Exceptions to Requirement of Mens Rea

* certain offences where the Crown has to prove that the individual was unreasonable, where the individual departed from a standard in a significant way. Objective blameworthiness. Only have to prove that the accused is blameworthy because he departed from a standard of behaviour
* Sometimes the Crown doesn’t even have to prove this, only the actus reus.
* Criminal negligence: burden on Crown to prove blameworthiness but unclear whether this has a subjective or objective component
* Strict liability offences: differs in two ways from “true crimes”: the standard of fault is objective (the question is whether the reasonable person would’ve done/thought/known something)
* second thing is that the Crown just proves the actus reus, and the accused can prove on a balance of probabilities that he or she was not negligent.
* Absolute liability takes away any mens rea requirement by the Crown and takes away any mens rea defence from the Crown. Doesn’t matter whether the accused can prove no negligence

Saulte St. Marie

* Before Saulte St. Marie, there were only two types of offences: absolute liability offences and offences that required subjective mens rea (true crimes)
* After Sault St. Marie, you had true crimes, strict liability offences, and absolute liability offences.
* Absolute liability was product of increasing industrialization. Breaches of regulations having to do with sanitization or the environment or streets were of a different ilk from murder/robbery
* To determine whether something was absolute liability and what was true crime, need to consider what the penalty was (the greater the penalty, more likely to be true crime), the subject matter of the offence (things associated with living in a peaceful organized society are things that tend to be absolute liability), difficulty of law enforcement if you had to prosecute with mens rea

**Class 3**

Sault Ste Marie (reasons why absolute liability is good)

* Very strong principal in law not to punish people who are morally innocentThe other side of that coin is that society needs high standards of public safety and the absence of mens rea was a judicial measure for expediency.
* People are more likely to be careful/comply with those rules if they know there isn’t any excuse, or ignorance of that standard, which will alleviate their being held responsible. Idea is that they will try harder because they won’t just skate by saying they made a mistake. Theory: if you don’t allow for a defence or mistakes, then people will try harder to comply with the law.
* Much more efficient administratively; don’t require Crown to prove mens rea or allow the accused to prove a defence. Crown just has to show that the accused broke a rule
* The penalties are low. Not a lot of stigma

Sault Ste Marie (reason absolute liability is bad)

* Do we, by having absolute liability, punish people who are morally innocent?
* There isn’t any empirical evidence at all of any deterrent effect. Instead leads to cynicism, disrespect for the law due to perception that we’re punishing the morally innocent.
* Penalties are also becoming increasingly severe. In certain offences, there are increasing sentences in repeated offences and in situations like this, absolute liability could result in jail
* Whether or not a person is careful in his or her behaviour is often admissible in sentencing. He Why not recognize that in the way that we structure liability?

Sault Ste Marie – Creation of Strict Liability

* meets some of the advantages of absolute liability but it doesn’t punish the morally innocent.
* In strict liability, Crown does not have to prove mens rea. However, it’s a good defence for the accused to show that he was not negligent. The burden thus shifts to the accused.
* The accused then shows he was careful and/or that he made a mistake that a reasonable person would’ve made. Defendant has to show, on balance of probabilities, that he or she acted reasonably or that the offence had occurred by accident
* Problem: if the burden shifts to the accused either on an evidentiary basis or on a persuasive burden, then we have to think this is violation of s.11 of Charter. Case is pre-Charter. That said, while the court was split, SCC upheld strict liability in Wholesale Travel.
* The defence in strict liability is due diligence. What the accused has to show is that he or she exercised reasonable care and the offence still happened.
* Proudman: an honest and reasonable belief in a state of facts which, if they existed, would make the defendant’s act innocent affords an excuse for what would otherwise be an offence.

Beaver

* person who held honest but unreasonable belief was acquitted because the offence required subjective, full mens rea. What we cared about was what the particular person believed
* If someone makes a mistake on an offence that requires a full mens rea and that mistake is honest, that may be a defence. But if a person makes a mistake on strict liability offence, the person must demonstrate that it is both honest AND reasonable, that a reasonable person in the same circumstances would have made the same mistake.

Is an Offence a True Crime, Strict Liability, or Absolute Liability

* If full mens rea, Crown has to say person had “this particular state of mind.”
* True crimes are laws passed under the federal criminal law power, but possible that full mens rea may be required under a provincial offence if there are words in that offence that indicate, like “wilfully.
* In Criminal Code, the starting point is that there’s full mens rea, unless it says otherwise.
* Assume that the starting point for provincial legislation is that they are strict liability unless you have words in the offence that tell you that what the legislators wanted was full mens rea
* Absolute liability: need very clear indication from the wording of the offence The only kind of defence other than “I didn’t do it” or that the actus reus wasn’t proven (no causation, etc), is volition. Presumption is against absolute liability.
* Ask yourself if it’s a true crime or has words of intent? Then it’s full mens rea. Then ask yourself if from wording of statute it’s absolute liability. If answer to both these question is no, then it’s probably strict liability.

Chapin

* one of the features of strict liability is that it is a regulatory scheme, and it’s summary conviction so not too serious. No mens rea words like “intent” and “wilfully” in the offence. It’s a public welfare offence and not criminal. It’s not a Criminal Code offence
* Not absolute liability: penalties are not minimal. Person could be incarcerated or fined quite a lot. Court also says that since as it’s a public welfare offence and part of a regulatory scheme, the starting point is that it’s strict liability unless the legislation says quite explicitly otherwise.
* Accused said she took all reasonable care and wasn’t negligent. Facts support this.

Criminal negligence

* S.219: everyone is criminally negligent who in doing anything or in omitting to do anything that it is his duty to do shows wanton and reckless disregard for the lives and safety of other persons.
* Negligence is an objective standard. It’s not about what the person thinks/known/intends, but rather what he ought to have.
* Important for criminal law: might decide in criminal negligence that what we’re going to punish is not someone having a morally blameworthy state of mind, not that they had bad thoughts/intentions, but that it’s criminal to fail to consider a particular standard of behaviour.
* not that they’re kind of careless, but that they’re deviating from a standard of behaviour or conduct that shows wanton disregard for lives and safety of others.
* It’s the nature of the risk you present to others that is significant. You must endanger the lives and safety of other people. The Crown has to lead evidence that this indicates a wanton and reckless disregard for the lives and safety of other people.

