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# Introduction to Canadian Criminal Law

* Parliament given exclusive authority to pass national criminal laws, provinces to administer/enforce them and decide their own course of action with regards to an offence; in disagreements the fed law wins out
* ***Criminal Code*** (codified in 1982): CL rules still apply in proceedings under any Acts except if there’s inconsistency
* Charter s.7: right to life, liberty, and security of person; cannot be taken away except under principles of justice
  + S. 24: right to exclude evidence if the admission of it would bring administration of justice into disrepute
* Classification of offences: **summary conviction** (smallest) < s. 553 **indictable** < s. 469 indictable
* No punishment that doesn’t comply with fixed, established law
* Law should be prospective: Can’t charge with offence that wasn’t offence when act committed (*Charter* s. 11g,i)

## Harm Principle

* How to protect liberty and autonomy of individual from **tyranny of majority**; catch-all phrase in *Charter* s. 7
* Stipulated 3 basic freedoms: Freedom of thought and emotion, Freedom to pursue their own tastes, Freedom to unite, as long as they’re equal of age
* **Standard of the reasonable man** Can a jury of 12 random rational-minded people be unanimous on an issue? That which they can all agree on should be considered public morality

## Adversary System

* Most cases go to a provincial court, with no jury; If you go to the Supreme Court, there is a preliminary hearing
* The Defence may choose to make a **No Evidence Motion** (that judge shouldn’t even allow the jury to consider the accused’s guilt or innocence because the Crown failed to introduce adequate evidence)
* In **adversary system**, judge doesn’t ask the witness a lot of questions and doesn’t go out to seek evidence (that’s the role of the prosecution and defence); Judge is limited by what the parties choose to introduce as evidence
* **Directed verdict**: judge can’t do it themselves, so jury has to do it; if jury refuses, then it’s declared a mistrial, and they start all over
* Alternative to **Inquisitorial Model** (France/Italy): Judge more active role in finding truth, can be trusted to do so

# Evidentiary Burden and the Burden of Proof

* The **Primary Burden** is on the Crown (BARD)
* **Balance of possibilities**: more likely than not

## Beyond a Reasonable Doubt

#### R v. Lifchus [1997] SCC

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| --- | --- |
| Facts | D was a broker working for a firm. He was accused of overvaluing the assets that were in his margin account. In trial, the judge had instructed the jury to consider “reasonable doubt” in everyday terms. |
| Issue | How should “proof beyond a reasonable doubt” be defined? |
| Discussion and Analysis | - Cannot rely on just “moral certainty”, the kind of decisions a person would make in their daily life  - Based on logic, and must be more than just “probably” or “likely” guilty |
| Ratio | If the charge as a whole gives rise to the reasonable likelihood that the jury misapprehended the standard of proof, then the verdict should be set aside and a new trial directed. |
| Holding | Appeal dismissed. R lost. |

#### R v Starr, [2000] SCC

|  |  |
| --- | --- |
| Facts | A man was killed by the side of a highway in a gang-related execution, and a woman was an unfortunate victim in the car with him. D/A. |
| Issue | Did the jury apply the wrong standard of proof? |
| Discussion and Analysis | - D argued that the Crown had failed to prove identity of the killers and to dispel the possibility that other gang-related people were the killers  - Likely that this trial judge, like in *Lifchus*, also gave jury an inaccurate description of what’s meant by “reasonable doubt”, ranking it below BoP in the certainty hierarchy (see 2-12 for diagram) |
| Ratio | Reinforced the difference between BoP and BARD. Criminal proceedings are BARD. |
| Holding | Yes they likely did. Appeal allowed. CA judgment set aside, new trial is directed. |
| Misc. | SCC dissent: Rest of trial judge’s instructions to jury made it clear that standard of proof was very high, they couldn’t convict on just the balance of probabilities, and that presumption of innocence was emphasized |

#### R v JHS, [2008] SCC

|  |  |
| --- | --- |
| Facts | R was convicted of sexual assault of his stepdaughter. Crown/A. |
| Issue | What were the correct burden and standard of proof to apply? |
| Discussion and Analysis | - SCJ agrees with dissenter in NSCA: Regarding that lack of credibility of the accused does not equate proof of his guilt BARD, jury instruction left no room for misunderstanding about the correct burden and standard of proof to apply |
| Ratio | Lack of credibility of the accused does not equate to proof of his/her guilt. |
| Holding | Appeal allowed. CA judgment set aside, and the conviction restored. |

## Reverse Onuses

Several different offences exist that put some kind of burden on the accused. The following cases explore how certain evidentiary burdens have different burdens of proof depending on the language of the offence. These reverse onus offences are often challenged to determine if they are constitutional. This has developed into the **Oakes test** which asks four questions about the offence to determine if the reverse onus is justified.

1. Does the parliament have a pressing and substantial objective by passing this legislation?
2. Is there a rational connection between that objective and the legislation?
3. Does the objective impair as little as possible the right or freedom in question?
   1. (Most often fails here)
4. Proportionality - between the effects of the measures which are responsible for limiting the charter and the objective

### Presumptions which require proof of a basic fact

1. **Permissive Inferences**: Where the trier of fact is entitled to infer a presumed fact from the proof of the basic fact, but is not obliged to do so. This results in a tactical burden whereby the accused may wish to call evidence in rebuttal, but is not required to do so.
2. **Evidentiary Burdens**: Where the trier of fact is required to draw the conclusion from proof of the basic fact in the absence of evidence to the contrary. This mandatory conclusion results in an evidential burden whereby the accused will need to call evidence, unless there is already evidence to the contrary in the Crown’s case.
3. Legal Burdens (**persuasive burden**): Similar to the burden in (b) except that the accused must disprove on BoP the presumed fact instead of by the mere raising of evidence to the contrary. These are “**reverse onus clauses**”.

