

# Criminal Law Tests:

## Statutory Interpretation:

- Governed by the Interpretation Act
- There are different ways to interpret a statute
- Strict construction adopts the position that is most favorable to the accused (Goulis)
- Dictionary definitions of words might also be considered (Goulis)
- Words can be read in the context of the surrounding words (Goulis)
- An interpretation that produces an absurd result must not be adopted (Pare)
- Can consider the intent and purpose of the statute (Pare)
- Statutes should be given "fair large and liberal interpretation as best ensures the attainment of its objects" (Interpretation Act)
- Read words in context harmoniously with their ordinary meaning (Bell ExpressVu)

## Burden and Standard of Proof:

- Conviction in criminal trials requires proof beyond a reasonable doubt (Woolmington)
- The burden is on the Crown to meet this requirement (Woolmington)
- The police may not trick people into doing things they would not otherwise normally do (Amato v. The Queen)
- If there is any doubt as to the guilt of the accused, or that the act may have been an accident, he is required to be acquitted (Woolmington)
- Everyone is innocent until proven guilty (Oakes)
- If the burden of proof is reversed, then it needs to be justified by s.1 of the Charter (Oakes) (Whyte)
  1. Pressing and substantial objective
  2. Rational Connection
  3. Cost-Benefit analysis
- An error in jury instruction can cause a conviction to be overturned (Starr)

## Reasonable Doubt (Lifchus):

- Do Mention:
  1. Presumption of innocence
  2. Burden of proof rests on prosecution
  3. Not a doubt based on sympathy or prejudice
  4. Must be based on reason and common sense
  5. Logical connection to evidence or absence thereof
  6. Not absolute certainty, not beyond any doubt, or an imaginary or frivolous doubt
  7. More proof is required than "probably guilty"
  8. "Probably guilty" requires and acquittal
- Do not:
  1. Say that "reasonable doubt" has no special meaning (Starr)
  2. Compare the task of the jury to important life decisions
  3. Equate "beyond a reasonable doubt" to a "moral certainty"
  4. Use any other adjectives besides reasonable

5. Forget to provide the proper definition of “reasonable doubt”

### **Role of Defence Counsel:**

- No obligation to assist the Crown with evidence gathering ([Stinchcombe](#))
- No duty to disclose ([Stinchcombe](#))
- Can only advise a client to take a plea if: ([Marshall Case](#))
  - a) Strong factual basis for the plea
  - b) Represents a voluntary and intelligent choice
  - c) There are alternatives open to the accused
  - d) The accused actually committed the crime
  - e) The accused is capable of understanding what they are doing
- Lawyer cannot let personal prejudice or private opinion cloud their job ([Professional Conduct Handbook](#))
- Cannot advise a client to lie on the stand ([Professional Conduct Handbook](#))
- Counsel can not have abusive/nasty litigation style ([Felderhof](#))
- Civility must be maintained in the courtroom ([Felderhof](#))
- If there is a problem with another counsel, take it up in the proper manner, with an abuse of process motion ([Felderhof](#))
- Accused has a right to give evidence, you cannot prevent him from doing so ([Law Society of Upper Canada](#))
- If you find evidence that will convict your client, you have an ethical obligation to anonymously turn it in to police ([Bernardo](#))
- If you know your client is lying, you need to resign from the case, but cannot say specifically way, nor can you say anything that will prejudice your client

### **Role of Prosecutor:**

- Justice is not an adversarial system ([Boucher](#))
- The role of the Crown is not to obtain a conviction ([Boucher](#))
- Crown must lay before jury all credible evidence relevant to crime ([Boucher](#))
- Crown must be firm, but fair ([Boucher](#))
- Public duty, arbiter of justice ([Boucher](#))
- Must be fair and dispassionate ([Munroe](#))
- Prosecutors must be thick-skinned ([Felderhof](#))
- When should a judge intervene? ([Felderhof](#))
  1. Conspicuous evidence of improper motives
  2. Conspicuous evidence of bad faith
  3. An act so wrong it violates the conscience of the community
  4. Something that would make it genuinely unfair and indecent to proceed
- Cannot make statements that are prejudicial to accused ([Munroe](#))
- If something is prejudicial, apply the [Pisani Test](#):
  1. Do statements have bearing on central issue at trial?
  2. Do statements encourage improper reasoning?
  3. Will they skew the jury’s perception of fact?
  4. Did the judge alleviate the prejudice?
  5. Bar is set high