**Class 4**

Objective Fault

* Objective fault is discussed in two different ways: by way of statutory interpretation and as a constitutional principle
* What we find blameworthy is not a state of mind but rather his failure to think or the individual’s departure from a standard, a standard of reasonableness
* How much deviation must there be: there must be a “marked and substantial departure.”
* If we have a crime that has an objective standard of fault and the accused claims that he was honestly mistaken, that’s not enough. The mistake must be both honest AND reasonable

Tutton

* If the crime is one of subjective mens rea, they’d be acquitted due to their having an honest belief. If it requires an objective fault, that’s not good and assuming most people wouldn’t have thought divine intervention reasonable, they’d be convicted.
* Manslaughter can thus be committed in two different ways: where a death is caused by criminal negligence (here it’s an omission – failing to provide necessaries of life) or by an unlawful act.
* Crown must prove beyond a reasonable doubt that they failed to provide necessaries and that that failure showed a wanton and reckless disregard for the safety of their son, resulting in his death, to get a conviction for manslaughter.
* the rules of burden of proof for omissions and acts were the same in criminal negligence, same fault standard for conviction.
* Judge says that criminal negligence has an objective standard of fault. Criminal negligence involves punishing people for conduct which causes bad results, even if the person is not aware of the risks involved with their conduct.
* For criminal negligence, it’s the conduct that is the focus, NOT the accused’s mental state.
* He talks about criminal negligence being the opposite of thought-directed action; we’re punishing the conduct and its results here, not a state of mind, rather, we’re punishing the consequences of mindless action.
* Reaffirmation that if a mistake is going to be a good defence, it must be both honest and reasonable and to convict, the finder of fact would have to find that the failure to give insulin was a marked and significant departure from the standard of a reasonably prudent person.

Hundal

* whether there is a subjective mental element required for dangerous driving.
* Cory says where negligence is used in criminal law in general, it requires a marked departure from the standard of a reasonable person, not just any negligence. Here we’re talking about offences in the crim code that have an objective standard of fault: manslaughter, dangerous driving; must be a marked & substantial departure from the standard of reasonable person
* Puts emphasis on looking at liability from the departure of the individual from a norm, rather than liability coming from something mental/internal.
* His reasons for this objective standard: licensing requirement, which establishes a norm regarding competence and standards of care, licensing requirement means you place yourself in a position of responsibility and you’ve demonstrated that you know what the standard of care is, or you’d not’ve gotten a license.
* Also, driving is an automatic and reflexive activity; it’s thus hard to determine the state of mind of an individual, doesn’t have much of a contemplative aspect to it
* Other reasons for objective standard: the wording of the section suggests we look at the manner of driving and not so much what the person was thinking or directing his mind at. We alsow ant to deal with something that has wide social implications in assigning objective fault. Too many deaths, problem with traffic accidents. Dangerous driving must be deterred by not providing the honest mistake or mens rea kind of defence. Again, whether or not deterrence actually works doesn’t have empirical evidence, but it is a consideration regardless.
* there must be some consideration of the context of the events in establishing an objective standard. There’s something about looking at the context and the person, the individual circumstances to determine what the objective standard and the reasonable person are.
* Examples he gives of things that must be considered to determine the appropriate standard of driving and the deviation: the conditions of driving (the road, weather, light, etc), also more about the person (for instance, guy is driving dangerously because he’s had a heart attack)

**Class 5**

Motor Vehicle Reference

* court says won’t make distinction between process, procedure, and substance. When it looks at provision that looks like an aspect of a law that’s going to be impugned, it won’t restrict itself or make any different ruling because something is substance as opposed to procedure.
* S.7 says that everyone has the right to life, liberty, and security of the person and not to be deprived thereof except in accordance with the principles of fundamental justice.
* The closest we get to a definition of what the principles of fundamental justice are is where the court says justice system is founded on a belief in the dignity and worth of the human person. Best guidance you have for what the principles of fundamental justice are is to look to the basic tenets of the legal system.
* It’s not that you have a right TO fundamental justice, but rather it’s a qualifier of the other rights, set the parameters of those other rights.
* Absolute liability violates the principle of fundamental justice, but that’s not enough for an s.7 violation. The violation at issue in MVR is the possibility of a prison sentence as the result of an absolute liability offence. Imprisonment and absolute liability, by themselves, are not undermined, but rather, it is the combination of a mandatory prison sentence and absolute liability that is the issue.
* MVR tells us that there is some level of fault required, constitutionally, where the punishment involves potentially a deprivation of life, liberty, and security of the person. This case does not tell us WHAT level of fault is required. It’s not saying subjective fault is required, just that absolute liability, which requires the Crown to prove nothing objectively or subjectively, is a violation if paired with a prison sentence; something MORE than absolute liability is required
* the s.1 argument for saving this provision is only for administrative efficiency, which is decided not to be good enough in MVR. Expediency is not the essence of a good s.1 argument.
* S.1, for reasons of administrative expediency, may come to the rescue of other s.7 violations, but only for cases coming out of exceptional circumstances (natural disasters, war, epidemics)

Martineau

* Constructive murder – we construct a charge of murder from various events that occur and in which death ensues. Death of a human being occurs in the commission of any of listed offences. Code shows that it’s irrelevant whether or not the person intends to kill someone
* Murder charges that come from (s.230) a person dying in the course of the commission of another offence and may be the death occurs during the escape as well
* there must be some subjective foresight of death, despite removal of mens rea in the provision for constructed murder. Because of the special stigma of murder and the available penalties, punishment MUST be proportionate to the moral blameworthiness of the offender. Subjective foresight of death is required before someone is labelled and punished as a murderer
* Concept of proportionality between the stigma and the moral blameworthiness of the offender and the court is saying that those who commit an offence intentionally or recklessly, subjectively, ought to be punished more severely in having a murder conviction than those who have caused harm unintentionally.
* There is no longer constructive murder, offences that put a series of events ending in homicide into category of murder are no longer law.

**Class 6**

Consequences of the charter on mens rea

* there are certain crimes that we will require subjective fault for. In crimes that are designated as special stigma crimes, the constitutional requirement is that the individual foresaw the consequences in that crime.
* Special stigma crimes: constitutional essential that there be subjective foreseeability of the consequences. Few crimes fall in this category. Things that are murder, from Martineau, and attempted murder, from Logan, are examples. Crimes against humanity, Finta, is a special stigma crime.