Example: S. 348 of the *Code* is about breaking and entering

* *Code*: In the absence of any evidence to the contrary, need to find proof that he broke and entered (AR established) with the intent to commit an indictable offence (i.e. MR)
* In the absence of such evidence, the Crown is supposed to find against the accused
* So it’s rather the opposite of the presumption of innocence
* Crown needs to prove: that there was breaking and entering (basic fact) 🡨 which triggers presumption in sub 2
  + Accused needs to point to contrary evidence to the presumed intent, to show that there was no ill intent behind his breaking and entering (e.g. mistake), otherwise it’s presumed there is

### Language Indicating Evidentiary Burden on the Accused

Certain words when discussing reverse onus can indicate what kind of burden of proof the accused must overcome.

* **Establish:** Balance of Probabilities (*Oakes* and *Whyte)*
* **In the absence of evidence of the contrary:** Raise a reasonable doubt. (*Downey*)

#### R v Oakes (1986), SCC

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| Facts | D was charged with unlawful possession for carrying hash oil and cash. He stated that the cash was from a workers’ compensation cheque. A/Crown; D/R. |
| Issue | Does s. 8 of the *Narcotic Control Act* (1970) violate s. 11(d) of the *Charter*? |
| Discussion and Analysis | - s. 8: If accused is found in possession of a narcotic, he is presumed to be doing so for the purpose of trafficking (reverse onus)  - This requires the accused to bear the burden of proof  - Not exempt just because it’s a federal statute; still subject to the *Charter*  **- Oakes Test**: to analyze whether a section is justified by s. 1 of the *Charter*: |
| Ratio | Developed a test to determine whether a reverse onus is constitutional and can be saved using s. 1 of the *Charter*. It is irrational to infer that a person with a small amount of drugs intends to traffic. |
| Holding | S. 8 has no effect, doesn’t meet the rational connection test of the Oakes test. Appeal dismissed. |

*R v. Whyte* 1988 SCC: Accused got into the driver’s seat while impaired, but fell asleep. Found: The Oakes test can pass if the offence is serious enough to warrant a reasonable limit on an individual’s s. 11(d) rights.

#### R v Downey (1992), SCC

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| Facts | Reynolds ran an escort service. The agency collected an introduction fee when clients first called, but money earned by the escorts in exchange for their services were kept by the women. When Reynolds wasn’t around, D ran the agency. D/A. |
| Issue | Does the burden of proof placed on the accused contravene the right to be presumed innocent set forth in s. 11(d) of the *Charter*? Can this presumption be justified pursuant to s. 1 of the *Charter*? |
| Discussion and Analysis | - D challenged s. 195(2) (NOW s. 212) of the *Code* as being unconstitutional, for it specified that anyone living with or in habitual company of prostitutes is proved to be living off the avails of prostitution, barring evidence to the contrary (so there is an evidential burden on accused)  - Presumption: that people living with or habitually with prostitutes must be living off the avails. It was included since it was found that most prostitutes are unwilling to report on their pimps  - Applying the proportionality test: minimal infringement of s. 11(d) by s. 212, fundamentally important objective (of rooting out pimps and protecting prostitutes), accused is only required to point to evidence that raises a reasonable doubt (not forced to testify) |
| Ratio | Oakes test can also be applied when the burden on the accused is only to raise a reasonable doubt. |
| Holding | Appeal dismissed. Presumption in s. 195 infringes on s. 11(d) but it’s done for greater societal good. |
| Misc. | SCC Dissent: s. 212 failed the rational connection test, it unfairly brings innocents into the criminal process without achieving its intended goal of catching the parasitic pimps; the presumption, if true, would require prostitutes to live and work alone, deprived of human relationships |

#### R v St-Onge Lamoureux 2012 SCC

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| Facts | D was made to take a breathalyzer. The last two of three samples showed lower BAC than the first one, though the technician asserted that the instrument was functioning properly. D/A. |
| Issue | Are the presumptions of facts made in this case constitutionally valid? |
| Discussion and Analysis | - s. 258(1)(c): presumption of accuracy; The results are accurate and conclusive proof of D’s BAC. To rebut this presumption, D must point to evidence that raises a reasonable doubt that the instrument was malfunctioning or improperly operated, so that it showed BAC > 0.08 even though BAC < 0.08  - s. 258(1)(d.1): presumption of identity; If the results of the analyses show that BAC > 0.08, then that’s proof that it really was > 0.08. |
| Ratio | Presumption of accuracy is not a deduction that can be “reasonably drawn” from the test, but it reflects demonstrated accuracy of the test under statutory conditions. |
| Holding | Conviction upheld, appeal dismissed. Ss. 258 (1)(c),(d.1) did not infringe ss. 7 or 11(c) of *Charter*. |
| Misc. | Dissent: No violation of s. 11(d) since both presumptions are valid. No violation of s. 1 either. Evidence is sufficient to validly convict the accused. |

# Determining Elements of the Offence

## Actus Reus

* ***Actus reus*** of an offence will always be outlined in the *Code*, to describe conduct prohibited by the *Code*
* Three factors of AR:
  + Conduct: An activity that is prohibited, done voluntarily; “product of an active/conscious mind”
  + Circumstances: Atmosphere or environment in which the offence takes place
  + Consequences: Are there required consequences of the offensive act necessary for the proof of guilt?

