpable homicide when he causes the death of a human being

(c) by causing that human being, by threats or fear of violence or by deception, to do anything that causes his death; or

(d) by wilfully frightening that human being, in the case of a child or sick person.

Intervening Acts

**General rule** (***R v Maybin,* 2012):** If the **intervening act** is **reasonably foreseeable**, then it does not necessarily break the chain and the accused will continue to be responsible for the harm.

Where the intervening act is the **intentional** act of another person, the court is **less likely** to conclude that it is part of the chain and instead hold that it severs the chain and relieves the accused of liability.

Analytical tools set out in ***Maybin* (2012):**

1. Was the intervening act **foreseeable**?
2. Was the intervening act **independent** of the accused’s actions?
3. Are the accused’s actions a **significant contributing cause** of the victim’s death? (***Nette***)

Sets up two **analytic tools** for measuring causation when there is an **intervening action**:

1. **Foreseeability** – intervening acts that are reasonably foreseeable will usually not break chain of causation so as to relieve offender of legal responsibility for unintended result
   1. Requires an **objective** standard of reasonability (general nature of intervening act and accompanying risk of harm needs to be what can reasonably be foreseen)
2. **Independent act** severing line of causation - did the accused’s act merely set the scene for the independent intervening act or did the accused’s act trigger the intervening act?

Given the decision in ***Maybin***, where an intervening act that contributes to the death of the victim is unforeseeable, it is more likely to be regarded as breaking the chain of causation. Similarly, where the act is independent of the accused, it is more likely to be regarded as breaking the chain of causation.

MANSLAUGHTER

**S 222(5)** A person commits culpable homicide when he causes the death of a human being,

(a) by means of an unlawful act;

(b) by criminal negligence;

(c) by causing that human being, by threats or fear of violence or by deception, to do anything that causes his death; or

(d) by wilfully frightening that human being, in the case of a child or sick person.

Manslaughter is a **residual** offence. In practice, manslaughter typically involves **two** broad situations:

**(i)** Killings where it is not possible to establish the *mens rea* for murder; and

**(ii)** Killings that are the unintentional result of conduct that constitutes a marked departure from the reasonable standard.

**Point:** Issue in many homicide cases is whether there is sufficient evidence (of *mens rea*) to establish murder

Actus Reus for Manslaughter

***R. v. Creighton* [1993 SCC]:** Crown must establish the independent fault that there is a **reasonable foreseeability** of the **risk of bodily harm that is not trivial or transitory**. Doesn’t require **foresight** of death, just foresight of bodily harm (consistent with thin skull rule).

Look to a **general** conception of the reasonable person (as opposed to a reasonable person with the characteristics of the accused). Because to do otherwise would make it difficult to hold people accountable for their dangerous actions. **Exception:** Those who lack the necessary **capacity** to appreciate the relevant risk.

Unlawful Act Manslaughter

**Section 222(5)**: A person commits culpable homicide when he causes the death of a human being

**(a) by means of an unlawful act**

***R. v. Gosset* [1993 SCC]:** When dealing with questions of unlawful act manslaughter, at a minimum the conduct of the accused must constitute a **marked departure from a reasonable standard of care**, even in situations where the relevant unlawful act was one that appears to involve a **lesser** form of negligence - such as careless use of a firearm.

* If a strict liability offence is to be used as the for an unlawful act in a manslaughter charge, then it likely that the strict liability offences will be “read up” to require the Crown to prove a marked departure from a standard of reasonable conduct.

**Structure of the offence of Unlawful Act Manslaughter (Actus Reus):**

1. The *actus reus* of the offence is a **significant contributing cause of the death of another human being**. (***Smithers; Nette***)
2. Unlawful act can include any federal or provincial offence. ***R. v. DeSouza* [1992 SCC]**.
3. **However:** The Court also noted that the offence cannot be an **absolute liability** offence (ie. must be a *mens rea* element) and it must be **objectively dangerous** (***R. v. DeSouza* [1992 SCC]**)

***Mens Rea* requirement:**

**Two** layers of fault need to be proved in order to establish liability for unlawful act manslaughter:

1. *Mens rea* for the **underlying (unlawful) act** (generally just basic intent ie. **S. 265** assault: intentional application of force). If the underlying offence is one of strict liability or negligence, then must at least establish that the conduct is a **marked departure from a reasonable SOC** (***R v Gosset*, 1993**)
2. That it was **objectively foreseeable** that the unlawful act gives rise to a **risk of bodily harm** that is neither **transitory** **nor** **trivial** (not enoughto simply establish that the accused *intended* the underlying unlawful act) (***R v Creighton***)

***R v Creighton* [1993 SCC]** (*drug-user-shoots-up-consenting-friend-dies*)

**REASONABLE STANDARD FOR OBJECTIVE MENS REA IS OBJECTIVE FORESIGHT OF THE RISK OF BODILY HARM THAT IS NEITHER TRIVIAL NOT TRANSITORY IN NATURE.** *Accused charged with manslaughter by means of unlawful trafficking of drugs when he injected cocaine into a (consenting) friend.* SCC affirmed manslaughter conviction using **modified objective test**: reasonable person would have been aware of the risks of non-trivial, non-transitory bodily harm. Evidence of accused’s personal attributes (ie. age, experience, education etc) is **irrelevant** unless it goes to the accused’s **incapacity** to appreciate or avoid the risk.

**Actus Reus:** Accused committed an **unlawful act** (administering a narcotic) which resulted in victim’s death

**Mens Rea:** Accused clearly intended to administer prohibited narcotic to the victim 🡪 court will **infer** objective foresight of harm where the underlying unlawful act is **manifestly dangerous**.

***Sinclair* (2008) 🡪** Convicted of **unlawful act manslaughter:** The victim (a 4-year old girl) refused to go to bed; in response her father picked her up, shook her, and threw her on to her bed. Victim bounced off the bed, struck the wall, and fell to the floor. Fall resulted in a traumatic brain injury which later caused her death.

Criminal Negligence Manslaughter

**S 222(5)**: A person commits culpable homicide when he causes the death of a human being

(b) by **criminal negligence**

**Identical offence (Causing Death by Criminal Negligence) S 220:**

Every person who by criminal negligence causes death to another person is guilty of an indictable offence

**Actus Reus:** Same as for other forms of homicide. Start with **S. 219(1)** (below)

Crown must establish that the accused **failed to perform a “duty imposed by law”** and this failure **caused the death of the victim** ***(R. v. J.F.*)**

**Mens Rea:** Question of **fault**. Start with:

**S 219 (1)** Every one is criminally negligent who

(a) in doing anything, or

(b) in omitting to do anything that it is his duty to do, shows **wanton or reckless disregard** for the lives or safety of other persons.

**Objective** standard (***Creighton* [1993]**): Crown must establish that the behaviour of the accused represented **a marked and substantial departure from the standard of reasonable care expected of a reasonable person**

**in the circumstances** (confirmed in ***R. v. J.F.,* 2008**)

Additional points to note from ***Creighton***:

* **(1)**Court will not impute the particular characteristics of the accused (such as age and education) to the reasonable person unless those characteristics would leave the accused incapable of appreciating the relevant risk.
* **(2)**Objective foresight of death is **not** required. Court specifically rejected the idea that the fault element must relate to all aspects of the *actus reus* of manslaughter.

***R v J.F.* (2008)** (*child-beaten-by-foster-mother-died*)

**CRIMES WHICH HAVE AN EXTERNAL NEGLIGENCE ELEMENT REQUIRE A MARKED DEPARTURE FROM THE**

**SOC; MANSLAUGHTER BY CRIMINAL NEGLIGENCE REQUIRES A MARKED + SUBSTANTIAL DEPARTURE FROM THE SOC.** *4 yr old child (M) was beaten by his foster mother; suffered extensive bruising + multiple blunt traumas to his head, causing death. She plead guilty to manslaughter. M's foster father (J.F.) was charged with manslaughter by criminal negligence under* ***S 222(5)(b)******and*** *unlawful act manslaughter under* ***S 222(5)(a)*** *(underlying offence was failing to provide necessaries of life,* ***S 215****). He was convicted by jury of manslaughter by criminal negligence but acquitted of unlawful act manslaughter. He appealed the conviction.* ***Is a conviction for manslaughter by criminal negligence + an acquittal for manslaughter by failing to provide for the needs of a child inconsistent verdicts?*****Held:** Acquitted of manslaughter by criminal negligence.

Analysis: J.F.'s guilt depended on exactly the same failure to perform exactly the same duty: the duty to protect his foster child from foreseeable harm from his spouse. Verdicts are inconsistent: signify that a lesser degree of fault was not established whereas a greater degree of fault was proven beyond a reasonable doubt. Failure to provide the necessaries of life required proof of a **marked departure from the conduct of a reasonably prudent parent in circumstances** where it was **objectively foreseeable** that the omission would lead to a risk of danger to M’s life. Criminal negligence, the more serious offence, required proof that the same omission represented a **marked + substantial departure from the conduct of a reasonably prudent parent in circumstances** where the accused either recognized and ran an obvious and serious risk to M’s life or gave no thought to that risk.

Unlawful act manslaughter should be found **first** (easier to prove re: mens rea and less serious offense). (**Debatable).** Where criminal negligence + failure to provide the necessaries of life are alleged, the jury **first** should consider whether the accused failed a duty to provide the necessaries of life, **then** should consider whether the accused, in failing to provide the necessaries of life, **showed a wanton or reckless disregard for the life or safety of the child**. If so, the jury is bound to find the accused guilty of criminal negligence.

Only after it has satisfied itself that the accused is guilty of unlawful act manslaughter should the jury **then** consider whether the accused had the *mens rea* for criminal negligence manslaughter (did the failure constitute a marked and substantial departure?)

**If YES:** Criminal negligence manslaughter **If NO:** Unlawful act manslaughter

The main distinction between unlawful act manslaughter and criminal negligence manslaughter is that where the unlawful act is a crime of **negligence**, the Crown need **only** prove a **marked departure** from standards of reasonable conduct. **In contrast:** In cases of criminal negligence manslaughter, the Crown must prove a **marked** **+ substantial** departure from reasonable conduct.

**Deschamps J.:** Verdicts not inconsistent because the two offences rely on different *actus reus*:

* **(1)  Unlawful act manslaughter** (failure to provide the necessaries of life – Section 215 the underlying offence): Failure of the duty must, when viewed objectively, endanger the victim’s life or permanently endanger the victim’s health.
* **(2)  Criminal negligence manslaughter:** Failure of this duty must show a wanton or reckless disregard for the lives or safety of others.

\*\*Manslaughter by criminal negligence has a more onerous/ **higher fault** requirement than that required for unlawful act manslaughter in situations where the unlawful act is a negligence-based offence (such as failing to provide the necessities of life or careless use of a firearm).

Unlawful act manslaughter: “marked departure” (read up from **S 215**)

Criminal neg. manslaughter: “marked and substantial departure”

In most other respects, **unlawful act manslaughter** and **criminal negligence manslaughter** are identical:

* The *actus reus* for both offences is the same (accused's actions must be a significant cause of death);
* Nature of duty for mens rea is **similar**
* Both require reasonable foresight of harm (but not death); and
* Both use a “non-individuated” reasonable person standard (i.e. one that does that does not consider the characteristics of the accused, except where those characteristics effect the capacity of the accused to appreciate the risk).

Second Degree Murder

Murder is classified as second degree if it falls within the scope of one of the categories set out in **S 229(a)** [intentional or reckless killing], **S 229(b)** [transferred intent] or **S 229(c)** [unlawful object].

**Actus Reus:** Same as manslaughter (directly or indirectly causing the death of another human being)

There needs to be some degree of coincidence between the act (actus reus) + intent (mens rea) for murder under **S 229(1)(a).**

**Rule** in ***R v Cooper* (1993)**: Correspondence is established provided that there is sufficient **overlap** between *actus reus*+ *mens rea***:** “[I]f death results from a series of wrongful acts that are part of a single transaction then it must be established that the requisite intent coincided at **some point** with the wrongful acts.”

**Mens Rea:** There are **3** basic ways in which a culpable homicide can be classified as (second degree) murder

* 1. **Intentional or reckless killing;**
  2. **Transferred intent; or**
  3. **Unlawful object.**

Intentional or Reckless Killing

**S 229(a)(i) [Intentional killing]**: (***Vaillancourt* (1987 SCC)**)

* **Subjective foresight** of the likelihood of causing death

**+**

* **Intention** to cause that death

**S 229(a)(ii) [Reckless killing]**

* **Subjectively intended** to cause bodily harm to the victim

**+**

* **Subjective knowledge** that the bodily harm was of such a nature as **likely** to result in death.
  + (***R v Simpson,* 1981**held that **objective** test was incorrect)

**Rule in *R. v. Cooper* [1993]:** Correspondence is established provided that there is sufficient overlap between the *actus reus* and the *mens rea.* **Practical effect:** Provided that the *actus reus* and the *mens rea* coincide at some point during the relevant course of events leading to the death, it does not matter that the victim died sometime **after** the accused ceased to have the requisite *mens rea.*

Transferred Intent

**Section 229** Culpable homicide is murder

(b) where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being

Under this section, the *mens rea* of intentionally or knowingly causing death to one person is **transferred** to act of killing the eventual victim.

***R. v. Droste (No. 2) (1984 SCC)*** *(accidentally-killed-children-instead-of-wife-during-fire*)

*Accused set out to kill his wife by setting fire to their car. Fire led to the death of two children who were buckled into the backseat of the car (they died of asphyxiation).* **Held:** Guilty of murder of the children. Because the attempted murder of the wife was planned and deliberate, the intent and guilty knowledge (that death would result) could be **transferred** to the children's deaths.

***R. v. Fontaine* (2002)** (*planned-suicide-killed-car-passenger-instead*)

**TRANSFERRED INTENT DOES NOT APPLY IN SITUATIONS WHEN THE ACCUSED INTENDS TO KILL HIMSELF BUT ENDS UP KILLING ANOTHER PERSON. *Why?*** B/c person who intends to kill himself does not have the level of **moral blameworthiness** required for murder. *Fontaine was driving with two other people in his car & was involved in a high-speed chase. He intended to commit suicide and ran the car into a parked trailer. He did not die, but one of his passengers in the car did.* **A CRIME THAT REQUIRES SPECIFIC INTENT (IE. MURDER) WILL NOT BE SATISFIED BY TRANFERRING GENERAL INTENT.**

Unlawful Object

**S 229** Culpable homicide is murder **(c)**  where a person, for an **unlawful object**, does anything that he knows or ought to know is likely to cause death, and thereby **causes death** to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.

**Elements of S 229(c):**

**(1) For an unlawful object:** Pursuit of a serious crime "clearly **distinct** from the immediate object of the dangerous (unlawful) act." [***R. v. Vasil* [1981]**)

**Example:** A kills a bystander in the course of gun battle on a Toronto street. Court held that firing the gun was a dangerous act (required by the section) in pursuit of an unlawful purpose (killing another gang member) [***R. v. J.S.R.* 2008 ONCA**]

**(2) [person does] anything that he or she knows:** For mens rea, **subjective** test is required (***Vaillancourt* [1987]; *R. v. Martineau* [1990]**; ***R. v. Shand* 2011**)

**(3) or ought to know is likely to cause death and**

**(4) causes death.**

***Vaillancourt v the Queen* [1987 SCC]** (*robbery-with-knife-friend-shot-someone*)

**ALL CRIMES WITH SIGNIFICANT STIGMA ATTACHED IE. CULPABLE HOMICIDE REQUIRE AT LEAST PROOF OF OBJECTIVE FORESIGHT OF DEATH BEYOND A REASONABLE DOUBT.** *V was convicted of 2nd-degree murder resulting from a robbery of a pool hall. He had a knife + thought that his friend also had a knife when in fact his friend had a gun. He explicitly told his friend before the event that he did not want to have guns involved. During the robbery, his partner fired a shot and someone was killed. The charge falls under*[*s.230(d)*](http://canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec230)*which* ***negates any necessity for mens rea****of killing to be proven before a conviction can be entered****. Is***[***s.230(d) of the Criminal Code***](http://canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec230)***contrary to***[***s.7 of the Charter***](http://canlii.org/en/ca/const/const1982.html#sec7)***because it imposes absolute criminal liability?* Held:** Yes;Lamer (majority) clearly decides that this section is contrary to the Charter as it establishes an **absolute** criminal liability. He states that it is a principle of fundamental justice that there must be at least a minimal mental state requirement before criminal liability can be imposed. A failure to require this is **contrary to**[**s.7**](http://canlii.org/en/ca/const/const1982.html#sec7)**.** (Subjective foresight requirement discussed in **obiter**).

