

*if 50-10-10, spend 70 minutes on first, 10 minutes on other 3
* if 40-20-20-20, spend 50 minutes on the first, 25 minutes on the other 3
(maximum 15 minutes on AR and MR → move on to your defences!)

BASIC DEFINITIONS

BEYOND A REASONABLE DOUBT: As defendants are innocent until proven guilty, the Crown must prove that the defendant is guilty beyond a reasonable doubt in order to secure a conviction. As in [*Lifchus*], this standard is based on reason/common sense, and is logically derived. As in [*Starr*], this standard is a legal concept that is not quantifiable, and is closer to certainty than probability.

ACTUS REUS: The action or conduct that is a constituent element of a crime.

MENS REA: the intention or knowledge that constitutes part of a crime, as opposed to the action or conduct of the accused
GENERAL INTENT: the accused meant to do an act prohibited by law; whether the defendant intended to cause the act's result is irrelevant [*Tatton*]

SPECIFIC INTENT: the accused intentionally committed an act and intended to cause the particular result; requires heightened state of mind, willfully/for the purpose of...

WILFULL BLINDNESS: a subjective state of mind where the accused is strongly suspicious of an activity but deliberately doesn't ask Qs
WEAPON: as in s.2 of *Code*, means "any thing used, designed to be used or intended for use

- (a) in causing death or injury to any person
- (b) for the purpose of threatening or intimidating any person

ID + CHARGING SHEET

→ The Crown must prove ID beyond a reasonable doubt. As in [*Sheppard*], the accused was in a fist fight and may have punched someone, but through testimony given by the victim and witnesses, it could not be proved beyond a reasonable doubt that it was him who struck the victim, so was acquitted.

→ The accused must be convicted on the **particularized elements** of the charging sheet, and the Crown may not amend this if prejudicial to the defense. In *Saunders*, the accused was implicated in a conspiracy to import cocaine, but in truth it was heroin that was being imported. The Crown requested to amend the charge, but was denied.

[*Clarke*] → conduct criminal because in public place vs open to public view (must interpret "pub place" in legislative context)

VALID LAW (CHARTER)

Valid Criminal Law

- 1) the law is written
- 2) passed by federal government (91(27) of const.)
- 3) criminal law purpose
- 4) has a prohibition
- 5) has a penalty

* Causing "harm" is not necessary [*Malmo-Levine; Caine*] marijuana

Justifying a Law that Limits a Charter Right

Oakes test used in [*Sharpe*]:

1. **Pressing/substantial objective:** easy hurdle to cross; (protect vulnerable children (directly & indirectly), important/need)
2. **Proportionality test** using three sub-tests
 - a. **Rational connection:** between violation of legislation + purpose trying to achieve? (possession → harm kids, attitudinal harm)
 - b. **Minimal impairment:** could it violate the right less? (two problematic applications = private use, consensual teens)
 - c. **Proportionality:** violation proportionate to good to society; low harm; high violation [*Sharpe*] FAILS HERE

Does the law go against fundamental justice? S. 7 TEST

1. **Vagueness:** law has to have some clarity with clear/understandable interpretation (usually easy to overcome)
2. **Arbitrariness:** relationship between effect and objective, state may not limit rights where not tied to legislative objective
3. **Overbreadth:** scope of the law; are situations captured that shouldn't be? MINIMAL IMPAIRMENT [*Heywood*] kids @ parks
4. **Gross disproportionality:** is effect on life/lib/security of the person proportionate to the purpose of law?

[*Bedford*] impugned provisions found unconstitutional:

- to keep or be in a bawdy-house = grossly disproportionate (harm to sex works vs purpose of stopping public nuisance)
- living off avails of prostitution = overbroad (captures pimps but also security guards, receptionists, family)
- communicating in public for the purpose of prostitution (dangerously isolating sex workers vs taking out of pub. view)

BURDEN OF PROOF

Section 11(d) of Charter:

Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.
*right to "full answer and defence" (also based on s. 7)

While the principle of proof beyond a reasonable doubt does not apply to each individual piece of evidence, it does apply in a consideration of the credibility of the witnesses and the evidence as a whole [*Kylo*].

When the crucial issue turns on **credibility of a witness**, the trier of fact must use the "**W(D)**" as affirmed [*JHS*]:

- 1) If you believe the testimony of the accused, you must acquit.
- 2) If you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
- 3) Even if you are not left in reasonable doubt by the evidence of the accused, you must ask yourself whether on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt of the accused's guilt.

Vetrovec warning: special consideration required when considering the reliability of evidence from unsavory witnesses → jury is given a "clear and sharp" warning with respect to the testimony of those witnesses

1. individual is likely an untrustworthy witness because personally invested in another person being at fault [*Kyl*]
2. do not use Vetrovec witness evidence to convict unless strong corroborating evidence
3. have to find proof beyond a reasonable doubt on each element (actus reus, mens rea)
* **not BARD on separate pieces of evidence** (like a single person's testimony)

REVERSE ONUS

When provision requires that the onus is on the *accused* to establish lack of guilt, it must be justified under section 1.

[*Oakes*] (reverse onus ok, saved by s. 1)

- possession must be proved BARD by Crown
- onus then shifts to the defendant to prove on a balance of probabilities that he was not trafficking (irrational to infer the trafficking from possession)

[*Keegstra*] (not saved by s. 1) (holocaust denier)

- onus on accused to establish defence of truth
- HELD: defence of truth is a reverse-onus that is unconstitutional → Crown doesn't have to prove holocaust was real; would be acquitted too easily then; would hinder Parliament's objective

CONCURRENCE

The *actus reus* and the *mens rea* must coincide at **one point**, as in [*Williams*], but they need not coincide continually [*Cooper*].

