Criminal Law Summary

Professor Boterell

**Winter**

19

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**Fall**

**INTRODUCTION 7**

Statutory Interpretation 7

**Maxims of Statutory Interpretation 7**

**The Golden Rule (R v Scott) 7**

R. v. Goulis (OCA, 1981) 7

R. v. Pare (SCC, 1987) 8

R. v. Scott (BC.CA, 2000) 8

**Absolute Liability Offences – Cannot be combined with imprisonment 9**

\*\*Reference re Section 94(2) of B.C. Motor Vehicle act (1985) SCC 9

R v Malmo-Levine (2003) SCC 9

**Vagueness 9**

R. v. Nova Scotia Pharmaceutical Society, 1992 SCC 9

**Overbreadth 10**

R. v. Heywood, 1994 SCC - 10

**Actus Reus 10**

INTRODUCTION TO OFFENCE ELEMENTS 10

**Four Parts of Actus Reus 10**

**Three C’s: 10**

**Fraud (Side note) (s. 380) 11**

**Actus reus for fraud (R. v. Olan, 1978): 11**

**Mens Rea for fraud (R. v. Theroux + R. v. Zlatic): 11**

R v Olan(1978) SCC 11

R v Theroux, 1993 SCC 11

R v Zlatic (1993) SCC 11

**Note on Fault Elements 12**

R v Sault set MArie (1978) SCC 12

**Note on Simultaneity 12**

R v cooper (1993) SCC 12

melI v the queen (1954) 12

R v Fagan (1969) QB 12

**DEFINING ACTUS REUS 12**

Sexual Assault 12

**Criminal Code s. 271 Sexual Assault- Hybrid Offence 13**

**Varieties of Assault: 13**

**Vitiation of Consent 14**

**Note on Sexual Assault 14**

R v Chase (1987) 14

**Factors to be considered include: 14**

R v V(KB) (1993) 14

**Consent and Assault 15**

**Types of assaults and consent 15**

**When can consent be vitiated? 15**

**Express and Implied Consent 15**

R v Cey (1989) 15

**Vitiating Consent 16**

**Aggravated Sexual Assault and Consent (HIV/STD) 16**

R v Bennett (1866) UK 16

R v Clarence (1888) UK 16

R v Williams (1923) 16

bolduc v the queen (1967) SCC 17

R v Maurantonio (1969) SCC 17

R v Cuerrier (1998) 17

R. v. Mabior, [2012] SCC 93 17

R. v. D.C. 18

**Consent and Sexual Assault 18**

R. v. Ewanchuk 1999 (SCC) 18

R v J.A. [2011] SCR 19

**Sexual Assault, Consent and Intoxication 19**

R v Tariq (2011) 19

**Mistake of Fact and Sexual Assault 20**

**Parliamentary Response to MBC 20**

Pappajohn v. The Queen, [1980] SCC 21

R. v. Sansregret, [1985] SCC 21

**CC s. 273.2 - Parliament’s response to Sansregret 21**

R. v. Malcolm, [2000] ONCA 22

R. v. Darrach, [1998] ONCA Application of 273.2 22

**Air of Reality 22**

R. v. Cornejo, [2003] ONCA 22

R. v. Cinous, [2002], SCC 22

**Consent and Public Policy 23**

R. v. Jobidon, [1991], SCC 23

R. V. Welch (1995) ONCA 23

R. V. W(G) (1994) ONCA 23

R. V. Paice (2005) SCC 24

R. V. Mcdonald (2012) ONCA 24

**De minimis principle 24**

**Voluntariness 24**

Rex v. Larsonneur (1933), 24 Cr.App.R. 74 24

Kilbride v. Lake, [1962] N.Z. S.C. 24

R. v. King, [1962] S.C.R. 746 25

R. v. Shaw, [1938] O.R. 269 25

R v Jiang [2007] BCCA 25

Tifaga v. Department of Labour, [1980] NZ 25

Finau v. Department of Labour, [1984] NZ 26

**Omission 26**

**If There is an Omission: 26**

**Where do Legal Duties Come From? 26**

R. V. Colucci 1965 27

R. v. Instan 1893 27

People v. Beardsley (1907) 27

R. V. Kirby, 245 D.L.R. (4th) 564 28

**Test for Failure to Provide Necessaries of Life 28**

R. V. Fagan, [1969] 1 Q.B. 439 29

R. V. Miller, [1982] 2 W.L.R. 937 29

Moore v the queen, [1979] 29

**Causation 30**

**Test for causation 30**

**BUT FOR CAUSE 30**

R. v. Winning (1973) 30

**REMOTENESS 30**

People v Lewis (1899) (Cal. SC) 30

R. v. Jordan (1956) 31

R. v. Smith, [1959] 31

**Intervening Acts (Novus actus interveniens): 31**

R. v. Blaue, [1975] 32

R. v. Shilon, (2006) 32

**Thresholds + Standards of Causation 32**

**Two leading tests: 33**

R. v. Maybin, (2012) 33

Smithers v. The Queen, [1978] 1 S.C.R. 506 33

R. v. Harbottle, [1993] 3 S.C.R. 306 33

R. v. Nette, [2001] 3 S.C.R. 488 34

**Actus Reus Summary 35**

**Mens Rea 35**

**Components of the Fault Requirements (Mens Rea): 36**

**Motive, Purpose, Intention and Knowledge 36**

**Motive 36**

R v Lewis (1979) 36

**Intention 37**

R v Steane (1947) 37

R v Buzzanga and Durcoher (1979) ONCA 37

**Conclusion (Intent/Motive) 38**

R v Hibbert (1995) SCC 38

R v Fontaine 38

R v Droste 38

R v Shand 38

**Wilful Blindness 38**

R v Sansregret (1985) 38

R v Griffiths (1974) 39

R v Briscoe (2012) 39

R v Lagace (2003) 39

R v sandhu (1989) 40

**Recklessness 40**

R v G (2003) UKHL 40

**The enigma of Criminal Negligence: Fault or Conduct Element 40**

**Offence of Crim Neg Causing Death - s. 219 and 220 42**

R v Tutton and Tutton (1989) 42

R v JF 42

**Neg as an element 43**

R v Hundal (1993) 43

R v Beatty (2008) 44

**Negligence Summary 44**

**Murder Constitutional Considerations 45**

R v Vaillancourt (1987) 46

R v Martineau (1990) SCC 46

**The Elements of Manslaughter 47**

**Manslaughter by Criminal Negligence 47**

**Manslaughter by Crim neg SUMMARY: Culpable homicide analysis under 222(5)(b) 47**

**Culpable homicide analysis under 222(5)(a): 48**

R v Shand (2011) ONCA - read in light of Martineau 48

R. v. Widdifield 49

**1st v 2nd Degree Murder 49**

**Four different types of FIRST DEGREE MURDER: 49**

**Manslaughter + UAM 51**

R v Desousa (1992) 51

R v Creighton (1993) SCC 51

R v Gosset (1993) 52

R v Naglik (1993) 52

**Infanticide 52**

R v Boroweic (2016) SCC 52

**Summary 53**

**Fault for Regulatory Offences 54**

R v Sault ste marie, (1978) SCC 54

**Absolute Liability 54**

R v Wholesale travel [1991] 54

R v Transport Robert, (1973) 54

**Principles of Cases 54**

**Answer Process – 58**

**Forms of Liability 58**

Aiding and abetting 59

Wilcox v Jeffery, [1951] UK KB - Abetting can be found in mere encouragement 59

R v Coney (1882), 8 QBD 534 60

R v Kulbacki, [1966] Man CA - failure to act can constitute AR of A&A 60

R v Dutchak, 43 CCC 74, [1924] 4 DLR 973; R v Hendrie (1905), 10 CCC 298; R v Dumont (1921), 37 CCC 166, 64 DLR 128 and R v Dick, 87 CCC 101, [1947] 2 DLR 213 61

R v Dunlop and Sylvester, [1979] SCC - Mere presence does not equal liability 61

R v Salajko, [1970] 1 CCC 352 Ont CA – Presence with pants down not aiding and abetting - Wrong 61

R v Black, [1970] 4 CCC 251 62

R v Clarkson, [1971] 3 All ER 344 62

R v Russell, [1933] Aus - Omission can constitute aiding/abetting 62

R v AA, [2004] - Demonstrates Limit of Party Liability 63

R v Dooley, [2009] Ont CA- Connection does not need to be but for cause 64

**Some Hypotheticals 64**

**Aiding and Abetting Actus Reus Summary 65**

**Mens Rea: Purpose of Enabling the Principle to Commit the Offence 65**

R v Poitras, [1974] SCC 65

R v Ahamad, [2004] ON SCJ 66

R v Hibbert, [1995] SCC 66

R v Greyeyes, [1997] SCC 67

**Note on Trafficking 68**

**Questions to Ask on Exam 68**

R v Wood, [2007] AJ No 763 68

R v Briscoe, [2010] SCC 69

R v Mariani, [2007] ON CA 70

R v Helsdon, [2007] ON CA- the mens rea for abetting is the same as for aiding 70

**Aiding and Abetting Mens Rea Summary 70**

**Other Forms of Party Liability: Common Intention and Counselling 70**

Common Intention 70

R v Jackson (R v Davy), [1993] SCC 71

**Constitutional Validity of s. 21(2) 72**

R v Logan, [1990] SCC 72

**Defence of Abandonment 72**

R v Whitehouse (1940 BC CA) 73

R v Miller and Cockriell (1976 SCC) - endorses “timely communication” requirement 73

R v Gauthier, [2013] SCC- changed the law surrounding the defence of abandonment 73

**Counselling 73**

**Co-Perpetrator Liability 74**

R v McMaster, 1996 SCC 74

R v Biniaris, 2000 SCC 74

R v Ball, BCCA 74

R v O’Brien, [2007] SCC 74

**Accessory After the Fact - ss. 23, 23.1, 240, 463 75**

R v Duong, [1998] ON CA 75

**Criminal Offence Liability Summary 76**

**Incohate Offences 76**

aTtempts 76

**Mens rea 76**

**Actus reus 77**

**Summary of Case Ratios 77**

**Attempts: Mens Rea 77**

R v Ancio, (1984 SCC)- Attempt Murder MR= Specific Intent to Kill 77

R v Logan, (1990 SCC)- Subjective Foresight of Death 78

**Attempts: Actus Reus 78**

**On Exam 78**

R v Robinson (1915 KB)- Last Step Rule 79

R v Barker, [1924] NZLR- First step/manifest criminality 79

R v Cline, [1956] ON CA- First step (after prep) 80

R v James, [1971] ON CA- furtherance 80

R v Sorrell and Bondett, [1978] ON CA 80

R v Deutsch, [1986] SCC- cite this case for AR of attempts 81

**Summary of Actus Reus for Attempts 81**

**impossible attempts 82**

United States of America v Dynar, [1997] SCC 82

R v Williams 83

**Summary for Attempts 83**

**Other inchoate offences 83**

conspiracy 83

Counselling an offence not committed 84

R v Hamilton, [2005] SCC 84

**Defences (Mistakes; Intoxication; Mental disorder; Automatism; necessity; duress; self-defence; provocation) 85**

mistakes 85

**1) Mistake of Fact 85**

R v Beaver, [1957] SCC- Mistake of fact is defence to possession, doesn't have to be reasonable 85

Constitutional Considerations for Defence of Mistake of Fact 85

R v Nguyen and R v Hess, [1990] SCC- Removing defence of mistake of fact can violate PFJs 86

R v Darrach, 1998 ONCA 86

**2) Mistaking one offence for another 87**

R v Kundeus, [1976] SCC 87

**3) Mistake of Law 87**

R v Campbell and Mlynarchuk, [1972] Alta Dist Ct 87

R v Molis, [1980] SCC 88

R v Docherty, [1989] SCC 88

**4) Official Induced Error (OIE) 89**

Levis (City) v Tetrault and Lévis (City) v 2629-4470 Quebec Inc, [2006] SCC 89

**5) Entrapment 90**

R v Mack, 1988 SCC 90

R v Nuttall, 2016 BCSC 90

**Intoxication 91**

Intoxication Analysis 92

Reniger v Fogossa, [1548] Ex Ct- voluntary intoxication is not a defence to criminal liability 92

DPP v Beard, [1920] HL- defence of intoxication, General vs. Specific Intent 92

Specific vs General Intent Offences 92

R v Majewski, 1976 HL- Intoxication is not a defence to general intent offences 93

R v Leary, [1978] SCC- Intoxication is not a defence to general intent offences 93

R v Bernard, [1988] SCC- Intoxication is not a defence to general intent offences 93

R v Daviault, [1994] SCC- Extreme intoxication is a defence to general intent offences 94

**Parliament’s Response to Daviault 94**

R v Tatton, 2015 SCC- Arson is general intent, intoxication short of automatism is no defence 95

R v Daley, [2007] SCC- Defence of intoxication concerns intent, not capacity 96

**Intoxication Summary 96**

R v Ladue 96

**capacity-based defence: Insanity or mental disorder 97**

Issue 1: Mental disorder and Fitness to Stand Trial 97

R v Whittle, SCC 1994 97

Issue 2: Not criminally responsible by reason of mental disorder 97

Not Criminally Responsible by reason of Mental Disorder Analysis (comes from CC s.16). 98

**Summary 98**

R v Taylor (1992), 77 CCC (3d) 551 98

M’Naghten’s Case 98

R v Cooper, [1980] SCC- Definition of “disease of mind”, meaning of “to appreciate” in s. 16 99

R v Bouchard-Lebrun, [2011] SCC- Intoxication & disease of mind; internal/external distinction 99

R v Abbey, [1982] SCC- Appreciate the nature and quality of the act 100

R v Chaulk, [1990] SCC- Knowing that it was wrong = legally and morally wrong 101

**Insanity Summary 101**

**Problems with s. 16(4) 101**

**capacity-based defences: Automatism 102**

Automatism Analysis 102

R v K, 1971 ON HC - definition of automatism 102

R v Rabey, [1980] SCC- cause of automatism is external not internal 103

R v Parks, [1992] SCC- Automatism; Expansion of test for automatism 103

R v Stone, [1999] SCC- Analysis for defence of non-insane automatism 104

**According to Bastarache in Stone 105**

**Bastrache’s 4 Principles of the defence of non-insane automatism 105**

R v Luedecke, [2008] ONCA- Application of Stone 105

**Automatism Summary 106**

Necessity 106

**Analysis for defence of necessity” 106**

**Justification v Excuse 107**

R v Dudley and Stephens, [1884] UK- Necessity is never a defence to homicide 107

Perka v The Queen, [1984] SCC- Outlines test for defence of necessity 107

R v Latimer, [2001] SCC- Affirms test for defence of Necessity 108

**Test from Perka 108**

Duress 109

**Framework 109**

Analysis for Defence of Duress (under either s. 17 or common law defence) (R v Ryan) 110

The Queen v Carker (No 2), [1967] SCC- Narrow interpretation of duress in s. 17 110

R v Paquette 111

R v Hibbert, [1995] SCC- Defence of duress has a “safe avenue of escape” Rule 111

R v Ruzic - Immediacy and presence requirements of s. 17 struck down 112

**Elements of Common-law defence of duress: 112**

R v Ryan, [2013] SCC 112

**s. 17 Statutory Defence of Defence: 113**

**Common Law Defence of Duress: (for exam take through these 6 things) 113**

R v Aravena (2015 ONCA)- Constitutionality of Exceptions in s. 17 113

**Summary 114**

**Self-Defence 114**

Analysis for Self Defence 114

R v Lavallee, [1990] SCC- s. 34(1) is a modified objective test 115

R v Malott, [1998] 1 SCR 223 115

People v Goetz, [1988] NYCA 116

**CC s. 34 Summary 116**

# INTRODUCTION

## Statutory Interpretation

### Maxims of Statutory Interpretation

* + Noscitur a Sociis – Know a thing by it’s associates
  + Ejusdem Generis – of the same genus
  + Expressio unius est exclusion alterius – the expression of one thing is the exclusion of the other
    - i.e. lions, tigers and bears excludes leopards
  + Presumption of constitutional validity
  + Avoidance of absurdity
    - When interpretation leads to absurd results
  + Strict Construction
    - The interpretation most favourable to the accused is adopted
* French and English version
  + Must use the common meaning of the two versions
  + Favours the more restricted meaning
  + Steps to determining bilingual statutes
    - Is there discordance?
      * Two versions must be reconciled
      * Narrower version favoured
    - Common or dominant meaning to ordinary rules consistent with Parliament’s intent
    - Bear in mind some principles of interpretation may only be applied in cases where there is ambiguity in an enactment

### The Golden Rule (*R v Scott*)

* **The Golden Rule:** if there is disharmony within the statute, then an unordinary meaning that will produce harmony is to be given to the words if it is reasonable capable of bearing that meaning
* The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act,* the object of the Act and intention of parliament
* If ordinary sense won’t do, then assign an unordinary meaning that will produce harmony if the words are capable of bearing that meaning (***Scott***)
* The CC has historically been interpreted in a ‘strict’ manner designed to give the accused the benefit of the doubt concerning any textual ambiguity (***Paice***)
* There is more than one interpretation of a word, apply the definition that coincides with the other words associated within the Act. Only apply the strict construction if there is still ambiguity (***Goulis***)
* The philosophy of Parliament in enacting a criminal law must be looked at (***Pare***)

## *R. v. Goulis* (OCA, 1981)

**Ratio:** the wording of a statute must be interpreted along with the other that it is associated within the statute. The rule of strict construction is only applied when there is still ambiguity in the definition of the word

**Facts:** ON AG appeals against acquittal of respondent following submission that there was no case to answer. Respondent had assets consisting of 1,173 pairs of ladies’ + men’s shoes and boots which he did not include to his trustee or upon examination.

**Issue:** Whether a bankrupt who deliberately fails to include items of his property in his statement of his affairs to the trustee and required to disclose them as assets in his examination has ‘concealed’ his property with intent to defraud his creditors under **s. 350(a)(ii)**. What is the meaning of ‘conceals’ for the purposes of **s.350 of CC**?

**Reasons:** Conceal for the purposes of **s 350** requires a positive act. When a word has more than one interpretation, although it is generally acceptable to apply the one that is more favourable to the accused, you must apply the definition that coincides with the larger scheme of the act and other words that it is associated with. Conceal can be reasonably construed as meaning either ‘refrain from disclosing’ or ‘put out of site’ and can be interpreted in two ways (1) a positive physical act on the part of the accused and (2) a negative non physical act on the part of the accused. Judge sides with interpretation (1) and there is no evidence accused did anything in (1).

## *R. v. Pare (SCC, 1987)*

**Ratio:** “While Committing” refers to the act being in the same transaction, not the same moment/simultaneously. Intended by Parliament to link a series of events.

**Facts:** Pare (17) lured victim to bridge by parking lot and indecently assaulted him. Pare ejaculated and got dressed. Victim told Pare he would tell his mom. Pare strangled victim with his hands, hit him several times with an oil filter and killed him by strangling him with a shoelace. Charged in Quebec that he illegally and intentionally killed Duranleau thereby committing first degree murder

**Prior Proceedings:** Accused was found guilty of first degree. At Superior Court, Judge Bienvenue said that ‘while committing’ can mean ‘committed at the same time’ OR ‘on the same occasion and the jury found him guilty of first degree. Accused appealed and court substituted verdict of second degree. At CA Beauregad J. said that it should be a restrictive interpretation and that ‘while committing’ must be contrasted with ‘after finishing committing’. He dismissed appeal + substituted verdict of second degree– concluding the murder + indecent assault must be simultaneous to mean ‘while committing’ vs. a close temporal connection. Lebel J. said that ‘while committing’ meant close temporal connection.

**Issue:** 2 errors made by CA: (1) **S. 214(5)** created substantive offence of murder and (2) Erred in its interpretation of the words ‘while committing’ in **s. 214(5)**.

**Reasons:** **Literal Meaning:** Pare committed the murder following the indecent act thus not ‘while committing’ but this was not a decisive argument. The murder is viewed as a single transaction as it represents an exploitation of the position of power created by the underlying crime (the assault) and makes the entire course of conduct a single transaction. This approach gives effect to the philosophy parliament had in **s. 214(5)** that elevated murders done while committing a hijacking, kidnapping, forcible confinement, rape, indecent assault to 1st degree. Liberal interpretation of the words ‘while committing’ in the CC was based on the difficulty in determining the beginning and end of the assault. Strict construction would have led to arbitrary and irrational distinctions and only operates when there is ambiguity in the provision. Court said that the “act causing death and acts constituting rape etc. may all form part of 1 continuous sequence of events forming single transaction’ = death was caused ‘while committing’”

**Held:** Appeal allowed and conviction of first degree restored.

## *R. v. Scott (BC.CA, 2000)*

**Ratio:** Two steps test for **The Golden Rule:** (1) The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament; and (2) If ordinary sense wont do, then assign an unordinary meaning that will produce harmony if the words can bear that meaning

**Facts:** Scott charged with robbing 3 stores. A gun was apparently used- but never recovered, making it hard to determine whether it was an imitation firearm. Scott charged on 6 counts: 3 robberies, with additional charge of using an imitation firearm in each. So: robbery on counts 1,3,5; using imitation firearm on counts 2,4,6. TJ acquitted on the imitation counts him under the doctrine of strict construction because it was not clear whether or not the firearm was real, so he therefore could not be charged with using an imitation firearm. Appeal to SCC dismissed.

**Issue:** (1) What was parliament’s meaning of ‘imitation firearm’ in **s. 85(2)**? (He can only be charged under one offence and if it cannot be proved that the item was an imitation, then can the accused be convicted even if the firearm may have been real?) (2) Are the courts required to interpret statutes in the strictest sense possible?

**Reasons (Braidwood):** Parliament did not intend to create an absurdity (disharmony) but an absurdity is created if ‘imitation’ is read in an ordinary manner. So the words of the statute must be read in a non-ordinary manner. Therefore the class of imitation firearms must be taken to include real firearms. Ruled in favour of The Crown by applying an unordinary meaning.

**Held:** In Favour of the Crown.

# Absolute Liability Offences – Cannot be combined with imprisonment

For **absolute liability offences**:

* 1. Just have to prove *actus reus*
  2. There is no defence available
  3. Liability irrespective of fault
* PFJ entail that absolute liability and imprisonment cannot be combined as it would be unconstitutional
* Because absolute liability offences don't require *mens rea*; there is a revulsion against punishing the morally innocent

## *\*\*Reference re Section 94(2) of B.C. Motor Vehicle act (1985) SCC*

**Ratio:** A law that combines absolute liability offence and penal sanctions (imprisonment) violates **s. 7 of the Charter**

**Facts:** Court is asked whether **s. 94(2) of B.C. Motor Vehicle Act** is consistent with *Charter*. **94(2)** provides that the offence of **s. 94(1)** “creates an AL offence in which guilt is established by proof of driving, whether or not D knew of prohibition or suspension”

**Issue:** Can an offence that carries at least the possibility of imprisonment be an AL offence?

**Held: S. 7** of the *Charter* is violated by the Act

**Ratio:** A law that has the potential to convict a person who has not really done anything wrong offends thePFJs and, if imprisonment is available as a penalty, such a law violates a person’s right to liberty under **s. 7***.* Such a law can only be salvaged if the authorities demonstrate under **s. 1** that such a deprivation of liberty in breach of those PFJs is, in a free and democratic society, under the circumstances, a justified reasonable limit to one’s rights under **s. 7**

**Reasons:** Term ‘PFJs’ is not a right, but a qualifier of the right not to be deprived of life, liberty, and security of the person; its function is to set the parameters of the right. It does not necessarily follow that because of **s. 7** AL offences can no longer be legislated. To the contrary, they can be legislated they just cannot be accompanied by a punishment of imprisonment

## *R v Malmo-Levine (2003) SCC*

**Ratio:** “Harm principles” is not a PFJ. Harm is not a required element of a crime. Parliament can legislate based on morality.

**Facts:** D charged with possession of marijuana for the purpose of trafficking. Claims that he was not harming anyone by smoking.

**Ratio:** For a rule to constitute a PFJ under **s. 7**, it **must be a legal principle** about which there is **significant societal consensus** fundamental to the way in which the legal system ought fairly to operate, and it **must be identified with sufficient precision to yield a manageable standard** against which to measure deprivations of life, liberty or security of the person.

**Held:** Upheld criminalization of marijuana under **s. 7**. Harm principle not a PFJ.

# Vagueness

* it is a PFJ that laws may not be too vague. (vague= lacks precision, does not give sufficient guidance for legal debate- citizens can’t draw the line, too much discretion for enforcement- not certain enough!) Contrast with overbreadth = encompasses too many things and is not a minimal impairment because the law goes too far in restricting rights (***Heywood***)

## *R. v. Nova Scotia Pharmaceutical Society, 1992 SCC*

**Ratio:** Vagueness is not permitted because it doesn’t give fair notice to citizens or provide a limitation of enforcement discretion.

**Facts:** Charged with conspiracy to prevent or lessen competition *unduly*, for sale of prescription drugs. Accused argued “unduly” is too vague, thus violating **s.7** in restricting one’s liberties. Doesn’t provide guidance as to what the law is.

**Held:** SCC said not too vague; too restrictive to impose absolute certainty.

# Overbreadth

* If a law applies to more areas than necessary to achieve its objectives or restricts liberty more than necessary to accomplish its goal, it can be found to be in violation of the PFJs of **s.7**

## *R. v. Heywood, 1994 SCC -*

**Ratio:** **s. 179(1)(b)** is overly broad to the an extent that it violates the right to liberty proclaimed by **s. 7,** cannot be saved by **s. 1**

**Facts:** Heywood charged with vagrancy for being previously convicted of a sexual offence and “found loitering at or near a school ground, playground, public park or bathing area” contrary to **s. 179(1)(b)**.

**Issue:** Is **s. 179(1)(b)** overbroad? When can the overbreadth principle be applied?

**Held:**Appeal dismissed, **s. 179(1)(b)** is unconstitutional and cannot be read down

**Reasons:** If the state, in pursuing a legitimate objective (separating sexual offenders and children), uses means which are broader than necessary to accomplish that objective, the PFJs will be violated because the individual’s rights will have been limited for no reason. The law in question is overly broad for the following reasons: **(1)** Overly broad in its geographical scope, embracing all public parks and beaches no matter how remote and devoid of children they are, **(2)** Overly broad in its temporal aspect as the prohibition applies for life without any process for review (**3)** Overly broad in the number of persons it encompasses. Not all sex offenders are child predators, and **(4)** Prohibitions are put in place and may be enforced without any notice to accused. Law was struck down because the court was able to think of scenarios where an innocent person could be criminalized solely based on past actions. Due to overbreadth of legislative provision, it fails minimal impairment stage of *Oakes* test

# Actus Reus

## INTRODUCTION TO OFFENCE ELEMENTS

* The act does not make a person guilty unless their mind is also guilty
  + *Actus –* prohibited act which is concerned with the accused’s conduct
  + *Mens –* fault element, state of mind
* M + A must coincide in time in order for the elements of an offence to be made out
  + Continuing transaction notion
* It is better to think in terms of the conduct of the accused and her state of mind at the time of that conduct

### Four Parts of Actus Reus

* 1. An act or omission – when the CC imposes a duty to act **s. 215**: to provide the necessities of life
  2. By a human being of capacity
  3. That is voluntarily (implies there also has to be a mens rea)
  4. That caused any relevant consequences (f consequences are an element he must have cause those consequences)

### Three C’s:

**Conduct**

* Conduct can be positive or negative
  + Positive conduct: punching, kicking, kissing, etc.
  + Negative conduct is failure to do something, can result in criminal liability where accused was under positive legal duty
* Criminal liability for omissions can arise in two ways in Canada:
  + (1) If the statutory offence section contemplates liability for omissions
    - a) Offences extending to omissions that explicitly include a statutory legal duty; e.g., failing to provide the necessaries of life (**s. 215.1**); failing to report treason (**s. 50(1)(b)**, failing to take exercise reasonable care of an explosive (**ss. 79-80**)
    - b) Offences extending to omissions that do not explicitly include a legal duty to act so that a legal duty outside the offence must be found; **ss. 126, 146(a), 180, 214, 218 (Abandoning Child)**
  + (2) If there is a failure to abide by a legal duty to act recognized by statute or CL
    - a) General relationships involving care and protection (some of which are codified; see **CC s. 215**)
    - b) Specific undertakings to act (e.g., **CC s. 217**; contractual)
    - c) Causal responsibility for dangerous situations **(*R. v. Miller***)
* When thinking about omissions think about **ss. 215-219**
  + omission offences **s. 220** - criminal neg causing death and **s. 215** – failing to provide necessaries of life (***Kirby***)
* The rule for liability with omissions is that there had to have been a legal duty imposed on the accused
  + duty is preferably found under the *CC* or some other statute, but can come from the CL

**Circumstances**

* It is common of the legislature to include specific circumstance among the elements of an offence
  + Wherever there are such circumstances, they are as much a part of the *AR* as the element of voluntary conduct
* Sometimes what is prohibited is doing something in certain circumstances
  + - **CC. s.250(2)**: Towing after dark
    - **S. 265** – assault…without consent is a circumstance of the actus reus

**Consequences**

* **Many offences include a specific outcome or consequence, such as death or bodily harm**
  + As with specific circumstances that might be required by the definition of the offence, offences must be closely scrutinized to ascertain whether they require a particular consequence or result
* When an offence specifies certain outcomes, the specified consequence itself generally poses little interpretive difficulty
  + Instead, the key issue tends to be whether the prescribed consequence was caused by the accused’s conduct

**Causation**

* Significant or contributing cause
* Substantial (for 1st degree)

# Fraud (Side note) (s. 380)

### *Actus reus for fraud* (*R. v. Olan*, 1978):

* i) offence has two elements: dishonest act; and deprivation
  + the dishonest act is established by proof of deceit, falsehood or "other fraudulent means” (very general), determined by an objective test.
  + element of deprivation is established by proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim, caused by dishonest act (actual economic loss not essential, just the risk or peril of potential loss)

### *Mens Rea* for fraud (*R. v. Theroux + R. v. Zlatic*):

* i) **subjective** knowledge of the prohibited act
* ii)**subjective** knowledge that the prohibited act could have as a consequence the deprivation of another (risk is sufficient)
  + "The subjective awareness that one was undertaking the act of deceit, falsehood, or other dishonest act, which could cause the deprivation in the sense of depriving another of property or putting that property at risk.”

## *R v Olan(1978) SCC*

**Ratio: AR of fraud** = (1) prohibited act (objective) and (2) deprivation caused by the act

The actus reus of fraud is:

1. Dishonest act (deceit, falsehood, or “other fraudulent”)
   1. established by proof of deceit, falsehood or “other fraudulent means” (very general) determined by objective test
2. Deprivation (or risk thereof) caused by the dishonest Act
   1. established by proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim, caused by the dishonest act (actual economic loss is not essential, just the risk or peril of potential loss)

## *R v Theroux*, 1993 SCC

**Ratio:** MR for fraud: Whether the accused subjectively appreciated those consequences [the risk of deprivation] as at least a possibility. Accused is guilty whether he actually intended the deprivation or was reckless as to its occurrence. Accused’s belief that the conduct is not wrong, or that no one would be hurt is not a defence.

* **MR of fraud** (and generally subjective knowledge) is:
  + a subjective knowledge of the prohibited act
  + the subjective knowledge or recklessness that the prohibited act could have a consequence of deprivation consisting of actual loss or risk of pecuniary loss
* Accused does not need to intend for fraud to cause loss; need only intentionally deceive. Careless statement not fraud.

## *R v Zlatic (1993) SCC*

**Held:** D guilty of fraud

* + **AR:** put financial interests of others at risk
  + **MR:** he knows he is gambling and knows what gambling is

### Note on Fault Elements

## *R v Sault set MArie (1978) SCC*

Offences grouped into three categories with different fault elements

* **True Crimes** - offences in which MR*,* consisting of some positive (subjective) state of mind must be proved
* **Strict liability** - offences where no MR needs to be proved BUT defence of reasonable care/due diligence is available
* **Absolute Liability** - offences in which no MR*,* no due diligence defence

### Note on Simultaneity

## *R v cooper (1993) SCC*

**Ratio:** MR must be concurrent with the AR. Determination of concurrent will depend on the nature of the AR

## *melI v the queen (1954)*

**Ratio:** MR and AR do not have to occur at the same time; continuing series of wrongful acts constitutes a transaction to which MR can be attached

**Facts:** Accused intended to kill victim and struck a number of blows. He thought the victim was dead and threw body over a cliff. But, it was not the blows but rather exposure suffered while he lay at the base of the cliff that resulted in death. Accused argued that when there wasMR (during beating) death did not ensure and when death did ensue there was no longer the intention to kill.

**Held:** Conviction Sustained.

**Reasoning:** Entire episode was one continuing transaction and could not be subdivided. At some point, the requisite MR coincided with the continuing series of wrongful acts that constituted the transaction.

## *R v Fagan (1969) QB*

**Ratio:** If during wrongful act the accused becomes aware and continues the act or omits to and allows wrongful act to continue, then liable. Not necessary that MR is present at the inception of AR as long as it is present during the continuation of act.

**Facts:** Fagan was driving and directed by officer to stop at a specific spot. Fagan drove the car onto the officer’s foot. Police tells him that he is on his foot and to get off but Fagan says “fuck you”. Cars engine is off, then D turns it back on to remove it.

**Reasons:** Though an act may seem unintentional and non criminal, if a person is made aware of the act and intentionally fails to act accordingly, this omission is sufficient to constitute the AR of the criminal offence. “An unintentional act followed by an intentional omission to rectify that act or its consequence can be regarded in total as an intention act” sufficient to fulfill AR. The AR and MR did not coincide because the MR was formed after the AR had been completed (simultaneity principle). AR was complete when Fagan drove the car onto the police officer's foot. MR was complete when Fagan had the intent to keep the car on the police officers foot. When Fagan told the cop to "fuck himself" then he had the intent to remain on his foot this is the MR and you add it to the AR of him being on the foot

**Held:** Continuous Act: AR was not complete when the accused first drove onto the officer’s foot, but continued while the force of the car was applied and the accused became aware of his actions (transactional effect- viewed whole event as one act)

# DEFINING ACTUS REUS

## Sexual Assault

Actus reus of sexual assault is not defined in the CC, so we need to look at assault first

**Criminal Code s. 265**- ASSAULT

**265. (1) A person commits an assault when:**

1. without the consent of another person, he applies force intentionally to that other person, directly or indirectly; (consent is the element of the AR)
2. he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
3. while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

**Marginal note: Application**

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

* **Actus reus of assault** is applying force to another person, directly or indirectly, without that persons consent
* **Mens rea for assault** is bringing about the actus reus intentionally, knowing that the complainant is not consenting or being reckless or willfully blind as to the presence or absence of consent

### Criminal Code s. 271 Sexual Assault- Hybrid Offence

**271.** Everyone who commits a sexual assault is guilty of

1. an indictable offence and is liable to imprisonment for a term of not more than 10 years or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or
2. an offence punishable on summary conviction and is liable to imprisonment for a term of not more than 18 months or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

**S. 271** does not tell us what sexual assault is and so the definition of sexual assault comes from the common law.

**s. 272:** Sexual assault with a weapon, causing bodily harm with threats or with accomplices

**s. 273:** aggravated sexual assault

**To prove Sexual Assault you need:**

* direct or indirect application of force (AR)
* without the consent of the victim (AR)
* intentionally done (MR)
* in circumstances of a sexual nature (AR- ***Chase****,* ***VKB***)

3 components of sexual assault (AR)

* 1. an assault
* 2. of a sexual nature
  + assault with intent to have intercourse for the purpose of sexual gratification (***R v Alderton***)
  + an act of force in circumstances of sexuality, which is intended to degrade, or demean another person for sexual gratification (***Taylor***)
  + to determine what "sexual nature" is a number of factors must be objectively considered (***Chase***)
  + even if there is not intent of sexual gratification, assault can be of a sexual nature if sexual integrity of the victim is violated (***VKB***)
* 3. where consent is not obtained
  + the consent element will be evaluated subjectively, and it cannot be implied (***Ewanchuck***)
* A sexual assault is an assault committed in sexual circumstances (***Chase***)

**Definition (A sexual assault is an assault committed in circumstances of a sexual nature – *Chase*)**

* Problem: **CC s. 271** doesn’t tell us what a sexual assault is; it simply tells us what the punishment for sexual assault is, so the definition of sexual assault comes from the common law. (***Chase, & V.(K.B.)***)
* **So**: begin with ‘simple’ assault in **CC s. 265(1)** – A person commits assault when:
  + a) *Without the consent* of another person, he *applies force* to that other person, directly or indirectly (consent is an element of the AR)
  + b) He attempts or threatens, by an act or gesture, to apply force to that person if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose
    - Sexual assault can be committed in this nature (***Cadden***)

### Varieties of Assault:

1. Common assault at sporting events (***Cey***)

2. Aggravated Assaults (***Cuerrier, Williams***)

3. Common assaults/assaults causing bodily harm in the context of consensual fights (***Jobidon, Paice***)

4. Sexual assaults (***Ewanchuck, Pappajohn, Sansregret***)

### Vitiation of Consent

1. On the grounds that what occurred was beyond the bounds of what was impliedly consented to (***Cey***)

2. On the basis of fraud (***Cuerrier, Williams***)

3. On the public policy grounds (***Jobidon, Paice***)

### Note on Sexual Assault

* a sexual assault is an assault that is committed in sexual circumstances (***Chase***): \*\****Actual test\*\****
* The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an *objective* one: “Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer?”

## *R v Chase* (1987)

**Ratio:** Sexual assault is an assault which is committed in the circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test to be applied determining whether the impugned conduct has the requisite sexual nature is an objective one: viewed in the light of all circumstances, is the sexual context of the assault visible to a reasonable observer? Note: This is only a test for the AR, the MR remains subjective- did the accused intend to commit the AR?

**Facts:** Chase entered the home of a 15-year-old girl and struggled with the girl, grabbing her by the arms, the shoulders, and the breasts. After the girl and her brother called for help, Chase ran away. This occurred over thirty minutes.

**Issue:** What is the difference between a sexual assault and common assault? What is the meaning of “sexual assault”?

**Previous Judgement:** NBCA stated that sexual should be interpreted int its natural meaning as limited to the sexual organs or genitalia otherwise touching someones beard would be a sexual assault. Crown appealed to SCC.

**Holding:** The appeal allowed, set aside the conviction of common assault and restore the conviction of sexual assault made at trial. Chase’s grabbing of the complainant’s breasts constituted an assault of a sexual nature.

### Factors to be considered include:

1. the part of the body touched;
2. the nature of the conduct;
3. the situation in which it occurred
4. the words and gestures accompanying the act
5. all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant
6. the intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual

* if the motive of the accused is sexual gratification, to the extent that this may appear from the evidence it may be a factor in determining whether the conduct is sexual
* it must be emphasized, however that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances (***Chase***)

## *R v V(KB) (1993)*

**Ratio:** Even if there is no intent of sexual gratification, assault can be of a sexual nature if sexual integrity of the victim is violated.

**Facts:** The accused on several occasions grabbed his son’s genitals; in a statement to the police, he explained that his son often grabbed the genital region of adults, and that he had “grabbed him by his privates to show him how much it hurts.”

**Issue:** Was this assault or sexual assault?

**Reasons:** The appellant, on 3 occasions, violently clutched the boy’s scrotum and evidence of bruising and severe pain.

**Holding:** It was clearly open to the TJ to conclude from all the circumstances that the assault was one of a sexual nature and that the assault was such that the sexual integrity of the appellant’s son was violated. Appeal dismissed.

**Note:** possible to do sexual assault through **265(1)(b)** which refers to assault where: he attempts or threatens, by an act or gesture to apply force to another person, if he has or causes that other person to believe on reasonable grounds that he has, present ability to affect his purpose

### Consent and Assault

* Consent (if proven) will **often negate the *actus reus*** and make an act lawful.
* **s. 265(1)** – consent as an element of the *actus reus* of assault
  + No prohibited act committed where **victim consented** to the application of force
  + **Not properly a defence** : it is a simply **an issue of the *actus reus*** – the Crown has not established all of the elements of the offence.
  + But **s. 265(4)** does allow for a defence of honest but mistaken belief in consent
    - And this goes to *mens rea* of the accused.

