**Mens Rea Attack:**

1. What was the fault level?
   1. Generally:
      1. *Buzzanga and Durocher; Tennant and Nacarratto* say subjective fault for criminal offences, default recklessness standard, acts can create a rebuttable presumption of subjective intent.
      2. Look to provision, then actus reus, purposive and contextual approach of statute (Paré, Bell) (*Theroux*)
   2. Specifically apply to the circumstances at hand:
      1. Specific language?
      2. Statutory language suggesting anything? (“IE Boxing is regulated”)
      3. Nature of actus reus and all its elements? (“What do they criminalize?”
      4. Why? (“Prizefights need participants etc.)
      5. Counterarguments? (“Why not modified objective like *Hundal*? Not automatic like driving, that’s why!”)
      6. Conclusion
2. Constitutional Issues:
   1. General stigma-penalty analysis: (*R. v.* *Durham* (Arbour JA) (p. 475): Stigma must be proportional to the gravity of conduct and the level of fault)
   2. Stigma of offence compared to others?
   3. Penalty enough to meet this?
   4. In relation to this offence?
3. Did D have this intent?
   1. Definition of the level of fault.
   2. Facts supporting this idea
   3. Facts against it
   4. Conclusion

**Policy Attack:**

What are the potentially unintended consequences of any ruling?

Does it hurt clarity of the law?

Does it lead to illogical situations?

**Actus Reus**

Essential Elements are

**Acts/omissions**

**Omissions (Duty to Act) (See CONTEMPORANEITY; CONTINUOUS TRANSACTION THEORY)**

Most crimes committed by positive acts; Legal duties (statutory, CL) must be basis for omission

Explicit Liability:

1. CCC explicit statutes
   1. Duty and punishment for omission (S. 215)
      1. (legal duties for families; everyone under duty who doesn’t perform)
   2. One section creates duty, another the offence (S. 219 – crim negligence) – duty defined in CL etc = might allow CL offences through back door

*R. v. Miller* p. 295 – Squatter, smoking, falls asleep, moves to another room when sees mattress smouldering. Charged with arson; mens rea is found in intentional recklessness.

May L.J.: “at moment of awareness, when power is there to rectify the act or its consequences, that can be regarded as an intentional act”

Adoption theory vs. Continuous transaction theory

*R. v. Thornton* p. 307– D knew he had HIV, was in risk categories, lied about it and donated blood; claimed it was to purge body, but friend said it was to test screening system

SCC does not approve/reject ON C.A. – deliberately silent

Charged with nuisance (S. 180) – explicit recognition of legal duties as defined elsewhere – either statutory or CL ~

Duty *not to injure neighbour* (para 15, 17): reasonable foreseeability from tort law

Torts give “duty not to harm” – is there a duty, can it be punishable by omission?

Use S. 216 duty for S. 180

applies to legal things which might endanger life (like donating blood)

must use reasonable knowledge, care, skill (except in necessity)

1. Implicit Liability

*R. v. Moore* p. 301 – D runs through red light on bike, motorcycle cop tells him to stop, gets told to fuck off, cop charges him with obstruction (S. 129) (failure in duty to assist)

Issue: Did he have a duty to assist? What activities give liability if violated?

Majority: Cost-benefit argument: too much to look for the guy vs. him giving his name right there

Constable had right and duty to investigate = requires information

“reciprocal duty” – you can obstruct through omission

Dickson (with Estey) (Diss.) (para. 42): Crim law is no place to imply duties

Only give duty to act in CL [31] or Statute [27] – majority imposes duty on cyclist via traffic laws

Right to silence supreme – cannot be obstruction

**Consequences/causation**

Standard for all: “significant contributing cause”;

Broken by remotenss, intervening act, withdrawal/abandonment,

**(Manslaughter)**

*Smithers v. Queen* [1978] SCC p. 327

Hockey game, violence; Smithers and V ejected, Smithers attacks V later when V surrounded by people – punches, then “hard fast kick” while being restrained

V throws up and dies b/c of faulty epiglottis – did this or Smithers kill him?

Dickson J: Burden met; Crown proved Smithers wouldn’t have died w/o kick

Kick was at least a contributory cause; plus thin skull principle (*R. v. Cato* (1975); *R. v. Garforth* [1954]; *R. v. Blaue* [1975]; *R. v. Nicholson* (1926))

**(Smithers Test)** 1)“A contributing cause that is not trivial or insignificant” beyond the *de minimis* standard

2) “Legal AND factual blameworthiness”

**(Murder 2)**

*R. v. Nette* (2001) SCC p. 343

D hogties 95-y.o. woman in Kelowna, brags about it to cops; Crown says it’s “unlawful confinement” etc.

L’H-D (McL, Gon., Bast.) – “Not insignificant” lower standard than “significant”

Arbour (Iac, Bin., Maj., Lebel) – “Not insignificant = “significant”, but “significant” is less confusing for juries

**(Murder 1)**

*R. v. Harbottle* (p. 351) “Substantial, essential, integral part of the killing”; “~ cause of death”

Requires greater contributing cause, not greater factual causation

**Causation broken by**

**Remoteness**

*R. v. Cribbin* p. 332: D not culpable if actions one part of a confluence of circumstances

**Intervening Event**

*R. v. Hallet* – Vic beaten unconscious, drowned when tide came in

*R. v. Reid and Stratton* (2003) NS C.A. (New Trial Ordered) p. 366

Reid and Boudreau arguing, confrontation with McKay (V) and Ds. Stratton headlocked V, Reid kicked. Tried to resuscitate, which forced vomit into lungs Would have come to without medical treatment; was this an intervening event? (BUT S. 225 (ignored) = Improper treatment does not break causation)

**Abandonment/Withdrawal = opposite of Adoption Theory (also, see Liability: Aiding and Abetting: Common Intention):** Must be communicated based on nature of offense, participation etc.

*R. v. Menezes* (ONSCJ) (2002) p. 361

D and V racing cars, V lost control struck pole: did V die just because of D? No: D gave up past the overpass; V would have seen this, known race was over. After this, V was an independent agent; D still guilty of dangerous driving.

**Contemporaneity (see DUTY TO ACT)**

**(Continuous Act Theory)**

*Daviault*

*Fagan v. Metro Police* (p. 292)

Fagen flagged down, rolls car on to cop’s foot, told to move, tells cop to get fucked, eventually moves car – did actus reus coincide with mens rea?

James J: Fagen applies force via the car – “continuous act of assault”

Bridge J. (diss): Actus reus stops when car stops, rests on its own inertia.

**(Adoption Theory) (**Noncrim acts can become crim via duty to act)

*R. v. Miller* p. 295 (Not the law)

*R. v. Cooper*: p. 297 (also 450, 694)

Continuing Transaction Theory vs. Duty to Act Theory both okay in Canada

Court did not identify which of these is preferred; UK prefers duty to act

Cory J. Once he started to strangle, he knew it was wrong = mens rea

Lamer (dissent): mens rea for murder is knowing you’d cause death

Cooper Test: “At some point, actus reus and mens rea conincide”

Innocent act may turn out to be criminal

Opposite is “**Withdrawal**”

**Voluntariness**

*R. v. Ruzic* [2001] SCC: p. 290

Must have: “conscious mind and controllable body”

*Daviault* elevated voluntariness to S. 7 requirement; does not negate actus reus but does serve as defence

Big difference between physical/moral voluntariness, must only punish moral blameworthiness

**Burden of Proof:**

**Common Law Standard**

*Woolmington v. DPP [1935]* p. 261

Wife leaves him, kills wife; says he was trying to threaten her with suicide when gun goes off; onus was on Woolmington to prove accident.