- Husband chokes wife to death—blacks out—claims doesn't remember, no MR—sufficient intent at point where he put hands on her neck (recklessness) [*Cooper*]
- If keep doing act "innocently" not knowing consequences, only need to show they knew of possible consequences at some point [*Bottineau*]; can impose MR on existing AR (drive on cop's foot accidentally) [*Fagan*]

—Acts → must be voluntary

—Omissions → no duty to act within relationship, unless legislated (s. 219); to find legal duty to act must make **clear and binding intent** for undertaking [*Browne*] (promise to take to hospital, drug

overdose); an "undertaking" must involve a commitment upon which "reliance can reasonably said to have been placed"

ACTUS REUS + CAUSATION

Factual Causation: "but for", connects the conduct with a resulting effect

[*Smithers*]: [kick to stomach, epiglottis failure, boy dies from choking on vomit] ... An action only has to be an operating cause outside of the *de minimis* range in order to be deemed the **cause** of the result. "Death may have been unexpected, and the physical reactions of the victim unforeseen, but that does not relieve the appellant."

De Minimis Test = was act a significant contributing cause? [*Cribbin*]
Legal Causation: addresses the moral element of whether the accused "should be held responsible in law" for some harm
[*Maybin*] accused's actions must be "significant contributing cause" of what happened:

- 1) was the general nature of the intervention obj. foreseeable?
- 2) how independent were subsequent events?

MENS REA

There needs to be some fault element to convict an accused. It is not enough that the accused engaged in the prohibited conduct, the individual must be aware that they are committing the prohibited act.

Mens rea can be in form of:

1. ACTUAL KNOWLEDGE

The accused *actually intended* to do the actus reus. Requires a completely subjective inquiry into the mind of the accused.

Where the accused willfully tried to block himself from knowledge, he will be deemed to have been aware and will be held liable to the fault standard of actual knowledge.

For many offences, the accused needs to have a subjective awareness that they are committing the prohibited conduct. The core subjective states of liability are *intention* and *knowledge*. Intention to commit some act is not the same as having a motive.

[*Briscoe*]: "**Wilful blindness** does not define *mens rea* required for particular offences. Rather, it can substitute for actual knowledge whenever knowledge is a component of the mens rea. The doctrine of wilful blindness **imputes knowledge** to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but *deliberately chooses* not to make those inquiries." [21]

2. RECKLESSNESS

The accused was *aware* that there were possible/probable harmful consequences of the action and yet *proceeded anyway*. Requires a subjective inquiry, but is not as stringent as that of actual knowledge.

[*Buzzanga*] → tried to get attention of French Canadians living in their area to take charge in political debate regarding French language school in their area; circulated anti-French pamphlet to try and stir people into action (had written themselves); charged under 319(1) inciting hatred against identifiable group

@ SCC → MR is satisfied as long as the outcome was intended or achieved through *recklessness*, however provisions including term "willfully" imply recklessness not available "the greater the likelihood of the relevant consequences following from the accused's act, the easier it is to draw the inference that he/she intended those consequences"
[*Lamb*] → child pornography found in cache folder, which shared this material with other program users; found "making available" means recklessness not available (requires *specific intent*)

3. NEGLIGENCE

A reasonable and ordinary person in the position of the accused would have known or foreseen that harm was likely to follow from the *actus reus*, and proceeded anyway. Requires an objective inquiry, the actual state of mind of the accused is irrelevant.

4. STRICT LIABILITY

There is no requirement to prove *mens rea* at all, but the accused may be able to escape liability by arguing honest and reasonable mistake of fact.

5. ABSOLUTE LIABILITY

No requirement of *mens rea* at all and no defense of mistake.

PARTIES TO AN OFFENCE

Aiding and abetting puts a person on the same legal footing as a principal (person actually commits the offence).

Parties to offence

- 21 (1)** Every one 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.

Common intention

(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.

(21(2)) → where you agree to do one crime, and while doing that act, B does another crime, A is on for B's offence too (constructively responsible as reasonably should have foreseen)

Principal & Co-Principal/Party to Offence 21 (1) (a)

[H(L.I.)] participate with knowledge, contribute to offence "blow of one = blow of all"

→ Crown doesn't have to specify principal/co-principal in indictment [*Thatcher*] (did he kill his wife or hire someone?)

legally equivalent; jury can convict on either [*Pickton*]

Aiding/Abetting to actively encourage or knowingly encourage an act a) act with purpose of aiding principal offender (or omits to do something); includes wilful blindness; [Briscoe]

b) only actual knowledge or wilful blindness will suffice in aiding and abetting (no recklessness) because "for purpose of"

Presence = insufficient Mens Rea for aider

1. to convict as aider/abetter, must infer that accused had prior knowledge that offence of that type was planned
2. [*Dunlop & S*] bring beer to abandoned dump + see girl being raped + drop beer and leave = not guilty

LEGAL SYSTEM PLAYERS

—The **Crown**

- prosecution's purpose is to lay out all relevant evidence and "see that justice is done", not to convict [*Boucher*]

- must disclose all evidence that isn't clearly irrelevant, failure to do so affects **accused's ability to make full answer** in defense [*Stinchcombe*]

—**Defense**

1. duty not to mislead court, can't plead guilt unless accused admits that they did it
2. if Defense knows of guilt, can't provide alibi/ suspect/ explanation that would mislead

in [*Marshall*] = was it ethical for defense counsel to raise possibility that Marshall was guilty of manslaughter instead of murder, while Marshall maintained that he did not stab Sandy?
—The **Judge**

strive for impartiality, but experiences reflect in judgment, as long as not using stereotypes that prevent fair and just determination of facts

—**Jurors**

can question jurors under 683 when there is a realistic potential that the jurors will not be indifferent in proceedings WHEN 683 HAS WORKED:

- 1) when massive media coverage/overly against accused (neg)
- 2) aspect of the crime is so horrific that someone may want to convict regardless
- 3) when there is a possible racial bias (ie. *Parks*)

RIGHT TO RETAIN COUNSEL

Detention: police reasonably create circumstances where a person believes they cannot leave; state in pos'n where can get info from you

→ you have right against self incrimination and are not forced to give evidence against yourself (have a choice), danger in making early statements (esp. when scared/shaken)

SECTION 10(B) "Everyone has the right on arrest or detention... to retain and instruct counsel without delay and to be informed of that right..."