#### Frey v Fedoruk, [1950] SCC

* Abolished the ability for courts to create new CL offences; From 1955 on, there were none except contempt

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| Facts | P is a peeping tom caught staring into D’s mother’s bedroom. D arrested him without a warrant. P/A. |
| Issue | Was there an act that constitutes a criminal offence? Was imprisonment justified? |
| Discussion and Analysis | - Mere fact that P was close to the window at night, though it was probable he would scare D’s mother, does not constitute criminal conduct at CL; no intention of violence or of being seen  - No evidence that peeping = criminal offence; the label “breach of the King’s Peace” is too broad to be useful; if it’s used properly and narrowly, then this voyeurism isn’t an offence known to the law |
| Ratio | No one should be convicted of a crime unless the offence is recognized as such in the *Code*, or can be established by CL as an offence. To be convicted, one must meet the AR elements of the crime. |
| Holding | Appeal allowed. P did not commit a criminal offence. Imprisonment not justified. |

### Legal Duty

* Criminal law does not require somebody to be a Good Samaritan

#### R v Boudreault, 2012 SCC

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| Facts | D was charged with having care or control of a motor vehicle while his ability was impaired with alcohol and his BAC was over the legal limit. D/A. |
| Issue | Is the risk of danger an essential element of the offence of care or control under s. 253(1) of the *Criminal Code*? |
| Discussion and Analysis | - Crown: risk of danger was that D would at some point set his vehicle in motion intentionally (e.g. changing his mind while still impaired); but denied in trial (found, as a fact, no realistic risk of danger)  - Intent to operate the vehicle while inebriated is not an element of the offence |
| Ratio | When a person uses a vehicle in a way that involves no risk of putting it in motion so that it could become dangerous, the *actus reus* is not present. (*R v Penno, R v Toews*) Proof of occupancy of the driver’s seat =/= conclusion that the essential element of care or control exists. (*R v Whyte*) |
| Holding | Yes it is, but no he did not. Appeal allowed. Acquittals restored. |
| Misc. | SCC dissent: Accused’s involvement with the vehicle was more than trivial, constituted care or control; still intoxicated, he asked police to leave him alone so he could drive home |

### Omissions

* Omissions to act are now part of the *Criminal Code*
* 3 broad areas of failure to act:
  + Negligence: wanton disregard for lives/safety of others; breach of the duty of care owed to others
  + More specific like in s. 216 or in *Thornton*: undertaking a lawful act that can endanger the lives of others; imposed by a statutory provision
  + Implied duty like in *Moore*: inferred from a duty that has been imposed on somebody else (e.g. the police officer’s duty became the accused’s duty)

*R v Brown*: Abella J. was critical of bringing civil law principles into criminal law

*R v Cooper (SCC)*: Accused engaged in strangulation, blacked out for the “killing”. There doesn’t have to be a perfect overlap in time, just some coincidence between AR and MR.

*R v Miller (HL)*: Accused drinks, lights cigarette, falls asleep, causes fire. He’s responsible for an omission to act where he has a duty to act. If you create a dangerous situation, you have to do something if you are capable of doing it.

#### Fagan v Commissioner of Metropolitan Police, [1968] PC

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| Facts | P drove onto D’s foot. When D asked him to get off, P wouldn’t obey and switched off his engine. Eventually he reversed the car off D’s foot. P was charged with assault. P/A; D/R: on behalf of D. |
| Issue | Was P guilty of assault on D? |
| Discussion and Analysis | - R: First mounting of the foot = AR, ended when the wheel was removed; during that act, A had formed the necessary intention that constitutes MR |
| Ratio | Mere omission to act does not constitute an assault. An act which at its inception was not criminal (due to lack of MR) became criminal when it continued and thus produced apprehension of harm. |
| Holding | Appeal dismissed. Conduct cannot be regarded as mere omission. |
| Misc. | PC dissent: Car rested on foot by its own weight, couldn’t move due to its own inertia; P “allowed” the wheel to remain, but didn’t “maintain” or “hold” it down |

#### R v Moore (1978), SCC

* Can’t superimpose a later *mens rea* on a previous and completed act

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| Facts | D rode through a red light on his bike. A peace officer followed him around, asking him to “pull over and stop”. D repeatedly rebuffed him and used swear words. D was charged with obstructing the officer in the performance of his duty, for failing to give his name when requested to do so. D/A. |
| Issue | Did D breach s. 58 of the *Motor Vehicle Act*? Was he guilty of an offence when he proceeded into the intersection during a red light? |
| Discussion and Analysis | - A bicycle is neither a “motor-vehicle” nor a vehicle” according to s. 2 of the *Motor Vehicle Act*.  - A bicycle is a “cycle” (c. 46) and is responsible for the same duties as a driver of a vehicle (s. 173(1)). That includes stopping at a red light (s. 128(6)).  - Constable was carrying out his duty of enforcing BC law by asking D to identify himself  - “Implied” or “reciprocal” duty on D to identify himself if he was suspected of an infraction since officer had a duty to enquire before exercising his power to arrest |
| Ratio | Refusing to accede to a constable’s request for identification needed to carry out his duty to enforce the law is an obstruction of his performance of said duty. Courts can sometimes create or interpret CL duties for individuals. |
| Holding | No D was not in breach of s. 58, but he’s guilty under s. 128(6). Appeal dismissed. |
| Misc. | SCC dissent: Not fair to the principles of presumption of innocence and privilege against self-incrimination. For avoiding giving ID in a petty traffic offence, A gets crim charge of “obstructing” and thus max 2 years in prison. No statutory or CL duty on a cyclist committing a traffic infraction to divulge his ID. Duty of officer to identify suspect does not equate duty of suspect to identify himself. |

#### R v Thornton (1991), ONCA

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| --- | --- |
| Facts | D knew all the risks of carrying HIV-positive blood and how it transmits, and still donated blood without informing the Red Cross (they caught it in time). He was charged with the common nuisance endangering the lives or health of the public. D/A. |
| Issue | Did D commit an offence known to the law? Can “legal duty” arise from common law or must it be found in a statute? If a common law “legal duty” is breached, and all elements of the offence are proved, is it an offence under CC s. 180? |
| Discussion and Analysis | - Committing a common nuisance = doing an unlawful act, OR failing to discharge a legal duty  - Donating contaminated blood by itself is not an unlawful act  - “Legal duty” = “duty imposed by law” = from both statute and common laws |
| Ratio | Fundamental duty of CL = duty to refrain from conduct that is foreseeable to cause injury to another person. Crim law can at times turn to other types of law to look for CL duties. |
| Holding | Appeal dismissed. D did commit an offence. |