### Types of assaults and consent

* Common assaults during sports (***Cey***)
* Aggravated assaults (***Currier*, *Williams*, *Mabior***)
* Common assaults causing BH during consensual fights (***Jobidon*, *Paice***)
* Sexual assaults (***Ewanchuk*, *Pappajohn*, *Sansregret***)

### When can consent be vitiated?

* Grounds that what occurred was beyond the bounds of what was impliedly consented to (***Cey***)
* Public policy grounds (***Jobidon*, *Paice***)
* Basis of fraud (***Currier*, *Williams****)*

### Express and Implied Consent

* Consent can be either **explicit (expressed) or implied** (***Cey, Jobidon***)
* explicit consent: in writing, orally or by other clear evidence
* implied consent: can be more difficult to determine
* Consent to a fight is not a defence to a charge of assault if serious or non-trivial bodily harm is intended *AND* caused. Person **can’t consent to serious bodily harm**. (***Jobidon, Paice***).
  + ***Paice***clarifies ***Jobidon*** by requiring intention and causation of serious harm to vitiate consent
* **onus is on the crown to prove** that what the accused did was beyond the scope of the consent that had been given. (***Cey***)
* Participation in a dangerous game (hockey) amounts to **implied consent** (***Cey***)
  + **BUT implied consent can be vitiated** if the actions in the games are so inherently dangerous that no one would reasonably consent to them ever! (or go beyond the course of game) (***Cey***)
* No consent where it is obtained by a **false or fraudulent representation** **of the nature + quality of the act** (***Cuerrier****).*
* Or if it is a dishonestly deceptive act which has a substantial risk of bodily harm.
  + In some cases fraud can be established in the absence of risk of harm, since the court held that Williams’s deceit vitiated the complainant’s consent even though at no relevant time did the respondent impose on the complainant a serious risk of significant bodily harm (b/c she was already likely HIV+) (***Williams***)
* **No doctrine of implied consent in the context of sexual assault** (***Ewanchuk***)
* There are Policy Considerations for vitiating consent.
* Example: Social usefulness of fist fights – fistfights are not valued by society.
* A charge of assault will only be barred if the Crown fails to prove an absence of consent, BUT:
  + The activities must have positive social value.

## *R v Cey* (1989)

**Ratio:** Consent can be implied but implied consent is limited. Some act are so dangerous that they exceed the consent initially given and fall into the realm of criminal law.

**Facts:** In the course of a hockey game Cey checked opposing player. At the time, the victim was facing the boards attempting to retrieve the puck. His face was pushed into the boards and he suffered injuries to his mouth and nose.

**Prior Proceedings:** TJ found no intent to injure so accused was initially acquitted. CA thought otherwise and ordered it back.

**Issue:** did the victim ‘impliedly consent’ to the contact that resulted in his injury?

**Reasons:** Hockey players do not impliedly consent to violent physical contact intended to cause harm/injury. It goes beyond the scope of the consent given to play. Issue not whether accused intended to cause harm, only whether he intended to apply force.

**Holding:** Crown’s appeal was allowed and a new trial ordered due to TJ’s misdirection on issue of consent.

**Note:** There is a **doctrine of implied consent (in relation to sporting events) but there are limits** : the limit has to do with the intent to injure – some acts are likely to cause serious injury so no one would reasonably consent to the acts

**Ratio: Two part test:** (1) Whether accused intentionally applied force to the victim; and (2) whether the victim consented to that application of force (some bodily contact carry such a high risk of injury that they go beyond what players can consent to)

**Steps to proving assault causing bodily harm =**  Intentional in light of circumstance, Applied force, Bodily Harm, No Consent

The onus is on the crown to prove these things in order to prove to assault causing bodily harm

Keep in mind for assessing risk:

* + **Nature of the game** – Was it an amateur or a professional league? Competitive? Contact or non-contact?
  + **Nature of the act(s) and surrounding circumstances** – Was the act common or uncommon? Did it occur away from the play or after the whistle? What degree of force was applied?
  + **Degree of risk** – Was serious injury possible or probable?
  + **State of mind** – Was there an intention to inflict injury? Was the act done in retaliation or to intimidate?

### Vitiating Consent

* Consent will be vitiated by fraud if:
  + Consent was obtained by false and fraudulent representations as to the nature and quality of the act (***Cuerrier, Williams***)
  + Consent was obtained by false and fraudulent representations as to the identity of the respondent
  + Did the Fraud lead the assailant to cause his partner ‘a significant risk of serious bodily harm’?

# Aggravated Sexual Assault and Consent (HIV/STD)

**Criminal Code s. 273- aggravated sexual assault (indictable)**

1. Everyone who commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant

## *R v Bennett* (1866) UK

**Ratio:** Fraud or dishonesty with respect to STD status was sufficient to vitiate consent.

## *R v Clarence* (1888) UK

**Ratio:** The only kind of fraud which destroy the effect of a woman’s consent as to convert a connection consented to in fact into a rape are fraud as to the nature of the act itself, or as to the identity of the person who does the act

**Pre Clarence:** consent will be vitiated by fraud if consent was obtained by false and fraudulent representations as to the:

1. nature and quality
2. identity of the respondent; and/or
3. respect to STD status

In essence, Clarence struct out (c) but kept (a) and (b)

## *R v Williams* (1923)

**Facts:** Singing teacher convinced 16 year old student to have sex with him, claiming it would improve her singing voice

**Held:** Consent was vitiated because fraud goes to the nature and quality of the act

## *bolduc v the queen* (1967) SCC

**Facts:** Gynaecological exam with an observer who was misrepresented as medical doctor

**Held:** Consent not vitiated because woman consented to a biological exam by a licensed physician, which she, in fact received

## *R v Maurantonio* (1969) SCC

**Facts:** Man falsely held himself out to be a physician and performs a gynaecological exam

**Held:** consent vitiated because women consented to a gynaecological exam from license physician, which she did not receive

## *R v Cuerrier* (1998)

**Ratio:** to vitiate consent, fraud need not go only to the nature and quality of the act provided that it involves a substantial risk of serious harm. Essential elements of fraud are dishonesty and deprivation or risk of deprivation (***Olan, Thereaux***).

* 3 necessary elements for fraud to vitiate consent
  + - * 1. Nature and quality of act
      * 2. Consent was obtained by false and fraudulent representations as to the identity of the respondent.
      * 3.Significant risk of Serious bodily harm

**Facts:** Accused charged with 2 counts of aggravated assault pursuant to **s. 268**. The accused was infected with **HIV** and was urged nurse to inform all sexual partners before having sex. Accused had unprotected sex with and did not tell her of the HIV.

**Issue:** Did the accused’s failure to disclose his HIV status constitute fraud sufficient to vitiate complainant’s consent?

**Arguments:** The only consent given was consent to have unprotected sex with a healthy partner. She did not consent to having infected bodily fluids exchanged that could result in serious disease and/or death. Without disclosure, no real consent.

**Cory-** for fraud to vitiate consent in the context of a sexual assault for bodily harm:

* 1. There must be a dishonestly deceptive act related to the obtaining of consent
  2. The dishonest must result in deprivation which may consist of actual harm or risk of harm
  3. The harm in question must be serious, and the risk substantial

**Holding:** Appeal allowed, the orders of CA and TJ are set aside and a new trial is directed (Crown doesn’t move forward with it).

**Summary opinions:**

* **Cory:** argues that fraud need not go to the nature and quality of act if it involves a substantial risk of serious hard. “commercial fraud theory of consent”
* **McLachlan:** refuses to reject traditional CL approach to fraud in sexual assault cases; returns to pre Clarence idea that fraud with respect to sexually transmitted diseases can vitiate consent; thinks Parliament didn’t intend to oust the CL meaning of fraud in sexual assault cases; division of powers issue (courts have no business stepping in here). “return to pre-*Clarence*”
* **LHD:** agrees with Cory that fraud need not go to the nature and quality of act but disagrees that it must involve substantial risk of serious harm; argues that any deceit that deprives the complainant of ability to exercise the will is sufficient to vitiate consent. **“expansive theory of consent”** imprecise, overbroad, detrimental practical consequences

## *R. v. Mabior,* [2012] SCC 93

**Ratio:** Significant risk of bodily harm only present when there is a realistic possibility of transmission. Where someone 1) wears a condom and 2) has a low viral load, there is not a realistic possibility of transmission, no significant risk of serious bodily harm and so no vitiation of consent.

**Facts:** Six women consented to sex with the accused, testified that they wouldn’t have done so had they known he was HIV-positive. Accused is documented HIV-positive and advised to use condoms and tell partners of HIV-positive status.

**Issue:** What is required of an HIV+ individual to avoid liability for sexual assault, if they don’t disclose?

**Held:** D convicted of 5 counts of sexual assault because even though he had a low/undetectable viral load, did not use condoms.

**Reasons:** The significant risk of bodily harm is still applicable. BUT there needs to be a “realistic possibility” of transmission to prove significant risk. Accused had a low-viral load, and if he wore a condom, there would have been a very low likelihood of transmission. But accused was properly convicted because he failed to take the precaution of using a condom.

## *R. v. D.C.*

**Ratio:** Significant risk test will be satisfied where there is a “realistic possibility” of transmission which is negative if (i) accused’s viral load at the time of sexual relations was low and (ii) condom was used.

**Facts:** Accused was a woman who contracted HIV from her husband. The complainant was her CL partner of 4 years. Complainant charged with assaulting DC and her son and shortly thereafter the complainant went to police to lay sexual assault charges against DC. According to the complainant’s testimony, at the start of their relationship, he and DC had engaged in several acts of unprotected intercourse before DC disclosed her HIV status. DC denied this saying that the couple engaged in one act of intercourse using a condom before she disclosed. DC had an undetectable viral load.

**Held:** DC acquitted. TJ erred in finding that the one act of sexual intercourse preceding disclosure had been unprotected.

**Reasons:** To avoid liability, persons with HIV required to disclose before sex unless they have low viral load and use condoms.

### Consent and Sexual Assault

Consent can be part of the AR and MR of sexual assault (***Ewanchuk***)

* If there is in fact consent, then there can be no guilty act (*actus reus*)
* But if the accused mistakenly believed there was consent, then he would not have the requisite *mens* *rea*
* Consent is purely subjective, and there is no such thing as implied consent (***Ewanchuk***)
  + If the complainant doesn’t subjectively consent, then she does not consent
* **MR of Sexual Assault**: "the accused *intended* to touch the complainant in a manner that is sexual, and *knew* of, or was *reckless* or *willfully* *blind* to, the fact that the complainant was not consenting to that touching" (purely subjective)
* **AR of Sexual Assault:** same as assault, but in circumstances of a sexual nature (objective)
* **ss. 273.1** and **273.2** provide definitions of consent and non-consent, applicable to sex assault (but not other assaults)

**CC s. 273.1- meaning of consent**

1. Subject to subsection **(2)** and subsection **265(3)**, “consent” means, for the purposes of sections **271, 272** and **273**, the voluntary agreement of the complainant to engage in thesexual activity in question.
2. No consent is obtained, for the purposes of sections **271**, **272** and **273**, where
   1. the agreement is expressed by the words or conduct of a person other than the complainant;
   2. the complainant is incapable of consenting to the activity;
   3. the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
   4. the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
   5. the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.
3. Nothing in subsection **(2)** shall be construed as limiting the circumstances in which no consent is obtained.

**CC 273.2 - where belief in consent is not a defence**

1. It is not a defence to a charge under section **271, 272** or **273** that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where
   1. the accused’s belief arose from the accused’s
      1. self-induced intoxication, or
      2. recklessness or wilful blindness; or
   2. the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

## *R. v. Ewanchuk* 1999 (SCC)

**Ratio:** No defence of implied consent in sexual assault. Consent is evaluated subjectively, based on complainant’s mind.

**Facts:** 17-year-old girl was in potential employer’s trailer, talking massaging touching occurred. She was afraid but did not show it. There was sexual touching she said no, he stopped. He took penis out and she said no. He gives her 100 dollars and she leaves.

**Issue:** What is the meaning of consent in sexual assault offences? Is there such a thing as ‘implied consent’ in sexual assaults? Is there a defence of mistaken belief in consent in sexual assault offences?

**Prior Proceedings:** TJ and AltaCA: determined there is an implied consent for sexual assaults.

**Reasons:** Consent: plays two roles in sexual assault cases

1. *Actus reus*: consent is entirely subjective and “is determined by reference to the complainant’s subjective internal state of mind towards the touching, at the time it occurred”
   * In court the complainant would have to testify in order to determine what was going on in their head
   * If there is such thing as implied consent, it would go to the AR, but there is not
2. *Mens rea*: accused’s **belief in consent** can function as a defence; has both subjective and objective elements
   * Honestly, but mistakenly, believed that there was a consent
   * Question whether there was an honest but mistaken belief in consent is driven in part by objective factors – **were reasonable steps taken**/was the belief a reasonable one? (see ***CC* s. 273.2(b)**)

* There can be no doctrine of implied consent in sexual assault:
  1. If there were a doctrine of implied consent for *AR* purposes, then a complainant could subjectively withhold consent, but impliedly consent via conduct
  2. But if the complainant does not subjectively consent, then she does not consent
  3. So if she does not subjectively consent, then she can’t impliedly consent either

**Holding:** Ewanchuk guilty. No implied consent

## *R v J.A.* [2011] SCR

**Ratio:** Cannot consent to sexual activity in advance. Not possible for someone to consent to sex when they are unconscious. Definition of consent for sexual assault requires the complainant to prove actual active consent through every phase and an unconscious person cannot do this. Person must be able to withdrawn consent at any time.

**Facts:** Man choked his partner until she passed out, and proceeded to have anal sex with her. He argued that she consented to the choking and the anal sex prior to her passing out. She testified that she consented to the choking but not the anal sex.

**Issue:** Is advance consent legally valid?

**Held:** Advance consent is not legally valid.

**Reasons:** The complainant had not consented to the sexual activity.

### Sexual Assault, Consent and Intoxication

## *R v Tariq* (2011)

* Degree of intoxication necessary to render a complainant incapable of consent to sexual activity is extremely high

**Ratio:** 2 part test 1) Inability to appreciate sexual nature of the act or inability to say no and 2) nature and quality of the act

**Facts:** Tariq was not intoxicated (no blood alcohol). P woke up in hotel room with someone she didn't know, blacked out at bar, they had unprotected sex the night before. P made a phone call the night before. Her tampon had been removed.

**Crown's Position:** Tariq guilty on one of two principles either, (1) complainant did not consent or (2) she lacked ability to consent

**Mr. Tariq Position:** Not guilty b/c she did consent or at least he believed she was consenting

**Issue:** What is the relationship between 'blacking out' and consent?

* + No direct route from finding a complainant was blackout drunk to finding a complainant was incapable of consenting, absent of other circumstantial evidence
  + "All that can be concluded is that the complainant is incapable of giving direct evidence as to whether or not she consented to the sexual contact or whether or not she had the capacity to do so"
* Distinguish actual consent and capacity to consent
  + Even if an individual is capable of consenting, it may be that she did not actually consent

**Reasoning:** The test is whether there was subjective consent. Setting aside the issue of capacity, cannot find the Crown has proved beyond a reasonable doubt, the absence of consent. What stands out is that consent to sexual acts does not require a high level of consciousness and does not require the complainant to be able to properly evaluate the risks and consequences with a clear mind. The question is whether or not the complainant was able to make a voluntary and informed decision, not whether she later regretted her decision or whether she would not have made the same decision if she had been sober. Case law suggests that the court must be able to identify evidence that establishes beyond a reasonable doubt that the complainant's cognitive capacity was sufficient impaired by consumption of alcohol. Therefore, a drunken consent is still valid consent. In these circumstances where K.S.' impairment was so obvious, where K.S. looked disorientated and unaware of her surroundings, either Mr. Tariq knew that K.S. was not capable of consenting or he was willfully blind or reckless to this fact.”

* “Cases where the complainant is said to be incapable due to consumption of alcohol or drugs are less clear-cut. Mere drunkenness is not the equivalent of incapacity… Nor is alcohol-induced imprudent decision making, memory loss, loss of inhibitions or self control… A drunken consent is still a valid consent. Where the line is crossed into incapacity may be difficult to determine at times. Expert evidence may assist and even be necessary in some cases, though it is not required as a matter of law.” (**R v Cedeno**)

### Mistake of Fact and Sexual Assault

* Mistaken belief in consent need not be reasonable, as long as it was honestly held (***Pappajohn***), and that there were reasonable steps taken to ascertain consent (***Darrach***), and that consent wasn’t arrived at through wilful blindness (***Sansregret***)
* This is a subjective analysis. An accused’s belief would need to be reasonably held because he must take reasonable steps
* There are two important issues concerning consent (*actus reus* & *mens rea*):
  + (1) The consent itself – relates to the actus reus and is subjective
    - There is no defence of implied consent in sexual assault (***Ewanchuk***)
  + (2) The accused’s belief in the victim’s consent
  + Mistaken belief can act as a defence, but it goes to the MR
  + The belief in consent does not need to be reasonable, only honestly held (***DPP v. Morgan***)
    - Juries unlikely to believe it was honestly held if it was not reasonable (***Pappajohn***) – **no longer the law** after **s. 265(4)** enacted
  + Mistake is a defence when it prevents the accused from having the MR (***Pappajohn***) – if the woman in her own mind withholds consent, but her conduct and other circumstances lend credence to the belief that she was consenting it may be unjust to convict
  + Wilful blindness substitutes for knowledge, thus when accused is wilfully blind they still have the MR (***Sansregret***)
* if an honestly held but unreasonable belief is present they will simply find *mens rea* through wilful blindness (***Sansregret)***

### Parliamentary Response to MBC

* In response to this, Parliament made some changes to the *CC*:
  + **S. 265(4)** **Accused’s belief as to consent** – Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused’s belief, to **consider the presence or absence of reasonable grounds for the belief**
    - ***Pappajohn*** was no longer the law in Canada…**reasonableness of the mistaken belief is considered**
  + **S. 273.2** – **Where belief in consent not a defence** – Roughly: accused’s belief in consent will not constitute a defence if the belief arose from: (this added the **reasonable steps requirement**)
    - Self-induced intoxication
    - Recklessness or wilful blindness
    - **(b) Or if the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting**
* Parliament read in a reasonableness requirement in cases involving mistaken belief in consent in sexual assault context o
* after **s. 273(b)** was enacted, MBC still does not need to be reasonably held. Only requires reasonable steps to be taken to ascertain consent. If this is done, accused can still arrive at unreasonable belief in consent, and be exculpated

AIR OF REALITY TEST- THEN reasonable steps- Air of reality not that important, but mention that it comes from **s. 273.2(b)**

* **CC s 273.2** imposes a reasonable steps requirement
* For TJ to direct a jury to the defence of mistaken belief in consent, there must be an **air of reality** to MBC claim (***Ewanchuk, Osolin***)
* To convince a jury, an accused should show that there is an air of reality to their MBC before trying to establish that they took reasonable steps (***Ewanchuk***)
* In order for an accused to convince a judge that there was an air of reality to a belief in consent the accused must at a minimum show that he took **reasonable steps** in the circumstances known to him (***Cornejo*, *Crangle***)
  + What is required of an accused in the way of reasonable steps depends on the particular circumstances(***Crangle***)
* So the MR of sexual assault is determined by looking at the subjective intent/knowledge/recklessness of the accused, but several objective measures (reasonable steps, statutory provisions) are used to determine if the subjectivity was present

## *Pappajohn v. The Queen*, [1980] SCC

**Ratio: MR for Sexual assault** is entirely subjective, knowledge or recklessness and extends to all the material elements of the offence including consent. **MR of sexual assault** is not just the intent to have sex, but to have without consent. If an accused honestly believed complainant consented, then they do not have the MR and are not guilty. The belief need only be honestly held; does not have to be reasonable, although absent reasonable grounds unlikely a jury will believe they honestly held it.

**Facts:** Accused was selling his house, and had lunch with his agent where liquor was consumed. They went to his house and 3 hours later the agent ran out of the home naked with bowtie around her neck and her hands tied. She denied any consent, and testified to physical and mental resistance. Defendant claimed she did consent, and that the binding was for pleasure. TJ refused to allow jury to consider whether he believed she consented, leaving them only with the issue of whether she did in fact consent

**Issue**: (1) Is a defence of MBC available? (2) If so, what evidentiary threshold required (based on reasonable ground)?

**Held**: Appeal dismissed, conviction upheld on lack of evidentiary basis for defence of mistake

**Reasons**: There must be evidence for the MBC. Accused cannot simply claim he thought the victim consented. In this case, court finds there was not enough evidence to support mistaken belief. Dickson J. dissents but says that the accused doesn’t get to just say I thought she was consenting. The jury still has to determine whether or not they believe he thought she was consenting, and to do this they must determine if there is supporting evidence. Even if a woman doesn’t consent, it would be unjust to convict the accused if the woman’s conduct and other circumstances led one to believe she was consenting

## *R. v. Sansregret*, [1985] SCC

**Ratio:** Wilful blindness substitutes for knowledge, and negates honest but mistaken belief in consent. Where accused is deliberately ignorant as a result of blinding himself to the reality, the law presumes knowledge of the nature of consent. Defence of mistake of fact not available because honest belief not present.

**Facts:** The accused had lived with complainant and been in relationship. They separated. He broke in one night very angry, so to calm him down she made him believe the relationship could be reconciled and they had intercourse. She reported it to the police, but did not pursue the matter. A few weeks later, he broke in again, assaulted her and threatened to kill her (had a knife). She, in fear of her life, tried to calm him down by promising reconciliation, and at the end they had sex. She testified she did not consent, but allowed it to happen for fear of death. D contended that he mistakenly believed she had consented to the sexual activity.

**Issue**: What role does willful blindness play in a defence of mistaken fact regarding consent?

**Held**: Judgment for the plaintiff. No consent was given because it was extracted by threats/fear (***Ewanchuk***)

**Reasons**: In cases of willful blindness the law presumes that the accused knew that the complainant was not consenting, so the SCC found that the accused did not have an honest belief in consent (willful blindness substitutes for knowledge). WB arises where a person who has become aware of the need for additional inquiry, declines to make that inquiry or take reasonable steps. Accused does not wish to know the truth and would prefer to remain ignorant. Culpability justified by the accused’s fault in deliberately failing to inquire when the accused knows there is reason for inquiry. WB is distinct from recklessness (subjective) because, while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, WB arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in WB it is justified by the accused’s fault in deliberately failing to inquire when he knows there is a reason for inquiry. Recklessness will not vitiate mistake of fact because of the subjective element versus the objective element of civil negligence. One can honestly believe in a mistake of fact and be reckless in their behaviour.

**The Law after *Sansregret*:** Honest belief in consent, when reasonable, will acquit but if it is arrived at through WB no defence.

### CC s. 273.2 - Parliament’s response to *Sansregret*

1. It is not a defence to a charge under section **271**, **272** or **273** that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where
2. the accused’s belief arose from the accused’s
   1. self-induced intoxication, or
   2. recklessness or wilful blindness; or
3. the accused did not take reasonable steps, in the circumstances known to them at the time, to ascertain that the complainant was consenting.
   * Parliament overruled ***Pappajohn***by insisting that an accused’s belief in the presence of consent be reasonable

## *R. v. Malcolm*, [2000] ONCA

* **S. 273.2(b)** requires the court to apply a quasi objective test to the situation. Reasonable steps requirement test:
* **First,** the circumstances known to the accused must be ascertained
* **Then,** if a reasonable man in the same circumstances, would he take further steps before proceeding with sex?
  + - **If yes,** and accused has not taken further steps, accused not entitled to a defence of MBC
    - **If no**, or even maybe, then accused would not be required to take further steps and defence applies

## *R. v. Darrach*, [1998] ONCA Application of 273.2

* + “The subjective *MR* component of [sexual assault] remains largely intact. **[S. 273.2(b)]** does not require that MBC must be reasonable in order to exculpate. The provision merely requires that a person about to engage in sexual activity take “reasonable steps…to ascertain that the complainant was consenting”. Were a person to take reasonable steps, and nonetheless make an unreasonable mistake about the presence of consent, he or she would be entitled to ask the trier of fact to acquit on this basis.”

### Air of Reality

**Note:** **R v Ewanchuk**- air of reality test

* **Step 1:** Determine whether any evidence exists to lend an air of reality to the defence;
* **Step 2:** If yes, whether the accused honestly believed that the complainant communicated consent. Any other belief, however honestly held, is not a defence
* you do not even get to **273.2** (step 2) unless you discover that they pass the air of reality test first
* **What is air of reality?**
  + “All that is required is for the accused to adduce some evidence or refer to evidence already adduced, upon which a properly instructed trier of fact could form a reasonable doubt as to his MR
* Meaning of consent in the context of honest but mistaken belief:
  + that complainant affirmatively communicated by words/conduct agreement to engage in sexual activity with accused

## *R. v. Cornejo*, [2003] ONCA

**Ratio:** Reasonable steps- application of **273.2**- If there is no air of reality, MBC defence is not put to jury. If there is no reasonable evidence to come to the conclusion that a reasonable person would have properly interpreted the circumstances to be that consent was given, MBC should not be put to the jury. For MBC to be raised to the jury there must be: (1) an air of reality to the belief determined by a totality of evidence and (2) the accused must have taken reasonable steps to ensure consent was obtained

**Facts**: Complainant and accused worked together. After golf tournament where they both consumed alcohol, accused phoned the complainant and when he learned the complainant’s boyfriend was no longer coming over, he asked if he could come over to which the complainant, who was tired, replied “mm-hmm”. No response at her house, he opened the door, and entered. Complainant was asleep for majority of the sexual encounter, but accused contends that she aided him in taking her clothes off. TJ ruled that that the complainant’s pelvic movements which aided in the removal of her clothes satisfied air of reality test.

**Issue**: (1) Did the TJ err in allowing the jury to hear the defence of mistaken consent? (2) Did accused take reasonable steps in order to determine if she was consenting to the sexual activity?

**Held**: Appeal allowed (Accused won on trial), acquittal set aside, new trial ordered

**Reasons**: The circumstances of this case were crying out for the need for reasonable steps being taken to ascertain consent. Easiest reasonable steps would have been to simply ask. Defence of honest but mistaken belief in consent involves: (1) that the accused honestly believe the complainant consented and (2) that the accused was mistaken in this belief. Circumstances required D to take reasonable steps to ascertain consent and he took no reasonable steps and so **273(2)** bars this defence

**First do reasonable steps test; THEN air of reality test**

## *R. v. Cinous, [2002], SCC*

**Ratio:** Air of reality test: Whether there is evidence upon which a properly instructed jury acting reasonably could acquit.

### Consent and Public Policy

## *R. v. Jobidon, [1991], SCC*

**Ratio:** Can’t consent to serious bodily harm/death. Sometimes public policy considerations imply that what would otherwise be valid consent is not legally effective. Consent to assault in a fight is vitiated on public policy grounds if serious bodily harm is both (1) intended and (2) caused. Person cannot consent to death or damage beyond transient and trifling in nature.

**Facts:** Jobidon and Haggart were fighting in parking lot. Jobidon threw a punch, causing Haggart to fall onto the hood of a car and be knocked unconscious. Jobidon continued to throw at least 4-6 more punches. Haggart later died of his injuries. TJ acquitted Jobidon on the grounds that Haggart’s consent to the fight negated assault (b/c no *actus reus*). CA allowed the conviction.

**Issues:** Can you consent to physical assault and injury to yourself? Is absence of consent a material element, which the Crown must prove, or are the CL limitations, which restrict or negate the legal effectiveness of consent in certain cases?

**Reasons:** Fistfights are not valued by society so there is no social usefulness and they may lead to bigger brawls resulting in breaches of the public peace. **However, the scale is tipped towards the inability to consent to bodily injury in a fight.**

**Policy consideration :**

* + - **Social usefulness of fist fights – fistfights are not valued by society.**
      * Consensual fights may sometimes lead to bigger brawls resulting in serious breaches of the public peace.
      * Common law limitations on consent may have some deterrent effect.
      * Moral point – sanctity of the human body should militate the validity of consent to bodily harm
  + Conclusion
    - **S. 265** limitations – “vitiates consent between adults intentionally to apply force causing serious hurt or non-trivial bodily harm to each other in the course of a fist fight or brawl.”
    - **You can’t consent to the causing of serious hurt or non-trivial bodily harm to each other in the course of a fistfight or brawl** (comes from the English position).
  + A charge of assault will be barred if the Crown fails to prove an absence of consent:
    - As long as the activities have positive social value AND
    - The intent of the actors was for the good of the people involved and often a wider group of observers
* Sopinka– concurring, different reasons
  + Consent is an essential element of defining what constitutes a crime.
    - Consent is an essential element of the AR of assault, and cannot be read out of the offence. If there is consent then we have not established the AR.
  + Absence of consent is a requirement – but restricted to those who give clear + effective consent free from coercion + misrepresentation.
    - The more serious the assault the more difficult it should be to establish consent.
  + Interpretation of **s. 265** –
    - Parliament – “made the absence of consent a specific requirement and provided that this applied to *all* assaults without exception.”
  + Social utility test = results in uncertainty.
  + However, this case can be resolved on other grounds.
    - **The victim cannot be seen to consent to that level of infliction of harm.**
    - **Consent has limits of its own, Haggart did not consent to being pummelled while unconscious**
      * although they may have consented to a few punches, they did not consent to level of injury that occurred.

**Held:** Appeal dismissed. Jobidon guilty of manslaughter. Cannot rely on the claim that Haggart initially consented to the fight and so he also consented to the serious resulting injuries.

## *R. V. Welch* (1995) ONCA

**Ratio:** Extension of Jobidon. Cannot consent to assault causing bodily harm unless accused is acting in course of a “generally approved social purpose”

* + “**Public policy should not sanction as a defence the consent to any degree of violence even though committed in private, where such violence is likely to result in serious and permanent bodily harm**. In ***R. v. Carrière***, Alberta CA rejected the defence of consent to aggravated assault where victim was stabbed with a knife. ***Jobidon***fortifies the view that, where serious injury amounts to aggravated assault, consent is no defence.”

## *R. V. W(G)* (1994) ONCA

**Ratio: *Jobidon*** extends to cases involving consensual fights between people under 18.

* **FACTORS TO BE CONSIDERED:- Consent but it was not valid**
  + 1. Intention to cause serious bodily harm;
    2. Nature of the force applied;
    3. Consequence of the actions (was there serious bodily harm)

## *R. V. Paice (2005) SCC*

**Ratio:** To vitiate consent, serious harm must be intended + caused. Self defence cannot be invoked if one consented to assault

**Facts:** Similar to ***Jobidon***, an apparently consensual first fight, a death, and manslaughter under **CC s. 222(1)(a).**

## *R. V. Mcdonald* (2012) ONCA

**Ratio:** Defence of consent available when (1) A didn’t intend to cause serious harm or (2) A didn’t cause serious harm

### De minimis principle

* the law does not care about mere trifles

# Voluntariness

* Voluntariness adds a mental component to the AR requirement, not the MR
* **General Rule:** accused must perform prohibited act voluntarily, where there is a lack of voluntariness, no AR so no crime
* The essential characteristic of voluntariness is conscious control of action
* AR occurs when a willing mind makes a definite choice or decision, regardless of whether they knew it was illegal. (***King***)
* AR requires the notion of a **conscious/willing mind at liberty to make a definite choice**, that is, **the act must be conscious and deliberate** (doesn’t mean intended/wanted, just conscious action) (***King***)
  + **a person cannot be made criminally responsible for an act or omission unless it was done or committed in circumstances where there was some other course open to him** (***Kilbride***)
* Criminal liability relies on a choice. If there was no choice available, then it is hard to hold someone criminally liable for their lack of choice.
* **Proof that the act is involuntary is a defence that entitles acquittal (*Finau*)**
  + However, the impossibility cannot be brought about by the accused’s own actions (***Tifaga****)*
* **No voluntariness when:**
  + There is no ability to make a choice or decision (***King***)
* A **reflex action**. (***Shaw***)
  + But, where an accused has put himself in a situation in which the consequence is **probable and foreseeable**, a reflex action will not absolve him. (***Shaw***)
  + If it was done or omitted in circumstances where there was **no other course open to them**. They **must have at least known about it.** (***Kilbride***)
  + Acts of a stranger that happens without your knowledge. (***Kilbride***)

## *Rex v. Larsonneur* (1933), 24 Cr.App.R. 74

**Ratio:** consequence voluntary because acts leading to it were- wrongly decided

**Facts:** Larsonneur was a French citizen and her passport allowed her to stay in the UK as long as she complies with conditions. This is changed and she has to leave the UK. She goes to the Irish Free State. She gets deported from the Irish Free State back to the UK. This is a violation of the requirement.

**Issue:** Did Larsonneur act voluntarily when the condition was violated?

**Holding:** Larsonneur was in violation of the condition and her appeal is dismissed

**Reasoning:** The accused could have chosen to return to France (where she is a citizen) and thus not have encountered the Irish deportation issued back to the UK. If there is an alternative, there there is voluntariness.

## *Kilbride v. Lake*, [1962] N.Z. S.C.

**Ratio:** Person cannot be made criminally responsible for act or omission, unless it was done or omitted, in circumstances where there was some other course open to them. If this choice is absent, then the act or omission is involuntary and there is no AR.

**Facts:**  Kilbride was accused of parking his car without having the “warrant of fitness” displayed. He claims it was there when he parked, but when he came back the sticker was gone.

**Issue:** Can an act done lawfully, become an offence by an occurrence outside of his influence or control?

**Held:** Appeal allowed, the physical ingredient of the charge was not proved against the appellant

**Reasons:** The appellant had no recourse, at the time and place of the alleged offence. The mental stimulus (of voluntariness) is entirely distinct from the mental element contained in the concept of MR*.* The latter is the intention or the knowledge behind or accompanying the exercise of will, while the former is simply the spark without which the AR cannot be produced at all. It cannot be said that the AR was the result of the appellants conduct

## *R. v. King*, [1962] S.C.R. 746

**Ratio:** No AR unless the prohibited act is the result of a willing mind “at liberty to make a definite choice or decision.” There must be will power to do an act, whether the accused knew or not that the act was prohibited by law.

**Facts:** King was charged with impaired driving. He had been to the dentist to have 2 teeth extracted. A nurse gave him sodium pentothal. Accused was not aware of the effect that sodium pentothal would have on him. After procedure, the accused drove away and struck a parked car. He was convicted at trial, but the CA directed an acquittal.

**Issue:** Was the act done voluntarily?

**Reasons:** There must be willpower to do an act for it to constitute AR. The accused’s loss of consciousness made him lose control of the vehicle, which led to the accident.It was a non-voluntary act that does not constitute the required AR for criminal liability. He didn’t understand the effects of the drugs- didn’t intend the natural consequences of his actions- wasn’t voluntarily driving impaired. No willing mind because he was high and wasn’t capable of understanding what he was doing. Not only was he high, he did not know he was high. Therefore did not intend the natural consequences of his actions.

**Holding:** Appeal dismissed. King did not have the willpower to do the act.

## *R. v. Shaw*, [1938] O.R. 269

**Ratio:** If someone is aware of pre-existing condition, anything resulting can be perceived as voluntary. Where a person knows /ought to reasonably know that partaking in certain behaviour may put others at risk, they must refrain from doing so

**Facts:** Shaw has a seizure while driving and kills two people

**Issue:** Should Shaw be held liable for an accident that resulted from an (apparent) epileptic seizure?

**Holding:** New trial ordered.

**Reasons:** The TJ misdirected himself when he said that there was no need for Shaw to present a defence. There is evidence that Shaw had a condition that he would have random faints and misrepresented his condition when he applied for a license. Shaw did not appreciate the seriousness of his condition. (possible defence against a charge of causing death by criminal negligence)

## *R v Jiang* [2007] BCCA

**Ratio:** If act is not voluntary then no AR.

**Facts:** Driver fell asleep at the wheel, and struck two children, killing one, and causing serious bodily harm to another. Expert witness testified that the accused was suffering from undiagnosed severe chronic insomnia. TJ acquitted her, bc falling asleep at the wheel, and striking the children was not a voluntary act.

**Held:** Acquitted, appeal dismissed

**Reasons:** The accused was not aware of the sleep disorder's effects, and the potential dangers that it posed. The sleep episode imposed an involuntary action, resulting in the offence. Therefore the accused lacked the AR for the crime. TJ erred because he did not ask the first question required by *Hundal*: ‘whether the respondent’s act manifested a **marked departure from the reasonable standard of care** in all the circumstances. If he did, he would have answered in the affirmative. However, driving was not voluntary, so there was no AR for the offence.

## *Tifaga v. Department of Labour*, [1980] NZ

**Ratio:** If you know that your actions will lead to a prohibited act, you must take steps to prevent the outcome. An intervening act will not be credited if the accused knew that the intervening act was likely to arise from his actions.

**Facts**:Accused found in NZ in contravention of his Visa. Got arrested and is in jail, doesn’t have money to leave the country.

**Issue**:Was the accused in NZ voluntarily if he did not have the money to leave?

**Held**:Guilty, appeal dismissed

**Reasons:** Accused had committed the prohibited act on the grounds that his remaining in NZ was something for which he was responsible. There was no ‘extraneous’ or intervening event that caused his unfortunate situation. It was not that the accused lacked “conscious volition”, it may only be said that he lacked no practical choice, which amounts to a defence of impossibility. No defence of impossibility available since the impossibility had been brought about by the accused’s own fault. The accused made the conscious and voluntary choice to go to NZ. When accepting the visa to come to NZ, he was accepting an implied term that he must leave if requested. The principle in ***Kilbride*** (intervening act or cause) is not available, because the accused committed the offence that would lead to the revocation of his visa. It was a voluntary act, not an intervening act beyond his control.

## *Finau v. Department of Labour*, [1984] NZ

**Ratio*:*** Question is whether the demonstrable occurrence of a prohibited situation or event really can be attributed to a particular defendant for purposes of liability.

**Facts:** She was found to be in contravention of various immigration requirements because her visa was revoked/expired. Woman was prevented from leaving NZ because she was too pregnant to fly. The only airline refused to allow her to fly prior to the birth of her child. She did not know that her pregnancy would affect her ability to fly.

**Issue: (1)** Did the accused voluntarily violate the immigration provisions? (2) Was the defence of impossibility available to her?

**Held:** Not guilty

**Reasons:** Because “there was no absence of due diligence on the accused’s part”**.** Her inability to leave NZ was due to circumstances beyond her control, consequently the defence if impossibility was available to her.

### Omission

* When you want to find liability through omission you must find a positive legal duty
* you can only be held criminally liable if you were subject to a legal duty to do that thing (***Collucci, Instan, Moore***)
* In certain cases, **an omission to act can constitute criminal liability**. (note: it was done voluntarily) (***Colucci***)
* There is **no liability for omission unless there is a LEGAL DUTY**, not merely a moral duty to act. (***Instan, Beardsley*, *Kirby***)
  + Must not equate a **moral duty** with a **legal duty** (***Beardsley***)
* You may be punished for knowing about your duty (a subjective test), or if you ought to have knownof your duty (objective test).
* You can create a legal duty by undertaking to act on one’s behalf. Once you begin an undertaking, failing to continue can constitute an omission and create criminal liability (***Instan***)

### If There is an Omission:

1. Was there a duty to act?
2. If so, where does the duty come from (i.e., relationship, undertaking, etc.)?
3. Is breach of duty an offence, or consequences that resulted from breach of duty? (did omission contribute- causation)
4. Is there an excuse that it would have made it unreasonable for the duty to be acted upon (i.e., endangering your life)?

### Where do Legal Duties Come From?

* ***Statutes***:
* Offences extending to omissions that explicitly include a statutory legal duty (failing to report treason) (***Kirby***)
* Offences extending to omissions that do not explicitly include a legal duty to act so that a legal duty outside the offence must be found; **ss. 126, 146(a), 180, 214, 218**
  + **S.180(2):** everyone commits a common nuisance who does an unlawful act or *f*ails to discharge a legal duty.
* statutory duties can arise either:
  + explicitly (***Kirby***)
  + by implication (***Moore*, *Kirby***)
* ***Common Law***:
* Three general common law bases for legal duties:
  1. **General relationships involving care and protection** (some are codified –**s.215** duty of persons to provide necessities) (***Instan, Kirby***)
  2. **Specific undertakings** to act which give rise to legal duties (e.g., **CC s. 217**; contractual – ***Beardsley, Instan***)
  3. **Causal responsibility for dangerous situations of your own creation** (***Beardsley*? *Miller***)
* **Duty (Responsibility) Theory**: If you, by your own act, cause a dangerous situation (even unintentionally), you have a duty to act upon realizing the effects of the act. (***Miller***)
* **Duty arises** when:
  + You were responsible for creating a **dangerous situation** (***Miller, Fagan***)
  + In common law there is a **duty of care** to refrain from conduct that would injure another person. (***Thornton***)
  + Through an **undertaking** where there is **binding commitment**, and **reasonably placed reliance** (***Instan***)

**For Omissions:**

* start with what accused is charged with
* does statute provide for legal duty related to omissions? **CC 215**
* specific undertaking to act? (contract)
* causal responsibility? (e.g. created dangerous situation)

## *R. V. Colucci* 1965

**Ratio:** An omission to act can result in criminal liability.

**Facts:** Colucci made a statement in a circular letter bearing date, January 9, 1963, that he knew was false in material with intent to deceive certain shareholders of a company known as Terminus Mines Limited contrary to **s. 343(1)(b)**.

**Issue:** Does an omission constitute a communication, publication, or statement within the meaning of **s. 343(1)**?

**Statute: 343(1)** Everyone who makes, circulates or publishes a prospectus, statement or account, written or oral, that he knows is false, with intent…**(b)** to deceive or defraud the members, shareholders or creditors, whether ascertained or not , of a company

**Reasons:** A statement which omits the material constitutes an act of deceit according to **s. 343(1)**. AR of the offence could be an omission. Common sense and reason would indicate that an offence to deceive, must include deceiving by an omission of a material particular.

**Held:** There can be no question in this case that the matter omitted was material to the fraud. Appeal dismissed.

## *R. v. Instan* 1893

**Ratio:** There must be a legal duty if omission can result in liability. You do not get liability from just a failure to do something even if it causes death. Non performance of a moral obligation or a legal duty is a crime. Moral obligations can give rise to legal duties.