→ **Manninen** once an accused person requests to speak with counsel, the police has to help him contact a lawyer; accused must act with "reasonable diligence" when calling counsel

Police have 2 duties after informing of rights:

- 1) facilitate opportunity to retain/instruct counsel w/out delay
- 2) cease questioning detainee until has reasonable opportunity to retain/instruct counsel

→ **Taylor** was read his rights but not given access to a phone at scene of DD accident or at hospital/blood sample led to convict. "Proactive steps are required to turn a right to counsel into access to counsel." [para 33]

→ **Brydges** asked if there was any legal aid available because he wouldn't "be able to afford anyone" – cops didn't help him find anyone right then// Lamer: "The police have both a duty to inform an accused of their right as well as provide sufficient info on obtaining advice from duty counsel." <<acquitted>>

TRIAL IN REASONABLE TIME

SECTION 11(B) "Any person charged with an offence has the right... to be tried within a reasonable time."

Jordan FRAMEWORK FOR ASSESSING 11(B) VIOLATIONS:

PART 1: The Presumptive Ceiling

- 1) Presumpt. ceiling = 18 mths @ prov cts, fr chrg to end of trial
- 2) Ceiling = 30 mths at Sup Cts, or in prov cts after prelim inquiry
- 3) Delay bec of **defence** doesn't count toward presumpt ceiling
- 4) Inst'l delay *does count* toward the presumptive ceiling

PART 2: When the Ceiling is Exceeded

- 5) When ceiling exceeded, autom. assumed UNREASONABLE
- 6) Crown may only rebut by establishing except. circumstances:
 - a. discrete event that was unavoidable
 - b. case is particularly complex + req. more time
- 7) When Crown can't rebut, charges = stayed = NO TRIAL

PART 3: Below the Ceiling

- 8) Ceiling not exceeded but still taking unreasonably long (accused must establish that delay is unreasonable by showing that:
 - a. it made a sust. effort to expedite the proceedings
 - b. case took markedly longer than reasonably should have
- 9) If both established = charges against accused will be stayed

SEARCH/SEIZURE + DETENTION

SECTION 8 "Everyone has the right to be secure against unreasonable search or seizure."

Any property found or seized by means of a violation of s. 8 has potential to be excluded as evidence under s. 24(2)

SECTION 9 "Everyone has the right not to be arbitrarily detained or imprisoned."

Investigative Detention: power of an officer to essentially freeze a scene to take a few minutes and make some inquiries

- must have "reasonable suspicion that the particular individual is implicated in the criminal activity under investigation"
- lim. ability to search person for weapons (not open ended)

Search + Seizure: [Patrick], garbage searched outside home
Test to determine abandonment of property/reasonable search:

- 1) Did the accused have a reasonable expectation of privacy?
 - location where 'search' occurred/in public view
 - accused's subjective expectation of privacy
 - was the accused's expectation objectively reasonable
- 2) If so, was it violated by the police conduct?
 - manifestation of any continuing assertion of privacy (ie. lock)
 - part of continuing investigation
 - location of garbage near the property line, easily accessible to passers-by (the general public)

= consider "totality of the circumstances", does this method of abandonment have a reasonable assertion of a continuing privacy interest?

Arrest: have to have reasonable + probable grounds to believe that person has committed or was about to commit an offence [McLellan] → need both subjective/objective belief

- 1) Officer must have **subjectively thought/believed** they have reasonable/probable grounds for arrest.
- 2) Officer must have objectively reasonable/probable grounds (a reasonable police officer would have believed so...)
 - == can conduct a full/thorough search (+seizure)

<< WAS THE SEARCH/SEIZURE REASONABLE? >>

Onus is on the Crown to prove reasonable grounds for arrest where there is search incident to arrest; objective justification for arrest must be considered *cumulatively* [McLellan]

- various aspects of the tip must be corroborated, rule out possibility of *mere coincidence*, reliability of informant, etc.

JUDICIAL AUTHORIZATION FOR SEARCH/SEIZURE

Warrants: needed for search/seizure in areas where the accused has a reasonable expectation of privacy

- not in public areas
- not in private areas where the accused has no reasonable expectation of privacy (ie. friend's garage); have you sufficiently abandoned your property? FAIR GAME

WITHOUT A WARRANT, A SEARCH IS *PRIMA FACIE* UNREASONABLE & THE ONUS IS ON POLICE TO PROVE IT WAS **REASONABLE**
Analysis: from [Hunter v Southam]

- 1) A search without a warrant is unreasonable.
- 2) Warrant must be issued before search.
- 3) Warrant must be granted by someone capable of acting judicially, not just administratively or on investigation
- 4) Prsn issuing warrant must be presented with sworn evidence.
- 5) Must be reasonable and probable grounds to believe that **relevant evidence is present** at the site of the search.

ATTEMPTS

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

From [Cline] → SIX FACTORS FOR ATTEMPT

- 1) Must be MR + AR but the misconduct lies primarily in intention
- 2) Evidence of sim actions leading to a crim. end will help prove attempt (if not too remote in time)
- 3) The Crown can raise this evid w/out waiting for spec. defense
- 4) Not essential that the AR is a crime, tort or even moral wrong
- 5) The AR must be more than mere preparation; and
- 6) When the req. intention was formed, the next action taken to further the attempt to commit the crime **satisfies** the AR.

