**CRIMINAL LAW – Professor Mosoff**

**2007/2008 – (Robert Kiesman)**

Constitution, Division of Powers

Constitution sets out division of powers - S 91(27) says criminal law federal.

Section 91(28) Penitentiaries a federal responsibility, while some institutions are provincial. Sentence over 2 years, the person goes to federal penitentiary (most often).

Section 92(14) Administration of Justice a provincial responsibility. The courts are run, maintained, and built by the provinces.

Section 92(14) Province can attach penalities to provincial offences. Provinces cannot make criminal law, but can make law on WCB, roads, etc, but the penalty cannot be too harsh or it will begin to look like criminal law.

Constitution, Significance of the *Charter*

s.52 - Charter supreme law - anything inconsistent of no force/effect.

s.1 - Reasonable Limits Clause - rights may be limited if those limits are reasonable and demonstrably justified in a free and democratic society.

s.7-14: Legal Rights s.15: Equality Rights

Legal Context of Criminal Law

Federal government has jurisdiction.

Law exists in federal statutes (eg: Criminal Code most often).

There must be a statute for a crime to exist - except for contempt.

Interpretation of the legislation (and scope) by the courts

Public Nature of Criminal Law: not private.

Blameworthiness: what is blameworty in determining guilt.

Presumption of Innocence

Crown has to prove guilt beyond a reasonable doubt.

No common law offences (s.8): you cannot have a crime that a judge makes up or one imported through England or anywhere else.

But benefit of common law defences (s.9): accused gets benefit of common law defenses. Some defenses (eg: necessity, intoxication) written in Code.

Blameworthiness

We are not punishing people for simply the harm they caused. We are assessing whether they are blameworthy.

Conviction based on **fault**, not simply harm caused.

**The Structure of Criminal Proceedings**

Form of Trial Depends on Type of Offense

*Summary Conviction* (less serious): trial in **provincial court** before judge acting as judge and jury. The process begins with laying an Information setting out the charge and minimal facts (max penalty $2000 and/or 6 months).

*Indictable Offenses* (more serious): process begins by preferring an indictment setting out the offence and bare facts. The method of trial can be in provincial court before a judge, in superior court before a judge or in superior court before a judge and jury. The mode of trial depends on the statutory provision (s.469) or the election of the accused. S.553 absolute jurisdiction of Provincial Court; S.469 absolute jurisdiction of Superior Court (almost always by judge and jury); everything else: determined by the election of the accused. **Option 1**: Trial in Provincial Court (no preliminary inquiry); **Op 2**: Trial by judge alone in Superior Court (after preliminary inquiry in Provincial Court); **Op 3**: Trial by Superior Court Judge and Jury (after preliminary inquiry in Provincial Court).

*Hybrid Offences* (can be prosecuted as either summary or indictable): the **Crown** decides. If by indictment, the accused may choose the mode of trial.

Preliminary Inquiry: before trial - venue in which the Crown presents case and must have enough evidence for there to be a leglitimate case for a trial. The standard is very low. Useful for accused who gets to hear broad framework of the Crown’s case.

Elements of Offense: components of the crime. Crown must prove each one of them.

Outline of Criminal Trial

Arraignment: formal reading of the charge.

Plea: guilty or not guilty. If he pleads guilty, jump to the sentence.

Opening Statements (occasionally): Depending on how formal the trial is there can be opening statements by Crown, and defense (but only when matter is serious or complicated). An opinion by counsel about what the judge/jury should **expect**. NO evidence at this point.

Crown Case: Crown calls witnesses who give their version of the events. The lawyer can say “what happened next? What did you do?” But NO leading or suggesting. Defense counsel can cross-examine - clarify; search for inconsistencies; set alternative explanations.

Crown Case closed. Defence may: (a) make “no evidence motion” claiming the crown has not met evidentiary burden; (b) not call evidence - argue Crown has not met legal burden - evidence is not good enough; (c) call witnesses that may or may not include the accused. The Crown can raise the criminal record of the accused but not otherwise.

Defence Case: calls their own witnesses; Crown can cross-examine.

Closing Statements: rare in Provincial Court, frequent in Superior Court. Summarizing positions, making pitch to the jury.

Charge to the Jury: All appeals are based on this point. Judge instructs the jury on how to deliberate (determine) whether the accused is guilty or not, and how to think about the law (requirments of defenses, etc).

Verdict: sometimes jury comes back if do not understand something.

Sentence: If accused is found guilty.

Statutory Interpretion: in deciding what is required, court must first **start** with the ordinary words of the statute(s). They start with the dictionary and then move on to Black’s Law Dictionary - they also consult the French texts.

**CHAPTER 2: Proving the Crime.**

KEY CHARACTERISTICS OF THE CRIMINAL TRIAL

Adversarial system: two positions being vigorously presented - opposite sides of the question - judge is a passive recipient. Evidence called or presented. The evidence must be **relevant** (useful in establishing elements of the crime) and **material** (something in dispute). **Credibility** (believability) influences weight of evidence - mistaken, confused, lying.

\*Presumption of Innocence: Based in common law and in s.11(d) of the Charter. Crown must present evidence to displace this preseumption beyond a reasonable doubt.

Separate functions of judge and juries: Jury is the **trier of fact** - what happened...who is to be believed. Judge is the **trier of law** - is evidence admissible. Decisions of fact almost never appealable - BUT if there was an error in the way the law was considered or an error in desribing to jury an area of the law (or deciding about the law) including allowing inadmissible evidence - MAY be appealable.

Evidentiary Burden: EB is initially with the Crown: is there evidence to support the case going to the trier of fact? At the end of the Crown’s case, defence can make a “**no evidence**” motion. EB: *to introduce evidence on each element of the offense that could prove beyond a reasonable doubt*. With “no evidence” motion, defence argues that a judge should not even allow a jury to consider the guilt or innocence of the accused because the Crown has failed to meet its EB - jury is instructed to acquit (Directed Verdict). EB can shift to accused (*Oakes* and *Whyte*).

Legal Burden: the Crown must persuade the trier of fact that the accused is guilty beyond a reasonable doubt. If there is reasonable doubt, the accused is not guilty. LB is based on the presumption of innocence and the burden remains with the **Crown** throughout. Crown must prove both physical aspects (*actus reus*) and mental aspects (*mens rea*) beyond a reasonable doubt. \*\**When accused raises a defence, Crown must prove beyond a reasonable doubt that the defence is not valid*. Exception: mental disorder.

Accused’s Burden: (Reverse Onus) can shift to accused when statute shifts it - EB on accused to displace the presumption by pointing to some evidence to contrary. Burden on accused can be **no higher than require proof on a balance of probabilities**. Accused may also have EB to give an air of reality in support of a defence.

What does a jury need to know about reasonable doubt?

R v. Lifchus: ***How reasonable doubt should be charged to a jury.***

The judge said to use it in its ordinary, everyday phrase. Judge then made an “**error of law**.” Explanation should include: (a) not based on sympathy; (b) *does not mean you need absolute certainty*; (c) not based on morality but on evidence; (d) no other adjectives are appropriate; (e) not based on **probability** - eg., not 51% then guilty (f) intertwined with presumption of innocence; (g) burden of proof remains with prosecution; (h) based upon reason and common sense; (i) logically connected to evidence or lack thereof; (j) if you think accused is probably guilty you must acquit.

R. v. CWH: ***Disbelief of evidence adduced by D does not rule out acquittal if reasonable doubt persists in mind of jury. If jury does not know who to believe - must acquit.***

Young complainant alleges improprieties from grandfather. Problems in conflict in evidence from the two camps - the daughter may be being influenced by her father. The legal issue: Was the jury misdirected as a result of the whole of the charge? Jury must be instructed on reasonable doubt and credibility - if they believe the accused, they must acquit. If after careful consideration, they are **unable to decide** who to believe, they must acquit due to reasonable doubt. If you do not believe the accused but are left in reasonable doubt about it, they must acquit. Finally, even if you are not left in doubt by the evidence of the accused (disbelieve the accused), you must ask yourself on the whole of the evidence, *whether you are convinced beyond a reasonable doubt by that evidence* that the accused is guilty. \*You **do not have to believe the accused** in order to acquit\*

STATUTORY PRESUMPTIONS AND PRESUMPTION OF INNOCENCE

Basic Fact Presumptions (found in Criminal Code)

 **Presumption**: statutory exception to presumption of innocence.

Structure: If Crown proves a basic fact (usually a component of the *actus reus*) another fact can be presumed (usually some aspect of the *mens rea*) - Specified in the statutory provision.

**Unless** accused does something to rebut the presumption.

Crown has to prove fact 1 ---> fact 2 can be assumed ---> unless accused *displaces* presumption. If accused does nothing the finder of fact goes 1-2.

Example: If the Crown proved accused broke and entered a dwelling, presumption that accused intended to commit an indictable offence.

Example: If accused possessed a narcotic, then there is a presumption that the accused intended to traffic.

Example: If accused occupies seat of car, presumption that the accused had care and control of the vehicle. *Appleby*

Often involve elements of the crime that are difficult for the Crown to prove like the **purpose** or **ulterior motive**.

*Accused in better position* to raise evidence to indicate (eg: had drugs for other purpose...broke into house for other reason.

Problematic: BFP are problematic because: (a) Pre-Charter they violate the common law presumption of innocence; (b) Parliament enacted statutory provisions that assist the Crown in proving its case, usually some element of the *mens rea*.

Types of Presumptions:

**Mandatory** basic fact presumptions require (in the absence of other evidence to displace the presumption) the trier of fact to find fact #2 if fact #1 is proved.

Irrebutable or rebuttable presumptions.

How does accused rebut the presumption? Two types of presumptions imposing **different burdens** of the accused...how much does the accused have to do to displace the presumption?

Evidentiary: All the accused has to do is \*raise some evidence\* that is capable of being believed that **breaks the connection** between fact 1 and fact 2. “I was sitting in the driver’s seat. I didn’t have care and control of the vehicle. I was in a diabetic coma.” *Require accused to raise evidence to the contrary but not to disprove anything*. How do you know if it is evidentiary burden? Such words as ‘in **the absence of evidence to the contrary”** signals that it is. Accused has to provide some evidence that is not disbelieved that displaces the presumption and the regular rules apply. Section 348(1) makes it an offence to “break and enter with the intent to commit an indictable offence.” When in a dwelling-house (fact 1), he intended to commit an indictable offence (fact 2). In the absence of evidence to the contrary.

Legal: Accused must meet persuasive burden and **establish** on civil standard that fact 1 does not lead to fact 2. Fact in *Oakes* was a legal presumption. Example: “I had this narcotic because it was mine in a small amount.” Can he persuade the jury of it in order to not be charged with trafficking? There has to be enough evidence to be convincing. If Crown proves basic fact, **presumed fact will be presumed** to exist unless the accused proves otherwise. Heavier onus on accused: A must disprove presumed fact.

Example: Section 8 of the former Narcotic Control Act. Offence of possession for the purpose of trafficking. *What is the basic fact?* Possession. *What is the presumed fact?* For purpose of trafficking. *How does accused overcome the presumption?* Accused must establish otherwise.

Charter

*Charter* specifically protects Presumption of Innocence (11d). Everyone has right to be presumed innocent until proven guilty by an independent and impartial tribunal. It is subject to state limiting rights under Section 1 of the *Charter* “law of no force or effect if inconsistent with *Charter*.”

Oakes: ***The presumption of innocence holds that the crown bears the burden of proving guilt BRD. A provision that shifts the burden to the A on an element of the offence violated the presumption of innocence b/c the A could be convicted depite a reasonable doubt in the jury.3) Sets out Section 1 test. Burden is always on the person who is trying to uphold the violation. Burden of proof is the balance of probabilities. 1st: Does it breach the Charter? 2nd: Is the objective of the statute important enough to justify the violation? 3rd: Can the provision be saved under s.l "reasonably justified in a democratic society"?***

Oakes charged with possession for the purposes of trafficking 8 grams of hash oil. Once TJ made finding of fact that Oakes was in possession, accussed challenged s. 8 of Narcotics Act on basis that it violated Charter.

Dickson DJD characterizes presumptions as Evidentiary burden on accused to raise sufficient evidence to bring into question of the presumed fact.

Sec 8 of NCAct is basic fact presumption involving mandatory presumption of law that shifts the legal burden to the accused.

Key: **can accused be convicted despite reasonable doubt**? If the jury has reasonable doubt about guilt and still has to convict...that violates. Statu presumptions tell a jury how it has to find even if it has a doubt about finding that way - accused loses benefit of presumption.

Section 1 Analysis: *Charter* sets out limits on freedoms. (*Oakes* real legacy). Purpose of Section 1: (a) guarantees rights and freedoms in Charter but there are limits; (b) states the exclusive justificatory criteria against which limitations on those rights can be measured. Sec 1 Burden of Proof: on party trying to uphold limitation. Standard of Proof is civil standard, proof by a preponderance of probability (this is less than BRD).

Section 1 Test for Limiting Rights: **Ends**: Is the objective the measures designed to serve important enough to warrant overriding a constitutionally protected right/freedom? Is it “pressing & substantial?” *To protect society from evils of drugs.* **Means**: (a) *Rational connection* between what legislation says and its connection to the goal. Court said it failed this test - there was only small amount; of drugs; (b) *Minimal impairment:* is there something we could have done that is less intrusive, less of an infringement of a right? *Proportionality*: more global question - consider the nature of impairment against nature of right that is at stake.

Oakes is important: (a) Set **strict standard** under s. 1 for all cases...signalling courts taking rights very seriously; (b) Very **expansive interpretation** of the presumption of innocence.

Whyte v. the Queen: ***Crown’s intrusion into rights need not be conducted by the most limited means, but reasonably limited and realistically enforceable. [Scaling back of Oakes].***

 Accused found passed out on steering wheel of car and charged with impaired care and control of the vehicle.

Section 253. Section 258.1 “accused shall be **deemed** to have had care and control of the vehicle unless the accused has established to the contrary.”

Presumed fact: he had care and control of the vehicle.

How to rebut: proving beyond a bal of probabilities that he was not.

Appleby: a legal burden on accused to establish on BOP did not enter vehicle for the purpose of putting it in motion.

Intention not an element of the offence: The short answer to this argument is that the distinction between elements of the offence on other aspects of the charge is irrelevant to the s.11(d) inquiry. The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence.”

Section 1: **Crown** has onus. **Burden**: Crown has burden of balance of probabilities. **Test**: Oakes - what is purpose? objective? is objective pressing and substantial?

\*\*Objective of legislators prevent generalized harm to society.

