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| **CANs Prepared for Benjamin Perrin’s Criminal Law Exam** |

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| **BURDEN AND STANDARD OF PROOF** |

***The Prosecution must prove the guilt of the accused (the golden thread).***

**Woolmington [1935]**

* In this pre-Charter age, statutory exception was able to shift the burden onto the accused.

***The presumption of innocence***

**S.11(d) of the Charter**:

***No statute may shift the burden onto the accused unless a limitation of Charter rights passes the test of s. 1.***

**Oakes (1986)** (The Oakes Test)

* s. 11(d) of the Charter is enforced. A limit must:
* Be an important reason (270)
* The means must be reasonable and justified.

***Reasonable doubt must be logically derived from the evidence or absence of evidence, not based on sympathy or prejudice.***

**Lifchus [1997]** (Definition of “proof beyond reasonable doubt”)

***Reasonable doubt falls much closer to absolute certainty than to proof on a balance of probabilities.***

**Starr [2000]** (How to explain “proof beyond reasonable doubt” to the Jury)

* The SCC enforces the adherence to Lifchus.

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| **THE ROLE OF THE PROSECUTOR AND THE DEFENSE COUNSEL** |

***The purpose of the Crown is to present credible evidence to administer justice fairly, not to obtain a conviction.***

**Boucher (1954)**

***Information that could lead to a conviction is the possession of the public to ensure that justice be done, not the possession of the Crown counsel.***

**Stinchcombe (1991)**

The Crown has discretion in disclosing information

* Protection of informers
* Irrelevant information
* The timing and manner of disclosure

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| **FAIRNESS IN TRIAL** |

***Q: When does misconduct by counsel render trial unfair?***

***A: The Judge, having inherent jurisdiction of the court, has the discretion to make that judgment. (13)***

**Felderhof [2003*]***(Inherent Jurisdiction of the courts and the judge’s discretion)

***A trial become unfair so that the courts should intervene “Where there is conspicuous evidence of improper motives or of bad faith or of an act so wrong that is violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed.” (16)***

**Power Test**as quoted in Felderhof.

***Criteria to discern whether a trial was unfair.***

**Munroe [1995]**

**Pisani (1970) Test**: (When does a trial become unfair?) (32)

1. Did a counsel’s comment prejudice the Jury?
2. Did the judge alleviate the prejudice?

**The Finta (1994) principle**: (How the judge may alleviate prejudice and restore fairness to a trial) (37)

The judge has the power to alleviate prejudice by being an unbiased arbiter and providing the last instruction to the Jury.

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| **ACTUS REUS** |

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| **Voluntariness** |

***Both at common law and s.7 of the Charter, physically voluntary conduct is an essential element of actus reus.***

**Ruzic [2001]** (290-291)

* Physical voluntariness = “conscious mind” + “conscious body”

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| **Contemporaneity** |

1. At some point, the actus reus and mens rea must coincide (***Fowler***)
2. (***Cooper***) In Canadian Criminal law, the coincidence may be argued by either the Continuous Transaction Theory (***Fagan, Meli***) or the Duty Theory (***Miller***).

***“The intent and the act must concur to constitute the crime.” (292)***

**Fowler (1798)**

***Continuing/Single Transaction Theory***

**Fagan [1969]**

* “It is not necessary that mens rea should be present at the inception of the actus reus; it can be superimposed upon an existing act. On the other hand the subsequent inception of mens rea cannot convert an act which has been completed without mens rea into an assault.” (294)

***Duty theory; or Responsibility to Act theory***

**Miller [1982]**

* **Issue:** Can the omission of an act become an intentional criminal offense?
* “an intentional act followed by an intentional omission to rectify that act or its consequences can be regarded in toto as an intentional act.” (296)
* **Duty Theory**: “When applied to cases where a person has unknowingly done an act which sets in train events that, when he has become aware of them, present an obvious risk that property belonging to another will be damaged, both theories lead to an identical result.” (297)

***The SCC would allow argument by either Continuing Transaction or Duty Theory.***

**Cooper (1993)**:

* “An act… which may be innocent or no more than careless at the outset can become criminal at a later stage when the accused acquires knowledge of the nature of the act and still refuses to change his course of action.” (298)

**Meli [1954]**as quoted in Cooper: (Continuous Transaction)

* “At some point, the requisite mens rea conincided with the continuing **series** of wrongful acts that constituted the transaction.” (298)

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| **Positive Acts** |

For positive acts, look at the Criminal Code, case law, and use a purposive and contextual interpretation as in ***Bell Express Vu***.

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| **Acts of Omission** |

The only time that one could be liable for omission is when one has a legal duty to act:

* Common law (eg. Thornton “Not to harm neighbor”)
* Or statues (eg. S. 216)

***Reciprocal Duty theory***

**Moore [1979]**

* “the officer was under a duty to attempt to identify the wrongdoer, and the failure to identify himself by the wrongdoer did constitute an obstruction of the police officer in the performance of his duties.” (303)
* Dickson J. (dissenting) “Each duty is entirely independent” (306). Challenges reciprocal duty.
* “omission to act only gives rise to criminal liability where a duty to act arises at common law or is imposed by statute.”
* “The Criminal Law is no place… to introduce implied duties, unknown to statutes and common law.” (307)

***An example of a duty to act arising out of common law***

**Thornton (1991)**

* A common law offense that was not made an offense according to s. 9(a) is becoming an offense under common law duty.
* The wording in s. 180, “legal duty”, does not limit duties to statutory duties. “the legal duty referred to in s. 180(2) is a duty which is imposed by either statute or which arises at common law.” (310)
* Galligan (OCA) has not been overruled. But the SCC chose to sustain the conviction based on a statutory duty rather than common law duty. (315)
* The textbook authors prefer that “criminal liability for non-compliance with legal duties should be restricted to statutory duties enacted by Parliament in reliance on s.91(27) of the Constitution Act, 1867.

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| **Causation** |

***Thin Skulled Man Rule***

**Smithers [1978**]

* “one who assaults another must take his victim as he finds him.” (331)

***The standard of contribution***

**Nette (2001)**

* Arbour J.: The accused’s conduct must be a “**significant contributing cause**” of the prohibited consequence.

***Application of the Nette test***

**Menezes (2002)**

* “A determination of causation requires a finding that the accused caused the death of another both in **fact** and in **law**.” (362)
* There can be more than one “**significant contributing cause**” (362)
* The accused **does not** have to be the **most proximate cause**. (362)
* **Chain of causation**, once established, continues until **withdrawl**. (363)
* “If the act of the accused is too **remote** to have caused the result alleged, causation is not established.” (363)
* The abandonment of conduct requires a **positive communication of notice**. The **sufficiency of the notice** is determined by the **nature of the offense** and the **degree of the accused’s participation**.

***An example of when a chain of causation may be broken***

**Reid & Stratton (2003)**

* The flawed CPR was not considered “improper medical treatment”. The flawed CPR by young intoxicated bystanders was itself the “**significant contributing cause**” of death.
* The accused did not pass the Nette test of providing “significant contributing causes”

***Contemporaneity of mens rea and actus reus is required for a conviction***

1. At some point, the actus reus and mens rea must coincide (**Fowler**).
2. (**Cooper**) In Canadian Criminal law, the coincidence may be argued by either the Continuous Transaction Theory (**Fagan, Meli**) or the Duty Theory (**Miller**).

Key cases and quotes:

* + **Fowler (1798)**: “The intent and the act must concur to constitute the crime.” (292)
  + **Fagan [1969]**: (Continuing/Single Transaction Theory) “It is not necessary that mens rea should be present at the inception of the actus reus; it can be superimposed upon an existing act. On the other hand the subsequent inception of mens rea cannot convert an act which has been completed without mens rea into an assault.” (294)
  + **Miller [1982]**: (Duty theory; or Responsibility to Act theory)
    - Issue: Can the omission of an act become an intentional criminal offense?
    - Ratio: “an intentional act followed by an intentional omission to rectify that act or its consequences can be regarded in toto as an intentional act.” (296)
    - Duty Theory: “When applied to cases where a person has unknowingly done an act which sets in train events that, when he has become aware of them, present an obvious risk that property belonging to another will be damaged, both theories lead to an identical result.” (297)
  + **Cooper (1993)**: (The SCC would allow argument by either Continuing Transaction or Duty Theory.) “An act… which may be innocent or no more than careless at the outset can become criminal at a later stage when the accused acquires knowledge of the nature of the act and still refuses to change his course of action.” (298)
  + **Meli [1954]**as quoted in Cooper: (Continuous Transaction) “At some point, the requisite mens rea conincided with the continuing **series** of wrongful acts that constituted the transaction.” (298)

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| **MENS REA** |

Finding of mens rea is necessary to obtain a conviction. The purposes of the mens rea requirement are:

* To punish morally blameworthy conduct.
* To exonerate morally innocent behaviour, such as accidents.
* \* Some offences do not require mens rea (see Absolute and Strict Liability)

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| **Absolute and Strict Liability** |

Subject to restraint by the Charter, liability for regulatory or public welfare offences may be satisfied by proof of the act requirement, accompanied by no further fault requirement (“absolute liability”) or a reduced fault requirement (“strict liability”).