Objective fault Constitutionality

* Objective fault is not unconstitutional
* In order to be constitutionally sound, yes you can have a crime that has an objective standard of fault, but it has to be a marked departure from the standard of a reasonable person.
* In Hundal, what was said that you had to take account of the reasonable person in the context (a driving context, there, a departure from reasonable driver would take into account the traffic, road conditions, etc), contextual factors are figured in when we finish with Hundal
* What isn’t allowed are the personal characteristics of the accused. Not going to treat young drivers differently from old drivers or old drivers differently from other kinds of drivers

Desousa:

* Two parts of the offence: There has to be an unlawful act and there has to be a connection between the unlawful act and the bodily harm.
* To fulfill first part, you have to do something, has to be an unlawful act that does bodily harm.
* The unlawful act does not need to be something that requires subjective mens rea
* the act must be something that is inherently dangerous and must also be foreseeability of the consequences
* s.269, there is an objective standard, not that you had subjectively foreseen the harm, but that the court says you ought to have. Only requirement: objective foresight of the consequences.
* When someone puts themselves in an inherently dangerous situation and is violating the law, and bad things happen, it’s not necessary for the Crown to prove that the individual had some subjective foreseeability/knowledge of those bad consequences. The liability/blameworthiness is inherent in the unlawful act for which certain consequences have occurred.
* Idea is that the person has put himself into a particular situation, violated the law, done an unlawful act that puts people in jeopardy, and then something bad happens – the blameworthy aspect of that goes not so much to the consequences, but to where the person has positioned himself.

Creighton

* experienced drug user injects girlfriend with cocaine, she dies, and he is charged with unlawful act manslaughter. There’s an unlawful act and there is a result, death, so this becomes part of the homicide regime under the Code. There’s an underlying offence and there is a consequence
* Crown argues this guy ought to have known, he’s someone who should’ve had a better knowledge of drugs. Should we expect a higher standard from him taking his personal characteristics into account?
* Majority judgment: in an unlawful act manslaughter crime, the fault requirement for causing death is objective, same as Desousa, an underlying unlawful act resulting in death, does the person have to have foreseen or desired death subjectively? No.
* All the Crown has to prove is that the reasonable person ought to have foreseen bodily harm. The dissent disagrees, says Crown has to prove that the reasonable person would have, ought to have foreseen death.
* the majority says this is not the place for personal characteristics being taken into account for establishing the standard, while dissent says they should

**Class 8**

Defence of mistake

* the accused is lacking one of the requisite elements of the mens rea that’s required.
* Mistake of law: Ignorance of the law is no excuse, if something is an error of law by the accused, that does not exonerate the person from having committed the offence
* Mistake of fact is a good defence, it amounts to a mistake about some required element of the offence, usually the circumstances; Crown failed to prove the mens rea because the accused was mistaken about something that was a requirement for guilt.
* the assertion of a mistake has to be to a relevant element of the offence. The mistake must go to something that’s both essential and relevant. (Stealing a purse and saying you were mistaken and thought it was full of cash is not essential or relevant)
* For true crimes, there just has to be reasonable doubt raised through defence of mistake.
* If it is a crime where subjective mens rea is required, the test for the mistake is also subjective. Only has to raise a reasonable doubt with respect to an honest mistake.
* When the crime requires the Crown prove the accused deviated from the requisite standard of care (objective), the accused has to prove both that he was honestly mistaken and that that mistake was reasonable.
* Even if the Crown doesn’t have to prove mens rea, the defence of mistake is nonetheless available if reasonably held an honestly mistaken belief. Accused in these cases must raise it on a balance of probabilities.
* If it’s a true crime, accused has to raise a reasonable doubt which is honest (if subjective) or honest and reasonable (if objective). If it’s a strict liability offence, the accused can raise the defence of mistake, which has to be reasonable and the accused must prove that on a balance
* In general, the rule about defences going to the jury is that there has to be an air of reality

Pappajohn

* Problematic part of these cases is on the circumstances issue around whether or not there was consent, an actus reus question, and then the mens rea issue is where is an assertion that the person had an honest belief in consent even though that consent may be absent.
* Victim claimed no consent and her evidence was inconsistent with consent.
* if the jury had a reasonable doubt that the complainant did consent, then they could acquit on basis of no actus reus. The mens rea defence, the jury could have a reasonable doubt that she was consenting (accused believed she was) and then they could acquit on the basis of no MR.
* SCC: majority says the judge needs only put a defence to a jury where there’s some evidence to give the defence an air of reality, otherwise you’re just going to confuse them. We don’t put, for instance, intoxication to a jury when there’s no drinking
* There was no evidence giving a sense of reality to the proposition that while she did not consent, the accused thought that she did.
* it is duty of trial judge in giving direction to jury to put before them the theory of the defence. In performing this task, clear that judge must put before jury any defences that may be open to accused upon the evidence whether defence raised it or not. He must give all the necessary instructions on the law relating to those defences.
* This does not mean the trial judge becomes bound to put forward every defence suggested by council. It’s only where there’s that evidentiary basis that he must direct the jury on it, otherwise he should not, as it will only lead to confusion.
* Does the mistake have to be reasonable? In 1983 Pappajohn case, only has to be honest, as it’s a true crime with subjective fault requirement. Problem is in these circumstances, it’s difficult to undermine an honest belief.
* As a result of Pappajohn, parliament enacted s. 265(4) of the Code, which says that where an accused believes the complainant consented to the conduct, the judge, if satisfied that there is sufficient evidence and if believed by the jury will constitute the defence, shall instruct the jury to consider the presence or absence of *reasonable* grounds for that belief.