**Facts:** Instan lived with her older aunt who suffered from gangrene. Aunt died of gangrene and the death was accelerated due to lack of food and neglect. These causes could have been averted if D communicated them to the neighbours or authorities.

**Issue:**Is Instan is criminally liable for not acting? Did the relationship between the niece and the aunt give rise to a duty to act?

**Held:** Omission to act on her duty results in Instan being held responsible for the death

**Reasons:** There was a common law duty (came from the ongoing relationship, living off her money, etc.) to the aunt that Instan did not live up to. She breached the obligation. Not every moral obligation involves a legal duty, but every legal duty is founded by a moral obligation. A legal CL duty is nothing else than the enforcing by law of that which is a moral obligation without legal enforcement. It was the clear duty of the accused to impart the necessaries to sustain life. It was only through the instrumentality of the accused that the deceased could get the food. She had a common law duty imposed on her, which she did not discharge. This failure to discharge her legal duty at least accelerated the death, if it did not actually cause it. Circumstances gave rise to the legal dutyto provide a duty of care, and the omission of action caused the consequences of the accelerated death of the victim

## *People v. Beardsley* (1907)

**Ratio:** No legal duty created by mere moral obligation, duty must be imposed by law / contract. The omission to perform the duty must be the immediate and direct cause of death. Legal duty only to spouse or family.

**Facts:** D cheating on wife with victim. D and victim drinking and she took some morphine pills. D tried to stop her but she wouldn't stop. D tells friend to take her to another place because his wife might come home and she dies. Charged with manslaughter.

**Issue:** Was D under a legal obligation towards the deceased at the time of her death?

**Reasons:** Blanche was a woman who was over 30 and made her own decisions and was responsible for them. She had experience in this type of behaviour. Just because Beardsley invited her to his home does not mean that he had a duty to her like he would for his wife. No obligation would have been forced if it had been two men. Accused had not assumed either in fact or by implication a care or control over his companion. If it had ben his wife, child, employee there would have been a legal duty to act.

**Held:** D had no legal duty because victim was not his wife and she “went upon this carouse” voluntarily, and “had ample experience in such affairs”. Convictions quashed.

## *R. V. Kirby*, 245 D.L.R. (4th) 564

**Ratio:** Omission to act may lead to criminal liability. But that can only arise if there is a legal duty, not just moral duty. Necessaries of life include intervention to prevent serious harm or death.

**Facts:** Wife suicide. Kirby and wife were in the washroom together and there was talk of suicide. Wife hung herself with curtain. Kirby did nothing to stop her and only intervened after his son asked him to untie the shower curtain. He then left without calling for assistance or even telling his 19-year-old niece what had happened. Charged under **ss. 220(b)** and **215(2)(a)(ii)**

**Issue:** Is the accused is liable for the death of his wife as a result of his failure to act?

**Held:** Formal conviction will be entered only on Count 1, the charge of crim neg causing death. Count 2 will be stayed because they both arose from the same underlying facts (***Kineapple***)

1. **Criminal negligence:** imposes liability for omissions, a person is criminally negligent who in omitting to do anything that is his legal duty to do, shows **wanton or reckless disregard for the lives or safety of others (AR for crim neg)**. Mere indifference to the risk of harm is enough so long as there is an awareness of the risk, or recklessness, or wilful blindness to it. To convict the accused of crim neg causing death, the Crown must prove:
   1. The accused omitted to do something that was his duty to do
   2. The accused showed wanton or reckless disregard for the life or safety of the deceased
   3. The accused’s conduct caused, in the sense of being a contributing factor to, the death
2. **Failing to provide the necessaries of life:** “necessaries of life” include anything to preserve life, such as medical aid or intervention to prevent serious harm or risk of death. To convict the accused on the charge of failing to provide the necessaries of life, the Crown must prove two things:
   1. It was **objectively** foreseeable, that failure to provide necessaries would endanger life of the deceased
   2. The conduct of accused represented **marked departure** from standard of reasonable person

**Reasons:** An omission to prevent the injury or death to a spouse is a violation of the legal duty of care imposed by statute on spouses by **s. 215(1)(b)** of the CC. An omission on the part of the spouse that leads to the death of the other spouse is sufficient to fulfil the AR prerequisite of a criminal offence. Parliament clearly intended to make the omission to provide necessaries of life, in certain circumstances, a crime. **S. 215** clearly sets out a duty to act in certain circumstances

* *Actus Reus*?
  1. The accused had the duty to intervene to try to stop his wife from killing herself and his inaction was an omission.
  2. The accused’s conduct was indeed a marked and substantial departure from what the reasonable person would do in those circumstances.
  3. Since prompt removal of the pressure around the neck could have led to Mrs. Kirby’s spontaneous recovery, the delay in providing aid was a contributing cause of her death. Kirby should have done something to help.
* **Mens rea of crim neg:** not intent, but subjective all the same: indifference + (subjective) awareness of the risk, or recklessness, or willful blindness will suffice.

### Test for Failure to Provide Necessaries of Life

1. **AR:** Action or failure to act when under a legal obligation, & where your action or inaction results in the death of the individual

2. **MR:** Objective, ‘marked departure’ from reasonable person standard (less than subjective awareness)

* *Actus Reus*?
  1. Yes it was clearly foreseeable that a failure to intervene would endanger the life of the deceased.
  2. The evidence revealed a drunken volatile domestic situation. Under those circumstances I have no hesitation in concluding that any reasonable person would have at least tried to stop their spouse from killing herself.
* *Mens rea*: objective, ‘marked departure’ from reasonable person standard

**Holding:** Conviction on Count 1 (crim neg causing death). Count 2 stayed - both counts arose from same set of facts (***Kineapple***)

## *R. V. Fagan*, [1969] 1 Q.B. 439

**Ratio:** A continuous wrongful act can constitute the AR; the AR does not have to be one single isolated act. It is not necessary that the MR is present at the inception of AR as long as it is present during the continuation of the prohibited act. Though an act may start as unintentional and non-criminal, if person is made aware of the act and intentionally fails to act accordingly, this omission is sufficient to constitute the AR of a criminal offence. “An unintentional act followed by an intentional omission to rectify that act or its consequences can be regarded in total as an intentional act.” sufficient to fulfil AR requirement.

**Facts:** Car on cop’s foot. Fagan was driving his car and was directed by officer to stop. Fagan drove car onto the officer’s foot. Officer tells him to get off but Fagan says, “fuck you”. Car’s engine is off and then Fagan turns it back on to move it

**Issue:** Can an omission to act constitute an assault?

**Reasons:** AR and MR did not coincide because MR was formed after AR had been completed. AR was complete when Fagan drove the car onto the police officer’s foot. MR was complete when Fagan had the intent to keep the car on the police officer’s foot. “There was an act constituting a battery which at its inception was not criminal because there was no element of intention but which became criminal from the moment the intention was formed to produce the apprehension which was flowing from the continuing act.” When Fagan told the cop to “fuck himself” he had the intent to remain on his foot and this is the MR and you add it to the AR of being on the foot.

**Holding:** **Continuous Act -** AR was not complete when the accused first drove onto the officer’s foot, but continued while the force of the car was applied and the accused became aware of his actions

## *R. V. Miller*, [1982] 2 W.L.R. 937

**Ratio: Duty Responsibility Theory:** If you, by your own act, cause a dangerous situation (even unintentionally), you have a duty to act upon realizing the effects of the act.

**Facts:** Miller began squatting in Birmingham. One night, after drinking, Miller returned to his squat; went to his bedroom, lit a cigarette, and then lay down on a mattress in that room. He fell asleep before he finished the cigarette and, either because he had had it in his hand or it was in his mouth when he fell asleep, it dropped on to the mattress and set it alight. Miller later woke up, realized that the mattress was smouldering but did nothing. He moved into an adjoining room, leaving the mattress burning, and went back to sleep. A police constable saw that the house was on fire. Damage to the extent of £800 was caused.

**Prior Proceedings (CA):** The whole of the accused’s conduct is a continuing act (***Fagan***) and there is an overlap with the MR. Continuous Act Theory- the entire transaction constituted an act, and so no issue regarding omissions arose. “…We do think that the whole of the appellant’s conduct in relation to the mattress…can and should be regarded as one act.” Where one engages in the AR to start a wrongful act, and during the continuation of that act, becomes aware of the wrongful act, the accused is deemed to have the necessary MR required to constitute the fault element though it was not present at the inception of the AR. His failure with knowledge to extinguish the fire had a substantial element of adoption on his part of what he had unintentionally done earlier.

**Issue:** Is the actual omission of putting out a fire a sufficient ARto constitute the offence of arson?

**Reasons(HL):** I see no rational ground for excluding from the conduct capable of giving rise to criminal liability conduct which consists of failing to take measures that lie within one’s power to counteract a danger that one has oneself created, if at the time of such conduct one’s state of mind is such as constitutes a necessary ingredient of the offence. **Duty (Responsibility) Theory:** There was a breach of a duty owed, and that breach is what grounds criminal liability. If you cause an act, whether by accident or not, you are under a legal duty to mitigate the damage stemming from the act. Having created the situation and being a position to mitigate the damage/risk caused, the accused has a duty imposed on him and the liability emerges from not fulfilling the duty

**Holding:** The accused had a duty to prevent the fire because he created it and became aware of it

## *Moore v the queen*, [1979]

**Ratio:** reciprocal duty not to obstruct peace officer’s duty to determine identity

There is an implied/reciprocal duty to identify oneself because

1. a police officer is under a duty to investigate/determine the identity of the individual
2. to fail to identify oneself is obstruction of justice

**Reasons:** officer was under a duty to a attempt to identify the wrongdoer and the wrongdoer’s failure to identify himself did constitute an obstruction of the police officer in the performance of his duties.

# Causation

* causation is important because the AR of some offences involves the causation of certain consequences
* **factual causation:** was there a causal connection between the victim’s injury or death and an act or omission of the accused?
* **remoteness:** was the accused causally responsible (in law) for the injury or death of the accused?

1. **But For Cause**
2. **Significant contributing cause**
3. **Substantial causation test – only to elevate 2nd to 1st under 231(5)**

### Test for causation

* **1)** The standard test for **causal connection** is the so-called **‘but for’ test (STEP ONE)**
  + C is a (but for) cause of E if E would not have occurred but for C’s occurrence
  + ask what would have happened if something that did occur had not occurred
* **2)** **Remoteness** (proximate or legal causation): is the accused fairly blamed?
  + was the accused causally responsible (in law) for the injury or death of the accused?
  + “The object of legal causation inquiry is to fix upon some wrong-doer the responsibility for the wrongful act which has caused the damage. When that has been done [when the responsible agent has been found], it is not necessary to pursue the matter into its origins; for judicial purposes the origins are too remote.”
  + sometimes the relationship between cause and effect is too attenuated to be legally significant (***Nette***) (**STEP 2)**
* **3) Substantial Cause** – Increases the level of moral culpability in a murder. Only applies to **s. 231(5)** charges – 1st degree murder (***Harbottle***). Usually the accused must play a very active role in the killing. (**STEP 3)**
* The *CC* doesn’t contain provisions governing the test for legal causation so we must turn to the common law
* The first test is that the accused's act need merely be a contributing cause of the prohibited consequence outside the *de minimis* (more than trivial)range (***Smithers***)- replaced by “significant contributing cause (***Nette***)
  + It need not be the sole cause of prohibited consequence; it need only contribute
* The constitutionality of the ***Smithers*** test was upheld in ***Cribbin***
* For some offences, the test for causation operates differently because they involve more serious offences (***Harbottle***)
  + ***CC*. s. 231(5)** turns what would otherwise be second degree murder into first-degree
    - For these offences, a restrictive test of substantial cause should be applied. The substantial causation test requires that the accused play a very active role—usually a physical role—in the killing
* In ***Nette***, the ***Smithers*** Test was replaced
  + “contributing cause outside the de minimus range” was replaced by “**significant contributing cause**”

### BUT FOR CAUSE

## *R. v. Winning* (1973)

**Ratio:** But for test for factual causation: If a crime would not have occurred "but for” the acts of the accused, then there is factual causation. If wrongful act has no cause or effect on outcome of a situation cannot be viewed as illegal. If a wrongful act is performed that has no bearing on consequences of a situation - the person performing the wrongful act should not be held liable.

**Facts:** Winning made two misrepresentations on a credit application & Eaton’s gave her credit based on her application form. But Eaton’s would have given her the credit despite her misrepresentations

**Issue:** Did Winning obtain credit by false pretences?

**Held:** Appeal allowed.

**Reasons:** Eaton’s did not rely on her false statements in giving her credit. It is not true that, but for her false representations, she would not have received credit. Winning did not obtain credit by a false pretence, because the credit was given not in reliance on her application, but rather in reliance on Eaton’s investigation of her. The only matter upon which the company relied was her name and address, both of which were correctly given.

### REMOTENESS

## *People v Lewis* (1899) (Cal. SC)

**Ratio:** But for test creates causal connection between accused’s acts and the prohibited consequence. Act is not too remote if it is: (1) an operative cause of the consequence, and/or (2) the consequence occurred in the natural course of things.

**Facts**: The accused shot the victim, the victim slit his own throat because of his impending death

**Issue**: Is there a causal connection between the death and the initial shooting?

**Reasons**: The wound induced the suicide in the natural course of things. Cutting of the throat is sufficiently connected to the original bullet wound that it can be attributed to the bullet wound. Even if the gunshot was not the direct or immediate cause of the victim’s death,if the gunshot caused the victim to cut his throat in the natural course of things, the accused would be guilty of homicide. But for the shooting, the victim wouldn’t have slit his own throat.. Looking at the situation as a continuous series of events, the consequence was a direct result from the prohibited act. The gun shot was still operative when the victim slit his throat

## *R. v. Jordan* (1956)

**Ratio: P**rohibited consequence arising out of separate event will be too remote to create liability. But for causation not sufficient. If consequence is too remote, legal causation not established. Medial treatment must be palpably wrong to break chain of causation. If the second cause overwhelms the original cause and makes it insignificant then the death may not flow from the original cause

**Facts**: Victim was stabbed, and sought treatment. Victim received bad treatment and later died due to the treatment.

**Held**: Not guilty

**Reasons**: No causal connection between stabbing and the death as the death was too remote from the prohibited consequence. But for the stabbing, the accused would not have found himself in the hospital, but the death was too remote from the initial wound. Bad medical treatment was a separate event. Original wound was no longer operative

## *R. v. Smith*, [1959]

**Ratio:** consequence will NOT be too remote if the act is still operative. Only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the original wound. A prohibited consequence arising out of a separate event will be too remote to create liability.

**Facts**: There was a fight at a military base and Smith stabbed three people with a bayonet. He stabbed one of the men in the arm and back, and when he was being carried to the hospital he was dropped twice. On top of this, they failed to give the victim a saline solution, could not perform a blood transfusion, and gave him artificial respiration when his lung was collapsed.

**Reasons**: Difference between ***Jordan*** and ***Smith***is that the original wounds in the latter were still operative, whereas wounds in ***Jordan*** were not. If at the time of death, the original wound is still an operating and substantial cause then death can properly be said to be the result of the wound, even though some other cause of death is also operating. Only if it can be said that the original wound is merely the setting in which another cause operates can it be said that the death does not result from the original wound.

### Intervening Acts (Novus actus interveniens):

When dealing with a question of remoteness, must ask yourself whether there was a break and the chain of causation

* ***Novus actus interveniens*: (new intervening act) an action or event that breaks the chain of causation**
* **Only a new cause that disturbs the sequence of events would break the chain of causation** (***Jordan*, *Smithers***).
  + The accused would not be guilty if another cause resulted in the death (***Lewis***)
* A man who did a wrongful act is deemed responsible for the **natural and probable consequences** of the act. Victim is under no responsibility (***Blaue***)
* **Thin-Skull Reasoning:** Take your victim as you find him/her. Can’t assume victim will not have unforeseen side effects. (***Blaue, Smithers***)
  + **To apply this rule, the after-effects have to be beyond the victim’s control.**
    - With the exception of reasonable religious beliefs. The victim need not act beyond beliefs
* Accused will be guilty if at the time of death the original wound is still an **operating and substantial cause**, even where other causes have intervened. (***Smith***)
  + If cause overwhelms original cause and makes it insignificant then death may not flow from original cause (***Smith***)
* Death resulting from normal treatment to deal with a felonious injury is regarded as caused by felonious injury (***Jordan***)
* It does not matter if victim acts to his own detriment, or if a 3rd party is negligent, if the accused caused the injuries from which the victim died. (***Blaue***)
* A reasonable act performed for the purpose of self-preservation, being of course itself an act caused by the accused’s own act, does not operate as a *novus actus interveniens* (***Pagett***)
  + Accused liable for any injuries if they result of a reasonable response by 3rd party to unlawful acts (***Pagett***)

## *R. v. Blaue,* [1975]

**Ratio:** **Thin-Skull Rule:** Take your victim as you find them. The reasonableness or unreasonableness of certain beliefs has nothing to do with it. Even if you do not know about the beliefs you will be treated as if you did and responsible for consequences. To apply this rule, the after effects have to be beyond the victim’s control, the only exception is religious beliefs.

**Facts:** Accused tried to sexually assault victim and stabbed her 4 times piercing her lung. She refused a blood transfusion because she was Jehovah’s Witness and died. Had she had the blood transfusion she would have survived.

**Appellant's Argument:** The appellant argues that the cause of death is her refusal to have the transfer, not the stab wounds. The argument is that this was a *novus actus interveniens* because the stabbing was too remote to be cause of death.

**Issue:** Are the stab wounds i the cause of the death or was the victim’s refusal to accept a blood transfusion a *novus actus interveniens* which broke the chain of causation?

**Reasons: Thin-skull reasoning:** “those who use violence on other people must take their victims as they find them… It does not lie in the mouth of the assailant to say that his victim’s religious beliefs which inhibited him from accepting certain kinds of treatment were unreasonable. The question for decision is what caused her death. The answer is the stab wound.” The stabbing results in the need for the transfusion so the stab wound caused her death. The fact that the victim refused the transfusion did not break the causal connection between the act and death. “Only if it can be said that the original wound is merely the setting in which another cause operates can it be said that the death does not flow from the wound.”

**Held:** Guilty.

## *R. v. Shilon, (2006)*

**Ratio:** Where conduct is inherently dangerous and carries a reasonably foreseeable risk of immediate and substantial harm from the act, the test for legal causation will have been met. Reasonable forseeability of harm is relevant to a test of legal causation.

**Facts:** motorcyclist leaves truck while test-driving a bike for purchase, friend steals truck, motorcyclist chases him, kills cop; Shilon stole the truck but didn’t kill the cop

**Issues:***(1)* Were Shilon’s actions a cause of victim’s death? (2) Were Shilon’s actions too remote to count as a legal cause?

**Holding:** Guilty

**Reasons:** Shilon’s actions were a “significant contributing cause” of the police officer’s death. Reasonable forseeability of harm is relevant in the analysis of legal causation in negligence based offences. Independent voluntary human intervention (*novus actus interveniens*) in events started by an accused may break the chain of causation but Trakas’ conduct was directly linked to that of the driver of pick-up truck. It was an available inference that the police officer’s death occurred in the ambit of the risk created by Shilon and that the driver ought reasonably to have foreseen such harm.

### Thresholds + Standards of Causation

* How much causal ‘oomph’ must an accused conduct have provided in order for accused to be responsible for the outcome
* The accused's act need merely be a contributing cause of death outside the *de minimis* range - Standard test for causation for homicide (except for first-degree murder)
  + Another way of stating the *de minimis* test is by the “but for” test: **“Has there been proof beyond a reasonable doubt that the consequence would not have followed but for the act of the accused?”** If yes, the act was a factual cause of death. (***Smithers***)
* Nette changes the wording of the Smithers de minimis test to ask whether accused's acts were a "significant contributing cause”
* **The Substantial Causation Test** requires that the accused must play an active role, not necessarily a physical role, in the killing (**only applicable to 1st degree murder** under **s. 231(5))**. (***Harbottle***)
* Whether an act or a series of acts (in exceptional cases an omission or series of omissions) consciously performed by the accused is or are so connected with the event that it or they must be regarded as having sufficiently substantial causal effect which subsisted up to the happening of the event without being spent or without being, in the eyes of the law sufficiently interrupted by some other act or event
  + Expresses the increased degree of moral culpability, as evidenced by the accused’s degree of participation in the killing, that is required before an accused can be found guilty under **s. 231(5)**

### Two leading tests:

1. ***Nette***: C causes E if C is a **significant contributing cause**- hold for all forms of homicide: manslaughter, crim neg causing death and murder
2. ***Harbottle***: C causes E if C is a **substantial contributing cause** - used only in the context of first degree murder pursuant to **s. 231(5)**. Requires that the accused must play an active role, not necessarily a physical role in the killing (***Harbottle***)

* language of substantial contributing cause is used to determine whether the moral blameworthiness of the accused warrants conviction for 1st degree murder

## *R. v. Maybin, (2012)*

**Ratio:** novus actus interveniens. Where an act is a direct response or is directly linked to the accused’s actions, and does not by nature overwhelm the original actions, then the accused cannot be said to be morally innocent of the prohibited consequences and causation is not severed. The intervening act (in order to be a direct response) must be a reasonable foreseeable act and it must be closely connected in time, place and circumstance to continue the chain of causation

**Facts:** Victim affronted the appellant Timothy Maybin in a crowded bar by touching a pool ball on his table. Maybin then punched his face and head. Maybin’s brother helped him but was pulled away by bar staff. Victim did not defend himself and after being hit multiple times, he staggered a few steps and fell face forward, unconscious onto the pool table. Commotion attracted the attention of the bouncer who immediately struck the unconscious victim in the back of the head with considerable force. The two assaults took place within less than a minute. Victim died as a result of bleeding in the brain. TJ and CA concluded that “but for” the appellants actions, the victim would not have died and SCC upholds this.

**Ratio:** “Reasonable foreseeability” and “intentional, independent act” approached are both valid, but neither are determinative of whether an intervening act severs the chain of causation. Factual causation not limited to direct or immediate cause (from ***Nette*** and ***Smithers***). Use a “but for” test to determine factual causation. Intervening acts will only break the chain of causation where the original act merely sets the stage, which allowed the other circumstances to coincidentally intervene. If the original act provokes the intervening act, then causation is still in tact.

## *Smithers v. The Queen*, [1978] 1 S.C.R. 506

**Ratio:** Standard = Outside the de minimis range*.* The accused’s act need merely be a contributing cause of death outside the *de minimis* range – more than trivial; “not insignificant.” The crown does not need to prove that the act was the primary or actual cause of the death to constitute legal causation. All that is required is that the Crown proves that that prohibited act was at least a contributory cause (not inconsequential), outside the de minimus range. This has been clarified in ***Nette*** and overruled in ***Harbottle***. The standard is basically the same for forms of homicide other than 1st degree but the language has been changed to “significant contributing cause” in ***Nette***. First 1st degree, the standard is substantial.

**Facts:** Fight after hockey game. Accused kicks deceased. Within 5 minutes, victim dies because he chokes on his own vomit because his epiglottis failed (rare reaction). Charged with manslaughter **s. 222.**

**Prior Proceedings:** Smithers convicted by judge and jury of manslaughter. Ontario Court of Appeal dismissed appeal.

**Issue:** Was the kick by Smithers causally connected to the death of the deceased?

**Reasons:** “The kick was at least a contributing cause of death, outside the *de minimis* range, and that is all that the Crown was required to establish that the kick caused the death for manslaughter.” But-for the kick there wouldn’t have been death. “It is no defense to a manslaughter charge that the fatality was not anticipated or that death ordinarily would not result from the unlawful act.” Another way of stating the *de minimis* test is by the “but for” test: “Has there been proof beyond a reasonable doubt that the consequence would not have followed but for the act of the accused?” If yes, the act was a factual cause of death. But for the kick, it is clear he would not have died, the kick was still operative at the time and the causal sense in the legal standard- it has to be more than trivial. This was another **thin-skull** situation from ***Blaue***. Take your victim as you find them.

**Held:** Kick was at least a contributing cause of death, outside *de minimis* range, and that was all the Crown had to establish.

## *R. v. Harbottle*, [1993] 3 S.C.R. 306

**Ratio:** The standard level of causation for **s. 231(5)** is a level of substantial causation. The accused can only be convicted if first degree murder if the Crown proves that the accused has committed an act or series of acts, which are of such a nature that they must be regarded as a substantial and integral cause of death.

**Facts:** Harbottle together with his friend forcibly confined the victim. While she was still confined with her hands tied, Ross strangled her while Harbottle held her legs to prevent her from continuing to kick and struggle.

**Issue:** Was holding of the girl’s feet a contributing factor to the girl’s death to constitute conviction of 1st degree murder?

**Reasons:** Refers to ***Thatcher***- does not matter whether the accused is merely a party to vs the principal. “The substantial causation test requires that **the accused play a very active role** – usually a **physical** role – in the killing. Under **s. 231(5)**, **the action of the accused must form an essential, substantial and integral part of the killing of the victim**.” To get to first-degree murder you have to pass the substantial causation test which is higher than the ***Smithers*** test! An accused can be found guilty of being a substantive cause of the death without having any physical contact with the victim (trapping a victim in a closet then setting a house on fire or fighting off potential rescuers). The consequences of a conviction for first-degree murder and the wording of the section are such that the test of causation for **s. 231(5)** must be a strict one. An accused may only be convicted under the subsection if the Crown establishes that the accused has committed an act or series of acts, which are of such a nature that they must be regarded as a substantial and integral cause of the death. There is every reason to believe that, had it not been for Harbottle’s holding her legs, she would have been able to resist the attempts to strangle her. In those circumstances, it is difficult to believe that Ross could have strangled her in the absence of the assistance of Harbottle.

An accused may be found guilty of first degree murder pursuant to **s. 231(5)** if the Crown has established beyond a reasonable doubt that:

(1) The accused was guilty of the underlying crime of domination or of attempting to commit that crime;

(2) The accused was guilty of the murder of the victim;

(3) The accused participated in the murder in such a manner that he was a substantial cause of the death of the victim;

(4) There was no intervening act of another which resulted in the accused no longer being substantially connected to the death of the victim, and

(5) The crimes of domination and murder were part of the same transaction, that is to say, the death was caused while committing the offence of domination as part of the same series of events.

**Holding:** Appeal dismissed.

**Note:** Raises the level of causation required from ***Smithers*** for **first-degree murder in s. 231(5)** from *significant* to *substantial*.

## *R. v. Nette, [2001] 3 S.C.R. 488*

**Ratio:** “significant contributing cause” – standard for causation for homicide offences. ***Harbottle*** did not change ***Smithers*** test, it only raised the standard for 1st degree murder to deal with the moral reprehensibility and specific language of the section with reference to the degree of participation in the murder. For all other cases the standard is the same as the ***Smithers*** test, rephrased to: the Crown needs to prove the prohibited act was a significant cause of the prohibited consequences

**Facts:** Mrs. Loski’s house was broken into and robbed and she was hog-tied and left in her bedroom. She died somewhere in the next 24-48 hours from asphyxiation.

**Accused’s Argument:** ***Harbottle*** replaced ***Smithers*** with a standard of substantial contributing cause for all homicide offences, and that as a result, TJ’s instruction to the jury was incorrect. TJ erred in referring to the ***Smithers***

**Crown's argument:** Standard for 2nd degree murder is the standard of ‘beyond *de minimis*’. Substantial cause standard only applies to 1st degree murder under **s. 231(5)-(6)**

**Prior Proceedings:** jury returned a verdict of second degree murder and the CA dismissed appellant’s appeal.

**Issue:** What is the threshold test of causation that must be met before an accused may be held legally responsible for causing a victim’s death in a charge of second degree murder? Did ***Harbottle*** raise the standard of causation for homicide generally?

**Reasons:** The test for 2nd degree murder should be test of causation for homicide should be the same for all varieties of homicide [71] - manslaughter, 2nd degree murder and 1st degree murder. “There is only one standard of causation for homicide offences, including second degree murder.  That standard may be expressed using different terminology, but it remains the standard expressed by this Court in the case of ***Smithers****..*.  The terminology of substantial cause in ***Harbottle*** is used to indicate the increased degree of participation in the killing that is required to raise the accused’s culpability to first degree murder under **s. 231(5)** of the Code.  ***Harbottle*** did not raise the standard of causation that applies to all homicide offences from the standard expressed in ***Smithers***.” Replaces “outside of the *de minimis* range” - Talk of ‘substantial contributing cause’ (significant or contributing cause) focuses attention on moral blameworthiness of accused, in the course of determining whether a conviction for first degree murder is appropriate (pursuant to **s. 231(5)**, e.g.). Where an accused person hog ties an elderly woman, places a ligature of clothing around her neck and abandons her, in the knowledge that she lives alone, without notifying anyone of her plight, it is not unexpected that death will result if no one rescues the victim in time.

* Under **s. 231(5)** if you are committing a sexual assault and the victim is killed intentionally then you are guilty of first-degree murder. If the victim is killed accidentally or as an outcome of the act -you have to pass the substantial causation test to be convicted of first-degree murder.

**Held:** Appeal dismissed – conviction of second-degree murder upheld.

**Ratio: *Harbottle’s*** substantial cause test applies only to **s. 231(5)** (1st degree) **Note:**

* + ***Smithers***: test = contributing cause outside the *de minimis* range (originally in the context of manslaughter)
  + ***Harbottle***: test = substantial contributing cause (in the context of first degree murder per. **s. 231(5)** ONLY)
  + ***Nette***: test = significant contributing factor or cause for all homicide

**The standard for causation of culpable homicide is the same for all homicide = it is a “significant contributing cause” (= cause that is beyond the de minimus range) – *Harbottle* did not change this test. The substantial cause standard only comes into effect/play after this standard causation test has been passed and it is used as a gauge to determine the moral blameworthiness of an accused, for the purposes of finding him guilty of 1st or 2nd degree murder with regard to s. 231(5).**

**Note: if the person is not guilty of 1st degree (doesn’t pass substantial cause test) or manslaughter – its 2nd degree murder for the purposes of s 231(5))**

### Actus Reus Summary

* Best summarized by considering the three C’s – circumstances, conduct and causation
  + Conduct
    - Either a positive act or failure to act when one is under a duty to do so
  + Circumstances
    - The general context in which an offence occurs
  + Causation
    - The relation between conduct and consequences if such a relation is required by the offence section in question

# Mens Rea

* An act does not make a person guilty unless their mind is also guilty
* In order for an individual to be held criminally liable, she must have done something (or failed to do something that it was her legal duty to do) with or under the direction of a certain mental state
* each offence has its own mens rea requirement
* What we are actually trying to figure out is what is the fault element
  + Each offence has its own mens rea requirement + there are different ways in which one can satisfy the requirement
  + Must determine what an individual offence’s requirement is
    - * purpose or intention
      * knowingly or with wilful blindness
      * recklessly
      * criminally negligent manner
      * penally negligent manner
* CC does not define these different forms of mens rea, so we must look at case law
* Generally speaking mens rea is determined subjectively and negligence is determine objectively
* For every component of the AR there must be an equivalent fault element that can be attributed
  + We ask ourselves ‘did this person subjectively know of a risk, and act in face of that risk anyway?’ when discussing recklessness
    - It is a form of subjective fault
  + Criminal negligence + penal negligence are objective fault
* distinction must be drawn between subjective and objective standards or degrees of fault
  + **subjective:** what was in the mind of this particular accused
  + **objective:** how would the reasonable person in the position of the accused have acted?
* intention, knowledge and recklessness = subjective test
* criminal/penal negligence = objective test

### Components of the Fault Requirements (Mens Rea):

1. Is the fault **subjective** or **objective**?
2. If **subjective**, then is there:
3. **Intention**?
   1. **Transferred Intent**?
   2. **Substituted Intent**?
   3. Is intention negated by **duress**?
4. **Knowledge**?
   1. **Does absence of knowledge** negate fault requirement?
5. **Recklessness**?
   1. Is recklessness negated by **honest mistake of fact**?
6. **Wilful blindness**?
7. (**Motive**)?
8. If objective, then is it:
9. **Marked departure** (from what would be expected from the reasonable person)?
10. **Marked and substantial departure**?
11. Is the mens rea **transferred**?
12. Is the mens rea **constructed**?
13. If objective, can it be negated by:
14. **Mistake of fact**?

### Motive, Purpose, Intention and Knowledge

* In a criminal law sense, the term motive means ‘ulterior intention’
* Intent and Motive are distinct in the criminal law
* “*Intent* is the exercise of free will to use a particular means to produce a particular result. “*Motive*” precedes the exercise of free will (roughly one’s reasons for exercising the will) (***Lewis v The Queen****)*
* Motive is not legally relevant to criminal responsibility (not related to *mens rea* or *actus reus*); (***Lewis v. The Queen***). Motive can be relevant for evidence however, if prosecution can prove motive then it is easier to establish guilt. “Motive is always relevant, never essential”.
  + One exception comes with terrorism offences (**CC. s. 83.01(1)(b)(I)(A)**)
    - Regarding such offence, the Crown must establish not only intent on the part of the accused, but also that the accused committed the prohibited act “in whole or in part for a political, religious, or ideological purpose, objective or cause”
  + Also, motive may be relevant for determining circumstances (ie. sexual nature). Motive, such as for the purposes of sexual gratification are motive indicators (this is not essential, only part of the sexual circumstances analysis)
* It is one thing to establish that an accused did an act intentionally, or with intent; it is another thing to show that the accused did an act with the intent to bring about some consequence (***Steane***)
* Word ‘purpose’ is sometimes used to describe the culpable mental state necessary for criminal liability (***Hibbert***) – **s. 21(1)(b)**-party liability
  + You can do something for a purpose even if you don’t want that purpose to happen

### Motive

## *R v Lewis* (1979)

**Ratio:** Motive can be relevant, but not essential to prove mens rea. MR is concerned with intent. Motive is no part of the crime and is legally irrelevant to criminal responsibility.

**Facts:** Accused participated in plan to mail co-accused’s daughter an electric kettle that was rigged with explosives. Plan succeeded. Accused claimed he had no idea package contained Kettle. No evident was adduced by crown as to accused’s motive in participating in murder + accused maintained he had been an innocent dupe

**Reasons:** In ordinary parlance, the words ‘intent’ and ‘motive’ are frequently used interchangeably, but in the criminal law they are distinct. The MR relates to intent, the exercise of a free will to use particular means to produce a particular result, whereas motive is that which preceded and induces the exercise of will. Motive is always relevant and hence evidence of motive is admissible. The existence of a motive makes it more likely that D in fact did commit the crime. However, motive is not a requisite part of mens rea that Crown has to prove, and thus not essential to prove accused’s guilt. Propositions as to motive formulated by Dickson (1) As evidence, motive is always relevant and evidence of motive is admissible, (2) Motive does not have to be proven by Crown, (3) Proved absence of motive is an important factor in favour of the accused, (4) Proved motive is favourable to the Crown on issues of identity and intention, (5) motive is always a question of fact for the trier of fact to determine

### Intention

* a person who forces the consequence is certain or substantially certain to result from an act which he does in order to a achieve some other purpose, intends that consequence (***Buzanga and Durocher***)
* two ways to intend a consequence: **(1) conscious purpose is to commit the act, (2) foresaw that consequence was certain or morally certain to result from their act, even if intention was to bring about a different consequence**
* honest beliefs that a prohibited consequence will not occur do not engage the guilty mind when there is knowledge that the consequence could occur

## *R v Steane* (1947)

**Ratio:** Guilty intent cannot be presumed, it must be proven. There must be a distinction between an act done with intent, and one done with the intent about bringing specific consequences. This case conflates motive and intent.

**Facts:** D a British subject was an actor employed in Germany prior to WWII, and was there with his wife and two sons at the war’s commencement. Was charged with doing acts likely to assist the enemy, with intent to assist the enemy. He was forced into agreeing to work for them by threats of violence to his wife and kids and was savagely beaten resulting in one of his ears being partly torn off. Maintained he only aided the Germans because of his fear for his family and never had the slightest idea or intention of assisting the enemy. At trial, he was convicted and sentenced to three years’ penal servitude. He appealed.

**Issue:** Did the TJ misdirect the jury with regard to whether the acts were done with intention of assisting the enemy?

**Reasons:** The TJ misdirected the jury with regards to the full defence of the accused. A man is taken to intend the natural consequences of his act. Still when a specific intention is part of the offence (intent to assist the enemy) the Crown must prove that specific intention. The fact that the accused’s act was not the ‘result of a free uncontrolled action’ suggests that the natural consequences argument is inapplicable here. It is impossible to say that where an act was done by a person in subjection to the power of others, especially if that other be a brutal enemy, an inference that he intended the natural consequences of his act must be drawn merely from the fact that he did it. The guilty intent cannot be presumed and must be proved. The proper direction to the jury in this case would have been that it was for the prosecution to prove the criminal intent, and that while the jury would be entitled to presume that intent if they thought that the act was done as a result of the free uncontrolled action of the accused, they would not be entitled to presume it, if the circumstances showed that the act was done in subjection to the power of the enemy. TJ did not remind the jury of the various threats to which the prisoner swore he had been exposed and the summing-up did not contain anything like a full enough direction as to the prisoner’s defence. It seems as though he *did* intend to assist the enemy. His ulterior intention was to aid his family. For all legal purposes, ulterior motive is not relevant.

**Held:** Appeal allowed; conviction quashed.

## *R v Buzzanga and Durcoher* (1979) ONCA

**Ratio:** If a person acts with intention to bring about the prohibited consequence, they are liable. A person who foresees that a consequence is certain or substantially certain to result from an act which he does in order to achieve some other purpose, intends that consequence. This is a subjective test. Purpose is to determine what the accused intended. Test for intention: (1) conscious purpose was consequence of action; (2) certain or morally certain that consequence would be brought about by act

**Facts:** Accused were charged with wilfully promoting hatred against Francophones for publishing a pamphlet. Durocher testified that his purpose was to show the prejudice directed towards Francophones and expose the truth about the real problem that existed with respect to the French-language school. Buzzanga said that he wanted to expose the situation, to show the things that were being said so intelligent people could see how ridiculous they were. The pamphlet was intended as satire. Defendants identified as French Canadian, which the pamphlet was directed against. They were convicted at trial and appeal was granted on the ground that the trial Judge misdirected himself with respect to the meaning of the word ‘wilfully’ in **s. 281(2)** of the *Code*

**Issue:** What is the meaning of the word ‘wilfully’ in **s. 281(2)** of the *Criminal Code*?

**Held**: Appeal allowed, new trial ordered

**Ratio:** Test for intention in Canadian criminal law. Intention is established when proof of 1) conscious purpose was consequence of action; or 2) certain or morally certain that consequence would be brought about by an act

**Reasons:** Did not consciously intend to promote hatred, and did not foresee that hatred would be promoted

### Conclusion (Intent/Motive)

* Three main cases:

1. ***Lewis***: introduces distinction between motive and intent: motive is evidentially relevant, but legally inessential
2. ***Steane***: a case where motive and intent get conflated; also worth reading for its treatment of duress
3. ***Buzzanga*** *and* ***Durocher***: the leading Canadian case on the definition of intent in criminal law

## *R v Hibbert* (1995) SCC

**Ratio:** Purpose means intention to act. Does not purpose “desire for ultimate end”. Accused does not need to desire (motive) the outcome of an act; the MR for purpose is satisfied as long as the accused intended to commit the offence.

**Facts:** Hibbert was charged with attempted murder. Victim was shot by Mark Bailey. Hubert participated in this attack by leading Bailey to the building and by “buzzing” victim’s apartment. Victim then came down to the lobby, where Bailey shot him 4 times. Hubert provided evidence that he helped Bailey because he was afraid that Bailey would shoot him if he did not. Court had to consider the meaning of the word “purpose” in **s. 21(1)(b)**. Hubert was arguing that he aided Bailey only because his “purpose” was to preserve his own life, not to cause the victim’s death therefore claiming he lacked the MR.

## *R v Fontaine*

**Ratio:** If you intend to kill one person and kill another that is still intent.

* Rationale behind **s. 214(2)** is that there is an added moral culpability to a murder that is planned and deliberate which justifies a harsher sentence. This added culpability is present by virtue of the planning and deliberation with relation to the taking of a human life, not with relation to the identity of intended victim. A mistake or accident as to the victim is not a mitigating factor.

## *R v Droste*

**Ratio:** on **s. 229(b)** mistake or accident regarding the victim is not a mitigating factor, having bad aim is not a defence

* Transferred intention (transferred malice) occurs when an injury intended for one falls on another by accident. If D intends a particular consequence, he is guilty of a crime of intention even though his act takes effect upon an object that was not intended.

## *R v Shand*

**Ratio:** **s. 229(c)** provides a definition of murder that does not require intent

* + provides that the person is guilty when, for an unlawful object, the person does anything that he or she knows is likely to cause death, and death ensues
* the context of the reading of **229(c)** has changed to be narrower, there are 2 components of it:
  + the perp must be pursuing an unlawful object
  + doing anything that you know is likely to cause someone’s death

### Wilful Blindness

* WB can substitute for actual knowledge whenever knowledge is a component of the MR. (***Briscoe***)
  + it is a way to impute knowledge to the accused
* An individual would be wilfully blind with respect to some aspect of the *AR* (ie. consent)
* Even if a person makes inquiries, can still be WB if they harbour suspicions and refrain from further inquiry (***Lagace***)
* No specific level of suspicion required, only “a real suspicion in the mind of the accused that causes the accused to see the need for inquiry” (***Lagace***)
* **Wilful blindness must be determined** **subjectively**…question is not whether the accused should have been suspicious, but whether the accused was in fact suspicious (***Mafar****)*

## *R v Sansregret* (1985)

“WB is distinct from recklessness because, while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, WB arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in willful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry.”