* The purpose of true criminal offences is to **punish morally blameworthy conduct**, so a finding of mens rea is required.
* The purpose of public welfare/regulatory offences is to **set a reasonable care standard to protect public interests**, so the Crown is required to prove only the prohibited act. The onus shifts to the accused to establish due diligence on a balance of probabilities (*City of Sault Ste. Marie*).

***If the statute mentions no mens rea, discern the purpose of the statute.***

**R. v. Pierce Fisheries Ltd. [1970] SCC**

* **Facts**: Accused charged with having undersized lobsters in its possession contrary to the Lobster Fishery Regulations of the Fisheries Act.
* **Issue**: If the statute does not contain words of mens rea (e.g. “knowingly, “willfully”), is mens rea not required?
* **Decision**: Mens rea is not required if the statute is regulatory. Mens rea is required if the statute creates a “new crime.”
* **Ratio**: The purpose of the regulation is to protect lobster populations. No new crime is created, so mens rea is not required.

***The purpose of regulatory offences is to set a reasonable standard, not to punish morally blameworthy conduct.***

**R. v. Wholesale Travel Group Inc. (1991) SCC**

* **Facts**: N/A.
* **Principle**: “The objective of regulatory legislation is to protect the public… from the potentially adverse effects of otherwise lawful activity.” (382-383)

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| **The Emergence of Strict Liability** |

Strict liability is a “half-way house between mens rea and strict responsibility…, that is responsible for [catching non-criminal] negligence” (Dr. Grandville Williams, quoted by Dickson in City of Sault Ste. Marie).

***Finding the proper category of liability for regulatory offences. Finding liability for strict liability offences.***

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

* **Facts**: - Pre-Charter, Common law case. City was charted for discharging pollution into water contrary to the Ontario Water Resources Act.
* **Issue 1**: How is the correct category of liability determined?
* **Ratio**:
  + The default liability for regulatory offences is strict liability.
  + If the wording (statutory language) of the offence includes ‘willful’, ‘intentionally’, ‘knowingly’ it goes to full mens rea.
  + If the wording (statutory language) of the offence suggests that the commission of the act itself is the offence it goes to absolute liability.
* First, look at the language, both explicit and suggestive.
* Then, look at the regulatory scheme and the nature of penalty.
* **Issue 2**: How is liability determined for a strict liability offence?
* **Ratio**:
  + The Crown proves prohibited activity.
  + The onus shifts to the accused to establish due diligence on a balance of probabilities.

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| **Constitutional Considerations** |

***Charter analysis determines that absolute liability and imprisonment cannot be combined.***

**Reference re Section 94(2) of the B.C. Motor Vehicle Act (1985) SCC**

* **Facts and Issue**:
  + Post-Charter case.
  + The court asked “Is s. 94(2) of the Act consistent with the Charter?”
  + S. 94(2) provides that the offense created in s. 94(1) creates an “absolute liability offense in which guilt is established by proof of driving, whether or not the driver knew of the prohibition of suspension.” (390)
  + S. 94(1) provides a prison penalty for failure to pay a fine.
* **Ratio** (Lamer):
  + If a law has imprisonment as penalty, there can be no absolute liability.
  + Absolute liability and imprisonment cannot be combined without infringing s. 7 of Charter.
  + S. 8 to 14 of Charter address specific deprivations of s. 7 rights – rights given according to the principles of fundamental justice: “They [s. 8 to 14] are designed to protect, in a specific manner and setting, the right to life, liberty, and security of the person set forth in s. 7.” (391)

***The deprivation of the defence of due diligence makes the regulatory offence one of absolute liability.***

**R. v. Pontes (1995) SCC**

* **Facts and Issue**: This case occurred after BC repealed s. 94(2) of the B.C. Motor Vehicle Act, and after the Offense Act was passed, which stated that no person is liable to imprisonment for an absolute liability offense.
* **Ratio** (Cory):
  + The B.C. Motor Vehicle Act is still an absolute liability offence.
  + The prohibition to drive in s. 92 is automatic and without notice, so an accused cannot raise a defence of due diligence.
  + The deprivation of the defence of due diligence creates an absolute liability offence
  + However, there is no Charter infringement, since the new Offence Act indicates that failure to pay a fine will not result in imprisonment.

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| **Levels of Mens Rea** |

Suggested definitions are on **p. 413-417**. These are attempts by law reformers to clarify the meanings of these terms. These are not binding definitions. Courts may interpret these terms on a case by case basis.

**Subjective levels** (“What was in the mind of the accused?”):

1. Intentionally/Purposefully

2. Knowingly

3. Recklessly (willful blindness)

**Objective level** (“Did the accused measure up to a normative standard?”):

1. Negligently

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| **Subjective States of Fault** |

**The subjective state of an individual can be discerned by:**

* The foreseeable consequence presumption.
* The accused’s testimony weighed with other evidence.
* Determining what a reasonable man should have anticipated as evidence, not that the accused actually had that anticipation in mind, but that it may have been likely that he had.

***The foreseeable consequence presumption and the accused’s testimony may be used as evidence of subjective fault.***

**R. v. Buzzanga and Durocher (1979) OCA**

* **Principles** (Martin):
  + The “Foreseeable consequence” presumption is generally reasonable.
  + The accused’s testimony is important material to be weighed with other evidence.

***A reasonable man’s subjective fault may be evidence that the accused also had the same subjective fault.***

**R. v. Tennant and Naccarato (1975) OCA**

* **Principles:**
  + When the test is objective, what a reasonable man should have anticipated constitutes the basis of liability.
  + But when the test is subjective, what a reasonable man should have anticipated is merely evidence from which a conclusion may be drawn that the accused anticipated the same consequence.

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| **Intention and Knowledge** |

***Motive is legally irrelevant to criminal liability, but it may be useful evidence of intent.***

**R. v. Lewis (1979) SCC**

* **Facts**: The accused was charged with murder. He sent a bomb in a kettle to the victims.
* **Ratio** (Dickson):
  + Intent: “the exercise of free will to use particular means to produce a particular result.” (419)
  + Motive: “that which precedes and induces the exercise of the will.” (419)
  + Dickson’s points re: motive:
    - 1) Motive is relevant evidence of intention.
    - 2) BUT Motive is legally irrelevant to criminal responsibility.
    - 3) Proved absence of motive is a fact in favour of the accused, and to be noted to the Jury.
    - 4) Motive may be important evidence to the Crown, when the evidence is purely circumstantial.
    - 5) “The necessity to charge on motive depends upon the course of the trial and the nature and probative value of the evidence adduced. A substantial discretion must be left to the trial judge.”

***The presumption of “natural consequences of action” does not apply when the accused testifies otherwise.***

**R. v. Steane [1947] Court of Criminal Appeal, England**

* **Facts**:
  + The accused was charged for doing acts likely to assist the enemy with intent to assist the enemy contrary to Defence (General) Regulations.
  + He was charged with entering the service of the German Broadcasting System.
  + The accused testified that he acted in order to save his family.
  + The Crown argued that motive is irrelevant in negating intent.
  + The Crown argued that the accused intended to assist the enemy out of motivation to save family.
* **Issue**: Can the Crown establish intent by the “natural consequences of action” presumption?
* **Ratio**: No. The “natural consequences of action” presumption cannot prove intent because it may only prove motive. Thus, the Crown must prove “particular intent” to assist the enemy in order to convict.
* **The presumption**:
  + The common law has a presumption of “natural consequences of action” (“if you did it, you intended it”).
  + The presumption does not apply when the accused testifies intent (i.e. “to save family”).
  + The presumption may operate to infer, but presumption may operate only when the accused has moral freedom (if the act was done by a free uncontrolled agent).

***“Purpose” in s. 21(1)(b) – “for the purpose of aiding” – means intent.***

**Hibbert v. The Queen (1995) SCC**

* **Facts**:
  + The accused was charged with attempted murder, and relied on the defence of duress.
  + The accused testified that he was forced by the principal offender to accompany him to the victim.
  + The principle offender then shot the victim.
  + The accused was acquitted of attempted murder, but convicted of the included offence of aggravated assault. He appealed to the SCC.
* **Issue**: What is the meaning of “purpose” in “for the purpose of aiding” in s. 21(1)(b)?
* **Ratio** (Lamer):
  + In the context of s. 21(1)(b), purpose is not desire or motive.
  + Purpose = intent.
  + Purpose does not equal desire, because, for example, a driver of a bank robbery purposed to aid the bank robbery, but he did not desire to aid the bank robbery. He merely desired to be paid for his service (Mewett and Manning).
  + It is okay to burden the accused with the evidence of duress because the accused’s decision to assist the principle offender had some level of agency (moral blameworthiness).
  + Duress cannot negate the mens rea for aiding under s. 21(1)(b) because the desirability of the act is irrelevant. If the accused intended to commit the offence, he purposed the offence.
* **Perrin’s words of caution**:
  + There are no common definitions of mens rea terms.
  + Meaning will depend on context.
  + Hibberts’s definition applies only to s. 21(1)(b).