Ewanchuk

* Major J: (majority) actus reus of sexual assault has three elements: There is touching (conduct) of a sexual nature (conduct) and that it is unwanted (circumstances).
* It is clear after Ewanchuk that “unwantedness” is entirely subjective to the complainant. What the Crown has to prove is that there was no consent and that is assessed entirely on the basis of what the complainant thought. It isn’t about what the accused thought or what the accused may have taken from the complainant’s actions.
* Court says that there is no doctrine of implied consent. There is only consent or no consent, from the complainant’s point of view.
* Consent is negated in certain circumstances. There is no possibility of finding that there has been consent if that consent has been obtained through fear, application of force, fear of that application to person other than the complainant, fraud, or the exercise of authority.
* there is recognition of the defence of honest mistaken belief of consent. Culpability is removed where accused honestly and mistakenly believed there was consent (provided it was not obtained through that list of factors above).
* Limits to this defence: where the words of consent are expressed by someone else on the complainant’s behalf, where the complainant is incapable of consenting, where the accused induces the complainant to consent through abusing position of authority or where complainant expresses through conduct a lack of agreement to engage in activity, or where complainant expresses through words or conduct an unwillingness to continue the conduct (someone can change their mind at any stage of a sequence of events)
* it is not a defence of sexual assault crimes that the accused believed the complainant consented where the accused’s belief arose from the accused’s self-induced intoxication or reckless or wilful blindness. Also, accused must take reasonable steps in the circumstances known to the accused at the time to ascertain that the complainant was consenting.

**Class 9**

Defence of Intoxication

* common law defence.
* conflicting policy considerations of what to do with someone when they’ve committed a crime and are drunk.
* Intoxication that is not self-induced is a matter of involuntariness
* self-induced, courts are concerned about convicting somebody in those kinds of circumstances because they may well not have had the appropriate mens rea for the crime that they’re charged with but the reason they don’t have it is that they’ve gotten themselves drunk: is it appropriate to find them blameworthy?
* Rule originally was that intoxication was a limited defence to offences or crimes that were defined as being specific intent.
* if you were a little drunk, it was no defence, and if you have consumed alcohol or drugs in order to give you the courage or stamina to commit the offence, that also ruled out
* You had to have been intoxicated enough so that you did not form the specific intent required of a specific intent offence.

Specific intent offences

* have a kind of ulterior purpose, they’re offences that go beyond the immediate.
* whether the crime says something like “with the purpose of” or “for the intention of.”
* Murder has been defined as specific intent and all attempt crimes are specific intent offences, since they are all with the intent of doing something else. Any crime that has a clear purposive element. All of the law has allowed intoxication to specific intent offences.
* Most specific intent offences have lesser, included general intent offences
* For example, robbery is made up of assault and theft; intoxication may clear the charge of robbery, but not these other two included offences, since they’re general intent.
* Idea of specific intent and general intent offences is a distinction that many commentators and some judges (especially Dickson) think is just a fiction. However, the two categories have been created and sustained simply to immunize certain offences from defences of drunkenness.

Leary

* whether rape was a crime of specific or general intent and therefore whether drunkenness was a defence.
* Dissent in Leary by Dickson was that the whole distinction between specific and general intent makes no sense. He says that the way that this works turns offences that aren’t specific intent offences into absolute liability. It doesn’t show that the accused had required mens rea.

Bernard

* Argument is that the distinction the judge made between general and specific intent offences is unconstitutional because the result of it is to create an absolute liability offence for general intent offences. The accused can be convicted, the argument goes, without any mens rea
* Sexual assault causing bodily harm: actus reus: assault (conduct), sexual in nature (conduct), with lack of consent (circumstances) which is purely from perspective of the victim (Ewanchuk) and causing bodily harm (consequence).
* You need mens rea for the assault and there has to be at least a recklessness with respect to the lack of consent for the mens rea.
* You don’t need any mens rea to be convicted of the bodily harm part. DeSouza: You put yourself in a position where extra consequences to occur, you don’t need mens rea for that extra consequence or harm to occur.
* General rule: intoxication should not be an excuse for committing an offence and although that is the starting point for what we think about drunkenness, there could be an exception to that general policy rule which is that intoxication can mitigate a specific intent offence. Makes no sense in policy or rationality to extend that exception to general intent offences.
* The general intent offence is one where the only intent involved relates solely to the performance of the action in question with no ulterior motive.
* Says that in crimes of general intent, Crown is not relieved from proving any element. Excluding drunkenness is merely to prevent accused from relying on his self-imposed drunkenness.
* McIntyre: Drunk people shouldn’t avoid criminal liability on that basis and the Crown is not relieved from proving mens rea for a general intent offence.
* he says that normally you can infer mens rea by looking at conduct (infer what people thought, met, intended, even if there’s a subjective requirement, by looking at what they’re doing. If you can’t do that because the person is too drunk and is acting in intoxicated way, he says that you can find the blameworthiness from the fact that the person voluntarily got himself drunk.
* Wilson agrees with most of what McIntyre says, which retains all the previous law. Her view though is that there could be an exception where a person is so drunk that they’re verging on insanity or automatism to negate the minimal mens rea for sexual assault.

Daviaux

* defence of extreme intoxication is allowed for this offence.
* Cory says that blameworthiness in the form of becoming drunk, self-intoxicated, is not sufficient to satisfy culpability for the essential element for a general intent offence.
* doesn’t disturb difference between specific intent and general intent offences.
* Cory says that to deny such a defence would, contrary to s.7 and s.11(d) of the Charter, allow for a conviction even if the tryer of fact had a reasonable doubt of the existence of the mens rea.
* it is up to the accused to convince on a balance of probabilities the finder of fact that he had no mens rea due to intoxication.
* Section 33(1) cancels out Daviaux, says that it is not a defence to an offence that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence where the accused departed markedly from the standard of care.
* a person departs markedly from the standard of reasonable care generally recognized in Canadian society is criminally liable when interfering with bodily integrity of another person. Standard is not defined, but they are liable regardless of intoxication.
* S.33(1) is limited to crimes of general intent that includes an element of assault or other interference or threat of interference against the person. The Daviaux defence is still available for all other crimes, like crimes against property

**Class 10**

Not Criminally Responsible by Reason of Mental Disorder.