**Wilful Blindness (subjective):**

- The law presumes knowledge on the part of the accused of the prohibited act

* + - Arises where a person who has become aware of the need for additional inquiry, declines to make that inquiry
    - if a party has suspicions aroused but then deliberately omits to make further inquiries because he wishes to remain in ignorance, he is deemed to have knowledge
    - The accused does not wish to know the truth and would prefer to remain ignorant
    - Culpability justified by the accused’s fault in deliberately failing to inquire when they know they should

**Recklessness –** recklessness is a subjective form of fault

* Doctrine
  + To establish that the accused was reckless the Crown must show
    - **That accused was subjectively aware that conduct could create a risk or danger of the prohibited consequence AND**
    - **That the accused acted anyway, in the face of that risk**
* Usually has to do with a consequence, but it could do with some other aspect of the AR
  + Sexual Assault (absence of consent)
  + Arson (reckless with respect to damage by fire)
* Recklessness is considered a lower form of MR than intent, but it is included on the basis that it is morally blameworthy to persist in conduct when you are aware of the risk that it may result in prohibited consequences

Only case we have is ***R v G***

* + Recklessness is a subjective form of fault
  + Key factual assumption – neither boy appreciated that there was any risk of the fire spreading in the way it did
  + According to House of Lords a preferable interpretation of recklessness is
    - A person acts recklessly with thin the meaning of section 1 of criminal damage act with respect to
      * Circumstance when he is aware of a risk that exists or will exist
      * A result when he is aware of a risk that will occur; and it is, in the circumstances known to him, unreasonable to take the risk

## *R v Griffiths* (1974)

* open to jury to find that accused knew candlesticks were stolen, or that, suspecting they were stolen, he declined to find out

## *R v Briscoe* (2012)

**Ratio:** WB does not define the MR required for offences. Rather, it can substitute for actual knowledge when knowledge is component of MR. WB imputes knowledge to an accused who's suspicion is aroused to the point where they see a need for further inquiry but deliberately choose not to make inquiry

**Reasons:** Actus reus was proven. The MR requirement reflected in the word “purpose” under **s.21(1)(b)** of the *Criminal Code* has two components: (1) Intent – Crown must prove that the accused intended to assist the principal in the commission of the offence and (2) Knowledge - in order to have the intention the aider must know that the principal intends to commit the crime, although he or she need not know precisely how it will be committed. Briscoe’s own testimony suggested he had a strong, well-founded suspicion that someone would be killed at the golf course and that he may have been wilfully blind to the kidnapping and prospect of sexual assault. He deliberately chose not to inquire about what the group intended to do because he didn’t want to know.

## *R v Lagace* (2003)

**Ratio:** WB can substitute for knowledge. Person can be wilfully blind even if they make inquiries. No specific level of suspicion required, only that it is a “real suspicion in the mind of the accused”. Sufficient that the accused saw the need for further inquiry. Just because accused made 1 inquiry doesn't preclude WB- question is whether suspicions remained after initial inquiry.

**Facts**: The accused is caught selling stolen cars. Some reason to think that he is part of a big stolen car selling operation Accused is convicted of fraud (MR for fraud is knowledge). Despite evidence that the accused inquired about the cars with reassurance that they weren’t stolen, TJ found that the accused did know. Convicted of fraud over $5,000 and possession of stolen property over $5,000. He was wilfully blind

**Issue**: Was the accused aware that the cars he was receiving were stolen?

**Held**: Accused was wilfully blind but new trial ordered for Tj’s mistake in evidence.

**Reasons**: Onus is not on the accused to prove reasonable steps – trier of fact will have to decide whether the Crown proved beyond a reasonable doubt that despite the inquiry the accused remained suspicious and refrained from making any further inquiry because he preferred to remain ignorant of the truth. While he did make inquiries as to the legality of the cars, those inquiries were not deep enough.

* Doherty J.A. replied to two arguments made on behalf of the accused
* **Argument #1:** Inquiry was only required if there was a genuine suspicion that the vehicles were probably stolen, but the accused had a much lower level of suspicion
  + **Reply:** no need to quantify the level of suspicion required, other than to say that it must be “a real suspicion in the mind of the accused that causes the accused to see the need for inquiry.” And that standard was met in this case
* **Argument #2:** The appellant could not have been WB because he did make an inquiry after his suspicion was aroused
  + **Reply:** where an accused makes some inquiry, the question remains whether the accused harboured real suspicions after that inquiry and refrained from making further inquiries because he preferred to remain ignorant

## *R v sandhu* (1989)

**Ratio:**  Where an offence requires knowledge on the part of the accused, it is improper to instruct the jury that a finding of recklessness satisfied the requirement. Recklessness is not a substitute for knowledge. Suspicion that “there may be more to the parcel than clothing” was not specific enough to reach the level of suspicion requires to support a finding of WB.

**Reasons:** While first two elements of his instruction were correct (knowledge and wilfully blind) because knowledge is required for possession and wilful blindness imputes knowledge, the third is not true.

### Recklessness

* + **General Idea:** recklessness is a form of *mens rea* properly so-called because it is a subjective form of fault
  + **Doctrine**: to establish that the accused was reckless (e.g., with respect to a given element of the actus reus of an offence) the Crown must show
    - (i) that the accused **was subjectively aware that her conduct would create a risk** or danger of the circumstance or prohibited consequence, and
    - (ii) that the accused **acted anyway**, in the face of that risk
  + Not sufficient to show that the accused “ought to have known” or that a reasonable person would have known.

## *R v G* (2003) UKHL

**Ratio:** Recklessness is subjective awareness of risk + performing the act knowing that it is unreasonable. A person acts recklessly with respect to 1) a circumstance when he is subjectively aware of a risk that exists or will exist or 2) a result when he is aware of a risk that will occur; and it is in the circumstance known to him unreasonable to take that risk. Recklessness is subjective.

**Facts**: Two young boys (11 and 12 years old) lit some newspapers and threw them under a bin. The bin caught on fire and set fire to another bin, which then set fire to a Co-Op shop. The fire caused £1m worth of damage. Boys charged with causing damage to Co-Op premises, not bins. Assumption: neither boy appreciated that there was any risk of the fire spreading the way it did

**Issue:** Can recklessness be established if it is proved that the accused was in fact unaware of the risk in question, although a reasonable person in the situation of the accused would have been aware of/appreciated the risk?

**Reasons**: In ***Caldwell*** the House of Lords suggested that recklessness is present when a person decides to ignore a risk of harmful consequences resulting from her acts, but also when a person fails “to give any thought to whether or not there is any such risk in circumstances where, if any thought were given to the matter, it would be obvious that there was [such a risk].”

**Ratio**: Four considerations/arguments: (1) ***Caldwell*** is contrary to fundamental mens rea principle – No criminal liability without fault, (2) ***Caldwell*** definition of recklessness leads to unfairness (in jury minds), (3) ***Caldwell*** has been criticized by academic and other commentators (sort of irrelevant) , (4) Court needs to correct misinterpretation in s. 1 of the 1971 Act. Suggest a modification where you compare with reasonable children of the same age. However this is rejected

### The enigma of Criminal Negligence: Fault or Conduct Element

**3 Key Distinctions of Negligence**

1. **Civil Negligence - departure, objective fault**

* standard of care characteristic of negligence law
* relevant to regulator offences/ strict liability offences
  1. **A departure from the standard of care expected of a reasonable person** 
     1. This the standard of care characteristic of negligence law
     2. Not a concept relevant to 'true crimes'
     3. do not hold individuals criminally liable for failing to behave as reasonable persons ought to behave
     4. mere negligence cannot be the basis of liability for true crimes: to be criminally liable one must have behaviour in a particularly erogenous manner
* Objective fault: focus on what the accused ought to have though or contemplated about his or her actions as opposed to what he or she did think about
* ex. manslaughter when it is unlawful act manslaughter
  + - It must be reasonable foreseeability of bodily harm that is neither trivial nor transient (bodily harm not death comes from ***Creighton***)

1. **Penal Negligence - marked departure- modified objective fault**

* lower level than crim neg
* **a marked departure from the standard of care expected of a reasonable person** *(****Kirby, Hundal, Beatty, R v L(J)****)*
  + - Offences such as dangerous driving, failure to provide the necessaries of life, arson by negligence (it would have to specifically mention negligence in the offence)

1. **Criminal Negligence- marked and substantial departure** 
   1. **A marked and substantial departure from the standard of care expected of a reasonable person (*Tutton, Anderson, R v. J(F)*)**
   2. Five provisions in the code - **220, 221, 222(5)(b), 249.2, 249.3** 
      * **Section 219** (definition of crim neg) – **219** provides for an omission, which req’s a legal duty (can be found in **s. 215**, or from any other legal duty). Charge would come under **s. 220**
      * **220** (crim neg causing death), **221** (crim neg causing bodily harm), **222 (5)(b)** (causing death by crim neg)
        + **220** and **222(5)(b)** are the exact same processes

* **The modified objective test has two modifications:**
  + (1) The marked (or marked and substantial) departure
  + (2) Examination of whether the accused was capable of appreciating the risk? [(in)capacity]
* Objective fault arises with the offence of unlawful act manslaughter, where it must be objectively foreseeable that the death was a cause
* Criminal negligence is defined in **s. 219** of the *CC*
  + Everyone is criminally negligent who
    - a) In doing anything, or
    - b) In omitting to do anything that it is his duty to do

Shows **wanton or reckless disregard** for the lives of safety of other persons

* ***CC* s. 220** = criminal negligence causing death, **s. 221** = criminal negligence causing bodily harm
* Neither ‘wanton’ nor ‘reckless’ is defined for the purpose of **ss. 219-221**
  + ‘Wanton’ may suggest an objective standard
  + ‘Reckless’ seems to point to a subjective standard
* In ***Tutton and Tutton***, SCC was deadlocked on whether MR for criminal negligence was subjective or objective
* This issue was decided in ***Creighton*** where the court decided on a **modified objective test,** but where the only personal factors of the accused that matters is capacity (marked (and) substantial departure still required)
  + The particular characteristics of the accused, **apart from capability**, are not considered
* Actus reus for criminal negligence is *wanton and reckless disregard* (**s. 219**) - (***Beatty****)*
  + ***JF***: SCC tells us difference between penal neg and crim neg and the **fault element** for crim neg
    - *Penal neg =* marked departure
    - *Crim neg* = marked and substantial departure
    - ***Fault element*** *for crim neg* = adds substantial. **Crim neg and Penal neg have difference fault elements (this is the distinguishing factor – Penal is lower)**
  + In ***R v JF*** jury charged JF with higher fault element (crim neg causing death) but acquitted on failure to provide necessities (lower fault element) - NOT RIGHT (cant meet high threshold if you fail on the low threshold)
    - SCC quashed conviction
* *Mens rea* of criminal negligence is the modified objective test (marked and substantial departure)
* only 2-3 offences of crim neg (causing death, causing bodily harm) for which the MR is marked and substantial departure
* The only CC provisions involving criminal negligence and the higher “marked and substantial departure” fault element are:
  + **219 – Criminal Negligence (not an offence)**
  + **220 – Causing Death by Criminal Negligence**
  + **221 – Causing Bodily Harm by Criminal Negligence**
  + **222(5)(b) – Culpable Homicide by Criminal Negligence**
  + **249(3)/249(4) – Street Racing (Criminal neg causing death while street racing)**
* All other CC offences requiring reasonable care are offences of penal negligence, and require the minimum the lower “marked departure” fault element
  + **79- duty of care regarding explosive**
  + **249- dangerous operation of MV**

### Offence of Crim Neg Causing Death - s. 219 and 220

## *R v Tutton and Tutton* (1989)

**Ratio:** Crim neg measured objectively. Must be marked and substantial departure from what is expected of the accused given their awareness of circumstances. Objective standard modified to take into account surrounding circumstances so modified objective test.

**Facts**: The accused were convicted of manslaughter of their 5 year old son through crim neg causing the death by omitting to provide the necessaries of life. Because of religious views and their belief in faith healing, they refused to administer insulin to their diabetic son.

**Prior Proceedings**: Convicted at trial. CA ordered new trial on basis that although an objective test is required for criminal negligence, a subjective test is necessary for acts of omission. Crown appealed to SCC.

**Issue**: Is the test for criminal negligence subjective or objective?

**Held**: New trial ordered. Court is split 3-3 whether objective or subjective test is to be used

**Reasons**:

* **Objective Test:**
* McIntyre J.: adopts objective standard of fault!
  + Criminal negligence punishes the consequences of mindless action (not a state of mind or intention)
    - Objective standard must be applied because of the difference between the ordinary criminal offence, which requires subjective proof, and that of criminal negligence
  + TEST: proof of conduct that reveals a marked and significant departure from the standard, which could be expected of a reasonable person in the same circumstances
* Lamer J
  + There should be an objective test, but there must be made a “general allowance” for factors which are particular to the accused, such as youth, mental development and education
* **Subjective Test**
* Wilson J
  + Objective approach to crim neg would make it an absolute liability offence; contrary to ***Sault Ste. Marie*** and **s. 7**.
  + “reckless disregard” requires some degree of advertance/awareness, i.e. subjective standard; “wanton” connotes wilful blindness to the prohibited risk which by its nature constitutes *prima facie* evidence of the mental element
* Basis of the manslaughter charge?
  + Causing death by criminal negligence via (now) **222(5)(b)**
  + Criminal negligence? Via (now) **219(1)(b)** – an omission
  + Omission? Failure to provide necessaries of life via (now) **215(1)(a)**

**Note: in this case the Crown had to establish 3 things:**

* + - * 1. That the Tuttons failure to provide the necessaries of life,
        2. Constituted crim neg, and
        3. That the omission was a significant contributing cause of their son’s death.

## *R v JF*

**Ratio:** crim neg (marked and substantial) **CC 215**- penal Neg (Marked). Under penal negligence, the fault element is a marked departure. Under crim neg, the fault element is a marked and substantial departure. Cannot convict an accused of manslaughter for an omission arising from **215**, if he has been acquitted of **215**.

**Facts:** The accused was charged with two counts of unlawful act manslaughter, one for criminal negligence (omission), and the other for failing to provide the necessaries of life (**215**). The accused was convicted of the crim neg charge, but not the **215** charge, which has a lower threshold, as a penal negligence crime.

* **215** only required a finding that the accused’s acts were a marked departure, whereas crim neg charge required the accused’s acts be a marked and substantial departure, but was based on the exact same omission. Incomprehensible that the jury could acquit accused for the lower threshold charge of **215**, and convict on the higher threshold charge of **220**

**Held:** The conviction of manslaughter by way of crim neg is quashed, because accused already acquitted of failing to provide the necessaries of life, and for a new trial to be ordered, he would need to be tried of the same crime that he has been acquitted of.

**Reasoning:**

#### **Count 1 (s.215): This is an offence of penal negligence**

* + The fault element is a marked departure from the standard of care expected of the reasonably prudent person.
  + The requisite fault element was that of failure to provide the necessaries of life.
  + Neither criminal negligence nor failure to provide the necessaries of life requires proof of intention or actual foresight of the prohibited consequence.
  + A **marked departure** from the conduct of the reasonably prudent parent in the circumstances where it was **objectively foreseeable** that the failure to provide the necessaries for life would lead to a risk of danger to the life, or a risk of permanent endangerment to the health of the child.

#### **Count 2 (s.220): This is an offence of criminal negligence**;

* + fault element is a **marked and substantial departure** from the standard of care expected of the reasonably prudent person.
  + Crown needed to show that the accused’s very same omission represented a marked and substantial departure from the reasonably prudent parent in the circumstances where the accused either recognized and ran an obvious and serious risk to the life of his child or, alternatively, gave no thought to that risk.
* Under both counts, the jury was required to determine not what the respondent knew or intended, but what he *ought to have foreseen*.

### Neg as an element

* + Dangerous driving is an offence of penal negligence because it involves dangerous conduct, but not subjective fault because involves lack of attention
  + where the accused ought to have foreseen a consequence, or ought to have been aware of a risk- whether or not he actually foresaw or was actually aware- it is said that the accused is negligent with respect to the risk.

## *R v Hundal* (1993)

**Ratio:** Dangerous driving uses modified objective test . The fault standard for dangerous driving is the modified objective test: a marked departure from the standard of care that a reasonable person would observe in the accused’s situation. Must consider all relevant factors in assessing whether a reasonable person would have been aware of the risksin accused’s conduct.

**Facts**: The accused was charged with dangerous driving causing death. The accused was driving an overloaded dump truck and ran a red light and collided with another car, killing the other driver. Accused charged under what is now **s. 249(4)**

**Issue:** What is the test for the mens rea of dangerous driving? Objective? Subjective? Mix of objective and subjective?

**Held**: Guilty on the modified objective test

**Reasons:** The aim and purpose of the objective test is to enable the court to take into account the sudden and unexpected onset of disease and similar human frailties as well as the objective demonstration of dangerous driving

Fours reasons why objective fault is suitable

* + Licensing requirement
    - Licensing establishes that you have minimum amount of skill (objective standard all drivers expected to meet)
  + Automatic/reflexive nature of driving
    - Driving is such an automatic activity, no thought to it.
    - we don’t want to know what accused was actually thinking, because they may not have been thinking anything
  + Wording of **s. 249**
    - Doesn’t seem to mention any subjective mens rea factors
  + Statistics:
    - The need for controlling dangerous conduct of drivers is obvious and urgent.
* Mix of subjective factors need to be considered though: (this is the “modified” part of the objective test)
  + “The test must be applied with some measure of flexibility.
    - Consider contextual factors such as unforeseeable consequences (weather), condition of car, heart attacks.
* **McLachlin J.** argues that there is no need to modify the objective test
  + Either the objective test will suffice or lack of criminal liability will flow from alternative criminal law principles
  + Voluntariness speaks to the AR
  + Marked departure still needed, but we don’t need to take into account particular characteristics of the accused
  + Will confuse juries who need to know if they are judging objectively or subjectively.

## *R v Beatty* (2008)

**Ratio:** The test for a charge of dangerous driving of a motor vehicle causing death under **s.249(4)**. **AR**- accused was driving in a manner that was [objectively] dangerous to the public having regard to all the circumstances. **MR** the trier of the fact should be satisfied on the basis of all the evidence, including evidence about the accused’s actual state of mind, if any that objectively shows the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused’s circumstances. If an explanation is offered by the accused, then in order to convict, the trier of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and danger involved in the conduct

**Facts**: Accused was charged with three counts of dangerous driving causing death after his pickup truck, for no reason, suddenly crossed the solid centre line into the path of an oncoming vehicle, killing all three occupants. Accused stated that he was not sure what happened but that he must have lost consciousness or fallen asleep. Evidence showed that before the accident the accused had been driving in a proper manner. Accused’s vehicle was in good working order, and intoxicants were not a factor.

Therefore the modified objective test modifies the objective test in two ways:

1. Requires that the accused’s conduct amount to “**a marked departure from the standard of care that a reasonable person would observe in the accused’s situations**”
2. Requires that all relevant circumstances be taken into account in “assessing whether a reasonable person would have been aware of the risks in the accused’s conduct”

**Issue**: Was the momentary act of negligence sufficient to constitute dangerous driving causing death with **s. 249(4)**?

**Held**: Appeal allowed, acquittal restored

**Reasons:** Unlike civil negligence, which is concerned with the apportionment of loss, penal negligence is aimed at punishing blameworthy conduct. The modified objective test established by the Court’s jurisprudence remains the appropriate test to determine the requisite mens rea for negligence-based criminal offences. Where the accused raises a reasonable doubt whether a reasonable person in his or her position would have been aware of the risks arising from the conduct, the premise for finding objective fault is no longer sound and there must be an acquittal. The reasonable person must be put in the circumstances that the accused found himself in when the events occurred in order to assess the reasonableness of the conduct. Actus reus was made out, but mens rea was not because conduct did not consist of a marked departure from the standard of care we can expect of a reasonable driver (Momentary lack of attention is not a marked departure)

### Negligence Summary

* For dangerous driving, AR is what the criminal code says it is, and the MR is modified objective test
* For criminal negligence there are two possible readings:
  + From McLachlin in ***Creighton***: **AR** is marked and substantial departure from reasonable person and **MR** is marked and substantial departure
  + If ***Beatty*** is used, **AR** is from *CC* (‘showing wanton or reckless disregard’) and **MR** would still be marked and substantial departure
* With unlawful act manslaughter offences, after the AR and MR of the unlawful act are established, all that is needed is to show that the unlawful act caused the death, was that there was an objective foreseeability of a risk bodily harm that was neither trivial nor transient
* Mens rea of unlawful act manslaughter is thus mens rea of the underlying offence and objective foreseeability of a risk of bodily harm that’s neither trivial nor transient
* Fault element = modified objective test (for Crim and penal neg)
* Fault elements differ:
  + Crim neg = higher (marked and substantial) than penal (marked)
  + If charged with two, if guilty of crim neg must be guilty of penal too (assuming charges on same facts)
* Personal factors only relevant if they go to capacity
* **Penal neg:** cite ***Beatty***
* **Crim neg:** cite ***JF***

### Murder Constitutional Considerations

**222(1)**: defines homicide

**222(2)**: distinction between culpable and non-culpable homicide; **222(3)** says that non-culpable homicides are not crimes

**222(5)**: says what constitutes culpable homicide

**229**: says what forms of culpable homicide constitute murder

**231**: says what forms of murder constitute first-degree murder (we know its murder already)

**233**: says what forms of culpable homicide constitute infanticide

**234**: says that a culpable homicide that is neither murder nor infanticide is manslaughter

* A homicide occurs whenever a person causes the death of another human being, however not every homicide is culpable
* 3 types of culpable homicide: manslaughter, murder, infanticide

**Section 229** of the *Criminal Code* sets out what murder is:

* **229**. Culpable homicide is murder
  + **(a)** where the person who causes the death of another human being
    - (i) means to cause his death, or
    - (ii) means to cause bodily harm that he knows is likely to cause death, and is reckless whether death ensues
  + **(b)** Where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being
  + **(c)** where a person, for an unlawful object, does anything that he knows **~~or ought to know~~**is likely to cause death, and thereby causes death to a human being, notwithstanding that he desire to effect his object without causing death or bodily harm to any human being (***JSR***) (ought to know is taken out by ***Martineau***)
* **Fault under this section must be subjective** (***Martineau***), and thus a jury cannot be told that an accused is guilty if they ‘ought to know’ if death is likely to occur
* Under **s.229 (a)(ii),** **the fault element** that must be demonstrated is:
  + (1) There must be subjective intent to cause bodily harm and subjective knowledge that the bodily harm is of such a nature that it is likely to result in death (***Cooper***)
    - **actus reus:** Causing the death of another human being, directly or indirectly, by any means (definition for homicide from **222(1)**), and doing so via one of **222(5)(a)-(d)** (definition of culpable homicide)
    - **mens rea: 229(a)(i):** subjective intention (***Buzzanga*** and ***Durocher***) to cause death, or **229(a)(ii)**: subjective intention to cause bodily harm that accused subjectively knows likely cause death (***Simpson***)
    - The default mens rea for murder is therefore subjective, and very strict. There must be subjective intent to cause bodily harm and subjective knowledge that the bodily harm is of such a nature that it is likely to result in death
* **Section 229(b)** sets out what is known as *transferred intent*: A intends to kill V1, but mistakenly kills V2 instead, the initial intent to kill V1 is transferred to V2 to satisfy the intent requirement
* **Section 229(c)** covers what is known as unlawful object murder
  + There is a constitutional problem with this provision as objectivity arises from the words **‘ought to know’** and murders require a subjective fault element
    - The courts have basically just ignored the ‘ought to know’ part
  + Additionally, the unlawful object must be distinct from the injury otherwise it looks a lot like **229(a)**
* ***R. v. J.S.R*** held that **229(c)** would be satisfied provided that jury was convinced beyond reasonable doubt that accused:
  + (1) For an unlawful object
  + (2) Did anything
  + (3) That he knew was likely to cause the death of a human being (not only the target)
  + (4) and that did cause the death of a human being
    - the victim is not the target of the unlawful object, or else it would be more effective to charge under **229(a)**
* In ***Vaillancourt***, the court held that it is a PFJ that absent proof beyond a reasonable doubt of at least objective foreseeability, there cannot be a murder conviction
  + Lamer J. was restricting his decision to objective foreseeability because that standard was not met on the facts
* In ***Martineau***, the court went even further and held that to satisfy the PFJs, a murder conviction must be reserved for those who either intend to cause death or who intend to cause bodily harm that they know will likely cause death
  + **Thus for murder, some type of subjective foresight of death is required**
* **These cases rendered s. 230(d) of the *CC* being repealed and findings that s.230 (a) and (c) are unconstitutional**
* Strike out all of **230** (**a-c** are invalid from ***Martineau***, **d** from ***Vaillancourt***)
* **Offence of murder has a constitutionally required fault element of subjective foresight of death**
  + **i.e. any offence called murder with less than that fault requirement is unconstitutional**

## *R v Vaillancourt* (1987)

**Ratio: s.213(d)** now **s.230(d)** repealed. Murder requires at least objective forseeability of death. It is a PFJ that, absent proof beyond reasonable doubt of at least objective foreseeability of death, there cannot be a murder conviction. **230(d)** is of no force or effect as it imposes absolute criminal liability and murder requires AT LEAST objective forseeability of death.

**Facts**: The accused and his accomplice committed an armed robbery of a pool hall. The accused was armed with a knife and his accomplice had a gun (which the accused was certain was unloaded). During the robbery, there was a struggle between the accomplice and a patron of the pool hall and the patron was killed. The accused was arrested but his accomplice escaped

**Issue**: Is **s. 213(d)** inconsistent with the provisions of either **s.7** or **s.11(d)** of the *Charter* and thus of no force or effect?

**Held**: Appeal allowed, **213(d)** is unconstitutional

**Reasons**: Section **213** substitutes proof beyond a reasonable doubt of objective foreseeability of death for proof beyond a reasonable doubt of certain forms of intentional dangerous conduct causing death- Requires neither subjective nor objective foresight of death.

* + This substitution cannot be made without violating **ss.7 & 11(d)** of the *Charter* because it could catch an accused who performs one of the acts listed and thereby causes death but who otherwise would have been acquitted of murder because he did not foresee and could not have reasonably foreseen that death would be likely to result
* This finding does not however end the inquiry of constitutional validity as the legislation could be saved under **s. 1**
  + Is the objective of the statute of sufficient importance to consider overriding a charter right?
    - Yes. Preventing death, deterring people from using weapons during commission of an offence
  + Is the measure rationally connected to the objective sought (proportionality test)
    - No. Measures would unduly impair the rights and freedoms in question. It is not necessary to convict of murder persons who did not intend or foresee the death and who could not even have foreseen the death in order to deter others from using weapons

**Lamer’s 4 reasons:**

1. Courts ability according to the Charter to be able to do this
2. Principles of fundamental justice and stigma
3. ***CC* s. 213** is too broad, captures too much conduct
4. Not saved under **s. 1**

## *R v Martineau* (1990) SCC

**Ratio: s.213(c)** unconstitutional - murder requires subjective forseeability of death. It is essential that to satisfy the PFJs, the stigma and punishment attaching to a murder conviction must be reserved for those who either intend to cause death or who intend to cause bodily harm that they know will likely cause death. **S. 230** in its entirely is of no force and effect. Murder requires at least a subjective foresight of death and therefore, “ought to know” is ineffective in **229(c)**. All of **230** is unconstitutional because it allows for conviction without subjective intent/ knowledge off foresight. It has yet to be repealed but it is no longer in effect.

**Facts**: The accused and his accomplice had set out to commit a robbery, and the accused carried with him a pellet pistol while his accomplice had a rifle. During the commission of the robbery, the accomplice killed two people because they had seen his face. He was charged with murder under **s.213** (now **230)(a))**

* + This section defines culpable homicide as murder where a person causes the death of a human being while committing or attempting to commit a range of listed offences, whether or not the person means to cause death or whether or not they know that death is likely to ensue if that person means to cause bodily harm for the purpose either of the commission of the offence or flight after committing the offence. This removes from the Crown the burden of proving beyond a reasonable doubt that the accused had subjective foresight of death

**Issue**: Does **s. 213(a)** of the *Code* violate either **s.7** or **11(d)** of the *Charter*?

**Held**: The *Charter* is violated by **s. 213(a)** and it this violation is not saved under **s.1** of the *Charter*.

**Reasons:** The stigma and punishment attaching to a murder conviction must be reserved for those who either intend to cause death or who intend bodily harm that they know will likely result in death. In sum then, a special mental element with respect to death is necessary before a culpable homicide can be treated as murder. That special mental element gives rise to the moral blameworthiness that justifies the stigma and punishment attaching to a murder conviction. For all the foregoing reasons, and for the reasons stated in ***Vaillancourt***, I concluded that **it is a PFJ that a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight of death**. Therefore, since **s. 213 (now 230**) expressly eliminates the requirement for proof of subjective foresight, it infringes **ss. 7 and 11(d)** of the Charter.The effect of **s. 213** is to violate the principle that punishment must be proportionate to the moral blameworthiness of the offender. “The essential role of requiring subjective foresight of death in the context of murder is to maintain a proportionality between the stigma and punishment attached to a murder conviction and the moral blameworthiness of the offender.”

### The Elements of Manslaughter

1. All culpable homicide that is not murder or infanticide is manslaughter

2. Essentially an UNINTENDED killing (or murder reduced by provocation)

3. Death caused by an unlawful act, that factor coupled with some form of MR (whether objective or subjective) directed towards causing any bodily harm should suffice

4. No requirement for foreseeability of death whether objective or subjective - at least foreseeability of bodily harm

5. Main types of manslaughter (**s. 222(5)**): Unlawful act manslaughter, MS by criminal negligence)

### Manslaughter by Criminal Negligence

* Manslaughter by crim neg covers the same ground as **s.220** (Crim neg causing death)
* The form of manslaughter by criminal negligence mirrors the form of UAM: Criminally negligent act + death = manslaughter by criminal negligence
* **The AR** will be AR for criminal negligence (marked and substantial departure), plus showing that the negligence was a significant contributing cause of the death (***Nette*** test)
* BUT, for the first part, ***Beatty*** could be applied (even though it was a penal negligence case) which would make the actus reus whatever the Code says negligence is (showing a wanton or reckless disregard)
* **The MR** will be the mens rea for criminal negligence (modified objective test), and an objective foreseeability of bodily harm that is neither trivial nor transient

### Manslaughter by Crim neg SUMMARY: Culpable homicide analysis under 222(5)(b)

1) Identify the criminally negligent act or omission

2) Analyze the MR and AR for that act or omission

MR must be a marked and substantial departure (***JF***)

3) Analyze the AR and the MR for **222(5)(b)**

* **The AR** = the AR for the crim neg act or omission + the causing of death
* **The MR** = the MR for the crim neg act or omission + objective foreseeability of the risk of bodily harm
* for an act/omission to amount to an unlawful act, it must amount to Crim Neg, therefore need a marked & substantial departure from a reasonable person.

**222(5): A person commits culpable homicide when he causes the death of a human being**

a) By means of an unlawful act

b) By criminal negligence

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

d) By wilfully frightening that human being, in the case of a child or sick person

### Culpable homicide analysis under 222(5)(a):

1. Identify the unlawful act (UA) or predicate offence

2. Analyze MR and AR for specific offence alone [MR must be marked dep+, cannot be abs liab] (***Beatty, JF***)

* MR must be at least a marked departure
* If either is lacking, then no UAM b/c no UA
* Cannot be an absolute liability offence

3. Analyze the AR and the MR for UAM

4. **The AR of UAM** = the AR for the UA + the causing of death

5. **The MR of UAM** = the MR for the UA + objective foreseeability of the risk of bodily harm

|  |  |
| --- | --- |
| Actus Reus | Mens Rea – Subjective Intention to cause bodily harm likely to cause death or cause death |
| - Must establish the causation of an act - 3 elements to causation   * Was there a factual relationship (‘but for’) between action + resultant consequence * Did ‘but for’ rise to the level of significant contributing cause (***Netty*** or ***Smithers*** – standard of causation) * Was there remoteness? Was the consequence so remote that the accussed deserves not to be punished (***Lewis, Jordan, Smith, Blau, Shilon, Maven***) | * **229(a)(i):** A (subjective) intention (per ***Buzzanga and Durocher***) to cause death, or **229(a)(ii)**: a (subjective) intention to cause bodily harm that the accused subjectively knows is likely to cause death (see ***R v Simpson***, 58 CCC (2d) 122) |

## *R v Shand* (2011) ONCA - read in light of *Martineau*

**Shand’s Argument:** ***Martineau*** must be read as establishing the principles that (1) subjective foresight of death is a necessary, but not a sufficient condition for a constitutional murder provision; and (2) a constitutional murder provision also requires proof of an intention to cause death or very serious bodily harm.”

**Crown’s Argument:** “The respondent agrees … that murder requires a minimum level of mens rea to ensure that only sufficiently blameworthy conduct attracts the stigma and sanction of a murder conviction. However, unlike the appellant, the respondent submits that the standard of subjective foresight of death established in Martineau is sufficient to justify a murder conviction.”

**Held:** Crown wins

**Reasons:**  Clearly, **s. 229(c)** was in the forefront of Lamer C.J.C.'s mind when he wrote his reasons in ***Martineau***. He wanted to ensure that there was no doubt about the constitutional validity of what is now **s. 229(c).** Lamer wanted to ensure that the case would not be prosecuted on the basis of the objective branch of **s. 229(c)**. He did not, however, show any concern with respect to the case being prosecuted later on the basis of the subjective branch of **s. 229(c)**. As he explained, the minimum mens rea for murder required is the subjective foresight of death. If it were his view that the Charter required, at minimum, an intent to cause serious bodily harm, the passage quoted above makes little sense. If the Charter required intent to kill or to cause grievous bodily harm, then all of **s. 229(c)**, and not merely its objective branch, would be called into question.”

## *R. v. Widdifield*

“In the Code “planned” is to be assigned, I think, its natural meaning of a calculated scheme or design which has been carefully thought out, and the nature and consequences of which had been considered and weighed. But that does not mean that the plan need to be a complicated one. It may be a very simple one, and the simpler it is perhaps the easier it is to formulate”

“As far as the word ‘deliberate’ is concerned, the Code means that it should also carry its natural meaning of ‘considered’, ‘not impulsive’, ‘slow in deciding’, ‘cautious’, implying accused must take time to weigh advantages/disadvantages of intended actions”

### 1st v 2nd Degree Murder

* **231(2)** – murder is in the first degree when it is planned + deliberate
* **s. 231(3)** Hiring someone to murder counts as planning + deliberation
  + murder for fire or contract killing automatically counts as murder that is planned and deliberate. regardless of the degree of actual planning and deliberation involved
* **231(4)**  - murder of police officer
* **231(5)** – did you commit the murder while committing one of those offences
  + The causal connection must be of substantial cause
* **Section 231** does not create a substantive offence, but rather serves a classificatory purpose:
  + It distinguishes first-degree murder from second-degree murder and says when a murder that would otherwise be second-degree murder becomes first-degree
* **S. 231(1)** states that all murder is either first degree or second degree murder
* The standard of causation is raised for 1st-degree murder charges.
  + The act must be a “substantial cause” of the victim’s death (***Harbottle***)

**Planned and Deliberate (s. 231(2) and (3))**

* **S. 231(2)** Murder is first-degree murder when it is planned and deliberate
  + ‘Deliberate’ means ‘considered, not impulsive’. It could not simply mean ‘intentional’ because it is only if the accused’s act was intentional that he can be guilty of murder in the first place (***R. v. Moore*** – not briefed)
* **‘Planned’** is to be assigned its natural meaning of a calculated scheme or design, which has been carefully thought out, and the nature and consequences of which have been considered and weighed. But that does not mean that the plan must be a complicated one. It may be a very simple one, and the simpler it is perhaps the easier it is to formulate. ‘**Deliberate**’ carries its natural meaning of ‘considered’, ‘not impulsive’, ‘slow in deciding’, ‘cautious’, implying that the accused must take time to weigh the advantages and disadvantages of his intended action (***Widdifield)***

**Murder of a Peace Officer 231(4)**

* **S. 231(4)** provides that murders of a certain class of people will be first-degree murder irrespective of whether the murder is planned and deliberate
  + class of people includes police officers (and other persons employed for maintenance of public peace) while in the course of their duties, employees of prisons, and persons working in prisons with the permission of the authorities
* The accused must have knowledge that the victim was a police officer acting in their duties (***Collins***)
  + If you don’t know, doesn’t mean you haven’t committed murder, just you haven’t committed first-degree murder

**‘While Committing’ 231(5)**

* **S. 231(5)** provides that murder is first-degree murder when the death is caused while committing or attempting to commit an offence under a list of enumerated sections, irrespective of whether the murder was planned and deliberate
* The ‘while committing’ requirement can be satisfied if the act causing death and the act(s) constituting the prohibited offences were part of one continuous sequence of events forming a single transaction *(****Paré***)
* **S. 231(5)** applies regardless of whether victim of underlying offence and victim of the murder are the same (***Russell***)
* Constitutionality of **s. 231(5)** has been challenged but the court has held that this section does not offend PFJs because there is an organizing principle (where murder is committed by someone already abusing his power by illegally dominating another it is an exceptionally serious crime) and Parliament can attach more serious penalties to more serious offences. The standard of causation is raised, requiring the act to be a substantial cause of the victim’s death (***Harbottle***)

# Four different types of FIRST DEGREE MURDER:

1. Planned and deliberate section **231(2)** (***More, Smith, Widdifield, Nygaard***)

* + Planning and deliberation must relate to the requisite fault for murder
  + i.e. premeditated murder
    - Planned = not the same as intention - planning occurs after the intent has been formed; previously formulated scheme - scheme was conceived and thought out before it was carried out - i.e. arranged beforehand
  + Time may affect whether it was planned. Longer the episode, more likely it was planned.
  + Planning must commence prior to commencement of the homicide
    - Deliberate = considered, not impulsive; some further mental process over and above intent to kill – i.e. accused took time to weigh the pros and cons of the intended action
  + Plan need not be lengthy or complicated; can be simple
    - Deliberation need not be lengthy
  + Planning (and probably deliberation) must precede in time the act of murder, but not necessarily by much
  + The killing may have been deliberate (considered, not impulsive – not to be confused with intent), but there was not sufficient evidence to establish that it was also planned.
    - e.g. drunkenness may not negate murder, but may negate the planning and deliberation (thus, second degree)
    - If planned and deliberate, but kill the wrong person, this is still first degree murder (***Droste***)
  + Threat can constitute planning for first degree & it demonstrates coupling of MR from one offence to another (***Nygaard***)

2. Contract killing - **section 231(3)**

3. Killing a peace officer - **section 231(4)**

* Act requirement
  + Victim is a peace officer
  + Victim was acting in the course of his or her duties at the time of death
* Any activity related to the performance of a duty or the officer’s ability to perform that duty
  + Refuelling a police car, having lunch, going to the bathroom, similar activities during a tour of duty
* Fault requirement
  + Knowledge the victim was a peace officer
    - Recklessness or wilful blindness will suffice
  + Knowledge that the officer was acting in the course of his or her duties
    - Recklessness or wilful blindness will suffice
* Recklessness as to whether the accused is shooting a police officer in the course of duty supplies the necessary MR (low threshold) to prove first-degree murder under **s. 231(4)**. (***Munro***)

4. Constructive Murder - Murder in the commission of offences - **section 231(5),(6)**

* Murder first has to fall within **section 229**
* It has been found to be constitutional
* Murder committed “while committing” an enumerated offence

**Bonus**: **s. 231(7)**: all murder that not first degree murder is second degree. The major difference between the two is sentencing

**First degree** - **ss. 231(2)-(6.2)**

* 1. Life, 25 year minimum parole ineligibility
  2. Note “faint hope” clause, 15 year review

**Second degree murder** - **s.231(7)**

a. Anything that is not first degree is second degree

b. Life, 10 year minimum parole ineligibility

### Manslaughter + UAM

* Culpable homicide analysis under **222(5)(a)** 
  + Identify UA or predicate offence (NOT an absolute liability)
  + Analyze MR + AR of offence
    - MR must be at least a marked departure (***Beatty***), but may involve subjective MR
    - If either MR or AR is lacking, no UAM because no UA
  + Analyze AR + MR or UAM
    - **AR** = AR of UA + causing death
    - **MR** = MR of UA + objective foreseeability of risk of bodily harm
* CH under **222(5)(b)** 
  + Identify criminal negligent act or omission
  + Analyze MR + AR for act or omission
    - MR must be marked and substantial departure (***JF***)
  + Analyze the AR and MR for **222(5)(b)** 
    - **AR** = AR for crim neg + causing of death
    - **MR** = MR for crim neg + objective foreseeability of risk of bodily harm

## *R v Desousa* (1992)

**Facts:** Victim was cut by glass that came from broken bottle during bar fight

**Ratio:** At least in the context of **s.269** – objective foresight of the risk of bodily harm is constitutionally sufficient. The act must both be unlawful and one that is likely to subject another person to danger harm or injury (objective forseeability).