### **Disclosure:**

- Crown counsel must disclose all relevant or potentially relevant information to the accused ([Boucher v. The Queen, Stinchcombe](#))
- Even evidence the Crown does not care to present at trial must be disclosed if it may benefit the accused ([Stinchcombe](#))
- Err on the side of inclusion, if in doubt about disclosure ([Stinchcombe](#))
- Disclosure is broadly given as a right under s.7 of the Charter
- Crown has discretion over following: ([Stinchcombe](#))
  - a) Protection of confidential informants
  - b) Irrelevant information
  - c) Timing and manner of disclosure

### **Summary and Indictable Offences:**

- Summary Offences:
  1. 6 months in prison and maximum \$2000 fine
  2. BC Provincial Court
  3. No jury
  4. Super Summary” can have 18mos sentence
- Indictable Offences
  1. More serious
  2. Created by Parliament
  3. Trial and penalties vary
- Hybrid Offences
  1. Can be summary or indictable
  2. Default sentencing position is indictable ([Interpretation Act s.34\(1\)\(a\)](#))

### **Murder:**

- [s.229](#) of Criminal Code
- Subjective foresight is required to be convicted of murder ([Vaillancourt](#))
- Intending to cause death
- Intending to cause harm that could lead to death
  1. Must know it may lead to death, or;
  2. Must be reckless as to whether it will cause death
- 1st Degree
  1. Planned and deliberate ([s.231\(2\)](#))
  2. While committing another offence of:
    - (a) Sexual Assault
    - (b) Kidnapping
    - (c) Hijacking of an Aircraft
    - (d) Hostage Taking
    - (e) Forcible Confinement
  3. With elements of contemporaneity and causation
  4. 25 years parole ineligibility
- 2nd Degree ([s.231\(7\)](#))
  1. All murder that is not 1st degree is 2nd degree
  2. Sentencing position

### 3. 10-25 years parole ineligibility

#### **Actus Reus:**

- The guilty act
- A person can be charged with a failure to act (Goulis)
- There is explicit and implicit liability to act (Moore)
- If you have a duty imposed by law, you must do it (Moore, Thornton)
- There can be a duty to act at Common Law and in statute (Thornton)
  1. Individuals must refrain from conduct which poses a reasonably-foreseeable serious harm to others

#### **Voluntariness:**

- All criminal offences must have this element
- This is entrenched in s.7 of the Charter (Ruzic)
- Requires conscious mind and controlled body (Ruzic)
  - Accidents are not crimes (Lucki)
  - Reflex actions are not the result of a conscious mind (Wolfe)
- Capacity to make a choice is important (Ruzic)
- There is physical and moral voluntariness
- Moral involuntariness must be raised as a defense
- Accidents are not crimes (Lucki)

#### **Causation:**

- Accused must have contributed in some way (Smithers)
  1. Cannot be a de minimus contribution (Smithers)
  2. Needs to be proven beyond a reasonable doubt (Nette)
  3. Cannot be "trivial or insignificant" (Nette)
    - a) Significant contributing cause
  4. Thin skull rule applies (Smithers)(Blau)
  5. Not restricted to most proximate or primary cause (Menezes)
  6. Can be more than one significant contributing cause (Menezes) (Reid & Stratton)
- Standard of causation is higher for first-degree murder (Harbottle)
  1. Must be essential, integral, and substantial
  2. The (Nette) test must be satisfied
- Element of offence must include causation
- Chain of causation requires criminal act at outset (Menezes)
- Must be found to have caused in both fact and law (Menezes)
  1. Factual causation is established by expert evidence (Smithers)
  2. Legal causation is moral cause, and determined by Jury (Smithers) (Menezes)
- To get rid of Causation:
  1. Remoteness of action disestablishes causation (Menezes)
  2. An interrupting or intervening act can break chain of causation (Reid & Stratton)
  3. Cannot be held liable for something outside your control (Reid & Stratton)