### Voluntariness

* Actus reus must arise from the conscious mind of an individual; conscious act of their will
* If an act is absent its own **voluntariness** (a mental condition of the actus reus), then it can’t be convicted
  + But if the bout of involuntary behaviour (e.g. fainting spell while driving) could have been anticipated, blameworthiness becomes a factor
* The way the law has been applied for cases of drink spiking as such: it was involuntary intoxication, because the drug that caused loss of voluntary control wasn’t taken willingly, even though the medium it was in (that is also a potential cause of involuntary behaviour) was ingested willingly
* External sources of involuntary behaviour: spilling coffee on yourself while driving, driving through a swarm of hornets that sting the shit out of you, being startled by a sudden horn, taking your arm to hurt someone else
* Defence of insanity 🡪 Not guilty by reason of mental disorder (different name, same way of treating the law)
  + Onus on defendant to prove this on the BoP
* **Automatism**: not the result of an ongoing condition (so not like narcolepsy), will often manifest as a temporary mental shock, reflex reaction, blackout, crime of passion; It’s a CL defence related to involuntariness
  + Voluntariness, not consciousness, is key element in judging whether something is automatism

*R v King* (1952, SCC): King was charged with impaired driving after being given a drug from his dentist. Before leaving the dentist’s office, a nurse had verbally warned him not to drive. He argued he hadn’t remembered those warnings, since he was already on the drug. SCC: The dangerous driving offence didn’t require mens rea for proof, yet found there was no actus reus unless it was the result of the willing mind. Not guilty.

*R v Ruzic*: Emigrating woman from the Balkans is ordered to smuggle drugs to Toronto or else her children would be murdered. Duress was very narrowly applied: threat had to be carried out immediately, and the danger had to be in proximity. MR satisfied (She’s aware she’s carrying this illegal drug but does it anyway), AR satisfied (She’s consciously and voluntarily carrying the drug to Toronto). But depriving someone of their freedom and applying to them the stigma of criminality is an infringement of *Charter* s. 7 if there was moral involuntariness.

#### R v Lucki (1955)

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| --- | --- |
| Facts | D failed to keep to the right side of the highway while driving through SK. His car skidded onto the left side of the road and as a result he collided with a car going in the opposite direction. |
| Issue | Is D guilty of an offence? Was it an involuntary act? |
| Discussion and Analysis | - Condition of the road made it slippery, so his car shifted involuntarily; mental element of *actus reus* not satisfied |
| Ratio | A person who by an involuntary act for which he is not to blame who gets onto the wrong side of the road is not guilty under s. 125(9) of *The Vehicles Act* for there is no AR. |
| Holding | Not guilty. Yes it was an involuntary act. |

*R v Wolfe* (1974) ONCA: D is a hotel owner. Complainant was told many times not to come to the hotel. Showed up and hit D. D was on the phone and instinctively turned around and smacked him with it. Initially charged D with assault. Reflexes are involuntary acts. Held for D.

### Causation

* In medical malpractice, who’s to blame? The person who caused the initial injury, or the doctor who exacerbated it?
* S. 222(1) broadly worded to apply to homicide: “a person commits homicide when, directly or indirectly, by any means, he causes the death of a human being”
  + (5) Can’t be an act influenced by mind alone, or wilful frightening (of a child or invalid)
  + (5)(c) Threats count if victim does something in response to threat and then dies
  + S. 224: Notwithstanding that the death could have been prevented by reasonable means
  + S. 225: If accused applies bodily harm to the victim and it causes death, notwithstanding that the immediate cause of death was due to improper medical treatment applied in good faith
  + S. 226: You can be held responsible for causing a death notwithstanding that the bodily injury you apply only accelerate the death; Exception when a patient is braindead and someone pulls the plug
* Two steps in determining causation:
  + **Factual causation**: Factual chain of events that culminated in the victim’s death
    - **But-For Test**: But for the act/omission of the accused, would the offence have occurred?
  + **Legal causation**: Determining who among those who have factually contributed to an event should be held legally responsible for that event
    - **I**mputable causation, responsible causation, blameworthy causation

#### R v Smith, [1959] UK CA

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| Facts | D was a soldier who got into a fight in a barracks. One private was stabbed with a bayonet and died. |
| Issue | Did the victim’s death flow causally from the accused’s actions? |
| Discussion and Analysis | - Many other factors between the bayonet stabbing and the victim’s demise: he got dropped, there was a delay in care, and he received artificial respiration that worsened his lung stab wound  - D: Treatment the victim received prior to death was abnormal, and abnormal treatment for a felonious injury shifts liability from the injury perpetrator to the treatment provider (*R v Jordan*)  - Crown: treatment was ruled to be poor in hindsight, so on the facts of the case it was a direct causation from bayonet stabbing to death by hemorrhage from the stab wound |
| Ratio | Causation can be determined if D’s actions are found to be the substantial and operating cause. A secondary cause can only be found if it overwhelms D’s actions. |
| Holding | Appeal dismissed. There was direct causation, on the facts of the case, which D was responsible for. |

#### R v Blaue, [1975] CA

* Court wants to focus on the wrongfulness of accused’s actions, not on victim’s conduct and reaction

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| --- | --- |
| Facts | A was convicted of manslaughter on the ground of diminished responsibility, wounding the victim prior to death, and indecently assaulting her and two other women. She had made it to hospital after he stabbed her and punctured her lung. She refused a blood transfusion because she’s a Jehovah’s Witness. She deliberately made the decision to refuse the help and thus died. D/A. |
| Issue | If accused caused a minor injury and then a side-effect (e.g. gangrene) killed the victim, is accused still guilty of homicide? Was the victim’s decision not to have a blood transfusion unreasonable? |
| Discussion and Analysis | - In trial D: Chain of causation broken by her refusal for blood transfusion; should acquit D of murder  - In appeal R: Physical cause of death = bleeding caused by knife penetrating lung, nothing else |
| Ratio | He who caused an injury which led to death cannot plead that his victim could have avoided death by taking greater care of herself. (*R v Holland*) Reaffirmed the thin skull rule in the context of causation. |
| Holding | Appeal dismissed. The stab wound was an operative cause of death. The victim’s refusal to receive the blood transfusion was reasonable due to her religion. |

*R v F(DL)* (1989) ABCA: Multi-car crash, so parallel and competing causes of victim’s death. Must be a real and contributing cause in order to be criminally liable.