***To determine the definition of the written mens rea level, link the level of mens rea to the consequence.***

***If the statute is silent regarding the level of mens rea, the default level is subjective.***

**R. v. Buzzanga and Durocher (1979) OCA**

* **Facts**:
  + Charged with “willfully promoting hatred” against Francophones contrary to s. 281.2(2).
  + The accused said their motive was to incite the French community to action, not to promote hatred.
* **Issue**: What is the meaning of “willful”?
* **Ratio**:
  + “Willful” in s. 281.2(2) – “willfully promotes hatred” – is determined by context and statutory scheme.
  + There are two ways to satisfy “willfully” in s. 281.2(2):
    - 1) Conscious purpose to promote hatred.
    - 2) If accused knew hatred would be incited even if that were not their motive.
  + There is no fixed meaning to “willful.”
  + To determine the meaning:
    - 1) start with a contextual analysis by linking the level of mens rea to the consequence (i.e. willfully >>> promotes hatred)
    - 2) Analyze the scheme of the Act.
    - \* If the statute is silent regarding the level of mens rea, it must be taken to import mens rea; at common law, it is either “intentionally” or “recklessly.”

***Requisite mens rea must be low enough to catch the intended “wrong,” but should not be too low that it catches wrongs***

***that do not merit the stigma and loss of liberty of a criminal sanction.***

***The accused’s belief that the prohibited conduct would not hurt anyone is not a defence to a charge of fraud.***

**R. v. Theroux (1993) SCC**

* **Facts**: Accused was convicted of fraud for accepting deposits from investors for a building project having told them falsely that he had purchased insurance – contrary to s. 380(1).
* **Issue**: What is the mens rea for fraud in s. 380(1)?
* **Ratio** (McLachlin):
  + To determine the proper level of mens rea for fraud:
    - Refer to the external acts (prohibited acts) that constitute the actus reus.
    - The accused’s belief that the prohibited conduct is not wrong or would not hurt anyone is not a defence to a charge of fraud.
    - The primary purpose of a fraudster is to advantage himself. The detriment that results to his victim is secondary to that purpose and is incidental.
  + To prove mens rea for fraud, prove:
    - Subjective knowledge of the prohibited act.
    - Subjective knowledge that the prohibited act could cause the deprivation of another.
    - \* Recklessness presupposes knowledge of the likelihood of the prohibited consequences.
    - Thus, either knowingly or recklessly satisfies mens rea requirement.
  + Policy considerations:
    - The definition of fraud should be wide enough to catch fraudsters who sought to advantage themselves through fraudulent means, but should not be too wide that it catches misrepresentations or sharp business practice (“which do not merit the stigma and loss of liberty that attends the criminal sanction” 443), which may be dealt with by civil sanction rather than by the Criminal Code.
* **Perrin’s wisdom**: “I don’t think Theroux is a very good guide.”

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| **Recklessness and Willful Blindess** |

***Willful blindness is an aspect of recklessness (continuance of act despite having knowledge of risk).***

**R. v. Sansregret (1985) SCC**

* **Facts**:
  + Accused advanced sex; woman reluctantly consented.
  + Accused charged under s. 143(b)(i) with breaking into home, assaulting and terrorizing, and sexually violating the victim.
  + At trial, the accused raised the defence of mistake of fact in consent.
* **Ratio** (McIntyre):
  + Willful blindness is an aspect of Recklessness.
    - Recklessness involves knowledge of danger or risk, and continuance of act nonetheless.
    - Willful blindness arises when a person gains knowledge of the need for inquiry regarding possible risks, but chooses not to inquire because he does not want to know the truth.
  + The accused had knowledge of the victim’s likelihood of his threats. Continuing sex under such circumstances constitutes willful blindness.

***If the accused was willingly ignorant, he may be charged under a provision with a knowledge requirement.***

**R. v. Duong (1998) OCA**

* Facts:
  + Accused charged with being an accessory after the fact to murder.
  + He allowed Lam wanted for murder to stay in his apartment.
  + He heard through media about a killing.
  + Lam told the accused that he was “in trouble for murder.”
* Ratio:
  + If the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge, he was willfully blind (Test in R. v. Jorgensen (1995) SCC).
  + “Authorities make it clear that were the Crown proves the existence of a fact in issue and knowledge of that fact is a component of the fault requirement of the crime charged, willful blindness as to the existene of that fact is sufficient to establish a culpable state of mind.” (449)

***If an offence includes multiple mens rea levels, link each level with each corresponding actus reus.***

**R. v. Cooper (1993) SCC**:

* **Linking example:** s. 212(a)(ii) – culpable homicide:
  + “means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;”
    - “Means” (intent) is linked to “cause him bodily harm.”
    - “Knows” (knowledge) is linked to “likely to cause his death.”
    - “Reckless” is linked to “whether death ensues or not.”
  + Each mens rea must be proven.
* **Ratio** (Cory):
  + In s. 212(a)(ii), the accused is liable if he has the subjective intent to cause bodily harm and the subjective knowledge that the bodily harm is of such nature that it is likely to cause death. The “reckless” requirement is assumed to be proven if the first two are proven, since a reasonable person should not perform the first two.

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| **Objective States of Fault** |

Courts apply the objective standard of mens rea for criminal negligence cases, but negligence as a standard for criminal liability is controversial as seen in the following cases.

***There are variations of the objective standard.***

**R. v. Tutton and Tutton (1989) SCC**

* **Facts**:
  + Parents believed in faith healing; deprived child of insulin to the death of the child.
  + Convicted of manslaughter, through criminal negligence causing death by omitting to provide the necessities of life.
  + Trial judge applied a pure objective standard of “a parent.”
* **Issue**: What is the standard to use in establishing liability for manslaughter?
* **Decision**: The court was split.
* **Ratio**:
  + Which standard?
    - The pure objective standard camp: McIntyre, L’Heureux-Dubé.
    - The “general allowance” objective standard camp: Lamer.
    - The low level of subjective standard camp: Wilson, Dickson, La Forest.
  + McIntyre (pure objective):
    - 1. Must keep a distinction between subjective and objective.
    - 2. Intent of manslaughter is to punish for engaging in risky behaviour that cause death. “should have known” standard is necessary to punish socially dangerous conduct.
    - 3. Attached “reckless” with conduct, rather than mind.
    - 4. “The authorities dictate an objective test.”
    - Exceptions to the objective test is based on the “perception of facts.”
    - The meaning of “reckless” in Sanregret is distinguishes; in that case “reckless” was used in regards to a traditional mens rea offence.
  + Lamer (objective + general allowance):
    - Objective + “The general allowance”
    - Personal characteristics should be considered (e.g. youth, mental development, education).
  + Wilson (low subjective):
    - Provision is ambiguous.
    - “Recklessness” requires mental fault.
    - The objective standard may be used to presume what the accused knew, but “willful blindness” or “recklessness” is required.

**R. v. Waite (1989) SCC**

* **Significance of case**:
  + Trial judge approved the use of a subjective standard for the crime of death caused by criminal negligence.
  + SCC judges were again split on whether this standard was too high or not.

***An accused is liable for criminal negligence offences only if he could have been aware of a potential risk.***

**R. v. Gingrich and McLean (1991) OCA**

* **Facts**:
  + President of trucker company and driver were charged with criminal negligence causing death after a fatal accident when the truck’s brakes failed.
  + Gingrich had experienced problems with the brakes over several days.
  + Both were convicted; they both appealed; Gingrich’s conviction was upheld.
* **Ratio**:
  + Accused had to have the opportunity to suspect a potential risk (sign of brake failure).
  + The boss of the company was not liable because he could not have been aware of the potential risk.
  + But once the driver knew of the brake failure, the driver was held to an objective standard because he should have acted in response to the brake problems.
* **Significance of case**:
  + Most courts follow Gingrich as interpreting criminal negligence as an objective form of fault.

***For offence involving a highly regulated activity, a subjective standard may be inadequate.***

**R. v. Hundal (1993) SCC**

* **Facts**:
  + Accused charged with dangerous driving causing death.
  + Driving an overloaded truck, the accused ran a red light and killed another driver.
* **Issue**: What is the standard to apply for a dangerous driving offence?
* **Ratio** (Cory):
  + For driving offence, subjective test is inadequate.
  + Driving is an automatic activity with often no time for establishing intent.
  + Personal factors need not be taken into account for driving offences since driving is a highly regulated activity.
  + (La Forest, concurring) The provision against dangerous driving is a quasi-regulatory offence, not criminal negligence.

