LAW 120 Criminal – April Exam CAN

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# Chapter 1: Introduction to Canadian Criminal Law

## A. Purposes of the Criminal Law

- Two parts of criminal legislation: (1) offence creating and (2) penalty provision

### R. v. Grant, 1965

F: D worked for fed gov’t in North. Used “relief fund” (intended for food) to build housing, set up store, power line, etc. for community. Charged w/ making false return. Convicted, TJ gave very small penalty.

I: Should justification of criminal offence have impact on penalty?

L: S. 92 of *Financial Administration Act*

A: D knew he was breaking the rules, has accountability to public, but was working to fulfill role to care for FN.

C: Greater penalty substituted.

R: Moral justification =/ lower penalty.

D: Is the purpose of criminal law to punish people who do harm? Does moral validity of crimes matter? Policy issues re: reputation of admin of justice.

## B. Sources of the Criminal Law

### 1. Constitution Act, 1867

- Feds: 91(27) – Criminal Law; 91(28) – Penitentiaries

- Provinces: 92(6) – Prisons; 92(13); 92(14) – Admin of Justice in Province; 92(15) – Enforcing provincial laws

### 2. Criminal Code, 1985

Doesn’t apply where inconsistent w/ territorial acts – CL defences still in force – Cannot convict of offences at CL, offences under Parliament in UK, offences under act in province before province joined Canada

### 3. Canadian Charter of Rights and Freedoms

Constitutional supremacy (S. 52)

S. 1 – Rights and freedoms in Canada

S. 2 – Fundamental freedoms

S. 7 – Life, liberty and security of the person

S. 8 – Search and seizure

S. 9 – Detention or imprisonment

S. 10 – Arrest or detention

S. 11 – Proceedings in criminal and penal matters

S. 12 – Treatment or punishment

S. 13 – Self-crimination

S. 14 – Interpreter

S. 15 – Equality before and under law and equal protection and benefit of law

S. 24 – Enforcement of evidence bringing admin of justice into disrepute; exclusion of evidence bringing admin of justice into disrepute

S. 32 – Application of Charter

### 4. Case Law

## C. The Commencement of Criminal Proceedings

- Officer fills out **information** – formal charging doc

- Officer appears before justice of peace and swears under oath

- If justice of peace wants to proceed w/ charge, they **issue process** – compels A to come to court

## D. Classification of Offences

### Summary Conviction Offences

Less serious – trial in provincial court – before judge (no jury) – no preliminary inquiry – max fine $5000 or 6 months imprisonment unless specified

### Indictable Offences

More serious – only fed Parliament can create

**1. Crimes specified in Section 469**

Exclusive jurisdiction of superior court – judge and jury unless otherwise agreed by Crown and A – preliminary inquiry precedes where A is discharged or committed to trial – charges approved by Crown e.g. Murder

**2. Crimes specified in Section 553**

Absolute jurisdiction of provincial court – judge alone – no preliminary inquiry

**3. Other indictable offences**

Election by A (i) Trial in provincial court w/ judge alone, no preliminary inquiry; (ii) Trial in superior court w/ judge alone after preliminary inquiry; (iii) Trial in superior court w/ judge and jury after preliminary inquiry

- Benefits of preliminary inquiry: get to see more of case against you, occasion to find inconsistencies in evidence -> Used to test strength of Crown’s case

### Hybrid Offences

Crown chooses between summary conviction or indictment – depends on nature of facts – involves negotiations – if indictment, falls under “other indictable offences”



## E. Outline of a Criminal Trial

1. **Arraignment** – formal reading of charge to A

2. **Plea entered** – guilty or not guilty, if guilty then sentencing follows

3. **Crown Case** – always has burden of proof beyond a reasonable doubt

* **Direct examination/examination in chief** – Crown asks witnesses Qs
* No leading witnesses – but defence counsel *can* lead witnesses

4. Crown case closed

5. Defence may make **no evidence motion** and Crown may reply

* If there has been no evidence introduced on an essential element of the crime

6. Defence case

* Crown cannot call A as witness but defence can
* If A is called, can be cross-examined on record – otherwise criminal record will not be part of case

7. Defence case closed

8. **Closing arguments**

* Defence goes first if they called evidence

9. Judge’s ruling

10. Sentence

### Role of Jury

Determines facts based on evidence – applies law to facts – decide whether facts support conviction of law governing charge – trier of law

### Role of Judge

Decisions about law – instructs jury on law – puts context around facts that jury deals w/ - trier of fact

- Decisions of fact are almost never appealable, decisions of law may be appealed

# Chapter 2: Proving the Crime

## A. The Adversary System

Judge is passive – listens to evidence and makes sure trial is conducted properly – assumption is that truth is more likely to emerge this way – Crown and defence are adversaries seeking different outcomes

Versus **inquisitorial model** – judge may be involved in investigating and collecting evidence – judge actively participates in questioning witnesses

## B. An Introduction to Evidence

**- Evidence has to be** relevant, material and admissible

* Relevant = makes material proposition more likely
* Material = probative of legal Q in issue in case

- Can be testimonial or documentary and real – real can be admitted through witness or special statutory provisions

- Admissible =/ credible

## C. The Evidential Burden and the Burden of Proof

### General Thresholds

**Preliminary Hearing:** C must introduce evidence in each area of the offence that could lead a reasonable jury to convict if it is believed.

**End of Crown Case:** A may make a “**no evidence motion**” – where the C has not introduced evidence on some element of the offence, that if believed could prove it BRD.

**General**: C must prove all elements of the offense BRD.

**Reverse Onus**: place both initial evidentiary burden and legal burden (on a balance of probabilities) on A - Possible Charter s. 11(d) breach (*Oakes)* – Burden of proof on D

**Mandatory Statutory Presumption**: place evidentiary burden on A to displace presumption by pointing to some evidence to contrary that could raise RD (*Downey*) – fact 1 (BRD) must lead to fact 2 unless A convinces finder of fact otherwise on balance of probabilities (*Oakes)* - raise concerns re: rights under s. 11(d) of *Charter*

**Permissive Presumptions**: Allow the jury to infer one fact from another (ex: A had stolen goods, therefore the good were stolen) but A may disprove.

**Defences**: A may give an air of reality to a defence; if this is done C must disprove BRD. Some defences operate as reverse onus tests; these raise Charter s. 11(d) issues.

* Mental disorder, extreme intoxication, automatism

### Legal Burden

Persuasion on a particular standard – Crown must convince finder of fact of guilt BRD - **Crown’s legal/persuasive burden** – based on presumption of innocence

* Stays w/ same party throughout case

### Evidentiary Burden

Introducing some evidence which supports a particular proposition which could be believed by a reasonable person - Initial evidentiary burden on Crown – **No evidence motion** when Crown has failed to meet initial evidentiary burden to introduce some evidence on each element of offence that, if believed, could prove it BRD – **Preliminary inquiry** determines whether Crown has met evidentiary burden to make prima facie case by introducing evidence upon which reasonable jury could convict

* Shifts between parties

### Jury instructions – Proof beyond a reasonable doubt

- Must explain relationship of Crown onus/burden w/ presumption of innocence– failing this there is an error in law (*Lifchus)*

- Jury must understand BRD is higher than balance of probabilities and less than proof to absolute certainty (*Lifchus*) – falls closer to absolute certainty (*Starr*)

- Words ‘reasonable doubt’ have specific meaning in legal context (*Lifchus*)

- BRD not an ordinary concept, not moral certainty, ‘doubt’ should not be described using words other than reasonable (*Lifchus*)

- BRD =/ no special connotation, no magical meaning – it is unique to legal system (*Starr*)

- BRD =/ sympathy, prejudice, imaginary/frivolous, absolute certainty, probability of guilt (*Lifchus*)

- BRD is a single, objective, unique, not measurable or used by analogy or image, and exacting standard of proof (*Starr*)

- Error in instructions may not constitute error if: the charge, when read as a whole, makes it clear that jury could not have been under any misapprehension as to correct burden and standard of proof (*Lifchus*)

### R. v. Lifchus, 1997

F: D charged w/ fraud and theft. Convicted of fraud. Appealed on grounds TJ erred in instructing jury on meaning of BRD.

I: Should BRD be explained to jury, and if so in what manner?

A: How BRD should be explained to jury, suggested charge on p. 2-8. RD is based on reason and common sense which must be logically based upon evidence/lack of evidence.

C: TJ erred by not defining BRD – appeal dismissed – new trial ordered

### R. v. Starr, 2000

F: D convicted of 1st degree murder. Appeal to Court of Appeal dismissed. D says Crown did not prove identity.

I: Was BRD adequately explained to jury?

A: Court of Appeal judgment was before *Lifchus*. Charge could have been understood as asserting probability standard. L-Heureux-Dube dissented – no likelihood that charge as a whole mislead jury – *Lifchus* is not mandatory checklist.

C: Appeal allowed – new trial ordered.

### Credibility

- *W. (D.*) rule – The following must be explained where credibility is an issue:

* If you believe evidence of A, must acquit
* If you do not believe testimony of A but are left in reasonable doubt by it, must acquit
* Even if you are not left in doubt by evidence of A, ask yourself whether, on basis of evidence which you do accept, you are convinced BRD by evidence of guilt of A

- Criticism of *W. (D.)*: (From *JHS*)

* Jury may believe inculpatory elements of A’s statements but reject exculpatory explanation
* If believe non of evidence of A, rejected evidence may itself raise a reasonable doubt
* Jury may not know whether to believe A’s testimony
* Needs addition of: If, after a careful consideration of all the evidence, you are unable to decide whom to believe, you must acquit.

### R. v. JHS, 2008

F: D A of sexual assault, says it didn’t happen. HE SAID SHE SAID. NS Court of Appeal found jury not instructed that lack of credibility of A =/ proof of guilty BRD.

I: Was BRD adequately explained to jury? What is relationship between BRD and credibility issues?

A: *W.(D.)* rule should have been explained. Lack of credibility =/ guilt BRD. Where credibility is central issue, judge must instruct on relationship between assessment of credibility and Crown’s burden and criminal standard.

C: Appeal allowed. Conviction restored. Charge as a whole did not mislead jury.

### Presumption of innocence

- Most important value in criminal law – based in CL and s. 11(d) of Charter (*Oakes*)

- Linked to s. 7 of Charter (*Oakes*)

- Under s. 11(d) minimum content: individual must be proven guilty BRD, state bears burden of proof, criminal prosecutions must be carried out lawfully (*Oakes*)

- Reflects difference in resources between Crown and A and value in system

- To displace presumption, Crown has heavy burden beyond a reasonable doubt

- Role of the Crown is to bring about justice, not convict

- A need not disprove anything or testify

- Reverse onus provisions generally violate presumption of innocence

### Violations of Presumption of Innocence

- Party that is claiming violation of right must prove on balance of probabilities, then Crown must prove that it is ‘reasonable law’ under s. 1

- Test: Presumption of innocence is violated when it is possible for a conviction to occur despite existence of a reasonable doubt (*Oakes, Downey*)

- S. 1 of *Charter* – guarantees rights and freedoms only to such reasonable limits prescribed by law as can be demonstrably justified… -> Limitations clause

* When a right has been violated under Charter – **Section 1 Test**

- To establish that a limit is reasonable and demonstrably justified: (1) Objective must be of sufficient importance to warrant overriding a constitutionally protected right or freedom (pressing and substantial) and (2) part invoking s. 1 must show that means chosen are reasonable and demonstrably justified (*Oakes*)

- Must be **rational connection** between fact 1 and fact 2 (*Oakes*)

- **Proportionality test**: (1) Measures adopted must be carefully designed to achieve objective in question – rational connection; (2) Means should impair as little as possible right/freedom in Q; (3) Must be proportionality between effects of measures which are responsible for limiting Charter right/freedom and objective (*Oakes*)

- *Oakes* and *Downey* – evidentiary and legal presumptions are unconstitutional

### Process to follow for Charter Case

1. Interpret the provision being challenged (correct construction of impugned statute)

2. Purposive construction of the relevant Charter provision

3. Bring them together - does the impugned provision breach a Charter right or freedom? (BoP burden on person claiming a breach)

4. If yes, can it be saved by section 1? (BoP burden on the Crown). If no, stop analysis.

### Statutory Presumptions

- (1) Presumptions w/o basic facts or (2) Presumptions w/ basic facts

- (1) Presumptions of law or (2) presumptions of fact

- Basic fact presumptions can be: (1) permissive or (2) mandatory

- Presumptions can be (1) Rebuttable or (2) Irrebuttable

- If rebuttable: (1) A may be required to raise reasonable doubt; (2) A may have evidentiary burden to bring into question truth of presumed fact or (3) A may have legal/persuasive burden to prove on balance of probabilities nonexistence of presumed fact

- A may rebut presumption by raising evidence (if evidentiary presumption) or by proof on balance of probabilities (if reverse onus and A has legal burden)

### R. v. Oakes, 1986

F: D charged w/ unlawful possession of narcotic for purpose of trafficking. Found BRD to be in possession. ONCA found that s. 8 of *NCA* is unconstitutional.