Means test: (1) Is there a rational connection? Between infringement of right and the goal. In this case, yes, there is internal rationality but quaere, but it is not entirely obvious. (2) Does this means impair rights (presumption of innocence) as little as possible? Instead of saying accused had to persuade that he was not in driver’s seat, legislators could have made it an **evidentiary presumption** where accused had to simply raise evidence to the contrary. (3) Proportionality test: area of difficult legislation. Contribution of *Whyte*: Extends scope of 11(d) it beyond elements of the offence to any matter essential to guilt.

Downey v. R: ***The presumptions which violate Charter must be able to pass Oakes test to earn s.1 exemption: Rational connection; Minimum Impairment; Proportionality (severity of violation is proportional to importance of objective).***

Post *Charter* evidentiary presumption: s 195 offense to live on avails of prostitution. If lives with prostitute without giving evidence to contrary, considered as living on avails of prostitution.

How to rebut: \*DON”T have to convince JUST raise evidence to the contrary\* (a) Raise evidence of own source of income. Case is not over...Crown can still raise evidence that he is living on avails of prostitution.

Different than Oakes: established that **mandatory evidentiary presumptions violate** presumption of innocence to be determined under s.1 on a case by case basis.

Why did Crown do this? Difficult to prosecute pimps - Major problem getting prostitutes to come as witnesses.

Leg does not offend **if proof of one element leads to proof of 2nd** fact BRD but not just a rational connection. Permissive presumption does not violate S.11d.

Section 1 Analysis

 OBJECTIVE: to get at pimps who are living parasitically. (yes) Provision is addresssed at cruel and persuasive social evil. MEANS: Rational connection - *are the means rationally connected to the legislature’s objective?* (yes). MINIMAL IMPAIRMENT: Parliament not required to choose the absolutely least intrusive alternative, but whether could reasonably have chosen an alternaitve to achieve objective as effectively - no - so (yes) it passes the test.

**CHAPTER 3: Elements of the Offense.**

(1) How do you know what the Crown has to do BRD? (2) Is it likely these facts will fulfill the elements of the offence? (3)Are these facts convincing enough?

LEGAL ELEMENTS OF THE OFFENCE

Found in the statute (and the way that the statute has been interpreted.

Essential elements divided into two parts: (a) *actus reus*: physical component; (b) *mens rea*: mental component or fault. The two parts MUST come together at **same** time.

Actus Reus: What is It?

A prohibited act or **omission**

Usually a physical act (eg: inflicting force), or failing to provide necessaries (eg: feeding your child).

Usually *actus reus* is found in the description of the offence.

Parts of the Actus Reus

**Conduct**: must be **voluntary**. Conduct requirement under 265(1a) is “applies force”. Note same act may be crime in some circumstances, non-criminal in other circumstances.

**Circumstances**: in 265 (1a) a circumstance is “without the consent of another person.” May include not only the presence of particular circumstances, but also absence of others. In sexual assault: the AGE of the plaintiff is a circumstance.

**Consequences**: Certain crimes require particular harm to have been caused. In Section 265(1a) there is no consequence - remember not all crimes have consequences (eg: not putting baby in car seat). But if there are, the conduct of the accused must have caused the circumstances. Crimes that do not have consequences (attempted murder) are called ***conduct crimes***. With consequences, the Crown must prove: (a) consequence occured and (b) the conduct of the accused **caused** the consequence.

Example: “Trespassing at night” Section 177. The (a) conduct is loitering and prowling; the (b) circumstances - at *night* on property of *other person* near a *dwelling* house. Note: in the Code night is defined as being between 9 and 6 ---> if it doesn’t occur between those hours not a crime; (c) no consequence.

Mens Rea: What is It?

Blameworthiness, fault, **guilty in mind**.

Mental state of the accused that **goes along with** an action.

Sometimes means intention, knowledge. You know there is going to be a prohibitive consequence.

A fault requirement must be proved in order for them to be convicted.

Starting point, *mens rea* requirement is subjective but sometimes objective; that is, person desired the consequence to occur...at least *aware of a risk but took the chance anyway*.

Included Offenses

An offense for which **all of its elements** are in the offence charged.

Accused can only be convicted of offence charged/included offence.

A person is charged with murder: you set out all elements of that offense - it is posssible the Crown may not prove all elements - but included in offense of murder is manslaughter.

Jury has to be **instructed** on the offense but also that if they do not find murder, they may also find accused guilty of lesser offense.

Elements of robbery made up of elements listed in *theft* and *assault*.

**CHAPTER 4: The Actus Reus.**

OMISSIONS

 May satisfy the conduct requirement of the actus reus as a *failure to act*

 BUT ONLY...Where there is a **legal duty** to do something OR

**Parliament** expressly states that a crime committed by omission

Section 215: Failure to provide necessaries to a child.

Criminal Negligence: Doing or omitting something to do anything that is your legal duty to do.

Section 242: Neglecting to obtain assistance in child-birth.

Fagan v. Commissioner of Metropolitian Police: ***If an act of ommission is done without mens rea, as long as that act continues, the essential mens rea for the offence can be formed later as long as there is some overlap between AR and MR.***

Police officer told him to move his car. He did and parked on his foot. The officer told him to move it and he said no. Later he slowly moved the car tire on his foot.

Running over his foot was an accident.

Issues: (a) *Actus reus* and *mens rea* did not occur at the **same time**; (b) it was an **ommission** to remove the car from his foot. You cannot have assault without *mens rea*.

**Omissions cannot satisfy** conduct of assault.

At inception driving on foot not sufficient b/c not deliberate BUT

Court: *remaining* on the foot satisfied the conduct requirement of assault when paired with intent to produce apprehension. Actus reus and mens rea concurrent - even though act started before intent.

R v. Moore: ***Where police have legal authority to identify wrongdoer, the wrongdoer has reciprocal duty to co-operate, and to not co-operate according to that duty is a criminal offense. (pre-Charter).***

Guy got pulled over on bike for running a red light and was arrested for not refusing to pull over and refusing to identify himself. Charged with obstructing a police officer in lawful execution of his duty.

Court said: police offer could not arrest the accused until he had done his investigation. Accused has been charged with obstruction through an omission - he did nothing (not given his name).

Omission **will satisfy** an offense if a legal duty is breached OR if it is specified in crime. There is no legal duty specified in *Code*.

WHERE does the duty come from? It is **implied** - see ratio.

Clear duty on the police officer - therefore implied duty on accused.

Recall: this was pre-Charter. **Nobody would rely on** this case.

Dissent (basic principle we should take): *No duty on D - the only duty is on officer; court should never imply a duty where none exists and where to do so would result in D’s arrest or imprisonment.*

R v. Thornton

Facts: D knew that he was HIV positive, yet gave blood.

Issue: Does “legal duty” in s.180 *include* common law duty?

Common law duty to refrain from conduct where there is reasonable foreseeability that harm ould be cause to another person?

Common nuisance: s.180: every one who commits a common nuisance who does an unlawful act **or fails to discharge a legal duty** and thereby endangers...

The accused says: no *actus reus*.

Ontario Court of Appeal said common nuisance made out.

Case opens up possibility that there are a lots fact situations and duties that would become part of prohibitive criminal conduct.

Widened the kind of legal duties implied in criminal law.

VOLUNTARINESS

Principle applies to the conduct of the *actus reus*. (Swarm of bees made me pull the trigger). Involves whether accused chose consciously to do act or omission.

**Not** a principle of *mens rea*.

There is a certain category of crimes where Crown does not have to prove *mens rea* at all - all they have to do is prove *actus reus*. If action is **involuntary** - does NOT count as an action.

Involuntary acts are considered not the acts of the accused because they are not the acts of an operating mind (eg: reflex, seizure). But if you voluntarily injest drugs and do something - it is voluntary.

**Difference** with mens rea: Voluntary (consciously choosing to do something - not why you do it); MR (intending to commit criminal act).

Luski: ***Example of where involuntariness negated the actus reus.***

Driving on wrong side of road due to involuntary act (poor road conditions). He was not guilty.

**CHAPTER 5: Causation.**

Only an issue in crimes that have a *consequence*. Crown in (consequence) crime has to prove two things: (a) the consequence **occurred** BRD; (b) the consequence caused **by the conduct or the omission** of the accused.

There are various sorts of causation required in homicide section of the *Code*, but most of the rules of causation are *judge-made*.

Causation is either **all or nothing**. Unlike tort, there is no apportioning of criminal liability - BUT at the same time more than one accused could have caused the consequences. The accused is either an agent whose actions caused the consequence - or not.

Smithers Case*:* ***TEST: Test for whether accused caused the consequence was if accused contributed to consequence in a way that wasn’t (de minimus) insignificant - that wasn’t trivial or trifling. This test is essentially a low test - if accused’s action is anything above the smallest thing, he can be held responsible.***

After hockey game a fight broke out, one man kicked another who eventually died **partly** due to anatomical abnormality. He died where someone else may not have died who didn’t have this throat issue.

Court said: The real question is: did “actions of accused **contribute** to the consequences the *di minimus* range” (something not insignificant)?

This ruling resembles the **thin skull** principle - you take your victim as he or she appears.

R v. Smith: ***If and only if there is an intervening event that makes original harm pale in comparison will the accused who inflicted original harm not be held responsible. At this point, original cause is no longer the cause.***

Victim was stabbed, but was given improper medical care afterwards.

She later died.

Harbottle Case: ***SCC laid down a more rigorous test for causation which only applies is FDM situations: the accused has to have been a substantial, integral, and essential to the cause of death.***

Accused says he was just holding her legs down while the co-accused strangled her. He says he was not guilty of first degree murder because he did not **personally** cause the victim’s death.

Court held the Crown had to prove he “committed an act or series of acts which are of such a nature that they must be regarded as a **substantial and integral** cause of death.”

Here: a *stricter test* has been applied. The test for causation changes.

R v. Nette: ***Subsequent to Smithers states that actions must be a bit more than something beyond the trivial. (2DM; Manslaughter)***

Test is higher for FD murder - what about other crimes?

Two young men break into 95-year old woman’s house - hog ties her and she died of asphyxiation.

Harbottle test only relevant to offense that is at issue in Harbottle (FDM) - all other serious offenses go back to other law that was expressed in *Smithers*.

Revises wording of Smithers test: “a **significant contributing cause**.”

R v. Blaue: ***If at time of death the original wound is still an operating cause and a substantial cause, then the death has been caused by the accused.***

JW refused blood transfusion after being stabbed.

If there are series of intervening events between time of conduct or omission that is part of the crime ---- and the consequence, how do you determine the causation?

Court: The failure of the victim to have sought assistance or intervention does not break the chain of causation.

Quoted phrase from this case: *It is only if the second cause is so overwhelming so to make the original wound merely part of history*.

Murder is FDM when **planned** and **deliberate**.

Manslaughter: where fault element resides in a combination of causing death by an **unlawful act,** or by criminal **negligence**, and mere objective **foreseeability** of death.

**CHAPTER 6: The Mental Element (Mens Rea).**

For analytic purposes, same conceptual framework as *actus reus*: conduct, circumstances, consequences.

Cases Demonstrate General Principles

*Beaver:* Subjective fault is the starting point.

*Lewis:* Motive is different than *mens rea*.

*Sault Ste Marie:* Presumption of true crimes (contrast with provincial offenses) that fault is subjective not objective.

*Blondin:* where statute silent, reckless will suffice, must relate to the elements.

General Principles

**Different levels** of fault required for different offenses and elements within offenses.

Look first to the **words** of the statute (what Crown has to prove with respect to fault?). Words like: wilfully, recklessly, fraudulently...

If level of fault not specified, **judges** to identify level.

General Rule: *subjective fault is required for true crimes*. Requirement goes to the mental state of accused: what did he know, intend, about circumstances and consequences. Did accused intend, was he reckless? **NOT** **what should** accused have known?

Crown must prove the mental state of the accused: evidence here is difficult to ascertain (practical problem). Often Crown will prove *mens rea* by virtue of **circumstantial** evidence. If evidence is circum, it still has to be used to go toward subjective state of the accused.

For some crimes, **objective** fault is enough (community standard).

Caution: distinguish “must have known” from “should have known.”

*Mens rea* applies to **each and every element** of the offense.

Levels of Subjective *Mens Rea: (most often specified in statute)*

HIGHEST: Intention/Knowledge/Wilful Blindness: accused intended to kill person ...wanted to...tried to... **Intention** goes with consequences: intended particular result. **Knowledge** (or be reckless) with respect to circumstances: on sexual assault, was there consent? If so, was he reckless with respect to the consent? **Wilful blindness**: policy alternative to knowledge. Accused must have intended to cause consequences, knew consequences were likely to occur.

MORE RELAXED: Recklessness: Accused was kind of **aware of a risk** (not necessarily intend or knew it would happen) but he took the risk anyway. Lesser standard. Crown merely needs to prove the accused was reckless. Note: recklessness is still subjective - Crown cannot merely say “he should have known,” he must prove the accused was aware of the risk and took the chance anyway (eg: you shoot a moving shape in woods).

It is not defence for accused to say “I didn’t know it was illegal.” Crown doesn’t have to prove anything of accused’s knowledge of the law.

Examples: (a) Suppose you are dealing with possession of stolen property. You know somebody who agrees to steal a watch for you. You agree to pay her $50: you are **knowingly** and **intentionally** in possession of stolen property. (b) If you knew someone was in business of selling stolen goods and that person says to you, “here is a $700 watch for $10 and you buy it and you think there is something fishy (risk, but you don’t know for sure): arguably - recklessness standard. You knew there was a **risk** and you did it anyway. If you bought a cheap watch from a drunk and didn’t suspect any risk, you may have been **negligent** and reasonable person should have known, but you neither knew nor acted recklessly. (c) If you buy from a reputable friend and had no idea you were purchasing stolen goods: no *mens rea* - you acted innocently.

Wilful blindness is an **alternative** to knowledge. If element of an offense requires Crown to prove knowlege (knowingly passed counterfeit money), one thing the accused could say is “I don’t know - I closed by eyes.” If Crown has to prove accused knew of consequences, then defense position could be: did not intend, did not know. If offense requires intention or knowledge, recklessness is not enough.

(Subjective *mens rea*) R. v. Beaver: ***If offense was a true crime, knowledge was essential - mens rea is required - essential element of offense. If person honestly believed the accused did not have knowledge, then he did not have requisite mens rea.***

Someone is trying to rip off police officer. Defense is that accused thought they were trying to sell sugar of milk. Did he honestly believe he had prohibited substance? Note: didn’t matter if he knew he was breaking the law. **Question:** *Is knowledge essential element of offense of possession for accused to know what the substance is?*  Honest belief is not the same as reasonable belief.

Distinction: Honest belief is not the same as reasonable - more outrageous the claim, the less likely it will be credible. You must ask: did accused know? You have to use circumstantial element to impute subjective state of accused.

