LAW 120: Criminal Law

**Charge and Law:**

1. **Reading the charge:** 
   1. Check required mental fault, act/omission, check penalties and default penalties.
   2. See definitions in s.2 of criminal code
   3. Read commentary
   4. Interpretation of the Act (Bell ExpressVu)
   5. Direct connection (temporal and causal) in wording? (Raja/Pare)
   6. New Offence? Retroactive offence? (Fedoruk/Amato)
2. **State Issues:**
   1. Burden of proof (Lifchus)
   2. Evidentiary burden? Beyond Reasonable Doubt vs BoP (Woolmington)
3. **Charter Issues?**
   1. S7 Liabilities? (Finta)
   2. S11(d) Reverse onus? (Oakes Test, Whyte)
   3. Justificiation under s1? (Keegstra)
   4. Trial/instruction issues?
      1. Misdirection (J.H.S./Boucher)
      2. Evidence (Stichcombe/Murray)
      3. Competency (Meer)
4. **Check Jordan test (18 or 30 months)**

**Actus Reus:**

1. Contemporaneity? (Fagan)
2. Physical Voluntariness (King and Ruzic)
3. Omission based offence
   1. Assault
   2. Duty-based offences
      1. Statutory duties – lack of duty (Browne)
      2. Common-law duty (Thorton, Mabior)
4. Causation (Nette's TEST/Harbottle Test/Smithers Test)
   1. Causation issues:
      1. Establishing causation (Winning)
         1. Factual and legal causation (Smithers/Nette)
      2. Negating causation
         1. Intervening acts (Pagett/Stratton/Marybin)
         2. Remoteness
         3. Abandonment
            1. Timely communication
            2. Nature of the offence
            3. Accused's degree of participation
      3. Statutory provisions
      4. Accomplice liability and causation
      5. Causation and s.231(5)

**Mental Fault:**

1. What is the level of mental fault. How can it be proved?
   * 1. Direct evidence
     2. Common sense inference (Buzzanga and Durocher)
     3. Intention (Buzzanga)
     4. Motive as strengthening tool. (Lewis)
2. Was level of mental fault fulfilled?
   1. Objective Foreseeability (Briscoe/Creighton)
   2. Reasonable steps (ADH,Levigne)
   3. Marked Departure (Hundal/Roy)

# Chapter 1 – Introduction to Canadian Criminal Law

## B. Sources of the Criminal Law

1. ***Constitution Act*, 1867**

* Section 91 – Federal Powers
  + Criminal law
    - Procedures to be followed in criminal trials
    - Establish, maintain, and manage federal prisons
    - For sentences >2 years
* Section 92 – Provincial Powers
  + Establishment, maintenance, and management of prov prisons
    - For sentences <2 years
    - Provincial offences aren’t true criminal offences, no record
  + Administration of justice in the province
    - Procedures in civil matters
    - Creation of the courts
    - Staffing courts
  + Impose punishment by fine or imprisonment for provincial laws

1. ***Criminal Code*, RSC 1985, c C-46**

* Contains most criminal offenses – **definitions** and **offence creating provisions**
* Contains most procedure followed in criminal cases
* Sections 8 and 9 – principle of codification so public knows laws
  + Section 8 – common law defences are preserved
  + Section 8(3) common law offences NOT permitted because of s 9 but common law **defences** are allowed – **principle of fairness to the accused**
  + Section 9 - all criminal offences created by **statute** (except contempt of court)

1. **Canadian Charter of Rights and Freedoms 1982**

* Rights the individual can exercise against the State
* Constrains power of the State
* Often used to exclude evidence, challenge laws, or violation of rights
* Sections 7-10 legal rights (ie right to jury trial if liable for prison > 5 yr)

## C. The Commencement of Criminal Proceedings

* After an investigation has been conducted, a police officer fills out a formal charging document called an ***information***
  + Police officer swears that he/she has reasonable grounds to believe the offences have been committed in front of justice of the peace (JP)
  + JP signs the information
* If JP decides that there are reasonable grounds to proceed with the charge, he/she will ***issue process***
  + JP can compel an accused to come to court to answer the charge

## D. Classification of Offences

* **Summary Conviction Offences**
  + Provincial court by judge only - Appeals go to supreme court by judge only
  + No right to preliminary inquiry
  + No minimum sentence
  + Maximum penalty – 6 months in jail/$5,000 fine
  + **Super-summary offences** - sentences have a higher penalty -usually part of a hybrid offence (S787 sentences don’t apply)
  + LIMITATION PERIOD S 78.2 6 months to charge with offence unless both parties consent (might be in your interest if charged with hybrid offence)
* **Indictable Offences**
  + Generally more serious criminal offences
  + Created by federal government (in *Criminal Code* and other statutes)

**Three different types of trials**

1. Offences listed in **s 553** of the *Code* (e.g. Theft under $5,000)

* Tried in provincial court by **judge alone**
* Like summary convictions but more leeway in punishment
* No preliminary inquiry

1. Offences listed in **s 469** & **468** of the *Code* (e.g. Murder)

* Tried in superior court
* Usually the accused will have a preliminary inquiry
* Trial before **judge and jury**

1. Electable offences (almost all are hybrid offences)

* Majority of indictable offences fall here
* Accused may elect the mode of trial , prov or superior court
* **Judge alone or judge and jury**, accused decides
* **Hybrid Offences**
  + Crown decides whether to proceed on summary conviction or on indictment (e.g. Sexual assault)
  + Penalties different by how they proceed
  + Accused can choose between trial by jury and trial by judge alone
  + Virtually always **electable** offences

