# Ch1 - Classification of offenses

Summary:

least serious, trial in prov court and **before judge** (no jury). No prelim inquiry. Penalty, unless specified: 5000$ max or 6 months.

Indictable:

-**s553:** absolute jurisdiction of prov court**, before judge** (no jury), no prelim inquiry. Same procedure as *summary*.

**-S469**: exclusive juris of **superio**r court. Has **judge and a jury**, unless trial by judge alone chosen (by accused and crown). *Preliminary inquiry* -> determines whether to proceed with trial or DISCHARGED (not acquitted). Evidence is gathered to see if they can go ahead.

OTHER indictable: **election** by accused: a) trial in prov court by judge alone (no prelim inq), b) trial in superior court before judge alone after prelim inquiry or c) trial in superior court before judge and jury after prelim inquiry.

Hybrid: **crown determines** whether by summary or indictment.

# Ch 2 - Proving the Offense

**\*Note**: leading a witness can only happen at cross-examination. Crown presents its case.. and has initial evidentiary burden and legal burden (unless some presumption). Normally, they put out witness, defense cross-examines, and then crown makes its case. After, if no “no evidence” motion, defense CAN present a case. If they do, they can introduce witness, and then crown cross-examines. If defence called evidence, they close first. And vice versa if not.

**Introducing evidence**: must be *relevant, material, and admissible*. **Relevance**: evidence that makes a material proposition somewhat more likely. **Material**: probative of a legal question *in issue* in the case (if identity is not at issue, then immaterial). **Admissible**: meets the rules of evidence (charter + other) – when it is prejudicial, unreliable or obtained by coercion.

**Judge functions**: trier of law (e.g. is evidence admissible).. decisions of fact are hardly ever appealable (appellate courts can overrule a finding of fact, but not easy to do). Jury usually is a trier of the facts (decide what happened), but they are one and the same person when no jury.

**Legal or persuasive burden**: the crown’s burden to prove each element of the offense BRD. Must persuade the trier of fact that the accused is guilty. Based on presumption of innocence. Remains throughout.

**Initial Evidentiary burden on crown** – must provide evidence on every element of the offense that could convict beyond reasonable doubt

* Evidence must be relevant. The trier of fact will decide if it is relevant
* Relevant for prelim inquiry and after it makes its case at trial.

Then must convince trier of fact that the evidence proves **guilt beyond a reasonable doubt (of each element)**

* Unless there is a reverse onus burden, in which case accused must prove on a balance of probabilities that they didn’t do it

Proving the Offense:

1. has the crown presented evidence that could convict?
   1. If no, A (accused) is discharged (not the same as acquitted).
   2. A can make **“no evidence**” motion if they believe the Crown has failed to raise evidence on each element that *if believed, would prove it beyond a reasonable doubt* (after crown makes its case).
2. Crown must prove **all elements** beyond reasonable doubt
3. If there is a **reverse onus** provision the court must consider section **11d**
   1. This places an evidentiary burden to adduce evidence disproving the presumption and legal burden to prove it *on a balance of probabilities* (*Oakes* e.g.)
4. If there is a **mandatory statutory presumption** court must consider section 11d
   1. This places an evidentiary burden on A to displace a statutory presumption by pointing to evidence that casts reasonable doubt on the presumed fact (e.g. *Downey*).
5. Permissive Presumptions
   1. Allow, but don’t require presumption. May be disproven by evidence (do not raise the charter concern in 11d – innocent until proven guilty)
6. Defences
   1. Accused must give “air of reality” to defence before the jury can consider it. **Evidentiary burden** on accused in defence. If met, goes to crown to disprove defence BRD.

# Presumptions

* **Reverse onus provisions** require the accused to adduce evidence that they didn’t do it (evidentiary burden) and prove it on a balance of probabilities (legal burden). \*lower than crown’s RD standard.
* **Mandatory statutory presumptions** require trier of fact to infer one fact from another, and it is up to accused to raise enough evidence to cast a reasonable doubt on the fact (evidentiary burden)
* Permissive presumptions allow the crown to infer one fact from another

## *R v Lifchus (1997) (Reasonable Doubt definition)*

* *Issues:* How should the jury be instructed on the meaning of “proof beyond a reasonable doubt”?
* ***Ratio****:* reasonable doubt is doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence. The standard of **BRD** **requires explanation** to the jury and cannot be misleading.
  + it must be based on evidence
  + it must be based on the presumption of innocence (doesn’t shift to accused)
  + reasonable doubt is more that what we consider reasonable in daily life, it is reasonable based on evidence.

ALSO it does not require absolute certainty, and the doubt cannot be based on sympathy or frivolous doubt

* + *RD is not based on sympathy or prejudice, nor is it an imaginary or frivolous doubt. It requires more than a balance of probabilities, and is much closer to an absolute certainty*.
* **What NOT to say**: standard is like “every day life”, standards like moral certainty, synonyms, qualifying words, not based on sympathy/feeling.

## *R v JHS (2008)*

* *Issues:* How should jury be instructed on determining guilt of accused?
* ***Ratio:*** The jury must be instructed not just to assess whether they believe the accused, but whether the crown has proven the accused guilt beyond a reasonable doubt. It is not enough to believe the accused is lying, you have to be convinced based on the evidence presented by the Crown that the accused is guilty
  + *1. If jury believes A they must acquit, 2. if jury does not believe A but is left with RD as to A’s guilt after hearing A’s testimony they must acquit, 3. if jury does not believe A, and evidence does not raise a RD, but accepted evidence does not prove guilt BRD, it must aquit, 4. If the jury does not know who to believe, they must acquit*
  + **Deciding between competing evidence/credibility contest does not mean that you decide the case on merely which competing side wins**.

## *R v Starr (2000)*

* *Issues:* Was the right standard of proof instruction given? *If the charge gives rise to the reasonable likelihood that the jury misapprehended the standard of proof, then as a general rule the verdict will have to be set aside and a new trial directed.*
* ***Ratio****:* the standard of proof explained to jury cannot belikened to “everyday situations” (non-legal context) and it is required that the standard convey more than a BOP. (There is no non-legal analogy that appropriately conveys the standard).

## *R v Oakes (1986) Reverse Onus (a legal presumption) unconstitutional, Needs s1 justification + test for passing violation under s1*

* *Facts:* Oakes was found with narcotics, and based on the section 8 presumption he was presumed to be trafficking from proof of possession. There was a reverse onus on Oakes to prove on a BOP that he was not intending to traffic. **Note**: “**Establish**” = INDICATESLEGAL burden (*“****adduce/provide some evidence”* = EVIDENTIARY BURDEN**.
* *Issues:* Does this violate section 11, the presumption of innocence? If so is it justified under section 1?
* *Analysis:* Section 11 holds that a person must be proven innocent beyond a reasonable doubt, and it is the crown that should bear this evidentiary burden.
  + **Presumption of innocence has three components**:
    - 1. Individual must be proven guilty beyond a reasonable doubt
    - 2. Crown must bear the onus of proof
    - 3. Criminal prosecutions must be carried out in accordance with lawful procedures and principles of fairness
  + This provision violates the presumption since Oakes has to prove he wasn’t trafficking (**possible for there to be a conviction** **even with a *reasonable doubt* about the offence).** Justified under s1 on **BOP**?
* **1. Pressing and substantial**?
  + Yes – the measures seeking to limit the charter right (11d) of stopping drug trafficking are pressing and substantial.
* **2. Rational connection**? **(proportionality test)** 
  + Three steps: a) *measures adopted have rational connection to objective*; b) *means, even if rationally connected, must impair the right as little as possible*; c) *must be proportionality between effects and measures*.
  + No, the reverse onus is **not rationally connected (2a)** to the objective of stopping drug trafficking, b/c the basic fact of possession only make trafficking more likely, but not prove trafficking existence BRD. **Fails the necessary inference** of intent to traffic.
* **3. Benefits/detractions**: (negative effects vs. positives sought by legislative objective) - \***Didn’t get here**.
* ***Ratio:* Reverse onus provisions are violations of section 11d. They must be justified by section 1 to be upheld.** 
  + *Any law that allows conviction despite reasonable doubt violates 11d*
  + *Reverse onus provisions: allow the crown to assume a fact from another fact, it is up to the accused to disprove it. So in this case trafficking was presumed from possession, this means he could be convicted of trafficking despite reasonable doubt as to whether he was actually trafficking* *(even if cannot prove something to a BOP*).

## *R v Downey (1992) Evidentiary burden on accused = unconstitutional, but can be justified by s1* (on these facts). Different understanding of minimal impairment (2a of Oakes).