I: Does s. 8 of *NCA* violate s. 11(d) of Charter? If so, is it justified under s. 1?

L: *Narcotic Control Act* – If found in possession (s. 3) presumed possession is for purpose of trafficking (s. 4) by operation of s. 8 – A has persuasive burden to prove possession not for purpose of trafficking on balance of probabilities – **Mandatory legal presumption** – most onerous setup

A: S. 8 violates s. 11(d) of Charter. Aimed at curbing drug trafficking. Does not survive rational connection test. Word ‘establish’ imposes legal burden on D.

C: S. 8 violates Charter and is of no force and effect. Appeal dismissed.

### R. v. Downey, 1992

F: D charged w/ living on avails of prostitution and convicted.

I: Is evidential burden placed on A under s. 195(2) of Code unconstitutional under s. 11(d) of Charter? If so, is it justified under s. 1?

L: S. 195(2)(j) of Code: evidence that person lives w/ or is habitually in company of prostitutes in absence of evidence to contrary = proof that person lives on avails of prostitution

A: **Mandatory evidentiary presumption** – possible to convict when reasonable doubt remains so infringes s. 11(d) – Court considers objective of provision, rational connection, minimal impairment, proportionality. Parliament could not have met stated objectives using less intrusive means. A only needs to raise RD to presumption, not disprove – must provide evidence to contrary – Dissent says no rational connection

C: Infringes s. 11(d) but justified under s. 1 – valid – appeal dismissed

### R. v. St. Onge Lamoureux, 2012

F: A charged w/ operating vehicle w/ BAC over legal limit. 2/3 breath samples showed under limit. Convicted on application of presumptions of accuracy and identity.

I: Do presumptions infringe s. 11(d)? If so, justified under s. 1?

L: Presumptions of accuracy and identity in s. 258(1)(c) and s. 258(1)(d.1) – A must point to evidence raising reasonable doubt that approved instrument was malfunctioning or operated improperly and this resulted in BAC over .08 when it was not at time of driving

A: No risk of conviction despite reasonable doubt about guilt – breathalyzer test is reliable indicate of BAC at time of driving – even if infringes s. 11(d), justified under s. 1

C: Provisions are constitutionally valid.

## D. Appellate Review

- A and Crown may appeal on ground that there was error in law: incorrect evidentiary ruling, errs in explanation of law to jury, misstatement of law in reasons – error must be sufficiently important to result that there is reasonable possibility that verdict would have been different – may result in new trial or substituted verdict

- A may appeal on basis that there is no evidentiary support – finding that verdict is unreasonable = conviction overturned and acquittal

- A may ask appeal court to overturn conviction based on miscarriage of justice = new trial or acquittal

- Courts are more comfortable hearing/deciding appeals when there is an error in law



# Chapter 3: The Elements of An Offence

## A. Analysing the Actus Reus and Mens Rea of Criminal Offences

- Crown must prove each element of AR and MR BRD *and* the facts alleged in the charge

### Actus Reus

The prohibited act. Divided into three parts, but each offence may not have all 3:

* **Conduct**: What acts or omissions must C prove – must be voluntary for criminal liability (intentional/reckless)
* **Circumstances**: Presence or absence of surrounding facts (knowledge/recklessness)
* **Consequences**: C may have to prove a certain result, in which case it must also prove causation (intent/reckless)

### Mens Rea

Fault or mental element. Often not stated in the Code, will (usually) correspond with AR and must take place at the same time.

a) In the absence of clear words, **subjective** MR is presumed for a true crime

* **Intent**: to commit an act or bring about a consequence
* **Knowledge:** Knowing that circumstance exists, or wilfully not confirming that one exists
* **Recklessness**: Reasonable foresight that an event might occur but proceeding anyway

b) **Objective** MR (criminal negligence) asks what ordinary person should have known or would have intended in the circumstances

* In **strict/absolute liability** Crown does not have to prove MR

- MR can be superimposed on continuous act but not on completed act. Must occur simultaneously to AR (*Fagan*)

## B. Use and Interpretation of Statutes

### “Parsing” the Offence

1. Find the relevant statutory provision(s) describing the elements of the offence charged.

2. Give meaning and effect to each and every word in the relevant provision(s).

3. Look for statutory definitions of key words (near statute or in definition section - s.2, *Interpretation Act*)

4. If no statutory definition, use case law to guide you.

5. If no statutory definition or case law, starting point is context of the word & ordinary meaning

6. Has Crown proved each aspect of AR BRD?

7. If not, are there any included offences?

8. Is there a consequence in the AR? Consider causation.

9. Has Crown proved each aspect of MR BRD?

*Interpretation Act* s. 12: Every enactment shall be deemed remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

## C. Included Offences

- A can only be convicted of offence charged in information/indictment unless:

* Included offence (lesser offence necessary to prove offence as charged)
* Attempt of offence as charged
* As set out in Code (rare)
* By manner information/indictment is worded (rare)



# Chapter 4: The Actus Reus

## A. The Principle of Legality

In order to be convicted of a crime, it must be a crime known to law.

* s. 9 only crimes listed in statutes (federal/some provincial) - except contempt of court
* s.11(g) must have been a crime at the time of the act or omission

- Underlying values: certainty, knowability of the law, parliamentary supremacy

- No one should be convicted of a crime unless the offence with which he is charged is recognized as such in provisions of Code, or can be established by authority of some unreported case as offence known to law (*Frey*)

- Judges cannot create new criminal offences (*Frey*)

### Frey v. Fedoruk, 1950

F: Mother of D saw man looking in window and told D. D chased P w/ knife. P arrested for breach of the peace. P claims false imprisonment.

I: Was P’s conduct a criminal offence? Can he be arrested w/o warrant?

A: Ds claim P was committing an act likely to cause breach of peace. P was not convicted of criminal offence.

C: P’s conduct not criminal offence. Ds did not justify imprisonment. Appeal allowed.

## B. Statutory Interpretation and the Actus Reus

### R. v. Boudreault, 2012

F: D fell asleep drunk in car while waiting for taxi to arrive. Acquitted at trial, convictions entered at Court of Appeal

I: Is risk of danger an essential element of offence s. 253(1) of Code? Did TJ err in law in finding no risk in present circumstnaces?

L: Charged w/ having care/control of motor vehicle while ability impaired by alcohol and w/ more than 80 mg of alcohol in 100 mL of blood. S. 258(1) – Presumption that occupying driver’s seat = care/control unless A proves no intention to drive car.

A: Case law says risk is an element of s. 253(1) – Parliament’s objective for provision was preventing danger – Care or control = (1) intentional course of conduct associated w/ motor vehicle; (2) by person whose ability to drive is impaired, or whose BAC exceeds legal limit; (3) in circumstances that create realistic risk, as opposed to remote possibility, of danger to persons/property – Risk must be realistic but not necessarily probable, serious or substantial – Realistic risk can exist w/o intention to drive – D’s actions break presumption – Dissent said risk not element of offence

C: Appeal allowed, acquittals restored.

## C. Omissions

Courts are very reluctant to punish omissions w/o a statutory directive or w/o statutory language that indicates that an offence can be committed by failing to perform a CL duty. Also, an omission may be seen as part of a continuing illegal act. Moral blameworthiness important. Omission must occur simultaneously w/ MR. In the absence of clear language to the contrary, an omission will not be criminalized.

**3 devices to include omissions** = imply a correlative/reciprocal duty (*Moore*), construct omission as a continuous act (*Fagan*), statutory language gives rise to CL duty (*Thornton*)

- There is a CL duty to avoid acting in a way that is reasonably foreseeably likely to cause harm – legal duty for purposes of Code (*Thornton*)

- Categories of duty s 215

### Fagan v. Commissioner of Metropolitan Police, 1968

F: P accidentally ran over officer’s foot. Parked on it and refused to drive off for some time. Convicted of assault. P claims no act which could form AR. No overlap between AR and MR.

I: Do MR and AR have to occur at same time? Did prosecution prove assault?

L: Assault offence specifies “any act…” – intentional application of force

A: P’s conduct was not omission. Act of battery at beginning w/o intention, became criminal when intention was formed (when P refused to move) which followed from continuing act. Action was continuing act that overlapped w/ intention. Dissent said after intention was formed, no AR.

C: Appeal dismissed – P guilty of assault.

### R. v. Moore, 1978

F: Officer witnessed D going through red light on bike. When stopped, D refused to provide name and address. Charged w/ unlawfully and willfully obstructing Peace Officer.

I: Does refusing to provide name/address constitute obstruction of peace officer?

L: Bikes are not motor vehicles under *MVA*.

A: D did not have duty to provide name under *MVA*. Officer had obligation to get D’s identity. Fact that officer had duty created reciprocal duty in D. Dissent said duty to identify oneself must come from CL or statute – no duty at CL to identify oneself to police – no reciprocal duty – officer could have arrested when D refused to give name

C: D was obstructing Peace Officer. Convicted.

D: Strong dissent – may no longer be good law – dissent applied in *Greaves*.

### R. v. Thornton, 1991

F: D donated blood to Red Cross knowing that he was HIV+ and did not disclose status. Convicted of committing a common nuisance endangering the lives/health of public.

I: Is there a legal duty to disclose HIV+ status when donating blood?

L: S. 180(s) – Everyone commits a common nuisance who does an unlawful act or fails to discharge a legal duty and thereby endangers the lives, safety or health, property or comfort of the public

A: Duty imposed by law includes duty at CL – CL has recognized duty to refrain from conduct which could cause injury to another person

C: Appeal dismissed – failure to discharge ‘legal duty’ within contemplation of s/ 180(2) by donating HIV+ blood w/o disclosure

## D. Voluntariness

- Analyzed as part of AR – if an act is involuntary then it was not the act of the A

- **Source of involuntary behavior is significant** (burden of proof is on party raising defence of involuntariness):

* Defence of intoxication – where A voluntarily consumes alcohol/drugs
	+ A acquitted if consumption of intoxicants was involuntary
* Defence of mental disorder/disease of the mind
* Defence of non-mental disorder automatism (e.g. sleepwalking)

- Involuntariness =/ lack of MR (*Lucki*)

- Person should not be held liable for involuntary conduct (*Lucki*)

- AR has mental element of voluntariness, this is not MR (*Theroux*)

- No punishment if act is done involuntarily. (*Bratty*)

- AR of offence may consist of driving when there is a risk of falling asleep (*Parks*)

* AR of act that creates risk of non-mental disorder automatism

### R. v. Lucki, 1955

F: D’s car skidded to wrong side of road due to black ice.

I: Did D commit necessary AR? Did he possess necessary MR?

L: Charged under s. 129(9) of Vehicle Act

A: D did not voluntarily commit action.

C: D acquitted.

# Chapter 5: Causation

Can only arise in consequence crimes – Crown must prove that consequence occurred and that it was caused by conduct of A. More than one person can be the legal cause of a consequence. No apportionment of responsibility – but relevant for sentencing. Rules of causation come from case law.

- **Factual causation**: what actually caused the harm in scientific/technical terms

* If result would not have occurred but for conduct of P, then factual causation is present.

- **Legal causation**: whether the harm is too remote from conduct of A to hold him responsible, not MR but incorporates idea of fault

### Test for Factual Causation

- Contributing cause beyond the de minimis range, not trivial or trifling (*Smithers*)

- Significant contributing cause – not different from *Smithers* just expressed differently (*Nette* majority)

- Not trivial =/ significant (*Nette* minority) – significant is higher threshold

- If you’re Crown, you would say *Nette* has not changed test for factual causation, significant = not trivial = beyond de minimis

- Without ‘but for…’ there is no causation – but this alone is not sufficient – also need legal causation

- But for test (*JSR, Nette*)

- Substantial and integral cause of death (*Harbottle*) – for 1st degree murder and not clear whether this was intended to apply to all offences

- Factual causation not limited to direct and immediate cause, or most significant cause (*Maybin*)

### Intervening Acts

- If at time of death original wound is still substantial cause then original wound is cause of death – only if second cause is overwhelming can initial cause cease to be cause of death (*Smith*)

- Operating cause at time of death (*Blaue*)

- **Thin-skull rule:** Those who use violence on other people must take their victims as they find them (*Blaue*)

- 2 approaches to determine legal causation when there are intervening acts (*Maybin*):

1. Reasonable foreseeability of general consequences, not precise results
2. Independent acts may sever the causal connection but not necessarily (is it connected to the time, place and circumstances of the A? Then no severance)
* If intervening act is a direct response or is directly linked to D’s actions and does not overwhelm original actions, then Ds not morally innocent

- Regardless of foreseeability and independence of intervening acts, causation test remains ‘Were the dangerous, unlawful acts of the A a significant contributing cause of victim’s death?’ (*Maybin*)

## A. English Cases

### R. v. Smith, 1959

F: D stabbed 3 people w/ bayonet. 1 victim dropped twice on way to hospital. Then failed to give him saline solution, could not perform blood transfusion, gave artificial respiration when lung was collapsed. Would have had 75% survival chance if proper treatment had been given.