## E. Outline of a Criminal Trial

1. Police lay an **information** to Justice of Peace
2. Justice of Peace decides whether to proceed
3. Arraignment (formal reading of the charge to the accused)
4. Plea Entered (“Guilty” or “Not Guilty”) 🡪 guilty straight to sentencing
5. Plea not guilty 🡪 Trial
   1. Opening statements
   2. Crown Case (Crown calls witnesses and documentary and real evidence is entered)
   3. Crown case is closed
   4. Defence may choose to make a “No Evidence Motion”
   5. Defence Case
   6. Defence Case is closed
   7. Closing Arguments
6. Charge to jury by trial judge (if applicable)
   1. Summarizes evidence in case
   2. Set out positions of accused and Crown
   3. Give instruction re burden of proof
   4. If exceptions re burden of proof, instruct jury
   5. Will tell jury options of verdicts if choices available
   6. Will tell jury what you have to find to find any of those verdicts
   7. CAN NOT tell jury what sentence is or will be subject to
7. Verdict

**R. v. Anthony Cook (Joint submissions)**

* Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.
* First, the guarantee of a conviction that comes with a guilty plea makes resolution desirable (Martin Committee Report, at pp. 285-86).
* Second, the accused may have information or testimony to offer the Crown that can prove invaluable to other investigations or prosecutions. But this information may not be forthcoming absent an agreement as to a joint submission.
* Third, the Crown may consider it best to resolve a particular case for the benefit of victims or witnesses.

**R. v. Jordan (Judicial Delays)**

* The right to be tried within a reasonable time is central to the administration of Canada's system of criminal justice. It finds expression in the familiar maxim: "Justice delayed is justice denied." An unreasonable delay denies justice to the accused, victims and their families, and the public as a whole.
* Created new ceiling for trial cases, 18 months for cases going to trial in the provincial court, and at 30 months for cases going to trial in the superior court.
* Exceptional circumstances lie outside the Crown’s control in the sense that (1) they are reasonably unforeseen of unavoidable, (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise.

JURY DECISION DECISION OF FACT CAN NOT BE APPEALED

JUDGE DECISION DECISION OF LAW and FACT LAW CAN BE APPEALED

**Grounds of appeal:**

Trial judge erred in LAW

Trial judge given deference in FACT finding unless egregious error

**Purpose of Criminal Law:**

(a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary; (d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

**R. v. Raja**

**Facts** – Terrorism Act 2000, c. 11 (U.K.)

Raja ran away from home in UK, left a note suggesting he was going to engage in jihad, but returned home after 3 days at the behest of his parents.

Code: 57. (1) A person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism.

**Issue** – Does ‘the superimposition of his facial image on the 9/11 hijackers consider an article intended for the purpose of conducting terrorism.

**Ratio**

Jury convicted the accused and sentenced Raja to two years in youth detention. Convictions quashed on appeal. On appeal: S57 must be interpreted in a way that required a **direct connection** between object possessed and act of terrorism.

**R. v. Malmo-Levine**

**Facts** – Marijuana reference.

**Issue** – What is required for the classification of Criminal law?

**Ratio – Criminal law must contain a valid criminal purpose, prohibition, penalty (Margarine Reference).**

**Amato v. The Queen**

**Facts** – Amato repeated harassed by police officer to provide cocaine or heroine. No intention to sell to the officer, just wanted to do it on the whim of being a friend.

**Issue** – Can common law defences continue to be recognized?

**Ratio – Yes, but entrapment did not apply to this case.**

**Frey v. Fedoruk**

**Facts** – Peeping Tom

**Issue** – Is peeping Tom a criminal offence?

**Ratio – “Legal certainty and prevention of arbitrariness generally favoured by courts, decline to create new offences). Validated under trespass at night. Responded by parliament. What was previously not a criminal offence cannot be charged to a person.**

**R. v. Pare**

**Facts** – Predicate offences? Indecent assault on a young boy while committing another action. First degree vs. second degree based on the judgement of the justice.

**Issue** – What does while committing mean?

**Ratio – There must exist a temporal and causal connection.**

* It is absurd to require simultaneity. She prefers the single transaction theory.

**Bell ExpressVu Limited Partnership V. Rex et Al**

**Facts** – Statutory interpretation case. Quotes the Modern Principle Elmer Driedger in Construction of Statutes 2nd Ed.

**Issue** – How to interpret statutes.

**Ratio – Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of parliament.**

# Chapter 2 – Proving the Crime

## The Adversarial System

* Judges are largely passive members, impartial decision makers
* Judge (and jury) make findings of **fact** based on assessment of **evidence**

## B. Evidence

* The common method of introducing evidence is through the oral testimony of witnesses under oath to matters within their knowledge (***testimonial evidence***)
* Evidence must be…
  + **Relevant** – the evidence makes a material proposition somewhat more likely
  + **Material** – probative of a legal question in issue in the case
  + **Admissible** – meets the rules of evidence
    - Evidence may be inadmissible if
      * There are reasons to doubt its reliability
      * It was obtained in violation of Charter rights
      * It’s so inflammatory and prejudicial it might not be good for the Court
      * The witness is not competent to testify
* ***Real (tangible) evidence*** may be admitted through
  + A witness
  + Special statutory provisions (ex. breathalyzer certificate)
* Evidence can be admissible but not **credible**
  + The trier of fact must consider whether to accept or believe each item of evidence, and whether the evidence is sufficient

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

***Charter s 11(d) Presumption of innocence –***

* *Constitutional rights*
* *Avoids wrongful convictions*
* *Protects rights of freedom and liberty to accused*
* *System should find those who are guilty guilty, and those who are not not*
* *Courts have final say – any legislation that offends the presumption of innocence can be made invalid by the Courts*
* **The Crown bears the burden of proof of the guilt of the accused** 
  + **Legal burden –** the essential elements of the offence must be proven by the Crown beyond a reasonable doubt ***Lifchus 1997***
  + **Evidentiary burden – must have evidence on each element of offence that a reasonable jury might prove BARD**
    - Preliminary inquiry set to determine if evidence exists on each element
    - No evidence motion by defense if Crown did not prove evidence of each element 🡪 if successful accused is acquitted
    - Then evidentiary burden shifts to accused
    - Defense can then raise defences to offences – has evidentiary burden
    - Crown can disprove defences BARD
* **Evidentiary burden on the accused – 2 kinds**:

1. **Reverse onus provisions** – place both an initial evidentiary burden and a legal burden to prove it on a **balance of probabilities**

* ***Oakes***

1. **Evidentiary burden** on the accused to displace the presumption by pointing to “some evidence to the contrary” that could raise a reasonable doubt about its correctness

* ***Downey***

**Woolmington v. D.P.P.**

**Facts** – Jury instructions improper when judge said “all homicide is presumed to be malicious and murder, unless the contrary appears from circumstances of alleviation, excuse or justification.”