* *Facts:* Downey was charged under section 212(3) which holds that anyone who lives with a prostitute is assumed to be living off the avails of prostitution (**This is a evidentiary burden** – it will be inferred unless they can raise **some evidence to displace the assumption**.
* *Issues:*  Is this presumption a violation of section 11d?
* *Analysis:* **Statutory presumptions** will be upheld if the proof of the substituted fact leads inexorably to the proof of the other, if it doesn’t then it obliges the trier of fact to convict in spite of reasonable doubt which is a violation of s1.
  + Is it justified under section 1?
    - Step 1 – the objective is to stop pimping, this is P&S
    - Step 2: A) Rational connection is met: often connection between maintaining close ties to prostitutes and living off avails. **Reasonable Connection**?
    - B) Minimal impairment – not about whether this is the least intrustive possible means, but could parliament have met the stated objectives using less intrusive means? No other alternative means that is really less impairing (esp with evidentiary burden only). **Reasonable range basically**.
    - C) Proportionality – Only needs to point to evidence *capable* of raising RD on the issue. Minor compared to importance of objective.
* ***Ratio***: *evidentiary presumptions are also unconstitutional, but can be justified under s1 (likely easier than reverse onus presumption in Oakes*).

# CH 3 Elements of an Offence

Actus Reus is the prohibited act, mens rea is the required mental element of fault

-Crown must prove each element, unless it is a lesser-included element (e.g. possession in trafficking).

-**AR BEFORE MR**.

-When parsing elements, define even the obvious things (e.g. obstructing, public place, night, etc), s2 and surrounding the provision. Look for lesser included offences, and might have to break offences down (e.g. assault causing bodily harm + assault).

-**Can only be charged with what is in the document** (or lesser included).

-Can also be charged for attempt of any offence.

## Actus Reus:

* **Conduct**: what acts or omissions must the Crown prove for this offence?
  + This can be many different acts, eg in murder it can be shooting, stabbing, etc
  + In some it is narrow – in drunk driving the conduct is driving the vehicle
  + There can also be an ommision- in the case of omission the conduct must be *voluntary*, the accused has to voluntarily NOT do the act
* **Circumstances**:
  + Not all have circumstantial element
  + Sometimes the Crown has to prove particular circumstances
    - Eg in impaired driving, the Crown must prove to accused was actually impaired
    - In sexual assault the requisite circumstance is that the victim was not consenting
* **Consequences**
  + Many offences prohibit certain conduct/circumstances regardless of the consequences
  + Some require proof of consequences (murder requires proof of death)
  + Whenever consequence is part of the actus reus, causation must also be proven

## Mens Rea:

* Fault element
* May be measured on either a **subjective** or **objective** basis
  + **Subjective fault:** Accused had the actual intention, knowledge or recklessness to commit an act, in a particular circumstance, or bring about a consequence
    - This assess what the accused intended or knew
  + **Objective fault:** asks what the ordinary person should have known or would have intended in the circumstances
    - Objective standard is gross negligence - a marked departure from that of the reasonable person in the circumstances
* Some sections explicitly include required intent
  + Eg theft is taking taking another’s property fraudulently, without belief that you are legally entitled to, with the intent to deprive to owner of the use of the goods
* Where the statute is silent, start with the presumption that true crimes require the Crown to prove a subjective *mens rea* beyond a reaosnable doubt in relation to at least some element of the *actus reus*
* These subjective mental states are:
  + 1. **Intent**: a person intends to carry out an act when he does so **purposely or deliberately** (not accidentally)
    - A person intends consequences of the act where he acts for the purpose of bringing about that consequence, or where he is *substantially certain* that the consequence will result from his act
  + 2. **Knowledge**:awareness that a particular circumstance exists or does not exist.
    - Willful blindness is a substitute for knowledge (suspecting the existence or non-existence of particular circumstance, but deliberately refraining from confirming that suspicion).
  + 3. **Recklessness**
    - A person is reckless as to a particular act or consequence occurring where she foresees that it may occur, but chooses to proceed in the face of the risk (this is usually sufficient to satisfy the mens rea component – **when NO MR indication, usually this**)
  + **Objective mens rea**:
  + Criminal negligence- *marked departure* from the standard expected of a reasonable person in the circumstances
* These *correspond t*o the *actus reus:*
  + 1. **Conduct** must be intentional or reckless act or omission:
    - this does not always correspond, in the case of sexual assault it just has to show touching occurred, and it was in a sexual circumstance not that the accused intended the touching to be sexual
  + 2. **Circumstance** – must have knowledge of circumstances (or be reckless or willfully blind to the circumstances)
  + 3. **Consequences** - must have intended or be reckless to the consequence
* In certain offences the mens rea element is objective – were they objectively reckless to the crime (e.g. manslaughter, racing)
* Mens rea will correspond with one or more elements of the actus reus
* Where mens rea is not stated, start from the presumption that it will be subjective + recklessness should suffice (unless it doesn’t fit).

# Ch 4 Actus Reus

Principles: **legality**, **voluntariness**, **contemporaneous existence of AR and MR**, **role of omissions**.

## *Frey v Fedoruk (1950) Concept of LEGALITY – 11(g) –illegality*

* *Facts:* P was peeping into D’s house, he chased him down and stopped him, he was charged with disturbing the peace. P sued for false imprisonment, said he wasn’t disturbing the peace
* *Issues:* Was he distubing the peace by peeping?
* *Analysis:* No, peeping tom is not an offense
* ***Ratio****:* *You cannot be charged with a crime that is not in the criminal code or an offense to law; new offences cannot be created under the CL* (now **s11(g)** charter).

**Voluntariness**: actually aspect of AR, not MR. Necessary for the conduct element to be satisfied (otherwise it’s not considered the accused’s conduct in a way). Involuntariness: disease of mind, automatism (non-insane), consumption of intoxicants (can be voluntary). **Comments on involuntariness**: ***HUNDAL***: if a driver without prior warning suffered a heart-attack/epileptic shock, resulting in dangerous driving, this is a complete defense (not something they did). ***Theroux***: tiny bit of MR in AR but distinct from MR.

\***note**: since MR not considered in strict liability or absolute, voluntariness, causation (and due diligence for SL) are only things available to argue.

## *Fagan v Commissioner of Metropolitan Police (1968) CONTEMPORANEOUS EXISTENCE OF MR AND AR – MR can be superimposed after existence of AR* + omissions.

* *Facts:* Appellant drove onto the foot of the police officer by accident, and then stayed there and refused to move after aware.
* *Issues:* Was this assault? The mens rea was absent until after the initial “assault” so can he be guilty?
* *Analysis:* yes, it was a **continuing** actus reus.
* ***Ratio:*** *Mens rea can be* ***superimposed*** *on a continuing act, but it cannot be imposed on a completed act; MR can come into the AR, even though it wasn’t there at inception; omission by-itself cannot result in an assault*.

## *R v Moore (1978) \*NOT law in Canada – legality \*Pre-charter*

* *Facts:* Bicyclist refused to stop for police officer. Officer had legal duty to try to ascertain person’s identity (in order to issue ticket), but Moore did not have a statutory duty (MVA did not apply to cyclist). He failed to do something, but not a legal duty. But the officer couldn’t carry out legal duty without Moore’s compliance.
* *Ratio:* *Majority – a reciprocal duty is created for M to stop/identify himself (by common law) by the fact that officer needs to carry out HIS legal duty*.
* \*Note: dissent says this is wrong, and there **has to be a statutory or CL duty imposed on M to identify himself** (moreso the position in Canada).

## *R v Thornton (1991) when omission not unlawful according to statute, could be grounded in CL (tort) duty to refrain from harmful conduct.*

* *Facts:* D knowingly donated HIV positive blood to the Red Cross
* *Issues:* He was charged with common nuisance (crim code) – which is an unlawful act or failing to discharge of his legal duty
* *Analysis:* Donating HIV positive blood is not unlawful, was it a breach of legal duty? Yes, there is a common law duty to refrain from conduct which is reasonably forseeable to cause serious harm to another person
* *Ratio:* common law duty to refrain from conduct which is reasonably forseeable to cause serious harm to another person (CIVIL NEGLIGENCE LAW)
  + \*SCC -> they find the duty in different CC provision (about surgical procedure)

## *Boudreault (2012 SCC)*: Statutory interpretation of AR – “care and control” (s253(1)) and grounds for APPEAL

* Facts: D accused of having “care or control” of motor vehicle while impaired by alc and above the legal limit of alc. (He was waiting for cab). Question of whether question of fact or law alone on the appeal – if question of fact, not appealable by crown, if Q of law, can. Crown appealed because they argue trial judge made mistake of law in being satisfied that D had no intention of setting vehicle in motion and not posing any realistic risk (realistic risk not element of the offence they argue). D then appealed to SCC.
* Decision: **“care and control”** involves **necessary element of *realistic risk*** (not just being in a car intoxicated), and is a *matter of fact*. **Intention** NOT essential element, but lack of intention can help determining *no realistic* risk ele. Consistent /w purposes of legislature. (Therefore, trial judge did not err in finding fact of risk and CA overturned).
* **Ratio:** *crown/defence can appeal if error of law, and verdict can be overturned if reasonable possibility of a different result* – can substitute new verdict or new trial. *Care and control has necessary element of REASONABLE RISK* and intention helps in proving that but is not a *necessary element*.
* **\*Note**: **constitutional reverse onus** in the case (justified under s1) – presumes fact of care & control from being in the driver’s seat.