I: Were D’s actions sufficient cause to create criminal liability?

A: Victim would not have been in hospital but for stabbing. Initial cause still significant cause. Subsequent causes not overwhelming. Only if 2nd cause is so overwhelming as to make original wound merely part of his story can it be said that the death does not flow from the wound.

C: Appeal dismissed, conviction upheld.

### R. v. Blaue, 1975

F: D attacked and attempted to rape victim. She then refused life saving blood transfusion and died as result. Judge instructed jury they could find D was operative/substantial cause of death.

I: Was jury given proper instruction regarding determination of cause of death?

A: Jury instruction permissible. Perpetrator must take victim as he finds them. D’s act still operative cause. Victim’s actions not judged on reasonableness standard.

C: Appeal dismissed.

D: Might be distinguished because V’s omission contributed to death, rather than act.

## B. Causation of Death in the Canadian Law of Homicide

The legal standard for causation of death was first set out SCC in *R v Smithers*, [1978] Test for causation of death is whether the actions of the A were “a contributing cause of death, outside the de minimus range”.

The question of causation was again at issue in *R v Harbottle* (1993), Court used higher standard than *Smithers* because of the seriousness of the 1st degree murder charge. Held the Crown had to prove that A “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.”

- Where there are multiple wrongful acts it isn’t necessary to know whose wrongful act was more detrimental to forbidden consequence (*JSR*)

### R. v. Nette, 2001

D: D broke into victim’s house, tied her up and left her. She died. D convicted of 2nd degree murder using *Smithers* test.

I: What is proper threshold of causation for 2nd degree murder?

L: S. 231(5) of Code

A: Jury must first find A guilty of murder before consider whether participation was direct and substantial enough for 1st degree murder – additional causation requirement under s. 231(5) is legal causation, not factual – *Smithers* applies to all homicide and *Harbottle* applies to 1st degree murder – better to state test as ‘significant’. Dissent says not insignificant =/ significant, significant is higher threshold than *Smithers*. *Harbottle* does not increase standard of causation – deals w/ participation. Causation issues are case-specific and fact-driven.

C: Appeal dismissed, conviction upheld.

### R. v. JSR, 2008

F: Charged 2/ 2nd degree murder. Gun battle on street. 2 shooters. Other shooter shot before JSR. Unclear which shot from 2nd shooter killed victim (before or after JSR started shooting in return).

I: Were factual and legal causation proven to jury?

L: S. 222(1) of Code – homicide

A: 2 possible characterizations: (1) A’s participation in shoot was significant contributing cause of death or (2) 2nd shooter would not have continued to shoot but for JSR returning fire. Legal causation satisfied bc they were engaged in joint endeavor (shootout). But for decision to engage in shootout, victim would not have died (factual causation). Moral blameworthiness appears to trump factual causation. D does not have to be medical COD to be part of factual causation.

C: D is factually and legally linked to victim’s death. Appeal dismissed.

### R. v. Maybin, 2012

F: Bar fight. Maybins punched victim a lot. When victim was unconscious, bouncer struck him in head. Victim died. TJ acquitted everyone. BCCA said risk of harm from bouncer was reasonably foreseeable – legal and factual causation good.

I: Did Maybins cause death in fact? If so, was assault by bouncer an intervening act that broke legal causation chain?

L: S. 222(1) of Code – homicide; s. 222(5) – culpable homicide

A: But for Ds actions, victim would not have died. Intervening acts are part of legal causation.

C: Bouncer’s actions were reasonably foreseeable, not independent act. Ds caused death. Appeal dismissed.



# Chapter 6: The Mental Element (Mens Rea)

Be sure to distinguish between: must have known, should have known

## A. The Subjective Approach

- **Intention**: not just about what you want to happen, about substantial certainty of consequences

* Includes foreseeing a particular result even if that is not the purpose – means to an end (*Buzzanga*) – You must have intended result to occur or result must have been substantially likely to occur

- **Knowledge**: Crown must prove you knew of existence of relevant legal circumstances

- **Wilful blindness**: equivalent to knowledge, if a person knows the circumstances but closes their eyes to them

* Very close to recklessness in practice
* Aware of risk, deliberately fails to inquire
* Deliberate ignorance (*Briscoe*)

- **Recklessness**: actual awareness of risk, risk that actions might cause consequences but go ahead and take risk anyway (*Schepannek*)

* Foresees conduct may cause prohibited result but takes deliberate and unjustifiable risk of bringing it about (*Buzzanga*)
* Crown will want to argue recklessness over willful blindness when possible because it is a lower standard

- In **specific intent** offences there is additional MR requirement not tied to AR – prohibited conduct committed w/ intention to achieve purpose (versus general intent offences where conduct performed for immediate end)

- MR for different parts of AR will often be different

* Conduct: action must be intentional or reckless
* Circumstances: must know (or be willfully blind) that relevant circumstances exist or be reckless
* Consequences: crime by crime

- **Motive** is almost never an essential element of crime, but can be useful in evidence

* =/ intent
* Ulterior intention – relates to end while intention relates to means
* Matter of fact rather than matter of law (*Lewis*)
* Not always necessary to charge jury on motive (*Lewis*)
* That which precedes and induces exercise of will (*Lewis*)
* Can mean (1) Emotion prompting an act or (2) kind of intention

**To determine Mens Rea:**

1. Look at the statute

2. If not specified, assume subjective

3. If it is silent, decide if it is a true crime or a public welfare offense

4. If a true crime, starting presumption is to prove subjective MR (*Beaver*) – recklessness is default subjective MR

5. If a public welfare offence, starting presumption is that they do not have to prove MR (regulatory in nature, high volume, effect on public health) (*SS Marie*)

### R. v. Beaver, 1957

F: D charged w/ possession and sale of heroin – D thought it was lactose. TJ instructed jury that honest but mistaken belief that it was lactose was irrelevant.

I: Is lack of subjective MR a defence? Does D have necessary MR?

L: *Opium and Narcotic Drug Act* – can be convicted of selling drug for selling something held out to be narcotic.

A: *ONDA* not public welfare offence. Possession should not be found when honest belief that substance is not a drug. No clear statutory language which says to disregard MR. No possession w/o knowledge of character of forbidden substance. MR requirement assumed unless otherwise stated.

C: Not convicted of possession, still convicted of selling.



### R. v. City of Sault Ste. Marie, 1978

F: city charged w/ pollution (garbage dump leaking into a river), regulatory offence on which D challenges MR requirements

I: What is the necessary MR of offences variously referred to as “statutory”, “public welfare”, “regulatory”, “absolute liability” or “strict liability”, which are not criminal but are prohibited in the public interest?

A: Subjective MR required for true crimes. Defence of due diligence allowed.

C: New trial ordered

## B. Intent and Recklessness

### R. v. Buzzanga and Durocher, 1980

F: Both French speaking - upset that money not used to build French school (promise broken). Wrote anti-French brochure as a call to action to band together. Charged w/ wilfully promoting hatred against an identifiable group. TJ: willfully means intentionally, not accidentally.

I: What is meaning of ‘wilfully’ in s. 281(2) of Code?

L: S. 281(2): Everyone who, by communicating statements… willfully promotes hatred against an identifiable group…

A: Wilfully can mean intentionally or recklessly, but Parliament will be explicit when it can mean recklessly. Here it means intentionally. If a person does an act likely to produce certain consequences it is reasonable to assume that the A also foresaw the probable consequences, and if he still acted then he intended them. Wilfully attaches to promoting hatred.

C: Set aside convictions, new trial ordered.

## C. The Mens Rea of “Fraud”

- *Theroux, Kingsbury*: Does honest belief that dishonest practice will not result in loss negate MR?

- S. 380 – Fraud

- AR elements:

* Conduct: dishonest act
* Consequences: deprivation – risk of deprivation is sufficient

- MR: subjective awareness of undertaking dishonest act, causing deprivation

- Honest belief that conduct is not wrong and/or hope/expectation that no deprivation will occur are irrelevant – dishonesty assessed on reasonableness standard

## D. Wilful Blindness

### R. v. Briscoe, 2010

F: Teens lured into car. D drove to golf course, knew L wanted to kill someone. D handed L pliers. D watched L rape and kill teens. TJ acquitted D because no MR. Court of Appeal overturned acquittals and ordered new trial.

I: Does TJ err in failing to consider willful blindness?

L: Aiding and abetting s. 21(1)(b)

A: Wilful blindness can substitute for knowledge, is distinct from recklessness. Deliberate ignorance. D deliberately chose not to inquire about group’s intentions.

C: TJ erred, new trial ordered, appeal dismissed.

## E. Recklessness as Sufficient Knowledge

### R. v. Schepannek, 2012

F: D smuggled package containing drugs into prison. Had not looked in package, but thought it was tobacco.

I: Did TJ err in finding Crown had established recklessness?

L: S. 5(1) of *Controlled Drugs and Substances Act*

A: Legal knowledge can be established by actual knowledge, recklessness or willful blindness. Culpability in recklessness justified by consciousness of risk and proceeding in face of it.

C: TJ correctly appreciated nature of recklessness. Appeal dismissed.

## F. Motive

### R. v. Lewis, 1979

F: D made bomb and mailed it to T’s daughter. D says he didn’t know package contained bomb. Convicted at trial and appeal at BCCA dismissed. Jury was concerned w/ motive, thought D might have been paid by T.

I: Did TJ err in failing to define ‘motive’?

A: Necessity of charging jury on motive can be looked at on continuum. Motive/absence of motive not proven by Crown/defence so no obligation to charge on motive.

C: Appeal dismissed.

## G. Transferred Intent

Intention to commit crime and act of committing crime must coincide

- CL doctrine of transferred intent arises in 2 situations:

1. A shoots B, believing that B is C (mistake as to identity of victim)
2. A aims at C, but by chance or lack of skill shoots B (accident)

- Law allows A to be convicted of murder of B even though A has no intent to kill B. Intent of A to kill C is transferred to B.

- Codified for murder in s. 229(b) of Code, but may apply to other offences if harm that arises is same kind as harm intended

- Does not apply to inchoate crime of attempt, in particular to attempted murder.

### R. v. Gordon, 2009

F: D offered to buy drugs from T, T punched D. D left, returned and shot at T. T not hit, but 3 bystanders were. D charged w/ attempted murder and aggravated assault of all 4. TJ charged jury that D guilty of attempted murder of 3 if D intended to kill T.

I: Does doctrine of transferred intent apply to attempted murder?

L: Principles of transferred intent laid out in s. 229 (culpable homicide) and s. 244 (discharging firearm w/ intent).

A: Principles underlying transferred intent apply to crimes that require result as part of AR, but inchoate crimes do not require result/harm as part of AR.

C: Judge erred in instruction to jury. Convictions of aggravated assault entered in place of attempted murder. Appeal allowed.

# Chapter 7: Departures from Subjective Mens Rea

- How do we depart from subjective MR:

1. Classification (*SSM*)

2. Criminal negligence (*Tutton*)

3. Objective MR

## A. Absolute and Strict Liability

- **Strict liability** offences permit A to prove defence of due diligence on balance of probabilities

* Crown must prove BRD that D committed AR, D must prove on balance of probabilities that he has defence of reasonable care (*SSM*)
* All provincial offences presumed to be strict liability unless indicated otherwise (*SSM*)

- **Absolute liability**: if you can prove AR BRD, then A is liable – defences available are volition, causation and mistaken identity

* Should be specified by wording if absolute liability

- Prior to *SSM*, strict liability = absolute liability

- The task of deciding whether an offence (which is not a true crime) imports MR, or is an absolute liability offence rather than being a strict liability offence depends upon an analysis of (*Chapin*):

 (a) the over-all regulatory pattern or scheme

 (b) the subject-matter of the legislation

 (c) the gravity of the penalty

 (d) the precise language used in the offence creating section.

- **Provincial Statute** - starting presumption = public welfare offence (*Chapin*)

- **Criminal Code** - starting presumption = true crime (*Chapin*)

- **Public welfare** - starting presumption = strict liability (*Chapin*)

### Public Welfare Offences

For the good of society and things subject to regulation (*Beaver*). Offences variously referred to as “statutory”, “public welfare”, “regulatory”, “absolute liability” or “strict liability”, which are not criminal but are prohibited in the public interest (*SSM*). Starting presumption is that you don’t have to prove MR (*SSM*). Protection of social interests requires high standard of care – remove loopholes (*SSM*). Aim to prevent risky behavior (*SSM*). Costs too high to prove MR, mere negligence is enough (*SSM*).