(Subjective) Sault Ste Marie:

Pre Charter. Involves not a crime in Code, but was a provincial regulatory offense - in alternate category to true crimes. All Crown had to prove was *actus reus*. This case creates a third category: middle ground between offenses that are absolute liability and ones that are true crimes. With absolute liability, defenses are: it wasn’t me - it didn’t happen - circumstances (all *actus reus* issues). You CANNOT say I didn’t mean to do it.

 Facts of case: City SSM contracts with a company to get rid of garbage, contractor does it - method of disposal compacting is done in place that has fresh water streams. Contractor charged with pollution of Ontario Water Act - city is as well. City says: didn’t know what contractor was doing - was not liable under statute. **Alternate approach**: was absolute liability - didn’t matter what city knew. Disctinction between true crimes and public welfare offenses: where offence is criminal, the Crown must establish mental element - that acused who committed prohibited act did so recklessly and intentionally, with knowledge of the facts...**negligence is excluded** as sufficient for criminal conviction unless statute says otherwise. In sharp contrast, absolute liability, must prove D committed the act - there is no relevant mental element - does not matter if it was accident.

Subjective *mens rea* required for true crimes - burden on Crown (as two cases above said). But ...what **level** of mens rea is required? ...

(Intent and Recklessness) R v. Buzzanga and Durocher: ***Where “willfully” is included in a statute, unless it specifically states that recklessness is included, the necessary MR will be intention.***

 Issue: what does wilfully mean? Wilfully modifies promotion of hatred - contrast with 281.2(1) which is also a true crime but where recklessness is sufficient. ***To desire to bring about consequences or know that consequence substantially certain. Even if you don’t want a thing to happen but you know it will happen anyway and your conduct leads to the consequence that satisfies intentionality.*** Two French guys make fun of positions their opponents are taking in French school controversy. They weren’t trying to promote hatred and opposition. They didn’t desire that consequence - they were using it as irony/political satire to make people see the light. **Intention**: isn’t restricted to desiring consequence to occur - if you are certain a consequence will occur it is same as intending it will occur. **Wilful:** is not part of subsection 1 - that inciting of hatred has to be wilfull. Where there is no other indication, recklessness is enough. Recklessness is minimal subjective *mens rea*. This case tells us about the use of **objective evidence to determine subjective intent.** It is a tall order to tell Crown they have to prove subjective intent - but use evidence surrounding, circumstantial. Purpose to “determine what individual intended, ***not*** to fix him with the intention that a reasonable person might be assumed to have in the circumstances.”

s.319(2) Wilful promotion of hatred: Everyone who, by communicating statments other than in private conversation willfully promotes hatred against any identifiable group is guilty of...

 ACTUS REUS:

Conduct: communicating statements

Circum: not private conversation

Consequ: promotes hatred against identifiable group

MENS REA:

Conduct: intended to make statement(s) / recklessness (does not mean negligence - there is still subjective awareness of accused as opposed to doing it by accident)

Circum: **recklessness** (Crown would have to prove A was reckless, not necessarily that he knew)

Consequ: wilfully (intentionality) - accused wanted to promote hatred against group OR that he was substantially certain that it was the likely result.

 Wilfuly only modifies “promotion of hatred” - so it is only consequences that require proof of intention.

What we need to know for *mens rea*:

But motive may be important in evidence. Motive is not the same as *mens rea* (intention). If intention is there to do the act, motive is largely irrelevant (not legally relevant). The only time motive comes close to being legally relevant - specific intent crimes.

Read statute carefully to determine whether mens rea is specified (wilfully, intentionally or knowingly).

If statute is silent in terms of *actus reus*, recklessness is sufficient.

Intention/know/wb are the higest level of MR.

Intention usually refers to consequences.

s.429: wilfully means reckless - but only for offenses in that part of *Code*.

Recklessness: recognize the **risk** that actions may cause this consequence or these circumstances exist but **take risk** anyway. Must be subjectively aware of the risk (possible that woman not consenting to sexual activity but take the risk anyway). Persistence in court of conduct which creates a risk that the prohibted result will occur.

Wilful Blindness: **Suspicions** aroused (re: circumstances or that actions will cause consequences) but **deliberately** close eyes to risk, does **not investigate** further. More deliberate, conscious shutting down in WB than in recklessness. Not to reward persons for closing their eyes to legally relevant circumstances and consequences when their suspicions are aroused. WB **only used where there is requirement** for knowledge or intention (as part of the *actus reus*). Declines to make an inquiry because you do not want to know the truth.

\*WB and R requirements only when there is knowledge requirement in statute.

R v. Blondin: ***Where statute silent, reckless will suffice - must relate to the elements.***

Scuba gear shipped from Japan - tank full of hash. He knew there was something amiss - paid to take it here. Charged with importing cannabis. He said he knew there was something illegal in it, but didn’t know what that was. *Did he have to know - does offense require it*? If legal requirement was knowledge, Crown must prove he knew - or that he was wilfully blind. If crime requires recklesness, the Crown has to prove **less**. First issue: which stakes is required by offense? Second issue: what was it that he had to know or be reckless or be wilfully blind about? What did he have to know what was in there? Court said what Crown had to prove with respect to the facts was that he had to know the *character* of the forbidden substance - not enough to know it was something illegal - **recklessness** was sufficient. Crown doesn’t have to prove he knew it was cannabis - but had to prove he knew/wasWB/reckless with drugs in general.

R. v. Currie: ***WB requires an actual subjective suspicion on part of accused. The fact that any reasonable person would have been suspicious is not sufficient for finding of WB. (Awareness)***

Young man cashed a forged cheque to a stranger for $5 - goes to bank signs his own name and gets money - charged with unlawfully and knowlingly uttering a forged document with intent to use it as genuine. Why was WB necessary? --> specific intent crime --> in order to convict person of uttering forged document the person had to do it unlawfully and knowingly - accused had to have known about forgery. If he was **reckless** about it that was not enough. Trial judge said he should have inquired and been suspicous - convicted on basis on WB. But this is wrong analysis of subjective mental state - crime requires he did something knowingly and Crown has to prove subjective mental state!

R v. Sansregret: ***A cannot rely on honest belief of consent unless he took reasonable steps to ensure consent was given - imposes objective test.***

Charged with rape, b&e, possession of weapon, robbery - rape subject of appeal. Woman kicked him out - he terrorized and threatened. Probation officer talked her out of pressing charges. Second incident: 4:30 am broke in and terrorized - she had sex with him to calm him - she was in danger. At Trial: rape charge - he had honest belief she was consenting: acquitted. Judge finding of fact: he had honest belief she was consenting of her own free will. Crown must prove there is no intent.

CONSENT:

If consent obtained by threat is not consent (or by force) - common law - but some places in Code say that.

Consent must be freely given. Appearance of consent doesn’t count.

**Mistake of Fact:** thought there was consent but he was mistaken (mr).

Pappajohn: An honest (even if unreasonable) belief in consent negated mr.

Dilemma in this case: finding of fact at trial. McIntyre J would have convicted on basis of recklessness BUT this conflicts with findings of fact at trial of honest mistake.

Trial judge also used WB, but not in technical sense, more like “should have known.” Reckelessness distinguished from WB.

**Wilful Blindness**: Requires awareness of need for further inquiry - then shut your eyes. WB = knowledge.

- Application to facts problematic: cannot simultaneously have honest belief in consent and find him WB as to consent.

- Recklessness, to form part of MR, must have element of the subjective.

- (see 6-33): “Recklessness involves danger of risk and persistence in course of conduct which creates a risk the prohibited result will occur.”

- Both recklessness and WB require some level of knowledge.

- This case: WB sounds like Gross Negligence.

AMENDMENT TO THE CODE

Addresses issues of mistaken belief in consent (s.273.2): It is not D under s.271-2-3 (sexual assault) that A believed she consented where consent arose from: self-induced intoxication; WB; A did not take reasonable steps in circumstances known to A at the time to ascertain C was consenting.

Introducting Objective Test: imposing affirmative obligation on A who cannot claim mistaken belief in consent witout taking reasonable steps to ascertain C was consenting.

A has to prove he took reasonable steps...

In this case SC defined WB and R.

MOTIVE:

R. v. Lewis: ***Evidence involving motive is always relevant and always admissible, however it is legally irrelevant to the question of liability. Proved absence of motive is an important factor, and the jury must be charged to this fact. This is different than absence of proved motive. Proved presence of motive is important factore in Crown’s case and the jury must be chagrged to this fact. Motive is a question of fact.***

TRANSFERRED INTENT:

In some situations, A intends one offence but another one occurs because of a mistake or accident. Common law doctrine of transferred intent arises when:

 A shoots B, believing that B is C (A intends to kill C)

 A aims at C, but by chance/lack of skill shoots B (A intends to kill C)

**In both cases A has intent to kill C but kills B instead.** The law allows A to be convicted of the murder of B even though A has no intent to kill B. The intent of the accuse to kill C is transferred to B - *so long as the harm that arises is the same kind as the harm intended.* If A has intent to commit mischief by denting B’s car with a hammer, but carelessly hits C in the leg instead, A’s intent cannot be transferred to make him guilty of an assault on C.

**CHAPTER 7: Departures from Subjective *Mens Rea*.**

Requires blameworthy state of mind for conviction.

Look first to definition of offense to determine nature of fault requirement.

Subjective fault refers to mental state of the accused at the time of the offense while **objective fault refers to a resonablenes**s standard.

Different elements of the offense (circumstances and consequences) may be different fault requirements.

Different forms of subjective fault exist on a continuum.

Intention and knowledge with alternative of WB are highest forms of subjective fault requiring substantial certainty that circusmtances exist or consequenes will occur.

True Crimes

Require subjective fault unless Parliament made exception.

MR exists as continuum where intention, knowlege, WB are highest form.

Recklessnes is sufficient unless P required intention or knowledge.

Strict/Absolute Liability

A further move down the MR continuum.

Before Sault Ste Marie, offences were either: (a) **Absolute** liability: result of increasing industrialization. All Crown has to prove is that *actus reus* occurred - no mental state required. If person did it accidentally or mistakenly - it doesn’t matter. Only defense is that you didn’t do it - or legally relevat circumstances didn’t exist. Sometimes called *public welfare* offenses. (b) ***Mens rea*** offenses (most subjective but also criminal negligence).

SSM adds (c) **Strict** liability: Crown has to prove act was done by the defendant beyond a reasonable doubt. If Crown prove actus, the accused does nothing - there is a conviction. No requirement to prove fault. But there is opportunity for accused to say he acted with due diligence or reasonable mistake of fact. What would a reasonable man have done in the circumstances?

Early cases classification factors:

**The penalty**: The higher the penalty the more likely the offense is strict liability.

**Subject matte**r: Public welfare or offenses that involved community standards are ones that tend to be strict liability.

Need for **deterrence**:

Difficulty of law enforcement:

Central Dilemma:

Balance of: (1) Need to **balance** high standards of public safety; (2) The revulsion for punishing the morally **innocent**.

Absolute Liability PROS:

* (Why we should not require MR)
* Protection of public requires high standard of care - more likely to be careful if ignorance is not an excuse
* Administrative efficiency
* Penalties low so trade-off worth it.

Absolute Liability CONS:

* (Why we should reqire MR)
* Violates fundamental principles of criminal liability
* No empirical evidence that absolute liability results in greater care
* Stigma with conviction where penalties increasingly severe.
* Cynicism and disrespect for the law.

Consistent with sentencing.

Strict Liability: Half Way

* Crown not required to prove MR
* But is a good defence to show the accused was not negligent
* Burden shifts to accused to show on BOP that he acted reasonably
* Known as the defense of due diligence.

Summary of Defence

“As a general rule an honest and reasonable belief in a state of fact, which, if they existed, would make D’s act innocent, affords an exuse for doing what would otherwise be an offense.”

Mistake must be **reasonable not just honest**.

Accused has the burden of proof.

Why Do we Need Middle Ground?

* Too onerous and time consuming for Crown to prove MR.
* Do not want to punish those who are blameless or at least acted reasonably.

Classification: Full Mens Rea

* Must be proved by Crown, included true criminal offenses and public welfare offences that incorporate MR language, any offences with mandatory jail sentences.
* True Crimes: Crown has to prove some kind of fault (welfare fraud in provincial statute has language “willingly”).

Strict Liability

Crown does not have to prove MR, but accused may avoid liability by showing he took all reasonable care or made honest and reasonable mistake.

What would reasonable person have done in the circumstances?

Includes all public welfare offences unless explicit language to the contrary.

Presumption that provincial offences fall into this category.

(Worker’s Compensation Act, Motor Vehicle Act - provincial statutes that are offense-creating). Starting point is SL unless stated otherwise.

Classification: Absolute Liability

Not open for accused to exculpate self by showing he/she was free from fault.

Legislators must make clear that liability intended without fault.

Presumption against absolute liability.

Is lack of voluntariness a defence to an offence of absolute liability?

These offences are becoming fewer - against s.7 of *Charter*.

One defense: I didn’t do it - legally-relevant circumstances do not exist. If hunting out of season, one defense could be it was not out of season.

Only other possible defense: lack of voluntariness.

 How to Classify:

Read words of Statute.

Is it a true crime or does it have words of intent? -- then there is a MR offense.

Do words indicate that it is absolute liability? - then it is absolute liability.

Otherwise, it is probably strict liability.

R v Chapin: ***Classic Example of Strict Liability.***

Accused went duckhunting with a friend - conservation officer investigates situation sees small pile of grain but not until right there. A charged under s.12(1) *Migratory Birds Convention Act* - breach of a regulation creates an offense - no person shall hunt to migratory game birds within 1/4 mile from bait. What kind of offense? (a) Is it a True Crime - if it is, the starting point it is full MR - Crown has to prove some kind of MR. Crown says not true crime: not serious offense (summary conviction); no words requiring MR in this Act (but other offenses in Act require MR); Regulatory offene for general welfare of people and ducks; Pub wel offence not criminal in true sense, thus no presumption of MR. Answer: not a true crime - no stat saying it is - nature of penalty - nature of offense; (b) Is it Absolute Liability? No - no words expressly stating it is; Pub wel offences are strict liability unless leg indicates otherwise; penalties not minimal (jail, gun forfeiture, licence revoke); possibility of defence of due diligence as weakening enforcement not sufficient considering penalties and possibilty of convicting morally innocent. **Classic Example of Strict Liabilty**: Accused can raise defence of due diligence: She *may absolve herself on proof that she took all care which reasonable person may have been expected to take in all circumstances* - she was not negligent. This case is an application of what we saw in Sault Ste Marie. End of Fall Term

Criminal Negligence

* CN is a true crime. Crown has obligation to prove fault BRD.
* A statutory exception to requirement that true crimes require subjective mental state.
* An offence that can be committed by an accused with **no** **subjective fault** with respect to the consequences of actions.
* Defined (but not creating an offense) in s.219…
* Everyone is CN who: (a) in **doing** anything; or (b) in **omitting** to do anything that it his duty to do, shows wanton or reckless disregard for the lives or safety of other person.
* CN only relevant to those offenses that mention CN, but *CN itself is not an offense.*
* Crimes involving CN: s.222 “manslaughter by CN”; s.221 “causing bodily harm by CN”; s.220 “causing death by CN.”
* All are **consequence** crimes.
* Definition: only covers risk to others; degree of disregard (wanton and reckless) - a very LARGE discrepancy; CN may be committed by omission but only where a duty exists; “shows” wanton and reckless disregard, emphasis on ***conduct*** - not what is going on in the mind of the accused. (Degree of “*unthinkingness*” that is apparent from nature of conduct).