**AR** for **269** – AR for predicate offence plus unlawful act

**MR** any MR for predicate offence combined with subjective foreseeability

## *R v Creighton* (1993) SCC

**Ratio:** UA Manslaughter (Objective Forseeability of risk of bodily harm). The MR for objective foresight of risking harm is normally inferred from the facts. The standard is that of the reasonable person in the circumstances of the accused, where the only personal factors to be considered are those that go to capacity. With criminal negligence, the AR is acting in a manner that is a marked and substantial departure from the standard of a reasonable person, and the MR is the same marked and substantial departure. There will also be an additional element of objective foreseeability of bodily harm that is neither trivial nor transient when death is involved, just as there is for unlawful act manslaughter

**Issue:** Does CL definition of unlawful act manslaughter contravene **s.7** of the *Charter?* No Subjective desire for death to occur.

**Facts**: Injects friend with cocaine with her consent (no assault). Unlawful act = trafficking (includes the administration of illegal substance). Not charged with murder because the intent to kill could not be established, no intent to cause bodily harm. D argues charter requirement for fault element of manslaughter, she consented to the injection of the drugs - fails on the causation stage, does not mean causal act. D argues that offence of manslaughters is unconstitutional because it requires only forseeability of the risk of bodily harm and not forseeability of death.

**Held:** Convicted. SCC was unanimous in requiring a marked departure from standard of reasonable person, but was split on whether personal factors should be taken into account. Majority held personal factors should not be considered

**Reasoning:**

Disagreement between Lamer + McLachlin over two items

* + The fault element of UAM
    - L – objective foreseeability of death
    - **M – objective foreseeability of risk of bodily harm (Law)**
  + The role played by personal characteristics and frailties in the articulation of the modified objective test

**2 requirements of manslaughter are constant:**

* + 1) conduct causing the death of another person
  + 2) fault short of intention to kill

McLachlin (Law – Judgement)

* Unlawful act manslaughter is perfectly fine as it is; no need to ‘read up’ the requirement of objective foreseeability of the risk of death; objective foreseeability of risk of bodily harm is sufficient
* No need to modify the objective test in order to take into account the particular characteristics of the accused
  + Unless the characteristics render the accused unable to understand the risks
* Stigma
  + Manslayer is not labelled a murderer
  + Punishment is proportionate to level of moral blameworthiness
  + Those causing harm intentionally should be punished more severely
  + Fault element is appropriately tailored to seriousness of the offence
* “To summarize, the fundamental premises upon which our criminal law rests mandate that personal characteristics not directly relevant to an element of the offence serve as excuses only at the point where they establish incapacity, whether the incapacity be the ability to appreciate the nature and quality of one’s conduct in the context of intentional crimes, or the incapacity to appreciate the risk involved in one’s conduct in the context of crimes of manslaughter or penal negligence.  The principle that we eschew conviction of the morally innocent requires no more.”
* **The legal standard of care for all crimes of negligence is that of a reasonable person. Personal factors not relevant, except on the question of whether the accused possessed the necessary capacity to appreciate the risk** 
  + fact that an offence depends upon predicate offence does not render it unconstitutional, provided that predicate offence involves **inherently dangerous act**, **not an offence of AL**, and **not unconstitutional** (***Desousa***).
  + **The test for *mens rea* of unlawful act manslaughter** is (in addition to the *mens rea* of the underlying offence) **objective foreseeability of the risk of *bodily harm* which is neither trivial nor transitory, in the context of a dangerous act. Foreseeability of *death* is *not* required.**

**Ratio:** Modified Objective Standard - The fault element of manslaughter requires objective foreseeability of bodily harm, which is neither trivial nor transitory. A trivial assault, not dangerous in itself and not likely to cause injury would not give rise to a conviction for manslaughter if it did somehow cause death. Personal characteristics and frailties are not relevant – contextualize without personalizing, however… The accused must be capable of appreciating the risk flowing from their conduct. **Modified standard – reasonable person in the situation of the accused, personal characteristics only relevant insofar as they go to incapacity**

## *R v Gosset* (1993)

**Ratio:** fault element for **s. 86(2)** is objective

**Reasons:** if “the conduct of the police officer constituted a marked departure from the standard of care of the reasonable person in the circumstances,” the offence would be made out, “absent any evidence of incapacity to appreciate the risk involved in the conduct. Lamer would have found the accused to the standard of a “police officer trained and experiences in the use of firearms”

## *R v Naglik* (1993)

**Ratio: s. 215**(failing to provide necessities of life)- fault element = objective

**Reasoning:** Court held that fault element was objective. “**s 215(2)(a)(ii)** punishes a marked departure from the conduct of a reasonably prudent parent in the circumstances where it was objectively foreseeable that the failure to provide the necessities would lead to a risk of danger to the life, or a risk of permanent endangerment to the health, of the child.” Court divided on whether standard should be adjusted for particular characteristics of accused. Judge should consider whether it was possible for Naglik to control or compensate for her incapacities in the circumstances.Trier of fact must determine the conduct of the reasonable person when engaging in the particular activity of the accused in the specific circumstances. These circumstances do not include the personal characteristics of the accused, short of characteristics which deprived her of the capacity to appreciate risk.”

### Infanticide

* **CC s. 233**: A female person commits infanticide when by a wilful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed.
* See also **CC ss. 662(3) and 663**

## *R v Boroweic* (2016) SCC

**Facts:** Newborn child found crying in dumpster. B admitted giving birth to the child and leaving 2 other babied in dumpsters- charged with 2 counts of 2nd degree murder. TJ acquitted her of murder but found her guilty of two counts of infanticide. CA dismissed the appeal.

**Issues:** Is it a stand-alone offence, a partial defence or both? What constitutes a disturbed mind for the purposes of **s. 233**? Is it an AR or MR element? Must is be causally connected with the act or omission that causes death of child?

**AR –** (1), by an act or omission, causing the death of the accused’s newly-born child, while (2) suffering from a mental disturbance connected with the effects of giving birth or the effects of lactation consequent on the giving of birth

* Must also establish legal duty (**s. 215** – mother + child)

Newly-born Child:

* A year or under (**s.2** – definition section)

Human Being:

* Once it has been birthed
* Mental Disturbance (part of the AR)
  + Does not need to be a medically or legally recognized term
  + Woman does not need to be able to appreciate the consequences of her actions
  + Term can simply mean mentally agitated
  + Does it need to be causally implicated in death of child?- No must just show disturbance is present/operative

**MR –** Same as for manslaughter: objective forseeability of risk of bodily harm

* A subjective intention to cause death, or an intention to cause bodily harm knowing that death is likely to result, will therefore satisfy the MR for infanticide, although such a heightened MR is not legally required

Second Issue - stand-alone, defence or both? (**Both**)

* Why does it matter?
  + “Choosing between the two characterizations of infanticide has profound importance in a case like this one where a mother is charged with murdering her child.  If infanticide provides a partial defence to murder, the mother will escape a murder conviction if the homicide falls within the purview of infanticide even though the Crown may prove all the essential elements of the crime of murder.  If, however, infanticide operates only as a potential included offence on a murder charge, and if the Crown proves the essential elements of murder, the mother must be convicted of murder even though the homicide falls within the meaning of infanticide.” (***R v LB***, at para. 2)
  + “The two interpretations lead to dramatically different sentencing options.  If the mother can raise infanticide as a partial defence, and if she is successful and convicted of infanticide, she is liable to a maximum penalty of five years. Existing sentencing patterns suggest she could receive a non-custodial sentence…  However, if infanticide serves only as a potential included offence if murder is not proved and the mother is found to have committed murder, she must be sentenced to life imprisonment.” (***R v LB***, para. 3)
  + Mainly for procedurally + in terms of sentencing

**Lesser Included Offence**

**662 (1)** A count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count, includes the commission of another offence, whether punishable by indictment or on summary conviction, the accused may be convicted

**(a)** of an offence so included that is proved, notwithstanding that the whole offence that is charged is not proved; or

**(b)** of an attempt to commit an offence so included.

**Held:** Appeal dismissed (infanticide conviction held).

### Summary

1. Infanticide is a form of culpable homicide distinct from both murder and manslaughter
2. It simultaneously operates both as a substantive, stand-alone offence, and a partial defence to murder
3. The mens rea for infanticide is the mens rea for manslaughter: objective foreseeability of the risk of bodily harm
4. What distinguishes infanticide from these other forms of culpable homicide is its unique actus reus, and the requirement that the accused be afflicted by or suffering from a mental disturbance that is the effect of giving birth
5. For purposes of **CC s. 233** “mental disturbance” is understood in an ordinary sense; it is neither a legal nor a medical term of art
6. Moreover, while the mental disturbance must be present at the time at which the act or omission that causes the death of the newly-born child occurs, but there is no need to prove that the mental disturbance caused that act or omission

### Fault for Regulatory Offences

## *R v Sault ste marie*, (1978) SCC

**Offences grouped into three categories:**

1. **True Crime:** offences in which MR, consisting of some positive (subjective) state of mind must be proved- NOW some objective fault elements
2. **Strict Liability:** offences, in which no mens rea needs to be proved, but a defence of reasonable care/ due diligence is bailable
3. **Absolute liability:** no mens rea, no due diligence. Cannot be couple with imprisonment. (***BC Motor Vehicle Reference***).

### Absolute Liability

## *R v Wholesale travel* [1991]

**Ratio:** Affirms constitutionality of strict liability offences

**Reasons:** reverse onus provision of due diligence defence does not violate Charter, framework of ***R v Sault Ste Marie*** preserved. It is permissible for Parliament to enact strict liability offences which require the reverse onus provision

## *R v Transport Robert*, (1973)

**Ratio:** emphasizes constitutionality of AL offences provided that they are not combined with the possibility of imprisonment

**Facts:** William Cameron and Transport were the owners of the vehicle that was sold which lost its wheel. Accused were charged under **s. 84(1)** of the ON HTA, which provided that the owner and operator of a commercial motor vehicle are guilty of an offence where a wheel become detached from the vehicle while it is on the highway. **84.1(5)** provided that it is no defence that D exercised due diligence to avoid or prevent the detaching of the wheel. The penalty was a fine of not less than $2,000 and not more than $50,000 but the defendant is not liable to imprisonment or probation as a result of a conviction or as a result of failing to pay fine.

**Held:** Since there is no possibility that an individual convicted of the offence can be either imprisoned or placed on probation, **s. 84.1** of the HTA does not violate any liberty interested by **s.7**.

### Principles of Cases

**Conduct:**

|  |  |  |
| --- | --- | --- |
| **Case** | **Topic** | **Principle** |
| **Positive Acts** | | |
| ***Rex v Larsonneur***(1933)  \*\*BAD LAW/WRONG | *Voluntariness* | An act is voluntary if the actions leading to them were voluntary and they lead to the result |
| ***Kilbride v Lake***, [1962] | *Voluntariness* | An act is not voluntary if there are no alternatives. Involuntary= No Actus Reas |
| ***R v King*** (1962) SCC | *Voluntariness* | The act must be the result of a willing mind at liberty to make a choice. |
| **Omissions** | | |
| ***R v Colucci***(1965) ONCA | *Duty Imposed by Law* | When the offense is to deceive, out of necessity this would include omissions |
| ***\*R v Kirby***(2004) | *Duty Imposed by Law* | Matrimonial relationship creates a duty of care under s215(1)(B) at least try to do something to prevent the harm. |
| ***R v Instan***(1893) QB | *Duty Imposed by Law* | Moral obligations can give rise to certain legal duties to act. |
| ***People v Beardsly*** (1907) | *Duty Imposed by Law* | ‘Mere Moral Obligations’ don’t create a legal obligation. There has to be some fact or implication of care of the other party |
| ***R v Fagan*** (1969) QB | *Duty Imposed by Law* | Actus reas can be more than one act and can include an omission if the omission is part of a continuous act. (e.g. refusing to move car off police officers foot) |
| ***R v Miller***(1982) | *Duty Imposed by Law* | If you cause an act it creates a legal duty to mitigate the consequences of the act. |

**Circumstances:**

|  |  |  |
| --- | --- | --- |
| **Case** | **Topic** | **Principle** |
| **Sexual Circumstances** | | |
| ***R v Chase***(1987) SCC | *Sexual Natur*e- Objective Test | Test for Determining Sexual Assault: **Viewed in the light of all circumstances is the sexual or carnal context of the assault visible to a reasonable observer?** |
| ***R v V(KB)*** (1993) SCC | *Sexual Nature-* Intent? | If the conduct was of a sexual nature and victims integrity was violated it is sexual assault regardless of intent |
| ***R v Taylor*** (1985) Alta CA | *Sexual Nature* | Act which is intended to degrade or demean another person for sexual gratification |
| **Consent** | | |
| ***R v Cey*** (1989) | *Implied Consent* | Acts may go beyond what could be reasonably included in implied consent |
| ***R v Cuerrier*** (1998) SCC | *Vitiated by Fraud* | Consent is vitiation if there is risk of signification bodily harm- TEST: 1. Deceptive act must go towards gaining consent  2. Dishonesty must result in deprivation (including harm or risk of harm) 3. Harm must be serious and risk substantial |
| ***R v Mabior*** (2012) | *Vitiated by Fraud* | HIV- doesn’t vitiate consent if:   1. Wears a condom 2. Low viral load |
| ***R v Williams*** (1923) CA | *Vitiated by Fraud* | Consent vitiated if goes to nature and quality of the act- e.g. Singing Teacher Case |
| ***R v Jobidon***(1991) SCC | *Vitiated on Public Grounds* | Adults cannot consent to serious bodily harm. There is no such thing as a consensual fist fight |
| ***R v Paice*** (2005) SCC | *Vitiated on Public Grounds* | To vitiate consent the harm must be both **Intended** AND  **Caused** |
| ***R v Pappajohn***(1980) SCC | *Mistaken Belief* | Test for mistaken belief in consent is Subjective- the accused’s belief need not be reasonable but unlikely jury will believe him if not |
| ***R v Sansregret***(1985) SCC | *Mistaken Belief* | Mistaken belief not a defense, even if held honestly, if the accused arrived at the conclusion through wilful blindness |
| ***R v Cornejo*** (2003) ONCA | *Mistaken Belief* | Defense requires:  1. An air of reality to the belief (determined by totality of evidence)  2. The accused took reasonable steps to ensure consent was obtained |

**Consequences/Causation:**

|  |  |  |
| --- | --- | --- |
| **Case** | **Topic** | **Principle** |
| **But for Test** | | |
| ***R v Winning***(1973) | *But for Test* | If a crime would not have occurred “but for” the accused’s actions then there is factual causation |
| **Standard for Causation** | | |
| ***Smithers v The Queen*** (1978)  (Case Overruled) | *Significant Contributing Cause* | Contributing cause outside *de minimus* range |
| ***R v Nette*** (2001) SCC | *Significant Contributing Cause* | For all forms of homicide other than first degree- standard is **Significant Contributing Cause** |
| ***R v Harbottle*** (1993) SCC  Doesn’t matter if they are ‘party to’ vs principle | *Substantial Contributing Cause* (S.231(5)) | First degree murder has an elevated causation standard- Substantial cause. |
| **Remoteness** | | |
| ***R v Maybin*** (2012) | *Remoteness* | Undertaking a dangerous act that can reasonably be foreseen to cause further acts that may lead to death are not too remote. |
| ***R v Shilon*** (2006)\*\* | *Remoteness* | Dangerous actions that have a **reasonable foreseeability** of **immediate and substantial harm** create legal causation. |

**Mens Rea**

**Subject fault**

|  |  |  |
| --- | --- | --- |
| **Case** | **Topic** | **Principle** |
| ***Motive*** | | |
| ***Lewis v the Queen*** (1979) SCC | *Motive* | Motive is not essential but it is always relevant |
| ***Intention*** | | |
| ***R v Buzzanga and Durocher*** (1979) OCA | Intent Test | Test for Intent:  1. Conscious **purpose was the consequence** of the act 2. Certain or morally **certain that consequences would be brought** about by an act |
| ***R v Steane***(1947)  \*Not best intent analysis AB | Intent and motive | Distinction between act done with Intent and act done to bring about certain consequences |
| ***Knowledge*** | | |
| ***R v Theroux*** | Subjective test for knowledge | **subjective knowledge** of the prohibited act; and **subjective knowledge** that the prohibited act could have the consequence |
| ***Recklessness*** | | |
| ***R v G*** (2003) UKHL (\*overturns Caldwell) | Negligence cannot be Recklessness | Recklessness requires the accused to be subjectively of the possibility of the risk. Therefore, cannot be negligently reckless because negligence is objective |
| ***R v Sansregret*** (1985) SCC | Subjective Test | 1. Subjectively aware that the conduct created the risk of the consequence  2. Acted anyway in the face of the risk |
| ***Wilful Blindness*** | | |
| ***R v Sansregret*** (1985) SCC | Subjective Test | When the accused is 1. Aware of the need to make additional inquires and 2. sdeclines to make that inquiry |
| ***R v Lagace***(2003) OCA | Level of suspicion necessary | 1. No need to quantify suspicion, just that further inquiries necessary  2. inquiries insufficient if there is still suspicion after  (essentially need to ask question until you are 100% sure) |
| ***R v Briscoe*** (2010) SCC  \*Affirms Sansregret | WB can substitute for the MR. requirement of knowledge | The accused’s suspicions aroused to the point where there is a need to make further inquiries and then **deliberately choses** not to |
| ***R v Sandhu*** (1989) ONCA | Recklessness cannot substitute for knowledge | Suspicion and then acting recklessly is not sufficient for wilful blindness |

**Objective Fault**

|  |  |  |
| --- | --- | --- |
| **Case** | **Topic** | **Principle** |
| **Criminal Negligence**  220, 221, and 222(5)(b), 249.2, 249.3 | | |
| ***R v Kirby***(2004) | *Marked and Substantial Departure* | For **s.220**-Crim Neg Causing Death: Must have be a **marked and substantial departure** from the *standard of care of a reasonable person* in this situation |
| ***R v Tutton*** (1989) SCC | *Marked and Substantial Departure* modified | Objective standard that must be modified to take into account surrounding circumstances (Modified Objective Test) |
| ***R v JF*** (2008) SCC | *Marked and Substantial Departure* Objective- what he *ought to have known* | Crim negligence for s.220 has an elevated fault element as opposed to s.215 Penal Negligence |
| **Penal Negligence** | | |
| ***R v Kirby*** (2004) | *Marked Departure* | For **s.215-**failure to provide necessities of life: Must have be a **marked departure** from the standard of care of a reasonable person in this situation |
| ***R v Hundal*** (1993) SCC | *Marked Departure*- Modified Test | Modified Objective Test: All the **relevant circumstances must be taken into consideration** when assessing whether a reasonable person would have been aware of the risk |
| ***R v Beatty*** (2008) SCC  \*Best dangerous driving case | *Marked Departure* | A reasonable person in similar circumstances must have been aware of the risk. If there is no marked departure from the norm then there is no penal negligence |
| **Unlawful Act Manslaughter (UAM)** | | |
|  | | |
| ***R v Creighton***(1993) SCC | *Objective Foreseeability of Bodily Harm* | Test for UAM- **Objective foreseeability of bodily harm** in the context of a dangerous act. Foreseeability of death is not required. |
| ***R v Gosset*** (1993) SCC | *Objective Foreseeability of Bodily Harm* | Fault element is objective, absent any evidence that the accused was incapable of appreciating the risk of the conduct |
| **Strict Liability** | | |
| ***R v Sault Ste Marie*** | *Failure to exercise due diligence= Negligence* | No MR needs to be proved. However, defense of reasonable care/due diligence is available |
| ***R v Wholesale Travel*** | *Failure to exercise due diligence= Negligence* |  |

**Absolute Liability**

|  |  |  |
| --- | --- | --- |
| **Case** | **Topic** | **Principle** |
| **Absolute Liability** | | |
| ***R v Transport Robert*** | *No MR Requirement* |  |

# Answer Process –

1. In order to establish **beyond a reasonable doubt** that (accused) committed (offence) contrary to (CC provision), the act and fault requirements must first be satisfied.

* if there was a predicate offence committed, must first **satisfy** (prove act and fault requirements met) the principle offence\*\*

1. Breakdown

a. Act Elements

Voluntary

* “act was a product of conscious control, and as such was voluntary” (***Parks***)

Listed in the CC provisions

Includes consent

* have to consider whether there was a mistaken belief in consent, or if consent was vitiated
* can’t consent to a fight leading to serious bodily harm (*Jobidon*)

b. Fault Requirements

Must correspond to an act element (can’t exist on their own)

* subjective fault (intent, knowledge, recklessness, wilful blindness)
  + look for words like “wilful” for intent
* Objective fault (would the reasonable person have committed the act element given the circumstances)
  + Look for words like “reasonable”, “ought to have known”
  + Any form of negligence uses objective fault (i.e. criminal negligence)
  + Accused’s conduct must demonstrate a marked departure from that of the reasonable person (***Hundal***)
  + Objective foreseeability (***Creighton***)
* May use mixed subjective-objective fault test

1. Apply case facts to act and fault requirements
2. If a predicate offence (result crime), you would need to separately satisfy the act and fault requirements from the principle offence’s act and fault requirements

* Act elements include those of the principle offence, plus additional factors (ie. sexual assault is assault with sexual conduct)
* Fault requirement for principal offence is always subjective fault; fault requirement for predicate offence is always objective fault

1. Causation

* Only an issue when consequence is part of an offence (i.e. endangering life, assault causing bodily harm, death, risk of physical or economic harm, fraud, etc.)
* The accused’s act need merely be a **contributing cause of death outside the *de minimis* range (*Smithers*)**
* “but for” test (***Smithers***)
* Significant contributing cause (***Nette***)

1. Defences

* Address any counter-arguments that may be raised by defence
* Need to rule these out

# Forms of Liability

* **Cohate Liability: Offence Complete**
  + Principal - **s. 21(1)(a)**
  + Aiding - **s. 12(1)(b)**
  + Abetting- **s. 21(1)(c)**
  + Common Intention - **s. 21(2)**
  + Counselling- **s. 22**
* **Incohate Liability: Offence Incomplete**
  + Attempts- **s. 24**
  + Conspiracy- **s. 465**
  + Counselling a Crime Not Committed- **s. 464**
* **Other Liability (and stand alone offences): Take Place AFTER Offence**
  + Accessory After the Fact- **s. 23**
  + Accessory After the Fact to Murder - **s. 240**

## Aiding and abetting

**s. 21(1)** Every one is a party to an offence who

**(a)** actually commits it

**(b)** does or omits to do anything for the purpose of **aiding** any person to commit it; or

**(c)** **abets** any person in committing it (omissions might also be applicable here – ***Dooley***)

Aiding = helping

Abetting = encouraging (usually accused is present during commission of offence, where ‘counselling’ occurs prior to commission)

OR **Physically Helping** or **Psychologically Helping**

|  |  |  |
| --- | --- | --- |
| **Principal in the first degree** | | Person who actually commits the proscribed act (**s 21(1)(a)**). |
| **Principal in the second degree** | **Aider (Party)** | Does/omits to do anything that enables principal to commit proscribed act (**s 21(1)(b)**). |
| **Abettor (Party)** | Encourages/instigates principal to commit act (**s 21(1)(c))** during commission of offence |
| **Counsellor** | Through communication, encourages commission of crime (**s. 22**); prior to being committed |
| **Accessory before the fact** | | Aiding, abetting, or counselling; but not present at the commission of the offence |
| **Accessory after the fact** | | Helping the principal to escape after the crime has been committed (**s 23, 240**). |

**Attempts s. 24; Conspiracy s. 465**

MUST SHOW: causation analysis between the principal and the victim, then aiding/abetting of accused to principal

**Actus Reus: Degree of Participation**

* Typically requires a positive act (***Wilcox v Jeffrey***)
  + Sometimes, omission may satisfy AR if there is a legal duty that accused failed to meet (***Kulbacki*; *Russeel***)
* Mere presence does not constitute AR for party liability (***Dunlop and Sylverster*; *AA*; *Salaiko***)

**Mens Rea for Aiding and Abetting:** is doing something for the purpose of enabling the principal to commit the offence. Purpose means intention + knowledge. For aiding and abetting, the individual must know what the principle is going to do and then aid and abet. Wilful blindness is sufficient (***Briscoe***).

## *Wilcox v Jeffery,* [1951] UK KB - Abetting can be found in mere encouragement

**Ratio:** With regards to aiding and abetting, it does not matter what the illegal act is, provided that the aider and abettors knows the facts sufficiently well to know that they would constitute an offence in the principal. Abetting can be found through mere encouragement of a criminal act. Encouragement doesn't have to be directly communicated to person committing the offence.

**Facts:** Hawkins is a saxophone player and was invited to the UK to perform, but was denied a work visa. Wilcox was present when Hawkins landed at the airport and overheard the customs officer tell Hawkins that he would not be allowed to seek employment while in the UK, paid or unpaid. Despite this, Hawkins played a show. Wilcox purchased a ticket for the show and subsequently, wrote about that show for publication in his magazine, despite overhearing the customs officer earlier.

**Issue:** Can Wilcox be convicted of aiding and abetting an offence committed by Hawkins?

**Appellant’s Position:** argued he was not connected with the persons responsible for organizing the concert and that he only gone to the airport to report Hawkins’ arrival for his magazine.

**Held:** Conviction upheld. Guilty of aiding and abetting.

**Reason:** Presence not accidental; he was there not only to approve and encourage what was done, but to take advantage of it for his paper to be able to write a story and take photos. If he had protested, booed, or gone as a member of a claque trying to drown out the noise of the saxophone this might have been evidence that he was not aiding and abetting. The accused encouraged, by purchasing a ticket and applauding, Hawkins commission of illegal act. Plus, accused had knowledge and intention.

**Concurring (Devlin):** Most of the concert was legal and presence during one illegal item may fall within the accidental class envisaged in ***Coney***. There was abundant evidence that D was making use of this illegal item and his presence was therefore deliberate. The accused benefits from that illegal act, since it allowed him to take pictures and write a story.

**Note:** Accidental presence not evidence of aiding and abetting (***Coney***). You can be guilty even if you didn't do something, if you encourage someone to do it.

## *R v Coney* (1882), 8 QBD 534

**Ratio:** Where presence may be entirely accidental, it is not evidence of aiding and abetting. Where presence is prima facie not accidental, it is evidence. Non-accidental presence at the scene of the crime was not conclusive of aiding and abetting.

**Facts:** A prize fight took place in Ascot and 4 or 5 men were convicted of aiding and abetting the fight. The conviction was washed on the ground that the chairman did not give correct direction to the jury when he told them that, as the prisoners were physically present at the fight, they must be held to have aided and abetted. The court held that was wrong being that it was too wide.

**Reason:** “In the case of principals in the second degree that there must be participation in the act, and that, although a man is present whilst a feeling is being committed, if he takes no part in it, and does not act in concert with those who commit it, he will not be a principal in the second degree merely because he does not endeavour to prevent the feeling or apprehend the felon.” “To constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal or principals. Encouragement does not of necessity amount to aiding and abetting, a man may unwittingly encourage another in fact by his presence, by misinterpreted words or gestures, or by his silence, or non-interference. But, the fact that a person was voluntarily and purposely present witnessing the commission of a crime and offered no opposition to it affords cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted.

## *R v Kulbacki*, [1966] Man CA - failure to act can constitute AR of A&A

**Ratio:** To be convicted of aiding and abetting, accused must have done something to encourage the commission of the offence or omitted to do something which assisted in its commission. If a person is in a position of authority over the principal and has a legal duty to prevent the crime, then failure to exercise the duty is abetting. Can be by omission where you have the authority to tell someone to stop doing something dangerous. Silence or failure to act can constitute the AR of aiding and/or abetting.

**Facts:** D was the owner of a vehicle and sitting in the front passenger seat, while a 16-year-old female drove his vehicle in excess of 90m/h. He did nothing to stop, prevent, or attempt to stop of prevent the driver of the car from driving in this manner. D was charged with driving a motor vehicle in a manner dangerous to the publicby aiding and abetting the commission of the offence.

**Issue:** Can a failure to do something constitute the ARof aiding and/or abetting?

**Held:** Conviction upheld; D guilty of aiding and abetting

**Reason:** His lack of action did encourage her to violate the law. The failure to even protest is equivalent to encouragement. Only passengers in an unlawfully driven motor vehicle with authority over the car or any right to control the driver are subject to conviction as an aider and abettor (omission must be tied to a legal duty). The accused, owner of the car, sat in the front seat and permitted this young lady to increase the speed to such a dangerous rate. He did, by his lack of action, encourage her to violate the law… “the failure to even protected is equivalent to encouragement and fatal to his defence.”

**Note:** Controversial decision because the decision drops the requirement of intention to abet and holds that mere knowledge that the principal intends an offence is sufficient. Seems to be held on public policy grounds where parents should ensure their children safely operate motor vehicles.

**Note:** **(1)** If a person present at the commission of a crime in the opinion of the jury on sufficient evidence shows his assent to such commission, he is guilty as a principal, and **(2)** that assent may in some cases be properly found by the jury to be shown by the absence of dissent, or in the absence of what may be called effective dissent. (***R v Russel****)*

## *R v Dutchak,* 43 CCC 74, [1924] 4 DLR 973; *R v Hendrie* (1905), 10 CCC 298; *R v Dumont* (1921), 37 CCC 166, 64 DLR 128 and *R v Dick,* 87 CCC 101, [1947] 2 DLR 213

**Ratio:** Accused does not have a duty and is not under any liability to do anything as long as he did not encourage commission of offence.

## *R v Dunlop and Sylvester*, [1979] SCC - Mere presence does not equal liability

**Ratio:** Mere presence at the scene of a crime, without anything else, is not sufficient to ground culpability. Something more is needed: encouragement of the principal offender (abetting); an act which facilitates the commission of the offence (such as keeping watch or enticing the victim away) or an act which tends to prevent or hinder interference with accomplishment of the criminal act (such as preventing the victim from escaping or being ready to assist the prime culprit (aiding).

**Facts:** A gang rape of the complainant occurred in an isolated area, where members of a motorcycle club were having a party. Multiple men had intercourse with the complainant while she was being held by two other members of the group. She identified Dunlop and Sylvester as two of the men who attacked her but they denied the charge. They testified that they attended a meeting of the club at the dump earlier in the evening in question, and later were present in a beverage room where the complainant and a friend were. Later, the accused delivered a quantity of beer at the dump. Dunlop saw a female having intercourse; with whom, he could not say, but he believed to be a member of the motorcycle club. After three minutes he and co-accused left.

**Issue:** Is mere presence sufficient to find aiding and abetting?

**Held:** Appeal allowed; for Ds. Accused acquitted.

**Reason (Lamer):** Presence at the commission of an offence can be evidence of aiding and abetting if accompanied by other factors, such as prior knowledge of the principal offender's intent to commit the offence or attendance for the purpose of encouragement.“Dunlop and Sylvester bear no responsibility for what [Douglas] may or may not have done. Apart from presence earlier in the evening at the dump and at the Waldorf beverage room, the evidence against D&S is (i) their arrival at the dump with a substantial quantity of beer, and (ii) their observation of intercourse. Neither of these facts is capable in law of affording evidence that the appellants aided and abetted the commission of the crime of rape. They go only to mere presence and not to complicity”. There was no evidence that while the crime was being committed either of the accused rendered aid, assistance, or encouragement to the rape. There was no evidence of any positive act or omission to facilitate the unlawful purpose. One could infer that the two accused knew that a party was to be held, and that their presence at the dump was not accidental or in the nature of casual passers-by, but that was not sufficient. A person cannot properly be convicted of aiding and abetting in the commission of acts which he does not know may be or are intended. One must be able to infer that the accused had prior knowledge that an offence of the type committed was planned, ie. that their presence was with knowledge of the intended rape.

## *R v Salajko*, [1970] 1 CCC 352 Ont CA – Presence with pants down not aiding and abetting - Wrong

**Facts:** A girl was raped by 15 men in a lonely field. Accused was one of 3 charged in a gang rape. Two of the accused were identified as having had intercourse with the girl but she admitted that Salajko, did not have intercourse with her. He witnessed the act with his pants down. Acquitted on the grounds that his presence was mere acquiescence.

**Issue:**  Was the accused’s presence mere acquiescence or did it constitute aiding and abetting?

**Held:** Mere acquiescence, D acquitted.

**Note:** Law should be that active acquiescence (which is beyond a mere presence) is aiding and abetting

* Dickson in ***Dunlop*** and Wilson in ***Kirkness*** say this was wrongly decided. Pants down around ankles is encouragement
* ***Kirkness*** discusses aiding/abetting a death where the accused is guilty of manslaughter instead of murder due to *MR* req.

**Reasons:**  Absence of evidence to suggest something in the way of aiding, or counselling, or encouraging on the part of the accused with respect to that which was being done by the others, there was no evidence upon which a jury could properly arrive at a verdict of guilty against the accused. Found error in TJ’s charge which seemed to indicate that a person could abet another in the commission of an offence if, knowingly, he stood by while the offence was being committed.

## *R v Black*, [1970] 4 CCC 251

**Facts:** Victim was coerced to clubhouse where he was subjected to various sordid indignities. Many of the accused took an active part in torturing the victim while others stood around laughing and yelling.

**Held:** BCCA confirmed the convictions

**Reasons:** The spectators furnished encouragement to the perpetrators of the outrages and their mere presence in the circumstances of the case ensures against the escape of the victim. Thus, there was something more than “mere presence”.

## *R v Clarkson*, [1971] 3 All ER 344

**Facts:** Girl was raped in a room in a barracks in Germany by a number of soldiers. Another group of soldiers clustered outside the door and later “piled in” to the room. They remained there while the girl was raped. There was no evidence that the appellants had done any physical act, or uttered any word which involved direct physical participation or verbal encouragement. There was no evidence that they touched the girl, or did anything to prevent others from assisting her or to prevent her from escaping.

**Held:** CA quashed the convictions.

**Reasons:** It was not enough that the presence of the accused gave encouragement. “It must be proved that the accused intended to give encouragement; that he wilfully encouraged”. There must be an intention to encourage and encouragement in fact.

## *R v Russell*, [1933] Aus - Omission can constitute aiding/abetting

**Ratio:** Silence in some circumstances amounts to acquiescence and gives consent. Where there is a moral or legal obligation, failure to intervene amounts to support.

**Facts:** Accused’s wife took their children into the water and the three of them drowned together. The accused stood by and did not attempt to help or save them.

**Accused’s Defence:** His wife took her 2 children into the ocean, while accused stood on the shore (watched and did nothing). She drowned the 2 children and then commit suicide.

**Issue:** Is a man who stood by and watched while his wife drown herself and their two children guilty of manslaughter?

**Held:** For Crown; D guilty for the manslaughter (not murder) due to aiding and abetting.

**Reason (Cusen ACJ):** Guilty of manslaughter. In such a case a husband and father doing nothing to prevent a tragedy may well be taken as showing his assent to what he contemplated was likely to happen. “Jury would be justified in finding that the husband and father being present had by his attitude of non-interference, shown his assent to his wife’s purpose, and therefore that he was guilt of the offence charged. Silence in some circumstances amounts to acquiescence and gives consent”

**Reason (Mann J):** Guilty of manslaughter. Not only was the accused morally bound (legal duty) to take active steps to save his children from destruction, but by his presence and approval to his wife’s act, he became an aider and abettor and liable as a principal offender in the second degree. A husband has control over his wife. Russel had a positive legal duty with respect to his children. Therefore, his failure to do something in combination with a positive duty to act can lead to criminal liability. By his deliberate abstention from taking steps to save his children, and by giving encouragement and authority of his presence and approval to his wife’s act, he became an aider and abettor and liable as a principal offender in the second degree.

**Reason (McArthur J):** Guilty of manslaughter because he came under a duty to take all reasonable steps to prevent the commission of the crime. The neglect of the D was gross and culpable neglect. A D may be held wholly responsible for the injuries to, or the death of, a person, notwithstanding that such injuries or death were caused, not solely be the negligence of the D, but by the negligence of a third party coupled with the negligence of the D. It is sufficient if the negligence complained of is a directcause of the death or injury; it is not necessary that it should be the (sole) direct cause. The negligence is not too remote and may be relied on as a directcause as a matter of law. The rules applicable to persons having the care and control of young and helpless children or of helpless adults cannot be applied to persons having the care or, or having under their protection adults who are not helpless, but are quite capable mentally and physically of looking after themselves. **Not guilty of manslaughter of his wife.** Not guilty of murder because whether the D “assented to, concurred in or countenanced” the crime is a question of fact for the jury and since they found him guilty of manslaughter and not guilty of murder this has been decided by the jury.

**Difference between criminal negligence causing death versus aiding and abetting:**

* + there was no crim neg causing death at the time of this case
  + Some situations where we will not have possibility of charging someone with crim neg. Context might not support charge.

**Note**: A failure to do something can constitute aiding and abetting – that’s part of the moral of ***Dunlop v Sylvester***, failure to do something without something more is not aiding and abetting. A legal duty or knowledge may be that something more.

## *R v AA*, [2004] - Demonstrates Limit of Party Liability

**Ratio:** Mere presence insufficient for party liability

**Facts:** The 15-year-old complainant testified that the four accused sexually assaulted and forcibly confined her. The first accused, complainant’s ex-boyfriend, convinced the complainant to skip school with them and they went to his apartment. She wanted to leave but didn’t have money for bus fare. She eventually agreed to have intercourse with her ex-boyfriend (SW), the second accused forced her to have intercourse with him (LS), the third accused masturbated and ejaculated onto her (AA) and the fourth accused forced her to have intercourse with him (BC). No one prevented her from leaving by impeding her departure. The four accused took her to the mall and left her when she had arranged to meet a friend. She told her friend what happened and a week later told her mother what happened.

**Issue:** Is AA guilty of collective charges of sexual assault and forcible confinement?

**Held:** AA acquitted of the collective charges of sexual assault and forced confinement. However, guilty of sexual assault that was not part of the collective charge.

**Reason (Cole JA):** The SCC held that mere presence at the scene is insufficient evidence of guilt (***Salajko*; *Dunlop***). Although AA knew what was going on – so did the various accused in the SCC cases and did nothing to prevent it. The fact that AA entered the bedroom with the others does not meet the requirement of encouragement (***Salajko***). They were acquitted because there was no evidence of any positive act of encouragement. Nor is there any such evidence here (example: when AA and the complainant were in the living room talking and the other three accused came into the living room to tell the complainant that she should go onto LS’s bedroom, AA remained silent). Even though AA was close in proximity to the complainant, Salajko was acquitted despite the fact that his pants were down. AA’s own sexual acts not sufficiently linked to the actions of others to give rise to party liability. AA’s own sexually motivated acts were somewhat excluded by the others from the planning of their illegal activities.

**Note:** Although these cases have been criticized and a need for change is recognized, Cole notes that this is not for him to do.

**Potential Question:** If you were the Crown in this case, what argument would you make in support of the claim that AA was a party to other sexual assaults?

* + He could have been a party to the sexual assaults as an abettor. His act of entering the room, rather than merely sitting in the living room, this is not “mere presence”. He made an act to enter the room which could constitute engagement. Whereas leaving would have been considered “mere presence”. He had knowledge of what was going on.

## *R v Dooley*, [2009] Ont CA- Connection does not need to be but for cause

**Ratio:** Although there must be a “connection”, the connection should not be framed using the language causation. There must be a connection, but it need not be (but-for) causative in nature.Connection will vary from case to case and is fact-specific. It does not matter if your action does not actually have the effect of encouraging a person, you can still be found guilty of abetting the commission of a crime (e.g. you shout encouragement, but the person does not hear you)… **EXCEPTION:** where it was impossible for your encouragement to have had any effect to begin with.

**Facts:** D’s child was being physically abused by D’s spouse and in light of knowledge that the beatings were escalating and worsening failed to protect the child.

**Issue:** How must the accused’s actions be related to the principal’s behaviour in order for the accused to be fairly said to have aided and abetted the principal? Must the help or encouragement be a but-for cause of the principal’s behaviour?

**Held:** D (and wife) guilty of murder. TJ described aiding as “including any form of assistance” and abetting as “to (positively) encourage someone in any manner to commit an offence.”

**Reason:** Liability as an aider/abetter has both a conduct component and a culpable mental state component. Both components tie the accessory’s liability for the substantive crime to the actual commission of that crime by another. Accessorial liability is not inchoate. Although there must be a connection or link, the connection should not be framed using the language of but for cause. Some kinds of culpable assistance have no causative link to the crime committed. If “A” holds down the victim while the perpetrator kills the victim, A could not escape liability if, before A held him down, the victim had been rendered defenceless by the acts of others. Similarly, if A encouraged the perpetrator to commit a homicide and the perpetrator did so after receiving that encouragement, A could not escape liability even if the perpetrator would have killed the individual irrespective of encouragement.