**\*Grounds for appeal**: defence can appeal on a few bases, while the crown could only appeal on error of law: \****unreasonable verdict*** *unsupported by the evidence* (conclusion was irrational based on evidence.. depends more on matter of fact). If successful, conviction overturned, acquittal entered. \****Miscarriage of justice***: improper behavior, inflammatory statements made to jury not corrected. If successful, court could order new trial/substitute for acquittal.

# CH 5 – Causation

ARISES IN CONSEQUENCE CRIMES: e.g. murder, manslaughter, assaulting causing bodily harm, criminal negligence causing death, willful destruction of property, sexual assault causing bodily harm.

Factual: what actually caused (scientific/technical), e.g. medical explanation of death. … \***LEGAL** ***Smithers – beyond de minimis* range** (not trivial) for ALL offences, including murder, until you get establish murder and are deciding whether its first or second degree.. ***Harbottle*** (1st degree): ***substantial cause*** (for degree of participation).

Legal: whether the harm is too remote from the conduct to hold accused responsible (not MR but incorporates FAULT).

## *R v Smith (1959) Operating cause \*INTERVENING CAUSE CONSIDERATIONS*

* *Facts: :* D stabbed a man who died, but he was treated badly in hospital, didn’t get good care and in theory the wound he got from the stabbing was one that people can recover from if treated in time
* *Issues:* If other factors made death more likely is D still responsible?
* *Analysis:*
  + Court says that the if wound at the time of death is still an **operating cause** then the death can still be said to be the result of the wound
    - **Only if the second cause is so overwhelming** so as to make the first cause **merely part of the history** can it be said that the death does not flow from the wound
    - To break the chain of causation, something new must be shown to *disturb the sequence of events*.
* ***Ratio*** 
  + To be found guilty of murder a persons **act must have caused the death,** it must have flowed from that persons action
  + Causation chain **can be broken** by subsequent action **but this subsequent action has to make the initial action part of the history**, such that is was not a major reason for the death

## *R v Blaue (1975) Thin-Skull Rule: “take your victim as you find them”, diminished responsibility however (manslaughter)*

* *Facts:* Blaue attacked a Jehovahs Witness with a knife, she needed a blood transfusion to survive but her religion prohibited it, she died from loss of blood
* *Issues:* Did his attack cause the death or did her refusal to get a blood transfusion break the chain of causation?
* *Analysis:* The defendant says that the decision should be analyzed on a reasonableness standard, if it was unreasonable then the causation is broken; the court disagrees**- there are different versions of reasonableness and it is not for the assailant to decide, assailant must take victim as he found her**
  + “The question is what caused the death, and the answer is the stab wound”
* ***Ratio****:* Causation chain is broken can be broken by poor care or poor decision making but it is not broken by people making decisions based on their beliefs – the assailant must take victim as he/she finds them

## *R v Nette (2001) SMITHERS TEST for causation (LEGAL) UPEHLD (not insignificant/beyond de minimus*) in 2nd degree, instead of *Harbottle’s* *“substantial cause” in 1st degree* (which is only about degree of participation, not causation); *de minimus* can be stated in affirmative.

* *Facts:* D robbed victims house and hog tied her, left her there, she died from asphyxiation. Dr said the asphyxiation was caused by her hog-tying, the ligature around her neck, and her old age/lack of muscle tone; D was found guilty of second degree murder
* *Issues:* How should the standard of causation be defined for second degree murder?
  + D says it should be a “substantial cause” as ***Harbottle*** defines causation for (1st degree) murder, Crown says it should be “beyond de minimus” as defined in *Smithers*
* *Analysis:*
  + To be charged with 1st degree murder the action has to be a substantial cause of death, to be charged with second degree murder it must be more than trivial
  + *In establishing a murder you must ask whether the murder happened first, and then look at whether it is first or second degree*
  + **Harbottle doesn’t require a higher causation but a higher participation**, when determining first or second degree the murder has already been established to have been caused by the defendant
  + **The test is still *Smithers*, but a better way of defining it is whether it was a significant cause of death- this is more clear than beyond *de minimis***
* *Holding:* D’s actions were a significant cause of the death. The jury was not misinstructed in being told that in homicide causation is defined as a significant cause
* ***Ratio****:* There is only one standard of causation for homicide, that is *Smithers* – a significant cause. Harbottle deals with the level of participation required to constitute first degree murder, but does not increase the standard of causation.

## R v Maybin (2012) SCC: FACTUAL vs LEGAL CAUSATION + analytical tool: but-for test for factual, and reasonable foreseeability (majority) and independent acts (dissent) for legal.

* *Facts*: appellants (brothers) assaulted patron until unconscious on table. Bouncer came and gave blow to head. Victim died from bleeding, but not clear which blow killed.
* *Issue*: are they still causally responsible for manslaughter, even with intervening blow from bouncer?
* *Reasoning*: Majority -> **FACTUAL causation**: **test of ‘but-for’ causation** -- doesn’t need to be direct or immediate, or even MOST significant (there is still an operative cause of death despite the difficulty). **LEGAL causation**: *whether the risk of harm caused by intervening party could have reasonably have been forseen* (yes, so legal causation) – **doesn’t have to be precise results**. 🡪 **JUST A TOOL, SO IT’S STILL SMITHERS** (if not reasonably forseeable, likely insignificant).
* Dissent -> legal causation: *whether the action of the intervening party was independent, intentional, and unforeseeable* (it severed causation).
* Held: factually caused by brothers (but-for, smithers), and legally (because reasonable foreseeability in circumstances).

## *R v JSR (2008) CA: establishing causality requires factual + legal, and legal is not severed by another party jointly participating or furthering dangerous situation*.

* *Facts:* D participated in a shootout in the street, a woman was killed, he was charged with 2nd degree murder
* *Issues:* Was the accused’s willing participation in a gunfight sufficient evidence to satisfy the *Smithers* causation test and justify the trial of accused for homicide? (**DIRECT OR INDIRECT**).
* *Analysis:*
  + **Satisfy factual causation? (but-for):** JSR’s actions were a contributing cause beyond *de minimis*.
    - Yes, participating in a gunfight was a mutual decision that was reckless to the death of the victim, all participants are responsible for the outcome even if it is only one of those participants who actually directly causes the harm
    - **Legal Causation severed?** Did the other shooter who shot the fatal wound constitute an intervening cause that severed the causal link between the victim and JSR?
      * Northbound shooter could not have severed, because he did not act independently – joint situation.
* *Holding:* Since a reasonable view could hold that JSR caused the death, the case should go to trial
* *Ratio:* If you participate in a dangerous activity that endangers lives then you are responsible for the death of those people, even if it was not you specifically who did the fatal act.

# CH 6 - Mens Rea (blameworthiness)

The nature of fault can take a number of different forms, depending on wording of the offence and the component of *actus reus* it is attached to. It may take one or more of the forms: intention (wanted or substantially certain), knowledge (or wilfull blindness), or recklessness, depending on the offence

-Usually subjective

-Default = recklessness

-When it’s objective: what *should* have been going through mind, and a deviation from the standard. Focus is *reasonable person*.

-True crimes: require some kind of MR.

-MOTIVE: *not relevant for MR*, but can be useful in evidence (***Lewis*).**

**‘Wilfully’ in statute** (Buzzanga and Durocher): *depends on context, but primarily INTENTION, and also RECKLESNESS*.

**Specific intent offences**: crimes that include a purposive element (e.g. break in and enter). Prohibited conduct /w intention to achieve some purpose.

## *R v Beaver (1957) MR assumed unless parliament specifically rules it out*; knowledge is NECESSARY element of possession; (subjective) honest reasonable mistake can be a defence to a crime where knowledge is required.

* *Facts:* Beaver was convicted of selling diacetylmorphine, but he believed it was milk powder or sugar. The jury was instructed not to consider whether or not he knew he was selling morphine.
* Decision: guilty of selling (now trafficking – held out to be a substance), but lacking MR of knowledge (MR = essential element of crime – fault).
* Ratio: *there is no possession without knowledge, if there is an honest, reasonable mistake*.