***R v Martineau* [1990 SCC]** (*B&E-turned-murder*)

**A PERSON CANNOT BE CONVICTED OF MURDER WITHOUT SUBJECTIVE FORESIGHT OF DEATH.** *M + friend were out with weapons (pellet gun + rifle), knowing they were going to commit a crime. Martineau thought that they were only going to commit a "B & E". They broke into a trailer, robbed the occupants, before M’s friend shot them. M is charged with murder under* ***S. 230(a)****.* ***Does a charge of murder require intent and is it subjective or objective intent that is required?* Held:** Subjective foresight required.Lamer, states that all murders should require **subjective** intent, as it is the most heinous and punished crime, and therefore this high threshold should be set.

***R v Shand* (2011)** (*gun-discharged-killed-occupants*)

**IMPORTANCE OF SUBJECTIVE FORESIGHT OF DEATH: ACCUSED MUST KNOW THAT DEATH WAS LIKELY TO**

**OCCUR AND NOT JUST A RISK OR POSSIBILITY.** *S + 2 others went to a drug dealer’s home to rob him. During the robbery he produced a loaded gun to subdue the occupants of the basement, which discharged & killed one of them. Accused was convicted of 2nd degree murder*. **Issue: *Is s. 229(c) unconstitutional b/c it permits a murder conviction w/o proof of intent to cause serious bodily harm?* Held:** Only “ought to know” section is unconstitutional.

***How does Section 229(c) relate to Section 229(a)?*** The key lies in the requirement in ***R. v. Vasil*** – i.e. that the unlawful object must be the pursuit of a serious crime "clearly distinct from the immediate object of the dangerous (unlawful) act."

FIRST DEGREE MURDER

According to **S 231**, murder is classified as either **first** or **second** degree. The section sets out a range of

circumstances in which the murder will be considered to be **first degree**:

1. Planned and deliberate (**S. 231(2)**);
2. Contracted murder (**S. 231(3)**)
3. Where the victim is (**S. 231(4)**):

(a) a police officer, police constable, constable, sheriff, deputy sheriff, sheriff’s officer;

(b) a warden, deputy warden, instructor, keeper, jailer, guard or other employee of a prison;

(c) a person working in a prison with the permission of the prison authorities.

1. When the death is caused by that person while committing or attempting to commit an offence under one of the sections listed in **s. 231(5)**)

**Charging and Sentencing**

1. In cases of first degree murder, the accused will be charged under **S 229** (the general provision for murder) and **S 231** (the specific provision setting out the conditions for first degree murder).
2. Although all murder convictions automatically give rise to a mandatory life sentence, in cases of first degree murder the accused will be ineligible for parole for twenty-five years (**S 745(a)**)

Actus Reus

Same as other forms of homicide – set out in **S.222** (see **Causation** above - ***Nette*** test is now the **general test** for causation in cases of **homicide** in Canada)

***Harbottle*** held that in order to secure a conviction under **S 231(5)**, the Crown must prove that the actions of the accused formed “**an essential, substantial and integral part of the killing of the victim**.”

**Three key aspects** of the decision in ***Nette***:

1. **Affirmed** the earlier decision in ***Harbottle*** and the applicability of the “**substantial causation standard**” to cases of first degree murder under **S 231(5)**
2. **Extended** the application of the “substantial causation” test to first degree murder under **S 231(6)**
3. **Explicitly** stated that the “substantial causation” test **does not** apply to all forms of first-degree murder. Does not apply to **Section 231(2), Section 231(3), or Section 231(4)**.

**Exception:** See intervening causes above***.***

Mens Rea

**For first degree murder, Crown must prove:**

1. *Mens rea* for murder as set out in **Section 229(a)**:

Must prove that the accused **intended** to kill the victim **or** meant to cause bodily harm that is likely to cause death and is reckless as to whether death ensues or not. **AND**

1. Fault consistent with one of the categories set out in **Section 231(1)-(6)**.

Planned and Deliberate Murder

**Section 231(2): Planned and Deliberate Murder**

**Basic rule:** First degree murder which is planned and deliberate requires **more** than intention to kill.

In addition, the Crown must establish that the murder was:

**(1)** Was “considered, not impulsive” (***R. v. More* [1963]**) ie. weigh pros + cons; **and**

**(2)** That there was **planning and consideration beforehand** (***R. v. Ruptash* (1982)**)

***Banwait* (2011)** defines **“Planned + deliberate:”** Implementation/ result of a **scheme** or **plan** that has been previously formulated or designed. The time between the moment one made the plan and its execution is not determinative in the consideration of the notions of "planning" and "deliberation” (***R v Bujold***)

***R. v. Smith* (1980)** (*hunting-trip-argument-results-in-shots-fired*)

**THERE MUST BE SOME EVIDENCE THAT THE KILLING WAS THE RESULT/IMPLEMENTATION OF A SCHEME OR DESIGN PREVIOUSLY FORMULATED BY THE ACCUSED.** *S + S go on a hunting trip together. They stop at an abandoned farmhouse and a heated argument begins, with the result that S shoots S in the left elbow and then in the back as he runs away, and in the head when he falls.* ***Does this justify a conviction under S. 231(2)?* Held:** Not first degree. Not the slightest evidence the appellant (Smith) had given any consideration to the murder of Skwarchuk until after he + Skwarchuk had left the house. It is obvious a murder committed on a sudden impulse and without prior consideration, even though the intent to kill is clearly proven, would not constitute a planned murder.

***R. v. Bujold* (2010)** (*killed-ex-gf-after-failed-reconciliation*)

*B + gf had been dating, but recently broke up. After various unsuccessful reconciliation attempts, B spends his day drinking + taking cocaine. He then calls ex and goes to her house approx 1 hour later. On entering the house, he stabs her 17 times, killing her, then unsuccessfully tries to kill himself.* **Held:** Convicted. Clearly planned + deliberate bc B wrote letters beforehand of intention to murder, and walked over, ensuring that he was alone. These elements were sufficient for the jury to find that he was no longer acting impulsively but that he was taking the necessary steps to execute his plan, which required a certain amount of reflection.

***R v Droste (No. 2)* [1984]** (*transferred-intent*)

**CAN BE GUILTY OF FIRST DEGREE MURDER EVEN IF YOU KILL SOMEONE OTHER THAN THE INTENDED VICTIM.** *Appellant had planned to kill his wife but in carrying out his plan killed his two young children instead.* ***Can you be guilty of first degree murder (S 231(2)*) *if you end up killing someone different from the person who was the subject of the plan?* Held:** Yes; the identity and character of any victim is irrelevant.**Policy rationale:** This added culpability relates to planning and deliberation with regard to the taking of a human life and **not** with regard to the identity of the victim. Murder is in the first degree when “it” is planned + deliberate. An intent to murder one person is **sufficient *mens rea***if, by accident, the accused kills another.

Murder of a Police Officer

**Section 231(4): Killing police officers and other officials in the course of their duties**

The section is **silent** as to whether the accused must **know** (or be reckless to the fact) that the victim is a police officer (or some other official). **BUT** see ***R v Munro****:*

***R. v. Munro* (1983)**

**THE CROWN MUST PROVE THAT THE ACCUSED EITHER KNEW (OR WAS RECKLESS TO) THE FACT THAT THE**

**VICTIM WAS A POLICE OFFICER.** Thenormal CL presumptions apply to **S 231(4)**. The Court stated that some degree of subjective fault (in addition to the *mens rea* requirements of **S 229(1)**) were needed to justify the additional penalties / stigma attached to a conviction under **S 231(4)**. It is not necessary for the accused to know for **certain** that the victim is a police officer 🡪 Enough to show some **subjective advertence** to the risk (ie. the possibility that the person is an undercover police officer).

The phrase “**on duty**” has been interpreted in a “purposive manner” to apply to a whole tour of duty, including breaks. ***R. v. Prevost* (1988)**

Officer is still acting **within the scope of their duties** even though they may have been using excessive force at the time they were killed. ***R. v. Boucher* (2006) \*unless force is SO excessive that self-defense can be used**

***R v Collins* (1989)** (*killed-police-officer-argued-unconstitutional-provision*)

**S 231(4) DOES NOT CONTRAVENE S. 7 OF CHARTER.** *The accused was charged with first-degree murder for killing a police officer. At the time he was killed, officer was on duty + in uniform. He was shot by the accused at close range. Accused argued that it**was unconstitutional + infringed s 7 to be able to convince of first-degree murder w/o proving planning + deliberation.* The onus is on the Crown to prove that the appellant knew that the victim was a police officer who was acting in the course of his duty. A heavier sentence **can be justified on the basis of added moral culpability or as additional deterrent** on the grounds of public policy.

Murder While Committing

**Section 231(5): When the death is caused by that person while committing or attempting to commit an offence (under one of the referenced sections)**

***R v Russell* (2001)**

**VICTIM OF THE MURDER + VICTIM OF THE ENUMERATED OFFENCE DO NOT HAVE TO BE THE SAME.** *The events took place at the home of S with whom R was romantically involved. R threatened her with a knife, allegedly sexually assaulted her + tied her up in the bedroom. He then left S and went to the basement where, a few mins later, he stabbed S’s tenant to death.* ***What is meant by the phrase “while committing?”* S. 231(5)** does **not** state that victim of the murder + victim of the enumerated offence must be the same. Requires only that the accused have killed **while committing** or attempting to commit one of the enumerated offences.

INFANTICIDE (NOT EXAMINABLE but potential policy-moral blameworthiness question)

**Section 233:** A female person commits infanticide when by a wilful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed.

**Section 237:** Every female person who commits infanticide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

***R v L.B.* (2011)** (*smothered-her-infants*)

**INFANTICE IS BOTH STAND ALONE INDICTABLE OFFENCE + PARTIAL DEFENCE TO MURDER.** *LB was charged with 2 counts of first-degree murder. She admitted to killing by smothering 2 of her infants to a psychiatrist.*

**Policy Issues:** If infanticide provides a partial defence to murder, the mother will escape a murder conviction if the homicide falls within the purview of infanticide even though the Crown may prove all the essential elements of the crime of murder. If, however, infanticide operates only as a potential **included** offence on a murder charge, and if the Crown proves the essential elements of murder, the mother must be convicted of murder even though the homicide falls within the meaning of infanticide. (Life imprisonment vs. 5 years).

**Mens Rea:** Infanticide as a form of culpable homicide, should require the *mens rea* required for manslaughter

**Application** (***R v LB,* 2011**)

1. The jury should first decide whether the Crown has proved beyond a reasonable doubt that the accused **caused** the child's death.
2. If the Crown proves causation, the jury next decides whether the Crown has proved beyond a reasonable doubt that in causing the child’s death the accused committed culpable homicide under **S. 229**. (culpable act is usually an **assault**).
3. If the Crown proves that the accused committed a culpable homicide, the jury must then decide the **nature** of the culpable homicide. The jury should be told to consider **infanticide** first. If the Crown fails to negate at least one of the elements of infanticide beyond a reasonable doubt, the jury should be instructed to return a verdict of not guilty of murder, but guilty of infanticide.
4. If the Crown does negate infanticide, the jury should be told to go on and consider whether the Crown has proved murder. If the Crown proves murder, then the jury should be instructed to determine whether the murder is first or second degree murder.
5. If the Crown fails to prove murder, the jury should be instructed to return a verdict of not guilty of murder, but guilty of manslaughter.

***R. v. LB* (2011): Arguments from LEAF (Women’s Legal Education Action Fund) intervener factum**

“[Y]oung, socially isolated and otherwise marginalized women, who commit the offence often in desperate and tragic circumstances, should have access to the reduced culpability offence of infanticide that carries a maximum sentence of 5 years (as opposed to life imprisonment for murder)… [O]ffence of infanticide recognizes the overlapping social, economic, psychological, medical and other effects of childbirth and lactation in the commission of the crime and, accordingly, that infanticide continues to play an important role as a reduced-culpability homicide offence that is separate and distinct from murder.”

PARTICIPATION

Gives rise to five categories / modes of participation:

**(1) Actual commission**

**(2) Aiding**

**(3) Abetting**

**(4) Common intention**

**(5) Counselling**

PARTIES TO OFFENCE

**Section 21(1)** Everyone is a **party** to an offence who

(a) actually commits it;

(b) does or omits to do anything for the purpose of aiding any person to commit it; or

(c) abets any person in committing it.

**Basic operation of Section 21(1):** Places the **aider** or **abettor** on the same “legal footing” as the principal.

Each of the participating parties will be convicted of the offence (***R. v. Thatcher* [1987]**). Not necessary for the Crown to establish/specify which person was the principal or the aider/abettor when both are **known** – as both the principal and the aider/abettor will be guilty of the same offence (***Thatcher; Pickton; Briscoe***).

***R v Thatcher* (1987)** (*unsure-whether-participated-in-or-directly-killed-wife*)

**UNANIMITY IS NOT REQUIRED AS TO MODE OF PARTICIPATION.** *T was charged with causing the unlawful*

*killing of his ex-wife. At trial, some evidence pointed towards him having been the principal perpetrator while other evidence suggested he had arranged the killing + was in another city at the time.* ***Does the verdict have to be unanimous with respect to the mode of participation?* Held:** No; provided that each juror was satisfied beyond a reasonable doubt that either T personally killed his ex-wife **OR** that he aided and abetted a 3rd party to kill his wife, unanimity is **not** required as to which of these modes of participation Thatcher actually engaged in. Otherwise may lead to risk of **acquittal** even though he is clearly guilty.

***R. v. Pickton [2010]***

*Many women missing from the DT east side (all sex workers); later found dismembered remains on Pickton’s property.* Question of Pickton’s involvement of 6 counts of 2nd degree murder as actual shooter or aiding/ abetting shooter (issue is jury instruction). **Held:** Should convict if they were satisfied beyond a reasonable doubt either that Pickton shot the victims **or** that he actively participated in their killings.

**Policy Question: *Why do we hold accomplices / parties to offences accountable?***

* It is a general principle of criminal law that individuals are not responsible for the actions of others,

and should **not** be held liable for acts or outcomes they did not intend.

**(1) Derivative Theory**

Liability of the accomplice **derives** from the offence committed by the principal. By identifying themselves with the principal’s efforts (to commit the offence), the accomplice has linked themselves to the actions of the principal/ **authorized** the principal to commit the offence on behalf of both of them. By encouraging or assisting the principal, the accomplice effectively **generates their own liability.**

**Advantages of this theory:**

**(i)** Provides an intuitive justification for why the accomplice + principal are convicted of the same offence (and can receive the same punishment). **SAME HARM RESULTS\*\***

**(ii)** Theory explicitly recognises that where people act together to commit a crime, it may end up being a matter of **chance** as to who actually “does the deed.”

**(iii)** Limits the liability of accomplices to situations where the victim has actually been **harmed** / an offence has been committed.

**Critics of this theory:**

**(1)** Critics of the theory argue that it doesn’t actually provide a reasoned basis for deviating from the general rule that people are not responsible for the actions of others.

**(2)** Theory doesn’t really tell us how much **association** is required.

**(3)** Theory doesn’t really tell us how much **participation** is required.

**(4)** Theory doesn’t tell us what to do when the principal does something outside of what is **expected** by the accomplice.

**(5)** Theory can produce “harsh results”

* + - Some would argue **foreseeability** is required for conviction 🡪 If this were the case, then **recklessness** would be sufficient *mens rea* for murder

**(2) Causation theory**

Liability of the accomplice derives from the fact that they can be said to have **causally contributed** to the harm to the victim.