- a) Example of A hits B, B is unconscious, Act of God kills B, not A's fault
- 4. Abandonment of Conduct ([Menezes](#))
  - a) Positive communication of notice
  - b) Sufficiency of Notice
  - c) Nature of Offense
  - d) Degree of accused's participation

### Levels of Fault:

- Higher level of fault satisfies test for lower levels
- Higher the mens rea, the higher the moral blameworthiness
- Can be subjective or objective
- Explicit language in a provision can make the level of fault higher ([Sault Ste. Marie](#))
- An offense with a mens rea requirement needs to be proven at the subjective level
- There is a hierarchy:
  - a) Purposefulness
  - b) Knowledge
  - c) Recklessness
  - d) Negligence
  - e) Strict Liability (objective)
  - f) Absolute Liability (objective)

### Regulatory Offences:

- Absolute and Strict liability can only satisfy requirements for regulatory offences ([Pearce Fisheries](#))
- There is a modified objective standard:
  - Would a reasonable person of a similar cultural background have acted this way?
- There is a lower standard for regulatory offences ([Pearce Fisheries](#))
- There is no stigma attached to regulatory offences ([Pearce Fisheries](#))
- Woolmington does not apply to regulatory offences ([Sault Ste. Marie](#))
- Burden of proof is on accused in regulatory offences ([Sault Ste. Marie](#))
  - Defendant alone will have the proof in these cases
- Default level is strict liability
- All provincial statutes are automatically regulatory

### Absolute Liability:

- For absolute liability to exist ([Sault Ste. Marie](#)):
  - a) Must be clear that guilt follows immediately
  - b) Must consider overall regulatory scheme
  - c) Must consider subject matter
  - d) Must consider importance of penalty
  - e) Must consider precision of language
- Absolute Liability cannot be combined with imprisonment ([Reference Re: s.94\(2\) of BC MVA](#))

### Mens Rea:

- Offences that do not identify mens rea are seen to import it, either at a default level of intention or recklessness (Buzzanga and Durocher)
- If a person is acting in order to achieve some purpose, than they intend the foreseeable causes (Buzzanga and Durocher)
  1. You can be liable based on conscious purpose or foreseeability
- Must exist contemporaneously with actus reus
  1. But must not be symmetrical with actus reus (Creighton)
- Moral blameworthiness
- To determine level of fault:
  1. Identify the level of fault
    - a) Apply contextual and purposive approach
  2. Link fault to act or omission
  3. Link level of fault to consequences
  4. Make an argument for causation
  5. Identify if there are any Constitutional issues
  6. Apply it to the facts, dummy!
  7. If it's silent, go with recklessness (Buzzanga and Durocher)
- The word "willful" in a provision of the code signals absolute intention (Buzzanga and Durocher)
- There is a hierarchy:
  1. Intent
  2. Knowledge
    - a) Aware of the nature of their conduct
    - b) Aware of the consequences of their actions
  3. Recklessness
    - a) If it's silent, it's this one! (Buzzanga and Durocher)
  4. Willful Blindness
    - a) Satisfying this is enough to satisfy knowledge (Duong)
  5. Criminal Negligence

### **Motive:**

- Relevant when dealing with circumstantial evidence (Lewis)
  - If it makes it more likely to convict accused
- Trial judge makes call on when to charge jury with motive (Lewis)

### **Intent:**

- Purpose and intent are the same (Hibbert)
  - Used (BellExpress Vu) to interpret
- Purpose does not equal motive (Hibbert)
  - Meaning to do something, as opposed for reason for doing it (Hibbert)
- Two kinds of intent (Buzzanga and Durocher)
- Subjective mens rea is the default if there is no identification of mens rea (Buzzanga and Durocher)