Regulatory Offence

## *R v City of Sault Ste. Marie (1978) Affirms that MR is SUBJECTIVE for true crimes (usual rule: when under fed crim law power -> some MR)*

* *Facts:* D charged with polluting a river
* *Issues:* Does this require mens rea? Or is it strict or absolute liability offense.
* *Analysis:* The difference is between **public welfare offences** and **criminal offences**, public welfare offenses are tried on absolute liability, criminal offenses require a mental element
  + True crimes require mental element, absolute liability does not and there are *no defenses* available. However strict liability does not require mental element but there is the excuse of if you acted as a reasonable person would and took “**due diligence**” to ensure the event wouldn’t happen
* *Ratio:* The was a regulatory offence and therefore the mental element is not required.

**Wilfull** Action

## *R v Buzzanga and Durocher (1980): Willfully can mean either intent or recklessness (here Q of “intentional” promotion of hatred); did not intend to bring about consequence of inciting hatred/see it as substantially likely, but to shed light on situation which was ridiculous.*

* *Facts:* D were charged with **willfully** promoting hatred against an identifiable group (French Canadians), in response to anti- french sentitment, the D’s decided to release a document that basically said Anglophones need to crush French canadian community. This was seen as “willfully promoting hatred” against French Canadians
* *Analysis:* How should wilfully be defined? The crime is:
  + *“anyone who, by communicating statements, other than in private conversation****, willfully*** *promotes hatred against any identifiable group is guilty of…”*
  + Should wilfull mean intentionally or recklessly?
    - **It can mean either, in this case it means intentionally**
      * **Intention**?
        + Either intending the consequence or seeing the consequence as being substantially likely
        + In this case they thought the consequence would be to shed light on the ridiculousness of anti-french canadian sentiment, the purpose was to make a political stir, not to promote hatred
* *Ratio:* **Intention is not about doing something not by accident, it’s about what was intended in doing those actions**. To have intent you have to have intended the result to occur or the result must have been substantially likely to occur.
* Held: trial judge erred saying that willfully is just opposed to accidental.

AR MR

|  |  |
| --- | --- |
| **Conduct**: Communicating statements | intentionally |
| **Circumstances**: Not private | Minimum: recklessness (anything more suffices) – nothing said about knowing/intending that it’s not private |
| **Consequences**: promotion of hatred against identifiable group | **Willful** (intention) |

Subjective Intent/Recklessness

## 

## *R v Theroux (1993) Gives us the subjective MR of FRAUD*

Issue: was the accused saved my lack of MR, by saying they did not think their action subjectively had lack of risk /w respect to deposits?

**Actus Reus** of fraud:

* + - **Dishonest Act** element: the dishonest act is established by the proof *of deceit, falsehood, or “other fraudulent means”*
      * The third is an OBJECTIVE test .. (what the reasonable person determines to be other fraudulent means, e.g. non-disclosure, use of corporate funds for personal purposes)
    - **Deprivation**: established by proof of *detriment*, *prejudice, or RISK of prejudice* to the economic interest of the victim, cause by the dishonest act.
      * It is sufficient that there be a RISK to economic interest (expanded)
  + **Mens Rea** of Fraud:
    - 1. **Subjective knowledge of the prohibited act**; and
    - 2. **Subject knowledge that the prohibited act could have as a consequence the deprivation of another** (which may consist in knowledge that the victim’s pecuniary interests are put at risk)
* Application: AR ok, but MR -> Told the depositors they had insurance when he KNEW they didn’t -> knew to be false. He knew he was DEPRIVING them of what they thought they had.. and it can be **inferred (not rebutted)** that he knew he was placing the money at risk.

\*Shepannek*: argued recklessness is sufficient for knowledge (BCCA as of now)*

Wilfull BlindnessR v Briscoe (2010) *WILLFUL BLINDESS IS A SUBSTITUTE FOR KNOWEDGE REQ IN MR: aware of risk, but deliberately ignoring suspicion – aiding and abetting requires knowledge (party crimes)*

* *Facts:* Briscoe was there when a murder happened, and he followed along/helped the parties to some extent, without further inquiring.
* *Issues:* Did he intend to assist in the crime? Was he willfully blind to the crime?
* *Analysis:* Wilfull blindness is a substitute for knowledge. Mens rea (of aiding & abetting) requires the person to have knowledge of the crime being committed or intended.
  + the court found his actions met the actus reus of assisted murder, but did he intend it? Did he know that is what he was doing?
  + Wilfull blindness is when the accused “shuts his eyes because he knows opening them would give him knowledge” - wilfull blindness cannot let you escape liability. He was wilfully blind (new trial?)

# CH 7 – Departures from subjective fault.

## *R v City of Sault Ste Marie (1978) Introduces STRICT LIABILITY offences, which have no MR, but defence of due diligence/honest and reasonable mistake is allowed – public welfare offences. Absolute liability applies only when legislative direction (and when small penalty).*

* *Facts:* D illegally polluted
* *Issues:* Public welfare offences (crimes against public) usually absolute liability, is this appropriate in public welfare offences with high punishment?
* *Analysis:* the crown should not have to prove mens rea, but its not really fair that actus reus automatically should lead to guilt.
  + The approach should be **strict liability**:
    - offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of *what a reasonable person would have done in the circumstances.*
    - The defense will be available **if the accused reasonably believed in a mistaken set of facts which, if true would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.** 
      * Public welfare offences will fall into this category
* *Ratio:* A public welfare offence should be strict liability –actus reus is prima facie evidence of guilt, unless the accused can disprove it by due diligence or honest and reasonable mistake of fact. Absolute liability will only apply when there is legislative direction.
  + **Due diligence:**  the accused took all the necessary steps that a reasonable person would have taken to avoid the act
  + **Honest and reasonable mistake:** the accused reasonably believed in a mistaken set of facts that if true would render the act/omission innocent.

## R v Chapin (1979) *Duck hunting regulation was actually a strict liability offence; crown can argue prima facie SL offence is AL, when having a rebuttable defence would severely limit the desired application of the legislation*; *three factors to determine whether SL, AL, or TC*.

* *Facts:* Mrs. Chapin was hunting for ducks near to grain, she claimed she didn’t know the grain was there*:* it is unlawful to hunt for migratory birds within one-quarter mile of a place where bait has been deposited
* *Issues:* should this be a strict liability, absolute liabilty, or mens rea offence?
* *Analysis:*
  + Mens rea should be for “true crimes”
  + Not absolute liability
    - *Sault Ste Marie* holds that public welfare offences should be strict liability
    - Should look at *overall regulatory pattern* (degree of punishment), *subject matter of legislation* (regulatory offence?), and *precision of language*
    - The punishment is severe, it is a regulatory offence, the regulations do not seek to impose an absolute obligation upon a hunter who innocently hunts believing reasonably that it is legal
* *Ratio:* To determine if it is a strict liability offence, absolute liability offence, or a true crime (requiring MR), look at the three factors stated above

# Second Semester

**SSM**: *True crimes (MR), Strict liability (AR + defence), Absolute liability* (rare)  
 -**Rule**: **True crimes** presumption of **subjective MR** (intent, knowledge, reckless) for each and every element (sometimes it’s objective) –need to punish the **guilty mind**. **Absolute/Strict Liability:** When we don’t care what the mindset is, but need to punish such*actions*, liability is attached by *marked departure from a standard of behavior that we think is important in society* (criminal thoughtlessness).

**Strict Liability**: prove AR + provide due diligence defence (belief in state of facts, which if true, would make the actions innocent – BOP).   
**Absolute liability:** No MR, and no defence. Will not be read-in, unless **clear language** from Parliament (can only argue lack of causality, voluntariness or identity). \*Cannot have prison sentence.   
CH 7 OBJECTIVE STANDARD OF FAULT **OBJECTIVE STANDARD OF FAULT**:   
  
1. **S219 (defined but not created by) Criminal Negligence**: few types, but are easy to identify: say something ABOUT crim negligence. Crim neg if: a) Doing anything or B) omitting anything that it is his **DUTY** to do, shows **wanton or reckless disregard** for the lives or safety of other persons.   
 -ROOTED in a legal duty: must be found somewhere in CC/statute OR common law. Not stand-alone (e.g. **s220-222**: crim neg causing manslaughter, bodily harm, or death).

-**Usually CONSEQUENCE crimes**, only deals with **RISK TO OTHERS**, a degree of disregard, and emphasize conduct.

-\***MARKED DEPARTURE** for crim neg.