***The majority uses a pure objective standard for unlawful act manslaughter, with incapacity as the only exception.***

**R. v. Creighton (1993) SCC**

* **Facts**: Accused trafficked cocaine; injected cocaine into victim; charged with unlawful act manslaughter.
* **Issue**: What is the standard to apply to unlawful act manslaughter?
* **Ratio**:
  + McLachlin (majority):
    - “A person may be held criminally responsible for negligent conduct on the objective test.” (463)
    - Applying an objective test “does not violate the principle of fundamental justice [if] the moral fault of the accused [is] commensurate[d] with the gravity of the offence and its penalty: R. v. Hundal.” (463)
    - “The negligence must constitute a ‘marked departure’ (Hundal).” (463)
    - An exception to reasonable man: Incapacity to appreciate the nature of risk should exonerate liability since “the foundation of the requirement of criminal law [is] that the accused must have a guilty mind, or mens rea.” (464)
    - The fundamental proposition of social organization (as supported by Justice Oliver Wendell Holmes (1881)) justifies the application of a pure objective standard that does not take into consideration whether the accused is “rich [of] poor, wise [or] naïve.” (464)
    - Stigma/penalty analysis: The stigma of manslaughter “does not approach that of murder.” (470)
    - Only reasonable foreseeability of bodily harm is required.
    - Re: the thin skull principle: If you set a high standard to “expect death” you defeat the purpose of the thin skull principle.
    - Policy demands a unified pure objective standard (rather than a modified objective standard).
  + Lamer:
    - The standard is not subjective, but is neither purely objective.
    - Lamer takes into account Mr. Creighton’s “experience in drug use” to judge if Mr. Creighton would have been aware of the risk of death arising from the injection of cocaine.
    - “Human frailty” does not include voluntary intoxication or foreseeable lapses in capacity.

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| **Constitutional Considerations** |

***Nothing less than subjective foresight is required before an accused person can be convicted of murder.***

**R. v. Vaillancourt (1987) SCC**

***If conviction for a particular offence attracts significant penalty/stigma, Crown cannot convict by an objective standard.***

**R. v. Finta**

* **Facts**: Accused charged for war crime for committing crimes including manslaughter as a result of his activities as a senior officer at a concentration camp in Hungary.
* **Ratio**:
  + R. v. Vaillancourt applied a stigma/penalty analysis:
    - The principles of fundamental justice requires that the penalty must match the stigma.
  + Since war crimes attract greater stigma than typical crimes, the Crown must prove that accused had knowledge of the circumstances that brought his acts within the definition of a war crime.

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| **MODES OF LIABILITY** |

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| **Participation** |

Section 21(1) spells that the actual committer (principal offender), the aider, and the abetter are all “parties to the offence.”

***There is no legal relevance between being a principal offender or an aider.***

**R. v. Thatcher [1987] SCC**

* **Facts**: Either the accused or his hireling caused the death of the accused’s wife.
* **Issue**: Can the Jury convict even if they cannot agree on who the principal and the aider or abetter was?
* **Ratio**: Yes. There is no legal difference between being a principal or an aider/abetter.

***In an offence conducted in concert, all parties are liable for causing the end result.***

**R. v. H. (L.I.) (2004) Man.CA**

* **Facts**: It is unclear who of the four dealt the final blow resulting in death of victim.
* **Issues**: Who legally caused the death?
* **Ratio**: There is no legal difference between a dealtor of the final blow or a dealtor of the preceding blows.
* If all four acted in “concert,” the accused is guilty of second degree murder regardless of whether he dealt the final blow.

***If innocent party was manipulated to do the actual commission of the offence, the manipulator is the principal offender.***

**R. v. Berryman (1990) BCCA**

* **Facts**: Accused forged passport contrary to s. 57(1)(a). Another person “made” the passport, although only the accused knew of the fraud.
* **Issues**: Can a person be convicted of forgery if the actual making of the false document was done by an innocent party? Who is the principal (for there must be a principal for an offence)?
* **Ratio**:
  + If you use an innocent party by regulating the movement of another to commit a crime, you are the principal offender; hence there is an offence, and you are liable.
  + The common law doctrine of the innocent agency – a person as machine.

***If driver drives your car improperly, and you are in car, silent, then you are liable for encouraging (aiding) the offence.***

**R. v. Kulbacki [1966] Man CA**

* **Facts**: 16 yearold infant drove dangerously. Accused was in the passenger seat; was charged for dangerous driving.
* **Ratio**:
  + The accused is liable for being silent, which meant that he was encouraging the offence.
  + Du Cros [1907]:
    - The car belonged to the accused.
    - The accused gave consent for driver to drive.
    - The accused was present in car while the driver drove improperly.
    - The accused was held liable.
  + Halmo [1941]:
    - Facts: The hired driver and the owner of the car were both intoxicated.
    - Employee was under the charge of the owner.
    - Owner did not stop employee from drinking driving.
    - Owner was found guilty of reckless driving committed by his chauffeur.

**"Mere presence and passive acquiescence" at the scene of a crime is not enough for a conviction of aiding or abetting.**

**Dunlop and Sylvester v. The Queen (1979) SCC**

* **Facts**:
  + Accused convicted of rape for their part in a gang bang of a 16 year-old infant.
  + Accused testified that they arrived at the scene and saw a woman having intercourse with a gang member, and left after three minutes.
* **Ratio** (Dickson):
  + ”There was no evidence that while the crime was being committed either of the accused rendered aid, assistance, or encouragement to the rape.” (P. 511)
  + Accused cannot be convicted of aiding/abetting an act if he “does not know” the actual nature of the act or does not “intend” the actual act. (p.511)

***Accused can be charged of aiding or abetting by omission if he has a duty to act.***

**R. v. Popen (1981) OCA**

* **Facts**: Accused charged with manslaughter of his infant daughter. His wife mistreated the daughter.
* **Ratio**: Accused can aid or abet by omission if he has a duty to act (parents have a duty to act to provide necessities for their children). In this case, however, the father was found not to be present when the wife mistreated the daughter.

***Person with statutory duty to “involve himself” is a party to an offence even by merely being present.***

**R. v. Nixon (1990) BCCA**

* **Facts**:
  + Accused was the senior officer in the Vancouver police lockup.
  + He was convicted of aggravated assault of a prisoner.
  + He was present while the prisoner was being assaulted.
* **Ratio**: A person with a statutory duty to "involve himself" (i.e. police officer at the scene of an assault) is a party to the offence even by his mere presence.

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| **Common Intention** |

Apply the “ought to have known” standard for parties of common intent only if there is no Constitutional minimum level of fault requiring subjective mens rea.

***Common intention (known or ought to have been known) is formed prior to or at the commission of the offence.***

**R. v. Kirkness [1990] SCC**

* **Facts**: Two offenders broke and entered. Snowbird killed victim. Kirkness did not plan to kill anyone.
* **Issue**: When and how is common intent formed?
* **Ratio** (Wilson):
  + Common intention is formed:
    - PRIOR TO or AT the commission of the offence (cannot be after).
    - The common intent must have been known or ought to have been known.
  + Killing ought to have been foreseeable as a “consequent offence” of the common intent.
  + Defences:
    - “timely communication” is required for abandonment (Whitehouse case).
    - Degree of participation determines the sufficiency of abandonment.

***An aider who formed common intent with an attempted murderer must also be charged by the same subjective mens rea.***

**R. v. Logan (1990) SCC**

* **Facts**:
  + Principal offender seriously wounds cashier during robbery.
  + Accused aided the robbery.
  + Accused charged with attempted murder and robbery because he “ought to have known” that harming someone was a foreseeable consequence of robbery.
  + The principal was charged by a subjective standard (attempted murder) while the aider was charged by an objective standard (ought to have known of the possibility of attempted murder in a robbery).
* **Issues**: Does charging an aider with a lower minimum mens rea than the principal impair s. 7 of the Charter?
* **Ratio** (Lamer):
  + If the ultimate offender is charged for attempted murder (subjective mens rea) all parties must be charged by the same level of subjective mens rea.
  + The mens rea for attempted murder cannot, without violating s. 7 of the Charter, require of the accused less of a mental element than that required of a murderer.
  + Stigma/penalty analysis shows that the stigma renders the infringement of s. 7 too serious and outweighs the legislative intent, making it unjustifiable under s. 1 of the Charter.

***An aider who formed common intent with a manslaughterer must also be charged by the same subjective mens rea.***

**R. v. Davy (1993) SCC**

* **Significance of case**:
  + McLachlin applied the Logan principle to manslaughter.
  + Manslaughter requires foreseeability of harm (subjective), so all parties must be convicted only if they have knowledge of harm, not for oughting to know the harm.

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| **Attempts** |

S. 24(1) Attempts

(1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.

24(2) Question of law

(2) The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.

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| **Actus Reus for Attempts** |

***Actus reus of attempt must be more than mere preparation.***

**R. v. Cline (1956) OCA**

* **Principles**: There is no single test to see if act is sufficient in law to constitute an actus reus for attempts.
  + There must be both actus reus and mens rea to constitute an attempt, but the criminality lies mainly in the intent.
  + The acts themselves which form the actus reus need not be illegal or mischief. They form actus reus only if there is criminal intent.
  + Actus reus must be more than mere preparation.
  + Preparation must be fully complete.