- **Pro absolute liability** (*SSM*):

* Motivate higher degree of care to protect social interests.
* Administrative efficiency
* Most efficient and effective way of ensuring compliance w/ minor regulatory legislation
* Slight penalties don’t carry same stigma

- **Con absolute liability** (*SSM*):

* Violates fundamental principles of penal liability
* Rests upon assumptions re: higher degree of care not proven
* There is stigma
* Public interest engaged w/ serious crimes too, but MR must be proven.
* Little force to administrative efficiency argument
* Major penalties today for public welfare offences

- Starting presumption for public welfare offences is that they import strict liability (middle ground), with the following allocation of **burden and standard of proof**:

1. Crown must establish AR beyond a reasonable doubt
2. Crown need not establish MR;
3. A may prove on the balance of probabilities that s/he took all reasonable care, which involves a consideration of what the reasonable person would do in the circumstances.
4. AND/OR A may present defence of honest and reasonable mistake: A reasonably believed in a mistaken set of facts that if true would render the act/omission innocent

### R. v. City of Sault Ste Marie, 1978

F: See above.

I: See above.

L: See above.

A: High standards of public health vs. revulsion against punishment of morally innocent. Creates offence of strict liability. **Defence available if A reasonably believed in mistaken set of facts which if true would render act/omission innocent or if he took all reasonable steps to avoid particular event.**

C: Strict liability offence. New trial ordered.

### R. v. Chapin, 1979

F: Duck hunting, didn’t see bait on ground. Charged w/ breaching s. 14(1) of *Migratory Birds Regulations*.

I: What kind of offence is violation under s. 14 of *Migratory Birds Regulations*?

A: Not true crime. Public welfare offence. Strict liability offence.

C: Strict liability. Appeal dismissed, no new trial ordered.

## B. Crimes of Objective Fault

Crown does not have to prove subjective MR but still must prove fault BRD. Offences may be identified as requiring objective fault by leg or case law. Presumption is subjective MR, unless Parliament has stated otherwise (*ADH)*.

- **Objective standard**: The test is that of reasonableness, and proof of conduct which reveals and marked and significant departure from the standard which could be expected of a reasonably prudent person in the circumstances will justify a conviction of criminal negligence (*Tutton*)

- **Criminal negligence** defined at s 219 – not a stand-alone offence - two specific offences of criminal negligence causing bodily harm (s 221) and criminal negligence causing death (s 220/222)

* Criminal negligence may be committed by omission but only where a duty exists
* In criminal negligence, the act which exhibits the requisite degree of negligence is punished – **objective fault** requirement (*Tutton*)
* If defence is honest belief, it must be reasonably held – consider circumstances but not personal characteristics – modified objective requirement (*Tutton*)

- In addition to crimes of criminal negligence, there are other crimes in the Code that are defined as requiring objective fault – standard of objective fault in **penal negligence**

- **Modified objective test:** although an objective test must be applied to offence of dangerous driving it will remain open to A to raise a reasonable doubt that a reasonable person would have been aware of risks in the A’s conduct/circumstances. Test must be applied w/ some measure of flexibility (*Hundal*)

* **Appropriate test for determining requisite MR for negligence-based criminal offences** – allows for defences such as incapacity and mistake of fact. Modified objective test for penal negligence does not ignore mental state of A – analysis is contextualized. (*Beatty*)
* **Do not consider personal attributes other than incapacity to appreciate risk/avoid creating it** (*Beatty*)
* Dangerous driving offence = objective MR, but in context of all surrounding events (*Hundal*)

### R. v. Tutton, 1989

F: As honestly believed that diabetic son had been cured by divine intervention. Did not give him insulin and he died. Charged w/ manslaughter by criminal negligence (s 219) and failing to provide necessaries (s 215). Claimed honest though mistaken belief in existence of a circumstance which, if present, would render their conduct non-culpable.

I: What is the MR requirement for manslaughter by criminal negligence – objective or subjective?

A: Objective test for s 219. Objective standard in negligence. Negligence punishes the consequence of mindless action, not a positive thought. AR is proof of blameworthy state of mind. Dissent: consider personal characteristics OR criminal negligence = subjective test.

C: Appeal dismissed. New trial ordered.

### R. v Hundal, 1993

F: A was driving overloaded dump truck towards intersection – ran red light. Charged w/ dangerous driving causing death (s 249).

I: What is the MR requirement for offence of dangerous driving?

A: Modified objective test applies to offence of dangerous driving. Applies objective test from *Tutton*. Potential harshness of objective standard may be lessened by consideration of certain personal factors as well as consideration of defence of mistake of fact. Defence of involuntariness can be raised e.g. sudden onset of illness. McLachlin dissent: importance of keeping separate subjective and objective tests.

C: Appeal dismissed – A guilty.

### R. v. Beatty, 2008

F: A charged w/ 3 counts of dangerous operation of a motor vehicle causing death under s 249(4). A claims he lost consciousness or fell asleep.

I: Was the momentary act of negligence sufficient to for s 249(4)?

A: Applied modified objective test from *Hundal* w/ slight changes. A reasonably held mistake of fact may provide a complete defence if, based on the A’s reasonable perception of the facts, the conduct measured up to the requisite standard of care. Momentary lapse of attention insufficient to found criminal culpability. Dissent: proof of marked departure part of AR, MR should flow by inference from that finding OR MR should only be inferred in case of marked departure; fault element is that a reasonably prudent driver in circumstances would have been aware of and acted to avert risk.

C: Appeal allowed, restored acquittals.

### R. v Roy, 2012

F: A pulled motorhome onto highway and in doing so entered into path of oncoming tractor. Normal driving prior to that.

A: Applies test from *Beatty*. For AR, consider whether driving, viewed objectively, was dangerous to the public in all the circumstances. Even where manner of driving is a marked departure from normal driving, the trier of fact must examine all of the circumstances to determine whether it is appropriate to draw the inference of fault. Only driving that constitutes a marked departure from the norm may reasonably support inference of MR. A’s actions were single momentary lapse in judgment.

C: Appeal allowed and acquittal entered.

### R. v. ADH, 2013

F: A did not know she was pregnant. Gave birth to baby in store. Thought child was dead and left him. Child was alive. Charged under s 218 – child abandonment.

I: Is fault element in s 218 subjective or objective?

A: Purpose of provision is to protect children. Subjective fault requirement. Value in our criminal law: morally innocent should not be punished. Comparison to surrounding provisions in Code – s 215 is objective fault. Dissent: objective fault – penal negligence – relates to consequences of child abandonment. Subjective fault would defeat provision’s purpose.

C: Appeal dismissed – A acquitted.

# Chapter 8: Mens Rea and the Charter

Charter has had significant impact on what is minimum MR for an offence. Courts have been willing to say level of fault suggested by Parliament is unconstitutional. Important: s 7 (life, liberty and security of the person) and s 11(d) (presumed innocent and fair/public hearing).

## A. Absolute Liability and the Charter

Combination of **imprisonment and absolute liability** violates s 7 of Charter and can only be saved by s 1 – PFJ requires some fault element for any offence where imprisonment is possible (*MVR*). **Subjective fault required for special stigma crimes** (*Martineau*). Absolute liability on its own is not a violation of s 7 (*MVR*).

### Reference re Section 94(2) of the Motor Vehicle Act, 1986

F: MVA holds that anyone who drives while prohibited or suspended from driving will serve prison for min 7 days. Absolute liability offence – A does not have defence of mistake etc.

I: Is s 94(2) of the MVA consistent w/ the Charter?

A: Courts will not question wisdom of enactments – do not consider merits of public policy. Adjudication under Charter is legitimate. Use purposive analysis in Charter challenges. PFJ =/ natural justice. PFJ found in basic tenets of legal system. System of admin of justice is founded upon belief in dignity and worth of the human person and the rule of law. S 1 may, for reasons of administrative expediency, successfully come to rescue of an otherwise violation of s 7, but only in cases arising out of exceptional conditions. Gov’t did not justify infringement as reasonable limit.

C: Inconsistent w/ Charter – appeal dismissed.

## B. Section 7 and the Mens Rea of Murder

- **Constructive murder**: if certain things happen in the course of your committing an offence, and various circumstances are in play, and a death ensues, it will be seen as murder – no intention to commit murder

- Minimum constitutional requirement for murder is **subjective foreseeability of death** (*Martineau*)

### R. v. Vaillancourt, 1987

F: A had a weapon on his person which wasn’t used to cause the death – it was his partner’s weapon that caused the death – the partner was never apprehended/tried – A was caught because of s 230(d).

I: Is s 230(d) consistent w/ Constitution?

A: Violates Charter since it does not require proof of foresight of death, even on an objective standard. Special stigma crimes: Special stigma crimes can be identified w/especially high sentences; **special stigma crimes should require subjective MR to be proven.**

C: Unconstitutional.

### R. v. Martineau, 1991

F: M and friend robbed trailer. Were planning to commit robbery, but friend shot the guy. M convicted of 2nd degree murder.

I: Does s 213(a) infringe ss 7 or 11(d)? Is it justified under s 1?

A: S 213 violates the principle that punishment must be proportionate to moral blameworthiness of the offender. PFJ requires, because of special nature of stigma attached to conviction for murder, and available penalties, a MR reflecting the particular nature of that crime. Dissent: subjective foresight of death for murder not PFJ.

C: Appeal dismissed. S 213 unconstitutional and not saved by s 1.

### Note: Unlawful Object Murder

- *Martineau* held that phrase ‘ought to have known’ in s 213 of Code – not s 229(c) was unconstitutional in reliance on objective foresight

- Until early 14th C, harm-oriented approach to murder – punishment for consequences not intent

- By 17th C, legal distinction between accidental and other homicides

- 1762 – felony murder rule – what might otherwise be unintentional killing was considered morally culpable because MR for felony superimposed onto AR of killing

- 1887: additional requirement shifted felony murder rule from one of absolute liability to one of objective MR - punishing negligent risk-taking in pursuit of objects that are themselves blameworthy

- Only object must be unlawful – act causing death need only be sufficiently dangerous that a reasonable person would know that doing it was likely to cause death

- Intention to carry out unlawful object is not sufficient to meet requirements of s 229(c) – Crown must also establish an additional component of MR – intent to commit the dangerous act, knowing that it is likely to cause death

- **‘Ought to have known’ has been read out of s 229(c) – subjective foreseeability element is now law**

## C. Application to Other Offences

**Subjective fault is required for attempted murder (*Logan*), accessory liability for crimes requiring subjective fault (*Logan*) and war crimes and crimes against humanity *(Finta*).**

- **For consequence crimes:** it is **sufficient that the person intends to do the crime, and the consequence is objectively foreseeable**, unless it is a special stigma crime (*DeSousa)*

* Objective foresight of bodily harm should be required for both criminal and non-criminal unlawful acts which underlie a s 269 prosecution (*DeSousa)*
* There must be an element of personal fault in regard to a culpable aspect of the AR, but not necessarily in regard to each and every element of the AR (*DeSousa)*
	+ Symmetry not always required – doesn’t always have to be MR to match w/ every element of AR (*Creighton*)
* MR requirement for manslaughter is objective foreseeability of bodily harm which is neither trivial nor transitory, in context of dangerous act (*Creighton*)

- **Personal characteristics** of A do not affect standard of objective fault (w/ few exceptions) (*Creighton)*

* DO consider incapacity to appreciate nature of risk which activity entails (*Creighton*)

### R. v. DeSousa, 1992

F: A charged w/ unlawfully causing bodily harm under s 269. Bystander injured when bottle thrown by A broke against wall. Challenged under s 7.

I: Is s 269 unconstitutional under s 7 or 11(d)? Justified under s 1? What is the required MR?

A: Must prove MR of underlying offence – must be constitutional in its own right. Underlying offences of absolute liability excluded from forming basis for prosecution under s 269. Bodily harm must be more than merely trivial or transitory in nature. Objective MR. Acceptable to distinguish between criminal responsibility for equally reprehensible acts on basis of harm actually caused. Not a serious stigma crime.

C: S 269 complies w/ Charter. Appeal dismissed.

### R. v. Creighton, 1993

F: A convicted of unlawful act manslaughter (s 222(5)(a)), arising from death of KAM, who died as a result of an injection of cocaine given by A. A is regular drug-user.

I: Does CL definition of unlawful act manslaughter violate s 7? What is the level of fault for consequence of causing death in manslaughter? Does objective test involve consideration of personal characteristics?

A: Requirements of manslaughter: (1) conduct causing death of another person and (2) fault short of intention to kill – either in committing another unlawful act which causes the death, or in criminal negligence. Most important feature of stigma of manslaughter is stigma which is not attached to it. Consider thin-skull principle. Criminal law imposes a single minimum standard for behavior. Legal standard of care is always the same (reasonable person in circumstances). Applied standard of care may vary w/ activity and circumstances of particular case. Person may fail to meet elevated applied standard of care by (1) undertaking activity requiring special care when not qualified or (2) being qualified but negligently failing to exercise special care required by the activity. Dissent: would require objective foresight of actual consequence, consider human frailties of A.

C: S 222(5)(a) consistent w/ Charter. Appeal dismissed.