Sacred consistency (“one golden thread”) is Crown proving beyond reasonable doubt; D should not have to prove anything, just explain

Allowed statutory exception to presumption of innocence (Violation of S. 11 (D))

**Statutory Exceptions**

*R. v. Oakes (1986)* p. 266 (See OAKES TEST) (statutory exceptions)

(Dickson CJC) D had bit of pot, charged with trafficking under *Narcotic Control Act*; D objects that *NCA* requires you prove it’s not for trafficking; might lead to convictions despite doubts about guilt = Violation of S. 11 (D))

Presumption of innocence is crucial to justice system; this worthy goal does not meet threshold per part 2 of Oakes Test.

**Reasonable Doubt**

*R. v. Lifchus*: (p. 280) (**THE standard**) (standard of proof; reasonable doubt)

“Reasonable Doubt” is not an everyday phrase

Fundamental to presumption of innocence; “probably guilty” not enough

Crown always has burden of proof; Based in logical sense, not prejudice etc.

standard of “beyond reasonable doubt”; series of certainties, being “sure” etc.

Slightly below “absolute certainty” and “sure”, but above “moral certainty” and “probably guilty”

Standard of proof high because of presumption of innocence

*R. v. Starr*: (p. 281) Iaccobucci +4

Judge did not explain how much less than “absolute certainty” was allowed

Need balance between “certainty” and “probability”; reasonable doubt closer to certainty

Dissent: L’H-Dubé:

*Lifchus* just guideline, judge still gave rules, instructions clear, juries not stupid

**Common Law:**

**Defences:**

*Amato v. The Queen* (p. 19, 132) (N. Van hairdresser, Mr. Big tactic to get Amato to get coke)

Estey J. – 1) Defence of entrapment should be allowed through S. 7.3 (8.3) of Code.

2) Draft Code 1879: “We can’t foresee everything, CL defences recognized, why screw with it?”; courts previously accepted CL defences; need evolving checks and balances

3) See *Kirzner* (1977) – “not frozen in time”, can’t be unjust to D

**Offences:**

*Frey v. Fedoruk* (peeping tom) (p. 21)

Cannot criminalize action via CL by hypothetical crime of public order disturbance; dangerous to prosecute by proxy; CL charges potentially arbitrary; recognized as such by Code drafters, 1879.

Value in protecting individual outweighs harm

Parl. outlawed CL offences in S. 9 *CCC;* Parliament can change peep laws

Judges allowed CL offences (contempt) – all authority from *Constitution* (supreme over *CCC*)

Might be allowed through back door with Duty to Act

**Defences (see also Common Law)**

*R. v. Mack* (1998): (130, 135) entrapment is when cops/informants instigate a crime without which D would not be charged

**Defences:** (S. 26) To be raised after Crown proves *actus reus* and *mens rea*.

Defence standards: 1) Reasonable doubt, 2) (Civil) balance of probabilities; 3) Air of Reality

Air of Reality is the most common.

Can have true defences (full excuse, like self defence) or partial defences (provocation)

**Duress**: (S. 17) Human threats of harm.

*R. v. Ruzic* (2001) SCC (p. 958): D intimidated and assaulted into smuggling heroin into Canada; threatened to harm her mother if she refused

LeBel: Fundamental justice requires voluntariness (see *Hibbert*). Requirements that the threatener be right there to threaten only D is too restrictive and contrary to S. 7

**Intoxication**: Keep S. 33.1 (basically, drunkenness not an excuse if you cause harm) open for constitutional challenge

*R. v. Daley* (2007) SCC: D drinking a lot with friends, go out, D ridiculously hammered, wife is stabbed when D’s sister comes back the next morning. Can drunkenness negate his *mens rea*? Extreme intoxication like automatism, which removes any conscious capacity though you might be able to act.

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Mild Intoxication** | **Advanced Intoxication** | **Extreme Intoxication** |
| **PROOF?** | Irrelevant | Air of reality test | Reasonable doubt |
| **General Intent** | Does not negate | Does not negate | Negates |
| **Specific Intent** | Does not negate | Negates | Negates |

**Mental Disorders**: S. 16; Not a true defence: D is NCRMD and gets treated, not acquitted.

Burden on whoso raises the defence, to be proved on Balance of Probabilities. 16.1: NCR for *actus reus* done while suffering from mental disorder (contemporaneity issue). Goes to the heart of moral blameworthiness, voluntariness, fault re consequence, etc.

*Test*: 1) Was D incapable of appreciating the quality/nature of acts (IE what will come of them) (*Cooper*) OR

2) Is D deprived from making a rational choice to resort to the illegal act? D may be deprived of capacity to know his act is wrong generally OR in application to the situation at hand. (*Oommen*)

Modified objective standard: how would a reasonable person with these delusions have acted?

“Any condition which impairs the human mind and its functioning to render D incapable of appreciating the nature of the act or the wrongness of the act.” (*Cooper*)

*R. v. Simpson*: (1977) ONCA (p. 790): No legal definition of mental disorder; let judges decide after the shrinks describe a condition.

*Cooper* *v. The Queen* (1980) SCC (p. 791, 794): Mental disorders should encompass anything except transitory and self-induced states (hysteria, intoxication, etc.)

“Any condition which impairs the human mind and its functioning to render D incapable of appreciating the nature of the act or the wrongness of the act.”

“Appreciating” includes understanding the consequences, if any, of doing X, not just that you did X. (Encompasses emotional AND intellectual awareness).

*R. v. Chaulk and Morissette* (1990) SCC (p. 800): D break into V’s house, rob and ransack, kill V because they think they have a right to kill “losers”. Aware of Canadian law but felt they were above it. Say knowing an act is “wrong” is too wide.

Lamer: “Wrong” is based on community morals (objective only). D only convicted if he is aware of society’s perceptions regarding the act **AND** that it’s contrary to the law. French statute uses “mauvais”, which is broader than “illegal”.

McLachlin (Diss): All that should be required is some knowledge that an act is wrong. Opens the doors to psychopaths, and the court cannot and should not judge morality.

*R. v. Oommen* (1994) SCC (p. 806): D felt local union conspiring against him because he had been a cabbie for scabs; thought woman he was living with was supposed to kill him.

Buzzers ringing etc = thinks this is the signal to kill him; thinks he sees knife (Air of reality)

*TEST:* Is D deprived from making a rational choice to resort to the illegal act? D may be deprived of capacity to know his act is wrong generally OR in application to the situation at hand.

McLachlin: D could distinguish right from wrong *per se*, but his delusions created a situation in which D had to kill V; the act was not wrong “by the standards of the ordinary person.”