* **Mens Rea**: The Crown must prove that the alleged aider or abetter acted “for the purpose” of aiding or abetting – meaning that they acted with the **intention** of aiding or abetting the perpetrator in the commission of the crime. This requirement can only be met if the D has knowledge of the crime that the perpetrator intends to commit.
* **Actus** **Reus**: “Aids” and “abets”. Conduct can include omissions (failure to act where there is a legal duty to do so). Liability is for the substantive crime and not for some preparatory step toward the commission of that crime, **there must be a connection between the alleged act of aiding and abetting and the actual commission of the crime by the person who is aided or abetted.** The connection does not mean causation. Any act or omission that occurs before or during the commission of the crime, and which somehow furthers, facilitates, promotes, assists or encourages the perpetrator in the commission of the crime will suffice, irrespective of any causative role in the commission of the crime.

**Note:** Mr. Ruby’s Example: An individual who shouts encouragement to another to commit a crime from a distance where the other person could not possibility hear the shouts of encouragement could not be said to have encouraged the commission of that crime. As such, that person could not be liable, as an abettor should the other person commit the crime.

**Note:** **S. 23.1:** You can be found guilty as an aider or abettor EVEN IF the principle himself cannot be found guilty. **S. 23.1** states that **sections 21** to **23** apply in respect of an accused notwithstanding the fact that the person whom the accused aids or abets counsels etc. cannot be convicted of the offence.

### Some Hypotheticals

* **Consider**: A wants to break into V’s house via an upstairs window and steal a TV. B, knowing that A intends to break into V’s house, leaves a ladder leaning up against the house in order to facilitate the theft.
* **Question**: does B aid or abet in the following hypotheticals?

*Before A’s arrival a third-party removes the ladder and as a result A is unable to enter V’s house.*

1. B is guilty of aiding or abetting.
2. B is not guilty of aiding or abetting.

*A sees the ladder but decides to shimmy up an adjacent drainpipe instead, and breaks into V’s house.*

1. B is guilty of aiding or abetting A.
2. B is not guilty of aiding or abetting A.

*A does not see the ladder and so shimmies up an adjacent drainpipe and enters V’s house.*

1. B is guilty of aiding or abetting A.
2. B is not guilty of aiding or abetting A.

### Aiding and Abetting Actus Reus Summary

* Typically requires a positive act (***Wilcox v Jeffrey*)**
  + Omission might suffice, if there is a legal duty (***Kulbacki*; *Russell***)
* Mere presence not sufficient to constitute AR for party liability (***Dunlop and Sylvester*; *R v AA*; *Salajko***)
* The person who did the offence needs to be aware of the aiding act (***Larkins v Police***)

# Mens Rea: Purpose of Enabling the Principle to Commit the Offence

As stated in section **21(1)(b)**, for conviction the accused must have done or omitted to do something “**for the purpose of aiding**” another in the commission of the offence.

**Mens Rea:** subjective purpose (intention + knowledge) (***Briscoe, Hibbert, Mariani***)

* + pre condition for intent is knowledge (***Briscoe***)
  + trafficking cases: ***Poitras, Greyeyes, Ahamad, Wood*** - key distinction between facilitating sale (trafficking) and facilitating purchase (no offence)

**Purpose** = intention (***Buzzanga and Durocher***) + knowledge of what principal is going to do + intending to aid in doing so do

**General Principles in Drug Charges:**

* + if it is incidental, and you do this thing merely to help the buyer - **not guilty of trafficking**
  + if you do something to assist the seller, **you are a party to trafficking**
  + if you do something that looks like trafficking, i.e. carrying drugs from seller to buyer, likely found **guilty of trafficking**

## *R v Poitras*, [1974] SCC

**Ratio:** Trafficking must aid in the sale but not the purchase of the drugs. If your help in purchasing drugs takes the form of trafficking, then this will make the person an agent of trafficking, even though their intention was to help the buyer.

**Facts:** An undercover cop, A, told L he wanted hash. L and A found the accused, Poitras. Poitras told L he did not have any hash but was on his way somewhere to get some. L accompanied Poitras to the house and bought the hash and brought it back for A.

**Issue:** A buyer of drugs is **not considered** a trafficker and buying drugs is not a criminal offence. The words “to buy” do not appear in the definition of “trafficking” therefore if Poitras is “an agent of” A and he is a mere purchaser can he come under the same protective umbrella? Did Poitras intend to aid the seller or the purchaser?

**Prior Proceedings:** TJ acquitted on the ground that a buyer was not a party to the offence of selling and so neither would someone aiding the buyer be guilty. CA imposed a conviction for trafficking in hashish.

**Held:** Poitras guilty of trafficking drugs pursuant to **section 21(1)(b)**(aiding an unknown seller). **Seller** of drugs = trafficker; **Buyer** of drugs ≠ trafficker. The key issue is whether the accused merely aided and abetted the **purchase of drugs** (not guilty of trafficking), but if the accused aided or abetted the **sale of drugs** the accused is guilty of trafficking.

**Ratio:** Trafficking involves the sale not the purchase of drugs. So, accused must aid or abet the sale of drugs to be guilty of trafficking. Aiding purchasing of drugs is not a crime.

**Reason:** TJ found that the three essential elements of a sale were present: (1) agreement or bargain; (2) payment of the price; (3) delivery or conveyance of the property. Alternative view is that Poitras aided and abetted an unidentified vendor in selling, and L in delivering the narcotic to A. Poitras did unlawfully traffic a narcotic. Though the accused might be acting for the buyer, the accused could also have been doing one or more of the acts which the legislation made illegal and constituting “trafficking”. Delivering, selling, or trading in drugs or offering to, are each forbidden with or without agency. Accused did not aid trafficking, because everything the accused did was to help someone purchase a drug. He was not doing anything to help sell drugs.

**Dissent:** One who buys a narcotic does not by that act engage in trafficking, and similarly, one who assists in a purchase is not guilty of trafficking through **s. 21.** **Section 21** makes a person a party to an offence if he does or omits to do anything for the purpose of aiding any person to commit it. If this area of law is interpreted too broadly then everyone who buys narcotics can be said to be aiding and abetting the person selling them the drugs. This broad sense fails to take account of the words for the purpose of aiding. Accused went with L and that L bought the drugs from an unknown dealer and then delivered the drugs to A. An agent for a purchaser who does not engage in any of the acts enumerated in **section 2** of the *NCA* cannot be guilty of trafficking. The accused was not acting for the purpose of aiding in the sale or delivery or distribution of a narcotic. The evidence supports the finding that the accused was aiding the purchase.

**Note:** The dissent is later picked up as precedent in ***Ahamad*** and ***Woods***?

**Note:** **Trafficking:** you sell, deliver or transport drugs. **Buyer:** no offence in purchasing drugs (but can be guilty of possession).

**Note:**

* Key Idea: the sale of drugs is sufficient for trafficking (CDSA s. 2)
  + seller of drugs= a trafficking
  + buyer of drugs is not automatically considered a trafficker.
* key issue is whether
  + accused aided or abetted the sale of drugs - then they are guilty of trafficking
  + aided or abetted the purchase of drugs- then they are not guilty of trafficking
* complication: when accused acts as agent for seller, or engages in conduct that would other wise render accused a trafficker
  + Example: if an accused is helping a buyer but in doing so transports/delivers drugs, then there is an argument that the accused is engaged in trafficking

## *R v Ahamad*, [2004] ON SCJ

**Facts:** Undercover cop asked Ahamad and another man for cocaine. The other man offered but Ahamad intervened and said he knew someone inside the building. Ahamad claims that the other man was selling stolen goods and felt sorry for the officer who was in a wheelchair and feared he would be ripped off. He went into the restaurant but the men selling would not give the drugs without the money. Ahamad gave the officer his wallet to hold on to while he purchased the cocaine. He came back out and received $20 from the cop and then purchased the crack and provided it to the cop. Ahamad claims he did not know the men inside and did not get anything from the deal.

**Held:** For D; acquitted of criminal liability.

**Reason:** Motive not completely irrelevant – Ahamad said he felt bad for the cop because he was in a wheelchair. The essence of his actions was that of a purchaser, not a trafficker. Follows ***Greyeyes***– if your acts are such that you intended to aid purchaser solely then you are not guilty of trafficking.

**Note:** In ***Wood***, CA ***Ahamad*** was wrongly decided because the TJ conflated motive and intent. Nevertheless, even if his intention were to only aid the undercover cop, his actions were that of one involved in trafficking.

## *R v Hibbert*, [1995] SCC

**Ratio:** (1) **Mens rea**of **s 21**: the word “purpose” means “intent”, the accused does not need to “desire” the outcome in order to be guilty of aiding and abetting (an accused acts with the purpose of aiding in the commission of an offence if the accused does or omits to do anything with the intention of bringing about that consequence). (2) Duress does not negate the MRbut it can excuse an accused even if the Crown successfully proved the elements of the offence. (3) The phrase “intention in common” in **21(2)** means that 2 people must have in mind the same unlawful purpose, it does not require that they have a common desire or motive.

**Facts:** Bailey threatened Hibbert with a handgun and was told to bring him to Cohen’s apartment. Hibbert refused and Bailey took him to the basement and hit him in the face several times. Hibbert was also ordered to call/lure Cohen and tell him to meet in the lobby of the apartment. Hibbert made no effort to intervene and claimed he had no opportunity to run away or warn Cohen. Bailey shot Cohen, but Cohen survived. CA convicted Hibbert of aggravated assault.

**Issue:** Is the defence of duress applicable in the context of aiding and abetting an offence under section **21(1)(b)**?

**Held:** Judgement for the accused. New trial ordered because TJ misdirected jury and said that duress negates the MR and did not instruct the jury on the fact that duress can be used as an excuse even if the Crown proves all the elements of the offence.

**Reason: (1)** Interpreting “for the purpose of” to mean desire would result in absurdity and thus cannot legitimately be ascribed as Parliament’s intention. **(2)** The words “intention in common” mean that the party and the principal offender must have the same unlawful purpose in mind, but does not mean that they must have the same motives and desires. The defence of duress will be available as an excuse if the accused acted under threat. An accused cannot rely on the common law defence of duress if he or she had an opportunity to escape from the circumstances causing duress. Only legislation where the offender must desire the result to be guilty can duress negate the MR **(3)** This means that the MRfor **section 21(2)** can not be negated by duress, but it can be used as a defence.

**Lamer’s Conclusion:**

1. Duress can in some instances be relevant for MR, but will depend on whether the mental state was specified by Parliament in its definition of the offence is such that the presence of coercion can, as a matter of logic, have a bearing on the existence of *MR*.
2. A person who commits a criminal act under threats of death or bodily harm may also be able to invoke an excuse-based defence (either **section 17** or CL duress), regardless of whether the presence of coercion has a bearing on the MR.
3. The mental state specified in sections **21(1)(b)** and **21(2)** are not susceptible to being “negated” by duress (i.e. lack MR). They may, however, seek to have their conduct “excused” through the operation of the common law defence of duress.

**Ratio:** (1) Purpose = intention, (2) Purpose does not mean desire, because then someone who did something while opposed to it would not have done it purposely, (3) So if the accused does or omits to do anything with the intention of bringing about that consequence, they are an aider, (4) Even if you do not desire to aid someone, you can still act for the purpose of aiding them

## *R v Greyeyes*, [1997] SCC

**Ratio: I**ndividual cannot be found to be a party to trafficking if they solely aid the purchaser. Minimal participation in sale is not trafficking. If the accused aids and abets the sale of narcotics then guilty of trafficking – hinges on the accused’s intention.

**Facts:** Undercover cop asks accused for cocaine. The accused directed officer to where he could buy drugs, helped to facilitate the price and complete the transaction, and also accepted $10 from the officer (purchaser) for helping facilitate the sale.

**Issue:** Can someone either acting as an agent for a purchaser or assisting a purchaser to buy narcotics be found to be a party to the offence of trafficking under section **21(1)** of the *Code*, by aiding or abetting the sale?

**Prior Proceedings:** TJ acquitted the accused on the ground that he was only helping the buyer, and so could not be guilty of trafficking, whether as a direct party or as an aider or abetter. Saskatchewan CA reversed that and entered a conviction.

**Held:** Accused guilty of aiding and abetting the trafficking of drugs because he did far more than aid the purchasing. If he had just aided or acted as an agent for the purchaser or assisted in purchasing of the narcotics then he would not be found to be a party.

**Ratio:** (1) Cannot impose a greater degree of criminal liability on a party that did less by way of criminal wrongdoing, (2) cannot be found guilty of aiding or abetting trafficking on the basis of the purchase alone, (3) Minimal participation in sale is not trafficking.

**Reason:** Accused did more than aid in the purchase of narcotics, he found the source and made a profit. Trafficking does not include purchasing; such an interpretation would be too broad. Trafficking is a serious offence accompanied by a great deal of social stigma and sentencing can be quite high. This idea should be extended to third parties as well. Reluctant to sanction an approach, which encourages convictions in cases where the assistance rendered, is **solely** to the purchaser. The proper charge in these circumstances would be aiding and abetting the possession of narcotic, and not trafficking.

* Advantages to this approach: **(1)** punishment should fit the crime, trafficking is harsh (stigma and sentencing – trafficking up to life in prison and possession maximum 7 years); **(2)** symmetry: someone whose acts are designed to aid a purchaser, even if they incidentally benefit the seller, it is more fitting that they share the culpability and stigma of the purchaser rather than the vendor; **(3)** it still punishes the aider and abettor for their involvement. In the current case the accused did far more than act as a purchaser. There was a concerted effort to transfer narcotics (ie. locate seller, brought buyer, introduced parties, acted as spokesperson, negotiated price of the drugs, passed money over to seller, accepted money for facilitating the deal). Without assistance, the purchaser would not have even been allowed in building.

**Cory J:** believes that by assisting a purchaser to buy narcotics they aid and abet the sale and thus are a party to the offence of trafficking. The accused may have been motivated solely by the desire to help the buyer, but what he intended to do was facilitate the sale of narcotics, and this is a culpable intention.

### Note on Trafficking

“**traffic** means, in respect of a substance included in any of Schedules I to IV,

(a) to sell, administer, give, transfer, transport, send or deliver the substance,

(b) to sell an authorization to obtain the substance, or

(c) to offer to do anything mentioned in paragraph (a) or (b),

otherwise than under the authority of the regulations.”

* trafficking means selling
* facts matter- think of the facts in this case- if the intention is to help someone sell drugs by getting you to buy them
  + “but for” the help, the transaction would not have occurred
  + are you getting money for directing people to a certain buyer?
* selling - trafficking
* buying- not trafficking
  + mere fact that you are acting as an agent for the buyer does not mean that you are not a trafficker
  + if you introduce the buyer to the seller/take a cut/ negotiate you can be a trafficker
  + did you do something ONLY for the purpose of aiding the purchaser, and would those acts constitute trafficking?
  + Can consider motive, although per *Lewis* it is not necessary to do so

### Questions to Ask on Exam

* was the accused acting for the buyer or seller?
* Did it only assist the buyer?
* if buyer- did he go above and beyond? Seek a particular seller? Plan an active role in the transfer (knock on the door, negotiate, receive a cut)? If yes to any of thee, party to trafficking
* If assisted seller, party to trafficking
* Would the action by itself constitute trafficking, regardless of the buyer or seller being there?

## *R v Wood*, [2007] AJ No 763

**Ratio:** **MR for trafficking** is the intent to do the act, such as sell, offer to sell, transport, offer to transport, deliver or offer to deliver and requires knowledge that the chattel is an illegal drug or substance. No motive is needed.

**Facts:** Wood charged with trafficking. Constables Knox and Coughlan attended an area with the intention of making opportunity drug purchases. They met the accused who was panhandling at the time and Coughlan asked the accused about the possible purchase of a gram of cocaine. Accused and the 2 officers walked to the Safeway store where the accused got the buy money from Constable Knox and approached the window of the suspects vehicle. After purchase, accused passed the drugs to Coughlan. Accused was given a small piece of cocaine (commonly referred to as a “hoof”, for facilitating the transaction).

**Elements of Trafficking:** **s. 5** of the *Controlled Drug and Substances Act* makes it a serious crime to “traffic” in, or possess for the purposes of “trafficking”, any of a long list of substance including cocaine. **S. 2(1)** defined traffic as to sell, give, transfer, send, deliver or offer to do any of the other acts listed.

**Prior Proceedings:** TJ acquitted because the respondent gave incidental assistance, lacked the necessary MR for trafficking and his acts were not necessary to the consummation of the purchase.

**Reasons:** There is no secondary or specific intent necessary to be guilty of trafficking in a narcotic. One simply has to know that it is a controlled substance and has to intend the forbidden act actually done. No evidence that this accused was a victim of mistake, misunderstanding, inadvertence, forgetfulness or misrepresentation. He intended to do what he did and was more than willing. Accused kept the buyer and seller separate and shuttled between the two with the money. It is at least arguable that he gave the cocaine to the buying undercover constables. He certainly “transferred” and “delivered” the cocaine.

**Held:** Appeal allowed. Conviction for trafficking entered.

## *R v Briscoe*, [2010] SCC

**Ratio:** Purpose = intention + knowledge. Knowledge can be imputed via WB (ie. knowledge is a prerequisite for intention: an accused can only act with the intention of aiding the principal if the accused knows what it is that the principal is going to do).

**Facts:** C, a 13-year-old girl, and her young friend were lured into a car on the false promise that they would be taken to a party. Briscoe drove the group, which included L and three youths, to a secluded golf course. L had said earlier in the day he wanted to find someone to kill. Appears the idea was generally received and C was chosen to be the victim. On arrival Briscoe opened the trunk and at L’s request handed him some pliers. Briscoe stayed at the car as the others went into the golf course under the guise of seeking the party. Briscoe re-joined the party around the time that one of the youths hit C from behind with a wrench. For a moment, Briscoe held on to C and angrily told her to be quiet or shut up. Briscoe then stood by and watched as C was brutally raped and murdered. All five involved were charged with kidnapping, aggravated assault, and first-degree murder.

**Issue:** What is the knowledge requirement for MR? Is the doctrine of WB relevant to mens rea?

**Held:** Appeal should be dismissed and uphold the order of a new trial on all charges.

**Ratio:** WB is a subjective test. Accused must “know that they are going to commit the crime”- need to be WB of the specific crime committed (***Viallancourt***). An accused can only act with the intention of aiding the principal if the accused knew what is it the principal was going to do. Knowledge can be imputed via WB. Recklessness is not sufficient for purpose (mere recklessness will not suffice for the fault element for aiding and abetting). Accused must have to know the likelihood of that exact offence happening but does not have to know the specifics of how that offence will take place specifically.

**Reason:** ARwas proven. MRrequirement reflected in the word “purpose” under **s.21(1)(b)** has two components:

* + Intent – Crown must prove that the accused intended to assist the principal in the commission of the offence
  + Knowledge (in order to have the intention the aider must know that the principal intends to commit the crime, although he or she need not know precisely how it will be committed)

WB is distinct from recklessness and involves no departure from the subjective inquiry into the accused’s state of mind, which must be undertaken to establish an aider’s or abettor’s knowledge. Wilful blindness does not define the MR required for particular offences; rather it can substitute for actual knowledge whenever knowledge is a component of the MR. WB imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries. Briscoe’s own testimony suggested he had a strong, well-founded suspicion that someone would be killed at the golf course and that he may have been wilfully blind to the kidnapping and prospect of sexual assault. He deliberately chose not to inquire about what the members of the group intended to do because he did not want to know. If the accused did not know the person they were aiding or abetting was engaged in a crime then it would be wrong to convict them.

## *R v Mariani*, [2007] ON CA

**Facts:** Deceased was beaten to death by a group of teenagers who had come to the park to confront a rival group. The rival group was not there and a couple did not want to go home empty handed so they decided to rob the deceased and his innocent friends. Deceased refused and was pushed to the ground by the accused and kicked. Not clear who delivered kick that killed him.

**Defence Argument:** Appealed conviction on the ground that he cannot be a party to death unless he is party to kicking.

**Issue:** Can Mariani, who didn’t actually kick the deceased, be found guilty of manslaughter?

**Held:** Conviction upheld.

**Ratio:** The offence of aiding and abetting manslaughter has a subjective and objective mental element. The subjective mental element relates to the “party” aspect of the charge, whereas the objective element pertains to the manslaughter aspect. Subjective intent to aid or encourage the commission of an unlawful assault (aiding). Objective foresight that the assault would lead to the risk of bodily harm (manslaughter). There are four elements that must be met to convict:

1. the person alleged to have been a party was present at assault or was close to the victim when he was being kicked;
2. the presence or conduct had the effect of aiding or encouraging the perpetrators to commit the offence;
3. the person alleged to have been a party must have intended (subjective) to aid or encourage the assault;

If these first three elements are met, using a **subjective test**, then the **party** issue is satisfied.

1. a reasonable person would realize the assault would lead to serious bodily harm (BH neither trifling nor transient).

This last element is met using an objective test and deals with the **manslaughter** issue.

**Reason:** You need to subjectively intend to aid the assault and Mariani knew that once the victim was on the ground an assault was going to take place. He did not need to know what the consequences were going to be. There was a subjective intent to aid in the pushing. There was objective foresight that kicking leads to bodily harm. There was an assault causing death. Therefore the accused is guilty if aiding and abetting manslaughter.

To be found guilty of aiding and abetting the crime of manslaughter there must have been:

1. The commission of the assault; (2) Causing death by the assault; (3) **Subjective intent** to aid or encourage the commission of an unlawful assault (aiding) (they need to know what is about to happen, do not need to know that death is likely to result); (4) **Objective foresight** (***Creighton***) that assault would lead to the risk of BH but not necessarily death

## *R v Helsdon*, [2007] ON CA- the mens rea for abetting is the same as for aiding

**Ratio:** the **mens rea for 21(1)(c)** - abetting is the same as for the mens rea for **21(1)(b).**

**The *mens rea* of section 21(1)(c): intended** that his words or acts **encouraged** the principal (***R v Curran***). Despite the difference in wording between the two paragraphs, the courts commonly treat the *mens rea* requirement for aiders and abettors as the same. Thus, the analysis with respect to section **21(1)(b)** applies equally.

### Aiding and Abetting Mens Rea Summary

* *Mens rea* for **s. 21** is **subjective purpose or intention** (***Briscoe***; ***Hibbert***; ***Mariani***)
  + Pre-condition for such intent is **knowledge** (***Briscoe***), which can be imputed via wilful blindness (***Briscoe***)
* Mere recklessness insufficient for liability under **s. 21(1)(b)** or **(c)** (***Roach***)
* Trafficking (***Poitras***; ***Greyeyes***; ***Ahamad***; ***Wood***) – distinction btwn facilitating sale (trafficking) and facilitating purchase
* **General rule:** if you do something which is incidental to the sale of drugs, and you do that thing for the purpose of helping the purchaser, you are not a party to trafficking (although, might be for possession)

# Other Forms of Party Liability: Common Intention and Counselling

## Common Intention

**s. 21(2)** Where two or more persons form an **intention in common** to carry out an **unlawful purpose** and to assist each other therein and any one of them, in carrying out the common purpose, **commits an[other] offence**, each of them who **knew or ought to have known** that the commission of the offence would be a probable consequence of carrying out the common purpose is a **party to that [other] offence**.

* **s. 21(2)** deals with cases where, a person may become a party to an offence committed by another which he knew or ought to have known was a probable consequence of carrying out an unlawful purpose in common with the perpetrator
  + liability under **s. 21(2)** relates to offences other than those included within the original unlawful plan
    - extends the breadth of liability for offences that your accomplice committed outside of the scope of what you planned to commit, as long as the offence was committed while committing your planned offences.
* e.g. murder while robbing a bank
* murder get treated differently in **21(2)** - need to subjectively foreseeable death so the “or ought to have known” does not apply in relation to murder (***Martineau***)
* A common intention is when two or more persons “have in mind the same unlawful purpose.”
  + Where a secondary party joins in on an assault by a primary party, there will be a common intention formed.
* The unlawful purpose must be distinct from the offence that is in fact committed.
  + Like **229(c)** – Unlawful object murder – there is a distinction between unlawful purpose or object, and the secondary offence that occurs (i.e. death for **s. 229(c)**
  + also, the unlawful purpose must be distinct from the offence that is in fact committed
  + also, both include “if you knew, or ought to have known”
    - but in **s. 229(c)**, “ought to have known” has been struck, because it is unconstitutional (need a subjective foresight of death, not objective)
* For **s. 21(2)** in intending to carry out an unlawful purpose, another offence is committed, it is the common intention of knowing or whether they ought to have known that the other offence was a probable consequence.
  + “Ought to have known” does not apply for murder or attempted murder – or offences with subjective faults

**Mens Rea:** an intention to engage in the unlawful activity

* you do not need to understand how this unlawful activity will take place
* “or ought to have known” - enables party to have a lesser fault element (subjective vs objective) - ***Martineau***

## *R v Jackson (R v Davy)*, [1993] SCC

**Ratio:** A person can be convicted of manslaughter if they do not possess the requisite MRfor murder, but do have the requisite MR for manslaughter (objective test from ***Creighton***). Person can be a party to a lesser offence than the principal. Person may be convicted of manslaughter who aids and abets another person in murder, where a reasonable person in all the circumstances would have appreciated that bodily harm was the foreseeable consequence of the dangerous act being undertaken.

**Facts:** Davy and Jackson charged with first-degree murder. Jackson found guilty for first-degree murder at trial, Davy guilty of second-degree. Davy thought Jackson was joking when he said he was going to murder victim, remained outside while Jackson committed the murder. TJ’s instructions to jury said it was unlikely they could find him guilty of manslaughter via **21(1)(b)** or **(c)**, or via **21(2)** – so jury found him guilty of second-degree murder. Conviction was set aside at CA and new trial ordered regarding instructions of manslaughter (with regards to Davy).

**Issue:** Can liability under **21(2)** extend to a lesser-included offence?

**Held:** For D; Appeal dismissed.

**Reason (McLachlin):** A person may be convicted of manslaughterwho aids and abets another person in the offence of murder, where a reasonable person in all the circumstances would have appreciated that bodily harm was the foreseeable consequence of the dangerous act which was being undertaken. “The reasoning in ***Trineer***, coupled with ***Creighton***, suggests that the appropriate MR for manslaughter under **s. 21(2)** is objective awareness of the risk of harm. It must follow that a conviction for manslaughter under **s. 21(2)** does not require foreseeability of death, but only forseeability of harm, which in fact results in death)

* + **MR for manslaughter under** **s. 21(2)** is objective forseeability of bodily harm (***Creighton***), which results in death; and NOT forseeability of death
  + **MR for murder:** subjective forseeability of death
* For a person to be guilty of aiding and abetting another in the offence of murder under **s. 21(1)(b)** and **(c)**, they must possess the requisite MR for murder. Where the aider or abettor does not have the MR required for murder, he may be guilty of the lesser offence of manslaughter if he possesses the requisite MR for that offence (which is objective foresight of the risk of non-trivial bodily harm – ***Creighton***)
* It is not possible to convict of murder, even under **s. 21(2)**, without proof of subjective awareness of risk of death.
* principal found guilty of murder. Party to manslaughter, because you lack the MR for murder, but you understood that bodily harm was the foreseeable consequence of the principles actions.

# Constitutional Validity of s. 21(2)

## *R v Logan*, [1990] SCC

**Ratio:** Fault element for common intention. On charges where SUBJECTIVE FORESIGHT is a constitutional requirement (murder and attempted murder), the objective component of **s. 21(2)** is not justified.

**Facts:** During one of a series of robberies by the respondents and others, a person had been shot and severely injured. Neither of the accused did the shooting. Logan admitted to being one of the robbers. Convicted of attempted murder at trial, CA substituted convictions for armed robbery.

**Issue:** Does **s. 21(2)** infringe **s. 7** and **11(d)** of the *Charter*?

**Held:** For D; Appeal dismissed – lower offence of armed robbery remains.

**Reason:** Parliament is able to enact laws that require different fault elements for principal offenders and parties. But, **if there is a constitutionally required minimum level of subjective fault for principal of an offence, a party to the offence cannot be convicted on the basis of a degree of MRbelow the constitutionally required minimum**. When there is a constitutional requirement of subjective foresight, the words “ought to have known” are inoperative when considering under s. **21(2)** whether a person is a party to any offence where it is constitutional requirement for a conviction that foresight of the consequences be subjective, which is the case for attempted murder”

* **Common intention case** – “ought to have known” unconstitutional for attempted murder.
* **MR for murder:** subjective forseeability of the risk of death (***Vaillancourt***)
  + to be a party, you would nee this subjective intent
* if the second offence is murder or attempt murder, you cannot proceed on the basis of objective foresight
* homicide charges that only require objective foresight: manslaughter and criminal negligence causing death
  + MR= Objective forseeability of harm + marked and substantial departure

# Defence of Abandonment

* applicable to:
  + **Common Intention** - **s. 21(2)**
    - accused is entitled to defence of abandonment if they abandon the common intention before offence is committed
  + **Aiding and Abetting-** **s. 21(1)(b)** and **(c)** ***(R v Gauthier)***
* Abandonment requires that there be a “change of intention on the part of the accused and, where practical and reasonable, a timely communication of the accused’s intention to abandon the common purpose from those who wish to dissociate themselves from the contemplated crime to those who desire to continue in it. (***R v Whitehouse***)
* ***R v Whitehouse***- there must be a timely communication of the intention to abandon the common purpose from those who wish to dissociate themselves from the contemplated crime to those who desire to continue in it
  + “timely communication” endorsed by SCC in ***R v Miller and Cockriell***, [1976] SCC
    - Timely communication is *determined by the facts of each case* but where practicable and reasonable it ought to be such communication, verbal or otherwise, that will serve **unequivocal notice** upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw (***R v Whitehouse***)
* ***R v Gauthier*** - the accused must take “in a manner proportionate to their participation in the commission of planned offence, reasonable steps to neutralize or otherwise cancel the effects of their participation or prevent the commission”
* Where a group has jointly planned to commit a rape and murder and the accused assisted in the initial part of the illegal plan but then leaves part way through, he or she does not abandon the offence and can still be convicted of murder.
* **Defence of Abandonment requires:**

1. Change of intention
2. Timely communication (***Whitehouse***)
3. Unequivocal communication (***Whitehouse***)
4. Reasonable steps in the circumstances to neutralize effects of the accused’s (proportional) participation (***Gauthier***)

## *R v Whitehouse* (1940 BC CA)

**Facts:** Appellant was convicted for murder which occurred during robbery. Appellant was aided and abetted in the commission of the crime by 2 youths, who fled the scene immediately before or just at the time the victim was struck down by the appellant.

**Held:** Appeal allowed, new trial ordered.

**Reasons:** Test for defence of abandonment: (1) Timely communication, and (2) Unequivocal notice

**Timely Communication:** “one essential element ought to be established in a case of this kind: where practicable and reasonable there must be timely communication of the intention to abandon the common purpose from those who wish to dissociate themselves from the contemplated crime to those who desire to continue in it. “ (***R v Miller and Cockriell)***

**Unequivocal Notice:** Timely communication “must be determined by the facts of each case but where practicable and reasonable it ought to be such communication, verbal or otherwise, that will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw”

## R v Miller and Cockriell (1976 SCC) - endorses “timely communication” requirement

**Facts:** Defence of abandonment advanced on Cockriell’s behalf, but no evidence he communicated “his intention to abandon the common purpose” to his associate, Miller, and “timely communication” of such intention amounting, where “practicable and reasonable”, to “unequivocal notice” has been characterized as “an essential element” of this defence (***Whitehouse***)

## *R v Gauthier*, [2013] SCC- changed the law surrounding the defence of abandonment

**Facts:** Cathie Gauthier was charged with bring a party, with her spouse, Marc Laliberté, to the murder of their three children.

**Crown’s Position:** According to the Crown, Gauthier planned murder as part of a murder suicide pact and supplied murder weapon. She did not prevent the children from being poisoned by spouse. Therefore, she helped her husband to kill the children

**Cathie’s Defence:** She said that she had not bought the medication to poison her children, that she was in a dissociative state on December 31, 2008 when she wrote some incriminating documents and that this state meant that she could not have formed the specific intent to commit the murders. Alternatively, she claimed to have abandoned the common purpose of killing the children and to have clearly communicated her intention to do so to her spouse.

**Prior Proceedings:** Jury found her guilty of first degree murder of her three children and the CA upheld guilty verdict, concluding that TJ had not erred in refusing to put defence of abandonment to jury since it was incompatible with defence’s principal theory.

**Reasons:** the accused must take “in a manner proportionate to his or her participation in the commission of the planned offence, reasonable steps in the circumstances either to neutralize or otherwise cancel out the effects of his or her participation or to prevent the commission of the offence.”

# Counselling

**s. 22(1)** Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.

**(2)** Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.

* ought to have known” creates a lower fault element for certain offences – unconstitutional to **s. 7** (***Logan***)

**(3)** For the purposes of this Act, “counsel” includes **procure, solicit or incite**.

# Co-Perpetrator Liability

## *R v McMaster*, 1996 SCC

**Lamer CJC:** Where a trier of fact is satisfied that multiple accused acted in concert, no requirement that they decide which accused actually struck the fatal blow

## *R v Biniaris*, 2000 SCC

**Facts:** Involved a beating inflicted by 2 separately charged perpetrators. There was considerable evidence that although the accused had assaulted the victim, the accused had not inflicted the fatal blows.

**Reasons:** Accepted 3 part theory of liability - liability as principle, as co-perpetrator, or as aider or abettor. Upheld conviction for second degree murder stating that there were two alternative routes to a second degree murder conviction, neither of which was dependant on proof that the accused actually caused the victim’s fatal injuries.

## *R v Ball*, BCCA

**Ratio:** where two people are charged as co-perpetrators, they can be convicted on that basis rather than as parties even if each has not performed every act that makes up the AR of the offence

**Abetting vs Counselling:** Counselling generally occurs before offence, whereas abetting takes place during offence

**Actus Reus:** An accused must have counselled another person to be a party to a criminal offence

**Mens Rea:** Intention to counsel offence

**Recall:** ***Dooley***: must be some connection between the offence and the acts of aiding/abetting, but does not need to be causal.

**Counselling Requirements:**

* + the kind of encouragement that could in principle make a difference. But doesn’t necessarily, in fact, make a difference
  + there must be some sort of reception from the principle offender, understanding that they are being encouraged

## *R v O’Brien*, [2007] SCC

**Ratio:** Counselling someone determined to do the crime anyway. If principal is in the process of deciding, and accused encourages her, then accused is guilty of counselling. The law is uncertain with respect to whether an accused would be guilty if a principal had already decided to commit a crime. For a conviction of counselling others to commit offence it may be sufficient if a conversation before the offence was supportive of X committing the offence, thus actively inducing the commission of the offence.

**Facts:** O’Brien convicted of counselling Richards to rob a store. R bought drugs from O’Brien. O’Brien told R that it would be easy to rob since there was only a 16-year-old girl working. Also, agreed that R should paint her face.

**Issue:** Had Richards already made up her mind to commit the robbery, or could O’Brien’s words/actions constitute counselling?

**Held:** O’Brien guilty of counselling

**Reason:** Before the discussion with O’Brien, R had not made up her mind to rob the store. Crown does not have to prove motive – but if there is evidence then it can be relevant to proving intent. Counselling is an active inducement of commission of offence. “The appellant has not satisfied me that the judge erred in concluding that his words, considered in context, were encouragement and hence counselling… His discussion with her prior to the robbery was supportive.” O’Brien’s comments were supportive and made a difference in Richard’s decisions to commit the crime. Further, Richards had not yet made up her mind to commit the crime “This suggests Ms. Richard had not made up her mind to rob Elliott’s, that she was still in the process of deciding what to do at the time Mr. O’Brien made this and his various other comments to her, contrary to Mr. O’Brien’s submission that the robbery would have occurred with to without his comments”

# Accessory After the Fact - ss. 23, 23.1, 240, 463

Being an accessory after the fact is made an offence by **s. 463** ( or **s. 240** in the case of murder)

**s. 23(1**) An accessory after the fact to an offence is one who, ***knowing* (wilful blindness; subjective**) that a person has been a party to the offence, receives, comforts or assists that person for the ***purpose* (intention**) of enabling that person to escape.

**s. 23.1** For greater certainty, **sections 21 to 23** apply in respect of an accused notwithstanding the fact that the person whom the accused aids or abets, counsels or procures or receives, comforts or assists cannot be convicted of the offence.

**s. 240** Everyone who is an accessory after the fact to murder is guilty of an indictable offence and liable to imprisonment for life

**s. 463** creates the penalties for this provision – same punishment for that of the attempt, but this is its own offence and does not make the accused an actual party to that offence

* can be an accessory after the face even if the principal was not convicted (e.g principal too young for criminal liability)

**Accessory after the fact applies only if an offence has been committed**

**BUT, you re not a party to that offence, you are guilty of a distinct one**

* the acts contemplated by “receiving, comforting, or assisting” are numerous and ensnare anyone who helps in any way
  + person does not become an accessory, merely by failing to inform the authorities of the principal’s whereabouts
* two fault requirements: knowledge and purpose

It is not necessary that the principal was convicted (***Camponi***) however it hasn't been decided if the other person can be charged if the principle was ACQUITTED based on merits of the case

**Actus Reus** (***R v Camponi***)

1. Conduct on the part of the accused which had the effect of receiving, comforting, or assisting a person
2. The circumstance that such person had been a party to the offence with respect to which the accessoryship is alleged

**Mens Rea** (***R v Camponi***)

1. Intention with respect to the conduct alleged
2. Knowledge by the accused of the circumstance that the person was a party to the offence with respect to which the accessoryship is alleged

* there is also a free standing fault element which is the ulterior intention or desire that the person assisted escape as a consequence of the conduct alleged
  + this makes being an accessory a s**pecific intent** offence

**Circumstances Where you Might Use This:**

* if the principle offender is killed
* if someone has killed someone, but they acted in self defence (or they have another defence)
* if they are found not criminally responsible
* principle escape the jurisdiction
* principle is under 12 years, not subject to criminal liability

## *R v Duong*, [1998] ON CA

**Ratio:** Where the Crown proves the existence of a fact in issue and knowledge of that fact is a component of the MR of the crime charged, WB as to the existence of the fact is sufficient to establish a culpable state of mind. Accused must know that Lam committed the murder; and wilful blindness can substitute for knowledge. Accused must know what specific crime the principle committed. Wilful blindness can substitute for knowledge, so long as it is knowledge of the specific offence. It is not a defence to argue that the principal would not have told the defendant even if he had asked.

**Facts:** 2 people killed. Reports on TV that Lam did it. Duong let Lam stay with him after seeing the broadcasts. D said he didn’t want to know what L did so he never asked. Accused found guilty via wilful blindness on trial and he appealed the decision

**Issue:** Did the accused know that his friend Lam had been a party to murder? Does **s. 23(1)** require proof that the accused knew or was wilfully blind to the fact that L committed a murder, or just that he had committed some unlawful act?

**Held:** Duong guilty of accessory after the fact to murder. Duong was WB and thus imputed with the knowledge of the offence.

**Crown’s Argument:** accused can be convicted if the accused knew or was WB to the fact that Lam committed a criminal offence.

**Defence Argument:** Accused can be convicted only if he knew Lam had been a party to the murder; but WB has no application

**Reason:** Knowledge has to relate to the specific offence. Here it can be determined from the facts that the accused was wilfully blind to the offence of murder, and wilful blindness satisfies the MRknowledge requirement of accessory to murder. A charge laid under **s. 23(1)** must allege the commission of a specific offence and the Crown must prove that the alleged accessory knew that the person assisted was a party to that offence. Accessory after the fact to murder contains its own penalty provision that is more severe than those attached to party accessories to other crimes. Accused had knowledge of Lam’s offence due to wilful blindness. The court held that liability turns on the decision not to inquire once real suspicions arise and not on the hypothetical result of inquiries that were never made.

* Penalty provision is **s. 240:** Every one who is an accessory after the fact to murder is guilty of an indictable offence and liable to imprisonment for life.
  + supports the inference that a conviction cannot be entered for accessory after the fact to murder with generalized knowledge that a principle has committed some undetermined crime.

**Mens rea:** knowledge (or wilful blindness imputing knowledge). Subjective standard

* if you think he did manslaughter, rather than murder, then could only be found as accessory after the fact to manslaughter
* if you thought you were accessory to murder, but it was only manslaughter, you can only be found guilty to manslaughter. This is because the offence must have occurred.

### Criminal Offence Liability Summary

1. **Principal liability** (**21(1)(a))**
2. **Party liability** 
   1. **Aiding**: helping, aiding in commission of criminal act (at time act is committed) – **21(1)(b)**
   2. **Abetting**: encouraging (at time act is committed) – **21(1)(c)**
   3. **Common Intention**: intention to carry out unlawful purpose with another, and crime committed – **21(2)**
   4. **Counselling**: encouraging commission of a crime (prior to crime being committed) – **22**
3. **Accessory after the fact**: helping (after crime has been committed) the principal to escape – **23, 240**

**s. 23.1**: **sections 21 to 23** apply notwithstanding that the person who the accused aids cannot be convicted of the offence.