Main objection to this theory is that it in effect **removes the distinction between principals + accomplices** altogether. Theory treats **both** as **causes** of the eventual harm, with the result that both are in effect principals. Ignores the fact that they may be responsible for different types of harm and as a result, do not necessarily deserve the same level of criminal liability and punishment.

**Example Argument by Tatjana Hörnle:** Argues that while individuals who collect (or distribute) child pornography are clearly acting wrongfully (in helping to fuel the market for the pornography, the wrong is **not the same** as that committed by those who **create** the pornography (and abuse children in the process).

**In defence:** It properly recognizes that both the principal and the accomplice have contributed to the harm, but provides a basis for treating their actions as different types of wrongs.

**(i) Aiding under Section 21(1)(b):**

**(a)** The accused person **actively rendered assistance** to the person who actually committed the offence **[*Actus reus*]**

**(b)** **Intended** to provide such assistance **[*Mens rea*]**

**(ii) Abetting under Section 21(1)(c):**

Crown must prove:

**(a)** The accused person **actively encouraged** the person who actually committed the offence **[*Actus reus*]**

**(b)** **Intended** to provide such encouragement **[*Mens rea*]**

Actus Reus

According to the Supreme Court in ***R. v. Briscoe* [2010]:** In order to make out the *actus reus* of aiding or abetting, the Crown must prove that the accused did (or, in some circumstances, omitted to do) something that **assisted** (aiding) or **encouraged** (abetting) the perpetrator to commit the offence. Does not have to **desire** the consequences, but rather **intention** is important (***Briscoe***). Note that mere presence/passive acquiescence will **not** be usually be sufficient for the purposes of **Section 21(1).**

"To **aid** under **S. 21(1)(b)** means to **assist** or **help** the actor… To **abet** within the meaning of **s. 21(1)(c)** includes **encouraging**, instigating, promoting or procuring the crime to be committed." (***R v Briscoe,* 2010**)

* **Abet** may also include **intentional encouragement** (***R. v. Wobbes* (2008); *R. v. Hennessey* (2010)**)

The accused must do **more** than **passively observe** an offence in order to be convicted on the basis of aiding or abetting. (***Dunlop & Sylvester; R v Williams***)

***R v Greyeyes* [1997 SCC]** (*helped-facilitate-drug-deal-guilty-of-trafficking*)

*An undercover police officer asked G if he knew where he could get some cocaine. G directed the officer to an apartment building, facilitated entry + negotiated the purchase, accepting money for facilitation of the trade-off.* ***Is someone who assists the purchaser of drugs guilty of aiding/abetting drug trafficking?* Held:** Yes; one who acts as agent for a purchaser or assists a purchaser to buy narcotics can be found guilty of trafficking under **s. 21(1)** of the Code by aiding or abetting. In this case, **both.** Notwithstanding that G’s motivation was to assist the officer, he intended to facilitate the sale of narcotics and is therefore guilty as a party pursuant to **s. 21(1)(b) + (c)**.

***Dunlop & Sylvester v. R.* [1979]** (*brought-beer-to-gang-rape*)

**MERE PRESENCE AT THE SCENE OF A CRIME IS NOT SUFFICIENT TO GROUND CULPABILITY.** *D + S were charged with rape. Evidence indicated that V – a 16-year-old girl – was subject to "gang rape" by 18 members of a motorcycle club. D + S admitted to bringing beer to the site of the rape (and saw 2 gang members have intercourse with the victim), but claimed that they did not take part in the rape.* **Held:** Not guilty. Something **more** is required besides **mere presence.** If there is no evidence of encouragement by him, a man's presence at the scene of the crime will **not** suffice to render him liable as aider and abettor.

***R. v. Williams* (1998)** (*passenger-border-drug-seizure-not-guilty*)

**MERE PASSIVE ACQUIESCENCE IS NOT SUFFICIENT.** *Accused was a passenger in a car that was driven by S.*

*Car was searched at the border by Canada Customs officers and found to contain 7 bags of cocaine. Accursed was convicted of importing a narcotic.* **Held:** Not guilty. Even if the accused **knew** of the presence of the drugs, "mere passive acquiescence" to their transportation could **not** be sufficient to justify a conviction of importing a narcotic. Must prove that the accused actually provided some **assistance or encouragement**.

**EXCEPTION:** If the accused is under a **legal duty to act** and **fails** to do so, if the the failure to act is accompanied by the **intent** to provide assistance or encouragement to the person(s) actually committing an offence, the accused will become a party to that offence as an aider and/or abettor.

* Ie. A parent is under a duty to provide the necessaries of life to their child (**section 215**), and this duty includes protecting the child from harm (including partner abuse).

***R. v. Dooley* (2009)** (*abused-by-parents-they-blamed-eachother*)

**CAN BECOME A PARTY TO AN OFFENCE IF UNDER LEGAL DUTY TO ACT/ PREVENT HARM.** *V, a seven-year-old boy, was being abused by his father + stepmother. Died of severe head injury (possibly a result of acts of step-mother). Both blamed each other for the injury, + both were charged + convicted of 2nd-degree murder.* A parent who does nothing to protect a vulnerable child from physical abuse can be a party to murder if he or she foresaw the likelihood of the child's death as a consequence of the abuse. When the harm is **reasonably foreseeable,** the failure to take reasonable steps to protect the child may be viewed as a form of aid to the other parent to harm the child.

***Nixon* [1990]** (*police-failure-to-act-prisoners-in-his-care*)

*N was a police officer in charge of the lockup. He was convicted as a party to aggravated assault of a prisoner who had given a false name.* The failure to act in accordance with a **duty** to protect prisoners under his care rendered him a **party** because his purpose was to facilitate the commission of an offence.

Mens Rea

Crown must prove two elements to the *mens rea* for **aiding + abetting**:

**(i)** Accused must **intend** to assist / provide encouragement to the principal offender; and

**(ii)** Accused must have **knowledge** of the **type** (if not necessarily the exact nature) of offence

“**Purpose** is synonymous with **intent** and does **not** include recklessness” (***R. v. Roach* (2004)**). **Not** required that the accused **desired** that the offence be successfully committed (***R v Briscoe***)

[In order to have the **intention** to **assist** in the commission of an offence, the aider must **know** that the perpetrator intends to commit the crime, although he or she need not know precisely how it will be committed. **Wilful blindness** may substitute for actual **knowledge]** (***R. v. Briscoe* [2010]**)

**Policy Issue:** Basic justification for requiring **intention** is that if we don’t, there is a danger that many innocent individuals (especially service providers) will find themselves guilty of aiding and abetting crimes. (ie. people who sell guns).

***R. v. Chan (2003)*** *(believed-trafficking-in-heroin-was-small-amount*)

**CAN BE CONVICTED OF AIDING/ABETTING EVEN IN THE COMMISSION OF AN IMPOSSIBLE CRIME.***C took part in the purchase of what he believed to be a large quantity of heroin. In fact, the drugs had already been intercepted (and substantially “diluted”) by the police, so that by the time of the purchase they only contained a very small amount of heroin. Convicted of drug possession.* **Held:** Mens rea was satisfied (Accused believed he was dealing heroin).

COMMON INTENTION

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

A person who forms a **common unlawful intent** (Ie. to commit a robbery) will be a party to **other offences** that he or she **knew** or **ought to know** would probably occur (ie. forcible confinement or manslaughter).

**Section 21(2)** usually only applies where the principal has committed crimes that go beyond what the accomplice **intended** to aid / abet.(***R. v. Simpson* (1988)**)

Actus Reus

**Crown must prove:**

**(i)** The accomplice formed a **common intention** (with the principal) to assist in carrying out an unlawful purpose; and

**(ii)** The subsequent offence committed was one the accused either **knew** or **ought to have known** would be a probable consequence of carrying out the common purpose.

**Note:** An **unlawful purpose** means a purpose contrary to the *Criminal Code*.

For the purposes of **Section 21(2**), the **relevant offence** is not confined to that offence for which the principal is convicted 🡪 can encompasses **any** **included offence.** Ie. A party to an unlawful purpose can be convicted of manslaughter (even though the principal is convicted of murder) if they only had objective foresight of bodily harm (as opposed to subjective foresight of death). ***R. v. Jackson* [1993]**

***R. v. Jackson* [1993]** (*joint-killing-of-employer*)

**ACCUSED DOES NOT HAVE TO FORESEE THE ACTUAL OFFENCE FOR WHICH THE PRINCIPAL IS ULTIMATELY CONVICTED.** *J + D were charged with 1st degree murder following the killing of J's employer. On the night of the murder, D drove J to the victim's antique shop. According to J, D never left the car + was unaware of what happened in the shop. J admitted to entering the shop, losing control and striking the victim with a hammer. According to D, J talked on the way to the shop about killing the victim, but D took this to be a joke. J got out of the car carrying a hammer and ordered D to follow him. J entered the shop; D remained outside near the door where he heard loud voices + violent noises. D became frightened, ran down the driveway toward the car. J ran after him, hit him + forced him to return to the shop to retrieve the cash box. Crown's theory was that J + D both entered the shop + both participated fully in the attacks + robbery.* Provided that D foresaw the possibility of murder or risk of harm, then he could be held liable for homicide by virtue of a **common intention** because murder + manslaughter are included offences – both are forms of **homicide**.

Note that what is required for the *actus reus* is **formation of common intent** to assist – and so it is not necessary for the accomplice to provide an **actual act of assistance.** What is being criminalized here is their **common purpose** and **actual participation** in the activities of the principal (similar to **conspiracy**).

Common Intention and Abandonment

**General rule:** The accomplice will **not** be held liable for the actions of the principal if they have abandoned the common intention **prior to the commission** of the offence.

**Policy Reasons for Recognizing the Abandonment Defence (*R. v. Gauthier* [2013]):**

1. Need to ensure that only **morally culpable** persons are punished;
2. There is benefit to society in encouraging individuals involved in criminal activities to **withdraw** from those activities + report them

For the **defence** of abandonment, the accused must prove:

1. That he or she **communicated** the intent to **abandon** the common intention to the person involved;
2. That he or she communicated in a **timely and unequivocal** manner;
3. That he or she took **reasonable** steps in the circumstances either to **neutralize** or cancel out the effects of their participation or to prevent the commission of the offence (**proportionality** analysis) 🡪 Step 3 added after ***R v Gauthier***

***R. v. Kirkness* [1990]** (*accomplice-raped-old-lady-during-robbery*)

*K + S broke into a house. S stole various items + blocked the front door while K sexually assaulted an elderly victim. S then killed the victim. K stated that he protested S’s homicidal actions.* **Cory J.:** K had formed an **intention in common** with S to commit the crime of B&E. He was **aware** of the sexual assault, but “there is no indication that he knew that death or bodily harm might result.” The pathology suggested that the victim died of suffocation, which occurred after the sexual assault. K did not aid or abet S in the strangulation or suffocation. K could only be guilty of manslaughter if he was a party to the sexual assault. The only step he took relevant to the sexual assault was to place the chair against the front door. K removed himself from the joint enterprise when he told S to stop strangling the victim.

***R. v. Gauthier* [2013]** (*planned-poisoning-of-children-double-suicide*)

*G + husband planned to murder their children + commit suicide. G supplied pills to her husband, then indicated that she did not think they should proceed. G argued abandonment.* ***Was there an air of reality to the defence of abandonment?*** Court added a new requirement for the defence of **abandonment**, such that the accused now has to demonstrate that they took **reasonable** steps in the circumstances either to neutralize or otherwise cancel out the effects of their participation or to prevent commission of the offence.

Criteria to establish an "**air of reality**" to the defence:

1. There was an **intention to abandon** or withdraw from the unlawful purpose;
2. There was **timely communication** of this abandonment or withdrawal from the other person
3. The communication served **unequivocal notice** upon those who wished to continue; and
4. The accused took, in a manner **proportional** to his or her participation in the commission of the planned offence, **reasonable** steps in the circumstances either to **neutralize or otherwise cancel** out the effects of his or her participation or to **prevent the commission of the offence.**

Court in ***Gauthier*** also noted that it will be harder to establish the defence of abandonment where the accused is charged with being a party to an offence on the basis of **Section 21(1)** b/c aiders + abettors have generally already performed acts to aid/abet the principal offender in commission of an offence. Thus, merely communicating in unequivocal terms their intention to cease participating in the commission of the offence will not be enough "to break the chain of causation and responsibility.”

***R. v. Logan* [1990]** (*robbed-store-wounded-cashier*)

**A PARTY TO AN OFFENCE CANNOT BE FOUND GUILTY OF THE OFFENCE BASED ON A LESSER STANDARD OF *MENS REA* THAN REQUIRED FOR CONVICTING THE PRINCIPAL.** *A were charged with robbery of a store and wounding a cashier. Two were convicted of attempted murder, argued no intention to shoot (neither had done the shooting).* If principles of fundamental justice require **subjective** *mens rea* to convict a principal, the same minimum degree of *mens rea* is constitutionally required to convict a party of that offence. For such offence, A can be convicted if s/he knew that the commission of the offence was a probable consequence of carrying out the **common purpose**.

PERSON COUNSELLING OFFENCE

**Counselling (a crime that is completed): Note that there are two forms of counselling:**

* **(i)**Counselling a crime that is **completed (Section 22)**
  1. Treated as a form of **participation**
  2. Punished as if had committed the **complete offence**.
* **(ii)**Counselling a crime that is **not completed (Section 464)**
  1. Treated as a form of **inchoate liability (incitement)**
  2. Punished as an **attempt** (as per **Section 463**)

**Section 22 (1)** Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.

**Idem**

**Section 22(2)** Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.

**Section 22(3)** For the purposes of this Act, ***counsel*** includes procure, solicit or incite.

Basic elements of the offence of counselling were set out in ***R. v. Hamilton* (2005 SCC).** **McLachlin C.J.:** “A*ctus reus* for counselling is the *deliberate encouragement or active inducement of the commission of a criminal offence.* And the *mens rea* consists in nothing less than an accompanying *intent* or *conscious disregard of the substantial and unjustified risk inherent in the counselling*: that is, it must be shown that the accused either **intended** that the offence counselled be committed, or **knowingly counselled** the commission of the offence while aware of the unjustified **risk** that the offence counselled was in fact likely to be committed as a result of the accused's conduct.”

Actus Reus

**To establish *actus reus*, Crown must prove:**

1. The accused **encouraged** or actively induced the commission of a criminal offence.
2. Accused **knew** – or **ought to have known** – that the offence was likely to be committed as a result of the counselling.

**Subjective knowledge** is the test in cases of murder or attempted murder as a result of the operation of **Sections 7 + 11(d)** of the Charter (***Martineau* (1990)**)

The crime does not have to be committed in the way it was counselled, or even be the same crime as was counselled. **However:** The crime must be one that was **reasonably foreseeable** from the counselling.

As per **S 22(3)**, the word counselling has been interpreted to include “procure, solicit or incite.” Also has been interpreted to include **advising or recommending** that someone else commit an offence, including:

* + - Finding someone to commit an offence;
    - Persistently asking someone to commit an offence: and
    - Provoking or instigating someone to commit an offence.

***R. v. O’Brien* (2007)** (*counselled-to-rob-store*)

**WHERE A (SUPPORTIVE) CONVERSATION BEFORE AN OFFENCE ACTIVELY INDUCES THE COMMISSION OF IT, THE ACCUSED CAN BE GUILTY OF COUNSELLING.** *Accused sold drugs to R, then suggested that it would be easy for R to rob a local store as the only person working there was a 16-year-old girl. Accused also suggested that R should paint her face before the robbery. Accused was arrested and convicted of counselling R to commit robbery.* **Held:** Accused was guilty of counselling. R indicated that she had not decided to rob the store before her conversation with the accused.

Mens Rea

**To establish *mens rea*, Crown must prove:**

1. The accused **intended** for the offences to actually be committed by the person counselled; or
2. **Extreme recklessness** with respect to the possibility that the offences might actually be committed by the person counselled.