**Did D lack the capacity to rationally decide if his act was right or wrong and act on that basis?**

Given the situation, D’s mental disorder replaced objective reality.

**Mistake of Fact:** (CL?)Only really allowed for subjective *mens rea*. Must be critically related to the fault of the offence (IE In theft, mistakenly taking stuff: you had *colour of right)*

Includes legal title to property. “I was told to buy flour and you’re telling me it’s blow?”

*R. v. Prue and Baril* (1979) SCC (p. 617): D doesn’t know license is automatically suspended by legislation. Mistake is as to the fact of suspension, not the operation of statute. (But see **Mistake of Law**)

*R. v. Pontes* (1995) SCC (p. 628) : automatic prohibition of license without notice. Cory: *MacDougall* was rendered prior to the Charter; unfair to convict without ANY notice.

Gonthier (diss): Holds to *MacDougall* (mistake about law), but allows mistake as mitigation.

**Mistake of Law:** Not a real defence (S. 19) except re nonpublication of the law; where offence suggests you need knowledge of the law; officially induced error (maybe)

*R. v. MacDougall* (1982) SCC (p. 618): Ditto, but was not notified about re-revocation. Opposite of *Prue and Baril*: court holds this is a mistake re operation of legislation.

*Jones and Pamajewon v. The Queen* (1991) SCC (p. 627): D believed they didn’t need a permit for their casino because they’re natives operating on a reserve.

Stevenson J.: assuming they were mistaken as to this, this is a mistake of law. Tough.

*R. v. Molis* (1980) SCC (p. 631): Producing chemicals that turn out to be illegal later is a mistake of law. Your mistake is re their illegality, not the fact that they had become illegal.

**Necessity**: (CL) You and your circumstances leave no alternative (alpinist breaks into cabin or dies)

You put yourself in your own situation.

*Test: 1) Situation must be urgent and imperilled; 2) Must be “demonstrably impossible” to follow the law; 3) must be objectively proportional*

*Perka v. the Queen* (1984) SCC (p. 927):D smuggling drugs to Alaska via international waters when a storm forced them into Canadian waters. Charged with importing.

Dickson: Justifications are like the cops who shoot hostage takers: right to act thus

Excuses: dislike the conduct but will excuse it on that factual instance.

Necessity can only work as an excuse – revokes voluntariness.

Must be about avoiding harm, not avoiding punishment.

**Self Defence:** (S. 26) Statutory, requires proportionality and withdrawal as much as possible.

Have a duty to assist some (kids) but not others (strangers)

Measure conduct with harm you’re preventing.

*Test (Pétel): 1) (Imminent) Unlawful assault, 2) Apprehension of death/harm; 3) No other alternative.* D must prove these were **subjectively and objectively reasonable** (reasonable person in the same position) with an air of reality standard

*R. v. Cinous* (2002) SCC (p. 986) : D a career criminal, thought Ice and Mike (V) were planning to kill him. Had heard about it, had revolver stolen, I & M were sitting behind him, whispering, snapping latex gloves, reaching into pockets, etc. D stops at gas station, goes to get wiper fluid, comes back to get money, pays, comes back and kills V.

Satisfies all matters of test except whether there was no **objective alternative**. D felt he couldn’t call the cops, but objectively he could have done this, run, hid, etc. Plus, buying wiper fluid and asking for money destroys suspicion of impending death.

**Duties:**

**Counsel (in General)**

**Civility**

*R. v. Felderhoff* [2003] (Bre-ex one)

D charged under ON Securities Act; D’s counsel perpetually complaining / uncivil

Crown demands new trial with new judge, says trial judge should have intervened

D says P cannot be adversarial at all

Rosenburg J: P is not a robot, only has to disclose potentially relevant evidence regardless of admission to evidence

Judges have discretion; not allowed to show bias by intervening – like hockey refs

D needs to act appropriately with appropriate language at appropriate time

Crown are big boys – should deal with it

**Felderhoff Rule:** Conduct of counsel may ruin trial; vital to understand rules of P and D

**Power Test:** Improper motives and bad faith, other wrongs which violate the conscience of the community (should be identified and dealt with **at discretion of judges**)

Irreparable harm, miscarriage of justice, personal feelings, timing, handbook,

Cases: Boucher, Lifchus, Power, Stinchcombe,

**Disclosure**

*R. v. Stinchcombe* (1991) SCC (p. 223)

D a lawyer, may have misappropriated securities; secretary’s video evidence (favourable to D) not disclosed after Crown reviewed it.

Sopinka J: Cannot refuse app for disclosure because not reciprocal;

Crown has duty to disclose all potentially relevant evidence,

Crown has reviewable discretion on manner/timing; should err to disclosure

Exceptions: privileged disclosure (informants, attorney-client, methods that identify, etc)

Disclose if: Relevant, not privileged, meet timing/manner of disclosure.

**Crown**

*Boucher v. The Queen* (1954) (See S. 7) p. 219

Crown failed to disclose and include statements from D witnesses; “We wouldn’t be here if we thought he was innocent”

Rand J: Crown duty is to investigate all, present all relevant facts, render justice;

Crown is NOT to seek conviction; Duties sourced by courts’ inherent jurisdiction;

Cannot prevent D from access to counsel

See also *R. v. Trochym* (2007)

**Defence**

*Tuckiar v. The Queen*

Tuckiar’s lawyer openly admitted he thought Tuckiar a liar during sentencing

Gross violation of privilege: should have advised not to take stand or not perjure

Handbook: Must defend despite personal views, use every strategy, etc.

Permissible (optional) to disclose info if might prevent death etc

Forbidden to: represent with false testimony, to bail client, allow nonguilty to plead guilty; destroy / conceal physical evidence.

**Language**:

*R. v. Munroe* [1995]:

Deteriorating relationship between D and wife; argument = D gets on top of her when she’s trying to call the cops to accuse D of incest

Issue: (Was he provoked? (Murder 2 to Manslaughter)); also, Crown’s comments

**TEST:** See *Pisani v. Queen* (1970) Test (Laskin):

1. Look at disputed issue, evidence to see if Crown’s statements could lead jury to “encourage improper reasoning” or “prejudice” that “affected the verdict”
2. Did trial judge alleviate the prejudice in instructions or was D deprived?

(*R. v. Finta*: trial judge’s words the neutral explanation – judges are supermen)

**Interpretation:**

**Strict Construction (see Contextual Approach)**

Ambiguity = go with strict definition – more favourable to accused

**Contextual Approach (see Strict Construction)**

*R. v. Goulis*: (p. 37) (declared bankruptcy, did not declare lots of shoes)

Issue: Does “concealment” mean deliberate hiding or “neglecting to mention”?

*Re: Dreidger*: take more lenient meaning for ambiguities.

Maxwell, “Interpretation of Satutes”: Other words lend colour

“removes, conceals, disposes of” = all positive acts

**Purposive (“Modern”) Approach:**

“What was the purpose of making this a crime?”