Historical Context of the Law of CN

* Law in a very confused state.
* Developed primarily in division of powers to legislate in the area of driving offenses.

Tutton: *McIntryre* J: ***CN is “marked departure from standards of reasonable person. An objective test must be employed and focus must be on conduct, not the mental state and any conduct that meets that definition is punish-worthy – fault lies not in what they thought, but in failing to think.”*** *Lamer J:* ***When applying an objective norm for CN there must be a “generous allowance” for factors particular to accused. [Creighton shut down this subjective import].***

* Subjective/objective distinction really mattered because of honest mistake by the accused on the facts of this case.
* Only 6 judges participated in decision ending in 3-3 tie on subjective/objective issue.
* Charged with manslaughter by way of CN. Also charged under 215(2), then 197(2) of separate offence of failing to provide necessaries, an unusual and awkward way to word the indictment.
* 3 Issues: Burden of Proof; whether mistake to be assessed on sub or objective standard; relevance of personal characteristics of the accused to objective standard.
* Deeply religious with belief in divine intervention – learned son had diabetes – parents attended classes on diabetes – mother stopped insulin believing son healed – son became ill – admonished by doctor – later mother believed he was cured again and took him off insulin – he died.
* Trial: honest belief that son healed by divine intervention. If offense is subjective MR offence “honest but mistaken belief in a set of facts which, if true, would make conduct non-culpable” would lead to acquittal. If offense is assessed on an objective standard, the test is what would reasonable parents in the circumstances believe.
* SCC: No wanton disregard because Ds honestly believed he was cured.

Subjective-Objective Issue

* Unlike most crimes, CN punishes for bad results even where **unaware** of risks.
* Focus on conduct and failure to think.
* Negligence precludes element of positive intent.
* “Shows wanton or reckless disregard” supports this.
* Different than subjective “reckless” described in *Sansregret*.
* MacIntryre J: “Negligence connotes the opposite of thought directed action. In other words, its existence precludes the element of positive intent to achieve a given result…**what is punished is not the state of mind** but the **consequences of mindless action**.”
* Objective standard: Conduct that reveals a marked and substantial standard of a reasonably prudent person in the circumstances. Mistake must be honest and reasonable. Any consideration of personal circumstances/attributes solely for the purpose of determining whether mistake is reasonable (eg: experience of parent with the illness, attempt to withdraw insulin).
* Subjective (Wilson, Dickson, LaForest: s.219 requires more than gross negligence in the objective sense – requires at least minimal awareness of the prohibited risk, but depart from sub standard in application. Driving example: “in driving context where risks to lives of others present themselves in a habitual and obvious fashion, the accused’s claim that he gave no thought to the risk or had simply a negative state of mind would in most cases amount to culpable positive state of WB to the prohibited risk.”

Summary:

* No diff between standard of CN when conduct of when omission.
* No clear determination of whether standard is objective or subjective fault.
* Issue raised of using personal characteristics in the determination of fault.
* For CN: there must be mark and substantial departure from the standard of a reasonably prudent person.

Penal Negligence: R v. Hundal: ***The intent required for a particular offense can be either subjective or objective and still meet the requirements of s.7 of the Charter. The test to be applied is “modified objective test” – taking into consideration the sudden and unexpected onset of disease and similar human frailties as well as the objective demonstration of dangerous driving. In order to convict, jury should be satisfied that all the conduct of accused amounted to MARKED DEPARTURE from standard of care that a reasonable person would observe under the same circumstances of the accused 🡪 must be satisfied a reasonable person in similar circumstances ought to have been aware of the risk and of the danger involved in the conduct of the accused.***

* Convicted of dangerous driving causing death.
* Appealed conviction on basis that s.233 requires a subjective MR of an intention to drive dangerously because of the possibility of a prison sentence associated with the offence. Appeal dismissed by SCC.
* CN applies to offenses in CC where words CN appears. Penal negligence is the const’l minimum for any offense that has objective standard of fault.
* Objective standard of fault: a **marked** departure from standard of reasonable person.
* KEY: *What should accused ought to have known – was behavior a marked departure?*
* Justification: that objective standard is appropriate 🡪 (a) there is a **licensing** requirement – so the individual has to know about the standard. (b) reflects nature of driving – done with little conscious thought as it is – automatic and reflexive nature that is largely reactive. (c) Statute looks at manner of driving in suggesting objective standard of reasonable driving. (d) Seriousness of problem - too many traffic accidents. (e) You need to look at test in context of incident.

**CHAPTER 8: Mens Rea and the *Charter*.**

This topic shows us…

* *Charter* limits what legislators can remove from requirements of MR.
* The purpose of fault in criminal law regarding what the accused did/the mental state of the accused.
* Debate around relationship between courts and legislatures in *Charter* era.

The most important *Charter* provision in this area is s.7

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

s.11 is also relevant:

* s.11: Any person charged with an offense has the right to be presumed innocent until guilty according to law in a fair and public hearing by an independent and impartial tribunal.

Brief Summary:

* SCC held that the principles of fundamental justice require some **fault requirement** where imprisonment is possible.
* The fault need not be subjective except with a few very serious crimes (eg: murder, crimes against humanity).

We already know…

* *Oakes*: s.11(d) requires Crown to prove every element of an offense BRD.
* *Charter* applies to substantive elements of an offence not just procedure, thus the very elements of the offense are affected by *Charter* considerations.

Reference: Motor Vehicle Act: ***Absolute liability does not violate s.7 on its own, but only when it is combined with an unjustified deprivation of liberty, life, or security of person (in this case, mandatory prison sentence). This case narrowed possibility for s.1 to allow a limit on s.7 rights – courts are reluctant to use s.1 to uphold s.7 violations in criminal law. Charter rights are in a hierarchy of which s.7 is at the PINNACLE.***

Prov leg absolute liability for driving without a license – constitutionality questioned. s.94(2) of *Act* - mandatory prison sentence for the offense of driving without a license. Guilt is established *by proof of driving* whether or not D knew of prohibition or suspension. Elements of AR: Conduct (driving) Circum (no license; MV) Conseq (none). Crown must prove BRD: accused was driving; had no license. MR requirements: (none). It was argued that this legislation violated s.7 of the *Charter*. Did it infringe the right to life, liberty, and security of the person? There is a deprivation of liberty issue here that stems from imprisonment. If AL tied to mandatory prison term there is deprivation of liberty (problem). Lamer: s.7 is the **broad expression** of our legal rights that are articulated in more specific ways in ss.8-14. Principles of fundamental justice is a ***qualifier*** of right not to be deprived of right to life, liberty, and security of the person. Many of the rights in ss.8-14 are procedural but others go to substance. AL from reference: does violate it, but that alone doesn’t give you a s.7 violation: ONLY because it is combined with deprivation of liberty, life, or security of the person.

s.1 Analysis: Administrative efficiency – s.1 may come to rescue of violation of s.7 but only in “cases of very exceptional conditions” (outbreak of war, natural disasters, etc). It is clear that (94(2)) could imprison someone who is morally innocent and so it is inappropriate, violating s.7. The objective was good – kept bad drivers off road – but risk of punishing a few morally innocent people is too great. This case narrowed the possibility for s.1 to allow a limit on s.7 rights – courts are reluctant to use s.1 to uphold s.7 violations in criminal law. *Charter* rights are in a hierarchy of which s.7 is at the pinnacle.

Impact *Charter* has: are there problems constitutionally with Parliament saying we don’t require subjective fault – objective is good enough. But if we say a test is objective, was does that mean? Are characteristics of accused important in determining what is reasonable?

SPECIAL STIGMA AND THE MR OF MURDER

* SS crimes are ones that have serious social stigma attached that the law should require **subjective fault** for conviction – first developed in *Vaillancourt*.
* Vaillancourt involved Constructive murder regime (s.213(d)) -- being convicted of *murder while committing another* offense. Problem: you could be convicted without **any** MR with respect to causing death – neither objective nor subjective. The accused did not need to foresee death to be charged with murder in these cases.
* *Vaillancourt* court said because crime so serious and punishment so harsh, there should be at least **objective** MR (ob foreseeability death will occur)🡪 *Martineau* said at least **subjective** for causing death.
* **Proportionality**: there must be proportionality of stigma, punishment, and the moral blameworthiness of the offense (*Martineau*).
* **Attempted murder** is now SSG (*Logan*).
* It is not necessary to have MR for all consequences in all serious crimes – the above constitutional minimum will only be reserved for most serious crimes – SS crimes (murder, crimes against humanity). *DeSousa*
* Assault causing bodily harm not SSG (*DeSousa*). Accused does not have to have subjective MR for every consequence as long as he was **already engaged in behavior** that has subjective fault attached to it.

R v. Vaillancourt: ***Because murder is so serious and its punishment so harsh, there should be at least objective MR - proof beyond a reasonable doubt of at least objective foreseeability that death will occur 🡪 principle of fundamental justice is proof BRD.***

D was convicted of 2DM “murder in commission of offenses.” Appealed, challenging constitutional validity of s.213(d). That section used where there was no intent to cause murder or foresight of death and the victim died during the D’s commission of a restricted act while using a weapon. Section criticized because murder has a mandatory imprisonment sentence and is consequences crime.

Court *begins* development of doctrine of SS crimes. Question of to what extent we carve out certain offenses in the Code that constitutionally require subjective MR because they are so serious and conviction for those crimes bring to the individual a very particular kind of stigma in our society. Court: there had to be some fault requirement related to death – minimally there had to be objective foreseeability.

R v. Martineau: ***The principles of fundamental justice require that SUBJECTIVE foresight of death (consequences) is required before a conviction of murder\*\* can be sustained. There must be proportionality of the stigma, punishment, and the moral blameworthiness of the offense. Those causing harm intentionally must be punished more severely than those causing harm unintentionally. For all SS crimes there must be at least subjective foresight of consequences – if provision does not mention this requirement it must be read in.***

Before this case, you could be convicted of murder if you killed someone in commission of one of the underlying offenses and intended to cause bodily harm. Two boys went with pellet guns to commit B&E. One boy killed them because they saw his face. D convicted of 2DM in relation to s.213(a) and (d) of the Code. **Section 213 eliminates requirement for proof of subjective foresight and therefore infringes ss.7 and 11(d).** For SS crime there must be at least **subjective** foresight of consequences. If the provision does not mention it this must be read in. Proportionality: must be proportional with respect to stigma and moral blameworthiness of the offender. People who commit an offense with subjective foresight of death 🡪 they should be punished more severely than those who cause a death unintentionally. The stigma and sentence for murder should be reserved for those who **intentionally or recklessly** cause death.

APPLICATION TO OTHER OFFENSES

Attempted Murder: (*Logan* case). **It is a special stigma crime**, and requires subjective intent. The stigma is the same for AM as it is for murder even though the result is different. Note: Attempts *always* involve subjective intent.

R v. DeSousa: ***Not all cases require that there be a mental state in all of the consequences – you can treat some cases according to their consequences. The accused does not have to have subjective MR for every consequence as long as he was already engaged in behavior that has subjective fault attached to it. Assault causing bodily harm is NOT a special stigma crime.***

New Year’s party – bottle broke – injured person – offense of unlawfully causing bodily harm. There was an assault with much worse consequences that what were intended by the accused. Question: is this a special stigma crime that requires subjective intent? No: *The consequences are not as severe*. There is not going to be requirement that there be fault for each and every consequence. Court held that objective foresight of bodily harm should be required for both criminal and non-criminal unlawful acts. Manslaughter: “When death is accidentally caused by the commission of an unlawful act which any reasonable person would inevitably realize must subject another person to, at least, the risk of **some harm** resulting therefrom, albeit not serious harm, that is manslaughter.”

R v. Creighton: ***Neither manslaughter by means of an unlawful act or by criminal negligence requires a subjective foreseeability of death. You only need to objectively foresee bodily harm b/c manslaughter does not have the same stigma attached to it (no minimum sentence/unintentional act). Absolute symmetry between the MR and the consequence of an offence is not a principle of fundamental justice and thus not required in all circumstances. The protection of the morally innocent requires a general consideration of individual excusing conditions only at the point where the person is shown to lack the capacity to appreciate the nature and quality of the consequences of his acts. Beyond this peculiar personal characteristics should not be taken into consideration. Different standards of care flow from the CIRCUMSTANCES of the activity not from the expertise of the actor.***

D convicted of manslaughter through CN, arising from death of a friend who died as a result of an injection of cocaine given by D who was experienced drug user – expertise in harm. D appealed on basis that it violated s.7 of *Charter*.

 Issue: Does manslaughter by CN require an objective foreseeability of bodily harm or death?

Policy arguments in favor of majority: (a) law should recognize death occurred, even if it was not foreseeable; (b) the rule that the accused must only foresee bodily harm is practical for juries – they don’t have to take on the arduous task of differentiating between bodily harm and death; (c) Objective standard is fair and constitutional – no person can be sent to prison without some moral fault and punishment must be in proportion to the MR; (d) unlawful act manslaughter has less of a stigma attached to it than murder and punishments are flexible here.

The legal standard of care for all crimes of negligence is that of the reasonable person. Personal factors are not relevant, except on the question of whether the accused possessed the necessary capacity to appreciate the risk (8-51).

Objective notions of fault are difficult in terms of punishments and when we weigh it against the *Charter* – particularly ss.7, 11. When is the *Charter* violated?

*Hundal*: objective standards of fault in order to be consistent with the *Charter* require **marked** departure of reasonable person – kind of like gross negligence.

NOTE: When we get to *Hibbert*, we will see the Court saying something different when question of personal characteristics comes into DEFENSES. In *Creighton*, we are talking about **liability on the crime**.

Principles: (a) Symmetry: where there is a coincidence between elements of AR and elements of MR. We have AR components and each element has corresponding/symmetrical fault requirement. (b) Stigma: social attribute deeply resented in society.

Lamer on why objective foresight of death required:

* Stigma attached to conviction (not murder, not SS, but **serious enough** to warrant objective foresight of actual consequence).
* Symmetry refers to elements analysis: ie – if consequence of death (AR) foresight should be to it (MR).