*R v Pinsky* (1989) BCCA: Useful for manslaughter and second degree murder.

#### R v Smithers, [1978] SCC

* *De minimis*: about minimal things
* **Thin skull rule**: You take the victim as you find him; Accused takes responsibility for any bodily harm that results from the initial injury, even if it was unexpected (i.e. if the victim had an abnormally thin skull)

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| Facts | Victim called D a racial slur. D kicked the victim once in the stomach and he collapsed and died shortly thereafter. Victim had choked on his own vomit and his epiglottis had malfunctioned. D/A. |
| Issue | What actually caused the victim’s death? |
| Discussion and Analysis | - Became the legal standard for causation of death in Canada  - Test: was there a “contributing cause”… and yes there was |
| Ratio | The test for causation of death in manslaughter is whether the actions of the accused are “a contributing cause of death, outside the *de minimis* range.” |
| Holding | Conviction upheld. Appeal dismissed. D is still to blame. |

#### R v Harbottle (1993), SCC

* SCC applied a higher standard due to seriousness of the conviction and higher degree of moral culpability
* Should this new **substantial and integral cause test** be applied to causation for all kinds of offences, all forms of murder, for all first degree murder, or for all first degree murder that complies with the definition in s 231 (5) and (6) (i.e. “caused by that person”)?
* Actions of the accused must form an essential, substantial, and integral part of the murder; non-trivial cause

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| --- | --- |
| Facts | D charged with first degree murder for sexually assaulting and killing a woman, for the death was caused while he was committing or attempting to commit another offence. He had held her legs down while his co-accused strangled her (after both had sexually assaulted her). |
| Issue | Did D personally cause the victim’s death? |
| Ratio | Test with a higher burden for first degree murders: “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”. |
| Holding | D was guilty of murder. |

*R v Cribbin*: *Smithers de minimis* test (low threshold) was analyzed to see if it was inconsistent with s. 7 of *Charter* and the principles of fundamental justice. Found to be too vague and broad for *Harbottle* test, which is only applicable to first degree murder. The morally innocent should not be punished.

*R v Reid*: Was there an intervening act that caused the actual death? Is the accused responsible in law for the death? Is the accused responsible for the initial act that contributed?

*R v Tower*: There had been an assault. Victim was in custody and refused treatment, and the police didn’t summon medical treatment. Held that this did not break the chain of causation.

#### R v Nette

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| --- | --- |
| Facts | An old widow was robbed and left hog tied in her room with a ligature around her neck. Over a period of 48 hours she suffocated to death. D was arrested and charged with first-degree murder under s.231(5) of the *Criminal Code*. D/A. |
| Issue | What is the proper threshold of causation required for second-degree murder? |
| Ratio | The *Smithers* *de minimis* standard for causation still applies to all homicide. But the test is rephrased to be a “significant contributing cause” to apply to second degree murder. |
| Holding | Appeal dismissed. |
| Misc. | Dissent (McLachlin): Agrees with conclusion, but not with semantic difference of change from “not insignificant” to “significant” (higher threshold of causation than *Smithers* test) |

#### R v JSR, [2008] CA

* Law of Intervening Acts

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| Facts | D was charged with 2nd degree murder. D the southbound shooter had a gun battle with a northbound shooter, and Jane was a bystander who was shot. Evidence showed that D either fired first or made to pull out his gun, causing the other shooter to open fire. |
| Issue | Factual causation: “But for” the actions of D either shooting or preparing to shoot at the shooter, would Jane have been shot and killed? Legal causation: Is the causal chain linking D to the death of Jane broken because the last voluntary cause was the other shooter shooting her? |
| Ratio | An intervening, independent act by a 3rd party that is a more direct cause of a victim’s death than D’s prior act may sever the legal causation connection between the victim’s death and D’s prior act even though the prior act remains a factual cause of the victim’s death. |
| Holding | Found that it was **joint conduct** (mutual gun fight) that led to the death. D was factually and legally linked to the death. D’s appeal failed, Crown’s appeal succeeded. |
| Misc. | Procedural History: A appeal – there was inadequate evidence to conclude that he caused Jane’s death. Crown appeal – there was reasonable evidence to convict on the charge of murder. |

#### R v Maybin, 2012 SCC

* “Operative cause”

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| Facts | Brophy touched pool balls by accident. D and D, who were playing, punched him in the head and rendered him unconscious. Gains came and punched B in the head and left him outside. B died; medical cause of death was bleeding in the brain. All 3 were charged with manslaughter. D/A. |
| Issue | When does an intervening act by a third party sever the causal connection between the accused’s act and the victim’s death and thereby absolve the accused of legal responsibility for manslaughter? |
| Discussion and Analysis | - Argument for acquitting G: But for the Maybins starting this fight, there would have been no death  - BCCA: Factual causation = but for the actions of Maybins, B would not have died. |
| Ratio | The assault from the third party was not independent of the accused’s unlawful acts but still the accused’s actions were a significant contributing cause of the victim’s death. The dangerous and unlawful acts of an accused need to be remote in order for him to be morally innocent. Reasonable foreseeability is not sufficient to prove causation. Reaffirms *Smithers* test. |
| Holding | Appeal dismissed. Open to the trial judge to find that the Maybins caused the death. |
| Misc. | BCCA dissent to Crown appeal: Would allow the appeal of D’s acquittal. Intentional act of 3rd party severed legal causation. |