**Key point to remember on *mens rea*:**Consists of **intent** or **conscious disregard of the substantial and unjustified risk inherent in the counselling *R. v. Hamilton* (2005).** Note that the wording “extreme recklessness” is the term used by commentators to describe the degree of recklessness required.

ACCESSORY AFTER THE FACT

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

**Where one party cannot be convicted**

**Section 23.1** For greater certainty, sections 21 to 23 apply in respect of an accused notwithstanding the fact that the person whom the accused aids or abets, counsels or procures or receives, comforts or assists cannot be convicted of the offence.

Under the ***Code***, an **accessory** **after the fact** is **not** a party to an offence (as is the case in many other forms of participation). **Instead:** **S 23** creates a new **substantive**, free-standing offence – being an accessory after the fact – which is **not contingent** on the conviction of the other party.

***R. v. S(F.J.) (1997 SCC)*** (*Convicted-for-helping-bro-even-though-bro-acquitted*)

**ACCORDING TO S. 23.1, A PERSON CAN BE CONVICTED OF BEING AN ACCESSORY AFTER THE FACT EVEN IF THE PERSON ASSISTED IS NOT CONVICTED OF AN OFFENCE.** SCC upheld the conviction of an accused for being an accessory after the fact – *for assisting her brother by transporting him from a killing & orchestrating a false alibi even though her brother was eventually* ***acquitted*** *of the murder*.

**Actus Reus:** In order to establish the *actus reus*, the Crown must prove that the accused **received, comforted, or assisted a person who has committed a crime.**

**Note:** Mere failure to inform authorities about the **whereabouts of a fugitive** is not enough (***R. v. Dumont***)

**Section 23(2)** – which provided that a married person could not be held liable for assisting his or her spouse after the commission of a crime – was repealed in 2000.

**Mens Rea:** In order to establish *mens rea*, Crown must prove:

1. **Subjective knowledge** that the person assisted has been a party to an offence; and
   * + **Subjective** knowledge in this context **includes willful blindness**
     + Accused must have knowledge of the **specific offence committed.** Knowledge that a general crime may have been committed is **not sufficient** (***R. v. Duong,* 1998**)
2. **Assisting** the fugitive for the purpose of assisting him or her to escape.
   * + The acts of assistance do not have to have actually helped the person escape

(***R. v. McVay* (1982)**)

* + - **Assisting** has been interpreted to require that the accused act with the **purpose of assisting** a known criminal to escape. (intent requirement – more than mere knowledge or recklessness) 🡪 higher form of **subjective** *mens rea*

***R. v. Duong* (1998)** (*harboured-fugitive-without-asking-about-crime*)

**SUBJECTIVE KNOWLEDGE INCLUDES WILLFUL BLINDNESS.** *2 individuals were killed by L. The deaths – and identity of the alleged killer – were reported on TV. Despite seeing the broadcasts, D allowed L stay with him afterwards. D later maintained that as he did not want to know about L’s involvement in the crime, he never asked him about it.* ***Is willful blindness sufficient for the purposes of Section 23(1)? Is it enough to simply prove some unlawful act?*** Where the Crown proves the existence of a fact in issue and **knowledge** of that fact is a component of the *mens rea,* then willful blindness as to the existence of that fact is sufficient.

INCHOATE OFFENCES

**Basic Rule:** A person can be held criminally liable for a crime even if the crime is not completed, provide that there is proof of some prohibited act and accompanying *mens rea*.

**Three main types of inchoate offences:**

**(1) Attempts**

**(2) Incitement / Counselling**

**(3) Conspiracy**

**Two key issues for inchoate offences:**

**(1)** At what point should we criminalize an attempt? At what point does the desire to commit a crime – and actual efforts to undertake a criminal act – constitute an attempt that warrants sanction &punishment?

**(2)** How should the criminal law distinguish between successful and unsuccessful attempts?

**Other key (policy) questions:**

**(1)** If one of the central aims of the criminal law is to acknowledge harms and punish wrongs, how do we justify criminalizing inchoate offences? How do we justify punishing people for incomplete crimes?

**(2)** Can we justify punishing an attempt where there is no accompanying harm?

Attempts

**Section 24(1)** Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.

**Question of law**

**Section 24(2)** The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.

Actus Reus

**Basic Rule:** The *actus reus* of attempt is an act or omission that goes **beyond merely preparation** to commit the complete offence (***R v Root,* 2008**) 🡪 can lead to remoteness issue\*

There is no universal test that can be used to establish the *actus reus* requirements for all criminal attempts. These *actus reus* requirements will vary according to the nature of the crime attempted & the circumstances of the individual case. In any given case, it will be the responsibility of the **trial judge** to determine whether the *actus reus* of the attempt has been satisfied.

***R v Cline* (1956)** (*attempted-indecent-assault-with-young-boy*)

**THERE MUST BE AN ACT/OMISSION THAT IS MORE THAN MERE PREPARATION TO COMMIT A CRIME.** *Accused approached C (a young boy) & asked him to help carry his suitcases, saying he would give the boy “a couple dollars.” Accused did not actually have any suitcases with him. C refused.* *Evidence that accused had done this on multiple occasions previously.* Accused was charged with indecent assault. Substituted with attempted indecent assault. Following preparation, the accused must then take a **next step** (accompanied by **intention** to commit the crime) that is sufficient in law to establish a criminal attempt.

***R. v. Deutsch (1986)*** *(job-interview-sex-expected*)

**THE DISTINCTION BETWEEN PREPARATION AND ATTEMPT IS QUALITATIVE + DEPENDENT ON THE RELATIVE PROXIMITY OF THE ACT.** *D placed newspaper ads for a secretary/sales assistant, + conducted interviews with 3 applicants and undercover police officer. D indicated that they would be expected to have sex with clients or potential clients if necessary to conclude a K and told them salary could be $100K. Did not make offer of employment but told them to let him know if interested*. D was acquitted of attempts to procure but on appeal, issue was ***whether acts or statements could, as matter of law, constitute an attempt to procure rather than mere preparation***.Although actual crime could not be committed until one of the women actually had sex with someone; offering financial rewards was a **step** in attempting to make this action occur.

**Sufficient Actus Reus:**

***R v James* (1971):** Accused caught going through the glove compartment of a car looking for car keys (with intent to steal the car). Sufficient *actus reus* for attempted theft.

***R. v. Boudreau* (2005):** Accused pointed a loaded gun at his ex-wife after chasing her to a neighbour’s house + yelling that he was going to shoot. Is this sufficient to constitute the *actus reus* for attempted murder?

***R. v. Tosti* [1997]:** Accused apprehended inspecting the lock of the barn he intended to burgle, while carrying concealed cutting equipment. Sufficient to constitute the *actus reus* for attempted burgulary.

***R. v. Litholetovs* [2002]:** Accused purchased petrol from a garage, took it to the complainant’s home, and then doused the front door. Sufficient to constitute the *actus reus* for attempted arson

**Insufficient actus reus for attempted theft: *R. v. Lobreau* (1988):** Accused made a plasticine impression of a car key, with the intent to steal the car.

**Section 24(2)** does **not** create a free-standing **defence of** **abandonment**. **However:** Canadian courts have recognised that evidence of abandonment may lead to “a reasonable doubt about whether the accused had the **intent** to commit the crime in the first place.” Courts treat **abandonment as a repudiation of the the *mens rea***for attempt (and not as a separate defence). ***R. v. Sorell* (1978)**

Has there been a **preparatory act**?

**YES**

Have the preparatory acts been **completed**?

**YES**

Has the accused taken the **next step** towards completion of the offence?

**If YES, then the *actus reus* for the attempt has been made out**

Mens Rea

The *mens rea*, or fault element, is the **most important element of attempted** crimes because the *actus reus* will, by definition, not include the completed crime. ***R v Cline***

***R v Ancio* SCC** held that for an **attempt**, the Crown must prove that the accused had the **specific intent** to commit the completed offence, even if the completed requires a **lesser intent *R. v. Colburne* (1991).** In the context of **murder**, for ex, this would mean that the accused must have had an **intent to kill**. ***R v Ancio* (1984)**

***R v Logan* [1990]:** SCC held that the constitutional minimum *mens rea* for attempted murder is **subjective foresight of the consequences** (death) because of the **stigma** attached to a conviction for attempted murder.

Canada **does not** hold people liable for attempts in cases of **recklessness** or **wilful blindness**. Attempts will often require proof of a **higher** (more serious) form of *mens rea* that in required for the completed crime. Can argue, for example, that that the *mens rea* for **attempted sexual** assault is the (subjective) **intent** to engage in non-consensual sexual activity, despite the fact that it is is possible to be convicted of the completed offence of sexual assault on the basis of recklessness, wilful blindness, or a failure to "take reasonable steps in the circumstances known to the accused at the time, to ascertain that the complainant was consenting."

***R v Ancio* [1984 SCC]** (*brought-shotgun-to-talk-to-ex*)

**A CONVICTION FOR ATTEMPTED MURDER REQUIRES PROOF OF SPECIFIC INTENT TO KILL – NO LESSER FORM OF MENS REA WILL SUFFICE.** *A, who wanted to speak with his Ex-wife, broke into an apartment building with a loaded shotgun. K, the man with whom his wife had been living, went to investigate the sound of break­ing glass + threw the chair he was carrying at A when he saw him climbing the stairs. The gun discharged, missing K, & a struggle followed. Shortly after his arrest, respondent stated to police that he "had him by the throat and would have killed him."* ***Is the mens rea in attempted murder limited to an intention to cause death or to cause bodily harm knowing it to be likely to cause death?*** The completed offence of murder involves kill­ing and any intention to complete that offence **must include the intention to kill**. An attempt to murder should have **no lesser intent** esp as mens rea may be the sole criminal element.

***R. v. Williams* (2003)** (*HIV-unprotected-sex*)

*W (who was HIV +) was convicted of attempted aggravated assault for having unprotected sex.* Accused was convicted of **attempted** aggravated assault b/c there was a reasonable doubt as to whether his partner was already HIV + at the time they had sex. Found **intention** to commit crime.

Counselling – Crime Not Completed

**Two forms of counselling:**

**(1)** Counselling a crime that is **completed (Section 22)**

* + Treated as a form of **participation**
  + Requires **objective** fault
  + Punished as if had committed the **complete offence**.

**(2)** Counselling a crime that is **not completed (Section 464)**

* + Treated as a form of **inchoate liability (incitement)**
  + Requires **subjective** fault
  + Punished as an **attempt** (as per **Section 463**)

**Section 464** Except where otherwise expressly provided by law, the following provisions apply in respect of persons who counsel other persons to commit offences, namely,

**(a)** every one who counsels another person to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence and liable to the same punishment to which a person who attempts to commit that offence is liable; and

**(b)** every one who counsels another person to commit an offence punishable on summary conviction is, if the offence is not committed, guilty of an offence punishable on summary conviction.

**Section 464 also sometimes referred to as Incitement\***

**To establish *actus reus*, Crown must prove:**

**(i)** The accused encouraged or actively induced the commission of a criminal offence. *(****Sharpe***)

For the purposes of the *actus reus*, it is not enough for the person to merely describe the offence. **Instead:** They must actively induce or advocate for the commission of the offence.

**Section 464** in effect borrows / imports the meaning of counselling from **Section 22(3)** – includes “procure, solicit or incite.” Does not matter if the person counselled never has any intention of carrying out the crime – see ***R. v. Glubisz* (No. 2) (1979)**

**To establish *mens rea*, Crown must prove:**

**(i)** The accused **intended** for the offences to actually be committed by the person counselled; or

**(ii)** **Extreme recklessness** with respect to the possibility that the offences might actually be committed by the person counselled.

**Subjective Intent:** Imputed based on evidence

**Objective Intent:** Imputed based on reasonable person

**Key points to remember on *mens rea*:** Consists of **intent** or **conscious disregard of the substantial and unjustified risk inherent in the counselling. *R v Hamilton* (2005)**

* “Mere” recklessness is **not sufficient**, as it would mean that a person would be liable for casual comments about the possibility of a crime being committed

***R v Hamilton* (2005 SCC)** (*counseled-various-crimes-thru-email*)

**EXTREME RECKLESSNESS (CONSCIOUS DISREGARD OF SUBSTANTIAL + UNJUSTIFIED RISK INHERENT IN COUNSELING) CAN SATISFY MENS REA FOR COUNSELLING.** *H sent email saying he had confidential info. Files had instructions on how to set bombs + break into houses. Included program to generate credit card #s. Charged with counseling of a crime under* ***s. 464(a). Is recklessness sufficient for the mens rea of counselling?* Held:** Yes, if extreme (see ratio definition). Mere recklessness not sufficient.

IMPOSSIBILITY

**Section 24(1):**

Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence ***whether or not it was possible*** under the circumstances to commit the offence.

There is **no impossibility defence for attempted crimes** in Canada. Can be convicted of an attempt even if it was a **factual** or **legal** impossibility. The only circumstance in which impossibility can be a defence is where the act in question cannot form the basis of a crime – that is, where the accused attempts to commit an **imaginary crime**.

**Factual impossibility:** Where an accused attempts to pick a pocket that contains no money – ***R v Scott* [1964]**

**Legal impossibility:** Attempting to receive goods believed to be stolen, but which were in law not stolen.

***United States of America v. Dynar* [1994]** (*attempted-laundering-of-fake-drug-money*)

**TRUTH IS NOT A RELEVANT PART OF MENS REA. WHAT IS LEGALLY RELEVANT IS D’S BELIEF OF THE CRIME. THEREFORE, IMPOSSIBILITY IS NOT A DEFENCE FOR ATTEMPTED CRIMES.** *USA sought to extradite the D for attempting to launder the proceeds of crime. It was impossible for him to launder the money b/c it had never in fact been drug money (it was provided as part of an FBI sting).* **HELD:** Convicted of attempt. Only relevant distinction for purposes of **s. 24(1)** is between imaginary crimes + attempts to do the factually impossible. An **imaginary crime** is one which, even if completed, still would **not** be a crime. Cannot convict these.

CONSPIRACY

**Section 465(1)(c)**

Establishes the **general offence of conspiracy** by providing that:

“[E]very one who conspires with any one to commit an indictable offence is guilty of an indictable offence and liable to the same punishment as that to which an accused who is guilty of that offence would, on conviction, be liable."

The offence is established because **Section 465** provides for the **punishment** (rather than definition) of conspiracy to commit various substantive offences.

Note that **Section 465** contains a number of **specific provisions** establishing various **forms of conspiracy**, including:

* Conspiracy to commit murder – **Section 465(1)(a);**
* Conspiracy to prosecute a person known to be innocent – **Section 465(1)(b);**
* Conspiracy with extraterritorial effects – **Section 465(3);**
* Conspiracy in restraint of trade – **Section 465(4)**

**Most** common in practice: cases involving organized crime and drug trafficking.

***R. v. O’Brien* (1954 SCC)** adopted the **definition of conspiracy** set out in ***R. v. Mulcahy* (1868)**: A conspiracy consists not merely in the intention of two or more, but in the **agreement of two or more to do an unlawful act**, or to do a lawful act by unlawful means.

***Dynar* (1997 SCC):** Conspiracy is a more '**preliminary**' crime than attempt, since the offence is considered to be complete before any acts are taken that go beyond mere preparation to put the common design into effect. The Crown is simply required to prove a **meeting of the minds** (agreement) with regard to a common design to do something unlawful, specifically the commission of an indictable offence. Basic justification for offence of conspiracy is the **prevention of crime.**

**POLICY\*:** Conspiracy is an offence that is viewed with extreme suspicion by civil libertarians, owing to its vague parameters. The power to charge an accused person with conspiracy is believed to place an unfair advantage in the hands of the Crown. (**Verdun-Jones**)

Actus Reus

The *actus reus* of conspiracy is an **agreement** to carry out the completed offence. (***R v Cotroni* 1979**). Do not need to prove that steps were taken to implement the agreement. Provided an **agreement to commit an offence** has been reached, nothing else is required on the part of the accused – AR complete (***F. J.* 2013)**

A single person can be convicted of conspiracy even if the other co- conspirators are not (***R. v. Murphy* (1981)**

An **implied** or tacit agreement to commit an offence is sufficient for conspiracy **– *Atlantic sugar Refineries co.* v. *Canada* (A.G) (1980)**

**Chain Conspiracies:** Does not have to be direct communication between the co-conspirators(***R. v. Controni & Papalia* (1979).** Ie. A is in contact with B who is in contact with C (conspiracy agreement is between A + C)

Where the accused joins a pre-existing conspiracy, they can only be convicted of conspiracy if the Crown can prove that they adopted the criminal plan as their own and consented to participate in carrying it out.