**Issue** – Reverse onus?

**Ratio – If there is a reasonable doubt, the person cannot be found guilty. (Section 11(d) of the Charter)**

**R. v. Whyte**

**Ratio** – “...the distinction between elements of the offence and other aspects of the charge is irrelevant to the s. 11(d) inquiry. The real concern is not whether the accused must disprove an element or prove and excuse, but that an accused may be convicted while a reasonable doubt exists. When that probability exists, there is a breach of the presumption of innocence.” – Dickson CJC

* **it is clear that the presumption of innocence is infringed whenever the accused is liable to be convicted despite the existence of a reasonable doubt as to guilt in the mind of the trier of fact.**

**R. v. Oakes**

**Facts** – Oakes was charged with unlawful possession of a narcotic (8 vials of cannabis resin in the form of hashish oil) for the purpose of trafficking, contrary to s 4(2) of the *Narcotic Control Act*. The section provides that if the court finds the accused in possession of a narcotic, he is presumed to be in possession for the purpose of trafficking unless the accused proves (on a BOP) otherwise. Who won? Oakes

**Issue** – Does the “reverse onus” clause in the Act violate s 11(d) (the presumption of innocence) of the Charter? If so is it within a reasonable limit violation under s 1 of Charter? NO

**Ratio** – s 8 of NCA violates s 11(d) of the Charter and is not a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society for the purpose of s 1 of the Charter.

Ratio – Test created to establish that a limit is reasonable and demonstrably justified in a free and democratic society (per Charter s 1).

**Test – The *Oakes* test\* (**\* Defense raise, ALL must be satisfied by the Crown)

1. The State must have a **pressing and substantial objective**
2. There must be a **rational connection** between the objective and the measures that are being taken
3. There must be **minimal impairment** of rights
4. There must be **proportionality** between the measure used to infringe the right and the objective.

Reasoning – The reverse onus clause does not survive the rational connection test because it would be irrational to infer that a person had intent to traffic on the basis of his/her possession of a very small quantity of narcotics.

**R. v. Keegstra**

**Facts** – Teacher communicated anti-semitic statements to his students. Convicted by jury.

**Issue** – Defence argued that s.319 of the criminal code pertaining to hate speech was unconstitutional.

**Ratio – s.3119(3) infringed section 11(d) of the charter, but was justified under section 1 by applying the Oakes’ test.**

**R. v. Lifchus**

**Facts –** Lifchus, a stockbroker, was charged with one count each of fraud and theft both over $1,000 for allegedly defrauding his employer of a large sum of money by misrepresenting the value of a bond. Convicted of fraud and acquitted of theft by a jury. He appealed, arguing that the judge erred in instructing the jury on the meaning of “proof beyond a reasonable doubt”. The Court of Appeal allowed the appeal. The Crown appealed to the SCC.

**Issue** – Should a trial judge explain “reasonable doubt” to the jury? How?

**Ratio – The trial judge erred by not defining “reasonable doubt” and by telling the jury to evaluate the term as ordinary, everyday words.**

BARD should not be explained as:

* An ordinary expression with no special legal meaning
* The standard of proof applied to important decisions in juror’s own lives
* A moral certainty
* A “substantial” or “haunting” doubt
* Being “sure” the accused is guilty

BARD should be explained as:

* Fundamental principle to presumption of innocence
* Based on research and common sense
* Logically connected to evidence or lack of evidence
* Not a standard of absolute certainty, must be more than ‘probably guilty’ (higher than a balance of probabilities)
* A burden that rests with the Crown (and not the accused)

**R. v. J.H.S.**

**Facts –** JHS was stepfather of the complainant. The complainant testified that JHS had sexually abused her since she was 4 years old, and she told her mother but her mother didn’t believe her. Her mother testified that the complainant began behaving badly at age 13. The defence claimed that the complainant was lying.

Procedural history – JHS was found guilty at trial. The Nova Scotia Court of Appeal set aside the conviction, concluding that the jury was not clearly instructed that lack of credibility on the part of the accused does not equate to proof of his guilt BARD. The Crown appealed to the SCC. Who won? Crown

**Issue –** Was the jury clearly instructed that lack of credibility on the part of the accused does not equate to proof of guilt BARD as required by *W. (D.)*?

**Ratio –** he instruction to the jury satisfied the ultimate test in *W. (D.)*.

1. **If you believe the evidence of the accused 🡪 acquit**
2. **If you do not believe the testimony of the accused but are in reasonable doubt by it 🡪 acquit**
3. **if you are not left in doubt by the evidence of the accused: on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused. -> If no, then acquit**

# Counsel and Defence

**Boucher v. The Queen (misdirection of jury)**

* The purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime.
* **Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to legitimate strength, but it must also be done fairly.**
* The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

**R. v. Stichcombe (Crown withheld evidence and witness from defense)**

* All statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses.
* Where statements are not in existence, other information such as notes should be produced, and, if there are no notes, then in addition to the name, address and occupation of the witness, all information in the possession of the prosecution relating to any relevant evidence that the person could give should be supplied.

**Ken Murray (Accused asked lawyer to obtain evidence from home)**

* All statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses.

**R. v. Meer (Incompetent defense counsel did not obtain any handwriting samples/evidence)**

* To succeed in setting aside a trial verdict on the basis of the ineffective assistance of counsel, the appellant must show "first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted": *R. v. G.D.B.*, 2000 SCC 22, [2000]
* However, the learned dissenting Justice did not indicate how the instances which he identified of counsel's incompetence had occasioned a miscarriage of justice: reasons on appeal, at para. 153.