2. **Objective Fault Offences**: standard of “penal negligence”. Quite a few offences include this (tougher for crown to prove subjective). Assessed on the *reasonable person* test, and sometimes *modified objective*. Dominated by **driving offences**. (not the same as *subjective recklessness*).   
  
\*Generally: Offences based on *crim neg*, *dangerous conduct, careless conduct, duty-based offences, and predicate offences* (e.g. manslaughter-like offences)   
  
**Tutton**: *sets out the OBJECTIVE standard* – ***marked and substantial departure from a reasonably prudent person in the circumstances*** and ***honest & reasonable mistake*** – **CRIMINAL NEGLIGENCE**:   
 -F: Holy spirit, insulin 2x, after listening to advice of Dr.   
 -L: **Charge of [criminal negligence] causing [manslaughter]** (have to root CN in *legal duty* elsewhere, which is in **failure to provide necessities** – 197(2)). The extent of PERSONAL CHARACTERISTICS used in objective test (modified) is only for **reasonableness** of mistake, but will not include *their belief system*. Their defence of **honest & reasonable (objective)** mistake is likely unreasonable (*marked departure*), only taking into account their non-personal circumstances.   
 **Hundal**: ***marked*** *departure (modified objective), driving*

F: drove truck through intersection on red, thought he could not stop at amber and killed driver.   
 -L: **Dangerous driving causing death** (s249): the test is **MODIFIED OBJECTIVE** -> interpreted as the PURPOSE (policy – need to deter/be able to get convictions) of Parliament in this type of provision + language (does not indicate MR). Standard only takes circumstances into account, not personal characteristics (if you can drive, it doesn’t matter what you’re thinking). Has to be **very serious departure** from the **ordinary person** (even just negligence alone might not do suffice/momentary lapses).

**ADH**: *Statutory interpretation in SUBJECTIVE/OBJECTIVE offences*

-F: walmart baby.. didn’t know she was pregnant, plus thought it was dead when it came out, so she left it there. **S218** at issue: ***unlawfully* exposing or abandoning a child (under 10)**, **so that its life is or is likely to be endangered or its health is or is likely to be permanently injured**… (Hybrid offence). **AR:** Conduct: abandoning or exposing child; Circumstance: child is under 10; Consequences: likely danger to life/health or likely permanent injury [**s214**: **“Abandoning” df.**] -> “**willful omission** to take charge of a child by person under *legal duty* and dealing with child in a way that is **likely** to leave them exposed to risk w/o protection”. **MR**: **willful omission** sounds SUBJECTIVE, and the consequence being “likely” = subjective foresight.

-L: **Purpose of provision**: to protect children from certain dangers from those who have a legal duty to protect them. *Expose, abandon*, etc. sound like they require subjective foresight + Parliament usually requires subjective MR.

CH 8 MENS REA and the CHARTER

Significant impact on the MR reqs because of Charter. Parliament constrained to a few constitutional requirements (esp for very serious crimes). Mostly dealing with s7 and 11(d). Impact on substantive criminal law (admin efficiency won’t be enough to violate the Charter). Then for *murder* (Vallaincourt + Martinau) half of the murder/homicide provisions struck down.

**Motor Vehicle Reference**: *Absolute liability + penalty = unconstitutional*

-**L**: *according to s7 principles of fundamental justice*, ***some fault requirement*** *needs to be included for every offense where* ***imprisonment*** *is possible*. (Does not have to *always* be **subjective**, just something, unless **special stigma crimes**: MURDER, ATTEMPTED MURDER, CRIMES AGAINST HUMANITY. Absolute liability will be very rare.

-F: MVA BC created an *absolute liability* offence, where imprisonment was possible, whether or not defendant knew of the prohibition or suspension. Takes away liberty inconsistent with principles of FJ.

**Vallaincourt** + **Martineau**: *SPECIAL SITGMA CRIMES = SUBJECTIVE MR*

-L: SS crimes require a higher level of MR, *because of liberty depriving consequences and proportionality*. **Not based on *OBJECTIVE*** **foreseeability of harm or that of a reasonable person, murder must have SUBJECTIVE foreseeability of death** (knew or was **substantially certain**/intended).

-After *M*,

**De Souza**: *CONSTITUTIONAL MIN ONLY FOR MOST SERIOUS CRIMES*

-L: **Displaced constitutional minimum in *Beaver*: subjective requirement only in *SPECIAL STIGMA* crimes. Does not apply to all cases** (some can be objective fault and constitutional still). In punishing *unforeseen circumstances*, the law is **not** punishing the morally innocent, but those creating *avoidable/, immoral/unlawful action*.

-F: s269 required that “everyone who unlawfully causes bodily harm..” and the accused did not foresee the consequence of death, but only the bodily harm.

**Creighton**: *MANSLAUGHTER IS MODIFIED-OBJECTIVE AND CONSTITUTIONAL* -F: Injected girl with cocaine, was experienced drug user, she died. Charged with **unlawful act manslaughter** 225(5)(a) – ‘Trafficking’ = the unlawful act. He wants to take his experience into account (more subjective) as well.

-L: **Manslaughter is on a *modified objective test* and you only have to *objectively foresee the likelihood of bodily harm, not death – is there a MARKED DEPARTURE from the RP in the circumstance?*** (otherwise too high burden on crown) (instead of Lamer’s “ought to have foreseen the death” - symmetry). This is because manslaughter is **not a special stigma** crime, and subjective MR not const required. Furthermore, **some level of moral culpability has to come from the *underlying act***(unlawful).   
 -TEST for Manslaughter:   
 1. *Establish AR* – the dangerous activity

2. *Establish MR* – activity must be done while there is objective foresight of harm (not death) that can be inferred from the facts (standard = marked departure from RP in circumstances).

-Further, *experience as a drug user* did not factor in: **personal characteristics erode the MINIMAL standard of care** necessary (has to be uniform). ONLY the CIRCUMSTANCES taken into account.   
 **\*NOTE: MANSLAUGHTER**   
**s222**: (4) Culpable homicide is murder or manslaughter or infanticide. (5) A person commits **culpable** homicide when he **causes the death** of a human being, (a) by means of an **unlawful act;** (b) by **criminal negligence**; Section 234: Culpable homicide that is not murder or infanticide is manslaughter.

# DEFENCES CH 9 – MISTAKE of FACT/LAW

## Mistake of FACT (subjective – honest mistake in true crimes)

**TRUE CRIMES**: basically proves that the crown didn’t make its case **BRD** **for requisite MR** (negates it). Has to be *relevant* (going to essential element). Accused only has to raise a ***reasonable doubt*** (whole legal burden on the crown still). Requirement is just an **HONEST mistake (subjective), NOT reasonable (the objective standard)** (except as modified by leg in sexual assault). \*MOSTLY developed in sexual assault (used to be rape charge with “outside of marriage” context). TEST: **AIR OF REALITY**.

For **STRICT LIABILITY**, the mistake has to be **reasonable & honest** (objective test). The accused carries the burden to prove MR component. The belief would have to be in a state of facts, which **if true**, would **render them innocent**.

**PapaJohn**: *MISTAKE OF FACT IN SEXUAL ASSAULT, HONEST MISTAKE (MR) and CONSENT (AR)*

-F: Accused met agent selling house, and went back to mansion. They got drunk and initial activity was found consensual, but turned into bondage activities which she said she didn’t consent to, and **made escape** with rope tied.   
 -L: **CONSENT goes to the AR** (circumstances), and takes into account the **subjective view of the complainant**. If it is satisfied that there *was not ACTUAL consent*, **defence of honest (not reasonable) mistake** can go to **AR** (air of reality – **bare assertion INSUFFICIENT, evidentiary basis**) – aka accused THOUGHT there was.

-C: defence fails, no air of reality (just bare assertion).   
  
**s265(4):** \*assault - *reasonable grounds required* + judges need to put to jury

**Ewanchuck**: *Prompts Parliament to add “reasonableness” to mistake of consent,* ***NO IMPLIED CONSENT*** *defence*. *Still HONEST* + **reasonable steps** mistake standard.

-F: “van interview”.. consecutive “no’s”, trial judge constructed consent, based on *lack of RESISTANCE* (failure to communicate her fears). Up to CA. Found her credible in her saying “no”.

-L: CONDUCT of sexual assault: **objective (what RP counts). No such thing as implied consent** (circumstance) in law as defence to sexual assault. Also, many circumstances under which *consent* cannot be acquired e.g. 271(1): **incapacity, threats, violence, fear** (DOES NOT HAVE TO BE REASONABLE fear). Once the accused has said **NO**, you have to be certain something has changed, and there is ONGOING Q of consent. **\*Therefore, some reasonable steps have to take place**.