**Key:** **Knowledge** of a conspiracy does not give rise to criminal liability – ***Lamontagne* (1999).** Also cannot conspire with a spouse, as they are treated as one person for the purpose of conspiracy – ***Barbeau* (1996)**

**No liability for attempt to conspire: *R. v. Déry* [2006 SCC]** overturned a conviction for attempted conspiracy on the basis that it would in effect criminalize "bad thoughts of this sort that were abandoned before an agreement was reached, or an attempt made, to act upon them."

**Unilateral** conspiracies (attempt to conspire but no agreement was reached) will normally be caught under our law by the offence of **'counselling an offence not committed**"’ under **s 464** (***R v Dery***)*.* A person who pursues a unilateral conspiracy beyond mere preparation could be guilty of an **attempt** to commit the actual crime. Person who **abets** (or **encourages**) conspirators to pursue the object of the conspiracy can be a party to the conspiracy even though they did not actually agree to the conspiracy.

***R v Dery* (2006 SCC)** (*attempt-to-conspire-not-liable*)

**NO LIABILITY FOR ATTEMPT TO CONSPIRE B/C CONSPIRACY REQUIRES ACTUS REUS OF AGREEMENT.** *Dery convicted of* ***attempting to conspire*** *to commit theft of liquor + attempting to conspire to unlawfully possess proceeds.* ***Can you be convicted for a fruitless discussion/contemplation of a crime never committed?*** No.

Mens Rea

Two key **subjective** elements to the *mens rea* for conspiracy (***R v O’Brien***):

(i) Intention to agree; and

(ii) Intention to put the common design into effect.

A + B enter into an agreement to kidnap C. Unknown to A, B has **no intent** to carry out the kidnapping. ***Can B be guilty of conspiracy?*** **No.** To be convicted of conspiracy, the accused must actually intend to carry out the agreement - ***R. v. O’Brien* (1954)**

A and B enter into an agreement to kidnap C. Unknown to A, B is an undercover police officer. A intends to carry out the kidnapping***. Can A be guilty of conspiracy?*** **No.** Need **at least two parties** to the agreement to intend to carry it out (and we would presume that the officer does not have the intent) – ***R. v. O’Brien* (1954)**

***R. v. Sokoloski* [1977 SCC]** (*conspiracy-between-2-drug-dealers-and-undercover-cop*)

*Police placed a car driven by D (who they suspected of drug dealing) under surveillance. Police arrest D + his companion (C), after witnessing a drug exchange. Police searched D’s premises and find drugs. During the search the phone rang, & was answered by a police officer. The caller A mistakenly thought he was talking to D, and asked the officer “Did that stuff finally came in?” The officer replied yes and then arranged a meeting with A to deliver it to him.* **Held:** Convicted A + D for **conspiracy** to drug traffic on the basis that A – the seller of the large quantity of the drugs – must have known that the purchaser would in turn sell the drugs.

***R. v. Nova Scotia Pharmaceutical Society* (1992)** (*pharmacy-conspiracy*)

*A number of pharmacies were charged with conspiracy "to prevent or lessen competition" under S 32(1)(c) of*

*the Combines Investigation Act for the sale of prescription drugs + dispensing services.* Although SCC reaffirmed the rule that **subjective** intent is needed for the mens rea of conspiracy, the Court also held that an **objective** fault element was sufficient in relation to the aims of the agreement: Accused would be guilty if Crown could prove that **reasonable business people** in the same position would have known that the agreement would unduly lessen competition.

Impossibility is not a defence to a charge of conspiracy. (***Dynar***). A + B convicted of conspiracy to launder money even though the money was not “dirty.” Court noted that although it was impossible to carry out the crime, there was still (1) Agreement (***actus reus***) + (2) Intent to agree and launder drug money (***mens rea***)

DEFENSES

INTOXICATION

**Brief history of the common law defence of intoxication in Canada**

* Canadian courts have traditionally followed the English approach, as set out in ***R. v. Beard* (1920)**
* Rules were modified in ***R. v. Daviault* [1994 SCC]** which held that there might be circumstances in which (extreme) intoxication could operate as a **complete defence** for **general intent** offences.
* Parliament then responded to the ***Daviault*** decision by amending the *Code*, resulting in **Section 33.1:** intoxication **cannot** be a defence to a general intent crime in the context of **assault.**

**Basic rules** set out in ***DDP. v. Beard* (1920):**

**(1)** Intoxication could be a ground for an insanity defence if it produced a **disease of the mind.**

* Ask whether the accused is suffering from a mental disorder as defined in **Section 16**.
* If Section 16 does **not** apply (the accused is not suffering from a disease of the mind), the Court should then consider whether **Section 33.1** applies.

***R. v. Bouchard-Lebrun* [2011]** (*assaulted-victim-after-taking-ecstasy*)

**INTOXICATION CAN BE A DEFENCE IF IT PREVENTED THE ACCUSED FROM FORMING THE ACTUAL SPECIFIC INTENT FOR THE OFFENCE.** *BL + friend purchased + consumed ecstasy pills. Went to house of victim (L) with intention of assaulting him. In the course of attacking L, D’s neighbor came + they brutally assaulted him too. L suffered serious + permanent injuries. B-L was charged with 2 counts of aggravated assault.* ***Defence:*** *Argued that at the time of the assault, B-L was in a psychotic, delusional state brought on by ecstasy pills.* ***Did the psychotic state constitute a disease of the mind for the purposes of the Code?*** Court used ***R. v. Stone* (1999):** distinguishes between **internal** + **external** factors when determining whether a person’s mental state could be said to be a disease of the mind. Concluded that B-L’s condition was caused by external factors that were transitory, and as a result **rejected the defence**.

**(2)** Evidence of drunkenness which renders the accused **incapable of forming the specific intent** essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent.

* Where the crime is one of **specific intent**, then intoxication can act as a defence.
* Intoxication can never be a defence to a crime of general intent.
* Where the accused succeeds in raising the defence of intoxication in the context of a **specific intent** crime, the effect will be to reduce the charge (**partial defence**)
* Ask: ***Is the crime one of general or specific intent?***
  + **General intent:** Intent to do the prohibited act. ***R v George:*** intention as applied to acts **apart** from their purposes
  + **Specific intent:** Intent to bring about prohibited consequences. ***R v George:*** intention as applied to acts considered **in relation** to their purposes
  + ***R. v. Bernard* [1988]:** He who kills intending to kill or cause bodily harm is guilty of **murder**, whereas he who has killed by the same act without such intent is convicted of **manslaughter**

***R v George* [1960]** (*intoxicated-assaulted-man-stole-money*)

**ONLY INTOXICATION TO THE POINT OF INSANITY WILL NEGATE MENS REA ALTOGETHER IN CASES INVOLVING ONLY GENERAL INTENT.** *George tried to sell a fur to Mr. A but the man declined. Later the same night, when he was very drunk, he came back to the house + assaulted the man, stealing $22. He was charged with robbery. Stated that he was very drunk + did not remember much about the incident, but he did remember hitting someone, remembered the house being the same one that he had been in earlier that day.* ***Should the courts substitute the offence of common assault? Does drunkenness negate mens rea?* Held:** Distinguishes between crimes of general vs specific intent. Substituted charge of common assault.

***R v Bernard* [SCC 1988]** (*Raped-victim-while-intoxicated*)

**INTOXICATION IS NOT A DEFENSE TO CRIMES OF GENERAL INTENT, AND SEXUAL ASSAULT IS A CRIME OF GENERAL INTENT.** B raped + punched victim. Raised defence of drunkenness + said when he realized what he was doing he “got off” her. ***Is sexual assault causing bodily harm an offence of general or specific intent? Can self-induced drunkenness be used as a defence to offences of general intent?*** **Held:** Sexual assault causing bodily harm is an offence of **general intent,** to which drunkenness cannot apply as a defence.

|  |  |
| --- | --- |
| **Examples of general intent crimes:** | **Examples of specific intent crimes:** |
| * + Manslaughter   + Assault   + Assault causing bodily harm   + Aggravated assault   + Sexual assault   + Pointing a firearm   + Impaired driving   + Damage to property | * + Murder   + Assault with intent to resist arrest   + Touching a child for a sexual purpose   + Theft   + Breaking and entering with intent to commit an indictable offence   + Attempting to commit a criminal offence |

* If the defence can raise a reasonable doubt as to the accused’s capacity to form the required specific intent, then they must be acquitted.
* While capacity and intent may be related, it is possible to envisage cases where evidence which falls short of establishing that the **accused lacked the capacity to form intent**, may still leave the jury with a reasonable doubt that, when the offence was committed, the accused in fact **foresaw the likelihood of death.**” (***R v Lemky* (1996)**)
* **If there is evidence of specific intent + lack of capacity, courts will follow specific intent evidence and deny intoxication defence**
* ***R. v. Robinson* (1996):** Key question when considering the second rule under ***Beard***is whether the Crown has satisfied [the jury] beyond a reasonable doubt that the accused had the requisite intent
* ***R. v. Daley* (2007):** Considered whether a literal interpretation of the second rule in ***Beard*** amounted to a violation of **Sections 7 and 11(d)** of the *Charter.* **Held:** Yes; jury **could convict** an accused where they had the capacity to form the specific intent (despite the intoxication), **even though there was evidence that they didn’t in fact have the intent.**

**(3)** Evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts

* If the accused cannot prove that the **intoxication prevented him or her from forming the specific intent** required, then there will be no defence (even if the intoxication prevented him or her from controlling their actions). **Lack of control** not a defence if specific intent was present.

***R v Daviault* [1994 SCC]** (*raped-old-lady-no-memory-shitfaced*)

**IF THE ACCUSED CAN ESTABLISH ON A BALANCE OF PROBABILITIES THAT THEY WERE IN A STATE OF EXTREME INTOXICATION AKIN TO AUTOMATISM/INSANITY, THIS IS SUFFICIENT TO RAISE A REASONABLE DOUBT AS TO THE MENS REA FOR A GENERAL INTENT CRIME.** *D was charged with sexual assault of a 65-year old woman, who was confined to a wheelchair due to partial paralysis. On the day of the assault, D consumed 7-8 beers + 35 ounces of brandy in the evening. D claimed that he had no memory beyond drinking the brandy, and that he could not recall any events relating to the alleged assault. At trial, a pharmacologist testified that D had consumed enough alcohol to cause death (or coma) in an ordinary person. However, he suggested that because D was an alcoholic, his tolerance to alcohol may have been higher. Pharmacologist also testified that given the level of alcohol in D’s blood, he may have been in a* ***state of dissociation*** *at the time of the alleged sexual assault.* **Held:** Majority agreed that a strict application of the second ***Beard*** rule amounted to a violation of **Sections 7 + 11(d).** Intoxication could be a **defence to a general intent crime** where there was evidence that it was so extreme as to put the accused into a “state akin to **automatism.” The substituted *mens rea* of an intention to become drunk cannot establish the *mens rea* to commit the assault.** Also leads to **voluntariness** issues. \*This is only available in **rare** cases.

Parliamentary response to ***Daviault***: Amended the *Code* to add **Section 33.1** – with the result that **intoxication cannot be a defence to a general intent crime in the context of assault**.

**33.1** **(1)** It is not a defence to an offence referred to in subsection (3) that the accused, by reason of **self-induced intoxication**, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2).

**(2)** … A person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to **interfere with the bodily integrity** of another person.

**Summarized in *Bouchard-Lebrun* (2011):**

This provision applies where three conditions are met:

(1) the accused was **intoxicated** at the material time;

(2) the intoxication was **self-induced**; and

(3) the accused departed from the standard of reasonable care generally recognized in Canadian society by interfering or threatening to **interfere with the bodily integrity of another**

\*\*Where these three things are proved, it is not a defence that the accused lacked the general intent or the voluntariness required to commit the offence.

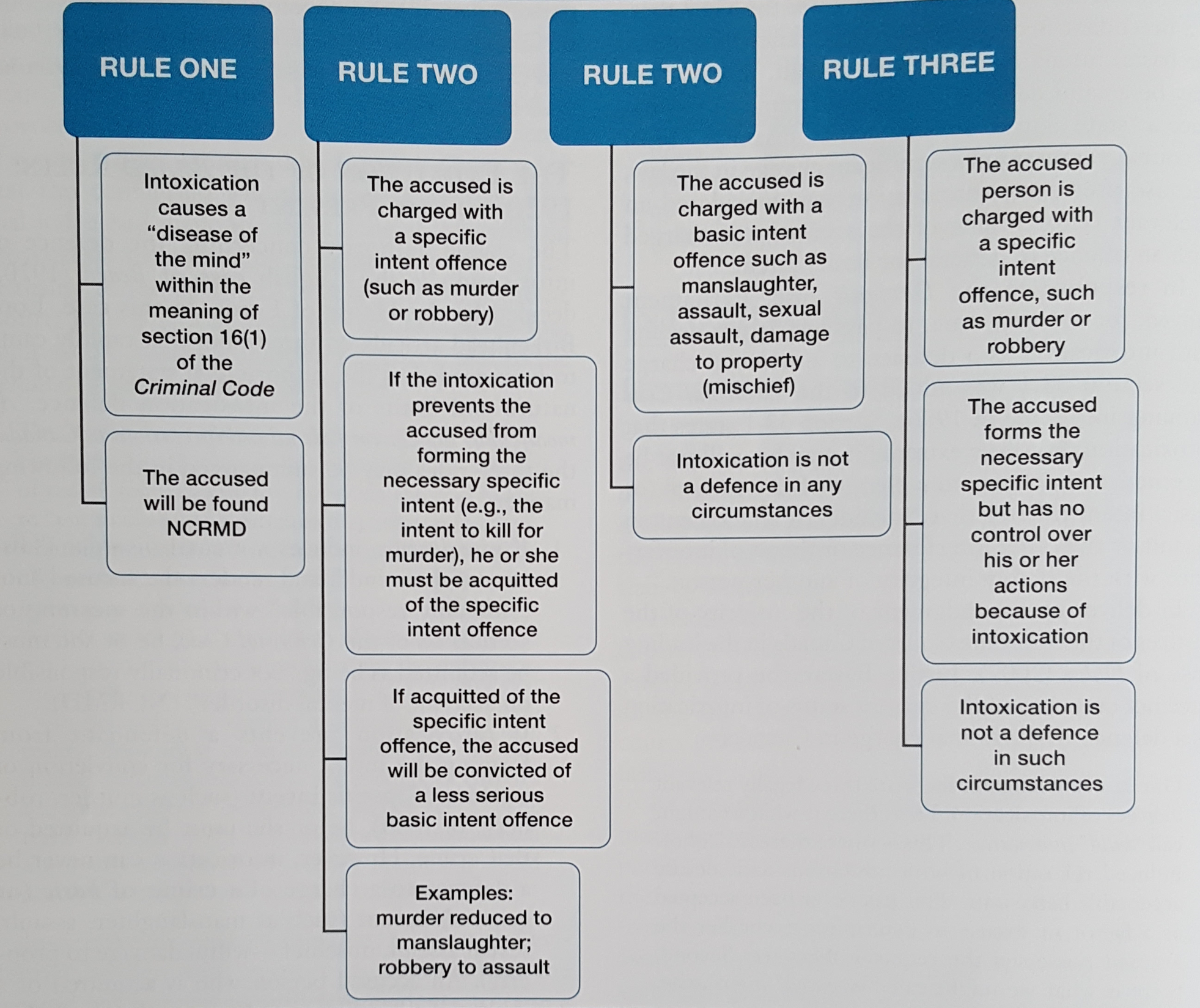
Note: The provision **does not apply to cases of involuntary intoxication** leading to a state akin to automatism or insanity – in those cases, the accused will have a **complete defence.**