McLachlin, Elements:

* Manslaughter is offence with long history.
* AR: unlawful act and causing death.
* What is an unlawful act? Some level of fault.
* *Only bodily harm* need be foreseeable by reasonable person.
* Contrast with murder that requires **subjective** foresight of death.

McLachlin on Symmetry:

* Unlawful act manslaughter may lack logical symmetry of modern offenses but has stood the test of time.
* Rejects symmetry because: (a) not a principle of fundamental justice - it is just rule of **criminal** law that has exceptions; (b) Thin skull rule **merges** foreseeability of bodily harm and foreseeability of death.

McLachlin on Seriousness:

* Proportionality between punishment and moral blameworthiness.
* Need to punish **intentional** conduct more seriously than unintentional.

McLachlin on Stigma:

* “the most important aspect feature of the stigma for manslaughter is the stigma which is not attached to it…a person convicted of manslaughter is not a murderer…”

McLaclin on Relationship between Punishment and MR:

* Manslaughter has more flexible penalty, therefore can **fit** the circumstances to the facts (ie: no minimum; life as maximum).

NATURE OF OBJECTIVE TEST:

* Implications are for more than manslaughter
* All agree to look at **circumstances** of the offence
* Majority: what a reasonable person in the circumstances ought to have foreseen. Only characteristic mentioned to consider is incapacity.
* Minority: reasonable person is someone with the **human frailties of the accused**.

MAJORITY:

* Personal characteristic erodes minimum standard of care, the point of objective standard; irrelevant.
* Parliament may hold people engaging in risky behavior to a minimum standard of care. They could make a new crime/offense with special liabilities.

**CHAPTER 9: Mistake**.

Two different mistakes:

1. Mistake of law: For most purposes (s.19 of *CC*) not a good defense.
2. Mistake of fact: Accused is mistaken about essential element of offense, which acts to negate MR. A different way of saying Crown did not prove necessary MR. A good defense in appropriate circumstances. *Sansregret* is a mistake of fact case. MOF only matters when accused asserts mistake on **essential element** of the offense.
* Accused can allege a mistake of fact either from his case or the Crown’s.
* What kind of mistake does accused allege?
	+ If requirement for MR is **subjective** he must prove he made an **honest mistake**.
	+ If test for the offense is **objective**, the accused must say he made a mistake that was **honest and reasonable**.
	+ In **strict liability** offenses, the accused has to prove the accused reasonably believed in a set of facts, which, if true, would render him innocent (due diligence).
* Doctrine rose in context of sexual assault. 1st line of defense: Accused can say complainant consented; 2nd line of defense: Accused can say he thought she consented.
* Problem with doctrine in drug context: If accused claims a mistake but mistake is not entirely an innocent one (you thought you were selling one drug but were selling another) – is that appropriate for MOF defense?
* Problem: When should this defense go to jury? In cases of sexual assault, accused says she said yes or I thought she said yes; complainant said I said no. How to decipher?

R v. Pappajohn: ***Judge only bound to put every defense to the jury that are reasonable. If the stories are totally contradictory, it is not likely that there is basis for mistake. A mere assertion of mistake by accused is not enough. It is a subjective test – belief must have been honest.***

A and C had lunch – alcohol consumed – C is real estate agent trying to sell his house - went to a home and had intercourse – he says it was consensual – she denies it. Must distinguish between AR defense (there was consent) and MR requirement (accused knew or was reckless with respect to lack of consent – A would say “I didn’t know, I was not reckless.” Generally, intoxication is **not** a defense to crimes of general intent like this one (only specific intent). [Extreme intoxication can be a defense.]

Court: it is a **subjective** test – it only matters if his belief was **honest**, not reasonable. Majority thought the only issue was whether there was consent, the dissent thought that on the evidence there was some evidence of mistaken belief in consent. Majority: There needed to be air of reality to defense before it could go to the jury (supportive evidence coming from a **source** **other than** the accused).

* As a result of *Pappajohn*, Parliament enacted s.265(4): applies to assault – Where an accused alleges complainant consented, if a judge believes the belief is **reasonable** and there is sufficient evidence, he can direct the jury to consider it.
* The jury can use **reasonableness** to determine if belief was **honest**.
* Sexual assault now replaces rape in *CC* 🡪 conduct no longer has to be intercourse 🡪 any touching will do.

R v. Ewanchuk: ***There is no such concept of implied consent in sexual misconduct. The question of whether or not there is consent comes from reference to complainant’s state of mind at the time. Limits on defense: evidence must show complainant communicated consent in order for accused to claim he thought she was saying yes. Complainant’s fear need NOT be reasonable.***

Job “interview” inside business owner’s trailer in parked trailer – girl was 17 and he was twice her age and size – she thought he locked the door - began massaging each other – level of sexual activity increased – she said stop, he relented – he asked her if she was scared, she said yes – he then later resumed increased activity – it heightened – she said she wanted to – he let her go.

Components of sexual assault: AR has three: touching, of a sexual nature, without consent. The first two elements have objective standard, but the question of whether or not there is consent comes from reference to **complainant’s** **state of mind** at the time – did she believe she was consenting? There has to be finding that she did not consent at time – there could be reasonable doubt whether or not she did – but it is her perspective that is entirely determined. If she gave consent that was based on **fear** – that consent is negated (see 265(c) for other elements). Evidence must show complainant **communicated** consent for accused to claim he thought she was saying yes – significant limits on honest but mistaken belief in consent. Accused **must take reasonable steps to determine** whether or not she is consenting (not used often by courts).

No consent when: Application of force – threats or fear of application of force – fraud – the **exercise** of authority.

**CHAPTER 14: Participation in a Crime.**

ATTEMPTS

Two basic questions:

1. Why punish attempts when no harm is caused?
2. Why punish less than actual crime if the same harm is intended?

*Section 24*:

(1) Everyone 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.

(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 to remote to constitute an attempt to commit the offence, is a question of law.

* Must be actual **intention** to commit, **not recklessness**
* Attempt can be by omission
* May be impossible to commit the offence
* Act must be more than mere preparation: AR needs to cross the line beyond simply preparing to do the event.
* Whether more than preparation is a question of law.
* MR is more important than the AR which itself is usually not lawful. What you are punishing is more about the MR. There is more of a connection from how you find the MR from the AR.

Difficulties

* What is sufficient AR? Test about AR: Whether accused has gone far enough to make it clear that the offence **would have been completed** had it not been frustrated by external factors.
* *Inference* of MR (criminal intent) from AR (conduct **not completed** and may not be criminal)
* What if accused changed his mind? (wavering intent)

Attempting the Impossible

* Dynar (1997)
* Impossible crimes can still be attempts. Factual impossibility does not mean person cannot be charged.
* Distinction between imaginary and impossible crimes. If not a crime, no charge.

R v. Ancio: ***Subjective intention is required for attempted murder – recklessness not enough.***

* SCC reversed itself in ruling that only intention suffices for attempted murder.

R v. Sorrell and Bondett: ***The more proof you have of intention the less you need for AR to make out an offence. But if using AR to infer MR this must be unequivocal. If there is a finding of the necessary intent for an attempt, and there is sufficient evidence that the acts did go beyond mere preparation, then it is an error in law to not find that the offence of attempt was not committed. Low AR + Hi MR = Attempt. The AR is the evidence of the MR. Where there is no extrinsic evidence of intent with which accused’s acts were done, acts of the accused may be insufficient to show the acts were done with intent to commit the crime 🡪 NO ATTEMPT.***

Two men wearing balaclavas go to door of chicken restaurant with intent of robbing it – restaurant closed early – did not try to force the door and left – waitress saw one with gun – later apprehended by police and charged with attempted robbery.

Trial: acquitted on attempted robbery – convicted on weapons charge – decision ambiguous about whether he was finding no AR or no MR. The only way the Crown can succeed on appeal is if CA finds the problem is in findings of the AR. If the problem with TJ decision is MR, then not appealable because **the question of whether or not AR has been made out (beyond preparation) is a matter of law – question of whether MR made out is a matter of fact.** TJ: “the accused by virtue of *good luck* of not having been able to progress further in doing whatever they were going to do had not yet crossed the line between preparation and attempt.” Court of Appeal: Issue – Did TJ base acquittal on lack of AR or the lack of MR? Accused says TJ based his decision on MR – Crown says TJ based it on AR. CA decision: TJ was sure of ID but not intent; *suggested both intent and act to be determined from evidence of act*; no independent evidence of intent apart from act.

Inevitable relationship between AR and MR in attempts:

* + Differentiate **between the mere preparation and the actual commencement of steps to commit the robbery**.
	+ Seems to say (14-10) that TJ said there was no AR (matter of law and appealable) but…TJ made no findings about intent – no requisite intent. May have found AR was there, but because trial decision doesn’t disclose findings on intent 🡪 there is no finding on intent.
	+ “where accused’s intention is **otherwise proved**, acts which are on their face equivocal, may be sufficient to prove attempt, but when no extrinsic evidence, may be insufficient to show….and hence insufficient to establish offence of attempt.” The more proof you have of intention the less you need for AR

AIDING AND ABETTING

* Principal: actually committed the offense.
* Party: involved in commission of offense, but is not the principal.
* Co-perpetrators: 2 principals vs. Principal/Party.
* Section 21(1): Everyone is party to offense who: (a) Actually commits it; (b) Does **or omits** to do anything for the purpose of aiding any person to commit it; (c) Abets any person in committing it.
* Section 21(2): Where two or more persons form an intention in common to carry out an unlawful offense and to assist each other therein and any one of them, in carrying out the common purpose, commits an offense, each of them who knew or ought to have known that the commission of the offense would be a probable consequence of carrying out the common purpose is a party to that offense.
* Wording of 21(1) and (2) is different and a case may be made out by either.

Principles:

* For the most part, the law treats as equal the principal and the aider/abetter.
* Can aid or abet by commission or omission.
* ***Mode of participation does not have to be in charge. Crown may charge someone with robbery and at trial, make it clear that the role of this accused is as an aider or an abetter. When you see fact pattern that asks you of likelihood of conviction and what defenses could be 🡪consider whether accused could be convicted as aiding or abetting the offense – Crown does not have to decide that at outset of trial. \*\*EXAM\*\* It does not have to be written in charge.***
* Irrelevant whether aiding does not actually help.
* Party can be convicted even where the principle is not convicted nor apprehended. Situations exist where party can be convicted and principal cannot (maybe he has vanished; maybe he has good defense).
* Party may be convicted of more serious crime than principal.
* NO duty to stop the commission of a criminal offense (eg: mere presence does not make a party). [Unless there is legal duty]
* Aiding and abetting **requires** MR regardless of underlying offense. *MR for aiding or abetting has to with knowing you are assisting* ***generally*** *what is going on*. Have to know you are “aiding” – **not** that it is a criminal offense.
* MR probably requires intention/knowledge.

Most Difficult Issue: Responsibility in Omission (cases inconsistent):

* Black (BCCA): Rape accused in small room with other men, **laughing** during sexual assault. He was convicted – something about his presence aided or abetted the rape.
* Salajko (OCA): Accused found near group rape with pants down – he was acquitted.

R v. Dunlop and Sylvester: ***Mere presence at scene of crime not sufficient to ground culpability – something more is needed: encouragement of principal; act which facilitates commission of offense (keeping watch; enticing victim); act which tends to prevent or hinder interference.***

Rape of 16 year old by 18 members of motorcycle club – complainant identifies accused as a principal – accused said his participation limited to meeting complainant at her hotel, transporting beer and observing at the scene. Presence at commission of offense can be evidence of aiding and abetting if accompanied by other factors, such as **prior knowledge of the principal’s intention** to commit the offense.

 Decision: No evidence of anything more than mere presence.

What is AR of Aiding or Abetting?

* Abetting usually means to **encourage while actually present** (Dunlop). also involves supporting, upholding, and assisting.
* Helping somebody ahead of time is known as **counseling** (s.22). Helping someone escape after the fact is covered under s.23 – “Accessory After the Fact.”
* Aid must be for “the purpose of” aiding the principal to commit the offence, not incidental. Usually helping, promoting, facilitating the offense even if you were NOT on the scene. Includes phone call, drive-away, etc.
* Must know he is **aiding in general**.
* Not necessary to know aid is related to commission of criminal offense.

Section 21(2): ***Common intention***: “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…commits an offense…each of them who knew or ought to have known the commission of the offense would be a probable consequence of carrying out the common purpose is a party to that offense.”

* Another provision where person can become party to offense.
* Where two or more persons make plan, have agreement to do something unlawful. In carrying out that purpose, **something else** happens that is criminal offense.
* Because of association of the two persons in formulating common intention where something else happens **even if second person NOT directly the enactor** of second crime.
* MR is **common intention**.
* What if you form common intention and you change your mind *before* the act is committed? You can withdraw from common intention, but you must have **communicated** that withdrawal to the principal.

Elements of the Offense (To be a Party):

AR:

* Act must be done before or during commission of the offense;
* Mere presence NOT enough – must be encouragement of principal;
* You can aid or abet by omissions.

MR:

* Must know what you are aiding (*Woolworth’s*), but you don’t have to know it is crime.

R v. Logan: ***Section 21(2) phrase “ought to have known” is unconstitutional as it applies to special stigma crimes such as attempted murder and murder. The same minimum level of subjective MR that is required of principal, is also required of accomplices. Constitutional minimum: subjective foresight of death.***

Accused were convicted as parties to attempted murder by an accomplice that occurred during course of robberies. SCC held where minimum level of MR is required for the commission of the substantive offense by a principal offender, that same minimum level of MR is required before an accomplice can be convicted of being party to the offence.

Result: Courts read out the *ought to have known* phrase from the section when necessary.

Note: This *ought to have known* phrase **still applies** to non-special stigma crimes.

R v. Thatcher: ***Common law legal distinction between principals and accessories has been abolished by s.21 – the Crown does not have to choose between the two forms of participation in an offense. Jury does NOT have to be unanimous as to the particular nature of the accused’s participation in the offense given that there is not legal difference between either form of involvement.***

Thatcher accused of killing wife – charged with FDM. Before trial, accused as Crown for more extensive particulars – what is your case? Crown had two theories about how crime occurred: (a) He did the killing; (b) He paid somebody else to kill her. There was evidence for both possibilities. TJ denied motion for particulars because this motion was trying to tie Crown down to one theory of liability and that was inappropriate. TJ charge to jury: you could find he committed the murder, or he paid someone else – and **either** of them were murder. Otherwise, they could find reasonable doubt on either. SCC: upheld section 21 and dismissed the appeal.

Held: Principal and party both potentially guilty of offense – the distinction is legally irrelevant.