*R. v. Paré*: (41, also 47) took Duranleau swimming to gain trust, started sequence of events, created an obligation

Issue of intention = ~ culpability = ~ 1st vs. 2nd degree murder = ~ punishment, parole (never; 10 years)

Murder 1 needs planning and deliberation, but D did not bring weapons etc.

S. 231(5) (214(5)) – “furtherance of a crime” “murder on a constructive basis”

Need: predicate crime, murder, contemporaneity, causation

Trial judge: “on the occasion of”;

Beaugrand J. (CA) said this was misdirection; LeBel (CA) said need “close temporal connection”)

Issue: What is the definition of “while”? What is extent of temporal connection?

Ratio: Wilson J.: “Doesn’t require an exact simultaneity”; look at literal meaning

Kjeldsen case – close parallel; vs. R. v. Stevens (“single sequence of events”)

“Unlawful domination” part of law; murder caused by (connected to) rape

Purposive approach = Parliament could not have intended this

Strict Construction used in past when all sentences were death.

*Bell Express Vu Ltd. vs. Rex et al* (2002) SCC p. 47

Iacobucci : Read act in entire context with ordinary and grammatical senses, objectives, Parliamentary intent, scope and scheme of legis, etc.

Strict Construction only if real ambiguity (equally plausible readings)

Can’t look for ambiguity, look at diff interpretations

**Judicial Notice:**

Judge can consider “notorious facts” not entered into evidence; (“it rains in Vancouver”)

**Liability** No longer need to pigeonhole. Can be liable in any mode.

**Aiding and Abetting**: (S. 21 (1)) Anyone who does/omits to do anything for the purpose of aiding any other person to commit an offence, in word or deed, incl. after-the-fact.

**Common Intention:** (S. 21 (2))2+ for unlawful purpose, and assist same: B is liable for any offence A commits consequential to the originating illegal act unless B withdraws.

*Kirkness v. The Queen* (1990) SCC (p. 512): Kirkness and Snowbird do B&E. S strangles V, K just says to stop, but still puts chair at the door to block entry.

Wilson J (Diss.): Common intention may be formed just before or at commission of offence; liability based on subjective/objective awareness of probability of consequences.

Parties must do “something more” to disassociate themselves with crime and withdraw. (*Whitehouse*: “timely communication of withdrawal where practical and reasonable.” Not enough to just leave or change mind.)

*R. v. Maier and Clark* [1968] SKCA (p. 520): D must know that B is a probable consequence of offence A to be convicted of offence B.

**Constitutional Considerations**

*R. v. Logan* (1990) SCC (p. 521): D participates in robbery, principal seriously wounds cashier; charge is attempted murder because D “knew or ought to have known”.

Lamer: common intent has the same *mens rea* as the real offence, except where it’s too low for s. 7. For attempted murder, subjective foresight is required, so “ought to have known” is not permitted. Still possible for criminal negligence, though.

D just needs to know principal would kill, but need not have that intent himself.

*R. v. Davy* (1993) SCC (p. 523): Thanks to *Creighton*, merely need objective foreseeability of risk of harm to convict thus on manslaughter.

**Mere Presence**

*Dunlop and Sylvester v. The Queen* (1979) SCC (p. 511): Appellants dropped beer off at dump, saw a girl being raped, and left. Charged with aiding and abetting.

Dickson: not guilty by virtue of presence, even if you do nothing (I.E. hardened urbanite) Must combine presence with other factors (esp. knowledge of offender’s intention etc)

**Omission:** “Where D has a right to control the actions of another and he deliberately refrains from exercising it, his activity may be a positive encouragement” (p. 513).

If D’s there and does nothing, he may be convicted if this encourages crime (*Nixon,* 514)

*R. v. Kulbacki* (1966) MBCA (p. 508): D (20 M) let X (16, F) drive his car, speed, and did not say anything. D says this was passive, but aiding/abetting is positive.

Court: We don’t expect him to have grabbed the wheel, but he didn’t even say anything. Failure to do anything imputes “consent and approval” of D. (*R. v. Halmo*: D guilty for chauffeur’s reckless driving: authority, presence, consent/approval, knowledge…)

*R. v. Salajko* (1970), D at gangrape with pants down = more than “passive acquiescence”;

Presence might be encouragement (at prizefight, dogfight etc)

*R. v. Popen* (1981) ONCA: V dies from mother’s abuse. D (father) needed to act/omit “for the purpose of aiding his wife inflict injuries to the child.” But D still failed in duty to provide for child.

*R. v. Nixon* (1990) BCCA (p. 513): D a senior cop, let a junior cop beat V in prison. He has power and duties, so his omissions and passive presence mean something.

“A failure to act in accordance with a duty to act may be an omission” for aiding.

If D’s there and does nothing, he may be convicted if this encourages crime.

**Attempts**: (S 24, 463) incomplete offences. Punish because blameworthiness is the same.

Anyone who, with intent to commit an offence, does (not do) something … for the purpose of carrying out the offence, whether or not it was possible, is guilty.

Punishment is generally half the sentencing range due to stigma, deterrence.

S. 239: attempted murder: like manslaughter, no minimum sentence (except using firearm).

**Actus Reus**

*R. v. Cline* (1956) ONCA (p. 540): No one test for what an attempt is (look at facts) because steps need not be illegal. Attempt must go beyond “mere preparation” and preparation should be fully complete to give full opportunity to abandon.

*TEST*

*Deutsch v. The Queen* (1986) SCC (p. 541): D puts ad in paper for secretary / sales assistant, tells them they might have to have sex with clients to induce them to seal the deal, but would be paid ~$100,000/year. No job offer made. Mere preparation to procure?

LeDain: Look at 1) actus reus, 2) nature of completed offence, 3) physical/temporal proximity etc.? All Deutsch had to do to complete the offence was offer the job. The offering of high pay was a significant inducement that puts this beyond mere preparation.

**Impossibility:**

*United States v. Dynar* [1997] SCC (p. 547): D agrees to launder drug money for undercover agent; fears he’s suspected, so passes it off to someone. FBI calls off the sting and nabs him for attempting to launder. Can he be extradited?

Dynar: “No, because I would have laundered US government money, which is legal!”

Court: there’s no distinction between legal impossibility and factual impossibility. Like trying to steal a wallet that’s not there vs. trying to steal one that turns out to be your own. You still tried to commit an offence and shouldn’t go free thanks to fortuity.

We only won’t punish imaginary crimes (things you attempt that aren’t actually crimes.)

**Mens Rea**: fault element is intending to commit an offence, acting with that purpose.

*R. v. Ancio* (1984) SCC. (p. 542): Just like *Woolmington*, except Kurely heard breaking glass and smacked D with a chair. D charged with attempted murder. CA overturns conviction.

SCC: While Crown argues that murder fault requirements should be enough, you can’t logically attempt to kill without an attempt to kill. (How do you attempt manslaughter?)

*R. v. Logan* (1990) SCC (p. 545): D participates in robbery, principal seriously wounds cashier; charge is attempted murder because D “knew or ought to have known”.

Lamer: Attempted murder still has a minimum *mens rea*, but the stigma is the same b/c you D has the same killer instinct. Standard is subjective, as per *Ancio*.