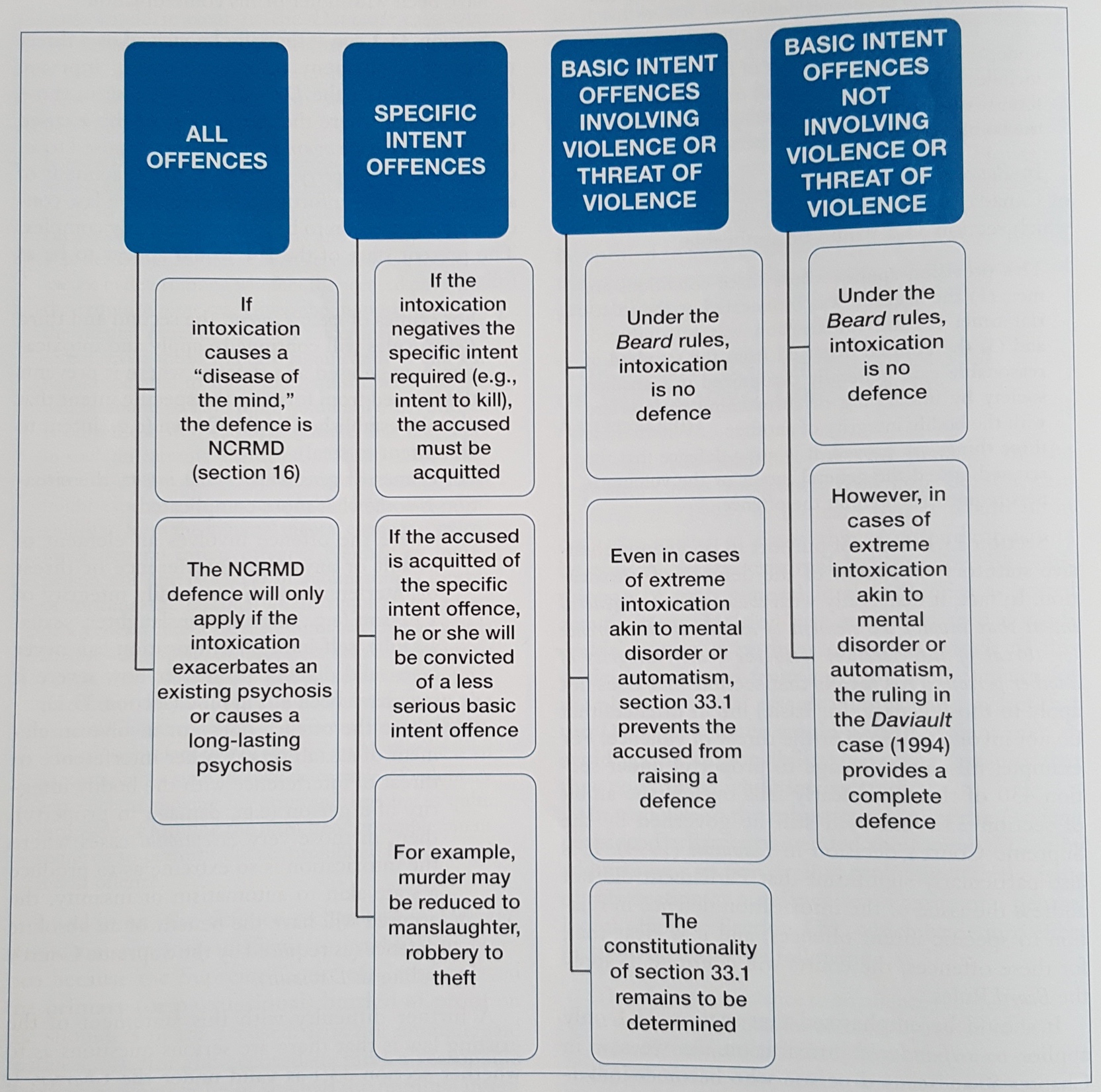
**Summary of the present law on intoxication (Verdun-Jones)**

**(1)** For crimes of **specific intent**, the second and third ***Beard*** Rules apply and intoxication may be used as a defence where it prevents the accused from forming the required specific intent.

**(2)** For crimes of **general intent**, where the offence involves an element of **assaul**t or any other interference or threat of interference with the bodily integrity of a person, **self-induced intoxication is not a valid defence** no matter how severe it may have been at the time (**Section 33.1).**

**But:** In all other cases - where the offence does not involve an element of assault or any other interference with the bodily integrity of a person – if the intoxication is so extreme as to produce a state akin to **automatism or insanity**, the accused will have the benefit of an **absolute defence** (***Daviault***).





Involuntary Intoxication

***R v Chaulk* (2007)** (*took-LSD-instead-of-caffeine-pill*)

**INTOXICATION IS SELF-INDUCED WHEN ONE VOLUNTARILY CONSUMES A SUBSTANCE WHICH THEY KNOW (OR OUGHT TO KNOW) WAS AN INTOXICANT AND THE RISK OF INTOXICATION SHOULD HAVE BEEN CONTEMPLATED.** *C smashed through victim’s neighbor’s (M) door in a drug-induced rampage + tried to get to her, then smashed M’s property, threatened to kill his fam, then stripped naked. M subdued him until police arrived. C had consumed 8 beers, a few puffs of marijuana, + taken a "wake-up pill" that he claimed to believe was a caffeine pill, but was a much more powerful drug (probably LSD).* ***What does "self-induced intoxication" in S. 33.1 mean?* Held:** New trial ordered (see ratio).

MENTAL DISORDER

**Two main defences** associated with **mental disorder** in Canadian criminal law:

**(1)** **Not criminally responsible on account of mental disorder** (NCRMD); and

**(2)** **Automatism**

These defences apply where there is evidence that the accused suffered from some form of severe mental impairment or incapacity.

**Basic distinction between the defences:**

**NCRMD:** Applies in situations where the accused **does not have the capacity to appreciate the nature and quality of the act or omission** (or to know that it is morally wrong). (**Section 16**) **If defence succeeds:** Accused is held to be NCRMD, and may be held in custody in a psychiatric facility / placed under community supervision if considered to be a threat to the public.

**Automatism:** Applies in situations where the accused acts **involuntarily** as a result of some t**emporary mental** i**mpairmen**t (such as a blow to the head). Common law defence; **If successful:** Accused is **acquitted** on the grounds that the *mens rea* of the offence is not made out.

**Section 16**

**(1)** No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

**Presumption**

**(2)** Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.

**Burden of proof**

**(3)** The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue (the **accused**).

Both the NCRMD defence + automatism have to be established on a **balance of probabilities**. This constitutes a violation of **Section 11(d) of the *Charter*** (presumption of innocence) because the accused can in principle be convicted even if there is a reasonable doubt about guilt. **However:** SCC has consistently held that this limit on the presumption of innocence is **reasonable** (***R. v. Chaulk* [1990]**).

Fitness to Stand Trial

Issue arises in situations where the accused – who was sane at the time the offence was committed – subsequently suffers from a mental disorder that would make it impossible for him or her to have a fair trial.

**Definition of unfit to stand trial is set out in Section 2:**

***unfit to stand trial*** means unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to

**(a)** understand the nature or object of the proceedings,

**(b)** understand the possible consequences of the proceedings, or

**(c)** communicate with counsel; (*inaptitude à subir son procès*)

**Key points in relation to fitness to stand trial:**

**(1)** Accused is **presumed** to be fit to stand trial.

**(2)** Unfitness must be proved on a **balance of probabilities** as per **Section 672.22** + **672.23**

**(3)** The standard of fitness is a **legal one.** Focuses on the fairness of the trial process and the ability of the accused to take part.

**(4)** Not necessary for the accused to be able to act in his or her **best interests** – ***R. v. Whittle* (1994):**

**Held that the test for fitness to stand trial “is quite different” from the definition of mental disorder in S 16.** The idea of fitness **focuses** on the narrow question of whether the accused is able to understand the process + communicate with counsel. It is not required that the accused be “capable of exercising analytical reasoning” in accepting counsel’s advice or making a decision that serves their interests.

**(5)** Accused may still be fit to stand trial even if they are not able to give testimony and do not remember the crime.

**(6)** If the accused is found unfit to stand trial, under **S 672.33** the Crown is required to establish a *prima facie* case against the accused **every two years** until the accused is either found fit to stand trial or is acquitted. Under **S 672.851,** the court is able to stay proceedings in cases where the accused is not likely to ever be fit to stand trial, and does not pose a significant threat to public safety.

***R. v. Whittle* (1994)** (operating mind test)

**Held that the test for fitness to stand trial “is quite different” from the definition of mental disorder in Section 16. Key:** The idea of fitness **focuses** on the narrow question of whether the accused is able to understand the process + communicate with counsel. It is not required that the accused be “capable of exercising analytical reasoning” in accepting counsel’s advice or making a decision that serves their interests.

Raising the Defence of Mental Disorder

Traditionally, in Canada the courts have allowed the Crown to raise the mental disorder offence (this is not generally allowed in other Common Law countries like Britain and the US). **Policy Rationale:** Society (as represented by the Crown) has an interest in ensuring that the mentally ill are not convicted of crimes, and so prosecution should be able to raise the issue even if the accused chooses not to.

**Counter-Arguments**

**(1)**  Crown could **strengthen a weak case** by presenting evidence of mental disorder (may be prejudicial to the accused if the defence is rejected);

**(2)** Accused could be subject to **indefinite detention** if the defence succeeds (and they are found not guilty on grounds of mental disorder); and

**(3**) Deprives the accused of the decision to argue that they are innocent of the crime.

***R. v. Swain* [1991]** (*attacked-family-bizzarely-Crown-raised-MD-defence*)

**CROWN MAY RAISE THE ISSUE OF MENTAL DISORDER INDEPENDENTLY OF THE ACCUSED ONLY AFTER THE TRIER OF FACT HAS PROVEN THE OFFENCE AND BEFORE A CONVICTION IS ENTERED.** *Swain violently attacking wife + children in bizarre manner, yelling about spirits and believed his wife + kids were being attacked by devil. Charged with aggravated assault.* ***Can the Crown raise evidence of insanity over and above the accused’s wishes and if so does this interfere with the accused’s control over his or her own defence?*** Court began by noting that the CL practice (in Canada) of allowing the Crown to raise the mental disorder defence violated **S 7** of the *Charter* because it deprived the accused of the ability to **control his or her defence**. BUT: SEE RATIO.

**Result (*R v Swain*):**

**(1)** Crown can only raise the mental disorder defence **after** the accused has been found **guilty**.

**(2)** Exception arises where the accused has raised an issue over his or her **capacity**.

**For example:** If accused raises issue of automatism, then it is open to the Crown to raise the issue of mental disorder (according to the definition in **Section 16)**.

**In addition:**

**(1)** The accused may raise the defence of NCRMD at **any time**, including after the verdict of guilty and before conviction is entered.

**(2)** Note that Justice Wilson – despite concurring with the result of the case – stated that allowing the Crown to raise mental disorder during the course of the trial still infringes on the accused’s right to control his defence. Also argued that this infringes the equality rights of the mentally disabled.

***R. v. Chaulk* [1990 SCC] (*burden of proof issues*)**

**THE “WRONG’ THAT AN ACCUSED MUST BE ABLE TO APPRECIATE IS A MORAL WRONG.** *C+M broke into an individual's house, plundered it, then stabbed + bludgeoned him to death. Evidence at trial that the pair were psychotic & thought that they were going to rule the world - killing the victim did not matter as he was a "loser". They knew that it was contrary to the law to kill people, but they thought that they were above the law.* ***Whether Sections 16(2) + 16(3) violate the presumption of innocence under Section 11(d) of the Charter.*** According to **Section 16**, accused is presumed to not suffer from a mental disorder, and if the issue is raise the accused must prove disorder on a balance of probabilities. Violates the presumption of innocence b/c it allows a factor which is essential for guilt to be **presumed rather than proven.** **However:** This displacement of the burden is demonstrably justified under **Section 1.** The principle at stake in **Section 16** is **not innocence**, but the proposition that the attribution of criminal responsibility and punishment is morally and legally justifiable only for those who have the **capacity for reason.**

**Note:** The defence of NCRMD will only be put to the jury is it has an “**air of reality**” to it (regardless of

whether it is raised by the defence or the Crown). (***R v Chaulk***)

Consequence of the Defence

**Step 1 – Disposition Hearing:** If the accused is found NCRMD, then a disposition hearing – composed of a judge and two mental health professionals – is required to be held “as soon as is practicable but not later than 40 days after the verdict was rendered” (**Section 672.47(1)).**

**Step 2 – Assessment and discharge:** If the review board concludes that “the accused is not a significant threat to the safety of the public”, then they will be discharged.

* ***What constitutes a significant risk? Winko v. British Columbia* [1999]: McLachlin:** Part XX.1 of the *Criminal Code* protects the liberty, security of the person, + equality interests of an accused who is not criminally responsible by requiring an **absolute discharge** unless there is a **significant risk to the safety** of the public. Dispositions are set out in **s. 672.54** and require **12 monthly review** for anything other than an absolute discharge. Not criminally responsible is not a finding that an accused is inherently dangerous or poses a significant threat to society. **Two objectives** – providing treatment to an accused and assessing their risk (if any) to society – are embodied within the provision.

***Winko v BC (Forensic Psychiatric Institute)* SCC 1999**

*W suffered from a mental illness which included hearing voices. In 1983, he was arrested for attacking pedestrians with a knife. Found NCRMD + was institutionalized. In 1995, the institute's review board directed W to be given a conditional discharge. Winko appealed the ruling, asking instead for absolute discharge.* ***Was S. 672.54 of the Criminal Code which granted the review board the power to give discharges a violation of section 7 + 15 of the Charter?* Held:** No; not vague/overbreadth/improper onus.

**Step 3 – Continued Detention / Conditions:** If the review board decides **against an absolute discharge**, then according to **S 672.54** they are required to make a disposition that – taking into “consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused” – is “the least onerous/ restrictive to the accused.”

**In practice**: This can mean placing the accused in continued detention at a mental health institution / hospital, or releasing them subject to a series of conditions and restrictions.

* Continued detention (or imposed conditions) must be **reviewed on a yearly basis** by the review board – **Section 672.81(1)**
* Detention and treatment of the accused is the responsibility of **provincial authorities.**
* Although the review board cannot order treatment for the accused, it does have the power to order provincial authorities to provide an assessment and **treatment plan.**

Background of the Defence

Current approach in Canada has its origins in the rules developed in ***M’Naghten:*** The accused will have a defence of insanity where it can be proved that “at the time of the committing of the act, the party accused was labouring under such a defect of reason, from **disease of the mind**, as not to know the **nature + quality of the act** he was doing, or, if he did know it, that he did not know what he was doing was **wrong**.”

* Rules focus on the **cognitive/ reasoning** abilities of the accused, and essentially exclude any consideration of **emotional or volitional factors**.

**16** **(1)** No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person **incapable of appreciating the nature and quality of the act** or omission or of **knowing that it was wrong.**

**(2)** Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.

**Three key differences** between the original ***M’Naghten rules***and the version contained in **Section 16:**

**(1)** **Section 16** substitutes the word “appreciate” for “know” in the framing of the rule:

**(2)** **Section 16** refers to the ***capacity*** of the accused to appreciate the nature and quality of their actions, while the original ***M’Naghten*** rulesrefer to **knowledge**

**(3) Section 16** was amended by Parliament in 1991, with reference to insanity being replaced by the term “mental disorder.”

In Canada, the defence is referred to as the **not criminally responsible on account of mental disorder (NCRMD) defence.**

Structure of the Defence

**Three basic steps before the defence can be established:** (confirmed in ***R. v. Bouchard-LeBrun* (2011)):**

**(1)** Accused must establish that, at the time of the alleged offence, they were subject to a **mental disorder** as defined in **Section 2** of the *Code*.