**CHAPTER 10: Intoxication.**

* Situations where someone consumes substances and says they are not responsible for their criminal acts.
* Defense only refers to VOLUNTARY intoxication.
* Usually refers to MR.
* Raises conflicting policy concerns:
	+ Don’t want to allow excuse/justification in open rampant way (don’t want defense of intoxication for drunk driving).
	+ Convicting people w/out MR – person must have blameworthy aspect.

Prior to Davialt:

* Intoxication a limited defense to crimes of specific intent, an entirely judge-made concept. Larger more complicated kind of intent required when there is specific intent offense.
* Specific Intent: have a **purposive** element and often have included offenses. All attempts are specific intent. Offenses where accused had particular purpose or motive in mind. More difficult to prove than general intent.
* General Intent: Some **minimal** intent required, but more limited. Courts have refused to allow the defense for rape, sexual assault as crimes of general intent. Easier to prove than specific intent.
* Intoxication a possible defense in SI crimes, so feminist groups were happy because the accused could not use intoxication as defense in rape and sexual assault crimes.

Issues:

* The burden on the Crown to prove MR.
* What is blameworthy? Are we really punishing someone for getting drunk? Is that what Parliament intended?

Origin of the Defense

* Rules from *Beard* (HL):
1. Drunkenness where accused incapable of forming the SI evidence – falling short is not significant. Must be a **significant** impairment.
2. Only to crimes of SI, not GI; rape a general intent offense (*Leary*).

R v. Leary (1978): ***When the accused was found the be sufficiently intoxicated at the time of the offence to be unable to form the "minimal mental element" required for a general intent offence, they may still be held liable as the act of inducing intoxication can be substituted for the requirement of*** [***mens rea***](http://en.wikipedia.org/wiki/Mens_rea)***.***

* Rape is offense of general intent.
* Important **dissent** on distinction: GI offences become absolute liability where alcohol prevents formation of intent. It relieves Crown of proving MR. Sober accused in better position than drunk accused – cannot punish people for drinking too much, but Parl could create new crime (eg: drunk & dangerous).

R v. Bernard (1988): ***Upheld distinction between general and specific intent. Extreme drunkenness may apply in a case which involved specific intent, if accused is so affected by intoxication that he lacks the capacity to form the SI required to commit the crime. Defense of drunkenness does not apply to crimes of general intent.***

Crime is sexual assault causing bodily harm – guy gets drunk – leaves complainant at his place – sexual assaults her, punches her – he leaves – he says he was too drunk to know what he was doing – says once he realized what he was doing, he left.

D argues: distinction between SI and GI irrational, and violates ss.7, 11 – results in absolute liability for offenses of GI. Argument: intoxicated accused can be convicted even though he has no MR because too drunk.

Court: (**Beetz**) Legitimate distinction because different level of intent required for GI and SI 🡪 they represent different levels of *intentionality and conscious planning*: “GI is one in which only intent involves relates solely to act in question with no further purpose. GI **only** related to direct performance of the AR (indecent assault). SI goes beyond and is more expansive than performance of AR. SI is one which involves the performance of AR coupled with intent or purpose going beyond mere performance of questioned act. The rule does not covert crimes of GI into absolute liability: Crown must still prove MR in GI offenses. Can *infer* MR by looking at conduct! Fact that person is **voluntarily drunk is the blameworthy** state.

(**Wilson**): Sexual assault causing bodily harm is GI – agree *that in most cases* jury can infer MR from AR – intent for this offense is minimal, would take intoxication verging on insanity or automatism to negate MR (not found here). Expressly disagrees that self-induced intoxication can be a substitute for MR – if Parliament wanted that to be an offense that is their job. Not morally innocent, but have a right to be protected against disproportionate punishment.

(**Dickson**): Overall disagreement with distinction between GI and SI. Question is simply MR – Crown must prove whatever is required. If intoxication is a fact found and it interferes with formation of MR, that is the nature of that particular case.

Summary: Majority of judges uphold distinction between SI and GI. Majority of judges would support putting intoxication to the jury with extreme intoxication akin to insanity or automatism.

R v. Daviault (1994): ***Distinction between specific and general intent upheld. But if D so intoxicated as to be in state akin to automatism or insanity then the defense of intoxication must be open to him in general and specific crimes. Reverse burden on accused to prove on BOP his state – violates s.7 but saved under s.1.***

Accused elderly alcoholic – victim elderly woman, partially paralyzed – accused remembered he drank 7-8 beers in the afternoon, then 1 glass of brandy, empty 35 oz bottle found near him – toxicologist testified that if this amount of alcohol consumed would have caused **death or coma** in average person. Sexual assault – charged with sexual assault. D says he was too drunk to form minimum intent to form MR. BUT sexual assault a GI crime and therefore he could not previously use that defense of intoxication no matter how drunk. He says that is wrong on *Charter* grounds, based on ss.7 and 11.

[When talking about extreme drunkenness – we are talking REALLY extreme.]

Cory (Majority): Option 1: “Keep *Leary* rule about the defense 🡪 if crime of general intent, no defense; if specific intent, could be defense; Option 2: Send intoxication to jury for all offenses; Option 3: Amend law to say [extreme] intoxication akin to automatism and should go to jury for general intent offences. For some situations, you may allow defense in crimes of general intent for very extreme intoxication.

Why no Leary? Blameworthiness for becoming intoxicated **not a sufficient substitute** for MR for GI offense. Intoxication does not **inevitably** lead to assault: “a strict application of *Leary* offends *Charter*.”

Exception carved out: Distinction between specific and general intent **upheld**. BUT in small number of cases of EXTREME intoxication (akin to automatism), violate s.7 to rule out intoxication for GI offenses. To deny requirement of even minimal element of intent offends *Charter* so drastically it cannot be upheld under s.1.

And then oddly says: burden of proof in circumstances on **accused** to prove he/she was so intoxicated as to be akin to automatism or insanity.

General Rule: Legal burden on Crown to prove elements of offence, include insufficiency of any defense from its own evidence or from that of accused; however, this case shows an exception to that as does situation with automatism defense. This may violate s.11(d) but **reasonable** under s.1.

Great Public Outcry After *Daviault* Led to Legislation:

* Parliament legislated quickly by enacting section 33.1 “Self-Induced Intoxication.” ONLY ABOUT EXTREME INTOXICATION.
* 33.1(1): “It is not a defense …that the accused, by reason of self-induced intoxication, lacked GI or voluntariness required to commit the offense, where the accused departed markedly from the SOC…” Note: Only applies to **general intent** offenses.
* 33.1(2): Marked departure: where the person while in a state of **self**-induced intoxication that renders the person unaware of, or incapable of controlling, their behavior, voluntarily, or involuntarily, interferes or threatens to **interfere with the bodily integrity of another person**.” [Notice bold font limit – does NOT touch crimes of property].

STATE OF THE LAW

* SI offenses paired with intoxication 🡪 same rules as before *Daviault*.
* GI offenses in regard to property and extreme intox 🡪 *Daviault* applies.
* GI offenses in regard to personal integrity, extreme intoxication 🡪 s 33.1 applies.

Questions to ask:

1. *How drunk was accused?*
* Quite intoxicated: interference with performing plan, purpose, specific. May make you intoxicated enough for def of intoxication for SI crime.
* Extremely intoxicated: not much going on in mind; little/no control over body – akin to automatism.

2. *General or specific intent?*

* Match rules to nature of impairment.

3. *Have you met standard met out in 33.1?*

* s.33.1 gives you standard to meet, you cannot use defense of extreme intoxication even if you are that drunk.

4. *Is it a crime against a person or property?*

* s.33.1 only applies to interference of bodily integrity of another person.

5. When assessing specific or GI, consider whether crime of SI **includes** lesser general intent offense. If it does, the defense of intoxication may apply to crime of specific intent, but may be lesser included offense of included intent and drunkenness NOT a defense.

EXERCISE: Classify following offenses as SI or GI. If GI, is defense of extreme intoxication available? If SI, do they incorporate lesser included offense of GI? Is extreme intoxication defense available for those included offenses?

1. Personation at examination (s.404): Specific Intent; no defense of extreme drunkenness.
2. Robbery (s.343(a)): Specific int. (“for purpose of”); no defense of extreme drunkenness.
3. Robbery (s.343(d)): General intent; s.33.1 can probably apply as “weapon or imitation thereof” would fit under words “interferes or threatens to interfere with bodily integrity….”
4. First-degree murder (ss.229(a)(i) and 231(2)): SI; no defense of extreme drunkenness.
5. Sexual assault with a weapon (s.272(1)(a)): General intent; no defense of extreme intoxication – interfering with bodily integrity.

**CHAPTER 11: Mental Disorder.**

Challenges to Assumptions of Criminal Justice System

* + People have capacity to make moral choices regarding behavior – our system depends on that
	+ If they don’t have capacity and they do those things, what to do?
	+ Premise of free will – voluntariness – free will

Mental Illness Relevant at 3 Points in Criminal Process:

* Person can claim they were mentally disordered **at time of the offense** and not criminally responsible by reason of mental disorder.
* At the **time of trial** – fitness to stand trial (as opposed to mental disorder at time of offense).
* At the time of sentencing.

Fitness to Stand Trial: Presumption

* S.2 gives definition of *fitness*: “Unable to account of mental disorder to conduct a defense at any stage of the proceeding before a verdict is rendered or instruct counsel to do so and unable to: (a) understand **nature** or **subject** of proceedings; (b) understand possible **consequences** of proceeding; (c) **communicate** with counsel.
* All (abc) are required, but the standard is quite low.

Defenses

* Asserting defense of Mistake of Fact: saying accused did not have appropriate MR.
* Many times the defense is about attacking Crown’s case of being insufficient.
* In defenses we are now beginning to discuss, mental disorder being one, are ones where conceivably the Crown has proved the accused had requisite MR and there is sufficient evidence of AR. Now although Crown has proven AR and MR, we argue he should be acquitted. In some circumstances we will allow something criminal to be **not wrong**.
* Sometimes the circumstances provide a justification for conduct and states of mind that would otherwise be criminal convictions.

History of Mental Disorder Defense

* Before 1992 amendments: “not guilty by reason of insanity.” If someone found NGBRI, there was automatic indeterminate detention. *CC* presented no alternatives 🡪 went directly to jail indefinitely. Also a political decision as to when they would be released.
	+ R v. Swain (1991): ***Resulted in: statutory Review Board in every province under CC s.672 that held hearings rather than Cabinet deciding when person released; options of absolute discharge, conditional discharge or indeterminate detention; individual absolutely discharged unless regarded as dangerous.***

Psychotic symptoms at time of offense – at time of trial, living as outpatient and reconciled with family. He would have been better off by pleading guilty given the state of the law. Issue: Is it unconstitutional for Crown to raise insanity against wishes of accused? Issue: Is it constitutional to require the judge to sentence the person to strict custody with no criteria? Held: s.7 violated because no standard for determining detention – cannot be upheld by s.1 on basis that the impairment is not as little as possible (Oakes). RESULT: The entire system was abolished – government given six months to dismantle the old system and set up with new. Now, judge does not have to send person away to strict custody. Unless there is evidence of dangerousness, often leads to absolute discharge.

* Now: “not criminally responsible by reason of mental disorder” 🡪 same meaning.

Mental Order Defense

* Rare - raised in less than 0.1% of cases
* S.16(1) has a two part test: No person criminally responsible for an act committed or an omission made while suffering from mental disorder that rendered the person incapable of appreciating the **nature and quality of the act or omission** or of **knowing that the behavior was wrong**.
	+ If successful, not convicted, but also not acquitted. Person is excused from responsibility, unjust to punish but may still need to be **detained** (s.672.35).
* MD is a legal concept, not a medical concept.
* What must be established? Two steps:
	+ Person suffering from MD (s.2; *Cooper*) – “disease of the mind”
	+ MD must render person **incapable** of appreciating nature/quality of his actions or knowing those actions were wrong.
* Burden of proof on **whoever raises** it on BOP. Mostly it is accused. Limitations in *Swain*: not up to Crown to raise mental disorder, but one possibility for Crown to raise it 🡪 accused put mental state into issue.

Steps in Defense of Mental Disorder

1. *Does this person suffer from mental disorder?* (s.2 and *Cooper*): “any illness, disorder, or abnormal condition which impairs human mind and its functioning, **excluding**, however, **self-induced** transitory states caused by alcohol or drugs, as well as **transitory** mental states such as hysteria or concussion.” DOES NOT include **psychopaths** who are said not to care about the consequences of their actions.
2. *Did it render person* ***incapable*** *of (a) appreciating the nature and quality of his actions OR (b) knowing the act was* ***wrong****?* (*Chaulk*).

Chaulk and Morrisette (1990): ***Changes the impairment branch of Oakes test by relaxing it. Oakes made high standard of what government had to do to justify Charter violation, now standard is lowered. In 16(4) Parliament chose from a range of means which impair s.11(d) as little as is reasonably possible [not necessarily the least intrustive means], thus balancing issues.***

* *Issue 1*: Nature of “insanity” defense: “the **accused has no capacity for criminal intent** because his or her mental constitution has brought about a skewed frame of reference…he is claiming that he does not fit within the normal assumptions of our criminal law model because he **does not have the capacity** for criminal intent.” NOT saying lacking MR or AR. Could be saying kind of AR “dissociative state.” MR – unable to form intent. Excusing from criminal responsibility – appreciation usually refers to incapacity to appreciate consequences (ex: result of strangling is killing).
	+ Steps:
		- Inability to appreciate nature of act 🡪 negates MR
		- Accused doesn’t know act is wrong, MR and AR are there 🡪 not criminally responsible.
		- Negation of AR 🡪 accused’s actions involuntary – could be either mental disorder or automatism.
* *Issue 2*: Does presumption of sanity (then 16(4)), now 16(2) violate presumption of innocence of s.11(d) of *Charter*? Yes. Court says sanity is essential for guilt and the presumption of sanity allows a factor essential for guilt to be assumed. Accused must **disprove** sanity on BOP – reversal of burden on essential element.
* *Issue 3:* Is s.16(2) a Reasonable Limit under s.1? Yes. (a) Pressing and Substantial Objective: Presumption of sanity objective to **remove onerous burden** on Crown – how to prove someone is sane? (b) Means Justified? *Rational Connection* passed – it is accused who can raise the evidence. Will help the Crown by preventing unjustified insanity verdicts. *Minimal impairment* – obvious alternative is evidentiary burden, but not all the options would be as effective. Lamer: “if insanity were easier for accused to establish, defense would be successfully invoked more often. Thus, putting lesser burden on accused would not have achieved objective which is achieved by s.16(4). He is worried about **fake insanity** claims. Proportionality: Yes. It would be too onerous on Crown otherwise; don’t want insane convicted; don’t want guilty to get off on insanity.
* *Issue 4:* What does word wrong mean? A person may know an act is illegal and still not know that the concept was wrong or right on a moral basis [Person with disease of mind knows it is legally wrong to kil., but kills in belief that it is in response “to a divine order and therefore not morally wrong.”]