* Mental illness is relevant at three points (an individual need not be mentally ill for all 3):
* at the time of the crime (he is saying that there needs to be consideration of his responsibility because he had a mental disorder at the time the offence was committed).
* the time of trial (sometimes a person, or the court will find, that the accused is not fit to stand trial, too mentally ill to be tried.
* At the time of sentencing (mental illness can be seen as a mitigating factor or it could be considered in the whole sentencing profile of what should happen to this person).
* However we decide that someone is mentally disordered, if we decide that, we will not find them guilty but we’re also not going to acquit

Swain

* Amendments prior to this case: mental disorder is substituted for insanity and there is addition of concept of responsibility, we say “not criminally responsible by reason of mental disorder.”
* Before Swain, the real problem with finding “not guilty by reason of insanity” was what happened to people as a result of that finding. Regardless of what kind of state they were in or the kind of crime they committed, they were sent off to a locked ward indefinitely and review board’s recommendation went to the cabinet, it was an entirely political decision what happened to them; if the crime had gotten a lot of people upset, they’d be in for a long time
* Swain: two issues – whether it was unconstitutional for the code to require the trial judge to sentence the person to strict custody without any assessment of present dangerousness and without any criteria and whether it was unconstitutional to let the Crown raise evidence of insanity against the wishes of the accused;
* whole review board system and strict custody system was dismantled. Found to violate s.7 and not saved by s.1 and prompted the govn’t to put into place the current system
* said that the Crown could not raise evidence of insanity or defence of mental disorder on its own unless the accused put his mental state into issue.

Chaulk and Morrisette

* post-Swain, waters down Oakes in a significant way.
* Questions the presumption of criminal law that people behave with free will and ahve capacity to make moral choices. Mental disorder questions that assumption.
* Mental disorder: 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 the quality of the act or omission or of knowing that it was wrong.
* First thing you have to figure out is thus whether or not a person has a mental disorder, which is defined as a disease of the mind. Treated as a legal question and not a medical question.
* there will be psychiatric evidence in these kinds of cases but the judge will ultimately decide whether there is a disease of the mind on the basis of that evidence and whether it can then go to the jury along with all of the other evidence.
* Second thing: whether the person was incapable of appreciating the nature and quality of the act or omission or knowing it was wrong.
* Chaulk, accused just has to prove he didn’t know it was legally wrong, but Chaulk goes beyond that and makes it “wrong” in the moral sense
* What Chaulk challenges: that every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility until the contrary is proven on a balance of probabilities. Chaulk argues this presumption is a violation of the Charter
* the burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue. After Swain, this can only be the defence, though it could be the Crown if the accused puts his mental state at issue in trial
* A mental disorder is not a self-induced or transitory state like drugs or concussions (Cooper)

**Class 11**

Chaulk and Morrisette

* At issue in the case was the presumption that everyone shall until the contrary be proven be presumed to be and to have been sane. Reason: we don’t want the Crown to have the burden to prove in all cases that a person is sane. It’d be a huge time sink and that aside, it’s very onerous for the Crown to prove and the times when sanity is actually a factor are infrequent
* when someone is not criminally responsible by reason of mental disorder, sometimes it’s an actus reus (the person is basically in disassociative state and is doing something involuntarily on account of the underlying disease of the mind)
* sometimes you can describe it as a person doing something because they don’t have the necessary knowledge/intent/requisite mens rea
* Lamer says accused that is mentally disordered has a skewed frame of reference, an altered perception of right/wrong, intentionality, something different from the rational person that can make choices about committing a crime
* Presumption is found to violate the Charter. No one can be guilty of a criminal offence unless sane, therefore sanity is an essential element of every offence. Presumption of sanity thus allows an essential element to be presumed.
* Accused must disprove sanity on balance of probabilities, therefore jury must convict despite reasonable doubt). This violates the presumption of innocence

Applying the S.1 Oakes test to the Presumption of Sanity (Chaulk)

* Objective is pressing and substantial: Removing the onerous burden on the Crown of proving an accused person to be sane, otherwise accused might raise this more frequently and guilty persons will be found insane.
* Rational Connection: putting the burden of proof on the accused will facilitate the Crown by preventing unjustified insanity verdicts, thus there is a rational connection.
* Minimal Impairment: obvious minimal impairment, which is often the answer where there is an infringement of a right, would be for the accused to just raise some evidence, evidentiary burden. The court says that that, however, wouldn’t be as effective; there would still be more fake claims and more unjustified insanity verdicts, and that’s the concern here. Court says that not all options of preventing fake insanity defences are equally effective.
* evidentiary burdens would be less of an infringement but less effective; not up to the court to second-guess the wisdom of the choices made by the legislators. Parliament may not have chosen the absolute least intrusive means of meeting its objective, but has chosen from a range of means which impair as little as is reasonably possible. As long as they’ve chosen something within a range of possibilities to meet the objective, that’s good enough, court won’t insist on the one choice that is the absolute least intrusive means possible.
* Proportionality: section 16(4) has to accommodate a variety of social policy considerations, the first being to avoid a virtually impossible burden on the Crown, making sure that the guilty are convicted, and making sure that persons are not acquitted outright who are really insane.

Chaulk

* Court had said in Schwartz is that they were unwilling to allow a defence when accused knew something was a crime but thought it was right to commit offence. Court thought this was too restrictive, extended responsibility to those who couldn’t distinguish between right and wrong, and they expand the definition of “wrong”
* Lamer says the rationale underlying defence of insanity in Canada is the belief that persons suffering from insanity should not be subject to standard criminal culpability
* A person may well be aware that an act is contrary to law but by reason of natural or imbecility disease of the mind is at the same time incapable of knowing that the act is morally wrong in the circumstances according to the moral standards of society. For instance, they know murder is illegal, but they think God is ordering them to do it.

Automatism

* Assumption is that person with disease of the mind means it’s ongoing, which means we have to worry more about recidivism than someone who is under automatism, doesn’t relate to an ongoing condition, one-time thing. That’s why they get an acquittal as opposed to NGBRMD.
* Difficulty is differentiating automatism from disease of the mind
* Internal sources are things that lead to it being a disease of the mind. External factors could be blows to the head, but could also be psychological blows.

Rabey

* Judge has to decide whether or not there is any evidence of disease of the mind, any air of reality to that assertion, if so, he explains that disposition to the jury, who then decide
* talks about the external sources/causes of automatism (transient effect caused by some specific external factor like concussion) and internal causes (having source in accused’s psychological or emotional make-up) of automatism. The latter is disease of the mind, but not the former.
* Transient mental states cannot be properly categorized as disease of the mind in a general statement and must be decided on case-by-case basis.
* If the problem is internal to him and his own emotional state, it would have to be disease of the mind. That said, a severe emotional shock could nonetheless be deemed an external cause that leads to sane automatism.
* A psychological blow could be the source of non-insane automatism but only if it were such that a normal person might be affected as such. Court is saying it can’t depend on your particular idiosyncratic emotional make-up
* heartbreak doesn’t count as such a blow, it’s part of the normal course of life. “Ordinary stresses and disappointments of life do not constitute an external cause constituting an explanation for malfunctioning of the mind that takes it out of category of disease of the mind” People who are easily affected by the ordinary things in life or things that would not affect others in that way would not be able to claim non-insane automatism.