<< ATTEMPTED MURDER >>

In [Ancio], the intention to commit the complete offence of murder must include the *intention to kill*; MR for attempted murder cannot be less than the SPECIFIC intent to kill. (Ancio intended to use gun to force his wife to leave her new partner; partner threw chair at Ancio and gun went off → no intent to kill)

In [Logan], subjective foresight is a constitutional requirement for both murder + attempted murder; objective component of 21(2) (party to an offence) is not satisfied if this specific person did not foresee the consequence of their action being murder

CONSPIRACY

Governing Principles of Conspiracy: from [Root]

- 1) an intention to agree
 - 2) completion of the agreement
 - 3) a common (unlawful) design
- * don't need to know all the details/ID of all involved, just need 2+ **genuine** participants (not cops)
- did the person agree to do the offences?
→ did the person attempt to do the offences?
→ did he counsel others to do the offences?

(accused need not have initiated/originated the transaction)
IMPOSSIBILITY [US v Dynar] at 105, since conspiracy "only requires an *intention* to commit the substantive offence, and not the commission of the offence itself, it does not matter that [objectively] commission of the offence may be impossible"

MERE PREPARATION VS ATTEMPT

[92] of [Root]: S. 24 of the Criminal Code instructs that an attempt to commit an offence consists of two elements:

- i. the intent to commit the offence; and
- ii. conduct, which is more than merely preparatory acts or omissions, for the purpose of carrying out the intention to commit the offence.

[98] of [Root]: To determine on which side of the preparation/attempt divide an accused's conduct falls, a trial judge should consider the relative proximity of that conduct to the conduct required to amount to the completed substantive offence. Relevant factors would include time, location and acts under the control of the accused yet to be accomplished.

DEFENCES

- 1) Make it so one of the *elements* can't be proved because of evidence or mens rea issues:
 - never blocked from using
 - use when poor quality Crown evidence
- 2) Particular circumstances negate the Crown's ability to prove one of the elements.
 - present a reason why there's a barrier to proving an element, even if solid evidence of it
 - can't always argue this
 - Crown must prove elements BARD
 - ie. mistake, intoxication, provocation
- 3) A positive defense where the Crown has essentially proved its case, but the offence is *justified* or excused.
 - can't always argue this
 - excuse: automatism; duress
 - Crown must *disprove* BARD one of the elements of the defense (ie. self-defense, necessity)

Category 2 + 3 Defences → need **AIR OF REALITY**

-- the threshold for a defense to be left with the trier of fact --

To meet this threshold:

- there must be some reasonable possibility of success
- the accused must point to some evidentiary foundation
- the evidence must be credible and reliable
- if there is conflict, or multiple inferences, the judge must go with the inference in favour of the *accused*

"Is there evidence upon which a properly instructed jury acting responsibly could acquit if it believed the evidence to be true?"

→ applied to *each element* of the defence

- Assume the evidence = credible/reliable, reasonable person would not draw that inference on one of the elements
- If there is an A of R, the Crown must *disprove* one of the elements beyond a reasonable doubt.

[Cinous] → The question for the trial judge is whether the evidence discloses a real issue to be decided by the jury, and not how the jury should ultimately decide the issue

MODIFIED OBJECTIVE APPROACH

"What would a reasonable person do in the *spec circumstances*?"

- average person, no basic characteristics, infuse reasonable person w/accused's experiences/state [Beattley]

Can infuse:

- subject to threats (scared), age, size/ at disadvantage

Can't infuse:

- aggressive, short temper, sexist/racist, cult norms/behaviour
- fact of intoxication [R v Antle]

CONSENT

265(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of (a) the application of force to the complainant or to a person other than the complainant;

(b) threats or fear of the application of force to the complainant or to a person other than the complainant;

(c) fraud; or (d) the exercise of authority.

To prove AR, prove the touching and absence of consent.

Absence of consent: (Ewanchuk) purely subjective, ask complainant what subjective internal state of mind was; credibility can still be assessed by trier of fact in light of evidence
Accused's perception of complainant's state of mind is not relevant/ only becomes so when defense of honest but mistaken belief in consent is raised at MR stage of inquiry.

*no defense of implied consent to *sexual assault* in Cdn law*

273.1 (1) ... "consent" means... the voluntary agreement of the complainant to engage in the sexual activity in question

[47] "For the purposes of the mens rea analysis, the question is whether the accused believed that he had obtained consent. What matters is whether the accused believed that the complainant effectively said "yes" through her words and/or actions." → accused believes he got her **consent**, not that the accused believes *she wanted it*

Limits on Honest but Mistaken Belief in Consent: [273.1 + 2]

- belief that silence, passivity, ambiguous conduct constitutes consent is a mistake of law (no defense)
- complainant is incapable of consenting
- abuse of position of trust, power, or authority etc..

Limits on Consent for Application of Force, from [Jobidon]

- "if consent is proved, or if absence of consent is not proved, an individual accused of assault will generally be able to rely on the consent of the complainant to bar a conviction" [62]
- limit demanded is one that *vitiates consent* when intentionally applying force causing serious hurt or non-trivial bodily harm in the course of the fight" [125]
- "the introduction of a weapon vitiates any consent which might have been given to *bare knuckle fisticuffs* and *Jobidon* does not apply" (no consent) [85] in *Hancock*

MISTAKE OF LAW

Mistake of *Fact*: subjectively measured in some cases where there's evidence to support it

Mistake of *Law*: not generally available as a defense

→ if were generally available would encourage ignorance of law
→ can be factored into sentencing + charge approval (in public interest? accused didn't know this complex law ...)