**273(2)**(b): **ACTIVE duty** (to ascertain consent)– reasonableness even further.

## MISTAKE OF LAW

CC: *ignorance of the law is not an excuse or justification*. Policy reasons for not allowing it.

**Campbell**: *Relying on court decision – NOT ENOUGH FOR MISTAKE OF LAW*

-F: “Bottomless dancing” decision in AB. Got overturned and they used mistaske of law for their argument. Not a defence.   
  
**Levis**: *OPENS UP MISTAKE OF LAW TO REGULATORY OFFENCES*  
 -F: Accused relies on official’s statement, and gets caught driving without appropriate licensing. Charged with fine.

-L: **Requirements for officially induced error (very hard)**:   
1. Error of LAW was made

2. Considered **consequences** of actions

3. Advice acquired from *APPROPRIATE* official

4. **Reasonable** advice

5. Advice was **erroneous**

6. Person **relied** on the facts.

# CH 10 – DEFENCES: INTOXICATION + PROVOCATION

Note on defences (consderations): 1. **Whether CL or STATUTORY**; 2. **To which offences does it apply?**; 3. **What is the result of successful one?**; 4. **The BURDEN**: *AIR of reality* (evidence capable of raising an RD), and only BOP in three cases (drunken auto, auto, and MD – BOP burden).   
E.g. of specific intent: *break in and enter*, with INTENT to commit indictable offence (included – break in). Has to be an **ULTERIOR motive** to doing the thing. **General intent**: *to do the conduct*, without anymore further. Specific = **MORE MR**.

**Bernard**: *Classic statement of defense of (VOLUNTARY) intoxication* – SPECIFIC-intent only.

-L: **not available for** **general intent** – sexual assault is general. Entirely a judge-made construct. Often Specific intent have *INCLUDED* offences. Lots of **dissent** about **whether this is CONSTITUIONAL** (to make *general intent offences like absolute liability when intoxicated* – can be convicted despite existence of RD). **However, the distinction is argued LEGIT** because you can *infer MR* by looking to **conduct**: being voluntarily drunk to this extent is the blameworthy thing. BUT, they pick up on what *Daviault* does (that someone could be **SO EXTREMELY drunk** verging on **automatism** that defence may be appropriate).   
  
**Daviault**: *OPENS UP EXTREME-INTOXICATION DEFENCE TO GENERAL-INTENT,* ***ALTER BURDEN OF PROOF****.*

-F: Sexually assaulted elderly lady, accused was alcie and got black-out drunk (drank an amount that should’ve killed someone).

-L: **Distinction between SI and GI** **is upheld, BUT small number of cases may allow EXTREME (automaton-like) intoxication**, where s7 would be violated, if defence not allowed. However, the **BURDEN should be BALANCE of probabilities** (because accused in a better position to know). Might violate s11(d), but reasonable under s1.

**33.1 – Intoxication Defense Reponse**:  
\***Basically limits EXTREME intoxication in general intent to ONLY non-bodily-integrity violating offences**:

* (1) It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused **departed markedly from the standard of care** as described in subsection (2).
* (2) For the purposes of this section, **a person departs markedly from the standard of reasonable care** generally recognized in Canadian society and is thereby criminally at fault where the person, **while in a state of self-induced intoxication that** renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or **involuntarily interferes or threatens to interfere with the bodily integrity of another person.**
* (3) This section applies in respect of an offence under this Act or any other Act of Parliament **that includes as an element an assault** or any other interference or threat of interference by a person with the bodily integrity of another person.

**What we’re left with**: Three levels of intoxication and defences:

1. **Extreme**: Specific intent, and SOME general (property) intent
2. **Medium (most)**: Specific intent, and NO general
3. **Low**: not a defence for anything

**Drader**: *Break-in and enter to commit indictable offence*, *Need good evidence*

-F: no Q about him breaking in, but whether he was sufficiently drunk to be able to **negate** the specific intent part. Based on conduct (e.g. singing + dancing), probably not drunk enough.

-L: **Conduct + POST-conduct** can help determine level of intoxication. **Medium level failed here, suggesting it is STILL FAIRLY HIGH**.

## PROVOCATION

Statutory **s232** – the heart of it is **sudden act or insult**, and is a **PARTIAL excuse**, which reduces *murder to manslaughter* (killing someone in passion is less penalized than calm-headedly).

* **232.** (1) Culpable homicide that otherwise would be murder **may be reduced to manslaughter** if the person who committed it did so in the **heat of passion** caused **by sudden provocation.**
* (2) A **wrongful act or an insult** that is of such a nature as to be ***sufficient to deprive an ordinary person*** of the power of self-control is provocation for the purposes of this section if the accused **acted on it on the sudden** and **before there was time for his passion to cool**.
* (3) For the purposes of this section, the questions
  + (*a*) whether a particular wrongful act or insult amounted to provocation, and
  + (*b*) whether the accused was deprived of the power of self-control by the provocation that he alleges he received, **are questions of fact**, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.

**Hill**: *SUBJECTIVE/OBJECTIVE part of the TEST, “ORDINARY person”*

-F: homosexual advances, the guy got scared and got a butcher knife.

-L: **OBJECTIVE PART**: **1.** The ordinary person thinks there would be an **insult**, and that the ordinary person would be **sufficiently** provoked to **lose self-control**. 2. **Subjective**: Did the accused IN FACT **react/respond** to these provocative acts/insult **ON THE SUDDEN**, before passions were cooled?

**Tran Case**: *sets out TWO-PART test* (basically above). *What is meant by* ***ORDINARY person*?**

-F: man showed up to estranged wife’s house, found her in bed with a man (who he knew of previous), made a call to his father to say “Got him”, after murder.

-L: **Go through two-part test**, but **define ORDINARY** as: *some context, and involves the NORMS and understandings of our* ***social world***. **You can take into account sex, age, race, and *RACE* when it’s a racial slur** (for the purposes of the insult).

# CH 11 – MENTAL DISORDER + AUTOMATISM

## MENTAL DISORDER

**Time when relevant**: 1. *At the time of the OFFENCE* (**s16**) 2. *At time of TRIAL* (fitness **s2**) 3. At time of *SENTENCING*.

**Result**: NOT CRIMINALLY RESPONSIBLE by reason of MD – channeled outside of the justice system (psychiatric) \*there is a cap on it.

\*Exists based on *assumption of free will*.

**Burden of proof**: *BALANCE OF PROBABILITIES* on the accused (justified under s1, although 11d violated).

**Until *Swain***: charter issues with the indefinite detention system /w review boards, and the CROWN raising the defence FOR the accused (now only when *put at issue*).

* **Mental disorder at the time of the offence s16 – 2 prongs**:
  + (1) **no person is CR** for an act committed or an omission made while suffering from a **MD** that rendered the person incapable of **appreciating** the nature and the quality of the act or omission **or** of knowing that it was **wrong** \*the two prongs.
    - Two prongs = two kinds of incapacity
  + (2) Every person is **presumed** **NOT to suffer from a MD** so as to be exempt from CR by virtue of (1) until the contrary is proved on a BOP
  + (3) the **burden of proof** that an accused was suffering from a MD so as to be exempt from CR is on the party that raises the issue.

\* **MD**: *a* ***LEGAL concept****,* informed by test in s16 and **POLICY** (e.g. “continuing danger”) \*NOT transitory states (*Cooper*).

\***Appreciate**: may go *beyond mere awareness of physical act* (**Cooper**)

\*Knowing act was **wrong** in legal sense (*Schwartz*) or **MORAL** (*Chaulk*).

**Chaulk and Morissette**: *Presumption of sanity and BOP to prove insanity saved by S1, nature of MD*

-F: 2 young accused robbed and stabbed the occupant, and defence was “paranoid psychosis”, making them think they had the power to “rule the world” and that killing was a “necessary means”. KNEW it was *illegal*, but believed they were above the law. Challenged presumption of **sanity** 16(4)

-L: **Nature of MD defence**: it negates the *AR or the MR* (sometimes voluntariness, and sometimes your ability to consciously intend the act). It is either a justification OR excuse.

-**Charter violation** (s11): could be a RD raised, while accused incapable of proving that he had insufficient MR or AR (through insanity).

-**Pressing and substantial** -> removing *onerous burden*. **Rational connection**: accused in best position to give evidence of the insanity, furthers crown goal. **Minimal Impairment**: *SATISFIED REASONABLE RANGE* (where you don’t have to compromise for an ineffective method completely). **Proportionality**:   
 -**Overruled *Schwartz***: “knowing conduct was **WRONG**” -> *LEGAL OR MORAL*

**Distinguishing MD from non-MD automatism**:

-Can use *ONGOING danger* policy tool, as well as *internal/external*.