## Subjective Mens Rea

* ***Mens rea***: mental capacity to commit a crime; guilty mind; wrongful intention of the accused
  + Function in crim law: to prevent the innocent from being penalized; those who do not understand or intend the consequences of their act
* Maxim: An act without a vicious will is no crime at all. **Vicious will**: moral blameworthiness, culpability
* Mental element is usually referred to in the definition of each offence, and it must be crucial to the description of the conduct that we want to label as criminal
* Rationale: anti-social behaviour is not enough to constitute criminal behaviour
* **Objective mens rea**: Requires the Crown to prove what D ought to have known
* **Subjective mens rea**: Requires the Crown to prove what the accused’s actual intent is
  + Where the accused has actual knowledge, awareness, and intention
* Regulatory offences don’t require the same kind of mens rea as a true crime would
* Criminal negligence as part of mens rea; has to be an objective test about what a reasonable person would do in the same situation
* **Wilful blindness**: where you suspect a reasonable circumstance but deliberately refrain from confirming that suspicion; you could be found to have the mens rea of knowledge

### Recklessness and Intent

* **Recklessness**: foresees a consequence but chooses to go ahead anyways
  + Requires the subjective element that D averted to (is conscious of) the risk and still did it
* In the provision of incest (s. 155), recklessness is not enough; accused must have had actual knowledge of the blood relationship (this is the essence of the offence)
* **Direct intention**: you want something to happen; you take action to get that to happen
* **Indirect intention**: Continuing in a conduct without necessarily being averted to the risk
  + Some substantial foresight of what could occur

#### R v Beaver, 1957

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| Facts | D sold to an undercover officer a package of what he believed to be sugar, but it was actually heroin. Charged with the offence of possession, and the offence of selling. |
| Issue | Is D guilty of selling an illicit drug? Is D guilty of having possession of the drug? |
| Discussion and Analysis | - Offence of selling doesn’t require knowledge that the package is actually heroin  - *Schepannek* relates |
| Ratio | Courts do not want to punish people who are morally innocent, unless a statute either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime. There is in law no possession without knowledge of the character of the forbidden substance. |

#### R v Buzzanga and Durocher (1980), ONCA

* Raises the discussion: How is recklessness different from intent?

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| Facts | D are Francophone Canadians who were trying to get French Canadians to fight for a French language school in their area. They circulated a pamphlet supposedly written by anti-French bigots to stir people to action, although they had written it themselves. They were charged under now s.319(2) with inciting hatred against an identifiable group and convicted at trial. D/A. |
| Issue | Did D intend to promote hatred of Francophones? |
| Discussion and Analysis | - Trial judge: “Wilfully” = true intention/knowledge that it’s likely to fulfill the act, not accidentally  - “Wilfully” modifies “promotes hatred”, not “communicating statements” (i.e. intention to do the crime vs intention to say what turned out to be a crime)  - Appeal judge: Self-misdirection about meaning of “wilfully” and thus lack of significance of D’s evidence on the issue of intent |
| Ratio | An intention to create “controversy, furor and an uproar” is not the same thing as an intention to promote hatred, and it is an error to equate them. Wilfully =/= reckless. |
| Holding | D’s foresaw the consequence of their action and proceeded anyways. |

#### R v Theroux

* Element of *mens rea* for fraud: D subjectively was aware that his actions could lead to a prohibited outcome that puts others’ property at risk.
* Elements of *actus reus* for fraud: 1. Dishonest act; 2. That causes deprivation.

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| Facts | D took deposits from people and told them they were insured. He knew they weren’t but honestly believed the project would be completed and thus the deposits were safe. The project did not finish, and many people lost their deposits. D/A. |
| Issue | Does the fact than an individual honestly believed there was no risk and money was not in danger negate the necessary *mens rea* of a charge of fraud under s. 380(1) of the *Code*? |
| Discussion and Analysis | - D knew he was deceiving them, but he thought it was ok since everything would get billed properly and argued there was no intent to harm (subjective appreciation that what he was saying IS false)  - SCC: D’s view of the morality of this outcome is irrelevant |
| Ratio | A person is reckless as to a particular act or consequence when he foresees the risk of it occurring but chooses to proceed. Mostly, reckless = intent. |

*R v Kingsbury*: D is charged with theft, unlawful possession, forgery, and fraud. He was planning to buy a trailer from the victim. He thinks he’s given the money to the victim as a loan, but victim thought it was a payment so he registered it under his own name only. D pretends to be the victim to go sign papers to pick up the trailer.

* Requisite mens rea to prove deprivation: Knowledge one is depriving someone of something they’re entitled to
* Holding: Appeal dismissed. D knew the facts that constituted the AR, and is guilty whether he actually intended the consequences or was just reckless. A mistake in law does not negate the requisite MR of **deprivation**.

### Wilful Blindness and Knowledge

* “**Wilful blindness**”: D suspects something but doesn’t actually check anything
  + Either a duty to inquire or to extract himself from the situation
  + Subjective duty rather than objective like other duties
* Negligence: D ought to have known or that a reasonable person would have known

#### R v Briscoe, 2010 SCC

* In cases where proof of knowledge is needed: deliberately choosing not to know something = knowing it

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| Facts | Teens C and friend were lured into a car that D drove (+ Laboucan and 3 youths) to a secluded golf course. D opened the trunk and, at L's request, handed him some pliers. One youth hit C from behind. D held on to C and angrily told her to be quiet. D stood by and watched as C was brutally raped and murdered. All involved were charged with kidnapping, aggravated assault, and first degree murder and the two adults, D and L, were jointly tried by a judge alone for aiding and abetting. D/A. |
| Issue | What is required to make a finding of willful blindness? |
| Discussion and Analysis | - SCC: Wilful blindness = heightened form of recklessness, which is inconsistent with the “very high MR standard for murder”  - Nothing short of subjective foresight of death is needed for MR in murder: *Martineau*  - Wilful blindness proven by quotes of D that show a deliberate suppression of questioning + a strong suspicion of impending murder |
| Ratio | Willful blindness substitutes for actual knowledge when knowledge is a required component of the *mens rea* of the offence and D subjectively suspected something but didn’t actually check. |
| Holding | Appeal dismissed. |

### Recklessness as Sufficient Knowledge

*R v Schepannek* 2012 BCCA: D convicted of trafficking and possession of marijuana. She argued she didn’t know the package given to her in a sock contained hash; she thought it was tobacco to give to her husband in jail.