Exceptions:

- officially induced error in regulatory offences (official in charge said ___ was the way to do it)
- "colour of right" → where a person legitimately thought they had a right to do some activity (limited availability, reasonable perception is required)

SELF DEFENCE

34 (1) A person is not guilty of an offence if

- they believe, reasonably, that force (or threat of force) is being used against them/another person
 - ... defending themselves or the other person from that ^
 - the act committed is reasonable in the circumstances
- (2) → factors to consider to say whether reasonable or not

Elements: affirmed in [R v S(H)]

- The accused subjectively believes they are acting in SD
- The Court must decide if this was the accused's true or actual purpose for his actions.
- The act was objectively reasonable in the circumstances.
→ amplified in 34(2) of the Code, factors to consider
→ go through a-f and say whether the factor is met or not

NECESSITY

3 Elements for the Defence of Necessity: (Dickson J in *Perka*)

1) Imminent peril or danger

- modified objective standard; infuse attributes/circumstances/basic characteristics into reasonable person
- foreseeable or likely = **not enough**
- must be on the verge on transpiring and *virtually certain*
- where the situation of peril should have been foreseen or *avoided*, an accused cannot reasonably claim any immediate peril

2) No reasonable legal alternative to disobeying the law

- modified objective standard; infuse attributes/circumstances/basic characteristics.
- this involves a realistic appreciation of the alternatives open to a person; the accused need not be placed in the last resort imaginable.

3) *Proportionality* between the harm inflicted + harm avoided

- objective std based on societal values (PURELY OBJECTIVE)
- doesn't need to clearly outweigh the other; must, at a minimum, be of *comparable gravity*

[*Perka*] (Colombian marijuana traffickers) → Dickson J: this defense is meant to be a rare exception where there is no reasonable legal alternative/couldn't have reasonably anticipated the problem and prevented it earlier

[*Latimer*] (Tracy, severe cerebral palsy, life taken) → SCC rules that subjective views do not influence assessment for the proportionality of actions taken; "fundamental principles of criminal law" would be sacrificed if subjective test sufficed [31] harm you avoid has to be *worse* than the harm you cause

Why Latimer was Not Successful:

- It was *her* not him who was in peril, and not *imminent*
- were other options like putting into a group home or surgery
- proportionality perhaps never met for *homicide* anyway

DURESS

Necessity is a defense that responds to *circumstances* that produce situations of imminent peril, whereas

DURESS is concerned with criminal acts committed while subject to a threat or compulsion *from another person*.

17 → "A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if the person believes that the threats will be carried out ..."

Essential Elements (statutory defence):

- Threats of violence/death (yourself or 3rd party)
[no imminent requirement]
- No reasonable route of escape
- Proportionality between threat + criminal act
(list of offences duress is not available for in s. 17 of Code include: murder, sexual assault, robbery, assault w/weapon)

[*Paquette*] → robbery @ Pop Shoppe, innocent bystander killed by bullet from rifle fired by Simard, Paquette was made to drive S to Pop Shoppe or would shoot him, w/gun to head;
= duress available to person who is sought to be made a party to the offence by virtue of 21(2)

[*Ruzic*] → young woman transported drugs because street thug threatened to kill her mother if she didn't; charged at border;
= common law rules for duress, no immediacy requirement but need a *close temporal connection* between threat + harm

[*Ryan*] → victim of abusive husband, believed would kill/srslly harm her + her daughter; attempted to hire undercover cop to kill her husband; acquitted at trial + CA on duress; at SCC Level: duress only available when person commits an offence *while under compulsion of a threat*, husband didn't compel her to do it, she decided herself (∴ not available to her)

[*Aravena*] → individual aided/abetted series of murders as part of biker gang; "If an accused chooses to assist in a murder, it may well be that nothing short of a threat of *immediate death* to that person or some other person could satisfy the proportionality requirement for the defense of duress"

♣ Despite section 8(3) of the Code (common law defences continue unless they are altered or are inconsistent with the Code) s. 17 changed to become more aligned to the common law post-Ruzic. This is because the common law defence of duress is for *parties to an offence* and the statutory defence is *only for principal offenders*. It is this distinction allows the common law defence to stand apart from the Code.

COMMON LAW DEFENSE OF DURESS (post Ruzic)

- explicit/implicit threat of present or future death/bodily harm directed at accused or third party (> trivial)
- accused must reasonably believe that the threat will be carried out (subjective + objective components)
- no safe avenue of escape, evaluated on mod. objective standard
- close temporal connection between the threat and the harm
- proportionality between the harm threatened + the harm inflicted (also on mod. objective standard) harm inflicted equal or no > than harm thr
- not party to conspiracy as subject to compulsion and *actually* knew threats were a possible result of criminal activity, conspiracy, etc.

have to show *air of reality* → if do, Crown has to disprove ONE element to be successful

INTOXICATION

= Category 2 Defense/will block MR/needs air of reality
Levels of Intoxication:

- MILD** → no defense; cannot negate mens rea; relevant in sentencing or as aggravating factor
 - here, "trial judge is not required to give an instruction on intoxication; there would be no air of reality..."
 - "This is where there is alcohol-induced relaxation of both inhibitions and socially acceptable behaviour. This has never been accepted as a factor or excuse in determining whether the accused possessed the requisite *mens rea*" Daley at [41]
- ADVANCED** → accused has no foresight of consequences
 - lacks **specific intent**, highly intoxicated, common sense inference for MR is based on sober person, so here consider effects of intoxication
 - "capable of conscious, voluntary, even if very drunken, action" separates Advanced and Extreme [Daley, 46]
 - (most applicable)
HOW MUCH: estimated 30-40 oz (by witnesses); 0.10 BAC at noon the next day
- EXTREME** → knocks out the **general intent** to commit off.
 - "automaton through self induced intoxication"
 - under s. 33.1 only available for *nonviol gen intent offences*
HOW MUCH: *Daviault*, drank 7-8 bottles of beer, ~38oz brandy

Is it 'advanced' or 'extreme' intoxication? Look at conduct in the time preceding the prohibited act; if they were "capable of conscious, voluntary, even if very drunken, action" then likely *advanced* intoxication, but not *extreme*.