# Chapter 3 – The Elements of an Offence

Must occur at the same time:

* ***Actus reus*** – the prohibited act (or sometimes omissions)
* ***Mens rea*** – fault element of offence

Crown pust prove:

* Elements of actus reus and mens rea
* Facts that prove the elements (including identity of accused and time/place)

# Chapter 4 – Actus Reus – Crown must prove BARD

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

1. ***How to determine the actus reus***

* The actus reus will be specified within the offence creating section of the *CC*
* Defined in: same part of the Code, Section 2 (general definitions), Index

**Voluntary conduct: behaviour that is the product of a free will and controlled body, unhindered by external constraints**

|  |  |
| --- | --- |
| **Conduct** | What act(s) or omission(s) must the Crown prove for this offence? |
| **Contemporaneity** | All offences require |
| **Physical Voluntariness** | All offences require |
| **Consequences** | Some offences require proof of particular consequences  *Causation* (conduct 🡪 consequences) must be proven |

## Contemporaneity

# Causation

* Relationship between conduct element and consequence element of actus reus
* The Crown must prove that
  + The consequence happened BARD
  + The accused’s actions **caused** those consequences BARD
* ***Omissions can be causes***
* In most cases, causation is not in dispute.
* Causation law largely derived from common law.
* Moral blameworthiness – punishment for **harm** **you meant to cause** AND **harm you actually cause**
* ***In tort law, causation damages reduced based on apportionment of cause***
* ***In criminal law, you are either fully responsible or you are not at all***

**Fagan v. Commissioner of Metropolitan Police (Drove onto police car by accident then refused to move)**

* The elements of actus reus and mens rea must be present at the same time. However, it is **not** necessary that mens rea be present at the **inception** of the actus reus; it can be superimposed upon an existing act. But, subsequent mens rea cannot convert an act completed without mens rea into an assault.
* **Contemporaneity** was established. The actus reus was a **continuing act** during which Fagan formed the necessary intention to constitute the mens rea.

## Voluntariness

* Actus reus must be committed voluntarily to be found guilty of the offence
* Involuntariness negates actus reus / mental element of actus reus *Jiang*
* Categories of involuntariness:
  + Under the influence of drugs or alcohol at the time of the offence
    - **Voluntarily consumes alcohol or drugs**
      * Must meet the **defence of intoxication**
    - **Consumption of intoxicants was involuntary** and the intoxication was sufficient to render criminal actions involuntary 🡪 acquittal
  + Suffering from a disease of the mind
    - Must meet the defence of **mental disorder**
  + State of automatism
    - Must meet the defence of **non-mental disorder automatism** *Jiang*

**R. v. Larsonneur (Was extradited from Ireland to UK and was charged for beling alienalien)**

* By being found in the United Kingdom after the date limited by the condition in her passport had committed the offence with which she was charged, the circumstances in which she returned to the United Kingdom being immaterial.
* **Highly contest case, commonly regarded as miscarriage of justice**

**R. v. King (Man got anaesthesia at dentist then drove car and drove into a parked vehicle)**

* The Crown's contention is that under s. 223 Cr. C., the driver of an automobile, whether conscious or not, if he has imbibed liquor or drugs, is guilty of driving while impaired.
* **There can be no actus reus unless it is the result of a willing mind at liberty to make a definite choice or decision, or in other words, there must be a willpower to do an act whether the accused knew or not that it was prohibited by law. [...]**
* When a doctor has given an injection of a drug to a patient, who is not aware of the state of mind it may produce, there is no volitive act done by the driver and he cannot be convicted.

**R. v. Ruzic (Brought in 2kg of cocaine to Toronto and used a false passport under duress)**

* Whether it is a principle of fundamental justice under s. 7 of the *Charter* **that morally involuntary conduct should not be punished** is a novel question before this Court.
* the Court classified the defence of duress as an excuse, like that of necessity. As such, duress operates to relieve a person of criminal liability only after he has been found to have committed the prohibited act with the relevant mens rea: see also *Bergstrom v. The Queen*
* Although moral involuntariness does not negate the actus reus or mens rea of an offence, it is a principle which, similarly to physical involuntariness

**Omissions**

* *General rule* – **the criminal law does not punish acts of omission** (failures to act) absent a specific criminalization of the omission or some kind of duty to act that can be imported to a criminal offence – even when the peril is grave and the risk to you would be small.
* *But, there are circumstances when the criminal law will impose liability for a failure to act Fagan*
  + **Specific Offences (Legal duty such as assisting a peace officer)**
  + **General Omission Offences:** 
    - **Statutory Duties (Criminal Negligence Causing Death)**
    - **Common law Duties**
  + **No mention of legal duty, general liability by omission (R. v. Currier)**

**R. v. Browne (Girl swallows cocaine bag to hide it and dies, friend does not call ambulance)**

* The mere expression of words indicating a willingness to do an act cannot trigger the legal duty. There must be something in the nature of a commitment, generally, though not necessarily, upon which reliance can reasonably be said to have been placed.
* **There being no undertaking within the meaning of s. 217 of the Criminal Code, there can be no finding of a legal duty**. There being no duty, there can be no breach contrary to s. 219 of the Code.

**R. v. Thorton (Man knows he has AIDS but donates blood to red cross)**

* Donating blood which one knows to be HIV-contaminated to an organization whose purpose is to make the blood available for transfusion to other persons clearly constitutes a breach of the common law duty to refrain from conduct which one foresees could cause serious harm to another person. It is thus a failure to discharge a "legal duty" within the contemplation of s. 180(2).
* The public, in general, was at risk and the fact that the effective screening by the Red Cross Society prevented injury or death is of no assistance in the court's view to this accused.
* Shows that the SCC is unwilling to accept common law duties.
* **A duty exists at common law that requires everyone to refrain from conduct that could cause injury to another person.**

**R. v. Mabior (Man knows he has AIDS but has intercourse without disclosure)**

* “The majority test (for fraud) in Cuerrier may be stated in different ways, but boils down to two elements: **(1) a dishonest act (either falsehoods or failure to disclose HIV status); and (2) deprivation (denying the complainant knowledge which would have caused her to refuse sexual relations that exposed her to a significant risk of serious bodily harm).**”
* A review of the case law pertaining to fraud vitiating consent to sexual relations leads to the following general principle of law: the Cuerrier requirement of a "significant risk of serious bodily harm" entails a realistic possibility of transmission of HIV. This applies to all cases where fraud vitiating consent to sexual relations is alleged on the basis of the non-disclosure of HIV-positive status.