**Defence of Automatism w/o mental disorder**

***Parks (sleep-walking)***

* Definition of disease of the mind is the threshold question – the answer decides if the defence of mental disorder or non-mental disorder automatism
* **Lamer** – Conclusion: (1) accused was sleepwalking at time of incident. (2) Sleepwalking is NOT a neurological impairment, or psychiatric illness, or anything else of that kind. (3) there is no medical treatment for sleepwalking aside from good health practices.
* **Two-step process** when non-insane automatism goes to jury
* some evidence to support leading the defence to the jury – must be something in the evidence to give it an air of reality
* To consider whether the condition or circumstance is, in law, sane automatism. By default, it means that it is NOT a disease of the mind. A legal, not medical, determination
* **LaForest was** talking about policy considering in trying to weed out those individuals who pose a continuing danger by evidence of what they’ve done. Related to “internal cause” theories: disease of the mind to be distinct from external circumstances. 🡪 Really about public safety. 🡪 hospitalization (separation from society)
* this is a defence that can easily attempted to be feigned. However, sleepwalking is something that can’t be faked because you need medical evidence and medical history to document the sleepwalking (not a lot of non-insane automatism defences)

***Stone –* More important case**

* **Judgment SCC:** Attention shifted from what was always called “unconsciousness”, and he talks about “impaired consciousness” where the individual has no voluntary control of his or her actions. The second thing that comes out: **Two step test for putting non-insane automatism to the jury**. This comes from the Majority of *Parks*
* **1)** Judge must assess whether there is a proper evidentiary foundation for defence of automatism (non-insane). Whether or not there is an air of reality for the claim of non-insane automatism.
* **Number of conditions necessary for Step 1:**
* Must be an assertion of involuntariness (almost always means the accused will have to testify)
* There is likely to be psychiatric evidence (at least some), which is necessary but insufficient
* Evidence of shock or trigger that led to automatism
* Should be corroborating evidence such as evidence of a documented medical history, of automatism-like instances
* Corroborating evidence by a bystander, revealing that the accused seemed to be behaving strangely. Acknowledged that the evidence of bystanders must be approached carefully, of course
* **Issue of motive.** The defence of automatism should involve acts of violence that are random. There shouldn’t be a victim where the accused has some motive to hurt that individual 🡪 it brings the claim under suspicion. If the person is both the trigger AND the victim of the state of automatism, there is some suspicion.
* **2)** Determine whether condition is mental disorder of non-mental disorder automatism.
* It is clear after *Stone* that most kinds of automatism that will go to the jury as a defence will fall under the Mental Disorder category of Automatism.
* Judge also alters the Burden of Proof for this defence.
* the accused to prove ALL forms of automatism on a Balance of Probabilities. (S.16 to prove mental disorder).

**Class 12**

Perka (Necessity)

* The defences of necessity, duress, and self-defence rest on an understanding that there are certain circumstances in which we will excuse the individual, say that person’s actions were justified in committing a criminal offence. Necessity is the basis of that, where we don’t expect martyrdom in certain circumstances.
* in certain cases individuals are faced with the choice of avoiding a greater harm or pursuit of some greater good. More often, these defences are about circumstances where there is a difficulty of compliance with the law in emergencies.
* Could be physical emergencies or emergencies that arise from threates, or emergencies that arise from threats to others
* These defences are available are in circumstances where the person has no real choice about what to do. In Perka: they either die or they commit a crime by bringing the ship to shore.
* In situations of duress, there is a choice, but the inference of these defences is that it’s not a real choice. Perka likens that to involuntariness. Every crime presumes voluntariness
* this isn’t physical involuntariness, but moral involuntariness. There’s no real choice about what to do and the choice has to be because of the circumstances, to commit the crime.
* Involves a 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 of self-preservation or of altruism overwhelmingly impel disobedience.

Perka (limits to the defence)

* There is an expectation of appropriate resistance of pressure, not going to allow defence of necessity in circumstances where the individual didn’t try to figure something else out in a context where there was a pressure to commit the crime, there has to be a significant amount of pressure; the circumstances have to be fairly extreme.
* The fact a person is involved in a crime is NOT a bar to using this defence. However, if there were perceived, legal alternatives, that would be a bar to the defence of necessity.
* There has to essentially be no way out. Idea is that there was an imminent risk taken to avoid direct imminent peril.
* Proportionality: the harm caused must be less than the harm avoided.

Latimer

* Appealed after first conviction to CA about whether the mandatory sentence was constitutional in his case; he wanted constitutional exemption to that mandatory minimum because of his unique reasons and circumstances. Sask CA didn’t agree and focused on two issues: seriousness of the crime and deference to parliament
* if the child were not permanently disabled, but was in extreme pain, would there be any question about making heroic efforts to sustain and maintain life? If the answer no, the decision would appear to be clearly predicated upon the diminished value assigned to the life of a handicapped child
* SCC said defence of necessity lacks air of reality based on barebones requirements:
* You have to establish that there was a clear and imminent danger. More pain wasn’t a change and isn’t the kind of thing SCC thought was meant by that requirement.
* Is there a reasonable legal alternative? Court says yes, they could’ve just struggled on and just continue with the life that had existed.
* Proportionality. Was there going to be more harm done by the criminal act than not? Latimer’s position that it was better for his daughter not to be alive than to be alive because of the painful life that she was suffering or enduring. Court says that’s not an objective assessment of proportionality. It’s not just that you think things would be better, but there must be an objective sense that the harm that was avoided was greater than the harm done
* Leaves open the question as to whether homicide could ever be a proportional response