## NON-INSANE AUTOMATISM

*RESULTS IN FULL ACQUITAL*. **Common law defence** (not s16). **Burden of proof**: also on the accused, like extreme intoxication and MD. Dissociative state that renders you **incapable of appreciating your actions**.

**Rabey**: ***PSYCHOLOGICAL BLOW*** *(external) automatism* ***OPEN but LIMITED***

-F: Sees the letter saying who she liked, got really upset and entered dissociative state. Bashes her head with rock (survives). Argued words were *psychological blow*, against crown theory of possessing weapon with *intent* to wound (otherwise, disease of mind).

-L: **External vs Internal distinction** - > EX: *non-insane*, IN: *insane* (go to s16) that would render you unable to appreciate actions. **Psychological blow is OPEN, but not found here, as “ordinary stresses and disappointments of humankind” do not constitute an *external event*** (sufficient for purposes of non-insane). Has to be **truly unusual**.

**Parks**: *SLEEPWALKING* – *can be NON-INSANE AUTOMATISM (NOT an MD*)

-F: kills parents-in-law while sleep walking.. Reports himself in. No motive, expert evidence, etc. Let go of his job, had a history, positive terms /w parents.

-L: Sleepwalking proven on evidence, and **not a neurological or psychiatric illness**, no treatment, etc. **NOT concerning enough to public** (on going danger) to make it *MD*.

**Stone**: *AFTER CASE, MOST* ***AUTOMATISM*** *channeled into* ***MD***. *Sets out general TEST. PUTS THE BURDEN OF PROOF AS* ***BOP****.*

-Q: should the judge put non-MD-automatism to jury?

-F: Wife yelling at husband, eventually goes into disassociative state. Stabbed her 47 times, woke up and saw her body. Left a note and left to mexico.

-L: **TEST** **FOR AUTOMATISM**:

1. **(Judge must determine)**: **WHETHER OR NOT THERE IS A PROPER EVIDENTIARY FOUNDATION for automatism at all**

**-**Has to be more than BARE assertion of involuntariness (likely accused will testify themselves)

-Professional **PSYCHIATRIC evidence**

-Evidence of some TRIGGER (psychological or physical)

-Other corroborating evidence

-Appears “glassy-eyed, distant” IMMEDIATELY before alleged involuntary act.

-Should be **no discernable motive**

-Someone being *trigger AND victim,* slightly problematic.

2. **WHETHER CONDITION FALLS INTO METNAL DISORDER or NON-MENTAL** (one time experience/external).

-**Starting place** for judge: think it’s a **condition of the mind**, but look for reasons to *DISPLACE* the assumption. Most cases will NOT be non-insane.

-**Internal vs External distinction + notion of continuing danger** (useful in informing the LEGAL term).

**-If not MD**, **only NON-MD** is left.

CH 13 Necessity & Duress Defences

## Necessity - common law 8(3)\*

**Pera et al**:  
Result of successful defense: **full acquittal**  
Three factors (*air of reality* for each): 1. **Imminent risk was taken to avoid direct peril**

2. **No existence of viable legal alternative**;   
3. **Proportionality between harm avoided and harm caused** (avoided < caused)

Absolves one based on **normative involuntariness** (human weakness taken into account). Negligence/crime is not a bar. It’s a justification or excuse.   
**-Facts**: large shipment of weed intended for Alaska, mechanical difficulties/weather caused accused to drop in Canada. Necessity fails in charge for importing because they had *viable alternative* of dumping weed instead.

**Latimer**:

The three elements are satisfied on a ***modified objective*** standard. **GENERALLY, it is the accused who is put in position of suffering in *necessity* cases, not someone else** (although still possible).

-**Facts**: failed on *air of reality* (not put to jury) because **not** a *clear & imminent danger* (surgery is not reasonably believed to be imminent peril), other *legal alternatives* exist (e.g. trying to minimize pain), and *never proportionality* when you inflict death to avoid pain. However, the argument about constitutional exemption (cruel & unusual punishment) to the **mandatory min** for 2nd degree was also rejected, because sentence is **not grossly disproportionate** to the most serious crime.

**Ungar**: *successful example of duress*

-**Facts**: ambulance case (his action was so morally praiseworthy (saving the person) that breaking the law was excusable, despite creating danger in doing so).

## 13 Duress – CL + Statutory

Involves *compulsions*, by another person (to you or a third party), which force you to bring an **innocent** **third party (victim)** into the picture, but could also be a third party *legal interest* (e.g. property) – forces you to do *some offence*. Involves **blameworthiness but *consider it excusable*.** Principle of **moral involuntariness** is s7 – principle of fundamental justice (‘no **real** choice’).   
 **STATUTORY – FOR PRINCIPALS**  
**17.** A person who commits an offence under compulsion by **threats** of **immediate death or bodily harm** ~~from a person who is present when the offence is committed (~~**RUZIC)**is excused for committing the offence if the person ***believes*** that the threats will be carried out and if the person is **not a party to a conspiracy or association** whereby the person is subject to compulsion, but this section does not apply where the offence that is committed is high treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson or an offence under [sections 280 to 283](http://www.efc.ca/pages/law/cc/cc.280.html) (abduction and detention of young persons)  
 -**Very restrictive**… cannot rely on duress for some of the most serious offences.

**4 elements+ CL (RYAN, RUZIC)**:   
1. must be threat of **death or bodily harm** **to the accused OR AN *INNOCENT* THIRD PARTY**   
2. accused must **reasonably believe** **(modified objective or.. subjective?)** threat will be carried outs   
3. Not one of the **excluded offences** and   
4. **Not party** to a *conspiracy*

**COMMON LAW ADDS (Ryan):**1. **NO safe avenue of escape** – *reasonable person, similarly situated* (**modified-objective test.**. some characteristics –)  
2. **Close temporal connection between threat & harm** (pretty close timing between them – not necessarily imminence).   
3. **Proportionality** between threat and criminal act to be executed (semi-objective test again, RP in similar situation).

**Ruzic**: unconstitional to require person to be present (that part struck out)

**CL DEFENCE – FOR PARTIES**:

**Elements** (**HIBERT – source)**

1. Explicit or implicit threat. May be of FUTURE harm.
2. Accused has to have **reasonably thought (modified objective)** that threat would be carried out.
3. **NO safe avenue** of escape (**modified objective**) – **HUMAN FRAILTIES** + circumstances of accused (more subjective than *objective fault* crimes).
4. **Close temporal connection** between threat and harm threatened (not necessarily immanence)
5. Must **be proportionality** between threat & criminal act assessed by **modified objective** standard
6. Must **not be a party** to a conspiracy or criminal association

**Facts**: Ruzic: the person performed drug delivery to avoid having her mom hurt (in a foreign country – parts of s17 unconstitutional and changes made); Ryan: wife tried to hire hitman to have her husband killed after suffering abuse (defence failed, but they gave her a stay of proceedings); Hibert: robbery in progress but person decided they didn’t want to do it anymore, but could not ‘back down’.

## CH 14 Attempts and Parties Attempts (statutory):

* Policy decision to punish attempts, although much less than if the offence were actually completed (has to be proportional). \*Mistake of law (impossibility of doing the offence at law –e.g. you don’t have a drug), doesn’t matter, all **collapses** into mistake of fact (and you can still be found to have attempted to commit the offence, despite it being impossible).

**S24** 1) **Intent:** Every one who, **having** **an intent** to commit an offence, **does or omits to do anything for the *purpose* of carrying out the intention is guilty** of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence;

-(1) = a **question of fact** to determine whether someone *does* have the **intent** (MR).

(2) **QUESTION OF LAW**: The question whether an act or omission by a person who has an intent to commit an offence is or is **not mere preparation** to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law (hence **can be appealed** by crown).

-(2): **the ACTUS REUS, the challenging part**: have to find that the acts cumulated into AN ATTEMPT at some point.   
  
**463 (penalties for attempts**) – *same as accessory after the fact. If completed offence can be punished by life, max – 14 years (e.g. murder). Less significant than if actually committed).* Different for ones where completed offence conviction would result in 14 years or less.

**Sorrell and Blondett**: *Attempted robbery, Fried chicken restaurant*

-**Rule**: The more proof there is of intention, the **LESS AR YOU WILL NEED**. But if relying on the **ACTS** to infer intent (no independent evidence), those acts **must be UNEQUIVOCAL**.

-Facts: they had the weapons and were ready to do the robbery, but ran away without initiating it. The only finding of intent was *from the AR* evidence alone. **If intent was found** (QofF)**, then the actions, in this case would’ve clearly been beyond mere prep** (QofL). Because no intent finding, would have to *acquit* and *not appealable by crown*, regardless of the fact that acts were *beyond mere prep*.