R v Swain: (CAN, p. 30-31)

* s.16(3) places onus of proof of mental disorder “on the party that raises the issue.”
* The Crown may in some circumstances introduce evidence of mental disorder against the wishes of the accused (maybe accused wishes to deny MD as he has other defense).
* Procedure for introducing evidence of mental disorder has four possibilities:
1. Accused pleads NCR at outset – evidence of MD heard during trial and accused must prove BOP he had MD at time of offense.
2. Accused pleads “not guilty” – advances defenses against conviction. If unsuccessful, and Crown proves guilt BRD, accused may change plea to NCR and a hearing on the matter will be held (after finding of guilt; before conviction entered).
3. Crown may raise evidence of accused’s mental disorder during trial if accused otherwise puts his mental state in issue (introducing evidence he was seeing shrink at time of offense). Crown has burden BOP the accused had mental disorder at time of offense.
4. Crown may raise evidence of mental disorder after finding of guilt as in #2, and had burden BOP that accused had mental disorder at time offense.

AUTOMATISM

* Excuse the person from what would have otherwise been criminal liability because they cannot be held responsible for their actions.
* After finding of automatism: **complete** defense resulting in acquittal.
* If there is finding of mental disorder 🡪 state maintains control over person.
* Insane automatism versus Non insane automatism: Drawing distinction between NCRMD and automatism. Insane automatism = mental disorder.
* Transient problem or permanent? Assumption is that if a **permanent** problem, there is concern that person is **continuing danger**. But if it is transient condition 🡪 less worry about continuing danger.
* If court finds source of dissociative state is something **internal** to individual (disease of the mind), the person is limited to s.16 defense. If source is something **outside** (blow to head; witnessing something traumatic), could lead to absolute acquittal.

R v. Rabey (1977): ***You cannot claim automatism as a result from the ordinary disappointments of life. Possibility open that a severe emotional blow could be a source of automatism – only if normal person would be affected – (objective test). There is a presumption actions are voluntary unless accused raises evidence to the contrary.***

Science student with huge crush on friend – he finds letter she wrote saying he was nothing – she likes another guy – he asks her about him – he smashes her over head with rock - she recovers.

Defense: News was a **psychological blow** so significant and startling that it put him into “dissociative state.” DS: really not me operating my body; not result of operating mind; result of external event – not something internal to me, like chemical imbalance.

Court said: We don’t buy it. If there were possibility that news or situation could result in automatism it can’t be result of **ordinary disappointments** of life. Finding out your girlfriend likes somebody else does not cut it. In this case, you cannot claim automatism – you have to go with mental disorder. It is up to the judge to determine whether underlying condition had the potential to lead to automatism or mental illness.

Severe Emotional Shock: can potentially be basis for automatism – but must be out of this type of category – **objective** test.

Automatism: unconscious involuntary behavior – person **not conscious** of what he is doing. The actions of the person are not the product of an operating mind.

Internal vs External cause: **Internal** cause = Defense of **mental disorder**. External Cause = (Possible) Defense of automatism.

R v. Parks (1992): ***Sleepwalking is not a mental disorder. For a person to be exempt from criminal liability under "disease of the mind" defense they must (a) be a "continuing danger" to public and (b) the condition must be an "internal cause" that stems from the accused's emotional or psychological state.***

Issue: Is sleepwalking a “disease of the mind” and therefore be channeled into insanity defense or non-insanity automatism?

Person has sleep problem – falls asleep on couch – gets up, gets dressed, gets car keys – drives 23km to in-laws house – takes tire iron from car – gets knife from kitchen – stabs and beats in-laws – mother-in-law killed – father-in-law seriously injured – goes to police station and confesses – can’t remember much.

Defense: Claims he was sleepwalking. Sleep disorder doesn’t come from underlying mental illness.

Court: This is NOT disease of the mind. Preliminary question – *is there underlying disease of the mind?* Accused was sleepwalking at time of incident, that sleepwalking was not a neurological problem – not associated with another mental illness – no medical treatment for sleepwalking.

Held: Court upheld the acquittal as the evidence presented a reasonable doubt that Parks acted voluntarily. Accused = non-insane automatism.

LaForest and Lamer set out what must be established for defense of automatism:

1. Must be an **air of reality** to it – something more than plain assertion.
2. Must be first evidence of **sane automatism**.
3. Evidence that someone is acting in a dissociative state is not enough to get defense to the jury – because could go to insanity or automatism.
4. Policy:
	1. **Public needs protection** – therefore want to see person hospitalized and treated as having “disease of mind”
	2. If it were internal to accused, more likely it will happen again, therefore hospitalization necessary.
	3. Sleepwalking not easy to fake 🡪 need medical evidence.

R v. Stone (1999): ***Psychological state required for defense of automatism is one of impaired consciousness – not completely out of voluntary control, but consciousness impaired to a great extent. The accused must convince the trier of fact on BOP of existence of automatism. Only in RARE circumstances where automatism won’t be caused by MD. Judge should presume a defense of MD and only consider automatism when accused raises it.***

Guy in truck being berated by wife – stabbed her 47 times – he claims a state of automatism – leaves for Mexico – leaves letter of apology to step-daughter – wakes up one morning in Mexico, remembering he stabs her – turned himself in.

Court: Describes psychological state required for defense of automatism: **impaired consciousness** 🡪 not completely out of voluntary control, but consciousness impaired to great extent.

Two-Part process for raising defense of automatism:

1. Judge has to decide whether there has been proper foundation for the defense before it can go to jury: “air of reality” test. Has accused presented sufficient evidence to prove he was in dissociative state?
* **psychiatric** evidence (not enough on its own)
* documented medical **history**
* Act of violence must **NOT be related to any motive** – must be random.
* Must be an assertion of **involuntariness** – therefore the accused almost has to testify.
* evidence of **shock or trigger** for psychological blow
* corroborating evidence
1. Judge has to decide whether condition alleged is mental disorder or automatism.

Court Alters Burden of Proof: Accused must prove BOP that he was in dissociative state.

Useful way of thinking about and understanding Defenses:

1. Is it statutory or CL? Section 8(3) of *CC*: Any *defense* part of CL is possible for the accused. There are **no** CL offenses.
2. What is the result of a “successful” defense? Is there full acquittal or not? Person charged with murder and successfully uses defense of provocation gets manslaughter.
3. To what offences does it apply? Does it apply to everything?
4. Burden of Proof: air of reality, or burden on accused?

For automatism, extreme intoxication, and mental illness, burden is on accused, BOP.

* There is narrow possibility of defenses of non-insane automatism.
* Automatism: impaired consciousness which denies accused voluntary control over his actions – negation of AR.
* Post *Stone*, vast number of cases will be channeled into MD defense.

2 Stage test for automatism:

1. Enough evidence to show trier of fact could find it on BOP.
2. Which type of automatism should be put to jury – presume insane unless accused raises otherwise.

**CHAPTER 13: Defenses – Necessity and Duress.**

NECESSITY

* Defense available through s.8(3) as common-law.
* Roots of duress, self-defense, exceptional circumstances where we **do not expect compliance with the law**. Realities of human weakness; horrible circumstances; issues of survival, protection.
* Often relevant in **emergency** circumstances.
* Choice between two evils.
* Important principle of **moral** involuntariness 🡪 **no real choice**.
* When successful as defense 🡪 FULL ACQUITTAL.
* Burden of proof 🡪 “air of reality” 🡪 goes to jury … no reversal of burden on the accused. Crown must prove **BRD**.
* Applies to any offense in *Criminal Code*.

R v. Perka (1984 SCC): ***Defense of necessity is rarely successful. The risk must be significant and imminent; no reasonable legal alternatives available; and must be proportional (risk to individual vs. harm caused). If necessitous situation clearly foreseeable to reasonable observer, then it should not be regarded emergency.***

 Issue: When does necessity apply?

Drug smuggling operation on boat on its way to Alaska – lots of marijuana on board – ship’s distress forced them to land in Canada – charged with importing drugs into Canada. Accused acknowledges AR and MR are there, but that actions were morally involuntary.

SCC: Rationale of necessity two-fold: (1) **Avoidance** of greater harm or pursuit of some greater good; (2) Difficulty of compliance of law in **emergencies**.

* Justification or excuse? Justification 🡪 person has not acted wrongly. Excuse 🡪 person is excused for acting wrongly. In Canada: Excuse.
* CL principles continued s.**8(3)**.
* No vindication of actions.
* Criterion is the moral involuntariness: **no real choice**.
* Expectation of appropriate resistance to pressure: don’t give in to breaking law too easy – must attempt to find legal alternatives.
* Negligence/involvement in crime not **necessarily** a bar: because you are already involved in an illegal activity does not necessarily bar you from claiming necessity. In accepting necessity as excuse, we are admitting that bad conduct should be excused – bad conduct has no bearing – does not automatically disentitle them to defense.
	+ Accused not doing anything illegal under Canadian law when necessity arose. They were not comprising to import to Canada.
	+ It is the accused’s subsequent conduct in dealing with emergent peril that is important.
* Existence of viable legal alternative disentitles: If you have series of choices to make and you make one to break law when had option of one that was legal 🡪 you cannot claim necessity.
* Imminent risk was taken to avoid direct imminent peril: Must be significant risk in order to meet requirements.
* Proportionality, harm caused must be less than harm avoided: Harm inflicted must not be disproportionate to harm the accused sought to avoid (or **comparable** to).
* Burden: Where accused places before Court sufficient evidence to raise the issue, onus remains on Crown to prove BRD.

Held: New trial ordered – jury was improperly charged in terms of whether there was reasonable alternative, imminent risk, and other issues relevant to necessity.

R v. Latimer (2001): ***Necessity does not apply where there are legal alternatives and no imminent peril. For proportionality test, the test is purely objective – reasonable person. For risk and alternatives, use modified objective. SCC doubts whether necessity an apply to murder (but remains unresolved). Involuntariness must be present.***

Tracey Latimer was 12 year old girl with cerebral palsy – multiple disabilities – in pain, had undergone surgery and faced another – father asphyxiated her by CO poisoning – first told police she died of natural causes – later confessed – found guilty of 2DM.

* Disability, pivotal question: He said he ended her life out of love and compassion for her. SCA majority said, “you would not be saying that if this child was not disabled.” Dissent: focused on the pain, and held father acted out of compassion for pain, not disability. Considered public reaction as many were sympathetic to him!
* New Trial: Latimer convicted again of 2DM. During deliberations jury asked if it could have **input** to sentencing: recommended 1 year of parole ineligibility not the 10-25 years instructed. He was given one year in prison and probation. TJ refused to put defense of necessity to jury because there was NO air of reality.
	+ Court of Appeal: Sentence must be mandatory minimum – no basis either evidentiary or legal to distinguish first appellate decision.
* SCC: *Perka* applied.
	+ Look at risk and alternatives in modified objective test: Did accused **honestly and reasonably** believe breaking the law a necessity?
	+ Was there clear and imminent danger? No. She was not about to die.
	+ Is there a reasonable legal alternative? Yes. Carry on.
	+ **Proportionality**? No, objective standard. Latimer would have said he achieved more good that the alternative of allowing her to live. This portion of test is difficult for murder – what set of facts needed? Test for proportionality purely objective.
	+ **There was no involuntariness here**!
* Held: No air of reality to any of 3 requirements for necessity.

R v. Ungar (2002): ***Example where necessity successful defense in driving dangerously in order to save someone in peril.***

Man worked in volunteer rescue organization – received call that woman hit by car – dispatcher said life threatening – slow traffic – put flashing lights – went through several red lights – drove north on southbound lane – vastly exceeded speed limit. SCC: Crown says there was a Reasonable alternative: do nothing. Court said not reasonable given his knowledge that 12 year old girl died recently from same circumstances – ambulance could not reach in time.

DURESS AND COMPULSION

* Giving into pressure – kind of a branch of necessity.
* **Duress applies where accused commits criminal act in response to threat from third party.**
* Concept of **moral involuntariness** prevalent here as well.
* Questions: (a) Does this defense have specific burden of proof (air of reality or reversal)? (b) Does accused, with successful defense get full acquittal or something else? (c) Is defense of duress statutory or CL? Answer unclear. (d) Is defense available to all offenses or just some?

Section 17 (STATUTE)

1. Applies to **principals** not parties (*Hibbert*). Principal perpetrator who did the deed can be covered, but not aiders, abetters, those sharing common intention.
2. Threats of **immediate** death or bodily harm
3. From a person who is **present** when the offense is committed. Threats by email or other media other than person being there is mandatory.
4. **Subjectively** believes threats will be carried out – honest belief.
5. Not party to conspiracy.
* Not enumerated offenses. For *many* serious offenses, this defense is unavailable.
	+ Someone calls you, says they have kidnapped your child and they will kill him if you don’t rob the bank and deliver the money. Can you claim duress under s.17? Problems under s.17: (a) Threat not given in person; (b) Threat to a 3rd party.
* Section 17 criticized because it is restrictive; listed offenses arbitrary; cannot rely on duress for serious offenses.

Common Law Defense

* Elements: (a) Threats of death or **serious physical** injury; (b) Accused must have **honest and reasonable** belief the threats will be carried out; (c) Personal circumstances, characteristics, life experience of accused **can** be taken into account – modified objective test (*Hibbert*); (d) Accused must avail himself of safe means of **escape**; (e) No offenses excluded from CL defense.
* Can be threat of future harm; threatener does not have to be present.
* CL duress almost identical elements as necessity except what is causing peril is something different.

Hibbert v. Queen (1995): ***For negligence based offenses,*** ***duress does not negate MR because a person is under compulsion as a party. CL not available if accused fails to avail himself of alternative escape (objective). You can take into account the personal circumstances and frailties of the accused in deciding whether the fear was reasonable and whether the person perceived a safe avenue of escape. Mr does not require D wants or desires to bring about consequences – all you need to prove is the D knew or ought to have known those consequences would result.***

D forced by principal to lure friend into lobby where principal shot him – principal escaped – D charged with attempted murder – says he went to apartment because he was afraid and had no opportunity to warn victim and no opportunity for safe avenue of escape. Hibbert can’t claim s.17 because he is a **party** 🡪 he can claim CL defense of duress.

He has to show the threats he got were serious physically (going to kill him); the belief was reasonable; he had reasonable belief that he could not escape 🡪 I had no real choice!