***Whether the accused passed mere preparation depends on the proximity of the accused’s act to the completed act.***

**Deutsch v. The Queen (1986) SCC**

* **Facts**:
  + Accused charged with attempting to procure female persons to have illicit sexual intercourse with another person.
  + The accused posted ads for a secretary/sales assistant.
  + Three women and a policewoman testified that the accused indicated that the job required sexual intercourse with clients to conclude contracts.
  + Generous salary $$$ was promised.
  + Trial judge acquitted on the basis that his acts did not go far enough because he had not offered the job to the woman.
* **Ratio** (Le Dain):
  + The accused is guilty of attempting.
  + There is no clear line between attempt and preparation.
  + The difference between attempt and preparation is qualitative.
  + 1. Define the nature of the actus reus of completed offence.
  + 2. Consider factors of proximity (how close was the completed offence?)
    - Time, location, and acts under the control of the accused.

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| **Mens Rea for Attempts** |

***The mens rea for an attempted murder cannot be less than the specific intent to kill.***

**R. v. Ancio (1984) SCC**

* **Facts**:
  + Common law case.
  + Ancio was convicted of attempted murder.
  + He broke into an apartment with a loaded sawed-off shotgun to speak with his estranged wife.
  + Kurely sensed an intruder, so he threw a chair at Ancio.
  + Ancio’s gun discharged, missing Kurely.
  + Ancio was not planning to kill anyone. He just wanted to threaten his wife.
* **Issue**: Can a person attempt to unintentionally kill?
* **Ratio**:
  + No. The mens rea for an attempted murder cannot be less than the specific intent to kill.
  + The intent to kill is the highest intent in murder; it would be illogical for an attempt to murder (intent to kill) to have a lower intent.
  + Although one could be convicted of murder on several levels of mens rea, the mens rea for attempted murder cannot be less than the specific intent to kill.

***The Charter requires that mens rea for attempted murder must be the same as that of murder.***

**R. v. Logan (1990) SCC**

* **Principle** (Lamer):
  + It is unconstitutional to charge an aider for “oughting to have known” of the possibility of attempted murder in the commission of robbery.
  + A murderer and an attempted murderer has the same stigma and penalty.
  + To protect s. 7 of Charter, the mens rea for attempted murder cannot require of the accused less of a mental element than that required of a murderer – that is, subjective foresight of the consequences.
  + Intent to kill, or intent to cause bodily harm likely to cause death, is the appropriate level of mens rea for attempted murder.

***Equivocal acts are not used as evidence of attempt.***

**R. v. Sorrell and Bonden (1978) OCA**

* **Facts**: Aunt Lucy’s Fried Chicken closed early. The accused were charged with attempted robbery for having gun and balaclavas over their heads while knocking on door.
* **Ratio**: The accuseds’ conduct was equivocal, hence was not an attempt of the charged offence.
* **Principle**: The unequivocal test: If an act is equivocal, it is not used as evidence of attempt.

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| **Impossibility of Attempts** |

***An accused can be guilty of either factually or legally impossible attempts.***

**United States v. Dynar [1997] SCC**

* **Facts**: Dynar wanted to launder money, but he could not have succeeded in laundering money known to be the proceeds of crime.
* **Principles**:
  + An accused can be guilty of either factually or legally impossible attempts.
    - Factually impossible: attempt foiled because of material impossibility. The completion of full mens rea is thwarted by inability to fulfill material element (e.g. Pickpocket reaches in pocket but finds no wallet.)
    - Legally impossible: attempt foiled because of legal impossibility, even though the accused may have completed all acts that could constitute full mens rea (e.g. man steals his own umbrella thinking that it belongs to someone else.)
  + The purpose of punishing attempts is to deter repeat offences. If the facts work in favour of the accused in the future, an offence could be completed if the accused attempts again.
  + Imaginary crimes are not crimes.

(Perrin approved reasons):

* + - Cannot form actus reus.
    - There is no mens rea for a criminal offence.
    - Common law offence cannot be introduced.
    - There is no need to deter non-crimes.

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| **DEFENCES** |

Defences exist because the criminal law does not want to punish people who:

* Are not morally blameworthy.
* Did not have physical or moral voluntariness.

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| **Mistake of Law and Mistake of Fact** |

**Mistake of Fact:**

* Subjective mens rea is required to establish guilt for subjective mens rea offences; so if accused was mistaken in fact, he has no requisite subjective mens rea.
* (We did not cover any cases specifically on mistakes of fact, so refer to the MENS REA section in this CAN. Mistake of fact is all about the lack of subjective mens rea. But be careful, because some offences do not require knowledge: e.g. reckless offences and objective mens rea offences do not require knowledge.
* See R. v. Prue and Baril (1979) for defence of fact.
* A non-negligent mistake in fact may exonerate one’s liability, since criminal law seeks only to punish morally blameworthy conduct. For example, if a man has intercourse with a half German/half Japanese woman, and she said “yaa” in Japanese (which means “no” in Japanese) but the man honestly thought the woman was speaking German and thought she said “yaa” (which means “YES” in German), then the man made a mistake in fact, and he mistakenly thought that he had consent. Such a man may not be liable because of a mistake in fact.

**Mistake of law:**

* Section 19 of the Criminal Code says “Ignorance of the law by a person who commits an offence is not an excuse for committing the offence.”
* Mistake of how a law operates is a mistake of law, not fact, and is not a defence: R. v. MacDoughall (1982).
* Exceptions are:
  + Colour of Right: If theft was committed due to the mistaken belief that the item was in one’s legal possession, due to a mistaken belief in a civil claim, one might have an excuse.
  + Officially induced error: may be a valid excuse if false information from an official responsible for exercising the law led to one’s commission of an offence. Not used successfully in SCC, but may be argued.
  + Non-publication of the law.
  + The offence itself requires knowledge of the law.

***Mistake of law is not a defence to a criminal charge.***

**Jones and Pamajewon v. The Queen (1991) SCC**

* Facts: Indians on reserve were charged with operating an unlawful bingo (s. 206). Indians pleaded mistake of fact.
* Ratio:
  + The mistake is one of law, believing that the unlawful bingo law is not operative on reserves.
  + S. 19 of the Code spells that a mistake of law is no defence.

***Since mistake of law is not a defence, an accused cannot put forward a defence of due diligence to know the law.***

**R. v. Pontes (1995) SCC**

* Facts: Accused is charged under B.C. Motor Vehicle Act for driving while having his license suspended.
* Ratio (Cory): Due diligence is not about ascertaining the law, but about adhering to the legal standard (applying Lamer’s principle in R. v. Molis (1980) SCC): (in Molis, accused produced a substance without knowing that it was prohibited by law – mistake of law).

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| **Self-Defence** |

***Self-Defence requires existence of 1. assault, 2. apprehension of grievous harm, and 3. no other legal alternative.***

**R. v. Cinous (2002) SCC**

* Facts: Cinous thought his friends were conspiring to kill him, so he shot one of them, Mike.
* Ratio:
  + To succeed in a defence of self-defence, there must be:
    - The existence of an assault.
    - Reasonable apprehension of death or grievous bodily harm.
    - Reasonable belief in the absence of alternatives to killing.
  + These three elements must be real as perceived by the accused (subjective) and be reasonable (objective).
  + The “whole defence” must have an air of reality and backed by evidence. (987)
  + Binnie, concurring, does not grant self-defence to criminals who set their own “rule of the criminal subculture, which is the antithesis of public order.” (993) Criminals cannot claim self-defence if they avoid an alternative fearing that the alternative would face them with arrest.

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| **Necessity** |

***Necessity defence requires 1. urgency 2. No reasonable and lawful alternative, and 3. Proportionality.***

**Perka v. The Queen (1984) SCC**

* Facts: accused charged with importing narcotic and possession of narcotic for trafficking.
* Ratio(Dickson):
  + To succeed in a defence of necessity, there must be:
    - A situation that is urgent and peril that is imminent, that “normal human instincts cry out for action and make a counsel of patience unreasonable.” (929)
    - No reasonable legal way out.
    - Proportionality: the chosen illegal act must not cause greater harm than the harm that the actor was trying to avoid.
  + Notice the “reasonableness” requirements in the three requirements.
  + Negligence or involvement in criminal or immoral activity does not disentitle the actor to the excuse of necessity. (930)
  + Justification approves the act, whereas excuse allows the act without approving it.
  + Perrin does not think this distinction is helpful.

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| **Duress** |

***In pre-Charter times, defence of duress was available only for the principal offender.***

**Paquette v. The Queen (1976) SCC**

***S. 7 of Charter requires that the “immediacy” and “presence” requirements of s. 17 of the Code be struck***

**R. v. Ruzic [2001] SCC**

* Facts:
  + Marijana Ruzic charged with unlawful importation of narcotic and possession and use of false passport.
  + Ruzic said Mirko Mirkovic threatened that he would harm a third party.
  + Future or third party threats seem excluded in the requirements for duress in s. 17 of the Code.
* Ratio:
  + The immediacy and presence requirement of s. 17 infringes s. 7 of the Charter.
  + “Although moral involuntariness does not negate the actus reus or mens rea of an offence, it is a principle which, similarly to physical involuntariness, deserves protection under s. 7 of the Charter.” (963)
  + “immediate” and “presence” requirements are struck.