**Equivocal Acts**

*R. v. Sorrell and Bondett* (1978) ONCA p. 546: D come to chicken place wearing balaclavas and holding a gun (found with same close by), but place closed early.

ONCA: Legal acts must be “unequivocal” to infer intent to commit the attempted crime.

**Principal Offenders**: those who actually commit the crime.

**Sole** **Participation; Hiring**

*R. v. Thatcher* [1987] SCC (p. 484): D a politician; hates ex-wife V. V shot, then half a year later beaten to death. D not identified as suspect at scene.

Crown: “he either did it or got someone to do it for him.” Defence: “Maybe he was there, maybe he wasn’t wasn’t there!”

Dickson: the evidence pointed to either theory. The Crown needs to prove guilt, not the material facts of guilt. S. 21 was meant to prevent accused from going free when jurors have different reasons for guilt. (BUT this may convict despite reasonable doubt on facts)

Under either theory, Thatcher would be guilty of the same offense.

**Groups**

*R. v. H. (L. I.)* (2004) MBCA (p. 490): A drunk Bernadette Young (witness) saw guys in a group go into V’s room, kick and jump on V.

Court of Appeal: Trial judge erred in applying Nette (causation). The question is not about whether D caused V’s death, but whether the group – of which D was a part – collectively caused V’s death. Just need to prove D participated in group.

Participation is equivalent to individual culpability because you have common intent.

Group assaults should not prevent individuals from being convicted.

**Innocent Agents**

*R. v. Berryman* (1990) BCCA (p. 501): D involved in all aspects of making a fake passport except “making” it – done by someone else. Originally acquitted – strict construction.

Court: common law doctrine of innocent agents applies: innocent agents are tools of D just like a gun; D controls the innocent agent (“a mere machine whose movements are regulated by the offeder”). Not aidor/abettor because D is the principal.

**Mental Element**

**Regulatory Offences**: Can presume mental element without proof

Test (from *Sault Ste. Marie*): Much like that in *BellExpressVu*

Default is strict liability. Look to language of statute, then scheme of legislation for a regulatory pattern, then stigma/penalty analysis.

**Absolute Liability:** you do it, you’re stuck regardless of excuses

*R. v. Pierce Fisheries Ltd* (1970 SCC) (p. 380): Fisheries finds 26 undersized lobsters in 60,000-lobster catch. Trial judge said *mens rea* required. SCC: mere possession enough.

Ritchie: Not crim, ergo no *mens rea* requirement

Nothing in legis to say otherwise; if Parl wanted a fault element, they could have said so

“Public good” legislation

Not prohibited, just restricted; no stigma for catching lobsters

Cartwright (diss): *Beaver v. The Queen* [1957] SCC, re narcotics, says you need to at least know what you have is wrong.

**Strict Liability:** you do it, you’re stuck unless you have a good excuse

*R. v. City of Sault St. Marie* (1978) SCC (p. 384): D dumped sewage into waterways. Regulations punish those who “caused or permitted to be discharged” pollutants. Trial judge said fault required

SCC: Crown should prove *actus reus*, then D should have to prove due diligence on the balance of probabilities because:

1) Seems unfair to punish you regardless.

2) Should promote higher standards of care

3) No indication of an intent to deny the defence of due diligence

4) OK for reverse onus because

-Presumption of innocence is for true crimes only; this at least allows for a defence like in Woolmington

-Accused in the best position to prove dilligence

-Without this, there’s ABSOLUTE liability only.

**Constitutional Considerations**

*Reference Re S. 94 (2) of BC Motor Vehicle Act* (1985) SCC (p. 390):

BC Act gave a fine and a minimum of seven days’ imprisonment for driving without a license. Lamer: Can’t throw people in jail for absolute liability offences. S. 8-14 of the Charter are examples, not limitations, of S. 7’s principles of fundamental justice.

Lamer basically applies an Oakes Test analysis to strike it down.

*R. v. Pontes* (1995) SCC (p. 393) : This same act created an absolute liability offence regarding driving without notice, but said neither its violation (nor failure to pay fines) would result in imprisonment.

Cory J: This and other provisions in the act create an absolute liability offence, but it’s okay because it would be unconstitutional to enforce it with any penal sanction, so other sections suggesting this possibility are clearly nonsense.

Gonthier (diss): It’s unclear whether or not this is strict or absolute liability based on the language of the offence, so we go with the default.

Also, you simply cannot combine absolute liability with the possibility of penal sanction.

**Mens Rea** (p. 411)

Test:

1. Identify appropriate amount of fault. If no language telling you, then…
2. Relate offence to level of fault required for *actus reus*, and written legislation
3. Particularly in using the purposive and contextual approach
4. Any Constitutional issues?
5. Apply to facts.

**Subjective Fault** (p. 418): 1) Intent, 2) knowledge, 3) recklessness, 4) wilful blindness.

*R. v. Buzzanga and Durocher* (1979) ONCA (p. 418):

We may infer the accused’s subjective intent based on the objective foreseeability of an act’s consequences; however, the accused’s subjective state of mind may negate this.

*R. v. Tennant and Naccarato* (1975) ONCA(p. 418):

Subjective liability infers intent of consequences based on reasonable foreseeability unless proven otherwise. Objective liability says you should have anticipated this regardless. Weigh D’s testimony with other evidence.

**Consciousness of Guilt Evidence**: fleeing scene of crime, not crying at someone’s funeral etc. Circumstantial evidence assuming what guilty people do.

**Intent vs. Motive**

*R. v. Lewis* (1979) SCC (p. 419): D sent an electric kettle to V, which contained a bomb which exploded and killed V.

Dickson: INTENT IS NOT MOTIVE.

Intent is the choice to exercise free will to act a certain way or achieve a result

Motive is what induces this choice.

*Hyam v. DPP*: Hyam wanted to scare V (motive) by setting fire (intent)

As a strict element of the crime, motive is irrelevant. It may, however, be important evidence to be admitted case-by-case at the discretion of each trial judge.

*R. v. Steane* [1947] CA (p. 422): D charged with assisting Germans in WWII by doing films to prevent family from being harmed. Before considering the defence of duress, you must prove intent (Woolmington).

Crown: “He intended to because he said he did it to help his family!”

Court: “But that’s motive! He did not intend to help the enemy in the strict sense.”

*Hibbert* v. *The Queen* (1995) SCC (p. 426): Hibbert forced at gunpoint to lure V out of apartment, where the principal shot V. Hibbert charged under S. 21.2 – “does anything for the purpose of aiding or abetting” but says he did not intend to do it (duress).

Lamer for the Court: No common law definition of purpose; depends on provision

For statutes such as S. 21, **purpose = intent**, but **purpose /= desire**, hence “common intention”. Hibbert’s motive may have been to save his skin, but his intent was to assist.

He can still invoke defences such as duress, but he still had the mental element.

Motive should not be a mitigating factor, lest getaway drivers get off because their motive was to make $100 and not to have the robbery succeed.

*R. v. Buzzanga and DuRocher* (1979) ONCA (p. 430): D charged with “willfully promoting hatred” against French Canadians. D say they intended to shock people with satirical and real statements. No fixed meaning for “willfully”.