### Note: Wholesale Travel Group, 1991

- Re: constitutionality of strict liability in false advertising offence under federal *Competition Act*

- A corporation charged w/ an offence does have standing to assert that a law violates the rights of a non-corporate A under s 7

- Objective test for MR in strict liability offences does not typically violate s 7 of Charter

- Reverse burden of proof in strict liability not found to be contrary to Charter, either because it doesn’t violate s 11(d) or because it is saved under s 1

# Chapter 9: Mistake

CL defence. For **true crimes**, A only has to raise RD that he was acting under mistake of fact – does not have burden of proof – A must be acquitted if in evidence of entire case, judge has RD about whether A was mistaken. In crimes w/ **objective fault** standard, A must raise RD that he was acting under a reasonable and honest mistake. If crime is **strict liability**, A can claim that he reasonably believed in a mistaken set of facts that, if true, would have rendered the act innocent – A has burden to prove mistake.

## A. Mistake of Fact

**A is mistaken about one of the components of the offence that negates MR.** Open to A whenever he holds an honest belief in a set of circumstances that, if true, would otherwise entitle him to an acquittal.

- Available as a defence to MR consent element for sexual assault – evidence must show that A believed that C communicated consent by words or conduct (*Ewanchuk*)

* S 273.2 holds that the defence is not available if the person “did not take reasonable steps in the circumstances known to the A at the time, to ascertain that the complainant was consenting”

### R. v. Pappajohn, 1980

F: A charged w/ rape. C says no consent. A says it was consensual, or if not then A was mistaken.

I: When does a mistake of fact defence have to be left to jury? Does the mistake need to be reasonable?

L: Rape – Crown has to prove A had intercourse w/ C w/o her consent. MR is knowledge or recklessness to lack of consent.

A: To put defence to jury, there must be some evidence beyond mere assertion of belief in consent. Mistake of fact prevents A from having requisite MR. **Negation of guilty intention rather than positive defence.** If act would be innocent, according to facts as he believed them to be, he does not have the criminal mind and ought not to be punished for his act. **Only honest belief in mistaken set of facts required – but jury will likely not believe A’s statement as to mistake unless it is reasonable**. Jury should be instructed to consider it as a factor if they think the honest belief is unreasonable.

C: Majority held that defence did not have to be left w/ jury and upheld conviction.

### Note re: Sexual Assault

**Defences to sexual assault:** identity (wasn’t me), there was consent (AR), A thought there was consent (MR). Defence that is usually given to sexual assault has to do w/ consent – MR and AR elements.

- Following *Pappajohn*, Parliament enacted s 265(4) of the Code:

S 265(4): Where an A alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the A’s belief, to consider the presence or absence of reasonable grounds for that belief.

- Code defines series of conditions under which law will deem an absence of consent in cases of assault, notwithstanding C’s ostensible consent or participation – s 265(3)

* C’s fear does not have to be communicated or reasonable to vitiate consent.

**Components of sexual assault**: (1) AR of assault is unwanted sexual touching; (2) MR is intention to touch, knowing of, or being reckless of or willfully blind to, a lack of consent, either by words or actions, from the person being touched (*Ewanchuk*)

* **AR is established by proof of 3 elements**: (i) touching (O), (ii) sexual nature of contact (O) and (iii) absence of consent (S – from C’s POV) (*Ewanchuk)*
* **MR of sexual assault contains 2 elements**: (i) intention to touch and (ii) knowing of, or being reckless of or willfully blind to, a lack of consent on the part of the person touched (from A’s POV) (*Ewanchuk*)
* **No defence of implied consent** to sexual assault (*Ewanchuk)*
* Consent in relation to MR of A is limited by both CL and provisions of ss 273.1(2) and 273.2 of the Code*(Ewanchuk)*
	+ Unless and until an A first takes reasonable steps to assure that there is consent, defence of honest but mistaken belief does not arise (*Ewanchuk* – dissent)

### R. v. Ewanchuk, 1999

F: C having job interview in A’s van. A progressed from massaging C to sexual assault. C said ‘no’ several times – did not consent in her mind.

I: What is the AR and MR of sexual assault? Is mistake available as a defence?

A: To prove AR of sexual assault, only C’s subjective consent matters – **matter of credibility**. Consent must be freely given to be legally effective. Once a woman says ‘no’ during the course of sexual activity, the person intent on continued sexual activity w/ her must then obtain a clear and unequivocal ‘yes’ before he again touches her in a sexual manner – ‘yes’ may be given by either spoken word or conduct. Dissent: Myths and stereotypes of sexual assault. S 265(3) should apply where C is silent/passive. Approach to the defence discussed in *Pappajohn* has been modified by enactment of s 273.2(b) which introduced the ‘reasonable steps’ requirement.

C: Conviction entered.

## B. Mistake of Law

**A is wrong/ignorant about the law – A does something not knowing it is an offence**. Mistake of law not available as defence as matter of policy (*Campbell*).

For CL defence of **officially induced error**, A must prove (*Levis)*:

1. That an error of law or of mixed law and fact was made
2. That the person who committed the act considered the legal consequences of his/her actions
3. That the advice obtained came from an objective official
4. That the advice was reasonable (assessed objectively)
5. That the advice was erroneous
6. That the person relied on the advice in committing the act

### R. v. Campbell and Mlynarchuk, 1973

F: A charged w/ unlawfully taking part as performer in immoral performance under s 163(2).

I: Is mistake of law available as a defence?

L: S 19: Ignorance of the law by a person who commits an offence is not an excuse for committing that offence.

A: A relied upon statement made to her by her boss that he had been informed that a Supreme Court judge had said nude dancing was ok. Only MR required is that A intended to do what she did. Matter of policy that mistake of law is not available as defence – but can affect sentencing.

C: No defence available – but absolute discharge.

### Levis (City) v Tetreault; Levis (City) v 2629-4470 Quebec Inc, 2006

F: R put motor vehicle w/o having paid registration fees. A city employee had told A that A would receive a renewal notice in mail 60 days before expiry date. Notice sent to wrong address, not received by A.

I: Strict liability or absolute liability? Are defences of due diligence or officially induced error available?

A: Use approach from *SSM* – strict liability. A was aware of date when fees would be due – defence not made out.

C: Appeal allowed – enter convictions.

# Chapter 10: Defences – Intoxication and Provocation

Considerations re: defences: (1) Statutory or CL? (2) What offences does it apply to? (3) What is the result if successful? (4) Burden of proof?

- When defences are raised, there’s still the same burden to the Crown (guilty BRD), but there’s an additional legal principle that’s put to the jury

- Sometimes a defence provides an ‘**excuse**’ – A is blameworthy, but their behavior will be excused because of the frailties of the human grace (e.g. duress)

- **Justificatory** defences amount to saying that because of all the circumstances, the behavior was not morally blameworthy

## A. Intoxication

CL defence. Result is acquittal. Involuntary consumption of intoxicants may allow A to argue involuntariness as complete defence. Intoxication as a defence refers only to voluntary intoxication. Intoxication may not serve as a defence when A gets drunk in order to gain courage to commit a crime (*Daviault*). Prior to *Daviault*: limited defence to crimes of specific intent – judge-made concept.

* **General intent** offence: only intent involved relates solely to performance of act in question with no further ulterior intent or purpose. **Specific intent** offence: performance of the AR, coupled w/ an intent or purpose going beyond the mere performance of the questioned act.

- Requisite state of mind may be proved: (1) triers of fact may infer MR from AR; (2) in cases where the A was so intoxicated as to raise doubt as to the voluntary nature of his conduct, the Crown may meet its evidentiary obligation respecting the necessary blameworthy mental state of the A by proving the fact of voluntary self-induced intoxication by drugs/alcohol (*Bernard*)

**Three levels of intoxication** (*Drader*):

1. Minimal or mild intoxication does not provide a defence to any offences
2. If there is a significant level of intoxication, that can serve as a defence to offences of specific intent – reasonable doubt that the A lacked the actual intent (MR) required to commit the offence
	* NB: if defence of intoxication is successful for specific intent offence – consider whether there are any lesser included general intent offences that might be successful
	* Intoxication can serve as defence for crimes of specific intent where A is so intoxicated that he lacks capacity to form specific intent (*Bernard)*
3. In cases of extreme intoxication, the A can be absolved of all CL criminal liability – in cases where A is in state of automatism – can be used as defence for general intent offences – but this is subject to s 33.1 of the Criminal Code
	* Exception to *Leary* rule: Permit evidence of extreme intoxication akin to automatism or insanity to be considered in determining whether the A possessed the minimal mental element required for crimes of general intent - to hold otherwise would be a violation of s 7 of the Charter – it would not offer the A the ability that he had no MR (*Daviault*)
	* **Extreme intoxication must be proven by A on balance of probabilities – expert evidence is required** (*Daviault*)

### R. v. Leary, 1978

Even in a situation where the level of intoxication reached by the A is sufficient to raise a RD as to his capacity to form the minimal mental element required for a general intent offence for which he is being tried, he still cannot be acquitted. In such a situation, self-induced intoxication is substituted for the mental element of the crime.

### R. v. Bernard, 1988

F: A charged w/ sexual assault causing bodily harm under s 246.2(c). A claimed intoxication as defence – was drunk but able to walk and talk.

I: Is sexual assault causing bodily harm a specific or general intent offence? Is voluntary intoxication a defence?

A: General intent offence. Evidence of self-induced intoxication should not be a relevant consideration in determining whether the MR of any particular offence was proven. Should not overrule *Leary*. Disallowing defence of intoxication for general intent offences does not make them absolute liability. No problem w/ distinction between general and specific intent offences. Dissent: Self-induced intoxication may not substitute for mental element required to be present at the time the offence was committed. Preferable to preserve *Leary* rule in flexible form – allow evidence of intoxication to go to trier of fact in general intent offences only if it is evidence of extreme intoxication involving an absence of awareness akin to state of insanity or automatism. Dickson dissent: distinction between general and specific intent crimes is artificial; *Leary* rule is unconstitutional; evidence of intoxication should be admissible for all offences.

C: Appeal dismissed.

### R. v. Daviault, 1994

F: A sexually assaulted C after having drunk a lot – had no recollection next day. Expert witness said A was likely blacked out.

I: Can a state of drunkenness which is so extreme that an A is in a condition that closely resembles automatism or a disease of the mind as defined in s 16 constitute a basis for defending a crime which requires only general intent?

A: Substituted MR of intention to become drunk =/ MR to commit assault – deprives A of fundamental justice. *Leary* rule is unconstitutional – violates ss 7 and 11(d). Mental element of voluntariness is fundamental aspect of every crime – Crown must prove voluntariness. **Voluntary intoxication =/ voluntary consequences.** Dissent: Should not change rule from *Leary*. Intoxication should only serve as defence under s 16. *Leary* rule is not unconstitutional. General rule that mental fault element of crime must extend to AR is subject to exceptions. Sexual assault is not special stigma crime. **1st PFJ: a blameworthy or culpable state of mind must be an essential element of every criminal offence that is punishable by imprisonment. 2nd PFJ: punishment must be proportionate to the moral blameworthiness of the offender.**

C: Appeal allowed – new trial ordered.

### Note: Criminal Code, s. 33.1

Enacted by Parliament in response to public disagreement over decision in *Daviault*. Intoxication cannot serve as defence for general intent offences that include as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.

- In *R v Dunn* and *R v Cedeno*, s 33.1 found to violate ss 7 and 11(d) of Charter and not saved under s 1

- In *R v Vickberg*, found to violate ss 7 and 11(d) of the Charter, but saved under s 1

### R. v. Drader, 2009

F: A charged w/ break and enter and commit theft; break and enter w/ intent to commit indictable offence and possession of property, to wit; mail, knowing that it was obtained by an offence – ss 348(1)(b); 348(1)(a) and 354(1).

I: Has Crown proven BRD A’s identity? Does A’s self-induced level of intoxication lead to an acquittal of any of the charges?

A: Specific intent offences. Level of intoxication is matter for jury – question of fact. Here there was evidence of intoxication but no evidence of irrational behavior. A had necessary MR and specific intent for counts 2 and 3.

C: Acquitted on Count 1; convicted on Counts 2 and 3.

## B. Provocation

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 A 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 A 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 A incited him to do in order to provide the A with an excuse for causing death or bodily harm to any human being.

* Allows rage to be partial defence to murder – partial excuse. Does not negate intent to kill required for conviction for murder.