# Incohate Offences

## aTtempts

Attempts are a form of inchoate criminal liability because the intended criminal act remains incomplete, anticipatory, or incipient

* + you can be punished for trying to commit an offence, even though you were not successful
* main focus is on the MR, because that is what turns an otherwise innocent act into an offence
* The fault element is governed by **s. 24** of the *Criminal Code*
  + **24** **(1)** Every one who, **having an intent** to commit an offence, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.
    - You can be found guilty of attempting to do the impossible, so long as that impossibility is an offence
  + **(2)** The question whether an act/omission by one with 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**.
    - This means that the *MR* is not determined by the trier of fact (jury) and thus, it may be raised at appeal
  + The *mens rea* is the focus of this offence because it is often the presence of this that creates the *actus reus*
* **Mens rea-** an intent to complete the offence in question
* **Mens rea for attempt murder**: Specific intent to kill (***Ancio, Logan***, read in light of ***Martineau***)
* **Actus reus-** qualitative test. Did the accused do enough to move beyond mere preparation towards furtherance of the offence. No generally accepted test, but must be more than “mere preparation”. They must constitute “furtherance”.

### Mens rea

What is the **fault element for attempts**? – the **intention to complete the offence**

* Both ***R v Ancio*** and ***R v Logan*** (**s. 21(2)** common intention cases) are concerned with the offence of attempted murder
  + ***Ancio*** gave us MR for attempt murder, ***Logan*** gives constitutional required minimum for MR for attempted murder
* What is the *mens rea* for attempted murder?
  + ***R v Ancio*,** – CITE this for the fault element of attempted murder
    - Intent to commit the offence under **ss. 229** and **230** of the *Code*?
      * If an accused can be found guilty of murder for unintentionally causing the death of a victim per **229** or **230**, then an accused ought to be capable of being found guilty of attempted murder for attempting to bring about an offence under **229** or **230** regardless of whether death results
      * All murders involve a killing; so in order to be guilty of attempted murder one must attempt to kill; thus the fault element for attempted murder must be a specific intent to kill
      * Although you could, at the time, be found guilty of murder for an unintentional killing, you could not be found guilty of attempted murder for an unintentional attempt to kill
        + So, **229(a)(ii)** – intent to cause bodily harm knowing death may result – is not attempted murder because there is no specific intent to kill
  + ***R v Logan***
    - discusses the *mens rea* for attempted murder, and asking what the constitutional minimum *mens rea* for that offence is against the background of **s. 7** of the Charter
    - “***Ancio*** established that a specific intent to kill is the *mens rea* required for a principal on the charge of attempted murder.  However, as the constitutional question was not raised or argued in that case, it did not decide whether that requisite *mens rea* was a constitutional requirement.”
      * + Lamer bases his argument on stigma: “The stigma associated with a conviction for attempted murder is the same as it is for murder… The attempted murderer is no less a killer than a murderer: he may be lucky—the ambulance arrived early, or some other fortuitous circumstance—but he has the same killer instinct.”

an attempted murder is no less a killer… except for the fact that he didn’t kill

* + - Attempted murder requires a **constitutionally required minimum *MR* of subjective foresight of death**
      * Specific intent to kill is the actual *MR*, but the constitutional min is subjective foresight of death
        + So, the constitutional requirement is lower than what they decided to legislate?
  + For attempted murder, it is nothing less than the specific intent to kill (***Ancio*, *Logan*,** read with ***Martineau***)

### Actus reus

There is no general test for determining the *actus reus* of an attempt – it is very fact specific

* Generally: the acts constituting the *actus reus* of an attempt must be **more than mere preparation**

### Summary of Case Ratios

* ***Robinson***: last step test
* ***Barker***: manifestation test; res ipsa loquitur
* ***Cline***: fact specific inquiry, no general principles
* ***James***: furtherance test
* ***Sorrell and Bondett***: equivocal acts + intent = attempt
* ***Deutsch***: qualitative test as leading SCC case

# Attempts: Mens Rea

***Ancio*** tells us what the MR for attempted murder is; ***Logan*** tells us what the constitutionally required minimum MR for attempted murder is. ***Ancio*** and ***Logan*** also stand for the general proposition that attempt require specific intent and subjective foresight.

## *R v Ancio*, (1984 SCC)- Attempt Murder MR= Specific Intent to Kill

**Ratio:** MR for attempt murder = specific intent to kill (**s. 229(a)(1)**. (This is like ***Vaillancourt*** but for attempt murder). MR for attempt in general is taken to be the specific intent to commit the completed offence

**Facts:** Ancio wanted to speak with his estranged wife, and broke into her building with a shotgun. The man she was living with investigated the noise, and threw a chair at Ancio. The gun discharged, missing the man, and a struggle followed. After his arrest, Ancio told the police that he “had [the man] by the throat and I would have killed him.”

**Prior Proceedings:** TJ found that Ancio intended to force his wife to leave and found attempt murder.

**Issue:** What is the MR for attempted murder? Is MR in attempt murder limited to an intention to cause death or bodily harm likely to cause death, or is it extended to the intention to do some action constituting murder as defined in **229 or 230** of the *CC*?

**Reasons:** There are arguments in favour of having a less stringent mens rea requirement for attempted murder, but this position is illogical because attempted murder aims at the full completion of a murder and should thus not have a mens rea falling short of specific intent to kill.

**Held:** Appeal dismissed, new trial ordered.

**Note:** This came before ***Vaillancourt***, which held that fault element for murder must be subjective. So **s. 230** is unconstitutional.

## *R v Logan*, (1990 SCC)- Subjective Foresight of Death

**Ratio:** MR for attempt murder is at least subjective foresight of death. The constitutionally required minimum fault element for attempted murder is subjective foresight of death. This is the fault element below which Parliament cannot legislate. (but the MR for attempted murder actually is specific intent to kill (***Ancio***)). ***Logan*** is the ***Martineau*** of attempted murder. Generally, it is intent to bring about the completed offence.

**Facts:** During a series of robberies by the respondents, a person had been shot and severely injured. Neither of the accused had done the shooting, but Johnson had admitted to being one of the robbers. He said he had no intention to shoot and that no discussion of doing guns had taken place. Logan had boasted of being involved in planning the robberies.

**Prior Proceedings:** TJ instructed the jury that the Crown must show beyond a reasonable doubt that Logan knew or ought to have known that someone would probably shoot with intention of killing. Logan was convicted at trial, but CA overturned the conviction and substituted a conviction for armed robbery.

**Issue:** Does **s. 21(2)** of the *CC* infringe rights to life, liberty and security of the person under **s 7** of the *Charter*?

**Reasons: *Ancio*** established that a specific intent to kill is the MR required for a principal on the charge of attempted murder. However, as the constitutional question was not raised or argued in that case, it did not decide whether the requisite MR was a constitutional requirement. It is a constitutional requirement that no one can be convicted of murder unless the Crown proves beyond a reasonable doubt that the person had subjective foresight of the fact that the death of the victim was likely to ensue (***Martineau***). The MR of attempted murder cannot, without restricting **s. 7** of the Charter, require of the accused less of a mental element than that required of a murderer under **s. 229(1)(i)**, that is, subjective foresight of the consequence.Stigma associated with conviction of attempted murder is the same as that of murder.

**Held:** Appeal dismissed.

# Attempts: Actus Reus

* **AR for attempts:** doing something, or omitting to do something, for the purpose of carrying out an intention
* must be more than mere preparation (***R v Robinson***)
* if you have taken the last step in terms of preparation, anything you do afterwards can constitute an attempt (***R v Robinson***)
* there is no generally accepted test for determining the AR of an attempt, it is incredible fact specific (***R v Cline***)

### On Exam

* analyze MR first, and then make arguments about the facts and how they can amount to the AR
* there is no generally accepted test for determining AR (***R v Cline***), but we can generally say that the AR of an attempt must be more than mere preparation (***R v Robinson***)
* make the distinction between preparation and furtherance
* the distinction between preparation and attempt is a qualitative distinction (***R v Deutsch***) so there is no bight line test
  + consider the nature of the complete offence and the proximity to the act in question to the completed offence in terms of time, location and acts under the control of the accused that remain to be accomplished (***R v Deutsch***)

|  |  |  |
| --- | --- | --- |
| **Case Name** | **Facts** | **Principle** |
| ***R v Robertson*** (1916 KB) | Tied himself up in store to far robbery to get insurance money. Communication with insurance company would have been the last step. | Last step test |
| ***R v Barker***(1924 NZCA) | Wrote letters to boy asking to meet him, then when they met, asked him to walk with him down a part | First step thest |
| ***R v Cline***(1956 ONCA) | Asked boy to carry his suitcases, but he did not have any. Grabbed his sleeve, told him not to tell anyone, gave him money and ran away | AR is the next step after the preparation to commit the crime |
| ***R v James*** (1971 ONCA) | An officer saw James enter a vehicle and rifle through the glove box. James said he was going to steal the car and was looking for the keys. TJ said this was mere preparation. | Any step beyond preparation, not merely the last step before completion |
| ***R v Sorrell and Bondett*** (1978 ONCA) | Store owner closed early, two men knocked wearing balaclavas, and holding a gun. Owner did not let them in and they let. At trial, judge said that this did not go beyond mere preparation, as there was reasonable doubt that they were committed to robbing the store since they left so easily. | Acts that are indeterminately guilty or innocent can be determined by the MR |
| ***R v Deutsche*** (1986 SCC) | Appellant advertised for a secretary, and in the interview said she would be expected to have sex with clients to secure deals. He did not offer the position, but told the undercover officer to think about it and let him know. | In determining whether an act was mere preparation, consider the proximity of the act to what would have been the completed offence in terms of time, location, and acts remaining to be completed |

## R v Robinson (1915 KB)- Last Step Rule

**Ratio: The Last Step Rule-** An act beyond mere preparation for the crime is required. It you've taken the “last step” of your preparation, then you are no longer in the preparation stage and attempt can no longer be abandoned.

**Facts:** Accused tied himself up and hid jewels in an attempt to collect insurance money. However, he did not take additional steps to report missing jewels to insurance company and admitted his plan to the police

**Reasons:** The actions were to remote to lead to the commission of the offence. It was not “immediately connected”.

1. Acts remotely leading towards the commission of the offence are not to be considered as attempt to commit it, but acts immediately connected with it are; an act beyond mere preparation for the crime is required
2. Mere intention to commit a misdemeanour is insufficient
   1. The court advocated the last step rule, if you've taken the last step of your preparation, then you are no longer in the preparation stage
      1. the store keeper had not contacted the insurance company, therefore he still needed to take further steps from his end to complete the crime

## *R v Barker*, [1924] NZLR- First step/manifest criminality

**Ratio:** An act done with the intent to commit a crime is not a criminal attempt unless it is of such a nature as to be in itself sufficient evidence of the criminal intent with which it is done – not the test in Canada. Can be guilty of an attempt eve if it is impossible. The AR for attempts is either the first step or manifest criminality.

**Facts:** Barker gave letters to young boy. He wanted to have sex with him. He met up with him. However, the act was never complete because a detective showed up.

**Issue:** Did the accused have the necessary AR for attempted indecent assault? Was the conduct of Barker sufficient to show that he did an act for the purpose of accomplishing his goal?

**Held:** For Crown; Barker had both the *mens rea* and *actus reus* to be convicted – there was more than just writing letters. Actions of the accused constituted an attempt to commit indecent assault and sodomy as an adult stranger asking a young boy to go out on a dark night “to have some good fun” constitutes manifest criminal intent.

**Ratio:** It is possible to be guilty of an attempt even if the circumstances would not permit the completion of the offence. Merely writing lets is not sufficient for the AR. Walking with him was the “first step”. A criminal attempt is criminal intent made manifest by the very nature an circumstances of some act done in pursuance of that intent

**Reason:** Unequivocal act theory – the act must wear criminality on its sleeve

* What matters is whether the accused took steps that clearly indicated they were going to commit the offence
  + Stout CJ suggests the “**First step test**”: if an act is the first step in a series of acts done in pursuance to commit a crime, then the act constitutes the *actus reus* of an attempt to commit the act
    - walking with the boy was the first step in pursuance of an attempt to commit the crime. The mere fact that it was not possible to commit the offence because o the presence of the police is no matter.
  + Salmond J suggests a different test based on the idea that the *actus reus* for an attempt is an act that makes manifest the *mens rea* for an attempt – **an act constitutes an attempt if it wears criminality on its sleeve**
    - “A criminal attempt is criminal intent made manifest by the very nature and circumstances of some act done in pursuance of that intent”
      * in order words: an act constitutes an attempt if it wears its criminality on its sleeve
    - “An act done with intent to commit a crime is not a criminal attempt unless it is of such a nature as to be in the itself sufficient evidence of the criminal intent with which it is done. A criminal attempt is an act which shows criminal intent on the face of it. The case must be one in which *Res ipsa loquitur*.”
* Using Salmond J’s test: “I am of the opinion that these acts on the part of the accused constituted in law an attempt to commit the offences of indecent assault and sodomy. When an adult stranger asks a young boy to go out of the street into a paddock with him the darkness of a winter evening for five minutes in order ‘to have some good ‘fun’,’ the case is one of *Res ipsa loquitur* within the law as to criminal attempts. I consider, therefore, that the conviction should be affirmed.”

## *R v Cline*, [1956] ON CA- First step (after prep)

**Ratio:** Whether an action is an attempt is fact specific. The test for attempts is the next step after preparation. Where preparation to commit a crime is complete, the next step done by the accused to commit the crime may constitute the AR for an attempt.

**Facts:** Cline asked 12-year-old on street to carry his suitcases (which Cline did not have). The boy refused. Cline gave the boy money to promise not to tell anyone about the approach. Later, Cline approached the boy and asked the same thing. Cline was charged with attempted indecent assault.

**Issue:** Has Cline attempted an indecent assault? What is the test for attempts?

**Held:** Appeal dismissed. Cline guilty of attempted indecent assault. Cline’s preparation was fully complete and it was only necessary to lure the victim.

**Reason:** While both MR and AR required, focus is mainly on the intention of the accused. AR need not be a crime or a tort, or even a moral or social wrong. The *actus reus* must be more than a mere preparation to commit the crime. But, where the preparation is complete, the next step done by the accused to commit the crime may constitute in law the *actus reus* for an attempt. Accused had worn a disguise and picked a particular time. The last step was to lure the victim. If the accused were successful, there would have been no doubt that the crime was committed.

**Ratio:** There are six factors dealing with attempts:

1. There must be both MRand AR, but the criminality of the misconduct lies primarily in the intention of the accused;
2. Evidence of similar acts done by the accused before the offence with which he is charged, and also afterwards if such acts are not too remote in time, is admissible to establish pattern of conduct from which the Court may find MR
3. The Crown can raise such evidence without waiting for the defence to raise a specific issue;
4. It is not essential that the *actus reus* is a crime, tort, or even a moral wrong;
5. The *actus reus* must be more than a mere preparation; and the next step done by the accused to commit the crime may constitute in law the AR for an attempt.

## *R v James*, [1971] ON CA- furtherance

**Ratio:** Adopts **“first step approach”**. Actus reus must be beyond mere preparation, and be in the furtherance of commission of the offence. Actions designed to further the commission of the crime are attempts, and not just mere preparation. An accused can be found guilty of an attempt if he does any act in furtherance of the commission of an offence beyond mere preparation, regardless of whether it is the last action in his attempt to commit the offence

**Facts:** Accused found in a car that was not his, rummaging around in the glove compartment; when PO asked him what he was doing in the car, accused says “I was going to steal it so I could get home.”

**Prior Proceedings:** TJ acquits on the ground that the accused’s action was mere preparation. Crown Appeals.

**Issue:** What constitutes the AR of an attempt? Did James’ actions constitute AR for attempt?

**Ratio:** The **AR of an attempt** is any act in furtherance of the commission of an offence beyond mere preparation.

**Held:** For Crown; CA overturns acquittal and orders a new trial.

**Reason:** Accused’s actions were more than mere preparation; he was looking for keys that would further the commission of the theft. Accused can be found guilty of an attempt if he does any act in furtherance of the commission of an offence beyond mere preparation, regardless of whether it is the last act in his attempt to commit the offence. Going through the glove box is more than preparation. D’s actions were more than mere prep. They constituted actions designed to further the commission of the crime of theft.

## *R v Sorrell and Bondett*, [1978] ON CA

**Ratio:** Equivocal evidence “may” show intent. In order to establish the commission of an attempted robbery, the Crown must show that the accused: (1) intended to do that which would in law amount to a robbery (mens rea) which is question of fact and; (2) took steps in carrying out that intent which amounted to more than mere preparation (actus reus) which is a question of law

**Facts:** Accused went to store with balaclavas and a gun. Knocked on windows as the store had closed 15 mins earlier than usual. Manager said “we’re closed.” Accused simply just walked away. Accused were later found and charged with attempted robbery.

**Issue:** How does proof of MR relate to determining the AR of an attempt? Do the accused have MR for attempted robbery?

**Prior Proceedings:** CA held that the TJ had determined that there was no proof beyond a reasonable doubt of the accused’s intentions, and that while the CA might have reached a different outcome, the TJ was entitled to find as he did.

**Held:** For D not guilty of attempted robbery. Appeal dismissed.

**Ratio:** Equivocality with respect to MR of an attempt might result in equivocality with respect to the AR of an attempt. Equivocal acts coupled with intent to commit an complete offence may constitute an attempt. Attempts that are indeterminately guilty or innocent can be determined by MR. Sometimes lacking the requisite intent shows that your actions cannot constitute the AR.

**Reason:** TJ, in our view, could not make a determination whether the acts of the respondents went beyond mere preparation until he had first found the intent with which those acts were done. The issue whether the acts of the respondents went beyond mere preparation could not be decided in the abstract apart from the existence of the requisite intent. Intent here could not be logically determined. There was no proof beyond a reasonable doubt of the accused’s intentions, and that the judge was entitled to find as he did, even if the ONCA might find a different result. The acts of the respondents are not clearly beyond mere prep until it is found that they had the requisite intent to commit the act. There was no proof beyond a reasonable doubt that they had that intention Where the accused’s intention is otherwise proved, acts which on their face are equivocal, may none the less, be sufficiently proximate to constitute an attempt. **Where, however, there is no extrinsic evidence of the intent with which the accused’s acts were done, acts of the accused, which on their face are equivocal, may be insufficient to show that the acts were done with the intent to commit the crime that the accused is alleged to have attempted to commit**, and hence insufficient to establish the offence of attempt. Sometimes, the *actus reus* can only be determined if the *mens rea* of intent is present. In this case, while abandonment is not technically a defence in law for an attempt, it constitutes evidence in support of insufficient mens rea of the respondents, i.e. casts reasonable doubt on whether they intended to commit a robbery.

## *R v Deutsch*, [1986] SCC- cite this case for AR of attempts

**Ratio:** Distinction between preparation and an attempt is qualitative – look at proximity of the act relative to the nature of the

offence. To constitute AR for attempt, the act must go beyond mere preparation. Consider the nature of the complete offence and the proximity of the act in question to the complete offence in terms of time, location and acts under the control of the accused that remain to be accomplished.

**Facts:** D put an ad in the paper for secretaries for his company. D told interviewees they would be required to have sexual intercourse with clients, if it was required to secure a contract. D was charged with attempting to procure illicit intercourse with persons contrary so **s. 212**. He was convicted at trial, but new trial ordered on appeal.

**Issue:** What is AR for attempts? What acts constitute mere preparation? If there was intent, did they constitute attempts or prep?

**Held:** appeal dismissed. Finding for Crown – D guilty of attempt, acts were beyond mere preparatory steps. New trial ordered.

**Reason (LeDain J):** In general, the AR for attempts must be some step towards the actual commission of the crime that goes beyond mere acts of preparation. In this case, the actual crime could not be committed until one of the women actually had sex with another person; **however,** his offering financial rewards were a step in attempting to make this action occur. The holding out of the large financial reward in the course of the interviews would not lose its quality as a step in the commission of the offence, and thus as an AR of attempt, because a considerable period of time might elapse before a person engaged for the position had sex with prospective clients or because of the otherwise contingent nature of such sexual intercourse. Therefore the offer of employment constituted more than mere preparation. The court held that “an act which on its face is an act of commission does not lose its quality as the AR of attempt because further acts were required or because a significant period of time may have elapsed before the completion of the offence”. In this case, there would of been little else for the appellant to do to complete the offence other than making a formal offer of employment.

**Note:** On exam, state that the law stipulates that action is required that goes beyond mere preparation. Then cite ***Deutsch*** to discuss proximity. Then make an argument on the specific facts of the case with respect to whether an attempt was made.

### Summary of *Actus Reus* for Attempts

1. **Temporal proximity** (although there may be considerable time elapsed before a person hired would have sexual intercourse with prospective clients the act, did not lose its quality as a step in the commission of the offence).
2. Geographical proximity
3. What acts were really **under the control** of the accused

# impossible attempts

**s. 24 (1):** Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out intention is guilty of an attempt to commit the offence whether or not it was possible in the circumstances to commit the offence.

* Factual or legal impossibility is not a defence to an attempted crime (***Dynar***)
* you can still be convicted of an attempt to commit an offence, even if on the facts, it was impossible to do so (***Dynar***)
* **factually impossible:** the facts are such that you cannot do what you intended to do
* **legally impossible:** you can do what you intend to do, but even where you do that thing no crime would be committed

**s. 24(2)**: The question of 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.

**Types of Impossibilities** – don’t need to remember these distinctions, just remember impossibility is not a defence

* Type I - Impossibility due to inadequate means
  + eg. X tries to kill Y by shooting from too far away; or X tries to break into Y’s house but does not bring along the sort of tools that would enable her to do so
    - In short, the criminal design is frustrated by the surrounding factual circumstances
  + Typically viewed as illustrating **factual impossibility (means)**
* Type II - Impossibility due to inability to satisfy an element of the *actus reus* of the overall criminal design (i.e. there is no way the criminal design to commit the offence could be completed given the circumstances)
  + eg., X tries to kill Y by shooting Y when Y is asleep, but in fact Y is already dead; or X tries to steal money from a safe that is empty -- there is no way that the criminal design (to kill, to steal) could be completed, given the way that the world is
  + Again, typically viewed as illustrating **factual impossibility (elements)**
  + in such cases, there is no way that the criminal design (i.e. to kill) could be completed, given the way the world is
* Type III - Impossibility due to a missing element of the *actus reus* (i.e. even if criminal completes attempt, the action does not constitute a criminal offence because an element of the AR is missing.)
  + eg., X takes possession of property believing it to be stolen, when it is not; X smuggles a substance for a reward thinking it to be a narcotic, when it is merely sugar
  + eg. X smuggles a substance for a reward thinking it to be a narcotic, when it was merely sugar
    - In such cases, even if X does what she intends to do, she does not commit a criminal offence because an element of the *actus reus* (that the property be stolen, or be a controlled substance) will be missing
  + Typically viewed as illustrating **legal impossibility**

## *United States of America v Dynar*, [1997] SCC

**Ratio:** One can still be convicted for attempt even if their actions, if carried out, could not possibly have led to a crime; all that is required is the intent to commit the crime and actions attempting to further this intent (ie. legal impossibility is not a defence). Impossibility is not a bar to conviction for attempt. **S. 24(2)** does not draw distinction between actually impossible and legal impossible attempts, you can be liable for both. If an accused intends to commit a crime and has taken steps to further this intention beyond mere preparation, he will be convicted of an attempt despite the impossibility of actually committing the crime. However, you cannot be liable for attempting a crime that does not exist.

**Facts:** D attempting to launder money. He communicated with people in the US who were going to bring money across the border for him to launder and return to them. The people he was dealing with were undercover FBI agents. So, the money he was dealing with was not actually the proceeds of a crime. Therefore, it was technically impossible for D to commit the crime of money laundering because the money must have been a benefit of a crime. US wants D to be extradited and stand trial there.

**Issue:** Can you be convicted for an attempt even if it was impossible to commit the crime that you were attempting to commit?Does **s. 24(2)** draw a distinction between factually impossible attempts and legally impossible attempts?

**Held:** For Crown; D guilty of money laundering in Canada and thus can be extradited to the USA.

**Reason:** Dynar can only be extradited if it is determined that his conduct could lead to a conviction in Canadian law. Therefore, the question is if the impossibility defence frees him from liability for his attempt. Cory and Iacobucci find that his actions would have led to criminal attempt in Canadian law, and therefore he must be extradited. They state that **s.24** is clear: you can be convicted for attempt if you have the intent to commit the crime and you have performed some act in furtherance of the attempt that is more than a mere preparation. It is blatantly clear here that the accused had the attempt to commit the crime. He also performed several actions in a further attempt to commit the crime. He was only thwarted by circumstances completely out of his control. Just because the money he was receiving was not actually from the proceeds of crime, legal impossibility is no defence. Because the money the undercover agents asked the accused to launder were not proceeds of crime, the accused could not possible have known that it was not proceeds of crime. Therefore, even if he had brought his plan to fruition he would not have been guilty of any completed offence known to Canadian law.

* But, one cannot be convicted of an imaginary crime – believing you are committing a crime by importing sugar

## *R v Williams*

**Ratio:** Fault element for attempt is specific intent for that crime.

**Facts:**  Respondent and his partner engaged in unprotected sexual intercourse. Respondent then learned that he was HIV positive, and continued to have unprotected sexual intercourse with the complainant. Complainant took test for HIV and tested negative. Relationship ended one year alter. Several months later, complainant tested positive for HIV. Accused was charged with aggravated assault, criminal negligence causing bodily harm and common nuisance. TJ found accused guilty of aggravated assault and common nuisance. CA dismissed the latter and substituted aggravated assault for attempted aggravated assault.

**Issue:** What is the fault element for an attempt?

**Ratio:** The fault element for an attempt is a specific or direct intent to commit the offence in question.

**Reasons:**“the crime of attempt, as with any offence, required the Crown to establish that the accused intended to commit the crime in question”. In this case, the accused had done everything required to commit an aggravated assault but, due to the lack of simultaneity in these circumstances, the crime was not possible. Citing ***Dynar***, the court held that the AR of aggravated assault in this case “is present in an incomplete but more-than-merely-prepatatory way”

**Held:** Respondent stands properly convicted of attempted aggravated assault.

### Summary for Attempts

* ***Mens rea***for attempts: per **CC s. 24(1),** ***intent*** to commit the (completed) prohibited act
  + Attempt murder (**CC s. 239**) has a constitutional *MR* requirement of subjective foresight of death (***Ancio, Logan***)
  + MR for murder is specific intent to kill- this is higher that the constitutional minimum
  + mentioning the constitution requirement is icing.
* No generally agreed-upon test for the ***actus reus***of an attempt
  + **Must be more than mere preparation**; but how much more is a complicated issue (***Robinson, Barker, Cline, James, Sorrell and Bondett, Deutsch***)
* ***Robinson***: last step test
* ***Barker***: manifest criminality test; *res ipsa loquitur* – not Canadian law
* ***Cline***: fact specific inquiry, no general principles
* ***James***: furtherance test
* ***Sorrell and Bondett***: equivocal acts + intent = attempt
* ***Deutsch*: qualitative test - leading SCC case**
* Finally, note that factual or legal impossibility is **not** a defence to an attempt charge – see **CC s. 24(1)**

# Other inchoate offences

## conspiracy

**s. 465(1):** Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy:

**s. 465(1)(a):** every one who conspires with any one to **commit murder or to cause another person to be murdered**…is guilty of an indictable offence and **liable to a maximum term of imprisonment for life**

**s. 465(1)(c):** every one who **conspires** with any one to commit an indictable offence is guilty of an indictable offence and liable to the same punishment as that to which an accused who is guilty of that offence would, on conviction, be liable

**s. 463** punishments

* penalty for conspiring is more severe than the penalty for attempts, despite the fact that it is more remote than an attempt because conspiracy is premeditated while attempts might not be

At common law, a conspiracy is an agreement

* **(i)** by two+ people;
* **(ii)** to carry out an unlawful purpose, or
* **(iii)** to effect a lawful purpose by unlawful means
  + unlawful means are those that are contrary to provincial/federal law

There is an exception to this offence

* ***R v Kowbel*,:** at common law, a husband and a wife could not be found guilty of conspiracy, because judicially speaking they form but one person, and are presumed to have but one will.” – married!
* As well, there is no offence of attempting to conspire – ***R v Dery***
  + Because the acts that constitute a conspiracy are insufficiently proximate to the completed offence – they are more remote than are acts that constitute an attempt, and so can’t “jump over” the preparation hurdle BUT you can conspire for an attempted offence

**Example:** A and B conspire to commit murder. If B goes to commit the murder, and does not succeed, both A and B are still on the hook for the same punishment as if they have completed the murder (because conspiracy carries the same punishment as the completed offence would have). Note that B would also be on the hook for attempted murder.

**Example:** Suppose X and Y talk, and X intends to agree and intends to effect the agreement. Y does not intend to effect the agreement, but rather reports it to the police. Is X guilty of conspiracy? - No. X had the MR for conspiracy but the AR was missing

**Actus reus**: the agreement itself, to conspire

**Mens rea: (i)** an **intention** to that agreement and **(ii)** an **intention** to carry out or fulfill the agreement

* From ***R v O’Brien***
  + “Although it is not necessary that there should be an overt act in furtherance of the conspiracy to complete the crime, I have no doubt that there must exist *an intention to put the common design into effect…*The intention cannot be anything else but the will to attain the object of the agreement. I cannot imagine several conspirators agreeing to…commit any indictable offence, without having the intention to reach the common goal.”
    - There must be evidence – emails, texts, etc.

## Counselling an offence not committed

**s. 464** **(a):** every one who counsels another person to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence and liable to the same punishment to which a person who attempts to commit that offence is liable

**s. 464 (b):** every one who counsels another person to commit an offence punishable on summary conviction is, if the offence is not committed, guilty of an offence punishable on summary conviction

* only use if there is a case of counselling, but the offence counselled never actually occurred
* **MR** intent or conscious disregard to the substantial and unjustified risk (***R v Hamilton***)

**Actus Reus:** deliberate encouragement or active inducement of the commission of a criminal offence (***Hamilton***)

**Mens Rea:** Either intention that the offence counselled be committed, or knowingly counselled the commission of the offence while aware of the unjustified risk that the offence counselled was in fact likely to be committed as a result of the accessed’s conduct. Recklessness is sufficient (***Hamilton***).

## *R v Hamilton,* [2005] SCC

**Ratio:** **Actus reus:** deliberate encouragement or active inducement of the commission of a criminal offence. **Mens rea:** consists in nothing less than an accompanying intent or conscious disregard (recklessness) of the substantial and unjustified risk inherent in the counselling, that is, it must be shown that the accused either intended that the offence counselled be committed, or knowingly counselled the commission of the offence while aware of the unjustified risk that the offence counselled was in fact likely to be committed as a result of the accused’s conduct. Recklessness will suffice for the MR.

**Facts:** Accused offered for sale through the Internet access to a ‘credit card number generator’ in terms that extolled its use for fraudulent purposes. He also offered for sale bomb ‘recipes’ and information on how to commit burglaries. He was charged with four separate counts of incitement, and was acquitted on all at trial and at CA. Crown appealed to SCC on the ground that the TJ erred as to the *MR* for counselling and that recklessness should suffice. Even if it does not, the Crown contends that the TJ erred in confounding motive and intent

**Issue:** What is the requisite mental element for the offence of counselling the commission of an offence which is not committed?

**Held** For Crown; *mens rea* met by D. Appeal dismissed, new trial ordered.

**Reason:** TJ made an error of law in the distinction between motive and intent. It does not matter to society what an accused’s motive was, but only what the accused intended to do. In acquitting the accused, the TJ conflated motive and intent. The TJ’s conclusion that the accused did not intend to induce the recipients to use those numbers is incompatible with the other findings of fact. TJ’s assertion that the accused’s motivation was monetary immediately after her reference to these facts demonstrates an error of law as to the MR for counselling the commission of a crime

**Note:** No causal connection needs to be established because nothing has been caused

Examples

* Alice wants her husband dead. She meets with an undercover OPP officer and agreed to pay him $25k to kill her husband, with $2k paid in cash that day. Later that same night, she provided address and picture of her husband to the “hit man.” Alice should be charged with:
  + Conspiracy to commit murder – no, there is no meeting of the minds, no real agreement, no co-conspirator
  + Counselling an offence not committed – yes, this is clear
  + Attempted murder – could also be charged with this, hiring someone to commit a murder is the same as if you committed the murder yourself, MR is specific intent to kill, AR is taking steps beyond mere preparation (down payment, address, picture – ***Deutsch***test for AR)

# Defences (Mistakes; Intoxication; Mental disorder; Automatism; necessity; duress; self-defence; provocation)

## mistakes

### 1) Mistake of Fact

* mistake of fact is a defence to a criminal offence if the facts as believed by the accused would, if true, constitute a defence to the offence with which he or she is charged
  + if held as the accused took it to be would be one in which the accused did not commit the crime with which they are charged, then they are entitled to a defence of mistake of fact (***Pappajohn, Sansregret)***
  + e.g. mistaken belief in consent (***Pappajohn, Sansregret, Cornejo, Crangle, Darrach***)
  + mistake of fact operates by engaging an element of the offence
  + it is possible that there is a mistake that doesn't actually negate any element of the offence. Thus the mistake would not operate as a deference in that case
* it is a defence saying you lack the MR for the time, typically comes up when the fault element is knowledge
* if you are mistaken about the nature of the object, it is probably a mistake of fact (not knowing your knife is a switchblade)
* mistake of fact can negate the fault element of the offence

## *R v Beaver*, [1957] SCC- Mistake of fact is defence to possession, doesn't have to be reasonable

**Ratio:** Fault element for possession of narcotic offence is subjective knowledge and mistake of fact is a valid defence and accused should be acquitted on the basis of the defence of mistake of fact if he held an honest belief (not necessarily reasonable) that the substance was not a drug. Mistake as to the nature of the substance possessed by an accused will serve as a defence to a charge of possession. For crimes involving possession of a narcotic, the Crown must establish the accused has physical control of the prohibited substance knowing that the substance was prohibited. This fault element is subjective, so the court must address what the accused actually knew and not what the reasonably person would have known in the circumstances. This is so even if a reasonable person would have known that the substance was prohibited.

**Facts:** D talking to undercover cop, money and drugs exchanged. D claims to have intended to rip-off cop by giving him sugar instead of morphine. Jury heard evidence that D had no knowledge that the substance was a narcotic, but honestly believed it was sugar. The package turned out to actually contain morphine. D charged with trafficking and possession.

**Issue:** was a defence of mistake of fact available to the accused? If the accused honestly believe that the package contained sugar of milk rather than drugs should he be acquitted due to the defence of mistake of fact?

**Held:** Acquitted on the charge of possession, but conviction of trafficking upheld.

**Reason:** CC definition of possession requires knowledge of drug possessed. If the jury believed the accused, then he was not guilty because he did not have the necessary fault element. Therefore, the defence of mistake should have been left with the jury in this case. Accused should still be found guilty of trafficking because he did in fact sell drugs to the undercover cop. For crimes involving possession of a narcotic, the Crown must establish that the accused had physical control of the prohibited object/substance**knowing that the substance was prohibited.**Thus, a mistake as to the prohibited nature of the thing physically in the control of the accused will serve as a defence to a charge of possession (***R v Ness***) – *mens rea* for possession is subjective knowledge (what accused actually knew/thought). “Where there is a manual handling of a thing, then in order to constitute possession within the meaning of the criminal law it must be co-existent with knowledge of what the thing is”. Knowledge is part of the offence - BUT whether the accused knew he was in possession of a prohibited substance requires a finding of fact – wilful blindness used to impute knowledge. If the accused **honestly believed** that they possessed sugar, instead of heroin, that is a valid honest but mistaken belief in fact. For drug offences the belief must only be honestly held, doesn't have to be reasonable

## Constitutional Considerations for Defence of Mistake of Fact

* the defence of mistake of fact operate to negate the MR of an offence
* for offences that remove the defence of mistake of fact (**s. 146(1)** in ***R v Nguyen***), the accused can be convicted of the offence even if they do not have the requisite mens rea
* for offences in which imprisonment is a possibility, ability to convict without proving MR violates **s.7** and is unconstitutional

## *R v Nguyen and R v Hess,* [1990] SCC- Removing defence of mistake of fact can violate PFJs

**Facts:** Accused were charged with having sex with a female under the age of 14 years. Claimed they did not know she was < 14. Accused argued that **s. 146(1)** of the *CC* was unconstitutional for restricting their **s. 7** liberty because it provides that every male who has sex with a female person who is under the age of 14 years “whether or not he believes that she is 14 years of age or more is guilty of an indictable offence and liable to imprisonment for life”

**Issue:** Does **s. 146(1)** of the Cc violate s. 7 of the Charter? If **s. 7** rights are violated, can they be saved under **s. 1**?

**Ratio:** Unconstitutional to combine an AL offence with a term of imprisonment. This violation is not saved under section 1. The words “whether or not he believes that she is 14 years of age or more” are of no force and effect.

**Held:** **s. 146(1)** (now **150.1**) is unconstitutional as it infringed **s. 7**. D is acquitted. Appeal allowed.

**Reason (Wilson):** Uses the *Oakes* Test – held that step one, pressing and substantial legislative concern and step 2, a rational connection between the legislative objective and the means to obtain that objective were met but finds that the provision is not proportional/minimally impairing. Considered arguments with respect to deterrence, sentencing and comparing the impugned provision with **s. 150.1(4)** which sated that an accused cannot rely on mistake of fact as a defence if an accused believe a female to be 16 or over unless he took reasonable steps to a ascertain her age). **Section 146(1)** expressly removes the defence of mistake of fact. Thus although the accused may in all honestly believe that he was having sex with a female over 14 years of age, he is subject to the possibility of life imprisonment once the Crown has established that, as a mater of fact, he had sex with a female under 14 years of age. Thus the accused could be subject to imprisonment without having MR- contrary to the PFJs. It is a PFJ that a criminal offence with a maximum penalty of life imprisonment must have a MR component. The provision fails the minimal impairment stage of Oakes. Parliament can affect its objective of protecting young females in a manner that does not restrict an accused’s right as much as **s. 146(1)**.

* **s. 150.1(4)**: a belief that the complainant was over the age of consent will only be accepted if the accused took reasonable steps to determine the age of the complainant – modified objective test

## *R v Darrach, 1998 ONCA*

**Ratio:** Fault element for sexual assault is subjective. Subjective determination of reasonable steps for sexual assault.

**Facts:** D charged with sexually assaulting ex-girlfriend. He argued that his intended defence was the complainant’s consent, and alternatively, his honest belief that she consented. On appeal, D argued that **s. 273.2(b)** (which says that mistaken belief is not a defence where no reasonable steps were taken, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting) was unconstitutional.

**D’s Argument:** it is unconstitutional for him to have to prove he took reasonable steps; this places the onus on the D to prove consent, when the Crown should be the one having to prove lack of consent. Wants to be able to just say, as a fact, that he thought there was consent therefore *mens rea* not met – thinks the reasonable steps requirement makes this an objective standard which should not be allowed because sexual assault requires *knowledge*

**s. 273.2 -** It is not a defence to a charge under section **271, 272 or 273** that the accused believe that the complainant consented to the activity that forms the subject matter of the charge, where

**(b)** The accused did not take reasonable steps, in the circumstances known to him, to ascertain that complainant was consenting.

**Issue:** What does it mean to have taken reasonable steps? Is the fault element for sexual assault objective or subjective?

**Held:** Accused appeal dismissed. Finding for Crown; the subjective *mens rea* requirement of sexual assault is still largely intact

**Reason:** Court held that if an accused took reasonable steps in the circumstances to ascertain consent and, in result, forms an

unreasonable belief in consent, the accused would be entitled to ask for an acquittal. The provision does not require that a mistaken belief in consent must be reasonable in order to exculpate. The provision merely requires that a person about to engage in sexual activity take "reasonable steps . . . to ascertain that the complainant was consenting". **Were a person to take reasonable steps, and nonetheless make an unreasonable mistake about the presence of consent, he or she would be entitled to ask the trier of fact to acquit on this basis** (therefore it’s subjective standard). Sexual assault is not one of those “very few” offences (***Vaillancourt***), which carry such a stigma that its *mens rea* component must be one of subjectivity. It is an offence of **general intent,** it can be prosecuted by way of summary conviction, it is a generic offence which covers a broad range of conduct, some of which may be very minor compared to other offences, there is no minimum penalty, the maximum is 10 years, - within this range the sentence can be tailored to reflect the moral blameworthiness of both the offence and the offender. If it does require a genuine subjective *mens rea* **section 273.2(b)** does not result in an unconstitutional offence. The provision may introduce an objective component into the mental element but it is only a modified subjective fault element. The words *in the circumstances known to the accused* mean that the issue is what he actually knew and not what he ought to have known. Further, the provision used to require “all reasonable steps”, which is more onerous.

* Notwithstanding **s. 273.2(b)**, the offence of sexual assault is still largely one based on objective fault. Although the provision can be regarded as introducing an objective component into the mental element of the offence, the objective component is modified. The accused is to “take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting”

### 2) Mistaking one offence for another

When you intend to commit one offence, but you actually end up committing a different offence, do you have the necessary AR and MR to be convicted of either offence?

## *R v Kundeus,* [1976] SCC

**Ratio:** MR of less serious crime may = MR for more serious crime. MR for trafficking is intent to traffic some prohibited substance.