**R. v. Hutchinson (Man intentionally damages condom and woman becomes pregnant)**

* “The majority test (for fraud) in Cuerrier may be stated in different ways, but boils down to two elements: **(1) a dishonest act (either falsehoods or failure to disclose HIV status); and (2) deprivation (denying the complainant knowledge which would have caused her to refuse sexual relations that exposed her to a significant risk of serious bodily harm).**”
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## Intervening Acts in Causation

* Intervening acts can be caused by nature or by other actors
* **Does the intervening act break the chain of causation?**
  + Usually found to NOT break the chain of causation (*Nette, Maybin*)
  + Even if there were other causes as well, if accused’s action was more than a trivial cause, they are found to have caused the death notwithstanding the other causes that they weren’t responsible for *Nette*
  + Ie. S 225 If the medical tx is applied in good faith but doesn’t save the person, doesn’t break chain of causation.
* **Thin skull rule** – accused must take victim as they find them (whatever problems they already had that contribute to their death don’t break chain of causation) (*Nette*)

## Tests for causation:

* **Factual causation/”But for” test** *Nette*  
  What was the actual scientific/technical/medical cause of consequence?  
  Was the conduct a **significant contributing cause** of the consequence?
* **Legal causation**Was the accused’s conduct **sufficiently connected** to the harm to justify holding the accused responsible? *Smith, Nette*
* ***R v Smithers*** 1978 SCC – set out the test for **causation of** **death** 🡪 whether the actions of the accused were “**a contributing cause of death that is not trivial or insignificant, outside of the *de minimis* range**” 🡪 reason: not trivial and not insignificant are accurate – changing them would RAISE the standard of causation.
* ***R v Harbottle***1993 SCC – **the test for causation for** **1st degree murder** 🡪 SCC used higher standard in the word “cause” in the offence 231(5) than in the *Smithers* “contributing cause” test because of seriousness of 1st degree murder conviction 🡪 “**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**”
* ***Nette*** 2001 SCC –

*Smithers* test applies to ALL murders **significant contributing cause of death** –

*Harbottle* test applies in 1st degree charge S 231 to raise standard for more serious penalties **substantial and integral cause of death**

**TEST FOR INTERVENING ACTS IN CAUSE OF DEATH**

* ***Maybin*** - No definitive test for deciding when something was an **intervening cause** - overarching question was still whether the accused’s conduct was a **significant cause** of the harm.

**2 analytical aids to consider whether there is an intervening cause of death:**

1. **Whether the intervening act was** **reasonably foreseeable** to the accused at the time he or she committed the conduct. The accused need not foresee the precise way the intervening act took place but rather whether harm was generally foreseeable.

1. **Did the intervening act flow directly from the conduct of the accused or was it an independent act by a third party?** [think of the *Smith* case here]

**R. v. Winning (Woman obtained credit from Eatons using false information)**

* The evidence clearly establishes that Eaton's did not rely upon the information contained in the application save for the name and address.

**Smithers v. The Queen (Hockey game where he kicked the other and vomit suffocation)**

* **Creation of the But-For TEST**
* Even if the unlawful act alone would not have caused the death, it was still a legal cause so long as it contributed in some way to the death.
* Thin-skull rule: one who assaults another must take his victim as he finds him. (R. v. Blaue is quoted, woman refused blood transfusion based on religious grounds).
* A person commits homicide, according to s. 205(1) of the Code, when directly or indirectly, by any means, he causes the death of a human being.

**R v. Harbottle (Two men confined woman and one beat her till death while the other confined her)**

* Creation of substantial cause test:
  + **An essential, substantial, and integral part of the killing. "Very active and usually physical role in the killing."** HARBOTTLE TEST only for s. 231(5) where there is predicate offence
* The substantial causation test requires that the accused play a very active role -- usually a physical role -- in the killing.
* S. 231(5) test:
  + Determine if a predicate offense is committed - if yes then other offense qualified
  + Did the accused cause the death. (Apply NETTE) - if yes then murder occurred
  + While committing? (Apply Pare test) - **There must exist a temporal and causal connection.**
  + Show that additional causation (Harbottle test) - elevated to first degree murder

**R v. Nette (95-year old woman was robbed and tied in her home, fell and died)**

* Creation of the Nette test (significant contributing cause test):
* The trial judge correctly charged the jury on the applicable standard of causation for 2nd degree murder: **it must be a significant contributing cause of death that is established by the Crown beyond a reasonable doubt.**
* Convicted 2nd degree murder “as long as his action… more than a trivial cause [of the death] and contributed to the death, he has caused the death notwithstanding that there were other causes involved for which he was or may not have been responsible”.
* In order to meet the higher standard of causation of first degree murder, the “substantial and integral cause of death” test should be used (*Harbottle*), but that in order to meet to the standard of manslaughter or second degree murder, the “contributing cause, beyond the *de minimis* range” test should be used (*Smithers*).

**Pagett v. The Queen (Girl was shot and killed in a stand off between man and police)**

* A reasonable act performed for self-preservation, being an act caused by the accused’s own act, does not operate as a novus actus interveniens” (intervening act)
* “If a victim acted in a reasonable attempt to escape from the violence of the accused, the death of the victim was caused by the act of the accused”

**R v. Reid and Stratton (Friends got in a fight, man was unconscious, failed CPR caused death)**

* Tragically those who tried to revive Mr. MacKay while he lay unconscious on Giles Street, inadvertently killed him.
* Nette’s test: **it must be a significant contributing cause of death that is established by the Crown beyond a reasonable doubt.**
* Whether any intervening cause which resulted in MacKay’s death occurred between the accused’s acts and the victim’s death?
* Were the actions by those at the scene to resusitate MacKay, an intervening event which broke the chain of causation between what Reid and Stratton are said to have done, and MacKay’s death, such that the actions of either of them are no longer seen by you as being a significant contributing cause of his death?
* Judge says no, and the instructions not properly given. Convictions quashed.