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| **Intoxication** |

When deciding if a defence of intoxication is possible, do the following:

* Step 1: determine the type of intent of the offence.
* Step 2: assess the level of intoxication.

***Advanced intoxication can negate mens rea for specific intent offence.***

***Extreme intoxication can be a defence to specific and non-violent general intent offences.***

R. v. Daley (2007) SCC

* Facts
  + Circumstantial evidence indicated that the accused killed wife.
  + He drank a lot.
  + There was a lot of evidence that he was very drunk (could not get pants up, forgot about peeing, spoke incoherently).
* Ratio
  + Mild intoxication is NOT a defence for any offence.
  + Advanced intoxication (which could affect mental state) may negate mens rea for SPECIFIC intent offence.
    - Accused must establish air of reality.
      * Crown can then disprove if there is reasonable doubt.
  + Extreme intoxication (which could affect physical voluntariness) may be a defence to:
    - SPECIFIC intent offence if accused proves extreme intoxication on a balance of probabilities.
      * (The accused must lack physical voluntariness, and be in an automatist state).
    - Non-violent GENERAL intent offence.
      * (Daviault [1994] SCC allowed extreme intoxication as a defence to general intent offences, but Parliament subsequently passed s. 33.1 to restrict the defence only to offences that did not constitute “an assault or any other interference or threat of interference by a person with the bodily integrity of another person” s. 33.1(3).

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| **Mental Disorder** |

Mental disorder is a defence because criminal law’s purpose is REHABILITATION and DETERRENCE. An NCR person must receive treatment, not punishment.

S. 16(1) **Defence of Mental Disorder**:

“No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of APPRECIATING the nature and quality of the act or omission or of KNOWING THAT IT WAS WRONG.”

Every person is presumed not to suffer from mental disorder so as to be exempt from criminal responsibility. (s. 16(2) This presumption infringes Charter s. 11(d), but Chaulk (1990) SCC found the infringement constitutional.

**Proving NCR** (not criminally responsible):

* Proven by party that raises the issue. (s. 16(3))
* Proven on a balance of probabilities. (s. 16(2))

If accused is NCR, then the Review Board administers treatment.

***Mental disorder is defence only if it prevents appreciation of nature/quality of act OR knowledge that act was wrong.***

**R. v. Simpson (1977) OCA**

**Cooper v. The Queen (1980) SCC**

***“Mental disorder” is a legal concept, and trial judge must decide if accused’s condition falls under the term.***

**Cooper v. The Queen (1980) SCC**

* **Ratio** (Dickson):
* “In a legal sense, “disease of the mind” embraces any illness, disorder, or abnormal condition which impairs the human mind and its functionaing, EXCLUDING however, self-induced states caused by alcohol or drugs, AS WELL AS transitory mental states such as hysteria or concussion.” P. 794
* Disorder must be of such intensity that it renders the accused incapable of “appreciating the nature and quality of the violent act or of knowing that is it wrong.” P. 794.

***“Appreciate” means the estimation and understanding of the consequences of an act.***

**Cooper v. The Quen (1980) SCC**

* **Ratio**:
  + Mere KNOWLEDGE of nature and qualify of an act does not equal APPRECIATION.
    - Perrin’s e.g.: a kid running on a wet surface “knows” that he is running, but does not understand the risk.
  + The McRuer Report Test, which Dickson adopts:
    - “Was the accused person AT THE TIME of the offence… by reason of disease of the mind, unable fully to appreciate not only the nature of the act but the NATURAL CONSEQUENCES that would flow from it?”
* **Perrin’s words of inquiry**: “If this McRuer Test is about seeing the consequences of an act, then what about offences with no consequence fault requirement?” – this question has not been dealt with in class.

***If accused, because of mental disorder, did not know that the society knew his conduct was “wrong,” then he may be NCR.***

**R. v. Chaulk and Morisette (1990) SCC**

* **Facts**: stupid kids knew that killing was illegal, but they thought that they had the power to rule the world, and they thought that killing a “loser” was right.
* **Ratio**:
* (Lamer)
  + *Schwarts*, which decided that “wrong” in s. 16(2) means “illegal,” was wrongly decided.
  + “wrong” in s. 16(2) means “contrary to the ordinary moral standards of reasonable men and women.” (802).
  + Accused may have a defence of mental disorder if he knew his conduct was illegal, but committed nonetheless in accord with his belief that he committed in response to a divine order. (803)
* (McLachlin) dissent:
  + Does not like basing the concept of “wrong” on moral standards of society.

***If delusion of an offender affected his interpretation of facts so as to justify conduct he knew was “wrong,” he can be NCR.***

**R. v. Oommen (1994) SCC**

* **Facts**:
  + Oommen suffered from a paranoid delusion, and shot a women whom he thought was conspiring against him.
  + Circumstances, such as the presence of a knife, and the going off of buzzers, helped to establish an air of reality to Oommen’s testimony of suspecting a conspiracy.
  + Trial judge did not grant a defence of mental disorder because the accused knew that the society would think that his act was wrong.
* **Ratio**:
  + Oommen’s delusion was a delusion of FACTS, not of the legality or morality of hi conduct.
  + His delusion made him think that he had no other choice than to kill the woman.
* **Test**:
  + “Did the accused lack the capacity to rationally decide whether the act is right or wrong and hence to make a rational choice about whether to do it or not?” (810)

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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:
  + 1. Legal definition of terrorism.
  + 2. Outlawing of terrorist groups.
  + 3. 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.

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| **ATTACKING THE EXAM** |



“Blood is just red sweat.”

(Enson Inoue)

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| **ATTACKING A FACT PATTERN PROBLEM** |

* If the exam question instructs to ignore any of these elements, then comply.
* Make sure that you refer to the cases to make sure that the principles are applicable to the facts.

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| **Did the Accused Commit the Actus Reus?** |

**What conduct does the provision prohibit?**

**What is the Prohibited Act?**

* For positive acts, look at the Criminal Code, case law, and use a purposive and contextual interpretive approach (Bell Express Vu).

**What is the Prohibited Omission?**

* The only time that one could be liable for omission is when he has a **legal duty** to act., and fails to act (Moore 1979). A legal duty can be established by:
  + Common law (e.g. “The duty not to harm a neighbor”). (Thornton 1991)
  + Statute (e.g. s. 215 “Duties Tending to Preservation of Life”).
* **Implied duties** are **NOT** accepted in criminal law. (Moore 1979)
* The SCC seems to prefer convicting based on statutory duties rather than common law duties. (Thornton 1991)

**Did the accused commit the prohibited conduct?**

**Is there causation?**

* The accused’s conduct must be a “**significant contributing cause**” of the prohibited consequence. (Nette 2001)
  + Causation requires a finding that the accused caused the prohibited conduct both in **FACT** and in **LAW**. (Menezes 2002)
  + There **can be more than one** significant contributing cause. (Menezes 2002)
  + The accused **does not have to be the most proximate cause**. (Menezes 2002)
  + The chain of causation, once established, **continues until** **withdrawal**. (Menezes 2002)
  + If the accused’s act is too remote to have caused the result, causation is not established. (Menezes 2002)
  + **Abandonment** of conduct requires a **positive communication of notice**. The sufficiency of the notice is determined by the **nature of the offence** and the **degree of the accused’s participation**. (Menezes 2002)
  + **Medical treatment may break** the chain of causation. However, if the medical treatment is improper, the treatment itself may become a “significant contributing cause.” (Reid & Stratton 2003)

**Is there Contemporaneity?**

* At some point, the actus reus and mens rea must coincide. (Fowler 1798)
* In Canadian law, the coincidence may be argued by either the **Continuous Transaction Theory** (Fagan 1969, Miller 1982) or the **Duty Theory** (Miller 1982).

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| **Did the Accused Have Mens Rea?** |

**What fault level does the provision prohibit?**

**Determine if the Test is Subjective or Objective**

* If the statute states a fault level, follow that.