### **Willful Blindness:**

- Choosing to remain ignorant (Sansregret)

- Satisfying this counts as satisfying knowledge (Sansregret)
- Conscious purpose is not necessary to be guilty of an offence (Buzzanga and Durocher)
- If a consequence is reasonably foreseeable a person can be found guilty (Buzzanga and Durocher)
- Does not include recklessness as part of the offence (Buzzanga and Durocher)
- If an accused knows or strongly suspects but chooses not to look further, he is willfully blind (Duong) (Jorgensen)
  - Liability turns on the desire not to inquire once real suspicions arise (Duong)

### **Recklessness:**

- If an individual acts without care or regard for the consequences of their actions (Sansregret)
- A reckless individual cannot have an honest belief of consent (Sansregret)

### **Criminal Negligence**

- Intentional causation of harm must be punished more severely than unintentional (Creighton)
- Requires a marked departure from the standard of a reasonable person (Tutton and Tutton)
  1. Personalization should only occur in cases of incapacity (Creighton)
- Requires an objective test (Tutton and Tutton) (Waite and Gingrich) (Hundal)
  1. A subjective or a modified objective test will likely produce the same result (Tutton and Tutton)
  2. There is no Constitutional requirement to give subjective test (Hundal)
    - a) Mental level of fault needs to relate to prohibited consequence
  3. Terms that can convey meaning include “the manner of...” and “have regard” (Hundal)
    - a) If this is in the provision it can help show an objective test is necessary
    - b) Use the principles of statutory interpretation
  4. There must be allowance for social factors (Tutton and Tutton) (Hundal)
- There must be minimal awareness of the prohibited risk (Tutton and Tutton)
  1. This can include willful blindness to the risk

### **Fault Levels:**

- An objective test is a reasonable person test
- Determining if something should be measured objectively:
  1. Use the principles of statutory interpretation (Hundal)
  2. Pay attention to the language used in the statute (Hundal)
- Give some deference to social factors (Tutton and Tutton)
  1. But do not personalize unless there is incapacity (Creighton)
- Manslaughter requires objective foresight (Creighton)
  1. This is because of the broad range in sentencing
  2. This would eliminate the thin-skull rule
- Using a firearm in a careless manner requires objective foresight (Durham)
- Careless storage of a firearm requires objective foresight (Finlay)

- Dangerous driving requires objective foresight (Hundal)
  1. Anything governed by a licensing scheme requires objective foresight (Hundal)
- If there is a high stigma/penalty relationship in the offence, there cannot be an objective fault level (Finta) (Creighton)
  1. Knowledge or intent must be satisfied for these higher level offences
    - a) Willful blindness equation still applies here (Finta)
    - b) Crimes against humanity are knowledge (Finta)
    - c) War crimes are knowledge (Finta)
      - (1) Knowledge that it is a civilian (Finta)
      - (2) Knowledge that there is a war going on (Finta)
    - d) Genocide is intent (Finta)

### **Aiding and Abetting:**

- It is legally irrelevant whether one aided and abetted or actually committed the crime (Thatcher)
- Aiders/Abettors must be charged with same standard of fault as principal (Logan) (Davy)
  1. This is justified in a stigma/penalty analysis (Davy) (Logan)
- Criminal Code s.21 alleviates the necessity for the Crown to choose between two forms of participation (Thatcher) (s.21)
- The jury needs only be convinced that the defendant intended the act (Thatcher) (s.21)
- Test for abetting:
  1. Must encourage or support the commission of the crime (Dunlop and Sylvester)
  2. Mere presence is not enough to establish guilt (Dunlop and Sylvester)
    - a) Unless there is a statutory duty to interfere (Nixon)
    - b) Circumstantial evidence will allow for mere presence to establish guilt (Jackson)
  3. Non-interference is not a crime (Dunlop and Sylvester)
  4. Must know of or intend the act (Dunlop and Sylvester)
- You can be guilty of aiding and abetting if you are silent (Kulbacki)(Popen)
  1. It must be shown that there is a degree of responsibility to control the actions of the principal offender (Kulbacki)
  2. There must be a duty to act (Popen) (Nixon)