**R v. Maybin (Brothers struck a man unconscious, then a bouncer came and punched the man to death)**

* BUT FOR actions wouldn’t have died – brothers convicted
* When does an intervening act by another person sever the causal connection between accused’s act and the victim’s death? \*\* FIRST CASE TO APPLY INTERVENING CAUSE TEST
* It was open to the trial judge to find that the Maybin brother’s assault remained a significant contributing cause of death.
* **If the risk of harm caused by an intervening actor is reasonably foreseeable to the accused(s), the intervening act will not break the chain of causation.**
* **Factual causation** established with “but for” analysis
* **Legal causation**: narrowing concept from factual causation, funnels factual causes into those which are sufficiently linked to a harm to warrant legal responsibility.
* Reasonably foreseeable consequence and/or intentional, independent act approaches both equally useful tools in determining legal causation.
* The physical intervention of the bar staff, with a risk of non-trivial harm, was objectively foreseeable.

The most significant part of the judgment is what the say about legal causation and intervening causes.

***The test for legal causation established:***

* whether it was a significant contributing cause
* confusing because it is the test for factual causation
* why divide it up into two parts?
  + Keep this in mind as your overwhelming consideration
  + Was the accused a significant cause ***even given*** the intervening act
* in light of answers to the analytical aids – answer this question

# Chapter 6 – The Mental Element (Mens Rea)

**Mens rea must be shown in *each element* of actus reus of offence – at some point during the action (even for a second, doesn’t have to be whole time or any specific time)**

* Always a question of fact – Crown has to prove both *actus reus* and *mens rea*
* If *actus reus* isn’t proven you don’t even get to the *mens rea* argument
  + **Intention \* Willfullness \*** *Beaver, Buzzanga*
  + **Knowledge**
  + **Deliberate Ignorance (Equate to Knowledge)**
  + **Recklessness** – knowing the consequence will probably happen or that a circumstance probably exists is not sufficient for crimes that require intention/knowledge.
  + **Criminal Negligence**
  + **Strict Liability**
  + **Absolute Liability**

## STRICT AND ABSOLUTE LIABILITY

When the code is silent on fault element – infer knowledge/intention OR recklessness – either is sufficient

* When the code wants ‘willfully’ to exclude recklessness it will say so!

**R v. Pierce Fisheries (Caught a ton of lobster and about 0.3% were under sized)**

* I do not think that a new crime was added to our criminal law by making regulations which prohibit persons from having undersized lobsters in their possession, nor do I think that the stigma of having been convicted of a criminal offence would attach to a person found to have been in breach of these regulations.
* Found to be subjective mental fault, and the company did what a reasonable person would do.

**R v. Wholesale Travel Group (Advertised items at ‘wholesale prices’, misleading advertisement)**

* Jail is jail, whatever the reason for it [...] I cannot agree that these principles take on a different meaning simply because the offence can be labelled as ‘regulatory’ [...] **negligence is the minimum level of fault which will accord with s. 7 of the Charter whenever a conviction gives rise to imprisonment.**” Lamer C.J.

**R v. City of Sault Ste. Marie (Advertised items at ‘wholesale prices’, misleading advertisement)**

* Jail is jail, whatever the reason for it [...] I cannot agree that these principles take on a different meaning simply because the offence can be labelled as ‘regulatory’ [...] **negligence is the minimum level of fault which will accord with s. 7 of the Charter whenever a conviction gives rise to imprisonment.**” Lamer C.J.
* **Strict Liability Test:**
  + Step #1: Has the Crown proven the actus reus beyond a reasonable doubt?
    - If no, accused acquitted
    - If yes, proceed to next Step
  + Step #2: Has the Accused proven on a balance of probabilities that they exercised “due diligence” (i.e. that all due care was taken – an objective standard)?
    - If no, accused convicted
    - If yes, accused acquitted
* **The over-all regulatory pattern adopted by the Legislature, the subject-matter of the legislation, the importance of the penalty, and the precision of language used will be primary considerations** in determining whether the offence falls into the third category [absolute liability].”

**R. v. Chapin (Woman duck hunted in a zone with bait and did nto know)**

* The offence is a **strict liability** offence. Not absolute liability as the defendant could not control where the illegal bait was placed and shouldn’t be liable for it being there.
* When a statute does not mention mens rea (by including words like “willfully” or “with intent”),
* Was enacted for the welfare of the public,
* Contains serious penalties (imprisonment or large fines, the offences created are likely strict liability offences.

**Reference re BC Motor Vehicle Act (BC AG sought to see constitutionality of the MVA)**

* A law enacting an absolute liability offence will violate s. 7 of the Charter only if and to the extent that it has the potential of depriving of life, liberty, or security of the person. Obviously, imprisonment (including probation orders) deprives persons of their liberty. An offence has that potential as of the moment it is open to the judge to impose imprisonment.
* **The combination of imprisonment and of absolute liability violates s. 7 of the Charter** and can only be salvaged if the authorities demonstrate under s. 1 that such a deprivation of liberty in breach of those principles of fundamental justice is, in a free and democratic society, under the circumstances, a justified reasonable limit to one's rights under s. 7

## Intent and Knowledge

**R. v. Buzzanga and Durocher** (1979) (Ont. CA): “if a person does an act likely to produce certain consequences it is, in general, reasonable to assume that the accused foresaw the probable consequences of his act and if he, nevertheless, acted so as to produce those consequences, that he intended them.”

**R. v. Tennant and Naccarato** (1975) (Ont. CA): “what a reasonable man ought to have anticipated is merely evidence from which a conclusion may be drawn that the accused anticipated the same consequences.”