**Class 13**

Duress

* another excuse based defence
* due to nature of the physical environment or compulsion or threats from another person, we say we will excuse the individual who has otherwise committed the crime, had the appropriate intent and has completed the actus reus, because of the reason they have done it
* One of the ways of focusing on defences was to ask a series of question, first of which is whether a particular defence was statutory or common law. Duress has both types.

s.17

* Paquette said if accused has been a principle offender of a crime, go to s.17 for the statutory defence of duress. If not the principal offender of the crime, just a party to it, go to the common law defence.
* s.17: a person who commits an offence under compulsion by threats of immediate death or bodily harm by a person who is present when the offence is committed is excused from committing the offence if he believes the threats and is not party to a conspiracy under which he is subject to compulsion. This defence is not available to treason, sexual assault, murder, forcible abduction, etc. It is thus a very limiting defence. It’s principle offender.
* there’s a requirement of immediacy, of serious consequence (immediate death or bodily harm).
* Next requirement: that it is from a person that is present when the offence is committed.
* subjective; has to be a real belief that the threatener will carry out what he says”
* conspiracy offences cannot rely on this defence.
* section is a bit ambiguous about whether you can claim this defence if you are protecting a third party. Read strictly would say no. Threats are not directed to you.
* Problem: list of enumerated offences that are excluded seem arbitrary, no clear rationale.

Hibert (common law)

* He aided or abetted the principle in the principle’s attempted murder. However, he’s guilty of the same crime if convicted.
* Before Hibet, the question was whether things like threats or compulsion, things essence of the duress, really go to mens rea or are separate and apart and are applicable to the defence after the Crown has proven both the actus reus and the mens rea of the offence
* Court says the threats that are involved in claims of duress do not negate mens rea. Usually threats results in us saying that that’s an excuse we will tolerate, just relates to motive
* The basis of party liability is not whether or not the individual wanted the offence to happen but rather whether there was substantial certainty or recklessness that the individual knew that the offence was going to happen
* Lamer said that evidence of duress doesn’t negate the fault requirement for party liability and duress exists as an excuse-based defence built on the concept of moral involuntariness, that there’s no real choice in a normative or moral kind of way. A person is subjected to external danger and commits an act as a way to avoid the harm the danger presents. For duress, it is the intentional threats of another person that is the source of the danger.

Safe Avenue of Escape

* If there’s a safe avenue of escape, that the accused could have utilized and thereby not committed the crime, he was expected to do so. This is part of the idea that compliance with the law must be impossible before the behaviour will be excused.
* Lamer says that the requirement is to be accessed according to whether the accused saw a safe avenue of escape, subjective component, and whether a reasonable person would have seen the safe avenue of escape, objective, and that the actor’s failure to take steps to inform himself of the true state of affairs is a choice and if the person did not inform himself of the alternatives, than that person is not truly involuntary.
* Court is saying that there has to be a subjective view that there’s no safe avenue of escape, however that is modified by the requirement that the accused has to have taken whatever steps were reasonable to find out whether there was anything else he could do.
* must take into account the persona characteristics of the accused when evaluating and assessing these steps. The person is in a situation that he didn’t create.You have to assess that objective reality on the basis of who the person is

Ruzic

* she’s the principle offender and as such, it would go to s.17
* The offences that she’s charged with are not part of the enumerated list and thus she is not disentitled by virtue of her offences; however the threats are halfway around the world, they’re not there and not immediate and it is on that basis that she challenges s.17 of the Code and says that this is unconstitutional because only voluntary conduct can be punishable and hers wasn’t
* court said that normative/moral involuntariness is a principle of fundamental justice – if a person has a threat to life, liberty, or security of the person and can be convicted of an offence despite moral involuntariness, which would be the case in s.17, that is unconstitutional
* The burdens of proof for duress remain on the accused in that the practical burden is to raise an air of reality for each element of the defence and then up to the Crown to incorporate that in its case about whether guilty beyond a reasonable doubt in view of the
* Ruzic suggests that duress is largely an excuse based defence on same principles as necessity – like necessity, situation where accused is responding to external pressure and Hibert means this might mean that occasionally this may lead to negation of mens rea, but very rare and only where there’s a purposive element of the offence.
* Criminalizing morally involuntary conduct violates a principle of fundamental justice. Thus, the s.17 requirements of immediacy and threatener being present have been struck as unconstitutional. Same argument could be used on rest of s. 17: could be a morally involuntary accused guilty of one of the enumerated offences. It is unclear from Ruzic what the status is of all those excluded offences in s.17.
* Best thing to do would be to say that s.17 has all been struck down and everybody can go to common law defence.

**Class 14**

Attempts

* Attempts are offences that are not completed. Law is that we punish attempts though there’s no harm caused and conversely we punish them to a significantly lesser degree than the person who successfully completes the offence.
* There’s a general harm caused by the attempt(fear, policy). Also it’s an acknowledgment that risky behaviour is unwanted and is liable to censure by the law, deterrent effect. Moral luck.
* Punishing for a morally blameworthy state of mind. We punish them less though, because they haven’t caused any harm. We have to say that what we’re really punishing is the state of mind, which is relatively the same as for someone who completed the crime.
* You can attempt an offence by an omission, do or omit to do something for purpose of carrying out intention, like not feeding your child to fail to provide necessaries of life, but it fail.
* Doesn’t matter whether it’s really impossible to commit the offence.
* The attempt must be more than mere preparation. Mere preparation is too remote to hold a person liable. Point is that the steps you have taken are so far towards the offence that the only next thing that can happen is completion.

Ancio

* you have to have an actual intention to commit the offence, you have to intend to commit the offence and do what you do for that purpose. You cannot attempt murder recklessly. An intention must be required for attempt of murder, not recklessness, higher standard. This is probably true for all attempts as well.
* The mens rea is intention for attempts, not recklessness
* Intention (same as Buzzanga): if you know that something is almost certain to come about, that is sufficient. Knowledge or substantial certainty.