The question of whether a particular mental condition qualifies as a mental disorder under the Code is a **question of law** for the court to decide, and may be determined by **policy considerations** as well as medical definitions or understandings of mental illness.

* In Canada, the courts have stressed that the **internal / external distinction** is not a determinative factor, and that danger of recurrence (typically associated with disturbances that have an “internal” cause) is only **one of many factors** that should be taken into account when deciding if condition in question is a mental disorder under **Section 16 .** Confirmed in ***R. v. Parks* (1992)**
* ***R. v. Stone* [1999]:** Factors that can be considered in determining whether a disturbance of the mind is a mental disorder include:
  + Evidence of continuing danger
  + Recurring likelihood of violence
  + Internal cause
  + Psychiatric history of accused

SCC provided a definition of disease of the mind in ***R. v. Cooper* (1979)**: Embraces any illness, disorder or abnormal condition which **impairs the human mind and its functioning**, excluding, however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion. The

phrase “disease of the mind” should be given a **broad and liberal legal construction**.

* Although “disease of the mind” includes a medical component, deciding whether a given condition fits within this phrase is ultimately a **question of law** determined by the **trier of fact** (***Cooper***)

Examples of conditions that have been recognised as **mental disorders** for the purposes of **Section 16:**

* Psychopathic personalities – ***R. v. Simpson* (1977)**
* Personality disorders – ***R. v. Rabey* (1977)**
* Brain damage, including fetal alcohol spectrum disorder – ***R. v. C.P.F.* (2006)**
* Severe mental disabilities – ***R. v. Revelle* (1979)**
* Delirium tremens produced by chronic alcoholism (where the condition is permanent and not simply the product of transitory intoxication) – ***R. v. Malcolm* (1989)**

***What about the question of self-induced states of mental disorder?***

**General Rule:** Excluded according to the decision in ***R. v. Cooper* (1979)**

**However:** Although the rule was confirmed in ***Bouchard-LeBrun* (2012)** – which held that the defence of NCRMD was not available where the accused is suffering from transitory psychosis as a result of involuntarily ingesting drugs – the court appears to have left open the possibility of the defence **where the ingestion of drugs exacerbates** **a pre-existing condition** and results in a form of psychosis that continues for a **significant period** (typically months rather than days).

***Bouchard-LeBrun* (2012)** (*unanticipated-toxic-psychosis-from-drug-use*)

**DEFENCE OF NCRMD NOT AVAILALE FOR FORMS OF TRANSITORY PSYCHOSIS AS A RESULT OF DRUG USE.** *A suffered “toxic psychosis” as a result of self-induced intoxication + brutally assaulted 2 people. The drug consumed by A caused “a complete dissociation betw/ subjective perceptions + objective reality.” A stated that this* ***effect was unanticipated****. A had never previously experienced toxic psychosis, + was not addicted to any substance. A argued that his toxic psychosis (and all toxic psychosis) must emerge from an underlying disease of the mind and not simply from intoxication*. **Held:** A malfunctioning of the mind that results exclusively from self-induced intoxication cannot be considered a disease of the mind in the legal sense, since it is **not a product of the individual’s inherent psychological makeup**. Toxic psychosis seems to be nothing more than an extreme symptom of the accused person’s state of **self-induced intoxication.** Such a state cannot justify exempting an accused from criminal responsibility.

**In order to successfully raise the defence of NCRMD, A must**

* Prove on a balance of probabilities that he or she was suffering from a mental disorder in the legal sense at the time of the events; and
* Prove on a balance of probabilities that due to the mental condition, A was incapable of knowing that the act or omission was wrong (or of understanding the nature and quality of his or her acts).

Certain types of self-induced psychosis may provide the basis for a defence of NCRMD, including:

* Psychosis caused by ingestion of a drug(s) that lasts for a significant period;
* Ingestion of a drug(s) exacerbates a pre-existing psychotic condition; and
* Psychosis caused by withdrawal from a drug (e.g. alcohol).

\*\***If the accused is able to pass this first step, then must establish EITHER:**

**(2)** That they lacked the **capacity to appreciate the nature and quality** of the act or omission that forms the basis of the charge against them; **OR**

The ability to **appreciate** the nature + quality of an act **involves more than mere knowledge** or cognition that the act is being committed. It also includes **capacity** to measure + foresee the **consequences** of the conduct

* The defence does **not** apply to an accused who has the necessary understanding of the nature, character + consequences of the act, but merely **lacks appropriate feelings**/emotions for the victim or lacks feelings of remorse or guilt for what he has done, even though such lack of feeling stems from “disease of the mind.” (***R. v. Simpson* (1977)**)

***R. v. Abbey* [1982]** (*incapable-of-appreciating-legal-consequences-irrelevant*)

**THE CONSEQUENCES THAT THE ACCUSED MUST BE CAPABLE OF APPRECIATING ARE THE PHYSICAL CONSEQUENCES OF THE ACT. PERCEPTION ABOUT LEGAL CONSEQUENCES IS IRRELEVANT.** *Accused was charged with importing cocaine and possession of cocaine for the purpose of trafficking. Psychiatrists called by both parties agreed that A knew what he was doing + that it was wrong. Differed as to whether he was capable of* ***appreciating*** *the nature + quality of the act. A believed that if he was caught he would not be punished.* **HELD:** A delusion about legal consequences does not render A incapable of knowing the nature and quality of his or her act.

**(3)** That they lacked the **capacity to know the act or omission was wrong.**

***Does Section 16 refer to a legal wrong or a moral wrong?***

***R. v. Chaulk* (1990):** The word wrong in **Section 16(1)** means wrong according to the **ordinary moral standards of reasonable members of society.** It is not enough to show that A understood that the act was contrary to law. The question is “whether an accused was rendered incapable, by the fact of his mental disorder, of knowing that the act committed was one that he ought not have done.”

***When is the insanity defence NOT available?***

* Insanity defence not available to a psychopath or other person following a **deviant moral code** if that person is “capable of knowing that his or her acts are **wrong in the eyes of society**, and despite such knowledge, chooses to commit them.” ***R. v. Oommen* (1994)**
* Insanity defence not available if – even though the accused was labouring under a delusion – they were still capable of knowing that the act in the given circumstances “would have been **morally condemned** by **reasonable** members of society.” ***R. v. Ratti* (1991)**
* Insanity defence not available where accused knows that killing the victim is wrong, but does so in the **deluded belief that killing them would save the world**. ***R. v. Baker* [2010]**

NCRMD defence will **not** be available under the second limb of **Section 16(1)** if the accused – who understands society’s general views about the difference between right and wrong – chooses to do the wrong thing due to a **delusion**.

***R. v. Oommen* [1994]** (*paranoid-delusion-of-conspiracy-to-kill-him*)

**THE INQUIRY FOCUSES NOT ON A GENERAL CAPACITY TO KNOW RIGHT FROM WRONG BUT RATHER ON THE ABILITY TO KNOW THAT A PARTICULAR ACT WAS WRONG UNDER THE CIRCUMSTANCES.** *O suffered from paranoid delusion believing the woman he repeatedly shot was part of a conspiracy that was coming into his house to kill him.* **Held:** On the evidence, the accused possessed general capacity to distinguish right from wrong, but delusions **deprived him of the capacity to know that killing the victim in particular was wrong** – in fact believed action was necessary + justified. **Held:** Acwuitted. The **Section 16** enquiry focuses on the ability to know that **a** **particular act was wrong** in the circumstances and at the time that the act is committed. The crux of the inquiry is whether the accused **lacks the capacity to rationally decide whether the act is right or wrong** and hence to make a rational choice about whether to do it or not.

***R v Landry* (1991 SCC)** (*believed-he-was-God-and-his-friend-was-Satan*)

*L charged with 1st-degree murder as a result of the killing of his friend. Evidence established that the accused had paranoid schizophrenia & over years believed his former friend was Satan and that he, the accused, was God. Believed it was necessary for him to kill the deceased so as to save the world from destruction.* **Held:** NCRMD – rendered **incapable** of knowing the act was **morally wrong** in the circumstances.

AUTOMATISM

At law, the term **automatism** refers to behaviour that is **unconscious or involuntary.**

***R. v. Rabey* (1977 SCC)** defined **automatism** as: Unconscious, involuntary behaviour, the state of a person who, though capable of action, is **not conscious of what he is doing**. It means an **unconscious involuntary act**, where the mind does not go with what is being done.

* ***R. v. Stone* [1999]**, the court held that the accused does not actually need to be **unconscious** to have the defence of automatism. Key is that the actions were **not voluntary.**

**Consequences** of the automatism defence are **complete acquittal *R. v. Bleta* (1964)**. If the accused presents evidence of automatism, it is then open to the Crown to counter with evidence that the cause of the automatism was a mental disorder (or some other factor).

**If cause of automatism is disease of the mind:**

**THEN:** Accused is **not criminally responsible by reason of mental disorder** (NCRMD) and subject to a disposition hearing.

**If cause of automatism is not a mental disorder:**

**THEN:** Accused must receive a **simple acquittal** as per the decision in ***R. v. Bleta* (1964)**

* ***R. v. Parks (1992):*** successful automatism defence amounts to a **repudiation of actus reus**

**Prior to 1992**: If the accused raised a defence of non-insane automatism, then the accused would be entitled to an acquittal if the evidence raised **a reasonable doubt as to whether they acted in a voluntary or conscious manner** (***R. v. Parks* (1992)**) Rationale for this approach was based on the idea that such evidence would raise a reasonable doubt as to whether the accused acted with the requisite **fault element** (including capacity to form any objective *mens rea*) or alternatively whether the *actus reus* was **voluntary / conscious**.

***R v Parks* (1992 SCC)** (*sleepwalking-killed-in-laws*) \***CHANGED AS OF *STONE***

**AUTOMATISM RESULTS IN AN ABSOLUTE ACQUITTAL.** *P attacked his parents-in-law when he was sleepwalking. He drove 23 kms to their house when he was sleepwalking + stabbed them in their sleep, killing his mother-in law + seriously injuring his father-in-law. No reasonable motive or mental conditions.* Acquitted. Once the defendant raises automatism, the burden is on the Crown to prove voluntariness.

Position changed as a result of the decision in ***R. v. Stone* (1999 SCC):** Before the court moves to consider a claim of non-mental disorder automatism, the accused must establish on a **balance of probabilities** that their conduct was **involuntary.**

**Roach** argues that there were **two main reasons** behind the shift:

**(1)** Court was concerned that automatism defence could be **faked** under the traditional approach – that is, jury could consider the question of automatism provided that the accused presented some evidence that raised a reasonable doubt as to voluntariness.

**(2)** Court wanted to bring burden of proof for automatism in line with extreme intoxication (***Daviault***) and NCRMD **(Section 16(1))** – that is, onus is on the accused to establish the defence on a balance of probabilities

***R. v. Stone*** also held that the new persuasive burden on the accused – to **prove automatism on a balance of probabilities** – also raised the **threshold** for judges with respect to whether to instruct the jury about the defence. In order to establish the **air of reality** threshold test, the accused must do **more** than simply assert involuntariness. Must also have **collaborating psychiatric evidence.**

***R. v. Stone***also lists a number of other factors that can beconsidered by the trial judge when deciding whether the **air of reality threshold** is met:

**(1)** **Severity** of any triggering stimulus

**(2)** **Corroborating evidence** of bystanders

**(3)** Evidence that the accused has entered into a state of **automatism in the past**

**(4)** Whether the victim was also an alleged **trigger** for the automatism

**(5)** Whether the crime can be explained **without reference to automatism.**

***R. v. Stone* (1999)** (*killed-wife-after-hours-of-insults-producing-automatistic-state*)

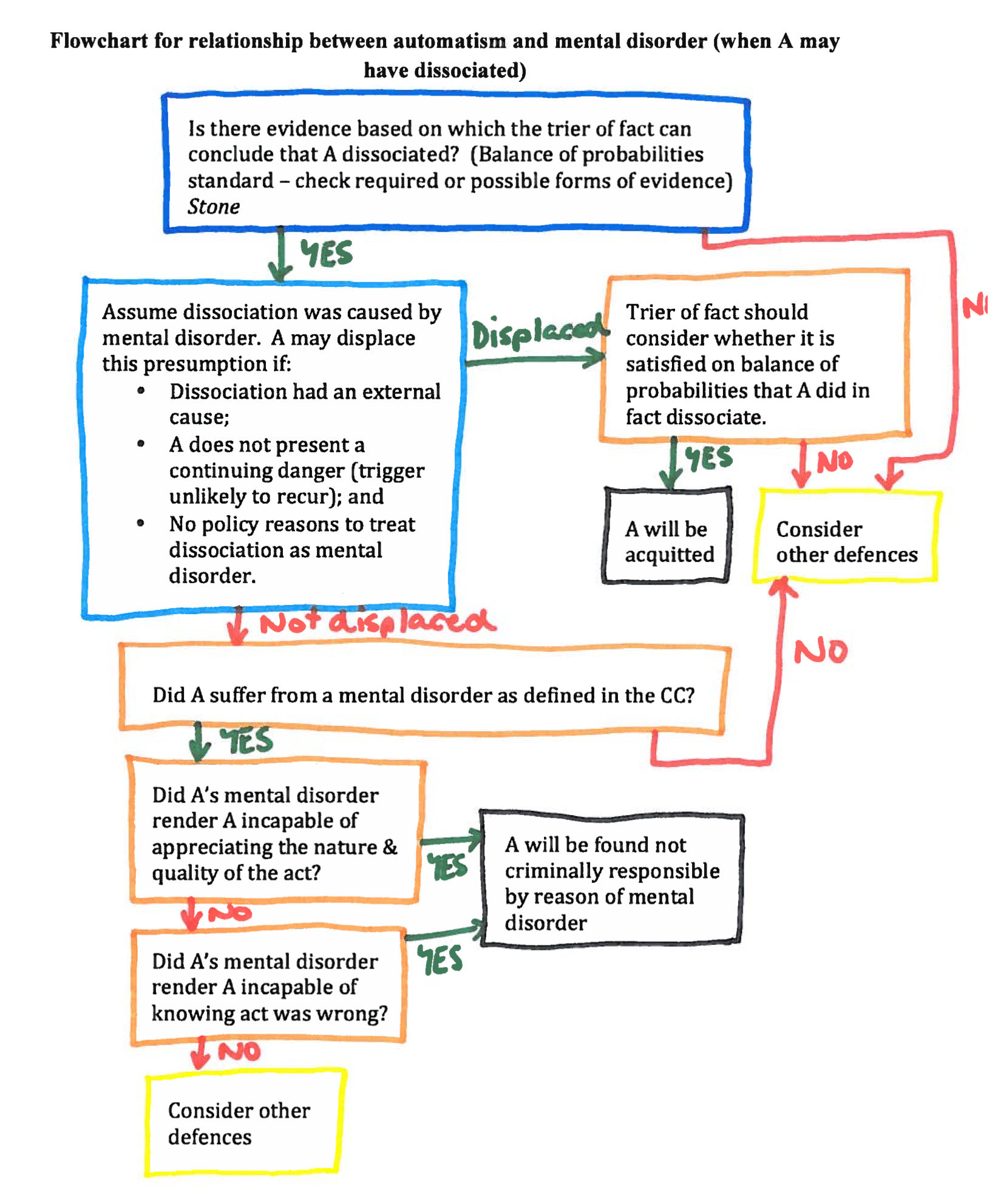
*Stone killed his wife after she had insulted him over a period of hours. Argued both automatism + mental disorder automatism.* *Claims that his wife’s words caused him to enter an automatistic state in which his actions were* ***involuntary***. Automatism is best defined as a **state of impaired consciousness in which an individual is capable of action but has no voluntary control over that action**. Automatism may stem from a disease of the mind, or it may not. The legal burden of proving automatism rests on the party who raises the issue, to a **standard of balance of probabilities.**  Question of whether to leave mental disorder or non-mental disorder automatism with the jury depends on the application of the definition of a disease of the mind. **Held:** A normal person would **not** have entered into an automatistic state from this.