**R. v. Lewis (Exploding electric kettle blew up and killed woman and daughter)**

* **Intent:** “the exercise of a free will to use particular means to produce a particular result”
* **Motive:** “that which precedes and induces the exercise of will”
* The mental element of a crime ordinarily involves no reference to motive.
* **Motive is NOT relevant as an element of the offence, but can strengthen argument to prove the defense or crown’s positions, and helps show what the D knew.**

**R. v. Hibbert (Man in fear and buzzed down friend with a gang member and gun member shot friend)**

* In most criminal trials, the mental element, the mens rea with which the court is concerned, relates to "intent", i.e. the exercise of a free will to use particular means to produce a particular result, rather than with "motive", i.e. that which precedes and induces the exercise of the will.
* The mental element of a crime ordinarily involves no reference to motive.
* **Knowledge: Accused is aware of the nature of his or her conduct or that it is “practically certain” his or her conduct will cause the prohibited consequences**
* **Accused was acquitted of attempted murder, but committed of aggravated assault.**

**R. v. Buzzanga and Durocher (Wilfully promoted hatred again French Canadians at school)**

* **As a general rule a person who foresees that a consequence is certain or substantially certain to result from an act which he does in order to achieve some other purpose, intends that consequence.**
* **In general, the accused must have intended to bring about a particular consequence or have foreseen a particular consequence (recklessness) to be found guilty**. Wilfully in s. 281.2(2) means with the intention of causing hatred.
* **Intends means intends a consequence that you:**
  + 1) desire
  + 2) know that will happen or
  + 3) know that is substantially certain to result from an action (that may be done for another purpose)
* **Mental Fault:**

1. Liable: Conscious Purpose was to promote hatred
2. Liable: The accused can be guilty if the they subjective foresaw that the hatred will occur. (Absolute liability)
3. Not Liable: create an uproar or controversy

**R. v. ADH (Woman left fetus at Walmart believing it was dead)**

* **Objective fault – criminal negligence (“penal negligence”):** 
  + That the risk resulting from the accused’s acts would have been foreseeable by a reasonable person in the same circumstances and, that the accused’s conduct was a marked departure from the conduct expected of a reasonable person in those circumstances (para. 15)
  + Common objective fault offences
    - Dangerous, regulated conduct
    - Careless conduct, requiring reasonable precautions
    - Predicate offences
    - Criminal negligence
    - Duty-based offences
* The offence of child abandonment requires **subjective mens rea**. The offence differs from failure to provide necessaries (which requires objective mens rea) because child abandonment is broader and can apply to anyone.
* Reasoning –.218 text suggests the fault requirement is subjective. Can’t abandon a child if there is no child (dead). Presumption of subjectivity for criminal offences. Obj standard could make scope too broad. Wilfull omission requires subj element.

**R. v. Levigne (Lured a child who was undercover police officer)**

* The prosecution will fail where the accused took reasonable steps to ascertain the age of his or her interlocutor and believed that the interlocutor was not underage. In this regard, the evidential burden is on the accused but the persuasive burden is on the Crown.
* Such evidence will at once constitute “evidence to the contrary” under s. 172.1(3) and satisfy the “reasonable steps” requirement of s. 172.1(4).
* **Where the evidential burden of the accused has been discharged, he or she must be acquitted if the trier of fact is left with a reasonable doubt** whether the accused in fact believed that his or her interlocutor was not underage. [...]

## C. Recklessness and Deliberate Ignorance

* The concept of willful blindness is used in some cases to satisfy a mens rea requirement
* **Can satisfy that an accused actually knew – equivalent to knowing, meets mens rea for knowledge**
* Deliberate ignorance – suspicious but chooses not to make inquiries because you don’t want to know

**R. v. Sansregret (Man repeatedly breaks into ex-girlfriend’s home, have consensual sex under duress)**

* A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. **He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge**. This, and this alone, is wilful blindness
* 273.2 It is **not** a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where
  + (a) the accused’s belief arose from the accused’s (i) self-induced intoxication, or (ii) recklessness or wilful blindness; or
  + (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

**R. v. Briscoe (Briscoe provided tools and helped in the murder of a girl with a group of youths)**

* Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?
* Willful blindness (suspicion aroused to the point where the accused sees the need for further inquiries, but would prefer to remain ignorant) can substitute for actual knowledge whenever knowledge is a component of the mens rea.

## Criminal Negligence

**R. v. Hundal (Truck driver sped through red and struck a car, believed he could not stop in time)**

* Hundal’s conduct amounted to a marked departure from the standard of care of a reasonable person in those circumstances
* **A modified objective test is appropriate to apply to dangerous driving - The accused’s conduct must amount to a marked departure from the standard of care that a reasonable person would observe in the accused’s situation.**
* **Modified because we don’t consider personal elements EXCEPT when the D can prove an explanation to his dangerous driving (ie sudden illness) which would give a complete defence.**
* A trier of fact may convict if satisfied BARD that, viewed objectively, the accused was driving in a manner that was “dangerous to the public, having regard to all the circumstances, including the nature, condition and use of such place and the amount of traffic that at the time is or might reasonably be expected to be on such place”.
* **Being held criminally responsible for negligent conduct on the objective test does not violate the principle of fundamental justice that the moral fault of the accused must be commensurate with the gravity of the offence and the penaly** (*Creighton*)
* Reasoning – A modified objective test is appropriate because of:

1. The licensing requirement – licensed drivers choose to drive and hence place themselves in a position of responsibility to the public.
2. The automatic and reflexive nature of driving – to use a subjective standard is challenging because “it would be a denial of common sense to find a driver was acquitted for not thinking of his manner of driving” b/c most people don’t think a lot when driving.
3. The word of s 233 “manner of driving” – we need to compare to objective standard of driving to determine appropriate manner
4. Statistics – need stricter test due to high rates of motor vehicle offences – makes it a public welfare offence (and those require objective standards)

**R. v. Creighton (Group took cocaine, plaintiff injected and left girl to die, did not help)**

* Unlawful act manslaughter is entirely consistent with the principles of fundamental justice and it conforms to the Charter.
* **Unlawful act must include predicate offence that involves a dangerous act, is not offence of absolute liability, and is not unconstitutional (*DeSousa*).**
* Manslaughter has a much lower stigma attached than murder, and is an appropriate stigma for the unintentional killing of another.