Mere Preparation

* Actus reus is not the same as the real, completed offence, but the individual has to have gone far enough in the steps in the act beyond mere preparation to constitute the actus reus of the offence of attempt.
* Determination of whether something is mere preparation is a question of law. If the determination of the case has been made on the basis of whether there’s been mere prearation or not, that’s an actus reus finding and it’s a question of law and is thus appealable.
* However, if the determination of whether or not there has been an attempt has been made on the basis of mens rea, that’s a question of fact and is therefore not appealable.
* very important to the further preceding of the case whether the trial court has found whatever it’s found about the attempt on the basis of the actus reus (whether there’s more than mere preparation) or on whether the person had the requisite intention to comit the offence.
* Mens rea is the most important part of offence of attempts of anything because that’s the unlawful, blameworthy thing; we’re punishing the guilty mind more than the acts

R v. Sorrell and Bondett

* CA: trial judges reasons are ambiguous as to whether he was finding no actus reus or no mens
* CA says trial judge didn’t make a finding that they had the necessary intent. CA says that both the intent and the act had to be determined from the act. There’s an inference from what the accused have done as to what their intention was and the intention is the more important part, because that’s what’s blameworthy.
* Has to find some mens rea, as that’s what’s blameworthy
* This case gets at this funny relationship between mens rea and actus reus in attempts. We look at the act to guess what the intent must’ve been but the intent also colors how the actions are perceived.
* Where the accused’s intent is otherwise proven despite the acts being on their face equivocal, we can find an attempt. Where there is no proof of the accused’s intent, the equivocal acts aren’t enough to find an attempt.
* The more proof there is of intention, the less you need of actus reus. The better the evidence about what the accused were intending in terms of this crime, the less of those actions you need. But if you’re using the acts to infer the intention, the acts must be unequivocal.

**Class 15**

Parties to an offence

* Principal: person who actually did the offence and committed the actus reus
* Parties: involved in some way in the commission of the offence, but haven’t done the crime, the action or conduct of the actus reus that is defined in the offence.
* Be careful to distinguish crimes where there is joint participation between co-principles and those situations in which there is more than one person involved in the crime, but one is a principle and one is a party. Any of those situations are nonetheless described as “co-accused”
* the law treats as equal the principle and the aider/abetter for purposes of liability, both are convicted of the substantive offence without any notation on criminal record to say whether they were an aider/abetter. There can be differences in sentencing though.
* You can aid or abet by the commission of an action or by the failure to do something
* The mode of participation is not in the charge; all are charged for that substantive offence (robbery, assault, murder). The Crown does not need to specify on the charging document the mode they are going to use to prosecute the accused. They may well be prosecuting the accused for being an aider or they could be prosecuting the accused as a principle. It is left open for the Crown to do either at trial.

Aiding and Abetting

* Abetting refers to the activities of the accused during the commission of the offence. Dunlop and Sylvester defines it as encouragement, support, giving assistance to someone while that individual is committing the offence. As guilty as anyone who committed the criminal act.
* Aiding is helping or promoting or facilitating the offence, usually when you aren’t there necessarily at the time of the commission of the offence; you may be driving the getaway car or driving to the scene of the offence, being a lookout
* Dunlop: mere presence is not enough, if you are simply there, a bystander, during the commission of an offence, that isn’t sufficient to make you a party. If you’re a bystander and do nothing and witness the offence that doesn’t make you a party.
* If, however, your presence encourages the commission of the offence, that would make you a party.
* Omission is not doing something that it was your legal obligation to do. Not calling the police when seeing a crime is thus not an omission worthy of criminal liability
* You can be charged as an aider or abetter even if the principal is never found, prosecuted, or convicted. This means the principal may plead guilty to a lesser included offence, but the aider/abetter will still be charged to the full offence to which you were a party.
* Thatcher: Judge may present all three options to the jury: say that you found that the accused did the deed or you may find that they aided or abetted. Give options.
* Mere presence is not enough unless you implicitly lend encouragement to the events that are transpiring, like making it more difficult for victim to get away or if it encourages the principals by presence alone. Question of Fact
* It doesn’t matter that your actual aiding or actions weren’t helpful. If you did what you did for the purpose of the commission of the offence, that still constitutes
* Aiding and abetting requires you to have mens rea, it is analyzed according to actus reus (doing or failing to do something in the context of facilitating the commission of that offence) and mens rea (you have done that thing for the purpose of committing the crime).
* You do not have to know that what you are aiding is a crime, you just have to know generally what it is that you are assisting with. Have to know you are aiding but not that it’s a criminal offence.
* Also, the intention/mens rea for the aider doesn’t have to be for specifics of the offence.
* Wilful blindness is a substitute for knowledge here: yes maybe he didn’t know, but he had wilful blindness, drove a guy to the bank while he was wearing a mask and carrying a gun.
* For party liability, it is probably intention or knowledge (and hence wilful blindness) that’s required. There’s not a case specifically on point about recklessness, but likely intention or knowledge.

Kony

* Prize-fight: court held that mere presence wasn’t enough, but if they bet on the fight or yelled encouragement to the fighters, that would be aiding and abetting.
* Just watching an incident, however violent, isn’t enough but if you do something that makes it worse, that would be ending or abetting.

Planning

* s. 21(2): when 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 unlawful purpose, commits an offence, each of them who knew or ought to have known that the omission of the offence would be a probably consequence of carrying out the common purpose is a party to that offence.
* Plan to do something unlawful and an agreement that it would be a joint effort. If one of them commits an offence and the other knows or ought to have known that the crime would occur to carry out the common purpose, then they’re held liable as a party.
* The party in this offence could have very little do with the commission of the further offence, don’t even have to be there, but if they knew or ought to have known that a crime was likely to be a probably consequence of carrying out the common purpose, than they are liable.
* “Ought to know” is the reasonable person in the position of the accused.
* Common intent is mens rea requirement. You have a plan to do something unlawful and that may be the end of it for you but the other person goes ahead and does the offence and thatmakes you liable. It’s the agreement, not the action, of any illegality that matters.
* one defence in the context of this kind of liability is that you can withdraw form a common purpose, decide you don’t want anything to do with that original plan and if there’s evidence that you told principal that you don’t want to do the illegal act, that can sever your liability for the common intention provision.
* This objective standard can be very problematic: it’s possible, if for example the principal turns out to kill someone after you’ve had a common intention to rob. There could be a difference in the standards of liability because the principal who might be accused of murder would have to show subjective foresight of death and the party would not.
* Courts in Logan said that where there has been a constitutional determination of mens rea for particular crimes (special stigma crimes) then accused brought into crime by common intention provision are held to the same standard as the principal.
* For murder, if a person is liable through s.21(2) of the Code then the objective standard, that you ought to have known, is read out.