* Section 21(1): “Everyone is party to offense who does or omits to do anything from aiding person to commit it.” What this defense says is that there is when under compulsion, you **don’t have** intent requirement. Court: Requirement is that you intend it to happen and you know it will happen – it does not matter why. The fact you are doing it because someone is threatening you, doesn’t change fact that you want it to happen – you just want it to happen for a different reason. Issue is not about having appropriate MR.
* Standard to be employed: Take into account particular circumstances and frailties of accused in deciding whether the fear was reasonable and whether a person perceived a safe avenue of escape.
* Autonomous individual has put himself into hazardous situation – freely chosen so we want strict standard. BUT when assessing excuse-based offenses rooted in normative voluntariness – the person has somehow not chosen to be in that scene – they have been compelled 🡪 so his perceptions must be relevant in determining MR.

Held: TJ erred in instructions. Appellant’s conviction set aside. New trial.

R v. Ruzic (2001): ***Principal offenders can now rely on CL defense of duress. Duress does cover third party threats. Moral Involuntariness is a principle of fundamental justice. Criminal liability is not appropriate when there is an appropriate defense of compulsion 🡪 no agency. CL criteria of immediacy no longer generally accepted component of the defense.***

Woman from Yugoslavia – gets involved with somebody who threatens her – says she has to import narcotics or he will hurt her mother – threatener is half-way around the world – she says she did it because she was afraid and claimed duress.

Court looks at Moral Involuntariness and finds it **is** a principle of fundamental justice:

* After finding parts of s.17 are not constitutional, court goes to CL defense, which is strange because they read out parts of s.17 and her offense was not one of the enumerated offenses.
* We don’t know: what status is of enumerated offenses is; what status of s.17 is.
* Ruznick could not invoke statutory defense of duress because the threat was not immediate; the threat is not to her.
* Statutory defense effectively useless.

|  |  |  |
| --- | --- | --- |
|  | **LISTED OFFENSE** | **UNLISTED OFFENSE** |
| **PRINCIPLE OFFENDER** | No defense of duress | s.17 defense |
| **PARTY** | CL defense of duress (*Paquette*) | CL defense |

**CHAPTER 12: Self Defense.**

1. Requires an air of reality to go to the jury, burden remains on Crown BRD.
2. It is a **complete** defense.
3. Is a **statutory** defense ss. 34, 35, 37, apply to different circumstances.
4. Applies to *any* relevant offense.
	* Note: There is ***no shift of burden*** in this defense.
	* Note: There is no CL defense of SD.

Section 34(1)

* + **Assault** (a minimal requirement)
	+ Accused did **not provoke** assault (not **initial** aggressor) – s.36 definition.
	+ Lack of intent to kill/cause grievous bodily harm (**intent**, not result is key)
	+ Force used must be no **more than necessary**, room for reasonable mistakes (partially *subjective*, partially *objective*).
* In heat of fight you can’t be expected to measure exact amount of force necessary.
	+ Key: *What was in the mind of the accused?*.

R v. Baxter

“Moreover, in deciding whether force used by accused was more than necessary…jury must bear in mind a person defending himself against an attack, reasonably apprehended, cannot be expected to weigh a nicety, the exact measure of necessary defensive action.”

Section 34(2)

* Applies when defender **intends** death or grievous bodily harm.
* (Before *Macintosh*, applying only to assaults where defender not the initial aggressor).
* After *MacIntosh*, this section applies where defender is **initial** aggressor.
* \*\*Reasonable **belief** that you are under threat of death or grievous bodily harm AND amount of force used necessary to protect self from death *or* grievous bodily harm.”
	+ Reasonable subjective beliefs.
	+ Force does not have to be proportionate; key is reasonableness of accused’s belief.
* *Duty to retreat? How extensive?* 🡪 Unclear, but you don’t have to retreat from your home.

Section 35

* Historically, only section open to **initial** aggressor, with a more **limited** defense.
* After *McIntosh*, 34(2) applies to initial aggressor 🡪 s.35 not as important.
* **Duty to retreat** from conflict.
* Requirements:
	+ Reasonable **apprehension** of death
	+ Reasonable belief that force is **necessary**
	+ **No intention** to cause death or grievous bodily harm **before** necessity for self defense arose
		- In course of event, things get worse 🡪 intention has to *arisen* then NOT at outset
	+ **No opportunity to retreat** from fight.

After *MacIntosh*

* 34(1) applies where accused did not provoke assault
* 34(2) – more lenient – available to **initial** aggressor who intends to cause death or grievous bodily harm.
* s.35 – more stringent – available to the initial aggressor who does not intend to cause death or grievous bodily harm.
* McIntosh does not make sense: 34(2) is **better defense** for accused (covers more situations and there is less to prove). It is hard to imagine anyone going to s.35.
* **If accused intended to cause death or grievous bodily harm 🡪 34(2); otherwise 🡪 34(1)**. It does not matter whether death or GBH caused, just matters what accused intended.

Section 37: (Preventing Assault)

* **Prevention**, usually 3rd parties under your protection. Applies to defense of someone in your care or to prevent an attack, but it’s not clear whether it can be invoked in apprehension of an attack.
* Usually only applied when ss. 34, 35 cannot work.
* The degree to which the assault must be in motion: *Can you say you are protecting your child from assault when nothing is actually ongoing?*

R v. Lavallee (1990): ***In the context of a battered wife, it’s inappropriate to hold that there is an unreasonable apprehension of death or GBH unless and until assault is in progress. A battered woman’s knowledge of her partner’s violence is so heightened that she is able to anticipate the nature and extent of the violence beforehand. Where evidence exists that an accused is in battering relationship, expert testimony can assist jury in determining whether the accused has “reasonable” apprehension of death. Issue is not whether outsider would have reasonably perceived but what accused reasonably perceived, given her situation and experience. It is not for jury to pass judgment on why she stayed in relationship.***

***Ask: “Given history, circumstances, and perceptions of appellant, whether her belief that she could not preserve herself from being killed except through force was reasonable.”***

BACKGROUND (R v. Whynot): Father) was violent to wife and son over period of time – evening of his death he said he would hurt or kill his son – mother shot and killed him while he was asleep in back of truck – not disputed that she believed reasonably he could and was about to carry out threats. She claimed s.37 – not put to jury because CA it was not appropriate offense to put to jury as assault was not in progress – he was sleeping.

Prior to this case, SD only available to imminent attacks: problematic for domestic abuse victims where violence predictable in degree.

Woman killed her abusive partner in situation where there was no imminent danger – he said “I will kill you if you don’t kill me.” She killed him as he was leaving room.

 Issue: Highlighting male model of self defense.

Issue: Relevance, availability, helpfulness of psychiatric evidence linked to “battered woman syndrome”

Psychiatrist Shane gave evidence on effects of battered women syndrome: bona fide psychiatric diagnosis, used to explain reasons for her actions.

BWSyndrome: (a) BWS led to heightened sensitivity to signals from abusive partner others wouldn’t notice – **predict** potential violence to themselves due to idiosyncracies to abusive partner; (b) **History** of her being hurt and she knew this was not mere threat – it would be carried out; (c) Effect on **alternatives**: why didn’t she just leave? She is scared of violence that will ensue from her going. She feels worthless despite veneer. Bad Combination!

Potential Problems with BWS: Could it be used as excuse? Could expert witness take role of jury? Over-reliance on experts.

R v. Petel (1994): ***Under s.34(2) an accused can make a reasonable mistake about whether she was actually being assaulted. It is not necessary she was actually being assaulted, so long as she believed an assault was taking place. The assault need NOT be imminent.***

R v McIntosh (1995): ***Threw s. 34 and s. 35 into turmoil. Section 34(2) available to initial aggressor – accused not limited to more rigorous requirements in s.35. Really about statutory interpretation – how you can use same rules to come up with different interpretations. Absurd result: more onerous defense test for accused who intends to cause less serious harm in s.35 than the accused who kill in s.34(2).***

Accused is initial aggressor and does not retreat – can’t fit himself into s.35 (only one available to fight-starter) – D argued that s.34(2) should be available to initial aggressors (open to initial aggressors). Crown said ridiculous: s.35 only one available to initial aggressor; Parl did not intend more lenient version of self defense to apply when someone initial aggressor – only for person attacked. Majority: s.34(2) available to initial aggressor – accused not limited to more rigorous requirements in s.35.

* s.34(1): includes “without having provoked assault” and 34(2) doesn’t say anything about who started it. Even if there was ambiguity, it should be resolved in favor of accused. Because this is penal statute (restriction of liberty) – the interpretation has to be resolved in favor of accused.
* Court says result may be absurd, but too bad.
* Dissent: Tries to uncover Parl’s intent: legislative history of section; CL defense; policy behind duty to retreat for initial aggressor.

R v Cinous (2002): ***All elements of defense have subjective AND objective component.*** ***In order for there to be air or reality to defense, there must be evidence, that if believed by jury, could result in this defense. If no evidence, the defense does not go to jury.***

Accused in criminal ring stealing computers with two others – he wanted out – they pulled him back in – gets into car at gas station in prep for theft – he said he had all indications that were threatening.

Issue*: Was there air of reality on self defense – should it have been put to jury?*

* First element of defense – s.34(2) – Was accused in course of assault? Was that belief reasonable? **Could a jury find the accused believed** he was involved in assault?
* Second element – Requirement for **evidence** the jury to believe accused thought he was facing death or grievous bodily harm. Did he think that reasonably?
* Third element – Requirement accused **believed he could not preserve** himself except by the actions he took. Did he think that reasonably?

Air of reality is made out in defense of SD if there is evidence of all the three above – with BOTH subjective and objective components.

Held: There was air of reality to belief assault existed and he had reasonable grounds to think it; there was air of reality that he believed he faced death, and it was reasonable; in part air of reality that he thought there was no other alternative BUT **no** evidence that was reasonable 🡪 should not have been sent to jury.

**CHAPTER 15: Sentencing.**

* From a defense attorney perspective: most often this is where you can do the most good.
* In sentencing submission: you want to make your client special, unique.
* In sentencing scheme, think about:
1. *What actual sentence can an accused receive? What is available upon conviction?*
	* *CC* rarely sets out specific sentence for specific offenses.
	* *CC* sets out minimums and maximums – then up to judge to decide what is appropriate. CC sets out maximum on **every** offense.
2. How does the judge decide given this range?
	* There is huge discretion given to judge here.
	* Since 1996, codified: therefore relatively recent codification of judge made principles.
* Sentencing occurs (a) After a trial; or (b) After a guilty plea. If individual has heard a trial, the judge has heard all the evidence (pro and con). There can be significant negotiations between the Crown and defense. “If my client pleads guilty on this charge, will you stay charges on that one?”
* Judge cannot acknowledge there has been a plea bargain. BUT a judge can consider an early guilty plea.
* Discharges: s.730. Best you can get for client is an **absolute** discharge. Accused is convicted, but no conviction is entered. Accused does NOT have a criminal record for that offense. There is record of fact that you were found guilty and had an absolute discharge.
	+ You can get absolute discharge when: (a) in best interest of accused; (b) not contrary to public interest; (c) offense does not have minimum punishment or offense that has sentencing structure where there is maximum of 14 years or more.
	+ Conditional Discharge: Conditions attached that put you on probation for period of time. If you pass through that period without discharge, then it becomes absolute discharge.
* Next best thing – Suspended Sentence with Probation: Extends passing of sentence and you are put on probation. If you behave you won’t be sentenced, but you have been convicted.
	+ If you violate probation conditions, you are sentenced for original offense AND breach of probation.
	+ Essentially, you get a record, but no sentence.
	+ Period of probation cannot be more than 3 years.
	+ S. 732.1: Required Conditions: (a) Every probation order must have condition that accused notifies court of any change of name, address; (b) Keep the peace and be in good behavior; (c) Appear before court when required to do so.
	+ Optional Conditions: see *Code*, s.732.1(3).
* Fines (734(1)): Accused can be given fine with certain amount of time to pay. There are mechanisms in CC for those who do not pay on time.
* Imprisonment: (a) Try to get judge not to impose any kind of imprisonment; (b) Try to get term as short as possible.
	+ s.743: If **no prison term specified** in penalty section of offense, if indictable, it cannot be more than 5 years; if summary conviction, can’t be more than 6 months.
	+ s.732(1): 90 sentence or less, may regard circumstances, and order **intermittent** sentence (eg: weekends).
* Concurrent v. Consecutive: Often you have accused with many charges; or person charged with many crimes on same facts (eg: car theft, dangerous driving, etc). Or multiple sentences (18 car thefts). Does he have to serve sentences concurrently?
	+ Frequently, they are served **concurrently**.
* Conditional Sentence of Imprisonment: NOT conditional discharge! s.742.1 – totally new kind of sentence. It is sentence of imprisonment that can be served in the community.
	+ We don’t have enough jails
	+ Jails don’t work.
	+ Persons have to return to the community anyway.
	+ Available for accused person who received term of 2 years, but that term is not served in jail.
	+ Given if court satisfied that serving in community **won’t endanger** safety of community; would be consistent with fundamental principles of sentencing set out is s.718.
	+ Often imposed where person who causes death in negligent-based offenses.

Fundamental Principles of Sentencing (s.718):

1. Denounce unlawful conduct
2. Deter offender and other persons from committing offenses
3. Separate offenders from society where necessary
4. Assist in rehabilitating offenders
5. To provide reparations for harm done to victims or the community
6. To promote sense of responsibility in offenders, and acknowledgement of the harm done to victims and the community.

Fundamental Principle (718.1):

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

Other Principles 718.2:

A sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to offense/offender:

* Offense **motivated** by bias, prejudice, hate based on race, religion, sexual orientation, mental disability, etc.
	+ Did accused abuse spouse or child? – abuse position of trust – **terrorism** offense – criminal organization?
	+ 718.2(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances, and (e) 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 **aboriginal** offenders.

R v. Gladue (1999): ***Section 718.2(e) does not alter the fundamental duty of the sentencing judge to impose a sentence that is fit for the offense and the offender. What it does alter is the method of analysis which each judge must use in determining the nature of a fit sentence for an aboriginal offender.***

Case produced increase in awareness of alternate ways of addressing that aboriginal peoples are in criminal justice system disproportionately.

* S.718.2(e) requires sentencing judges to consider all available sanctions other than imprisonment and to pay particular attention to circumstances of aboriginal offenders.
* Purpose to ameliorate serious problem of overrepresentation of ab people in prisons.
* S.718.2(e) directs judges to undertaking sentencing of ab offenders individually and differently. Consider:
	+ Unique systemic or background factors which may have played a part in bringing the offender before the courts;
	+ Types of sentencing procedures and sanctions which may be appropriate in circumstances for offender because of his/her particular ab heritage or connection.
* Consider the **priority given in aboriginal cultures to a restorative** approach to sentencing.
* If there is no alternative to incarceration 🡪 length of term must be carefully considered.
* S.718.2(e) is not to be taken as a means of automatically reducing prison sentence of aboriginal offenders.