- **Aspects of provocation defence** (*Hill*):

1. Was there an insult? Would it be sufficient to deprive the ordinary person of self-control? (Objective)
* Particular characteristics that are not peculiar or idiosyncratic can be ascribed to an ordinary person w/o subverting the logic of the objective test of provocation (*Hill*)
1. Did the A in fact act in response to those ‘provocative’ acts; was he/she provoked by them whether or not an ordinary person would have been? (Subjective)
2. Was the A’s response sudden and before there was time for his/her passion to cool? (Subjective)

- **Aspects of provocation defence** (*Tran*):

1. The objective element: a wrongful act or insult sufficient to deprive an ordinary person of the power of self-control
* Important distinction between contextualizing the objective standard, which is necessary and proper, and individualizing it, which only serves to defeat its purpose (*Tran*)
1. The subjective element: the provocation must have caused the A to lose self-control and act while out of control

### R. v. Hill, 1985

F: A charged w/ committing 1st degree murder under s 218(1). At time of killing, Hill was a male, 16 years of age. Position of Crown at trial was that A and C were homosexual lovers and that A had decided to murder C after a falling out between them. A’s position was that he had been subject to an unexpected and unwelcome homosexual advance.

I: Did TJ err in instruction to jury by not instructing them to take into account age and sex of A?

A: Collective good sense of the jury will naturally lead it to ascribe to the ordinary person any general characteristics relevant to the provocation in question. **Ordinary/reasonable person has a normal temperament and level of self-control**. TJ does not have to tell jury what specific attributes to ascribe to ordinary person.

C: Appeal allowed, restore conviction.

### R. v. Tran, 2010

F: A separated from wife C. A found C in bed w/ new bf and stabbed both of them. Charged w/ murder and attempted murder.

I: Is defence of provocation open to A?

A: No ‘insult’ here – no suddenness (A already knew C was involved w/ bf). Social context should be considered in defining what amounts to provocation. Defence is informed by contemporary social norms and values. No one shall be deemed to have given provocation to another by doing anything that he had a legal right to do. Should not take individualized approach to ordinary person – criminal law sets standards of human behavior.

C: Appeal dismissed – no evidential basis for defence of provocation.

# Chapter 11: Defences – Mental Disorder

Mental illness is relevant (1) at time of offence (mental disorder); (2) at trial (fitness – Section 2 CC); (3) at sentencing.

- *R v Cooper* (1980): In a legal sense ‘disease of the mind’ embraces any illness, disorder or abnormal condition which impairs human mind and its functioning, excluding self-induced states and transitory mental states

* Perception = ability to perceive the consequences, impact and results of physical act (*Cooper*)

- NCRMD can deny AR or MR. Defence should be characterized as exemption to criminal liability based on **incapacity for criminal intent** (*Chaulk*)

- **Disease of the mind is a legal term** – what mental states/conditions constitute ‘disease of the mind’ is a question of law for judge. Medical witness opinions are not determinative. If there is any evidence upon which jury could find that A suffered from disease of the mind within legal meaning of that term, Q whether he suffered from a disease of mind is one of fact for jury (*Rabey*)

- Mental disorder may be permanent or temporary, curable or incurable, recurring or nonrecurring (*Rabey*)

### Defence of Mental Disorder – S 16 of Code

- Following *Swain* – where A claims that he had a mental disorder at time of committing offence, he can ask for a special verdict of not criminally responsible by reason of mental disorder (NCRMD) – s 16

- **Results of successful defence of NCRMD**: absolute discharge; conditional discharge; detained for psychiatric treatment

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

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

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

* *R v Schwartz* (1977): only capacity to know that act was legally wrong was required to disentitle the A to the special verdict
	+ *Chaulk* overrules *Schwartz*: **wrong** can = incapability of realizing that (1) act is legally wrong; (2) act is morally wrong or; (3) act is wrong in the circumstances
* Claim under 1st branch of s 16, appreciating nature and quality of act, is a denial of MR or denial of voluntary AR. Claim under 2nd branch of s 16, knowing that act was wrong, is claim to be excused for what would otherwise be criminal behavior (*Chaulk*)

### R v Chaulk and Morissette, 1990

F: Constitutional challenge under s 11(d) to reverse onus clause contained in s 16(4) of Code. As entered a home, robed it, and killed occupant, then turned themselves in. Tried and convicted of 1st degree murder. As had paranoid psychosis – knew laws of Canada, but believed they were above ordinary law. Appeal to MCA dismissed.

I: What is nature of mental disorder defence? Is s 16(4) of Code inconsistent w/ s 11(d) of Charter? Is it saved under s 1? What is interpretation of word ‘wrong’ in s 16(2)?

A: No one can be guilty of a criminal offence unless sane, therefore sanity is an essential element of every offence. Presumption of sanity embodied in s 16 violates presumption of innocence because it permits a conviction in spite of RD in mind of trier of fact as to guilt of A.

Re: s 1 test – sufficiently important objective, rationally connected, minimal impairment, proportionality. Parliament is not required to search out and to adopt absolutely least intrusive means of attaining its objective. Presumption of sanity is justified under s 1. Insanity defence should not be made unavailable on basis that A knows that a particular act is contrary to law and that he knows, generally, that he should not commit an act that is a crime.

C: Appeal allowed – new trial ordered.

### Note: R v Swain, 1991

F: A had a psychotic episode in which he acted violently towards his family. A was treated, and then tried a year and a half later. When A was at trial, he had reconciled w/ his family, was no longer suffering from psychosis. Swain wanted to plead guilty, because he knew it was likely to result in a more lenient sentence than pleading not-guilty by reason of insanity. Crown raised insanity defence.

I: Can Crown raise insanity defence against wishes of A? Is there a ss 7 or 11(d) problem w/ leg that requires judge to send A to forensic psychiatric institute upon finding that A was mentally disordered at time of offence?

A: **Procedure:**

1. A may plead NCR at outset of trial – evidence heard during trial – A must prove on balance of probabilities.
2. A may plead not guilty and advance defences etc. If Crown proves guilt BRD, A may change plea to NCR and a hearing on the matter will be held – A must prove on balance of probabilities.
3. Crown may raise evidence of A’s mental disorder during trial – Crown has burden on balance of probabilities.
4. Crown may raise evidence of A’s mental disorder after finding of guilty but before conviction is entered – Crown has burden on balance of probabilities.

C: Crown cannot raise defence of insanity against wishes of A, unless A puts his mental state into issue.

## C. Automatism

- Behavior performed in a state of mental unconsciousness or dissociation w/o full awareness (*Parks*)

- How criminal law treats claim of automatism depends on alleged source of dissociative state

1. **Insane automatism** = involuntary action as a result of disease of the mind = falls under s 16 (*Stone*)
2. Where claim is that automatism is neither result of voluntary intoxication nor product of mental disorder, A is arguing defence of **non-mental disorder automatism** – if successful, entitles A to full acquittal (*Stone*)
	* CL defence – applies to all offences – **burden is on A on balance of probabilities** (*Stone*)
	* **Sleep-walking** may fall into ‘non-insane automatism’ depending on circumstances (*Rabey, Parks*)

- **Internal/external causes:** Distinction to be drawn is between a malfunctioning of the mind arising from some cause that is primarily **internal** to the A [insane automatism], as opposed to a malfunctioning of the mind which is the transient effect produced by some specific **external** factor [non-insane automatism] (*Rabey*)

* Transient disturbances of consciousness due to certain specific external factors do not fall within the concept of disease of the mind (*Rabey*)
* Ordinary stresses and disappointments of life which are the common lot of mankind do not constitute an external cause constituting an explanation for a malfunctioning of the mind which takes it out of the category of a ‘disease of the mind’. **Extraordinary external events** might reasonably be presumed to affect the average normal person w/o reference to the subjective make-up of the person exposed to such experience (*Rabey*)

**Steps for defence of automatism** (*Stone*):

1. Establish a proper foundation for defence of automatism
	1. Voluntariness is key legal element – **evidentiary burden on A** to rebut presumption of voluntariness – requires confirming psychiatric evidence – has to be evidence of trigger – burden met where there is evidence upon which a jury could find that A acted involuntarily on balance of probabilities
	2. Consider: severity of triggering stimulus, corroborating evidence of bystanders, corroborating medical history of automatistic-like dissociative state, whether there is evidence of a motive for the crime, and whether the alleged trigger of the automatism is also the victim of the automatistic violence – no single factor is determinative
2. Determine whether to leave mental disorder or non-mental disorder automatism w/ trier of fact
	1. Presumption that automatism is result of disease of the mind, then consider whether evidence has rebutted presumption
	2. Modified objective test
	3. Use holistic approach that considers multiple theories: (1) internal cause theory (consider reaction of normal person in same circumstances to psychological blow); (2) continuing danger theory (recurring danger = disease of the mind); (3) other policy factors
3. Available defences following determination of disease of mind question
	1. If TJ concludes that condition A claims to have suffered from is not disease of the mind, only defence of non-mental disorder automatism will be left w/ trier of fact
	2. If TJ concludes that alleged condition is disease of mind, only mental disorder automatism left w/ trier of fact
	3. If trier of fact finds that A was not suffering from mental disorder, this extinguishes validity of A’s claim of involuntariness

### R v Rabey, 1977

F: R liked X, X did not return feelings. X wrote letter to friend which said mean things about R and that X liked another boy, and R found letter. R took rock from lab (says for studying). R and X were going to watch squash game, then R suddenly attacked X. Various reports from witnesses about physical symptoms in R on that day. Dr. S says: no neurological disease; if R is telling truth then consciousness was dissociated. Dr. O says: R entered into complete dissociative state caused by emotional shock; this state usually occurs in people w/ normal mental state; rare for this to recur; dissociative state is not ‘fully categorizable’. Dr. R says: R was in extreme state of rage; was aware of actions; if R was in dissociative state then he suffered from ‘disease of the mind’. AG appeals against acquittal of R. R charged w/ (1) having in his possession a rock for purpose of committing offence of wounding and (2) causing bodily harm to Miss C w/ intent to wound her. Crown argues that R committed actions intentionally or in the alternative R suffered from ‘disease of the mind’ – NCRMD. Defence argues that R was in dissociative state induced by psychological blow – no disease of the mind.

I: Is ‘dissociative state’ a disease of the mind?

C: TJ erred in holding that the ‘psychological blow’ was an externally originating cause, should have held that R was suffering from ‘disease of the mind’. Appeal dismissed on count 1, appeal allowed on count 2; new trial ordered.

### R v Parks, 1992

F: A drove 23 km and attacked his parents-in-law in middle of night – killed mother-in-law and seriously injured father-in-law. Then immediately confessed at police station. A presented defence of automatism – claimed that he was sleepwalking. A has always slept very deeply, year prior to events was very stressful. A had positive relationship w/ in-laws. Charged w/ 1st degree murder and attempted murder. TJ only put defence of automatism to jury (not disease of the mind). A acquitted.

I: Should sleepwalking be classified as non-insane automatism resulting in an acquittal instead of being classified as a ‘disease of the mind’ (insane automatism), giving rise to the special verdict of not guilty by reason of insanity?

A: Lamer: No indication of illness here – medical evidence = sleepwalking. No medical treatment for sleepwalking, aside from good sleep hygiene. Person who is sleepwalking cannot think, reflect or perform voluntary acts. **Sleepwalking could be a disease of the mind** in another case on different evidence.

La Forest: 2 distinct approaches to policy component of disease of the mind inquiry: (1) **Continuing danger theory**: any condition likely to present a recurring danger to the public should be treated as insanity; (2) **Internal cause theory**: a condition stemming from the psychological or emotional make-up of the A, rather than some external factor, should lead to a finding of insanity. Neither approach determines obvious result here. Only those who act voluntarily w/ requisite intent to commit an offence should be punished by criminal sanction.

C: Appeal dismissed, acquittal upheld. TJ did not err in leaving defence of automatism rather than that of insanity w/ the jury.

### R v Stone, 1999

F: A was in car w/ wife who was berating him. A says that he blacked out and awoke to find that he had stabbed her. A then ran away to Mexico, but returned and surrendered himself. A charged w/ murder of wife. A claims that wife’s words caused him to enter an automatistic state in which his actions were involuntary. A claimed: insane automatism, non-insane automatism, lack of intent and provocation. BCSC ruled that only form of automatism available to A was insane automatism. Jury found A criminally responsible but not guilty of 2nd degree murder (under s 16).

I: Should TJ have put non-insane automatism to jury?

A: A may still claim independent s 16 defence of mental disorder if first step of defence of automatism fails (no evidence of involuntariness). **Primary question is whether A acted voluntarily**.

C: TJ reached correct result on disease of the mind question. Appeal dismissed.

# Chapter 13: Defences – Necessity and Duress

Excuse criminal conduct where A was acting under compulsion of threats from another person (duress) or in response to emergency circumstances (necessity) in order to prevent a greater evil from occurring.

- A **justification** challenges wrongfulness of an action which technically constitutes a crime

- An **excuse** concedes wrongfulness of action but asserts that circumstances under which it was done are such that it ought not to be attributed to actor

## A. Necessity

CL defence. Should be recognized in Canada as an excuse, operating by virtue of s 8(3) of CC (*Perka*). Defence of necessity is narrow and of limited application in criminal law (*Latimer*).