**Key points** from ***Stone:***

* The defence bears the legal burden of proving involuntariness on a **balance of probabilities** to the trier of fact. This is justified under **Section 1** as automatism is **easily feigned** & the relevant knowledge rests with the accused. Question for the trial judge is whether the defence has raised evidence on which a properly instructed jury could find that the appellant acted **involuntarily** on a balance of probabilities. The trial judge should consider factors such as **motive** & **corroborating** evidence in deciding whether this standard has been met.
* The trial judge must decide which form of automatism to leave with the trier of fact. The trial judge must decide which mental conditions are included within the term and whether there is any **evidence** that the accused suffers from an **abnormal mental condition**.
* In deciding whether the accused suffered from a disease of the mind, the judge may have regard to:
  + **(i)** Whether the normal person might have reacted to the alleged trigger by entering an automatistic state. In the case of psychological blow automatism (such as this one), an **extremely shocking trigger** must be needed to prompt automatism in an ordinary person.
  + **(ii)** **Policy** considerations also dictate attention to the question of whether A presents a continuing danger. If the danger is likely to be a continuing one, this supports a **preference for Section 16**. 🡪 Ask whether the trigger would recur, not the automatism

**Interesting implication of the majority decision:**

***R. v. Luedecke* (2008):** After ***Stone*,** the trial judge must **begin from the premise** that the automatism is caused by a disease of the mind & look to the evidence to determine whether it convinces him or her that the condition is not a ‘disease of the mind.’ ***Stone*** overrules ***Parks*** in this regard. Ie. tends to keep sleepwalking cases in mental disorder automatism. Consider a situation where the defence produces evidence that shows that the accused was – on a balance of probabilities – suffering from dissociation. **Trial judge is obliged to presume that the dissociation was the result of a mental disorder** (unless there are facts that displace the presumption). If the court concludes that the dissociation was **not** the result of a mental disorder, court is not able to “return to the start” and consider “non-insane” automatism.



**Main categories of automatism:**

**(1)** Automatism caused by “normal” conditions (such as sleepwalking and hypnosis);

**(2)** Automatism caused by external trauma (such as blows to the head);

**(3)** Automatism involuntarily induced by alcohol or other drugs;

**(4)** Automatism voluntarily self-induced by alcohol or other drugs; and

**(5)** Automatism caused by a mental disorder.

**Note: Only categories (1) – (3) can constitute the non-insane automatism defence.**

**(1) Automatism caused by “normal” conditions (such as sleepwalking and hypnosis)**

***R. v. Parks* (1992):** Sleepwalking is a normal condition and renders a person “unable to think or perform voluntary acts.” Court rejected the argument that sleepwalking was a form of mental disorder, and held that it is a normal condition that can provide the basis for the automatism defence (and a complete acquittal). As a result of ***Stone***, the decision in ***R. v. Luedecke*** held that **sleepwalking** in this case was a **mental disorder**.

**(2) Automatism caused by external trauma (such as blows to the head)**

***R. v. Rabey (1977 SCC):*** Held that an automatic state brought on by an **emotional or physical blow** could provide the basis for a defence of non-insane automatism. **BUT** event in question must be “extraordinary” one that might reasonably be presumed to effect the average normal person ie. being in a serious accident or seeing a loved one killed. Being exposed to “ordinary stresses + disappointments of life” will not be enough.

* Likelihood of **recurrence of dissociation** must be **remote.**
* Noted that in the case of a physical blow, the question is **whether the accused went into a dissociative state** (not whether a reasonable person exposed to the same blow would have done so).

**(3) Automatism involuntarily induced by alcohol or other drugs**

If the accused falls into a state of automatism as a result of **involuntary intoxication** – or from being drugged – then they are entitled to the defence of automatism. **NOT** available where there is evidence that the accused had **foresight** of impairment or had taken the alcohol / drug **voluntarily.**

**(4) Automatism voluntarily self-induced by alcohol or other drugs.**

**Rule:** If the accused falls into a state of automatism as a result of **voluntary intoxication** – or from taking drugs – then they will **not** be entitled to the defence of automatism ***R v Revelle* (1979)**

***Bouchard-Lebrun:*** SCC held that there was **no mental disorder** where the accused took drugs resulting in a toxic psychosis (& committed assault in part because of religious delusions).

**(5) Automatism caused by a mental disorder**

Where the automatism is **caused by a mental disorder,** the accused will **not** be entitled to the defence of automatism, but instead **Section 16** will apply.

SELF-DEFENCE

**Self-defence is a right. Key points to note about the operation self-defence:**

1. Self-defence is **not** a repudiation of the *actus reus* or *mens rea* of the crime, but rather a **justification** that provides a **complete defence** (and leads to acquittal).
2. Accused does **not** have to establish the defence on a balance of probabilities (unlike for mental disorder, automatism, intoxication), but rather the Crown must **disprove** the defence as part of its burden to prove guilt beyond a reasonable doubt. If jury has a reasonable doubt the accused acted in self-defence, then it **must acquit**.
3. Trial judge does **not** have to instruct the jury in all cases where self-defence is raised. (***R. v. Cinous* (2002 SCC)**)held that the standard **air of reality test** applies.Trial judge must be satisfied that a properly instructed jury acting reasonably could acquit on the basis of the evidence**.**
   1. ***R. v. Cinous***:there was no evidence that the accused acted in self-defence (when he shot the victim in the back of the head), and so the trial judge should not have instructed the jury to consider the defence.

Section 34(1)

A person is not guilty of an offence if

(a) they believe on **reasonable grounds** that force is being used against them or another person or that a threat of force is being made against them or another person;

(b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and

(c) the act committed is reasonable in the circumstances.

**Three key requirements under Section 34(1):**

For a claim of self-defence to be successful, the accused must raise a **reasonable** doubt that they:

1. **Subjectively believed on reasonable grounds that force (or the threat of force) was being used under S 34(1)(a)**; 🡪 **INCORPORATES A SUBJECTIVE + OBJECTIVE COMPONENT** 
   * Begin by asking whether the accused **subjectively** believed they were being assaulted or threatened with an assault. **Then:** Ask whether there was an **objective** (**reasonable**) basis for the subjective belief (***R v Reilly,* 1984; *R v Cinous,* 2002**)
   * Can make a **subjective** mistake as to existence of threat/ force as long as it is **objectively reasonable** (***R v Berrigan,* 1998**)

***R v Berrigan*** (*cellphone-in-pocket-instead-of-perceived-gun*)

**CAN MAKE A SUBJECTIVE MISTAKE AS TO EXISTENCE OF THREAT AS LONG AS IT IS OBJECTIVELY REASONABLE.** *Accused stabbed the victim. Claimed he did so b/c he thought the victim was reaching for a gun (in fact, he was taking a cellphone out of his pocket).* **HELD:** Mistake was based on **reasonable grounds**, having heard that the victim had told Berrigan on 3 previous occasions that he carried a gun.

***R v Cinous* (2002 SCC)**

**MUST BE AIR OF REALITY TO SELF-DEFENCE (BOTH SUBJECTIVE + OBJECTIVE ELEMENTS).** *C supported himself with criminal acts esp. computer theft. Suspicious that the victim had stolen his revolver, and had heard rumours that the deceased + 3rd party intended to kill him. Several days after the revolver was stolen, the victim + 3rd party proposed that the accused join them in a theft. The accused said they behaved suspiciously. When the victim put on latex surgical gloves, the accused, thinking he was soon to be killed, shot the deceased in the back of the head at a service station where they had stopped to purchase windshield wiper fluid.* **Held:** No air of reality. Needs both subjective component and objective for all elements. It is not enough for an accused to establish a subjective conviction that he had no choice but to shoot – the accused must be able to point to an objectively **reasonable ground** for that belief. For **34(2)** to succeed, a jury would have to accept that the accused believed on reasonable grounds that his own safety/ survival depended on killing the victim at that moment.

**Other Points:**

* + - * 1. Includes **threat of force 🡪** Honest but reasonable mistake as to the existence of an assault is permitted ((***R. v. Petel* (1994)**)
        2. The accused is **not** required to wait until faced with an imminent attack before acting in self defence (***R v Lavallee,* 1990**)🡪 May be possible for a battered spouse to accurately predict the onset of violence before the first blow is struck, even if an outsider to the relationship cannot
        3. **History of the relationship between the parties** is relevant to the question of whether the accused had reasonable grounds to believe that he or she faced force or a threat of force – ***R. v. Lavalle* (1990)**
        4. **Imminence of the force** is also relevant to the question of whether the accused had **reasonable** grounds to believe they faced force or a threat of force – ***R. v. Cinous* (2002)**
        5. **Section 34(1)(a)** also extends to the **protection of “another person”** from force or threats of force.

1. **That they had the subjective purpose of defending themselves (or others) under S 34(1)(b)**;
   * Subjective intent behind the accused’s use of must go to self-defence, and not things such as a desire for vengeance
2. **That their actions taken in self-defence were reasonable in all the circumstances under** **S 34(1)(c)**.
   * Key question is whether the amount of **force** used in self-defence was **reasonable** under all the circumstances

**Battered Women’s Syndrome changed the context of self-defence:** The accused is **not** required to wait until faced with an **imminent** attack before acting in self defence (***R v Lavallee,* 1990**)

***R. v. Lavallee (1990)*** *(shot-abusive-husband-from-behind*)

**ACCUSED DOES NOT HAVE TO BE FACED WITH AN IMMINENT****ATTACK BEFORE ACTING IN SELF DEFENCE.** *Accused shot her abusive husband in the back of the head after he threatened to hurt her once their guests had left their house.* ***Can expert evidence be used in a claim of self-defence, and if so, to what extent?* Held:** Accused was acting in self–defence, even though she was not being assaulted at the time of the act.A psychiatrist gave expert evidence at trial describing her state of mind, and that she felt as though she was "trapped" and that she would have been killed if she did not kill him. **Wilson J.:** Rejected the view that it was unreasonable to for the accused to **apprehend** death or grievous bodily harm – and act accordingly in self-defence – unless the assault was in progress. It justifies the act because the defender reasonably believed that he or she had no alternative but to take the attacker's life. If there is a significant time interval between the original unlawful assault and the accused's response, one tends to suspect that the accused was motivated by revenge rather than self-defence. Inference makes sense with two “men” of equal size + strength. Role of imminence is diminished where the accused is a woman who has been subjected to a pattern of physical abuse.

***R v Malott* [1998 SCC]:** The fact that the appellant was a battered woman does **not** entitle her to an acquittal. Battered women may well kill their partners other than in self-defence.

Past experience can be relevant when assessing whether someone is a serious threat to you or not → Can use subjective requirements to give meaning to imminence requirement. The issue is not what an outsider would have reasonably perceived but what the accused reasonably (subjectively) perceived, given her situation and her experience**. (*R v Petel,* 1994 SCC)**

Section 34(2)

**Section 34(2)** In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, etc

* Sets out **nine specified factors** that the court should refer to when determining whether the third requirement – that the force used be reasonable – is made out.
* The jury is **not confined** to the list contained in **Section 34(2)**.
* Provides guidance on whether the third element of **S. 34(1)** is made out

**(a) The nature of the force or threat**

* The greater the degree of violence being used against the accused, the **more force** they can reasonably use in response.
* Use of force can be **preemptive** (in response to threatening words or gestures).
* Must be considered in the context of history of **abuse** and **reasonable perceptions** of accused (***R v Young,* 2008**)

**(b) The extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force**

* The less imminent the likelihood of violence, the more the accused will be expected to find a means of avoiding the threat / resorting to self-defence
* No formal requirement of imminence – and so an absence of imminence will not be fatal to the defence – ***R. v. Petel*** **(1994)**
* ***R. v. Lavallee* (1990)** – role of imminence is diminished where the accused is a woman who has been subjected to a pattern of physical abuse

**(c) The person’s role in the incident**

* The defence may not be available in cases where the accused has initiated the violent encounter that led to them using self- defence
* ***R v McIntosh* (1995 SCC):** Held that the accused – who had confronted the victim with a knife following a disagreement over property he’d lent him – could not repy on self-defence as he has provoked the attack

**(d) Whether any party to the incident used or threatened to use a weapon**

* The *use of a weapon* will be a key factor in determining whether the force used was **reasonable** in all the circumstances. ***Lavallee* (1990)**: Court held that it might be reasonable for a woman to use a weapon against a more powerful male partner (in the context of history of abuse)
* Very difficult to rely on self-defence where accused uses deadly force in response to a non-lethal weapon – ***R. v. Cain* (2011)**

**(e) The size, age, gender and physical capabilities of the parties to the incident**

* Where the accused is at a significant physical disadvantage, then the use of a weapon / extreme force is more likely to be regarded as **reasonable** – ***R. v. Lavallee* (1990)**
* Role of gender in ***R. v. Lavallee* (1990)**: “I do not think it is an unwarranted generalization to say that due to their size, strength, socialization, and lack of training, women are typically no match for men in hand-to-hand combat.”

**(f) The nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat**

* The existence of a pre-existing relationship between the parties – particularly if it is an **abusive** one – may be taken into account when considering whether the pre-emptive use of force in self-defence was **reasonable** – ***R. v. Lavallee* (1990)**

**(f.1) Any history of interaction or communication between the parties to the incident**

* The court can look to previous interactions / past communication when determining whether the accused’s conduct was reasonable.
* Ie. if you borrow money from a loan shark with a reputation for violence, it may be reasonable to be in fear for your safety when they come to collect the debt (***R. v. Docherty*, 2012**)

**(g) The nature and proportionality of the person’s response to the use or threat of force**

* The use of force must be proportional to the circumstances / situation.
* Courts recognize decisions made in relation to self-defence are often made quickly/ in heat of moment – when it’s difficult to decide what might be an appropriate/proportionate response
* ***R. v. Baxter* (1975)**: “[A] person defending himself against attack, reasonably appreciated, cannot be expected to weigh to a nicety, the exact measure of necessary defensive action.”

**(h) Whether the act committed was in response to use or threat of force that they knew was lawful**

* Good example of this is where a trespasser knows that a homeowner has a legal right to use force to remove them (if they have refused to leave). In this case, if the trespasser resorts to the use of force in self-defence, the court may not agree that the use of force was justified.
* Note also the operation of **Section 34(3)**: Cannot rely on self-defence where the force used / threatened is from an individual who is legally entitled to use such force / make such threats (such as a police officer).

**Essay Tips:**

1. **Give yourself time to show off for a paragraph or 2 🡪 CRITICALLY ENGAGE with the material not just regurgitate ie. discussing whether or not you think it’s the right outcome/law, policy arguments, etc.**

* **Might be woven together through multiple paragraphs**

1. **Even in a “discussion” essay Q, would be helpful to pick a side/argument anyway to give structure to your essay**

**Is the definition of mental disorder sufficiently developed in Canadian criminal law? Why or why not?**

**(Perrin 2010)**

Step 1. Define mental disorder in Code (not really a definition)

Step 2. Pick a side (ie. no)

Step 3. Outline your argument/ thesis

Step 4. Back it up with case law/ examples

* Mental and legal definition are different (legal more narrow)
* This is a problem bc if a person is found NCRMD, they are now in the hands of medical profession rather than legal
* Need more cohesive definition
* How it’s been used/interpreted in common law
* Make an argument (ie. Code could actually include psychiatric conditions – or why shouldn’t we do that?)

Step 5. Talk about the other side too and pros/cons 🡪 Is this the question we should be asking? It’s implying that a good definition would fix problems, but would it?

Step 6. Conclusion

**“The law should not distinguish between a completed offence and an attempt. Attempts occur for the ‘lucky’ criminal.” Do you agree? Explain. (Mosoff 2011)**

**“Direct symmetry between elements of the *actus reus* and *mens rea* is foundational to the criminal law. To upset this rule would be to change the very nature of criminal liability.” Discuss.**

**(Mosoff 2014)**