Specific or General Intent Offence? [Tatton at 33]

- What is the mental element of the offence, and its 'relative importance'? Crimes with a more sophisticated and relatively important *mens rea* will likely be classified as specific intent, whereas those which require little mental acuity – in other words, where the *actus reus* is truly the **crux** of the offence = general intent (assault=classic example; accused must intentionally apply force; however, no requirement he intends to cause an injury) (look for *for the purpose of, or with intent to in Code provision*)
- If **no clear answer** from (1), courts direct intention toward policy considerations. Would it be wise, given the nature of the crime, for accused persons to rely on self-induced intoxication as an defence to escape liability? If alcohol habitually associated with this crime, having intoxication as a defense = counterintuitive.

ADVANCED INTOXICATION

→ Based not on the "incapacity" of the accused to form intent, but on the "*absence of intent*". Could reduce specific intent offence to a general intent one (ie. "possession with intent to traffic" to "possession", or murder to manslaughter)

Specific Intent Offences: one which involved the AR coupled with an intent or purpose of going beyond mere performance of the questioned act, to cause a particular result

[*Daley*] → accused charged with murder of common law wife; called expert evidence about his blood alcohol level + its effects on him [Robinson at 48]: "In the case of murder the issue is whether the accused intended to kill or cause bodily harm with the foresight that the likely consequence was death." → did the accused foresee that his/her actions were likely to cause the death of the victim? [49]

Air of Reality: TJ must be "satisfied that the effect of the intoxication was such that its effect might have impaired the accused's foresight of consequences sufficiently to raise a reasonable doubt" [48 Rob.]

❖ "Evidence of intoxication can be considered *with all other evidence* in determining whether the accused **actually** had the specific intent required to constitute the offence." ...

→ NOT subject to rule requiring that it has to be to a degree that takes away capacity to form the specific intent [Rob. at 89]

Death Is Obvious Consequence (ie. gun to head)

❖ "for certain types of homicides, where death is the obvious consequence of the accused's act, an accused might have to establish a particularly advanced degree of intoxication to successfully avail himself or herself of an intoxication defense of this type."

EXTREME INTOXICATION

Eliminates the *general intent* for offences, which negates voluntariness and is thus a *complete* defense to criminal responsibility [Daley at 43]; defense can only be run for non-violent general intent offences (*Crim Code* 33.1).

[Tatton at 27] → extreme intoxication is characterized by *automatism*, whereby even the minimal thought/reasoning processes required to form the general intent of a crime are not met (not even slight degree of mental acuity)

*if public policy reason where intoxication is habitually associated with some act, may not be available for use as defence

Critique: using extreme intox. to negate MR goes against fund. justice as it substitutes the intent/reckless. to get drunk for the intent/recklessness required to commit offences, even if not at all morally equivalent

PROVOCATION

The defense of *provocation* only applies to **murder**, and can only reduce murder to *manslaughter*. This defense arises after intent is already proved, and acts as a **partial excuse** for the act (momentarily lost control, emotionally lost control because of a provocative act). Requires air of reality.

Elements:

- Provocative act has to strike on an unprepared mind.
- The response is *because* of the act (subjective test + actual provocation, was the accused *in fact* deprived of the power of self-control in response to the provocative act?)
- Reaction is sudden, with *no time* for the passion to cool.

The Provocative Act:

- would have caused ordinary person to respond similarly
- analyzed on *modified objective standard*, where we put an ordinary person in **those circumstances**, includes race, age, sex (so racial slur could be provocative act)

[*Tran*] → knew about estranged wife w/another man, entered her home uninvited, discovered them in bed; attacked both of them and killed the boyfriend by stabbing him repeatedly
→ at SCC, found that the act *did not strike on an unprepared mind* because he broke into her house

232(2) → the provocative act now *has* to be something that is a serious criminal act (an indictable offence) in order to deprive an ordinary person of the power of self-control

Critique: no "sudden" discovery by the appellant as had suspected wife of having a new lover; while TJ found "outward excitement and anger", not sufficient to establish the requisite loss of self-control (he had acted with deliberation); "ordinary person" test problematic, an ordinary person should be able to retain self-control in circumstances such as witnessing a partner's adultery, not a good excuse; reducing domestic homicide to manslaughter should not be available; must acknowledge the reality of domestic violence and its gendered nature; language that this case was "tragic" minimizes this behaviour, fails to convey the prevalence and systemic nature of this kind of violence as well as the vulnerability of women/children, especially post-separation

[*Robinson*] → rolled up charge; jury might not see enough evidence for each defence presented (intox, prov, self defence); if jury still has a doubt about intent, can consider evidence from each of the defences *cumulatively* on intent issue; do not isolate the evidence on those issues

MENTAL DISORDER

Proved on the **balance of probabilities** from a very strong assumption that the accused is not of sound mind, burden of proof on the party who raised the issue (defence or Crown)
Not Criminally Responsible due to Mental Disorder (NSCRMD) s. 16(1) of Code: "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."

Mental Disorder: "any illness, disorder, or abnormal condition which impairs the human mind and its functioning" [Cooper]

→ doesn't have to be chronic/long standing/sever disorder [Dickson J in Cooper, 39] "Disease of the mind" embraces any condition which "impairs the human mind and its functioning, excluding *self-induced* states caused by alcohol or drugs, as well as *transitory* mental states such as hysteria or concussion." → Lesann's disorder was not cons transitory

[Lesann] Defences raised: (1) NCRMD, (2) no intent to kill (specific), evidence of mental disorder can matter for this (second option if NCRMD is not met) CLUES:

- post offence conduct (leave scene, try to get rid of evidence suggests their mind was controlling their actions)
- Lesann called someone after + said he had killed the devil; shows *delusion*, also that thought she was a threat/danger

Did they know what they were doing?