### **Common Intention:**

- Expands the **Nette** test
- Must know or ought to have known an offence would be committed (Kirkness)
  1. These need to be present prior to or at the time of the commission (Kirkness)
  2. This applies to consequent offences (Kirkness)
    - a) Must be reasonably foreseeable (Kirkness)
- Can use abandonment as a defence:
  1. Timely communication is required for abandonment (Kirkness) (Whitehouse)
  2. Degree of participation determines sufficiency of abandonment (Kirkness) (Whitehouse)



- People charged with a common intention must be charged under the same standard of fault level (Logan) (Davy)
  1. Mens rea must be proved individually (H.(L.I.))

### Co-Principals/Participation:

- If a group of people act together to commit a crime, they are equally guilty (H.(L.I.))
  1. There is no difference between the person who deals a final blow and those who deal the preceding blows (H.(L.I.))
- Using an innocent party:
  1. Someone who convinces an innocent party to act is guilty as principal offender (Berryman)
  2. Innocent party is not guilty (Berryman)
  3. Common law doctrine of innocent agency (Berryman)

### Attempts:

- Must be an act beyond mere preparation (Sorrell and Bondett) (Cline)
  1. Acts that are proximate and related to the commission of the offence go beyond mere preparation (Sorrell and Bondett) (Deutsch)
    - a) Qualitative analysis (Deutsch)
      - (1) Define nature of actus reus of completed offence
      - (2) Consider factors of proximity
      - (3) Consider time, location, and factors under control of accused
      - (4) Standard is common sense
  2. Preparation must be fully complete (Cline)
  3. Acts forming actus reus can only do so if there is criminal intent (Cline)
- Intent to commit the underlying offence must also be present (Sorrell and Bondett) (Cline)
  1. Criminality rests mainly in intent (Cline)
- Mens rea for attempted murder cannot be less than specific intent (Ancio) (Sit)
  1. This overruled the decision in (Williams)
  2. Otherwise it would produce an absurd result (Ancio)
  3. One cannot logically attempt to kill without intending to kill (Ancio)
  4. Could also be specific intent to cause bodily harm (Logan)
- If an act is subject to multiple interpretations, it is not evidence of an attempt (Sorrell and Bondett)

### Impossibility:

- There is a difference between factual and legal impossibility (United States v. Dynar)
  1. Legal Impossibility:
    - a) If the act when completed is not a crime (United States v. Dynar)
    - b) Ie: stealing a free sample
    - c) Will still result in guilt (United States v. Dynar)
  2. Factual Impossibility:
    - a) Thwarted by a change in facts (United States v. Dynar)
    - b) Ie: shooting and missing
    - c) Will still result in guilt (United States v. Dynar)

- The only offences that will get an acquittal on impossibility are imaginary offences ([United States v. Dynar](#))
  1. These are offences that are not actually crimes ([United States v. Dynar](#))
    - a) Cannot form the actus reus ([United States v. Dynar](#))
    - b) A Common Law offence cannot be introduced ([United States v. Dynar](#))
    - c) There is no need to deter non-crimes ([United States v. Dynar](#))
  2. I.e.: wearing a mask at night

### **Mistake of Fact:**

- Disproves subjective mens rea offences
- Reckless and objective mens rea offences do not avail themselves of this defence ([Prue and Baril](#))
- Mistake must be non-negligent in its nature

### **Mistake of Law:**

- Ignorance of the law is no excuse
- Mistake of law is not a defence ([Jones and Pamajewon](#))
- Must be mistake of how a law operates ([MacDoughall](#))
- Generally it is not a defence except when:
  1. There is color of right
    - a) If a person thinks they have a right that they do not
  2. There is officially induced error
    - a) An official responsible for exercising the law gave misinformation
    - b) This has not been successful in SCC
  3. There is non-publication of the law
    - a) How can you be guilty of an offence that wasn't available to be known?
  4. The offence itself requires knowledge of the law
- Due diligence cannot apply to mistake of law ([Pontes](#))
  1. Due diligence is not about ascertaining law but about trying to apply it ([Pontes](#))([Molis](#))