Court: look at words around it, scheme and purpose of the act. Previous offence has no language of intent = that must be “reckless”, and this one must be intentional.

Trial judge focused on intentional conduct, not intention to promote hatred.

Must be 1) conscious promoting of hatred or 2) reasonably foreseeable incitement thereof

**Knowledge**

*R. v. Theroux* (1993) SCC (p. 438): D accepted building deposits misleading victims by saying he had building insurance. What is the *mens rea* requirement for fraud?

McLachlin: look to actus reus and its consequences:

“Do I intend them? Do I just not give a shit?”

Regardless of whether or not accused feels it is wrong etc.

**1)** Acts of deceit, falsehood, dishonesty, **2)** resulting in deprivation or risk thereof

So *mens rea* is that D had some knowledge that he didn’t have (but should have had) deposit insurance, and that he acted on it anyway.

Ergo D must *intentionally* act in some way to deceive, and must be *reckless* as to the potential consequences: (*LaFrance*: taking a car intending to return it is still theft)

Cannot catch all sharp biz practices, nor restrict it to being sure about consequences.

**Recklessness**: presupposes knowledge of the likelihood of prohibited consequences (*Theroux*)

*R. v. Cooper* (1993) SCC (p. 450): S. 229 (A) (2): culpable homicide:

*Actus reus*: causing the death of the individual

*Mens rea*: Must prove each element of either

1) a) Intend to cause death or grievous bodily harm;

b) Knowledge that harm is likely to cause death and

1. Reckless to the consequences

OR

2) recklessly cause bodily harm likely to cause death

Recklessness is subjective because you must be subjectively aware of a risk and proceed anyway. (Contra negligence: should just know harm.)

*R. v. G*: knowingly disregarding a potential for harm is recklessness

**Willful Blindness** – specific aspect of recklessness

*R. v. Sansregret* (1985) SCC (p. 444): D broke into V’s house, terrorized her, raped her and said he thought she consented

Trial judge: clearly didn’t have knowledge; recklessness suggests a subjective awareness and assumption of a risk. Each allows for mistake of fact, ergo he’s golden.

McIntyre: Willful blindness arises when D becomes aware of a need to inquire and deliberately chooses not to do so. (Not objective because you can lead evidence as to your subjective beliefs etc.) Just because you don’t officially have knowledge is not good enough.

*R. v. Duong* (1998) ONCA (p. 447): Willful blindness will satisfy knowledge requirement

D watching TV and hears about a murder, then Lam comes to door and says he’s “in trouble for murder.” D lets him sleep there, and is charged with being an accessory. D claims he thought Lam was only a witness.

“An accessory is one who, knowing that a person has been party to an offence…”

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| **Defence says the requirement is** | **Crown says the requirement is** |
| Knowledge | ***Willful blindness*** |
| ***Of the Specific Offence*** | To any offence |

Choice not to further inquire is knowledge enough. Willful blindness = knowledge

**Objective Fault** (p. 454): Only found when explicit. Generally too low, requires significant standard of reasonableness.

*R. v. Tutton and Tutton* (1989) SCC (p. 454): D were faith-healer parents; kids with diabetes died, parents charged with criminal negligence causing death. ONCA says subjective tests require for *omissions* in negligence.

McIntyre and L’Heureux-Dubé: require an objective test. 1) No basis for distinguishing between acts and omissions and this would make S. 202 irrelevant.

2, 3) Criminal Negligence punishes consequences of departure from standard of conduct

4) Authorities dictate objective test

Use objective standard against factual circumstances and D’s perception thereof.

Lamer: ditto, but “generous allowance” for factors particular to D.

Wilson, Dickson and LaForest: want a subjective test; ignore scheme of act etc;

Start with an objective standard, move to subjective standard regarding evidence of state of mind (would therefore only protect deserving accused with extra defence)

S. 202 notoriously ambiguous and the default is supposed to be subjective

*R. v. Waite* (1989) SCC (p. 459) : D driving car at high speed, killed four. Trial judge said to look at subjective element (mind of accused) and evaluate that against the objective standard.

McIntyre, L’H-D and Lamer: “we said an objective test!”

Wilson, Laskin, LaForest: “when we said subjective, we meant recklessness and not deliberate intention”

**Modified Objective Test**

*R. v. Gingrich and McLean* (1991) ONCA (p. 459): Both charged with criminal negligence when truck brakes failed. Gingrich (driver) convicted, McLean acquitted. ONCA chooses objective over subjective – that’s what negligence is about. BUT each defendant must be subjectively aware of the relevant fact before you can convict on objective conduct.

*R. v. Hundal* (1993) SCC (p. 460-61): D charged through intersection because too dangerous to stop. Court says driving is automatic and therefore objective; only exception is subjective facts to change standard. LaForest (subj. in *Tutton*) says it’s quasi-regulatory.

*R. v. Creighton* (1993) SCC (p. 462): D a user who injected V with coke. Introduces stigma-pentalty analysis.

Lamer (diss): objective foresight the constitutional minimum for manslaughter

Test (p. 467): hold D to objective standard based on someone with D’s objective frailties, circumstances, etc.

1. Offences with consequences (“causing death”) need fault requirement
2. “Risky activities” offences presume mens rea = objective is okay

Police officers already get objective test re discharging of weapons (*R. v. Gossett*)

McLachlin: strict objective test has been Constitutional for a long time.

Test: Manslaugher should be purely objective intent to *embrace risk of harm* for anyone with capacity; the entire purpose is that D did not specifically intend anything.

Lamer’s approach would abrogate the thin skull rule

Would let useless, youthful offenders (*R. v. Naglik*) go free for no reason

**Constitutional Considerations**

*R. v. Martineau* (1990)*, R. v. Vaillancourt* (1987)  (474): Minimum *mens rea* must be in line with nature of crime, usually subjective as a constitutional minimum.

Short of capital murder, war crimes etc, something less than intent is probably okay.

Objective standards okay for criminal negligence (p. 475)

*R. v. Durham* (1992) ONCA: careless storage of firearm violates standards

*R. v. Peters* (1991) BCCA: arson does not need subjective foresight

*R. v. DeSousa* (1992) SCC: objective standards okay for causing bodily harm

*R. v. Finta* (1994) SCC (p. 476): D accused of war crimes in Hungary during the war.

Cory: war crimes have special stigma, ergo need their own mens rea to make them a war crime. Must have an element of subjective knowledge on the part of D, but need only prove that D was subjectively aware of facts etc which made it a war crime.

LaForest (+2) conc.: need only prove this in relation to the major elements of the crime.

**Oakes Test:**

1. Is the reason for *Charter* violation important enough to override *Charter* rights?
2. Demonstrably Justified Proportionality:
   1. Must be designed to achieve desired result; reasonably connected to objective
   2. “impair as little as possible” *Charter* rights
   3. Proportionality between severity of violation, success of measure

**Procedure (“Substantive Criminal Law”):**

Police bound by S. 7-10

Can question anyone, can make random inquiries, but not binding.