To be capable of appreciating the **nature + quality** of the act, the accused must have the capacity to *know what he is doing*.

[Kjeldsen] accused must have capacity to estimate/understand the physical consequences which could flow from his act (ie. death) Did they know it was *wrong*?

→ do with broader morals of society, not own morals
→ have to subjectively believe that society's values are aligned with your own actions/don't go against that

S. 16 of CC in Kjeldsen → "No person is criminally responsible for an act committed ... while suffering from a mental disorder that rendered the person incapable of *appreciating* the nature and quality of the act..."

→ Judge instructed jury on meaning of "appreciating" (SCC adopts AJ's statement on *appreciation*: "Appreciation of the nature and quality of the act does not import a requirement that the act be accompanied by appropriate feeling about the effect of the act on other people. No doubt the absence of such feelings is a common characteristic of many persons who engage in repeated and serious criminal conduct." [355 Simpson ri K])
- don't limit application of "appreciate" to mere physical character of actions → incl. reference to *consequences* that flow from them

AUTOMATISM

Premise is *physical involuntariness*; defense goes to knock out the AR of the offence (as presumption of voluntariness). Automatism is not punishable under the criminal justice system as the accused is not of conscious mind (common law defense). Voluntariness requirement is a principle of fundamental justice protected by s. 7 and 11(d) of the *Charter*.

<<prove on the balance of probabilities>>

Non mental disorder automatism:

some external event causes you to become an automaton (ie. death of a loved one, see something especially shocking); very rare; can be *acquitted* on this; you are not a danger to society

Mental disorder automatism:

"automatic state is the product of a *mental disorder*"

[*Lueduecke* at 60] the internal mind is part of the issue (at least) that partly caused you to go into this state; might have happened in the past but *at time of offence* were an automaton (ie. sleep walk)

Establish:

1) Not consciously controlling actions

2) Is it non-mental disorder automatism or MD automatism?

[*Lueduecke*] → Toronto landscaper sexually assaulted a woman in his sleep; it cannot "be appropriate in a criminal justice system in which liability is predicated on personal responsibility to convict persons based on conduct which those persons have no ability to control"; parasomnias (sleep-walkers) have a type of "non-insane" automatism that warrants full acquittal

[119] NCR-MD verdict triggers [page125] an individualized, careful, current assessment of the accused's condition leading to a disposition tailored to the individual accused

INDIGENOUS PEOPLES + CRIMINAL JUSTICE

CHALLENGING FOR CAUSE (jurors + racial bias)

[*Williams*] long entrenched biases against FN people to do with criminality and violence, but also *credibility* (subconscious); 12 jurors said they thought bias would affect how would conduct self in proceedings

→ (old way) to prove racial bias, have to show that the bias is toward *criminal behaviour* (assumption that guilty of a crime)

@SCC → no longer have to prove bias link to criminality; credibility concerns are also important

- associations of not being worthy of in-depth scrutiny + heightened belief that the accused is untrustworthy
- "credibility, worthiness, and criminal propensity" of concern
- evidence of this is national so applies nationally; every First Nations person can challenge for cause

WRONGFUL CONVICTION

[*Marshall*] → convicted of murder by judge + jury in 1971; conviction was overturned in 1983

- mistaken identification; 15 + 16 year old kids saw two men arguing at night and identified the one who plunged a "shiny object" into the stomach of Sandy Seale as Marshall
- Marshall said it was one of the two men in long blue coats who said they were priests from Manitoba

SENTENCING OF ABORIGINAL OFFENDERS

Part of 1996 parliamentary reforms (Bill C-41) included s. 718.2(e) of the CC, which provides that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, *with particular attention to the circumstances of aborig. offenders*" [*R v Gladue*]

Facts: Gladue accused of 2nd degree murder after killed fiancé with a knife; was convicted of manslaughter

@SCC: first time this new provision was considered in deciding a sentence; big issue of Aboriginal representation in prisons
Ratio:

- restorative justice must be given particular consideration when dealing with Aboriginal offenders; however, it is not the only thing to be considered in these cases, as the traditional punitive measures must also be *weighed* with the facts of the case
- s. 718.2(e) applies to Aboriginal persons in general, not just to those who live in Aboriginal communities/reserves
- When sentencing an Aboriginal offender, the court must consider:
 - A. the unique systemic or background factors which have played a part in bringing the offender before the court; and
 - B. the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his/her particular Aboriginal heritage or connection
- section 718.2(e) is not to be taken as a means of automatically reducing the prison sentence of aboriginal offenders; not receiving more lenient sentence just because incarceration is not imposed
- the more serious and violent the crime, the more likely it will be as a practical matter that the terms of imprisonment will be the same for similar offences and offenders, whether Aboriginal or non-Aboriginal

RESTORATIVE APPROACH TO SENTENCING:

- make reparations
- hear impact of harm from victim + their family
- sense of responsibility, acknowledgement of harm done (*R v Ipeelee*) reaffirmed/expanded upon principles from *Gladue*
- Courts must take judicial notice of history of colonialism, displacement, residential schools; how history continues to affect health, education, livelihood of Aboriginal persons
- provide necessary context for understanding/evaluating case-specific information presented by counsel
- don't need direct causative relationship with trauma/harm as problem of *systemic discrimination*

[*Proulx*] → CONDITIONAL SENTENCES = 742.1 in CC; if no MM, sentence is <2 years, not danger to community, then can serve the sentence in the community subject to CONDITIONS

- 18 year old offender charged with dangerous driving causing death/bodily harm → not danger to community
- given 18-month sentence, @ SCC changed to *conditional*
- "the creation of a conditional sentence suggests, on its face, a desire to lessen the use of incarceration" [40 *Gladue*]

→ SCC addressed issue of restorative justice and noted that it is concerned with the restoration of the parties that are affected by the commission of the offence; "A restorative justice approach seeks to remedy the adverse effects of crime in a manner that addresses the needs of all parties involved. This is accomplished, in part, through the rehabilitation of the offender, reparations to the victim and to the community, and the promotion of a sense of responsibility in the offender and the acknowledgment of the harm done to victims and to the community."