**Dynar**: *impossibility to complete offences doesn’t matter for attempt, legal impossibility is nonsense.*   
 -**Rule:** trying to do something that is **impossible factually** doesn’t matter, you can still be charged with the attempt (if in the process of going beyond *mere prep*). **Legal impossibility**: still possible for you to get charged with the attempt to do this (e.g. smuggling something you think is illegal, but really is not…)

## PARTIES to the offence

**Principal**: actually committed the offence; **Party**: involved in commission of the offence (anyone); **Co-perpetrators**: 2 principals vs principal/party. For the purposes of the criminal charge, everyone is treated the same (no “mode of participation”), but for sentencing, or availability of certain defences (e.g. duress) may be relevant whether principal or aider/abettor.

**S21**: (**1) Every one** is a **party** to an offence who

* (a) actually commits it;
* (b) does or omits to do anything **for the purpose of aiding** any person to commit it; or
* (c) **abets** any person in committing it.

###### Common intention

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

-When 2+ people form the intention to do an **unlawful** thing or help each other in carrying it out, the each of them becomes a **PARTY** to a **probable consequence** of that offence (e.g. something happened in the bank robbery), when they **knew or OUGHT to have** known.

-“**Ought to know**” – *reasonable person in the position of the accused*.

-**“Common intention**” – agreement to do any illegality, and you’re liable based on your planning you were involved in (agreement rather than *action*) that forms the liability.

-You can **withdraw** from common purpose, but must be a finding that you *withdrew* in a **reasonable** way.   
  
**s22 – Counseling an offence**

**s23 -- Accessories after the fact**

**Dunlop & Sylvester**: *WHAT IS* ***“AIDING” or ABETTING”****?* ***By-standers not parties***, “no duty to stop commission of offence” (*gang rape*) *-***Rule**: “**abetting**” usually means **encourage** while actually present, and **“aid**” means **promote** or facilitate in any way **even if not there** (e.g. driveway car, maybe hacking). **Mere presence** is INSUFFICIENT, *unless* your mere presence somehow lends **encouragement** or makes it **more difficult** for the victim to get away. Irrelevant whether actual aiding, if found, doesn’t help further it.   
 -**AR**: *some act or omission done before the commission of the offence, regardless of whether it actually assists*

-**MR**: *for the purposes of aiding regardless of whether you knew it was a criminal offence* (**specific intent**).   
 -**Rejected three interpretations**: (*aiding/abetting, common intention, or principals*). Doing nothing is not a crime.

**Thatcher**: s*21(1) makes distinction between principal or aider/abettor* ***legally irrelevant***:

**-Rule**: *charge to jury is not wrong if instructed to decide on EITHER being party (hiring hitman) or principal* (*WIFE ASSASINATION*). \*HOW he was liable, if at all, for murder didn’t matter. 21(1) is supposed to **take the burden off crown** to *settle* on one **method** of participation, because both forms are **equally culpable**.

-Three ways to look at it: 1. He did it himself; 2. He AIDED someone else to do it; 3. Innocent. If jury is convinced of 1 or 2 **BRD**, then **convicted** and don’t have to see the case the same way. **\*If no mandatory min (not murder), can be relevant for sentencing**.

# CH 15 - PRIMARY PRINCIPLES OF SENTENCING

The two important parts: 1. **What ACTUAL sentence** accused can receive; 2. **Maximums and minimums and what discretion is retained** (max is ALWAYS there). Many interested parties. Outside of parameters given in code, *fairly discretionary*.

*Sentencing Occurs in two scenarios:*

**1. After a guilty-plea**: the judge has not heard evidence, witnesses, defenses, etc.   
 -Defense will have **disclosure** before trial (everything it needs to make its case).

**Plea Bargain**: “my client will plead guilty, if you will tell the judge that X is the appropriate sentence”. Joint submission: powerful (but not binding on judge).

**Crown reading-in facts**: once found guilty, crown will state facts. You can correct them, or agree. Crown will suggest appropriate sentence. Defense makes its submission: role in crime, hardships, positive things said about them, etc.

**Sentencing report ordered**: e.g. impact statement, etc. part of judge’s consideration.

**\*Criminal Record**: *very important* to sentencing (e.g. are there *related* offences?)

**2.** **After trial**.

**Types of sentencing dispositions**:

1. **S730: The least restrictive possible disposition**: **ABSOLUTE DISCHARGE**. There is a **conviction** but *no criminal record* entered. There still is a record of the fact that guilty and discharged. Don’t have to answer “no criminal record”, but not to “ever been convicted/found guilty”.
   1. **The test**: 1. Is it in the **best interest** of the **accused** and
   2. Whether it is consistent with the **public interest**.
      1. Nothing in legislation or caselaw suggesting previous convictions prevent a future discharge.

2. **s730**: **CONDITIONAL DISCHARGE**: same effect as *absolute*, but with certain conditions (e.g. probation). It will be absolute discharge when completed. \***NOT** the same as conditional sentence.   
  
3. **S731: S*uspended* Sentence With Probation**: passing of sentence on hold. Put on probation and won’t be sentenced, although there will be a *conviction* record. If you violate the probation, you will be sentenced for ORIGINAL AND violation (can’t be more than 3 years – **supposed to be for *rehabilitation*)**.

4. **s734-737**: **FINES**. Don’t happen that often, but have sentencing in case fines are not paid on time.

\*IMPRISONMENT (last resort): 5. **S742.1: CONDITIONAL SENTENCE**. Where accused would have been serving 2 year or less for sentence, but permitted to serve in the **community instead**. If meets the 2 yrs or less req, then as long as **consistent with fundamental principles of sentences in s718** and not a danger to the community.

**Parole**: Not a sentencing consideration, but **ADMIN decision** made by *CORRECTION CANADA*. Code sets out rules for eligibility (only for some offences). **Normal rule**: eligible for **FULL** parole after 1/3 of sentence service, and for **DAY PAROLE**, 6 months before that. \*Judges are not supposed to think of it while sentencing. Murder: **mandatory parole eligibility** (jury can make recommendation).   
  
**Controversial Dispositions**:

1. **Dangerous Offender** **Provisions**: show repeated patterns of *violent behavior*, and no change. Once designated, subject to *indeterminate* sentence.
2. **Long-term Offender**: mostly sex-offenders and adds period of **supervision** for up to 10 years.

**Principles codified in 718**:

**“To contribute along with crime prevention, respect for the law, just and peaceful/safe society, imposing just sanctions with the following objectives:** a) denounce b) deter c) separate d) rehabilitate e) make reparation for harm f) promote responsibility”

-s**717.1**: **sentence must be proportionate** **to the gravity of the offence, and degree of responsibility of the offender.**

-**718.2:** OTHER principles:   
1. **Sentence** should be informed by any **AGGRAVATING or MITIGATING** **circumstances** (e.g. homophobia, addiction, etc)2. **Abuse of spouse or child, position of power**/authority against the vulnerable (crime here = aggravating);

3. **Parity between sentences** (similar ones treated similarly);  
4. **Consecutive Sentences** (instead of concurrent) must not be unduly harsh.

5. **Prison is a last resort** (especially for aboriginal offenders).

**Smith**:

-**It is POSSIBLE that the court can invalidate a sentencing provision** (on grounds of unusual punishment s12 for min of 7 years, importing prohibited substance) \*the then narcotics provision.   
  
Sentencing for Aboriginal Offenders

Court’s position **s718.2(e)**: “all available sanctions OTHER than imprisonment, reasonable in the circumstances should be considered for the **aboriginal offender**”. Possible that they only codify the same principle as before. Worked only if the aboriginal **community** was **willing** and able to play a **central** **role** in the rehab (before Gladue). Then the idea was that it didn’t apply unless on *reserve*.   
  
**Gladue**: *ABORIGINAL SENTENCING*, “*GLADUE COURTS*”, 718.2(e) *REMEDIAL PROVISION*

-F: Aborig woman dating guy, but worried he was going to cheat and stabbed him, killing him. She had no crim record, and “hypothyroid condition”, tending to produce **extreme emotional reactions**. Original sentence = 3 yrs.

-Q: Did the trial judge/appeal court err in stating that “*no special circumstances need to be taken into account because of her aboriginal status*”? (Did not need to apply 718) – was three years grounded in **denunciation/deterrence** appropriate?

-L: **Three errors committed**: 1. Limiting 718.2(e) to those living on RESERVES; 2. Failing to consider **system or background factors** that might’ve influenced her behavior (e.g. general/specific things to aboriginal person, immediate and more remote); 3. **Ignoring the distinct concept of sentencing**.

-**It’s not discretionary** to consider alternatives before prison sentence, and the distinct aboriginal considerations here in the background.