* Issue: What is the mental element of trafficking?
* Holding: Appeal dismissed. Culpability is justified by consciousness of the risk (D “decided not to look inside” package she delivered) and by proceeding in the face of it. Knowledge element of offence met by recklessness.

### Motive

* **Intention** = prerequisite as an element of a crime, while **Motive** not essential for a crime: ulterior intent
* Motive is hard to determine if people aren’t talking
  + Some people act without motive
  + Some do bad acts with good motives (necessity, justification, lesser of two evils)
  + Motive precedes and induces the exercise of the will
* Issues like theft of bread to feed your starving child, euthanasia: in terms of criminal liability not treated differently from murder, or murder to get insurance money; but different at the sentencing stage

*R v Khawaja* (ONCA): No rule to prevent Parliament from including motive as part of definition for elements of a crime. This supported motive for political/ideological purposes to be an essential part of terrorism offence.

#### R v Lewis (1979), SCC

* Authority for: How the trial judge should instruct the jury about the theories of the case
* Court came up with two theories of what occurred: Lewis made a bomb, or he mailed it knowing it was a bomb

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| Facts | D made a bomb out of a kettle with the co-accused (Tatlay) and mailed it to Tatlay's daughter. She died when she opened it. D claims that he did not know what was in the package even though he mailed the package. D/A. |
| Issue | What role does motive play in obtaining a conviction? |
| Ratio | Motive is not the same thing as intent; it is an “ulterior intention” and does not need to be proven by the Crown in order to get a conviction. |
| Holding | Appeal dismissed. |

### Transferred Intent

* Doctrine of **transferred intent** for when accused attempts one offence but commits another:
  + By mistake as to the identity of victim: A shoots B, believing B is C.
  + By accident: A aims at C, but by chance or lack of skill shoots B.
* Codified for murder in s. 229(b) of the *Criminal Code*, but can maybe apply to other harms as well

*R v Droste*: Man set fire to his car to piss off ex-wife, kids were in the backseat and asphyxiated. Unintended victims, but sufficient MR and AR for an aggravated assault charge.

#### R v Gordon 2009 ONCA

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| Facts | D and his friends approached someone they thought was a dealer to buy pot. Thompson punched them for the lowball offer. They ran away, and a few minutes later D dressed in black came along. He shot at Thompson, who ran into the bar. Three bystanders were shot instead. D/A. |
| Issue | What is the crime committed when in cases of transferred intent? |
| Ratio | In inchoate offences, it is much more difficult to apply implied consent as it is not set out in the Code. |
| Holding | D is guilty of assault causing grievous bodily harm but not attempted murder (appeal allowed). |

## Departures from Subjective Mens Rea

### Strict Liability

* Three types of offences:
  + **True crimes** have full mens rea
    - Found in federal statutes (only fed govt under federalism can impose crim law)
  + **Strict liability offences** require the Crown to prove AR of the offence but permit D to raise the defence of **due diligence** which can be proved on a BoP
    - Assumption: Unless it is explicitly stated in a statute that purports to impose absolute liability, there should be a strict liability
    - Criteria: look at 1. the overall pattern, 2. the subject matter of the legislation, and 3. the gravity of the penalty
    - Does not afford ability for due diligence in Europe; also known as absolute liability
  + **Absolute liability offences** would be the most effective way to ensure compliance if the social ends are important enough to override the by-product of punishing anyone for even the slightest violation
    - A bit ridiculous, prohibiting the actions of people with no regards to their mental element
* **Public welfare (or regulatory) offences** (strict liability offences):
  + Starting presumption is that they impose strict liability
  + Crown must prove actus reus only
  + Accused is in the position of proving on BoP that they acted with due diligence to avoid the harm

*Sweet v Parsley* (1970, HL): Deals with absolute liability. MR must be read into a provision.

*R v Wholesale Travel Group*: The accused will generally have the means to prove due diligence (especially in large organizations), only has to prove it on BOP. Putting burden on accused is a violation under 11(d), but saved by s 1.

*City of Levis v Tetreault* (2006) SCC: To determine whether strict or absolute liability, Court doesn’t need to ask whether DD defence should be available (legislature doesn’t have to make it clear that due diligence is necessary to the charge). All regulatory = strict offences, and these allow due diligence to be a defence. Passive ignorance is not a defence. DD requires an active and reasonable attempt to prevent the prohibited act.

*R v MacMillan Bloedal Limited*: A mistake must be honestly held and an honest belief in a statement of facts that, if true, would not have resulted in the prohibited consequences/conduct. Regulatory Offences are designed to encourage people to take appropriate safeguards. Determined by reasonable person standard.

*R v Commander Business Furniture*: Determining what’s reasonable depends on the circumstances (e.g. what are best industry practices, how prompt was D in identifying the problem and taking action, was the situation out of D’s control, were there prohibitive economic conditions, D’s skill level). Passivity is not going to satisfy the burden.