### **Self-Defence:**

- Requires existence of:
  1. Assault ([Cinous](#))
  2. Apprehension of grievous harm ([Cinous](#))
  3. No other legal alternative ([Cinous](#))
    - a) Fear of arrest does not preclude this ([Cinous](#))
  4. An air of reality ([Cinous](#))
  5. All these are subject to a reasonable standard ([Cinous](#))
    - a) Assessed in the context and circumstances of the accused ([Lavallee](#)) ([Cinous](#))
  6. Must also be real as perceived by accused ([Cinous](#))
- Can be used to defend self, another, or property
- This defence does not avail itself to criminals who set their own rules of criminal subculture ([Cinous](#))

- Self-defence is a complex defence and this is preventing it from people using it in all the ways they should be able to (McIntosh)
- An initial aggressor can use this defence (McIntosh)
  1. Under s.34(2) they need not retreat (McIntosh)
  2. Under s.35, they need to prove retreat (McIntosh)

### **Necessity:**

- The defence of necessity must meet the following test: (Perka)
  1. Urgency
    - a) Normal human instincts cry out and make a counsel for patience unreasonable
    - b) Imminent peril
  2. No reasonable and lawful alternative
  3. Proportionality between harm avoided and harm caused
  4. Objective standard by which these are measured
    - a) Modified objective test
- Involvement in criminal or immoral activity does not preclude one from this defence
- Justification approves the act, whereas excuse does not approve but still allows

### **Duress:**

- Used to only be available to principal offender (Pacquette)
- Future and third party threats are satisfactory for this defence (Ruzic)
- There does not need to be immediacy and presence, just reasonable belief
- Duress eliminates the moral voluntariness of the act
- Common Law Defence (applies to not-principals):
  1. A temporal link between the threat and commission of crime
  2. No safe avenue for escape
  3. Proportionality between threat and response

### **Intoxication:**

- When deciding if this defence applies, you need to determine the following:
  1. What kind of intent is required by the offence?
  2. What was the level of intoxication present?
- Advanced states of intoxication will negate mens rea for specific intent (Daley)
  1. But not general intent (Daley)
- Extreme intoxication will negate mens rea for specific and general intent offences (Daley) (Daviault)
  1. Established on a balance of probabilities
  2. Must lack physical voluntariness
  3. Must be in an automatist state
  4. Available only for non-violent general intent offences (Daviault)
    - a) With extreme intoxication and a general intent offence, you need to apply s.33(1)
- Mild intoxication is not a defence for any offence (Daley)
- The accused must establish an air of reality (Daley)
  1. Can be disproved by reasonable doubt (Daley)

## **Mental Disorder:**

- Is not a true defence
- If a person was suffering from a mental disorder which:
  1. Rendered the person incapable of appreciating the nature and quality of the act (Simpson) (Cooper)
    - a) Mere knowledge is not enough to satisfy the appreciation test
    - b) Must be fully aware and appreciative of the natural consequences that would flow from the act (McRuer Report) (Cooper)
  2. Rendered the person incapable of knowing an act was wrong (Simpson) (Cooper)
    - a) Act must be wrong according to moral standards of society (Chaulk and Morissette)
- Every person is automatically presumed not to suffer from a mental disorder (Chaulk)
- Will be found not criminally responsible:
  1. On a balance of probabilities (s.16(2))
  2. Proven by the party that raises the issue (s.16(3))
- A judge is the person to determine whether a particular mental state was a mental disorder (Cooper)
  1. Does not include self-induced states due to alcohol or drugs (Cooper)
  2. Does not include transitory states like concussion or hysteria (Cooper)
  3. Is a disease of the mind that embraces illness, disorder, or abnormal condition (Cooper)
- Did the accused lack the capacity to:
  1. Rationally decide an act was right or wrong (Oommen)
  2. To make a rational choice whether or not to do it (Oommen)