**OR**

* If the statute **mentions no mens rea**, discern the purpose of the statute. (R. v. Pierce Fisheries Ltd. [1970] SCC)
  + **IF the purpose is to regulate** an act for the protection of a public good, the offence may not require the offender to have subjective mens reas. The offender has a defence of due diligence. (R. v. Pierce Fisheries Ltd. [1970] SCC)
  + **IF the purpose is to punish/deter** morally blameworthy behaviour, the offence may require the offender to have subjective mens rea or objective mens rea (negligent behaviour that was a “marked departure” from the norm (R. v. Hundal (1993) SCC))

**AND**

* If an offence includes **multiple mens rea levels**, link each level with each corresponding actus reus. Each mens rea for each actus reus must be proved beyond a reasonable doubt. (R. v. Cooper (1993) SCC)

**Subjective?**

**(the requisite mens rea may be subjective if the provision bears the following features)**

* + If a provision has “intentionally,” “knowingly,” “Recklessly,” “willfully,” or “purposefully” the fault level is subjective.
  + If the statute is **silent** regarding the level of mens rea, the **default level** is subjective. At common law, the default level is either intention or recklessness. (R. v. Buzzanga and Durocher (1979) OCA)
  + The requisite fault level to satisfy a mens rea term is discerned by context and statutory scheme. (Buzzanga)
    - Link the level of mens rea to the consequence (i.e. willfully > promotes hatred).
    - Analyze the scheme of the Act (purposive approach of Bell Express Vu).

**Constitutional Considerations**

* + Nothing less than subjective foresight is required before an accused person can be convicted of murder. (R. v. Vaillancourt (1987) SCC)
  + If conviction for a particular offence attracts significant **penalty or stigma**, the Crown CANNOT convict by an objective standard. (R. v. Finta)

**If the requisite level is subjective, how high or low should it be?**

* + To determine the fault level of a written mens rea term, 1) link the level of mens rea to the consequence, and 2) analyze the scheme of the act. (R. v. Buzzanga and Durocher (1979) OCA)
  + Requisite mens rea must be low enough to catch the intended “wrong,” but should not be too low that it catches wrongs that do not merit the stigma and loss of liberty of a criminal sanction. (R. v. Theroux (1993) SCC)
  + Some criminal provisions that address crimes involving the intent of gaining personal advantage and a reckless disregard for the welfare of victims, such as the provision against fraud, are only concerned with whether the accused intended to advantage himself. Whether he intended to hurt his victim is irrelevant. He is guilty if he merely was reckless in regards to creating victims. (R. v. Theroux (1993) SCC)

**Objective?**

**(the requisite mens rea may be objective if the provision bears the following features)**

(**Regulations)**

* + - If the statute is **regulatory**, its purpose is to set a **reasonable standard**, and not to punish morally blameworthy conduct. (R. v. Wholesale Travel Group Inc. (1991) SCC)
    - The **default liability** for **regulatory offences** is **strict liability**. (R. v. City of Sault Ste. Marie (1978) SCC).
      * If the wording (statutory language) of the offence includes ‘willful’, ‘intentionally’, ‘knowingly’ it goes to full mens rea.
      * If the wording (statutory language) of the offence suggests that the commission of the act itself is the offence it goes to absolute liability.
        + First, look at the language, both explicit and suggestive.
        + Then, look at the regulatory scheme and the nature of penalty.
    - Charter analysis determines that **absolute liability and imprisonment CANNOT be** **combined**. (Reference re Section 94(2) of the B.C. Motor Vehicle Act (1985) SCC)
    - If the statute is such that does not allow the defence of due diligence, the regulatory offence becomes one of absolute liability. (R. v. Pontes (1995) SCC)

**(Criminal Negligence)**

* + - You will be able to argue for an objective test if the provision says “**negligence**.” (e.g. s. 219 Criminal Negligence). But the court in *Tutton and Tutton* was split over whether a pure objective, an objective + general allowance, or a low subjective level should be required. In that case, it was arguable whether the phrase in s. 219, “shows wanton or reckless disregard” pertains to the conduct or to the mind.
    - For offence involving a **highly regulated and automatic activity** (driving), a subjective standard may be inadequate. (R. v. Hundal (1993) SCC)
    - The majority in Creighton used a pure objective standard for unlawful act manslaughter, with incapacity as the only exception. (R. v. Creighton (1993) SCC)

**Did the accused have the prohibited fault?**

**For Subjective Fault Offences**

* The foreseeable consequence presumption and the accused’s testimony may be used as evidence of subjective fault. (R. v. Buzzanga and Durocher (1979) OCA)
* A reasonable man’s subjective fault may be EVIDENCE (\* not a determination) that the accused also had the same subjective fault.(R. v. Tennant and Naccarato (1975) OCA)
* **INTENTIONALLY and KNOWINGLY**
  + Although motive is legally irrelevant to criminal liability, **motive may be useful evidence of intent**. (R. v. Lewis (1979) SCC)
  + The presumption of “natural consequences of action” does not apply when the accused testifies otherwise. (R. v. Steane [1947] Court of Criminal Appeal, England)
  + “Purpose” does not mean “desire.” So even if the accused says that he did not “desire” the conduct or the outcome, hey may be liable as long as he “intended” it. (Hibbert v. The Queen (1995) SCC)
  + If the accused was willingly ignorant, he may be charged under a provision with a knowledge requirement. (R. v. Duong (1998) OCA)
  + The accused’s belief that the prohibited conduct would not hurt anyone is not a defence to a charge of fraud. (R. v. Theroux (1993) SCC)
* **RECKLESSNESSLY and WILFULLY BLIND**
  + **Willful blindness is an aspect of recklessness** (continuance of act despite having knowledge of risk). (R. v. Sansregret (1985) SCC)
  + If the accused was willingly ignorant, he may be charged under a provision with a knowledge requirement. (R. v. Duong (1998) OCA)
  + If an offence includes multiple mens rea levels, link each level with each corresponding actus reus. (R. v. Cooper (1993) SCC)

**For Objective Fault Offences**

* An accused is liable for criminal negligence offences only if he could have been aware of a potential risk. (R. v. Gingrich and McLean (1991) OCA)
* The court may grant (with good and compelling reason):
  + “General allowance” Personal characteristics should be considered (e.g. youth, mental development, education). Lamer in (R. v. Tutton and Tutton (1989) SCC)
  + An exception to the objective test based on the “perception of facts” – the only exception to McIntyre’s pure objective test in (R. v. Tutton and Tutton (1989) SCC)
  + An exception based on incapacity (R. v. Creighton (1993) SCC)

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| **Was the Accused a Party to the Offence?** |

**Is the accused a party to the offence by aiding or abetting the principal?**

* Section 21(1) spells that the actual committer (principal offender), the aider, and the abetter are all “parties to the offence.”
* There is NO legal relevance between being a principal offender or an aider. (R. v. Thatcher [1987] SCC)
* In an offence conducted **in concert**, all parties are liable for causing the end result. (R. v. H. (L.I.) (2004) Man.CA)
* **If innocent party was manipulated** to do the actual commission of the offence, the manipulator is the principal offender. (R. v. Berryman (1990) BCCA)
* If driver drives your car improperly, and you are in car, silent, then you are liable for encouraging (aiding) the offence. (R. v. Kulbacki [1966] Man CA)
* "**Mere presence and passive acquiescence**" at the scene of a crime is not enough for a conviction of aiding or abetting. (Dunlop and Sylvester v. The Queen (1979) SCC)
* Accused can be charged of aiding or abetting by omission if he has a **duty to act**. (R. v. Popen (1981) OCA)
* Person with **statutory duty to “involve himself”** is a party to an offence even by merely being present. (R. v. Nixon (1990) BCCA)

**Is the accused a party to the offence by forming common Intention with the principal?**

* Common intention (known or ought to have been known) is formed **prior to or at the commission** of the offence.

(R. v. Kirkness [1990] SCC)

* + - The common intent must have been **known or ought to have been known**.
    - Killing ought to have been foreseeable as a “consequent offence” of the common intent.
    - Defences:
      * “**timely communication**” is required for **abandonment** (Whitehouse case).
      * **Degree of participation** determines the **sufficiency of abandonment**.
* The Charter requires that an aider who formed common intent with an attempted murderer must also be charged by the same subjective mens rea as the murderer. (R. v. Logan (1990) SCC)
* A conviction for manslaughter under s. 21(2) requires the aider to have foreseen the harm (not necessarily death). (R. v. Davy (1993) SCC)

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| **Did the Accused Attempt an Offence?** |

* S. 24(1) Attempts

(1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.

* 24(2) Question of law

(2) The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.

**Did the Accused Commit the Actus Reus of an Attempt?**

* Actus reus of attempt must be **more than mere preparation**. (R. v. Cline (1956) OCA)
* The acts themselves which form the actus reus need not be illegal or mischief. They form actus reus only if there is **criminal intent**. (R. v. Cline (1956) OCA)
* Actus reus must be more than mere preparation. Preparation must be fully complete. (R. v. Cline (1956) OCA)
* Whether the accused passed mere preparation depends on the **proximity of the accused’s act to the completed act**. (Deutsch v. The Queen (1986) SCC)
  + There is no clear line between attempt and preparation.
    - The difference between attempt and preparation is **qualitative**.
    - 1. Define the nature of the actus reus of completed offence.
    - 2. Consider factors of proximity (how close was the completed offence?)
      * Time, location, and acts under the control of the accused.