SENTENCING - PRINCIPLES

Fundamental Principle:

718.1 A sentence must be **proportionate** to the gravity of the offence and the degree of **responsibility** of the offender.

To decide sentence:

- 1) Look at the CC to see what the maximum sentence is.
- 2) Look at case law to find a range of sentences.

Principles:

- if circumstances call for denunciation, may be ^ sentence
- weigh risk of person committing again (spec. deterrence)
- especially concerned about this offence so want to *generally* deter others

SENTENCING - OPTIONS

1. Agree to a diversion/Crown stays the case (admit guilt, volunteer to take class, charge *dropped*) NO CONVICTION
2. Absolute discharge
 - found guilty but have no further requirements
 - technically no criminal record, but is CONVICTION
3. Conditional discharge
 - ie. community service, take counselling, teach a class, etc.
 - one fulfill conditions, get absolute discharge
4. Pay a fine
 - conviction *and* criminal record
 - becomes an issue when *can't pay fine*
5. Suspended sentence (*servicing* of the sentence is suspended)
 - not a discharge
 - suspending the passing of some sentence as long as accused fulfills ___ conditions
 - might be 9 months, but don't go into custody
 - if stick to conditions over the sentenced period, they serve suspended sentence + don't go to prison
6. Conditional sentence
 - serve sentence in community with **heavy** conditions
 - greater than would be with suspended sentence
7. Custodial sentence
 - actually put in prison (might be an intermittent sentence)
 - may be on weekends so can keep job
8. Period of *incarceration*
 - PROVINCIAL: less than 2 years at a provincial institution
 - not as great of programs as federal institutions
 - more dangerous than federal institution
 - FEDERAL: more than 2 years at fed. institution
 - often more difficult than parole
 - life sentence sometimes (for 1st degree murder, only *apply* for parole @ 25 years)
9. Dangerous Offender designation
 - ongoing danger to society
 - never get out unless demonstrate you're not a danger

Maximum Sentences:

- in the *Criminal Code*, lists maximum sentences for each offence
- reserved for the *worst* offender in the *worst* circumstances
- courts decide an appropriate range based on case law

Courts Consider:

1. circumstances of the *offender*
2. circumstances of the *offence*

Purposes of Sentencing / s. 718:

The fundamental purpose of sentencing is to **protect society** and to contribute, along with crime prevention initiatives, to **respect** for the law and the maintenance of a **just, peaceful and safe society** by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences; (specific) (general) deterrence
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community

SENTENCING – CASE LAW

"The sentencing of an individual is perhaps one of the most difficult tasks for a judge" [*Ruhl*] at 55

[*Ruhl*] → a conditional sentence can appropriately address issues of general deterrence and denunciation, but the appropriateness of the sentence depends on the particular circumstances of the offence, the offender, and the broader community

- look at both aggravating and mitigation factors in deciding which sentence to use
- **AGGRAVATING**: period of dishonesty was lengthy, thefts took place over ~4 year period; victim impact statement; magnitude of the crime (almost a million dollars stolen)
- **MITIGATING**: first time offender; guilty plea indicating remorse + potential for rehabilitation; remorse is genuine/ sincere; conduct was out of character, consequence of gambling addiction; accused suffered significant negative consequences (embarrassment, humiliation)

[*McConnell*] → "sentencing judge must be cognizant of the usual sentencing range, but that range is not determined in a vacuum. It depends entirely on the circumstances of the offence and the offender before the court." from *R v G(D)*

- looked through sentencing precedents for assault causing bodily harm/ assault using a weapon

Mental Illness of the Accused:

- mitigating factor
- affects the moral blameworthiness of the offender
- have to show *causal link* between the illness and the criminal conduct (illness is the underlying reason for his aberrant conduct)

Aggravating Factors:

- use of weapon
- injuries suffered by the complainant
- consequences of the offence

Help:

- denunciation + deterrence should be stressed for these types of offences, but at time of the offence, the accused was suffering from mental illness
- suspended sentence with probation of 3 years; terms of probation include not contacting the complainant, not possessing any weapon, no knives outside of residence; must take reasonable steps to maintain mental health

[*Langthorne*] → mostly discusses aggravating factors for why he is receiving such a long sentence

- *robbery* (factors = disguise, level of violence, phys injury)
- *kidnapping* (factors = blindfolded, taken to unknown location, made known to family / friends, gun use, length of time)

VERY IMPORTANT FACTORS:

- is there a high risk of re-offending?
- what are aggravating circumstances?
- does the sentence reasonably denounce/deter?

MANDATORY MINIMUMS

"Tough on crime" measures increase use of mand. minimums

- judges historically have wide discretion to fashion fit sentences for criminal offenders
- minimum sentences encroach on that discretion
- absent a finding of unconstitutionality, judges have no means of deviating from the imposition of MM sentences
- proportionality is fundamental principle in setting a just sentence; have to reconcile these contradictory approaches when MMs apply
- Canadian court system out of step with comparable jurisdictions where efforts made to restore judicial discr.
- MMs take away the Gladue tools