#### R v City of Sault Ste. Marie (1978), SCC

* Reaffirmed the general process of reinterpretation that we first saw in *Beaver*
  + *Salt Ste. Marie* created two different kinds of offences with a lower MR burden than in *Beaver*: absolute and strict liability offences, which do not have a subjective MR requirement

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| Facts | The city was charged with violating a provincial statute for causing or permitting pollutants to be discharged into a clean water source. |
| Issue | What is a public welfare offence and is it a strict liability offence? |
| Ratio | In general, public welfare offences are strict liability offences unless proven otherwise. |
| Holding | Appeal dismissed. Cross-appeal dismissed. New trial ordered to allow the defence of DD to be raised. |

#### R v Chapin (1979) SCC

* Difficulty of enforcement when regard is had to the penalties that may ensue from conviction, I do not think that it is in the public interest when viewed by the convention

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| Facts | D accidentally wandered into a private hunting club, didn’t see duck feed on the ground. They shot two ducks. She was arrested and charged with breaching s.14(1) of the federal *Migratory Birds Regulations* (prohibits shooters from shooting within a 1/4 mile of bait). Crown/A. |
| Issue | Was this a strict liability offence? |
| Discussion and Analysis | - SCC: This is not a true crime (no MR language in offence); the violation for this offence is one where the Crown is proceeding by summary conviction, so this is a public welfare offence  - Regulatory offence aimed to prevent conservation chaos; regulates how to hunt vs banning hunting |
| Ratio | An accused may absolve himself on proof that he took all the care which a reasonable man might have been expected to take in all the circumstances. Burden of proof required to show due diligence can be low. Regulatory offences should be interpreted to have strict liability. |
| Holding | Appeal dismissed. No new trial to be directed. |

### Negligence

* Defined in s.219: wanton or reckless disregard for one’s legal duty
  + Has an objective MR component, and Crown must prove that plus the AR
* **Penal negligence**: Requires just a marked departure from what a reasonable person would do; includes criminal negligence as a subset with a much higher standard (*R v Tutton*)
* **Criminal negligence** imports subjective MR
  + Defined as a marked and substantial departure from what a reasonable person would do (*R v JF*)
  + Prohibits behaviour by the accused that fails to meet civil standard of care and produces a harmful result
  + Punishes that even when the accused is unaware of the risks
  + Will attach criminal liability even when accused exhibits failure to think, or to take heedless actions
* **Civil standard**: what the reasonable person would do
* Murder is either culpable or non-culpable:
  + **Culpable**: Definitely an offence; Includes infanticide and manslaughter and homicide
    - Homicide: death of another person by unlawful act or criminal negligence
  + **Non-culpable**: Not an offence

#### R v Tutton (1989) SCC

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| Facts | D charged with criminal negligence for an unlawful act, causing death of infant son. They were religious and relied on faith healing to bring about cure for son’s diabetes. Once the mother received a dream that he was miraculously cured, she stopped giving him insulin. |
| Issue | What is the *MR* requirement for manslaughter by criminal negligence: subjective or objective intent? |
| Discussion and Analysis | - D had honestly held belief that victim cured by God; not reasonable, so not a defence to this charge  - We ought not to personalize the objective test |
| Ratio | Criminal negligence was found to have an objective MR (represented above). |
| Holding | Committed manslaughter. Guilty of criminal negligence causing death. |

#### R v JF (2008) SCC

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| Facts | M was four years old when he died in his foster home from multiple blunt traumas to his head. M's body was extensively bruised. M's foster mother confessed to beating M and pleaded guilty to manslaughter. JF, M's foster father, was charged with: 1. manslaughter by criminal negligence and 2. manslaughter by failing to provide the necessaries of life. |
| Issue | Are a conviction for manslaughter by criminal negligence and an acquittal for manslaughter by failing to provide for the needs of a child inconsistent? |
| Discussion and Analysis | - S.215 outlines provision of necessaries of life |
| Ratio | Generally, crimes which have an external element of negligence require a standard of a **marked departure** from the standard of care; manslaughter by criminal negligence requires a standard of **marked and substantial departure** from the standard of care. |
| Holding | Acquittal for D on failure to provide the necessities of life. Convicted on crim neg causing death. |

#### R v Hundal (1993) SCC

* Objective MR requires fault

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| Facts | D was driving his overloaded dump truck towards an intersection. There were several witnesses who said that he ran a red light. He is charged with "dangerous driving causing death" under s. 233 (NOW s. 249) of the *Criminal Code*. S. 249(2) criminalizes simply creating the risk by dangerous driving, (3) deals with bodily harm and (4) when the driving causes death. The difference between these subsections is the punishment that they allow. |
| Issue | What is the *mens rea* required to prove the offense of dangerous driving? |
| Discussion and Analysis | - Evidence that he had been drinking  - D said he couldn’t stop and went through the intersection and killed people |
| Ratio | Test for required *MR* of dangerous driving is a modified objective test: you must take all of the surrounding circumstances into consideration in order to determine if the accused committed a "marked departure" from what a reasonable person in the same circumstances would have done. |
| Holding | D convicted. |

#### R v Beatty (2008) SCC

* MR requirement of s. 249 (In determining MR, the Court should consider the totality of the evidence, including the evidence of the accused’s state of mind.)

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| Facts | Momentary lapse of consciousness in perfect road conditions led to drifting into another lane. D was driving safely before the accident, and no choice to drive dangerously |
| Ratio | For dangerous driving, the trier of fact cannot reason backwards from a consequence and attempt to deduce fault to make it dangerous. All elements of the offence must be proved. |
| Holding | D was not driving objectively dangerously. |

#### R v Roy (2012) SCC

* Need to establish fault (consistent with constitutional minimum, and with Hundal)

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| Facts | D was driving a motorhome with a passenger. Poor driving conditions and he collided with a truck. The passenger was killed. |
| Ratio | If a reasonable doubt can be raised that a reasonable driver would make a similar choice, then the accused cannot be found guilty of dangerous driving. |
| Holding | Reaffirms the position in *Beatty.* D was not objectively driving dangerously. |

#### R v ADH (2013) SCC

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| Facts | D went to a Wal-Mart bathroom and gave birth to the child. She thought it was dead and left it there. It wasn’t. She was charged with the offence of child abandonment (s. 218). She said she had no awareness of being pregnant. |
| Discussion and Analysis | - D’s expert witness: If she had no idea that she was pregnant, her reaction would have been normal to the circumstances. |
| Ratio | There appears, in s. 218, to not be any language typically employed by Parliament when it intends to create an offence of objective fault. |