**Did the Accused Have the Mens Rea of an Attempt?**

* (Refer to the section on how to find mens rea of an offence.)
* The mens rea for an attempted murder cannot be less than the specific intent to kill. (R. v. Ancio (1984) SCC)
* The Charter requires that mens rea for attempted murder must be the same as that of murder. (R. v. Logan (1990) SCC)
* **Equivocal acts** are not used as evidence of attempt. (R. v. Sorrell and Bonden (1978) OCA)

**Did the Accused Attempt an “impossible” Act?**

* An accused **can be guilty of either** **factually or legally impossible attempts**. (United States v. Dynar [1997] SCC)
  + An accused can be guilty of either factually or legally impossible attempts.
    - Factually impossible: attempt foiled because of material impossibility. The completion of full mens rea is thwarted by inability to fulfill material element (e.g. Pickpocket reaches in pocket but finds no wallet.)
    - Legally impossible: attempt foiled because of legal impossibility, even though the accused may have completed all acts that could constitute full mens rea (e.g. man steals his own umbrella thinking that it belongs to someone else.)
    - **Imaginary crimes are not crimes**.

(Perrin approved reasons):

* + - * Cannot form actus reus.
      * There is no mens rea for a criminal offence.
      * Common law offence cannot be introduced.
      * There is no need to deter non-crimes.

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| **Does the Accused Have a Defence?** |

**Mistake of Fact?**

* Subjective mens rea is required to establish guilt for subjective mens rea offences; so if accused was mistaken in fact, he has no requisite subjective mens rea.
* (We did not cover any cases specifically on mistakes of fact, so refer to the MENS REA section in this CAN. Mistake of fact is all about the lack of subjective mens rea. But be careful, because some offences do not require knowledge: e.g. reckless offences and objective mens rea offences do not require knowledge.
* Cite R. v. Prue and Baril (1979) for defence of fact.
* Cannot plead mistake of fact if you were willfully ignorant (R. v. Sansregret (1985) SCC)

**Mistake of law?**

* Section 19 of the Criminal Code says “Ignorance of the law by a person who commits an offence is **not an excuse** for committing the offence.”
* Mistake of law is **not a defence** to a criminal charge. (Jones and Pamajewon v. The Queen (1991) SCC).
* Mistake of **how a law operates is a mistake of law**, not fact, and is not a defence (R. v. MacDoughall (1982)).
* Exceptions are:
  + **Colour of Right**: If theft was committed due to the mistaken belief that the item was in one’s legal possession, due to a mistaken belief in a civil claim, one might have an excuse.
  + **Officially induced error**: may be a valid excuse if false information from an official responsible for exercising the law led to one’s commission of an offence. The SCC has not applied this defence, but it may be argued.
  + **Non-publication** of the law.
  + The offence itself requires knowledge of the law.
* Since mistake of law is not a defence, an accused cannot put forward a defence of due diligence to know the law. (R. v. Pontes (1995) SCC)
  + Due diligence is not about ascertaining the law, but about adhering to the legal standard (applying Lamer’s principle in R. v. Molis (1980) SCC): (in Molis, accused produced a substance without knowing that it was prohibited by law – mistake of law).

**Self-Defence?**

R. v. Cinous (2002) SCC

* + To succeed in a defence of self-defence, there must be:
    - The **existence of an assault**.
    - **Reasonable apprehension of death or grievous bodily harm**.
    - **Reasonable belief in the absence of alternatives to killing**.
  + These three elements must be real as **perceived by the accused** (subjective) and be **reasonable** (objective).
  + The “whole defence” must have an **air of reality** and **backed by evidence**. (987)
  + Binnie, concurring, does not grant self-defence to criminals who set their own “rule of the criminal subculture, which is the antithesis of public order.” (993) Criminals cannot claim self-defence if they avoid an alternative fearing that the alternative would face them with arrest.

**Necessity?**

Perka v. The Queen (1984) SCC

* + To succeed in a defence of necessity, there must be:
    - A **situation that is** **urgent** and **peril that is** **imminent**, that “normal human instincts cry out for action and make a counsel of patience unreasonable.” (929)
    - **No reasonable legal way out**.
    - **Proportionality**: the chosen illegal act must not cause greater harm than the harm that the actor was trying to avoid.
  + Notice the “**reasonableness**” requirements in the three requirements.
  + Negligence or involvement in criminal or immoral activity does not disentitle the actor to the excuse of necessity. (930)

**Duress?**

* In pre-Charter times, defence of duress was available only for the principal offender. (Paquette v. The Queen (1976) SCC)
* S. 7 of Charter requires that the “immediacy” and “presence” requirements of s. 17 of the Code be struck (R. v. Ruzic [2001] SCC)
  + The immediacy and presence requirement of s. 17 infringes s. 7 of the Charter.
  + “Although moral involuntariness does not negate the actus reus or mens rea of an offence, it is a principle which, similarly to physical involuntariness, deserves protection under s. 7 of the Charter.” (963)
  + “immediate” and “presence” requirements are struck.

**Intoxication?**

When deciding if a defence of intoxication is possible, do the following:

* Step 1: determine the **type of intent** of the offence.
* Step 2: assess the **level of intoxication**.

(R. v. Daley (2007) SCC)

* + **Mild intoxication** is NOT a defence for any offence.
  + **Advanced intoxication** (which could affect mental state) may negate mens rea for **SPECIFIC intent** offence.
    - Accused must establish **air of reality**.
      * Crown can then disprove if there is **reasonable doubt**.
  + **Extreme intoxication** (which could affect physical voluntariness) may be a defence to:
    - **SPECIFIC intent** offence if accused proves extreme intoxication on a **balance of probabilities**.
      * (The accused must lack physical voluntariness, and be in an automatist state).
    - **Non-violent GENERAL intent** offence.
      * (Daviault [1994] SCC allowed extreme intoxication as a defence to general intent offences, but Parliament subsequently passed s. 33.1 to restrict the defence only to offences that did not constitute “an assault or any other interference or threat of interference by a person with the bodily integrity of another person” s. 33.1(3).

**Mental Disorder?**

S. 16(1) **Defence of Mental Disorder**:

“No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of APPRECIATING the nature and quality of the act or omission or of KNOWING THAT IT WAS WRONG.”

Every person is presumed not to suffer from mental disorder so as to be exempt from criminal responsibility. (s. 16(2) This presumption infringes Charter s. 11(d), but Chaulk (1990) SCC found the infringement constitutional.

**Proving NCR** (not criminally responsible):

* Proven by party that raises the issue. (s. 16(3))
* Proven on a balance of probabilities. (s. 16(2))

If accused is NCR, then the Review Board administers treatment.

**Case Law that Clarifies the Meaning and Significance of Mental Disorder**

* Mental disorder is defence only if it **prevents appreciation of nature/quality of act OR knowledge that act was wrong**. (R. v. Simpson (1977) OCA) and (Cooper v. The Queen (1980) SCC)
* “Mental disorder” is **a legal concept**, and trial judge must decide if accused’s condition falls under the term. (Cooper v. The Queen (1980) SCC)
  + “In a legal sense, “disease of the mind” embraces any illness, disorder, or abnormal condition which impairs the human mind and its functionaing, **EXCLUDING however, self-induced states** caused by alcohol or drugs, AS WELL AS transitory mental states such as hysteria or concussion.” P. 794
  + Disorder must be of **such intensity** that it renders the accused **incapable of “appreciating the nature and quality of the violent act or of knowing that is it wrong**.” P. 794.
* “**Appreciate**” means the **estimation and understanding of the consequences of an act**. (Cooper v. The Queen (1980) SCC)
  + Mere KNOWLEDGE of nature and qualify of an act does not equal APPRECIATION.
  + The McRuer Report Test, which Dickson adopts:
    - “Was the accused person **AT THE TIME of the offence**… by reason of disease of the mind, unable fully to appreciate not only the nature of the act but the NATURAL CONSEQUENCES that would flow from it?”
* If the accused, by reason of mental disorder, **did not know that the society knew his conduct was “wrong,”** then he may be NCR. (R. v. Chaulk and Morisette (1990) SCC)
  + “wrong” in s. 16(2) means “**contrary** to the ordinary **moral standards of** **reasonable men and women**.” (802).
  + Accused may have a defence of mental disorder if he knew his conduct was illegal, but committed nonetheless in accord with his belief that he committed in response to a divine order. (803)
  + (McLachlin) dissents because she does not like basing the concept of “wrong” on moral standards of society.
* If a delusion of the offender **affected his interpretation of facts** so that he thought that he was **justified to commit an act that he knew was “wrong,”** he can be NCR. (R. v. Oommen (1994) SCC)
* **Oomen Test**:
  + “Did the accused lack the **capacity to rationally decide** whether the act is right or wrong and hence to make a rational choice about whether to do it or not?” (810)

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| **Is There a Conviction?** |

The accused will be convicted if:

* He committed the requisite actus reus by any ONE of the following:
  + A positive act;
  + An act of omission;
  + Aiding or abetting;
  + Forming a common intent with the principal;
  + Attempting the full actus reus;

AND

* He had the requisite mens rea.

AND

* If he does not have a defence.

AND

* If the trial was fair.