**Searches:**

S. 8: Searches okay with warrant, OR

With reasonable and probable cause (without possibility of a warrant) (same standard for offences)

“Search incident to detention” / “Investigative detention”

Allowed “preventative pat-down search” if reasonable belief of “potential weapon”

“Search incident to an arrest” - Allowed on clothing, belongings – for safety etc.

**Standards of proof (see Burden of Proof):**

Reasonable grounds to believe = balance of probabilities = can arrest for evidence needed to convict, can get wiretaps, warrants, can question and investigate, can detain

Reasonable grounds to suspect

No grounds

*R. v. Mann* (2004) – leading case on search

Cops called about burglary at night by 5’10” Ab male in coloured jacket

D matched description = enough to detain = investigative search

Search needs (reasonable belief (committed offence) (~got weapon – even tools)

“soft bulge” found = not allowed to search b/c not a weapon

Did not commit B&E – charged with possession = thrown out per S. 24

**Arrest:**

Requires “reasonable grounds to believe”

Requires “force” (or threat thereof) and “words of arrest”

Permitted “Search incident to an arrest”

Allowed on clothing, belongings – for safety etc.

Allowed S. 10 rights: information on reason; contact lawyer, Habeas Corpus

**Charges:**

Indictable = fed/supreme court greater weight, blame, punishment,

2+ years (max sentence); fed penitentiary

Have “indictment”

Summary = provincial court; procedures in S. 787 CCC; punishments here unless elsewhere; max punishment of $2000 and 6 mos. in jail

Supersummaries – 18 mos. jail

Have “information” (indictment for summaries); sworn by cops in front of J.P. (ex partes proceedings)

Hybrid Summary or indictable as “elected” by Crown; assumed to be indictable

Issue process: Court tells you where and when to arrive

Arraignment: Charged with X

**Extradition:**

Require *Double Criminality* (that you can be punished for the same thing in both the USA and Canada).

**Inferring Mens Rea:**

*Consciousness of Guilt Evidence*: fleeing scene of crime, not crying at someone’s funeral etc. Circumstantial evidence assuming what guilty people do.

*Equivocal Act:* (See R. v. *Sorrell and Bondett*, p. 546): to infer *mens rea* on attempts, the act should have no other reasonable purpose (IE firing a gun etc.)

**Pleas:** guilty = go to sentencing

Individually, or Joint Submission (both sides agree on plea bargain)

Not Guilty: Go to trial

Autrefois Acquit; Autrefois Convict (even in another country); S. 11(h) *Charter*

Bail: Get out of jail while waiting; no booze, guns, avoid V.

Preliminary Inquiry (see *Stinchcombe*, DISCLOSURE)

See a couple of key pieces of evidence

Serious cases = jury trials; jury selection

**Trial:**

Direct examination: cannot ask leading questions of own witnesses

Crown begins case, calls witnesses

tangible evidence must be identified by witness and entered as exhibit

Dock identification: identification on the spot at court

Cross examination: allowed to ask leading questions

Redirect – subsequent examinations; only for clarifications; no cross-examination allowed

Defence: Has burden of proof been met? (Actus reus / mens rea proved if all evidence believed?)

No = motion for a directed verdict (rare)

Yes = defence calls witnesses, crown crosses, defence redirects

Closing arguments: defence goes first if they call evidence (testimony etc), otherwise crown.

Guily=sentencing now or later

Sentencing and Remedies:

Always take more lenient one if conflicted

Many at pre-trial stage; much discretion over punishments (apologies etc); no pleas for domestic crimes b/c should not reward

Crown and judge must agree on sentence for check and balance

Judge may reject pleas, increase sentence

**Voir Dire**: hearing to see if evidence is admissible, valid etc.

Charter:

Charter interpreted purposefully and liberally

**1. (Oakes)** 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**.

8. Everyone has the right to be secure against unreasonable search or seizure.

9. (**Less than reasonable grounds for detention are invalid**)

Everyone has the right not to be arbitrarily detained or imprisoned.

S. 10. (**help prepare for defence**)

a) to be informed promptly of the reasons therefor;

b) to retain and instruct counsel without delay and to be informed of that right; and

c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

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) (**burden of proof**) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

e) not to be denied reasonable bail without just cause;

f) (**right to jury trial if 5+ years possible**) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

h) (**autrefois acquit/convict**) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

24. (Throw out invalid evidence etc.)

(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

7. (**Boucher**) 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 into it: Prosecution can be removed if doubts about disclosure

All evidence against D must be disclosed except in case of risk of witness’ life

Treatment or punishment 12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Self-crimination 13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Interpreter 14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Sources of law: Constitution; legislation; common law

Federal powers: Crim law, procedure; federal prisons

Provincial powers: provincial laws; courts, reformatory prisons

Laws uncoded until 1800s. Creation of CCC 1892 = end of CL offences (S. 9) unless stated otherwise (contempt)

Consolidations of CCC in 1906, 1927; R. C. in 1947= revision in 1953

Terrorism: allowed to use force if you think the plane is in danger etc.

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| **TERRORISM** |

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| **Terrorist Provisions Discussed in Class** |

Part II.1,

* Interpretation [of “Terrorism”]; s. 83.01 (1).
* Financing of Terrorism; s. 83.02.
* Using or Possessing Property for Terrorist Purposes; s. 83.04.
* List of Entities; s. 83.05.
* Admission of foreign information obtained in confidence; s. 83.06.
* Freezing of property; s. 83.08.
* Disclosure [Duty]; s. 83.1.
* Participating in activity of terrorist group; s. 83.18.
  + The broadest form of mode of liability seen in our class. This offence requires the highest level of intent (specific intent), but the lowest level of actus reus.
* Investigative Hearing; s. 83.28.
  + R. v. Bagri found that this section does not violate Charter s. 7 because of the witness has immunity from self-incrimination and the right to counsel.
* Recognition with Conditions; s. 83.3.
  + A “Preventative Arrest” provision.
  + This was a sunset clause, and is no longer applicable (was voted down 159-124).

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| **Policy Issues** |

1. Have we got an entirely new offence? Or amalgamate of existing criminal law?

2. Are the modes of liability we have enough? Are they cast too wide (inclusion of mere preparation and remote aiders)?

3. Are the procedural and evidentiary rules necessary? Do they withstand Charter scrutiny?

4. Is the current state-centered foreign policy and criminal law of liberal realism sufficient to combat cell-based terrorism?

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| **Scholars on the Impact of the Anti-Terrorism Act** |

**David Chambers**

What has been the impact of the ATA?

* “It is my understanding that these [terrorist investigations] have been carried out using powers that existed before the ATA.”
* Maher Arar case: the net might be cast too wide, investigating and detaining innocent people.

What is terrorism?

* Violent politics
* Objectives are political and impact is societal.
* Attacks are selective, but victims seem indiscriminate to induce shock.

Emerging trends in terrorism?

* Decentralized, transnational, post-modern organization. Al-Qaeda Jihadist movement may represent a Revolution Terrorist Affairs, combining features of an apocalyptic cult (charismatic leader, Manichean (us vs. them) ideology, vision of ultimate victory, para-military training) with those of a multinational corporation (IT driven, franchise-centered model, use of globalization tools).
* Privatization of warfare through private funding.