- **Conceptualized as an excuse** – rests on realistic assessment of human weakness, recognizing that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience (*Perka*)

* Moral or normative **involuntariness** (*Perka*)

- **Requirements for defence** (*Perka*):

1. At a minimum, situation must be such an emergency and peril must be so pressing that normal human instincts cry out for action and make a counsel of patience unreasonable (*Perka*) – disaster must be imminent or harm unavoidable and near – modified objective (*Latimer*)
2. Compliance w/ the law must be demonstrably impossible (*Perka*) – A need not be placed in last resort imaginable, but he must have no reasonable legal alternative – modified objective (*Latimer*)
3. Proportionality: harm inflicted must be less than harm sought to be avoided (*Perka*) – 2 harms must, at a minimum, be of comparable gravity - objective (*Latimer*)

### R v Perka; Hines and Johnson, 1984

F: Drug smugglers. Had been intending to do a hand-off in int’l waters but had to dock in Canada due to emergency (boat breakdown). Charged w/ importing cannabis into Canada and w/ possession for purpose of trafficking, As claimed they did not plan to import into Canada or to leave their cargo of cannabis in Canada.

I: Does defence of necessity apply?

A: Involuntariness is measured on basis of society’s expectation of appropriate and normal resistance to pressure. **Negligence/involvement in criminal/immoral activity does not disentitle actor to excuse of necessity.**

### R v Latimer, 2001

F: A is father of Tracy Latimer. Tracy was a 12 yo who had a severe form of cerebral palsy. Tracy had a serious disability, but was not terminally ill. Tracy had an upcoming surgery that might have increased pain. A took her life (out of compassion).

I: Should defence of necessity have been put to the jury?

A: 1st and 2nd requirement are objective – but take into account situation and characteristics of A. Proportionality is measured on basis of community standards infused w/ constitutional considerations. Requirements for defence not met here. Court leaves open, if and until it arises, question of whether proportionality requirement could be met in a homicide situation.

C: No air of reality to defence of necessity – should not have been put to jury.

D: Compare w/ defence of provocation – anger can serve as excuse for murder but not compassion?

### R v Ungar, 2002

F: A charged w/ operating a motor vehicle in a manner that was dangerous to the public contrary to s 249(1)(a) of the Code. A volunteers w/ Hatzoloh, largest volunteer pre-hospital care provision service in US. Responders are EMTs. He received a call that a woman had been hit by a car, was not moving and possibly wasn’t conscious. Drove very fast/dangerously to get there and provided assistance – ambulance arrived 5-6 mins later.

C. No reasonable legal alternative – defence of necessity succeeds. Charge dismissed.

## B. Duress

- CL and statutory defence. Applies where A commits a criminal act in response to a threat from a third party. Specific criminal conduct need not be directed by threatener. Result is full acquittal. Statutory defence applies to principals, CL defence available to parties of an offence.

- **Section 17**: A person who commits an offence under compulsion by threats of (1) immediate death or bodily harm ~~from a person who is present when the offence is committed~~ is excused for committing the offence (2) if the person believes that the threats will be carried out and (3) if the person is not a party to a conspiracy or association whereby the person is subject to compulsion, (4) but this section does not apply where the offence that is committed is high treason or 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 (abduction and detention of young persons).

* May include **threats against third parties** (*Ruzic*)
* Immediacy and presence requirements deemed unconstitutional in *Ruzic*
* Where ambiguities or gaps exist in partially struck-down s 17, **CL defence of duress operates to clarify and flesh out statutory defence:** (*Ryan*)
	1. No safe avenue of escape (modified objective standard)
	2. Close temporal connection between threat and harm threatened (modified objective standard)
	3. Proportionality (modified objective standard)

- **CL defence**: (1) Threat of death of bodily harm [does not have to be directed at A, can be explicit/implicit]; (2) Reasonable belief that threat will be carried out [modified objective]; (3) No safe avenue of escape [modified objective]; (4) Close temporal connection [so that A lost ability to act freely]; (5) Proportionality [modified objective – reasonable person similarly situated]; (6) Not a party to a conspiracy or criminal association [cannot rely on defence if A knew that participation came w/ risk of coercion and/or threats to compel them to commit an offence - subjective] (*Ryan*)

* CL defence of duress continues to apply in cases involving party liability (*Hibbert*)
* Question of whether a ‘safe avenue of escape’ was open to an A who pleads duress should be assessed on an objective basis, but appropriate objective standard to be employed is one that takes into account the **particular circumstances and human frailties of A** (*Hibbert*)
* Objective-subjective standard to consider gravity of threats (*Ruzic*)

### Hibbert v The Queen, 1995

F: A charged w/ attempted murder and convicted of lesser included offence of aggravated assault. B, a drug dealer, shot another dealer, FC, in lobby of FC’s apartment building. A was present. A said that he took B to FC’s apartment building because B threated A and A feared that B would kill him. A said he had no opportunity to run away or warn FC.

I: Was CL defence of duress available? Was TJ’s charge to jury w/ respect to duress at error?

A: To determine whether MR is ‘negated’, consider whether mental element of offence is defined in such a way that either an actor’s motives or his immediate desires have any direct relevance. If offence is one where presence of duress is of potential relevance to existence of MR, A is entitled to point to presence of threats when arguing that Crown has not proven BRD that he possessed mental state required for liability. Duress does not negate MR. A person who commits a criminal act under threats of death/bodily harm may also be able to invoke an **excuse-based** defence of duress (CL or statutory). S 17 doesn’t apply here – party liability.

C: TJ erred in instructions to jury on law of duress – new trial – appeal allowed.

### R v Ruzic, 2001

F: A arrested, charged and tried for possession and use of a false passport and unlawful importation of narcotics. Found w/ heroin and fake passport at TO Airport. A was acting under threats from a man in Yugoslavia, who was threatening her and her mother. Believed only way she could protect mother was to obey orders. At trial, A successfully challenged constitutionality of s 17 of Code, raised CL defence of duress and was acquitted by a jury.

I: Do requirements in s 17 of Code, that a threat must be of immediate death or bodily harm and from a person who is present when the offence is committed infringe the rights of an A person as guaranteed by s 7? Does s 17 infringe s 7 rights by precluding access to defence of duress where threat is to a third party? Are these justified under s 1?

A: A person acts in a morally involuntary fashion when, faced w/ perilous circumstances, she is deprived of a realistic choice whether to break law. **Moral blameworthiness is protected under s 7 as PFJ.** Morally involuntary conduct is not always inherently blameless. Criminal responsibility should be ascribed onto to acts that resulted from choice of a conscious mind and an autonomous will - **moral involuntariness deserves protection under s 7 as PFJ**. By strictness of its conditions, s 17 breaches s 7 of Charter because it allows individuals who acted involuntarily to be declared criminally liable.

C: S 17 of Code should be declared unconstitutional in part, acquittal upheld and appeal dismissed.

## C. Relating Duress, Necessity and Self-Defence

|  |  |
| --- | --- |
| Self-Defence | Duress |
| - Victim is attacker- Motive of victim is irrelevant- Attempt to stop victims threats by meeting force w/ force- Completely codified- Justification – focus on action - Rationale = lawful to meet force w/ force - Challenges wrongfulness of what would otherwise be a crime  | - Victim is third party- Purpose of threat is to compel A to commit an offence - Succumb to threats by committing an offence- Partially codified - Excuse – concessions to human frailty – focus on circumstances - Rationale = moral involuntariness- Morally blameworthy but excusable  |

### R v Ryan, 2013

F: A has been victim of violent, abusive and controlling husband. She tried to hire 2 hitman previously who wanted too much money. She hired hitman to kill him – undercover police officer. Arrested and charged w/ counseling commission of an offence not commited contrary to s 464(a) of Code. TJ found that CL defence of duress applied, and acquitted A. Court of Appeal upheld TJ’s verdict.

I: Is duress available in law as a defence where threats made against the A were not made for purpose of compelling commission of an offence? If not, what order should be made and should a stay of proceedings be entered? Can law of duress be clarified and how?

A: Court of Appeal developed CL of duress in order to fill a gap in law of self-defence – not appropriate. Duress is available only in situations in which A is threatened for purpose of compelling commission of an offence.

C: Stay of proceedings.

# Chapter 14: Participatory Limits: Parties and Attempts

## A. Attempts

May be charged separately or found as included offence. See sentencing rules for attempts in s 463.

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

* **Subjective MR**: you have to intend to commit the offence – MR is more important for attempts (*Ancio*)
* MR is question of fact – not appealable (*Sorrell*)

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

* AR has to be something beyond mere preparation (*Ancio*)
* AR is question of law = determined by judge = can be appealed (*Sorrell*)
* AR need not be a crime apart from state of mind (*Ancio*)
* When preparation to commit crime is fully complete, next step done by A for purpose and w/ intention of committing a specific crime constitutes an AR sufficient in law to establish a criminal attempt to commit that crime (*Sorrell*)

- Where there is no extrinsic evidence of intent w/ which A’s acts were done, acts of A, which on their face are equivocal, may be insufficient to show that acts were done w/ intent to commit crime – **the more MR you have, the less AR you need for attempts** (*Sorrell*)

### R v Ancio, 1984

F: A went to C’s apartment building (A’s estranged wife was living w/ C), and broke in. C threw chair at A, and A’s gun went off. A charged w/ attempted murder of C contrary to s 222 of Code. TJ convicted A of attempted murder on basis that A had carried and used a weapon in course of a breaking and entry w/ intent to effect forceable confinement of his wife. Court of Appeal quashed conviction and ordered new trial.

A: **Criminal attempt is an offence separate and distinct from crime alleged to be attempted. Criminal element lies in intent itself.** Intention to commit complete offence of murder must include intention to kill. MR for attempted murder cannot be less than specific intent to kill.

C: Dismiss appeal and confirm order for new trial.

### R v Sorrell and Bondett, 1978

F: Chicken store closed a few minutes early. 2 men wearing balaclavas showed up outside just after it had closed. Rapped on door and window, then left when manager wouldn’t let them in. Manager called police and they were found to have guns in their possession. TJ acquitted As on attempted robbery and convicted on weapons charges. Unclear whether TJ acquitted them for lack of MR or AR. Crown appeals against acquittal of As on charge of attempted robbery.

I: Did TJ acquit based on lack of intent or no AR?

A: Crown must prove that As (1) intended to do what which would in law amount to robbery specified in indictment (MR); (2) took steps in carrying out that intent which amounted to more than mere preparation (AR). Here no evidence of intent to rob other than that furnished by acts relied on as constituting AR.

C: Appeal dismissed.

- **Can you be convicted of an attempt to do an impossible crime?** (*Dynar*)

* S 24 draws no distinction between attempts to do possible but by inadequate means, attempts to do physically impossible, and attempts to do something that turns out to be impossible ‘following completion’. All are varieties of attempts to do ‘factually impossible’ and all are crimes. Only attempts to commit imaginary crimes fall outside scope of provision.
* An attempt to do factually impossible is considered to be one whose completed is thwarted by mere happenstance
* Legally impossible attempt is considered to be one which, even if it were completed, still would not be a crime – Canadian law does not recognize ‘legally impossibility’
* \*\* An A is guilty of an attempt if he intends to commit a crime and takes legally sufficient steps towards its commission \*\*

### United States of America v Dynar, 1997

F: D was attempting to launder money - communicated w/ people in US who were going to bring money across border for him to launder and return to them. BUT other party that he was dealing w/ was actually an undercover FBI officer – money was not actually proceeds of a crime. SO technically impossible for D to commit crime of money laundering. D was ordered extradited at trial, but overturned at appeal.

I: Does D’s conduct in US constitute a crime if carried out in Canada? Is an A who attempts to do the ‘impossible’ guilty of attempt and is an A who conspires w/ another to do the impossible guilty of conspiracy?

L: S 462.31(1) of Code and s 19.2(1) of Narcotic Control Act – requires that A knew that money he converted was proceeds of crime to be convicted.

A: Cory and Iacobucci: Because A attempted to do impossible but did not attempt to commit an imaginary crime, he can only have attempted to do ‘factually impossible’. A believed that he was embarked upon a scheme to convert drug money. Purpose of law of attempt is deterrence of subsequent attempts – impossible attempts are no less menacing than are other attempts. Major (dissent): If there is no offence then there can be no attempt. Laundering of legal proceeds is an imaginary crime. Criminal law should not patrol people’s thoughts.

C: A’s conduct would have amounted to a criminal attempt and a criminal conspiracy under Canadian law – appeal allowed.

## B. Aiding and Abetting

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

(a) Actually commits it

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

* Have to know (or at least be reckless) that you are aiding – don’t have to know that it is a criminal offence – specific intent

(c) Abets any person in committing it

(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.

* Can withdraw from common purpose and abandonment = defence (but must communicate to principal)
* ‘Ought to have known’ in 21(2) is invalid for special stigma crimes and read out (*Logan*)

**Principal**: actually committed offence. **Party:** involved in commission of offence. **Co-perpetrators**: 2 principals versus principal/party. **Aiding:** promote or facilitate in any way even if not there. **Abetting**: encourage while actually present. Irrelevant whether aiding does not actually help. Party can be convicted even where principal is not apprehended. Party may be convicted of more serious crime than principal. Crown does not have to specify whether it is pursuing conviction as party or principal.