Ratio –

* S 222(5)(a) is consistent with the principles of fundamental justice
* Manslaughter for unlawful act only requires **objective** **foreseeability of risk of bodily harm**, not foreseeability of death (*DeSousa*). To require foreseeability of death would mean that someone who killed another might get off on aggravated assault instead of manslaughter… “the terrible consequence of death demands more”. Brings up public policy and deterrence issues – not effective deterrent if you can get away with a lesser charge (ie aggr assault)

**The care required by some activities is greater than the care required by others.**

* A person may fail to meet an elevated *de facto* standard of care in two ways:
  + The person may undertake an activity requiring special care when not qualified to give that care.
  + A person who is qualified may negligently fail to exercise the special care required by the activity.
* The higher *de facto* standard flows from the circumstances of the activity, not from the expertise of the actor.
* Manslaughter has a lower stigma than murder – its not intentional.

**Test – Mens rea of unlawful act manslaughter**

* **Objective foreseeability of the risk of bodily harm that is neither trivial nor transitory**, in the context of a dangerous act.
* Foreseeability of the risk of death is not required.
* All people held to the same standard of a reasonable person, unless no capacity to appreciate the risk of harm – no other personal factors considered as not a subjective test and doesn’t risk finding morally innocent people guilty

**R. v. Beatty (Dangerous driver skid across path due to momentary lapse of awareness)**

* Conduct not marked departure from reasonable person – acquitted
* The trial judge’s decision that momentary lapse of attention met civil negligence not criminal negligence was insufficient to be found criminal culpability was correct.
* **Actus reus and mens rea are not the same**
  + *Actus reus* – Must be satisfied BARD meets elements in offence – driving in a manner that was dangerous to the public
  + *Mens rea* – Must be satisfied BARD that accused’s objectively dangerous conduct was accompanied by the required mens rea – should include accused’s actual state of mind, if any, that the conduct amounted to marked departure from the standard of care that reasonable person would observe in accused’s circumstances.

**R. v. Roy (Pulled out of drive way and got hit by trailer, passenger died)**

* The trial judge inferred marked departure, failed to conduct an inquiry into whether Roy displayed a **marked departure from the standard of care expected of a reasonable person in the circumstances**.
* In a criminal setting, the driver’s mental state does matter because the punishment of an innocent person is contrary to fundamental principles of criminal justice. **The degree of negligence is the determinative question because criminal fault must be based on conduct that merits punishment**.
* Driving which, objectively viewed, is simply dangerous, will not on its own support the inference that the accused departed markedly from the standard of care of a reasonable person in the circumstances

**R. v. Finta (War Crime)**

* **Charter can only raise level of fault and not lower it. Parliament can always intend a higher level of fault than the Charter demands.**
* \*Objective fault. When you say that by conducting the actus reus, you are liable for the offences, is that not a section 11(d) issue as well?\*
* Section 1 can save an infringement of any part of the charter. The SSC has never found any infringement of s7 justified.
* Types of Serious International Crimes (War Crimes):
  + Genocide (Partial or complete destruction of a national, ethnical, racial, or religious group)
  + Crime against humanity of murder (Widespread systematic attack against civilian population)
  + War Crime (Attack on group of protected people while aware of armed conflict)

# Chapter 8 – Mens Rea and the Charter

## A. Absolute Liability and the Charter

* “Special stigma” crimes when subjective fault should be constitutionally required (the crime is so serious that there must be subjective standard, not objective)
* Who gets to decide what the substance of a crime should be, Parliament or the Court?
* Charter in 1982, equality portions added 1985 –
  + Nobody thought the Charter would be used to challenge the substance of laws (ie assisted dying, prostitution)
  + Was thought to be more used about procedural rights that go to having a fair process when charged with a crime
* IF It was Strict Liability there would be a defense of due diligence allowed. No defense allowed in Absolute Liability after Charter

|  |
| --- |
| Section 1 – ALLOWS CHARTER RIGHTS TO BE LIMITED IN SOME CIRCUMSTANCES The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. |
| Section 7 – RIGHT TO LIFE LIBERTY AND SECURITY Everyone has the right to life, liberty and security of the person **and** the right not to be deprived thereof **except** in accordance with the principles of fundamental justice. \*\* read section 7 as a qualified right – you don’t have a right to life liberty security specifically – you have a right not to have those interests taken away without |
| **11.** Any person charged with an offence has the right(*a*) to be informed without unreasonable delay of the specific offence;(*b*) to be tried within a reasonable time;(*c*) not to be compelled to be a witness in proceedings against that person in respect of the offence;(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; (CROWN MUST PROVE ALL ELEMENTS BARD) |

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| ABSOLUTE LIABILITY SECTION 7 CHALLENGE(Motor Vehicle Reference) |

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

222(3) Homicide that is not culpable is not an offence - not always criminal

222(4) 3 classes of culpable homicide:

* Murder Manslaughter Infanticide
* All other forms of culpable homicide fall into residual category of manslaughter s 234 – conduct causing death, fault short of intention to kill – either a) another unlawful act or b) criminal negl

222(5) – culpable homicide – causing death of a human being:

**(a)** by means of an unlawful act;

**(b)** by criminal negligence;

**(c)** by causing that human being, by threats or fear of violence or by deception, to do anything that causes his death; or

**(d)** by wilfully frightening that human being, in the case of a child or sick person.

229 **Culplable homicide is murder**

**(**a) where the person who causes the death of a human being

(i) means to cause his death, or

(ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;

**(b)** **Transferred intent – killed wrong person** where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless … by accident or mistake causes death to another human being… or

**(c)** Where a person, for an **unlawful object** (indictable offence), does **anything** (illegal or dangerous) that he **knows** ~~or ought to know~~ (“unlawful object murder” removed in Martineau - creates objective standard which is not constitutional) is **likely to cause death**, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being. \*\* Only used now for accidental death, most use 229(a)