Threat to Canada?

* Inconclusive evidence, though there is a possibility.

How should Canada respond to these trends?

* Peace and order in Afghanistan is crucial.
* Must not allow Canada to become a sanctuary for terrorists, or else ill effect to Can-US relations.
* “Intelligence is the first line of defence against terrorism.”
* Crisis response mechanisms should be tested to ensure reliability.

**Robert Martyn**

What has been the impact of the ATA?

* Largely at the federal level, mainly to show Americans that Canada is doing its part.
* Potential threat to convenience and civil liberties, but most Canadians do not feel the impact.
* ATA perhaps a ploy for government reelection.

What is terrorism?

* “deliberate violence, threatened or actual, intended to exploit fears for the advancement of a belief or cause”

Emerging trends in terrorism?

* Rise in religious fanaticism.
* Decline in state sponsorship.
* Escalating technological competence had led to more innocent victims.

Threat to Canada?

* Terrorism is a tactic, not THE enemy. Must have clarity in this to set effective solutions.
* Porous border with USA, and multicultural society could make Canada a route for terrorism.
* As a Western nation, Canada is perceived to be “just like America.”

How should Canada respond to these trends?

* Do not expect any single government sector to hold the solution.
* Restore public confidence in intelligence gathering.
* Support causes that aim to ameliorate poverty that leads to breeding grounds for terrorism.

**Lorne Sossin**

What has been the impact of the ATA?

* No significant impact on law enforcement.
* The surrounding debate showed that terrorism is a slippery term.
* Passing an act that could curtail civil liberties is admission of defeat against terrorism.

What is terrorism?

* “Violence by state or non-state parties, directed more or less indiscriminately at particular populations, intended to achieve particular political goals.”

Emerging trends in terrorism?

* More diffused forms and networks.

Threat to Canada?

* No increased threat to Canada as a result of the current trend, with the exception of the threat to Canadian soldiers in Afghanistan.

How should Canada respond to these trends?

* Not always true that poverty breeds terrorism. 9/11 terrorists were middle class. So foreign aid must be dealt thoughtfully.
* Effective profiling, so that unfair or arbitrary mistreatment is minimized.
* Cooperation with foreign governments at all levels of law enforcement and national security intelligence.
* Think of how best we can monitor, constrain and supervise the exercise of executive authority in the interests of national security.

**Martin Rudner**

What has been the impact of the ATA?

* Three pronged response:
  + Legal definition of terrorism.
  + Outlawing of terrorist groups.
  + Better equipment of intelligence and law enforcement agencies to identify, prosecute, convict and punish terrorists and friend in Canada.
  + The law enforcement element has allowed law enforcement officials to:
    - Leverage the new provisions to penetrate the rightly knit cells of contemporary terrorism.
    - Success of the provisions ought not to be judged by the number of prosecutions and convictions.
  + The intelligence gathering element has allowed:
    - The enhancement of the operational capacity of the intelligence services (collection of communications intelligence on terrorist suspects and groups, and for the monitoring of financial transactions).
  + Powerful effect on deterrence – any connection to terrorism (financial, support).

What is terrorism?

* “militant acts of violence on the part of state and non-state organizations directed at individuals and institutions, violence calculated to cause death, mass fear and public demoralization.”
* Not subject to the conventional laws of war.
* Unlike criminal violence, terrorist violence is to advance a radical political or ideological agenda.
* Distinction: Global (in pursuit of transcendental objective) vs. domestic terrorism (to force change in government policy).

Emerging trends in terrorism?

* Forced Islamization of the West.
* Cell-based.
* Intellectual depth, due to well-educated members often trained in the West.
* Adaptable, and can rebound from defeats.
* Effectively weakens opponents by targeting the opponent’s economy (causing damage to infrastructure, market upheaval, business disruption, and forcing opponents to direct resources to protection).

Threat to Canada?

* Terrorism targets softer jurisdictions and economic interests (pussy countries) so Canada can be a target.
* Al-Qaeda declared Canada a target.
* Terrorists may infiltrate Canadian universities or research places to gain access to radiological, chemical, or biological recipes for WMD.

How should Canada respond to these trends?

* Think of terrorism as asymmetric warfare.
  + Public confidence building in the government’s terrorist fighting efforts (enforcement and info gathering).
  + Protect the moderate Arab/Muslim communities from manipulation and subversion by terrorists.
  + Curb terrorist recruitment – careful controls on ID and passports and trans-border movements.
  + Closing legal or operational chinks in our armour. E.g. Canadian intelligence has no mechanism to alert universities and labs about individuals who may pose a threat by having access to Chemical Biological Radiological and Nuclear material.
  + Hardening of prospective targets: proactive (but civil liberties protecting) intelligence to dismantle terrorist organization, financing; and law enforcement to bring violators to justice. US and UK have managed to avert further threats by hardening their counter-terrorism efforts.

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| **The Benefits of Terrorist Provisions** |

* Proactive information gathering.
* Prevention of terrorism.
* Deterrence.
* Relieving psychological anxiety of the populace.
* Maintenance of good relations and trade with the US.

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| **The Detriment of Terrorist Provisions** |

* Curtailing of civil liberties.
  + Certain identifiable groups may be stigmatized.
  + Foreign aid to enumerated terrorism groups may be for humanitarian purposes.
  + Non-disclosure of evidence for security purposes may go against *Stinchcombe*.
* There may not be a real threat.
* The law alone may be ineffective to combat terrorism.

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| **Mechanisms to Protect Liberty** |

* The Charter, especially sections 7-11 (legal rights), 15 (equality rights) and 1 (proportionality).
* Sunset clauses (e.g. Part II.1 s. 83.05 (9) – Review of List).
* The use of special advocates during the review of special certificates. Special advocates must have secret security clearance. Thus, they can be trusted with confidential information relating to national security, and ensure that the accused has an advocate to present adversarial evidence.

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| **The Charter and Terrorist Provisions** |

**R. v. Khwaja [2006]**

* Chilling effect of the clause “political, religious, or ideological” in definition of terrorism in s. 83.01(1)(b)A
* Stigmatizes the community of the accused.
* Charter analysis
  + Violates s. 2
  + Fails s. 1 test.
    - Yes, the infringement is for a purpose of sufficient importance.
    - Yes, the means to achieve the significantly important objective is rational.
    - But NO! The infringement is not a proportional response to threat.

**Charkaoui v. Canada [2007] SCC**

* S. 7 challenge to Immigrant and Refugee Protection Act
* McLachlin:
  + Procedural fairness is at issue:
    - 1. Hearing
    - 2. Impartial judge
    - 3. Decision based on fact and law
    - 4. Right to know the case against, and to answer
  + The possibility of detention is the reason for needing a fair process.
  + There can be substitutes for each of the 4 elements, but all 4 must be available.
  + In this legislative scheme, the 3rd and 4th elements are missing.
    - Since the judge cannot disclose evidence, the accused cannot present counter evidence, or know the case against him.
  + Fails third step of the Oakes test because there can be less intrusive alternatives, such as the use of special advocates.