* **Mere presence at scene of crime is not sufficient to ground culpability**, something more is needed – objective standard to determine encouragement (*Dunlop*)
* Presence at commission of offence can be evidence of aiding and abetting **if accompanied by other factors**, such as prior knowledge of principal offender’s intention to commit offence or attendance for purpose of encouragement (*Dunlop*)
* S 21(1) makes difference between aiding and abetting and personally committing an offence legally irrelevant (*Thatcher*)
* **For special stigma crimes:** Where a minimum level of MR is required for commission of substantive offence by a principal offender, that same minimum level of MR is required before an accomplice can be convicted of being a party to the offence (*Logan*)

### R v Dunlop and Sylvester, 1979

F: As had met C and brought her to area. C was raped by 18 men – she identified the 2 A as 2 of men who had raped her [i.e. some evidence that they were principals]. A testified that they left area to go and buy beer and that when they returned, they saw some people standing around and saw a woman having sex w/ a man [i.e. some evidence that they were aiders and abettors].

TH: Issue for jury: did As have intercourse w/ C? 3 options left to jury: (i) S 21(1) – As were aiders and abettors – had not had sex w/ C; (ii) S 21(2) – there had been a common intention to commit a crime which As were involved in; (iii) As were both principals to rape. As were tried twice and convicted on a charge of rape. Jury wanted to know if A would be guilty if they had been there and known what was going on and did nothing to try to prevent it – TJ said if a person deliberately omits to do something that he could have done to prevent the offence, then he was a party to the offence. Court of Appeal held that TJ made a mistake in his instruction on s 21(2) – common intention provision had no basis in this case.

I: Did TJ err in charging jury w/ respect to s 21(1) re: parties to an offence?

A: Dickson: No evidence of common unlawful purpose – 21(2) is irrelevant. No evidence of aiding/abetting. Martland (dissent): jury may draw inference from evidence that A were more than merely present at a crime – could conclude BRD that As were aiders/abettors.

C: TJ erred in charging jury on alternative bases of (i) principal offender and (ii) aider and abettor. Acquittal.

### R v Thatcher, 1987

F: A arrested and charged w/ causing death of ex-wife. Crown held that (1) A had murdered C or; (2) A caused someone else to do so and was therefore guilty as a party under s 21. Very strong evidence connected A w/ crime. Some evidence which, if believed, points to his not having committed the crime personally. Convicted of 1st degree murder by jury – told that they could convict A on either of the Crown’s theories. Appeal to SK court of Appeal dismissed.

I: Did TJ err in failing to instruct jury that a verdict of guilty must be unanimous in relation to one or other of alternative means of committing offence of murder?

A: Both forms of participation under s 21(1) should be treated as one single mode of incurring criminal liability. If there is evidence before a jury that points to an A either committing a crime personally OR aiding and abetting another to commit offence, provided jury is satisfied BRD that A did one or other, it is a matter of indifference which alternative actually occurred.

C: S 21 precludes a requirement of jury unanimity as to particular nature of A’s participation – appeal dismissed.

### R v Logan, 1990

F: A were convicted as parties to an attempted murder by an accomplice that occurred during course of a series of robberies.

I: Is there a requirement of proof or subjective proof of MR to be convicted as a party for attempted murder?

A: Phrase ‘ought to have known’ in s 21(2) was unconstitutional as it applied to offence of attempted murder. Minimal level of MR for conviction for attempted murder is subjective foresight of death.

# Chapter 15: Sentencing Principles and Parameters

## A. The Principles of Sentencing

TJ must fix a fit sentence that is proportionate to gravity of offence and blameworthiness of offender (s 718.1). **Range of sentencing options include**: (a) Imprisonment; (b) Fine; (c) Probation (suspended sentence) – second least onerous - does result in criminal record; (d) Conditional sentence (house arrest); (e) Conditional or absolute discharge – least onerous; (f) Firearms prohibition; (g) DNA databank order; sex offender registration order. See s 718 for purposes and principles of sentencing. Parole is not a sentencing consideration – admin decision made by Corrections Canada. Once someone is deemed a **dangerous offender** they are subject to indeterminate sentence of imprisonment. **Long-term offenders** get up to 10 years of supervision after serving their sentence.

- **2 specific objectives of long-term supervision** as a form of conditional release: (1) protecting public from risk of re offence, and (2) rehabilitating offender and reintegrating him into community (*Ipelee*)

- Dilemma facing sentencing court is to balance a proper consideration of consequences of a criminal act against reality that criminal justice system was never designed or intended to heal suffering of victims of crime (*Sweeney*)

- Purpose of sentencing is to enhance protection of society – achieved if imposition of legal sanctions discourages both convicted offenders from re-offending and those who have yet to offend from doing so at all (*Sweeney*)

- Gravity of offence and degree of responsibility of offender are determined by moral culpability of offender’s conduct (*Sweeney*)

- **Purposes of sentencing** (*Sweeney*):

1. **General deterrence**

Legal sanction imposed on actual offenders will discourage potential offenders. Not clear that longer sentences deter more effectively.

1. **Specific deterrence**
2. **Isolation**

Achieved primarily by a sentence of imprisonment – justified as a goal of sentencing by simple provision that so long as an offender is separated from society he cannot re-offend. Most people emerge from prison a worse threat to society than when they entered.

1. **Rehabilitation**

Cannot be achieved through imposition of custodial sentences. Remains only certain way of permanently protecting society from a specific offenders. If rehabilitation of a specific offender remains a reasonable possibility, that is a circumstance which requires sentencing court to consider seriously a non-custodial form of disposition.

1. **Denunciation**

Associated w/ retributive theory of sentencing. Must be strictly limited to ensuring that sentences imposed for criminal convictions are proportionate to moral culpability of offender’s unlawful act. Achieved by considering and taking into account the aggravating and mitigating circumstances individual to each offence and each offender.

- S 12 of the *Charter* will only be infringed where sentence is so unfit having regard to offence and offender as to be grossly disproportionate (*Smith*)

### R v Sweeney, 1992

F: A, 20 yo at time of offence, convicted of 1 count of criminal negligence causing death, 1 count of driving w/ BAL in excess of .08 and 1 count of failing to remain at scene of accident. Sentenced to 4.5 years’ for 1st count, 6 months concurrent on 2nd and 6 months consecutive on third. Right to drive suspended for 15 years. A drove into another car while being chased by police – driver of other car died. A comes from dysfunctional family, was born w/ serious physical disfigurement, has learning disabilities, has alcohol and drug abuse problems. TJ had various sources to consider for sentencing including letter from A’s landlady, letter from victim’s sister.

A: Criminal justice system alone cannot be expected to solve deeply rooted and profoundly complex social problems. No role for revenge in a principles system.

C: Appeal allowed – substitute sentence of 18 months less one day for 1st count, no interference w/ 2nd and 3rd.

### R v Smith, 1987

F: A returned to Canada w/ cocaine hidden on his person – sentenced to 8 years in prison.

I: Is mandatory minimum sentence of s 5(2) of *NCA* contrary to, infringes or denies rights and guarantees of *Charter* under s 12? If so is it justified under s 1?

L: S 5(2) of *NCA* – should A be convicted of importing drugs into Canada, minimum sentence was 7 years and maximum sentence was life in prison.

A: In assessing whether a sentence is grossly disproportionate, court should consider: gravity of offence; personal characteristics of offender; particular circumstances of the case.

C: S 5(2) of *NCA* violates s 12 of Charter and is not saved under s 1.

D: Only time the SCC has invalidated a sentencing provision in the CC.

## B. Mandatory Minimum Sentences

General rule is that jury has no role to play in sentencing A. Exception is where a person is convicted of 2nd degree murder, an offence that carries a mandatory life sentence, w/ a minimum period of parole ineligibility of between 10 and 25 years – jury is asked to recommend a period of parole ineligibility.

# Chapter 16: Secondary Principles of Sentencing (s 718.2 Code)

S 718.2 provides a non-exhaustive list of factors that a sentencing judge may consider when sentencing an individual offender.

## A. Aboriginal Peoples and the Principles of Sentencing (s 718.2(e))

Aboriginal people make up between 3-4% of Canadian population – they make up 20% of the prison population. Aboriginal people are overrepresented in virtually all aspects of criminal justice system (*Gladue).* Highest rates are in North-West Territories, MB, SK and Yukon. Aboriginal men make up 25% of men in sentenced custody – aboriginal women make up 41% of females in sentenced custody.

- Cases prior to *Gladue*:

* S 718.2(e) really didn’t change anything – just a codification of CL rules of sentencing
* Only clicked in if the aboriginal community was willing and able to play a central role in rehabilitation of the offender – so very little effect on people in urban areas
* Doesn’t apply at all unless aboriginal offender lived on a reserve

- S 718.2(e) has a **remedial purpose** – alters method of analysis which each sentencing judge must use in determining nature of fit sentence for an aboriginal offender – not optional (*Gladue*)

- Judge should consider the unique systemic or background factors which may have played a part in bringing that particular aboriginal offender before courts (*Gladue*)

- S 718.2(e) applies to all aboriginal offenders wherever they reside (*Gladue*)

- **Restorative justice:** approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts harmony which existed prior to its occurrence, or at least which it is felt should exist (*Gladue*)

- Not all offenders and communities share same values when it comes to sentencing, therefore different/alternative sanctions may more effectively achieve objectives of sentencing in a particular community (*Ipelee*)

* Most traditional aboriginal conceptions of sentencing place a primary emphasis upon ideals of restorative justice (*Gladue*)

### R v Gladue, 1999

F: A is aboriginal – brought up on a reserve but living in Nanaimo at time of offence. Stabbed partner and father of her children out of jealousy while intoxicated. Sentenced to 3 years’ imprisonment and to a 10-year weapons prohibition.

I: Did TJ err in failing to take into account A’s aboriginal status in making sentencing decision?

TH: TJ took into account several mitigating factors as well as aggravating circumstances. Found that there were not any special circumstances arising from A’s aboriginal status that he should take into consideration. Did not apply s 718.2(e). Court of Appeal dismissed A’s claim – particular circumstances could not reasonably support a conclusion that the sentence, if a fit one for a non-aboriginal person, would not also be fit for an aboriginal person.

L: S 718.2 provides that **all available sanctions other than imprisonment that are reasonable in circumstances should be considered for all offenders, w/ particular attention to circumstances of aboriginal offenders.** Fundamental purpose is to **treat aboriginal offenders fairly by taking into account their difference**.

A: Aboriginal offenders are more adversely affected by incarceration and less likely to be rehabilitated thereby – culturally inappropriate and discrimination. Circumstances of aboriginal offenders differ from those of majority because many aboriginal people are victims of systemic and direct discrimination, many suffer legacy of dislocation, and many are substantially affected by poor social and economic conditions. Generally, the more serious and violent the crime, the more likely it will be as a practical matter that terms of imprisonment will be same for similar offences and offenders, whether offender is aboriginal or non-aboriginal.

C: Appeal dismissed – in these circumstances it is not in interests of justice to order a new sentencing hearing in order to canvass A’s circumstances as an aboriginal offender.

### R v Ipelee; R v Ladue, 2012

F: As are offenders w/ lengthy criminal records. Each had history of committing serious assaults and sexual assaults while intoxicated. Each breached long-term supervision order. Sentencing judges considered fact that A was Aboriginal man w/ lengthy history of childhood neglect, poverty and addiction but concluded that primary consideration had to be protection of public and isolation of offender. ONCA dismissed Ipeelee’s appeal, BCCA allowed Ladue’s appeal and substituted a sentence of 1 years’ imprisonment.

L: S 753.1: If court finds an offender to be a long-term offender, it must impose a sentence of 2 years or more for predicate offence and order that offender be subject to long-term supervision for period not exceeding 10 years.

A: S 718.2(e) has not had a discernible impact – due to misunderstanding and misapplication of *Gladue*. **3 interrelated criticisms**: (1) sentencing is not an appropriate means of addressing overrepresentation; (2) *Gladue* principles provide what is essentially a race-based discount for Aboriginal offenders; (3) providing special treatment and lesser sentences to Aboriginal offenders is inherently unfair as it creates unjustified distinctions between offenders who are similarly situated, thus violating principle of sentence parity. Sentencing judges can endeavor to reduce crime rates in Aboriginal communities by imposing sentences that effectively deter criminality and rehabilitate offenders. Methodology set out in *Gladue* is designed to focus on those unique circumstances of an Aboriginal offender which could reasonably and justifiably impact on sentence imposed. To extent that *Gladue* will lead to different sanctions for Aboriginal offenders, those sanctions will be justified based on their unique circumstances. Offenders **do not have to establish causal link between background and offence**. **Application of *Gladue* principles required in every case involving an Aboriginal offender**.

C: Allow Ipelee’s appeal and dismiss Crown’s appeal from Ladue’s reduced sentence.