**Facts:** Accused was at a table in a beer parlour advertising the sale of various narcotics. An undercover police officer asked for hash or acid, and the accused said he was out but offered to sell mescaline. The mescaline capsules actually contained LSD. It was taken as fact that the accused intended to and thought that he did sell mescaline. MR for trafficking is intent to traffic, and the accused argued that he was required to have specific intent to traffic specifically in LSD. If the court held that specific MR was required the accused would likely be acquitted, but a conviction would likely be entered if the court held that the MR could encompass all trafficking in a prohibited narcotic. D charged with trafficking LSD, when he thought he was instead trafficking mescaline. *Actus reus* was easily made out.

**Issue:** Did the accused have the requisite *mens rea* for the trafficking of LSD if he honestly believed he was giving mescaline? Is it fair to find the accused guilty of a more serious crime on the grounds that he had the *mens rea* for a less serious crime? Will intent to traffic in a drug that belongs to the same restricted class as LSD suffice to sustain a conviction? Will intent to traffic in a restricted drug in general suffice to sustain a conviction?

**Ratio:** The MR of a less serious crime may be interpreted to constitute the MR for a more serious offence. If an accused commits the AR of selling a specific substance and knew or intended to traffic in another restricted substance, the accused would have the necessary fault element for the offence.

**Held:** appeal allowed.D guilty of trafficking LSD. Conviction restored. D had the necessary mens rea and is guilty of trafficking LSD. Mistake of offence doesn't provide a defence here.

**Reason (Dickson):** The *mens rea* for trafficking is simply an intent to traffic (sell, transport). But, the *mens rea* does not need to be an intent to traffic that specific drug. The Crown must only establish that the accused intended to traffic in some prohibited narcotic, NOT that the accused knew exactly what drug he was trafficking. If the Crown proves that the accused had the intent to traffic some prohibited substance, the accused will be convicted for whatever drug they actually trafficked, even if this means a more serious narcotic offence than the accused believed to be trafficking for. The accused would prefer a narrow interpretation of the *mens rea* where it must be matched to a specific drug. Accused argued he lacked the necessary *mens rea* because there was a mistake of fact regarding the intent of the drug to traffic. However, as long as the accused knew broadly that he was trafficking a prohibited narcotic, it is appropriate to convict him of a more serious narcotic offence. MR should be interpreted in its widest sense. If the accused knew he was trafficking in a prohibited narcotic, it is appropriate to convict him of a more serious offence.

**Note: *R v Blondin***

* The charge was unlawfully importing cannabis. TJ told the jury that the Crown was obliged to prove that the accused knew that the narcotic was that of cannabis resin. This was a misdirection, it was a proper direction to the jury that it was enough if the accused knew that some kind of narcotic was involved**.**

### 3) Mistake of Law

* The general proposition is that mistake or ignorance of law does not constitute an excuse/ defence ***R v Molis***
  + **s. 19**: Ignorance of the law by a person who commits an offence is not an excuse for committing that offence
* A problem, however, is that the difference between mistake of fact and law can be blurry
  + eg. suppose X is charged with distributing pornography (**s. 163(1)**)
    - X admits to certain elements (possession with intent to distribute) and admits he is aware of the nature of the material, but he states that he did not know that the material was “obscene” – mistake of law or fact?
      * Suppose instead that X was mistaken about the nature/content of the material – eg. believed he possessed Sports Illustrated Swimsuit edition instead of pornography, or if it was ‘art’?

## *R v Campbell and Mlynarchuk,* [1972] Alta Dist Ct

**Ratio:** Ignorance of the law is no defence to commission of an offence, although it can be considered for sentencing purposes. Doing your best to try and figure out the law does not excuse you. It is a mistake of law to not understand that TJ is not final word.

**Facts:** D charged for immoral performance **s. 163(2)**. She initially refused to engage in the performance. She began her dance with clothes on but by the end she was nude. Only agreed to perform after her boss informed her that an SCC judge previously ruled they can go ahead with bottomless dancing referring to the trial level decision of ***R v Johnson***, which was reversed

* The D relied on a false statement of law – surely she was *morally innocent* of the crime she was charged with

**Issue:** Is the accused’s reliance on a mistake belief of law a defence?

**Held:** For Crown; D’s conviction upheld – but TJ used sentencing discretion to grant absolute discharge

**Reason:** The accused’s mistake was a mistake of law- it was a mistake to misunderstand the significant of a decision of trial court and to conclude that the decision of any particular judge correctly states the law unless that judge speaks on behalf of the ultimate court of appeal. Thus the accused was morally innocent, and so it would be wrong to punish her.Nonetheless, no defence of mistake of law was available, and this for policy reasons: “the principle that ignorance of the law should not be a defence in criminal matters is not justified because it is fair, it is justified because it is necessary, even though it will sometimes produce anomalous results. So the mistake of law made by the accused does not afford a defence, but it should certainly be considered in mitigation of sentence.” Despite being morally innocent, a conviction as entered against the accused.

## *R v Molis,* [1980] SCC

**Ratio:** Due diligence means knowing the law and doing everything to ensure one meets their legal duty. Due diligence cannot absolve guilt if one does not know their legal duty. Ignorance of the law is not an excuse. There is a slight relaxation of **s. 19** of the CC when dealing with a regulation. The regulation or amendment must have been published in the Canadian Gazette or have been brought to the attention of the people affected by it.

**Facts:** A police investigation revealed the appellant and his partner were manufacturing MDMA in a lab.D was operating a laboratory to develop test kits to help test the safety of dangerous drugs. The chemicals in her lab could be used to produce other prohibited drugs. D was found to be manufacturing MDMA, which was not a restricted substance at the time of manufacture but became one after a 1976 amendment to the *Food and Drugs Act*. D was only arrested after it was added to the restricted substance list. Addition of MDMA to the list was published.

**D’s Argument:** says change was not published in the *CC* and publishing it in the Canada Gazette is not enough. Not aware of law change. D claims he did his due diligence when starting out and that at the time MDMA was not a controlled substance

**Issue:** Is there defence of mistake of law? Is ignorance of law a defence? Can accused argue due diligence as defence?

**Held:** For Crown; D guilty. Appeal dismissed, conviction upheld.

**Reason:** First, ignorance of the law is no defence according to **s. 19**. When the commission of an offence is dependent upon a regulation, some consideration should be given to the fact that regulations are less discoverable. Such an abatement of the rigours of **s. 19** offer no solace to the accused in this case as his conviction was for the manufacturing of MDMA during a period after the publication of the law in the Canada Gazette. Even if **s. 19** were to be slightly relaxed, that leeway would only apply if a regulation were not published in the Canada Gazette. Secondly, due diligence is a recognized defence for certain offences (***R v Sault Ste Marie***). Due diligence does not apply to researching whether a law is in effect or not. It applies to someone consciously avoiding breaking the law. But, that defence is in relation to fulfilling a duty imposed by law, not one to the ascertainment of the existence of a prohibition or its interpretation - the defence protects you when you have done your best to fulfill a duty imposed by law (***Sault Ste Marie***); due diligence does not apply to avoiding offences you do not know exist. The fact that you took all reasonable steps to determine whether the regulations had changed, is neither here nor there. All we care about is what the law was- the fact that you don’t understand that does not constitute a defence.

## *R v Docherty,* [1989] SCC

**Ratio:** MR of **s. 666(1)** is the intent to breach the probation order. This requires knowledge on the part of the accused that his conduct constitutes a criminal offence. **s. 666(1)** is an exception to **s. 19** and can be a defence of mistake of law. Exception to ignorance of law rule. Where the MRrequires knowledge of the law, absence of that knowledge will be a good defence

**Facts:** D found intoxicated in his car contrary to **s. 253**. He was then charged with a wilful failure to comply with the terms of a previous probation order requiring him to keep the peace and be of good behaviour (then **s. 666(1)**). D appealed the probation charge because at the time he was sitting in the car, **he honestly believed that it was not useable.** Although this was irrelevant to the **s. 253** charge, it was argued that **his lack of knowledge was relevant** to **s. 666(1)**. The provision read - “*willfully* breaking probation…”. D argues that he did not wilfully break the probation order because he didn’t know that he was doing anything wrong

**Issue:** What is the MR for the offence of wilfully failing to comply with a probation order? Does s. **666(1)** of the CC require its own mens rea, or does the MR of the underlying offence (drunk driving) provide the mens rea for s. **666(1)**?

**Ratio:** An accused requires knowledge to be held to have wilfully failed to refuse to comply with a probation order which is an exception to **s. 19**. Wilfulness requires knowledge, so you can only wilfully do something if you know that it is wrong. Ignorance is an excuse where the offence requires wilfully refusing to comply with the law.

**Held:** For D, acquitted of breaking his probation under s. **666(1)** – now **s. 733.1(1)**, removed ‘wilfully’. Crown appeal dismissed.

**Reason:** Rejects the view that s. **666(1)** requires knowledge on the accused that his conduct was a criminal offence – only then can he said to be wilfully failing or refusing to comply with the probation order. Commission for the underlying offence constitutes the AR for an offence under s. **666(1)** because it established the accused violate a parole term by committing a criminal offence. Rather, the significance of the conviction for the underlying offence is that it “constitutes the *actus reus* under s. **666(1)**. It establishes that the accused has violated the term of his parole through the commission of a criminal offence. But it is not evidence of an intent to do so, still less a wilful intent to do so. This is a different intention from the intention to commit the *actus reus* of the underlying offence. **666(1)** seems to be an exception to **s. 19** - “knowledge that one’s act is contrary to law…is an element of the requisite *mens rea* of wilfully failing to comply with a probation order… An accused cannot have wilfully breached his probation order through the commission of a criminal offence unless he knew that what he did constituted a criminal offence.”

Charge under s. **666(1)** requires a knowledge of the law, so lacking knowledge of that law will be enough to negate the *mens rea* for that offence. The significance of the conviction for the underlying offence is that it constitutes the AR of s. **666(1)**. It established that the accused has violated the term of his parole through the commission of a criminal offence. But it is not prima facie evidence of an intent to do so.

**Note:** Parliament amended the probation order provisions of the CC. Section **733.1(1)**, then s. **666(1)** now reads: “An offender who is bound by a probation order and who, without reasonable excuse, failed or refuses to comply with that order is guilty”. This revised offence does not require a MR component thus the accused would likely not be acquitted under this new legislation.

### 4) Official Induced Error (OIE)

* What if the accused’s actions were due to a mistake of law based on the government’s fault?
* The defence of OIE has feel of *estoppel*: given the government’s representations to accused, government estopped from prosecuting the accused since they were responsible for the conditions that led to the accused’s criminal conduct

## *Levis (City) v Tetrault and Lévis (City) v 2629-4470 Quebec Inc,* [2006] SCC

**Ratio:** Creates a 6-step test for the defence of Officially Induced Error. OIE is available as a defence in criminal law. The government is estopped from prosecuting an accused who relied on the government’s misrepresentation leading to the accused's criminal conduct. The defence is a form of detrimental reliance

**Facts:** Automobile Association told the accused company they would send the accused company a renewal notice for automobile license. Not long before the license expired, the Association send the renewal notice but failed to include apartment number so the notice was returned. Accused company was later charged with not paying registration fees. T was pulled over by the police, who found that T's driver's licence was invalid because it had expired. At his trial for violating **s. 93.1** of the HSC, which prohibits driving without a valid licence, T claimed that he did not know that the date on his licence was the expiry date, not the payment due date.Numbered Company D paid 15 months of registration fees as recommended by an employee of the city and that the city would send a renewal notice. A renewal notice was never receive by the D. Numbered Company was charged with violating **s. 31.1** of the *HSC*, which prohibits the operation of a vehicle for which the registration fees have not been paid.

**Issue:** Is the defence of OIE available to an accused?

**Held:** For Crown; D’s guilty of their crimes. Defence not available in this case. T did not do due diligence and was passive about licence expiration. Company did not do due diligence and did not consider legal consequences of its actions and did not rely on the representations of a legal official.

**Reason:** Official induced error is in effect a form of detrimental reliance on the representations of a government or state official. There are 6 requirements an accused must satisfy to avail himself of the defence of OIE: (which was not met in this case):

1. That an error of law or of mixed law/fact was made;
2. That the person who committed the act considered the legal consequences of their actions (“am I allowed to do this?”;
3. That the advice obtained came from an appropriate official;
4. That the advice was reasonable (objective question must be considered from the perspective of a reasonable person);
5. That the advice was erroneous;
6. That the person relied on the advice in committing the act (objective test).
   1. Factors to look at: efforts made by accused to obtain info, the clarity or obscurity of the law, position and role of the official who gave the info or opinion, and clarity, definitiveness and reasonableness of the info or opinion.

In T’s case, there was no due diligence. Passivity, leading to ignorance, is not a defence in criminal law. T did no more than state that he expected to receive a renewal notice for his licence and that he confused the licence's expiry date with the due date for paying the fees required to keep the licence valid. **He did not take any actions or attempt to get information**. In the Numbered Company’s case, there was no due diligence, nor did they consider the legal consequences of their actions, nor did they rely on the representations of a legal official. The company knew the due date for the payment of registration fees and, thus, the expiry date of the registration. It could and should have been concerned when it did not receive any notice. It remained passive when it had the obligation to do more. The questions asked of the city employee were at best an administrative practice, not the legal obligation to pay the fees by the prescribed date. **The company could not have considered the legal consequences of its conduct on the basis of advice from the official in question, nor could it have acted in reliance on that opinion**, since no information regarding the nature and effects of the relevant legal obligations was requested or obtained.

Various factors will be considered in assessing these factors such as the efforts accused made to obtain formation, the clarity/obscurity of the law, the position and role of the official who provided the information and the clarity/definitiveness/ reasonable of the information or opinion.

### 5) Entrapment

* entrapment prevents the government from doing something it would otherwise have the authority to do on the grounds that it is in part responsible for the criminal conduct of the accused
* there will be entrapment when (***R v Mack***):
  + a) The authorities provide a person with an opportunity to commit an offence when they lack a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bond fide inquiry; or
  + b) Although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and induce the commission of the offence (***R v Mack***)
* Factors to consider in an entrapment analysis (***R v Mack)***:
  + the persistence and number of attempts made by police;
  + the type of inducement offered, including deceit, fraud, trickery or reward;
  + whether the police conduct exploits human characteristics which society feels should be respected;
  + the timing of the police conduct;
  + the proportionality between the involvement of police and the involvement of the accused;
  + the existence of threats;
  + whether the police conduct is directed at undermining other constitutional values

## *R v Mack*, 1988 SCC

**Facts:** Undercover cop asked the accused to buy him drugs. Accused used to be a drug dealer but had given it up several years earlier and did not want to return to lifestyle. The cop repeatedly asked the accused for drugs. On one occasion, while in the park together, the cop produced a pistol and told the accused “a person could get lost.” Accused found a dealer and bought drugs for the cop. Accused was arrested for trafficking. Accused argued that he felt threatened by the cop and a argues he was entrapped.

**Issue:** Is the defence of entrapment available?

**Held:** Yes, conviction set aside.

**Ratio:** There will be entrapment when: (a) the authorities provide a person with an opportunity to commit an offence when they lack a reasonable suspicion that this person is already engaged i criminal activity or pursuant to a bona fide inquiry; or (b) although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and induce the commission of the offence.

**Reasons:** Distinction between police acting on reasonable suspicion or in the course of a bona fide inquiry providing an opportunity to a person to commit a crime, and the state creating a crime for purpose of prosecution. Court views entrapment as a reflection of disapproval of police and state conduct. Even through accused has committed a criminal act, the state lacks standing to punish the accused as a result of the state’s complicity in the criminal act. The cop went further than merely providing the accused with an opportunity to commit an offence. Average person might also have committed offence in response to the threats.

## *R v Nuttall*, 2016 BCSC

**Facts:** RCMP conducted an investigation into possible terrorist activities by the accused. Undercover cops regularly met with the accused and the accused discussed his plans to carry out various attacks. As the investigation went on, it became clear that the accused’s general ineptitude, his inability to think logically and to remain focused on a task would prevent him from following through with any plan. The undercover cops pretended to be members of powerful terrorist organizations and provided the accused with money and supplies and helped construct a plan to bomb the Legislature in Victoria. The accused was so convinced the cops were members of Al Qaeda that he came to fear the officers would kill them if he did not complete the terrorist plan. 3 inter explosive devices were planted and the accused was charged with 4 counts of terrorism-related offences.

**Issue:** is the defence of entrapment available to the accused?

**Held:** Yes, stay of proceedings entered.

**Reasons:** An opportunity is a situation in which something one wants to do is made possible; however, a possibility is not an opportunity - it is only something that might happen sometime in the future. The RCMP’s decision to present the opportunity to the accused was based on their belief that the accused was predisposed to violence. But predisposition falls short of evidence that the accused was already engaged in terrorist activities. Principles in ***Mack*** are designed to ensure that one standard of police conduct is applied to all persons in the community regardless of their criminal propensities. On a balance of probability, the RCMP offered the accused an opportunity to commit a terrorist offence without a reasoned suspicion that the accused was already engaged in criminal activity. On this basis, the RCMP entrapped the accused into committing the offences for which he was accused

# Intoxication

1. Intoxication is a defence to a specific intent offences (***Daviault***)
2. Self induced intoxication is no longer a defence to violent (assaultive) general intent offences (**CC s. 33(1)**)
3. This is true even if the accused’s intoxication is so extreme as to render the accused’s assaultive actions involuntary
4. Involuntary intoxication may constitute a defence.

Intoxication is a recognized defence that can negate the *mens rea* or *actus reus* of certain criminal offences

* However, **s. 33.1** says that self-induced intoxication is no defence to crimes of general intent involving an assault or any other interference or threat of interference by a person with bodily integrity of another person (eg. assault, sexual assault)
* self induced advanced and extreme intoxication can be a defence to crimes of specific intent (***Daviault***)
* self induced extreme intoxication can be defence to some general intent crimes if intoxication is akin to insanity or automatism (***Daviault***, **s. 33.1**)
* self induced advanced and extreme intoxication is not a defence to violate crimes of general intent (**s. 33.1**)
* self induced intoxication negates the defence of mistaken belief in consent in the context of sexual assault (**s. 273.3**)
* involuntary intoxication remains a good defence for many offences, going to the lack of AR

**Core Concepts of Intoxication**

* **General vs specific intent offences** (***Beard***) - Intoxication may act as a defence to specific intent, but not general intent
  + Specific requires focusing on an objective further to the immediate one at hand
    - eg. Murder (to kill), Attempt (intent to commit specific crime), Aiding/Abetting (to aid for purpose of…),
    - To determine if it is a specific intent:
      * Look at MR: specific intent offences sometimes require a “heightened mental element” or ulterior motive (***Lewis***), or intent to bring about a particular consequence (murder), or knowledge of the circumstances (possession of stolen property)
      * Look at policy (***R v Tatton***): focus on whether alcohol is associated with the crime – it would be counter-intuitive to allow intoxication as a defence to behaviour historically involved in the crime
      * Look if the offence includes lesser-included offences – likely to be specific intent, but the lesser included offences are general intent where liability may still be imposed
  + General requires intent of the conduct – eg. (Sexual) Assault, Manslaughter (obj. foresee. of BH), Arson (***Tatton***)
* Intoxication generally vs intoxication akin to insanity/automatism (***Bernard*; *Daviault***)
* Intoxication affecting *mens rea* (incapacity to form the fault element) vs *actus reus* (incapacity to the voluntariness)
* incapable of conscious goal-directed behaviour
* can still be responsible for behaviour in virtue of getting drunk in the first place
* three classes:
  + **Mild intoxication** - never a defence
  + **Advanced Intoxication:** drunk enough to interfere with ability to form specific intention
  + **Extreme Intoxication-** defence to a general intent crime
* **s. 33(1)** - response to ***Davio***
* three main views on the relationship between intoxication and criminal culpability
  + 1) Intoxication may INCREASE (aggravate) criminal culpability
  + 2) Intoxication is IRRELEVANT to criminal culpability
  + 3) Intoxication may DECREASE (mitigate) criminal culpability
    - current law is a mix of 2+3
* modern law on intoxication is ***Daviault*** + **s. 33(1)**

## Intoxication Analysis

**Question 1:** How drunk was the accused? The law recognizes 3 levels of intoxication (***Daley***)

1. Mild Intoxication
   1. Alcohol induced relaxations of inhibitions and socially acceptable behaviour (***Daley***)
2. Advanced Intoxication
   1. Intoxication to the point that the accused lacks specific intent/foresight of consequences (***Daley***)
   2. Self induced advanced intoxication is defence to specific intent offences, but NOT to general intent offences (***Daviault***)
3. Extreme Intoxication
   1. Negates voluntariness and this is a complete defence to general intent offences, subject to the exceptions in **s. 33.1(3)** (i.e. offences that have an element of assault or other interference to threat of interference with bodily integrity) (***Daley***)

**Question 2:** What offence is the accused charged with?

* **general intent offences: assault, sexual assault, arson, manslaughter**
* **specific intent offences: murder, attempts, aiding & abetting, robbery, possession of stolen property**

**Question 3:** If accused is charged with general intent offence, is it captured by **s. 33.1(3)**, making the defence unavailable?

## *Reniger v Fogossa*, [1548] Ex Ct- voluntary intoxication is not a defence to criminal liability

* voluntary intoxication is not a defence to criminal liability
* the MR for a criminal offence is derived from the blameworthiness associated with getting drunk

“[I]f a person that is drunk kills another, this shall be felony, and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding nor memory; **but inasmuch as that ignorance was occasioned by his own act and folly** [getting drunk], *and he might have avoided it*, he shall not be privileged thereby.”

* The *mens rea* for the criminal offence (here, murder) is transferred from the blameworthiness associated with getting drunk by the words ‘his own act and folly’ – the moral fault for voluntarily getting drunk could be substituted for the fault element required for serious crimes; **intoxication was an *aggravating factor*** to a crime

## *DPP v Beard*, [1920] HL- defence of intoxication, General vs. Specific Intent

**Facts:** Beard killed a woman in the course of a rape by keeping his hand over her mouth. Conviction for felony, murder was confirmed by the HL who said “drunkenness in this case could be no defence unless it could be established that Beard… was so drunk that he was incapable of forming the intent to commit it.”

**Issue:** Is drunkenness a defence to murder? Is there a defence of intoxication and can Beard rely on it?

**Ratio:** Three important principles concerning the defence of intoxication: (1) “Intoxication could be a ground for an insanity defence if it produced a disease of the mind”; (2) “evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent.”; (3) That evidence of drunkenness falling short of a proved incapacity to form the intent necessary to constitute the crime, and mere establishing that his mind was affected by drink so that he had more readily gave way to some violent passion does not rebut the presumption that a man intends the natural consequences of his acts.”

**Held:** For Crown – Beard’s conviction confirmed by HL. There is a defence of intoxication, but Beard cannot rely on it.

**Reason:** “Specific intent defences require the mind to focus on an objective further to the immediate one at hand, while general intent offences require only a conscious doing of the prohibited act” (***R v Daley***).

* 1) Specific: Advanced intoxication can be a defence
  + murder - engage in behaviour with the purpose of killing someone
* 2) General: ONLY extreme intoxication can be a defence, subject to **s. 33**
  + (a) Violent - **s. 33(1)** - intoxication never a defence
    - e.g. Assault- intentionally apply force to another person without their consent- no further purpose
  + (b) Property-Based - extreme intoxication a defence

**Note:** intoxication a defence only if it renders the accused **incapable** of forming the **specific intent** to commit the crime

## Specific vs General Intent Offences

* the distinction matters because it makes a difference to the level of intoxication that is required to provide a defence.
* Specific intent offences: require the mind to focus on an objective further to the immediate one at hand (***R v Daley***).
  + assault with intent to resits arrest
  + attempts- MR is intent to commit the specific crime
  + aiding and abetting - Mr is doing something for the purpose of aiding and abetting
  + Murder (***R v Cooper***)
  + Robbery (***R v George***)
  + Possession of stolen property (***R v Tatton***)
  + Theft
  + Fraud
* general intent offences: requires only a conscious doing of the prohibited act (***R v Daley***)
  + Assault (***R v Tatton)***
  + Sexual assault (***Leary, R v Chase***)
  + Arson (***R v Tatton***)
  + Manslaughter

**Analysis:** in determining whether an offence is of general or specific intent: consider 3 things:

1. Whether the fault element requires higher order thought (***R v Tatton***)
2. If the distinction is NOT clear, must result to policy considerations to resolve the question (***R v Tatton***):
   1. Whether alcohol consumption is habitually associated with crime in question. If yes, intoxication should not provide a defence (***R v Tatton***)
   2. Whether the offence has lesser, included offences. If so, more likely to be a specific intent offence since defence of intoxication will not generally apply to the lesser, included offence and liability will still be imposed (***R v Tatton***)
      * + Note: attempt is always a lesser and included offence

## *R v Majewski*, 1976 HL- Intoxication is not a defence to general intent offences

* if a man of his own volition takes a substance which causes him to cast off the restrains of reason and conscience, no wrong is done to him by holding him answerable criminally for an injury he may do while in that condition
* his course of conduct in reducing himself by drugs/alcohol to that condition supplies the evidence of MR sufficient for crime of basic [general] intent

## *R v Leary*, [1978] SCC- Intoxication is not a defence to general intent offences

**Significance:** Adopted ***Majewski***- Intoxication is NOT a defence to general intent offences

**Facts:** Defendant admitted he had sex with a woman, but said it was consensual and that he did not threaten the complainant. She said he threatened her with a knife.

**Issue:** Is being drunk a defence to offence requiring criminal intent?

**Ratio:** When accused is sufficiently intoxicated at the time of the offence to be unable too arm the minimal mental element required for a general intent offence, they may still be held liable as the act of inducing intoxication can be substituted for MR.

**Reasons:** Majority affirmed HL decision in ***Majewski***: “[the defendant’s] course of conduct in reducing himself by drugs and drink to that condition in my view supplies the evidence of MR of guilty mind certainly sufficient for crimes of basic intent. It is a reckless course of conduct and recklessness is enough to constitute the necessary MR in assault cases.

**Note:** Following ***Beard, Majewski****,* and ***Leary*** intoxication is not a defence to a general intent offence (i.e. assault, sexual assault). Accused could be convicted of assault even though, due to intoxication, he did not intend to apply force directly to victim.

## *R v Bernard*, [1988] SCC- Intoxication is not a defence to general intent offences

**Ratio:** relaxes the ***Leary*** rule with an exception- Intoxication is not a defence to general intent offences, except when the intoxication is akin to insanity/automatism.

**Facts:** Charge of sexual assault causing bodily harm contrary to **s 272(c)**. Complainant was beaten and raped by D. D admits he forced the complainant to have sex but he did it because he was drunk and stopped when he realized what he was doing. TJ and CA correctly applied precedent of intoxication being no defence

**Issue:** Is intoxication a defence to a general offence crime?

**Held:** Appeal dismissed.

**Reasons:** Self induced intoxication is not a defence to general intent offences - confirms ***Leary***.

**Concurring:** Argued for a modification or relaxation of the ***Leary*** *rule* to allow drunkenness to be a defence to general intent offences, **but only where the intoxication was so extreme as to be akin to insanity or automatism** (for trier of fact to decide). Only in such cases is the evidence capable of raising a reasonable doubt as to the existence of the minimal intent required for the offence.

## *R v Daviault*, [1994] SCC- Extreme intoxication is a defence to general intent offences

**Ratio:** Upholds ***Bernard*** – but after the principle was limited by **s. 33.1**. Extreme intoxication akin to automatism or insanity can provide a defence to general intent offences. Burden is on the accused to establish that, on a balance of probabilities, he was in such an extreme state of intoxication.

**Facts:** Defendant was a chronic alcoholic who went out to get some alcohol for a friend of his wife. The woman was semi-paralyzed. He brought a 40oz bottle of brandy to her, she drank half a glass, and later passed out. He drank the rest of the bottle and sexually assaulted her when she woke up. He had 7 beers at a bar before this. Charged with sexual assault (general intent crime). Defendant claimed he lacked the MR necessary for sexual assault. An expert witness testified that someone who drank as much as he did would not function normally and would not be aware of his actions. TJ acquitted the D using ***Bernard***on basis he was so intoxicated he couldn’t form the MR. CA applied ***Leary***and convicted holding that intoxication is no defence to ‘general intent offences.’ Held that intoxication to the point of automatism cannot negate the MR requirement of a general intent offence

**Issue:** Does a blackout constitute a “disease of the mind” such that D can claim defence of mental disorder under **s. 16**? Can intoxication akin to automatism constitute a defence to a general intent offence? (trying to choose between ***Bernard*** and ***Leary***)

**Ratio:** The defendant has a defence of extreme intoxication akin to automatism or insanity, and must prove that he was in such a state on the balance of probabilities. This defence is sufficient for both general and specific intent crimes.

**Held:** For D – appeal allowed, new trial ordered. Absence of a defence for general intent offences on the basis of intoxication akin to insanity violation **s. 7** and **11(d)** of the Charter. Overturned the guilty verdict and ordered a new trial.

**Reason (Cory J):** Voluntary intoxication can act as a defence in crimes of general intent only if the intoxication was such that the person was in a state of **extreme intoxication akin to automatism or insanity**. Allowing people to be convicted even though they were acting automatically violates **s.** **7** and **s. 11(d)** of the *Charter* and cannot be upheld. Allowing convictions in these cases, the court would essentially be substituting the intent to get drunk for the intent to commit the crime, which is unfair. **This only operates in cases of extreme intoxication resulting in automatism actions – it does not apply when the defendant was just drunk.** The decision in ***Leary*** substitutes the intention act of the accused to voluntarily become intoxicated for the intention to commit the offence or for the recklessness of the accused with regard to the offence. The blameworthy nature of voluntary intoxication is not such that the Charter is not violated if the ***Leary*** approach is adopted. Voluntary intoxication is not yet a crime. A person intending to drink cannot be said to be intending to commit a sexual assault. Given the minimal nature of the mental element required for crimes of general intent, even those who are significantly drunk will usually be able to form the requisite *mens rea* and will be found to have acted voluntarily.  In reality it is only those who can demonstrate that they were in such an extreme degree of intoxication that they were in a state akin to automatism or insanity that might expect to raise a reasonable doubt as to their ability to form the minimal mental element required for a general intent offence.”

When is the ***Daviault*** defence available?

* Intoxication not a defence of **general intent** offences, **except** when intoxication was so extreme as to be akin to insanity or automatism.

Why did the SCC focus on *extreme intoxication akin to insanity or automatism*? If the ***Leary***rule violates **s. 7**, shouldn’t evidence of intoxication always be relevant?

* Because, again, from ***Beard***we have the distinction between specific and general intent offences, and we have the general proposition that intoxication is not relevant to general intent offences unless it is of an extreme variety

**Note:** Defence of extreme intoxication will only work in rare cases. An accused who is so drunk is unlikely to be able to physically do much, and unlikely to be able to provide evidence of their drunken state as they probably won’t remember much.

**Note:** Following ***Daviault***, then, the law was this:

1. Intoxication can be a defence to crimes of specific intent
2. Extreme intoxication akin to insanity or automatism can be a defence to an offence of general intent, although the accused bears the burden of establishing it on the balance of probabilities
3. In such cases, extreme intoxication could go to *mens rea* or *actus reus*

### Parliament’s Response to *Daviault*

***Daviault*** essentially protected rapists, so Parliament enacted ***CC* s. 33.1** which removes self-induced intoxication as a defence

* In effect, Parliament returned to the rule from ***Reniger v Fogossa*** – “[I]f a person that is drunk [departs markedly from the standard of care and assaults] another, this shall be [a criminal offence], and he shall be [punished] for it, and yet he did it [when] ... he had no understanding nor memory; but inasmuch as that ignorance was occasioned by his own [recklessness], and he might have avoided it, he shall not be privileged thereby.”

In response to ***Daviault***, Parliament enacted **s. 33.1** of the CC

**s 33.1 (1) - when defence not available -** It is no defence to an offence referred to in subsection **(3)** that the accused, by reason of **self-induced intoxication**, lacked the **general intent** or the **voluntariness** required to commit the offence, where the accused departed markedly from the standard of care as described in subsection **(2)**.

* **(2)** For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.
  1. EXCEPTION to voluntariness rule- if you are in a state of extreme intoxication you do not have to be acting voluntarily to be found guilty of general intent violent offences. Don’t need to be directed by your conscious mind.
* **(3)** This section applies in respect of an offence under this Act or any other Act of Parliament **that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person**.

**Following s. 33.1, the current law in Canada regarding intoxication is:**

1. (Advanced) intoxication remains a defence to specific intent offences
2. Self-induced intoxication is no longer a defence to violent (assaultive) general intent offences
   1. This is true even if the accused’s intoxication is so extreme to render the accused’s assaultive actions involuntary
3. Involuntary intoxication, on the other hand, may constitute a good defence (except with respect to those offences that involve, as part of the *AR*, intoxication, eg. impaired driving

## *R v Tatton, 2015 SCC-* Arson is general intent, intoxication short of automatism is no defence

**Ratio:** Self-induced intoxication (short of automatism) is no defence to a crime of “general intent,” although it may be admissible as a defence to a crime of “specific intent.” Arson is an offence of general intent. MR of arson is the intentional or reckless performance of the illegal act -the damaging of property by fire.

**Facts:** Respondent was acquitted of arson. While intoxicated at his GF’s house he put oil in a frying pan, turned the element on high and then left the house. When he returned 15-20 minutes later, the house was on fire. The home was completely destroyed.

**Issue:** Is self induced intoxication a defence to a charge of arson under **s. 434** of the CC? Whether arson constituted a specific intent offence, so as to permit the accused to rely on his state of intoxication as a defence to his charge contrary to **s. 434** of CC.

**Prior Proceedings:** At trial, the respondent raised the defence of accident and tendered evidence of his intoxication at the time he caused the fire. The trial judge considered the evidence of intoxication, finding that, in the circumstances of this case, arson was a specific intent offence. Ultimately, the trial judge was not satisfied beyond a reasonable doubt that the respondent left the stove on high either intentionally or recklessly. The Crown appealed, arguing that the trial judge should not have considered the evidence of the respondent’s intoxication because arson is an offence of general intent, and evidence of self-induced intoxication is inadmissible for the purpose of determining whether an accused has the requisite intent to commit that offence. A majority of the Court of Appeal dismissed the appeal.

**Reasons:** Arson under **s. 434** is a general intent offence meaning that intoxication falling short of automatism is not a defence. No complex though or reasoning processes are required for MR of arson. The distinction between general and specific intent lies in the complexity of the thought and reasoning processes that make up the mental element of a particular offence, and the social policy underlying the offence. The thought and reasoning process for general intent crimes are relatively straightforward. Crimes of general intent are those where the *mens rea* involves “such minimal thought and reasoning process” that even a high degree of intoxication is unlikely to absolve the accused of any criminal liability. By contrast, specific intent crimes are those where the mental element involves some sophistication of thought, to the point that intoxication may negate the existence of a guilty state of mind. Whereas the more serious offences of murder and robbery have been classified as being of specific intent, the “lesser” offences of manslaughter and assault are of general intent. As the MR or arson requires no sophisticated reasoning process, the Court found it “difficult to see how intoxication short of automatism could deprive the accused of the low level of intent required”. Crimes with a more sophisticated and relatively important *mens rea* will likely be classified as specific intent, whereas those which require little mental acuity – in other words, where the *actus reus* is truly the crux of the offence – would fall under the latter category.If the analysis under (i) fails to yield a clear answer, courts should direct their intention towards policy considerations. Would it be wise, given the nature of the crime, for accused persons to rely on self-induced intoxication as an exculpatory defence?  Where alcohol consumption is habitually associated with the crime in question, recognizing intoxication as a defence may be counterintuitive.

**Held:** Decisions of both courts overturned and found that arson was an offence of general intent. Intoxication short of automatism is NOT a defence to a charge of arson under **s. 434**.

## *R v Daley*, [2007] SCC- Defence of intoxication concerns intent, not capacity

**Ratio:** Intoxication concerns intent, not capacity. A charge to the jury on the defence of intoxication should focus only on whether the accused possessed actually intent, and not on whether the accused had capacity to form the requisite intent. Juries are to be instructed to ignore issues of capacity and ask whether the intoxicated accused in fact formed the requisite intent. If the jury has a reasonable doubt that the accused, due to intoxication, lacked the requisite intent, then intent is not proved.

**Facts:** Accused and his common law wife were drinking with friends. They went back to his house, drank some more, and left, leaving his wife dancing in the kitchen. They returned around five in the morning, and neighbour testified that they heard him angry about being locked out. Later, the wife was found dead of a stab wound. Accused was charged with murder. He called expert evidence about his BAC and its effects on him, and many witnesses testified that he was very drunk.

**Issue:** Does the defence of intoxication go to issues of capacity or to issues of intent? How is a jury to be instructed with respect to the intent and defence of intoxication? Did the accused lack the intent required for murder due to his intoxication?

**Held:** For Crown; P’s charge of 2nd degree murder upheld. Jury instructions were appropriate, accused found guilty.

**Reason (Bastarache):** Defines three levels of intoxication:

1. “**Mild”** intoxication = alcohol-induced relaxation of inhibitions and socially acceptable behaviour – irrelevant to the law
2. “**Advanced”** intoxication = intoxication to the point that the accused lacks specific intent/foresight of consequences
3. **Extreme** intoxication akin to insanity or automatism “which negates voluntariness and thus is a complete defence to criminal responsibility” subject to **s. 33.1** (***Daviault***)

There was no injustice to the accused by instructing the jury to only consider actual intent. An accused who was not capable of forming the specific intent for the offence obviously cannot be found to have formed that intent.

All attempts are specific intent offences. Murder is a specific intent offence.

Assault and sexual assault are all general intent offences - you do not have to punch them for an ulterior purpose

To determine if something is a specific intent offence, look for “with the intent to” in the statute.

To determine if something is a general intent offence, look for violent against a person, non-violent, not against a person

### Intoxication Summary

* Self-induced intoxication can be a defence to crimes of specific intent – ***Daviault***
* Self-induced intoxication akin to insanity/automatism can be a defence to some crimes of general intent – ***Daviault***, **33.1** 
  + But, it is **not** a defence to violent crimes of general intent (eg., assault, sexual assault) – **33.1**
* Self-induced intoxication negates defence of mistaken belief in consent in the context of sexual assault (see **CC s. 273.2**)

It is now generally agreed that intoxication may not **increase** (or aggravate) criminal culpability

* But where the offence in question is a violent general intent offence, the fact that the accused was intoxicated is **irrelevant** to criminal culpability – **CC s. 33.1**
* where the offence in question is a specific intent offence or a non-violent general intent offence, intoxication may **decrease** (or mitigate) criminal culpability provided that it can be shown that the accused was in a state of advanced or extreme intoxication or in a state of intoxication akin to insanity or automatism (non-violent general intent offence)

## R v Ladue

**Facts:** Charged with offering an indignity to a dead body. He mistakenly believed the body was alive but unconscious.

**182** Every one who

* **(b)** improperly or indecently interferes with or offers any indignity to a dead human body or human remains, whether buried or not,
  + Fault element is unclear – but definitely minimal, not heightened – suggests general intent
    - And this requires extreme intoxication in order for a defence of intoxication to be applicable
  + Assume accused was in state of advanced intoxication and charged with attempted sexual assault
    - Likely to be found guilty of this charge (but not a sexual assault charge – can’t SA a dead body?)
      * But for attempts, impossibility is no defence, so attempted sexual assault is still possible
        + This is a general intent offence – intoxication is no defence (generally)
  + Let’s say accused said: “I was so drunk I didn’t think she was dead, just unconscious”
    - Intoxication is no defence to this because self-induced intoxication does not allow for the mistake belief in consent
      * Now we have the issue of: can you sexually assault a dead body?

**Held:** For Crown – Ladue guilty

**Reason:** In ***Kundeus***, all you needed was *mens rea* in the wider sense – don’t need to know which drug specifically. Taking Ladue at his word, he was trying to have sex with an unconscious woman. He clearly had the intent to perform a sexual assault. The intoxication or that he mistakenly believed she was alive isn’t much of an issue.

# capacity-based defence: Insanity or mental disorder

Defence of mental disorder deals primarily with the accused’s state of mind at the time the alleged offence was committed. However, the accused’s mental state can be relevant at the time of trial if it renders him or her unfit.

Two ways insanity / mental disorder is relevant to the criminal process

* 1) Mental disorder can result in finding that the accused is unfit to stand trial (**s. 672.23**)
* 2) Mental disorder can result in finding the accused NCRMD (**ss. 2, 16, 672.54**)

## Issue 1: Mental disorder and Fitness to Stand Trial

* **s. 672.22** **Presumption of Fitness**: an accused is presumed fit to stand trial unless the court is satisfied on a balance of probabilities that the accused is unfit to stand trial --- either the accused or the Crown may raise this issue
* **s. 672.23** **Court May Direct Issue to be Tried**: (1) Where the court has reasonable grounds, at any state of the proceedings before a verdict is rendered, to believe that the accused is unfit to stand trial, the court may direct, of its own motion or on application of the accused or the prosecutor, that the issue of fitness of the accused be tried.
* The test that was developed under the common law is codified in **s. 2** as:
  + **s. 2- Unfit to stand trial** means unable, on account of mental disorder, to conduct a defence at any stage of proceedings before a verdict is rendered or to instruct counsel to do so, and unable to
    - (a) Understand the nature or object of the proceedings,
    - (b) Understand the possible consequences of the proceedings,
    - (c) Communicate with counsel
  + Minimum requirements for this defence are found in ***R v Whittle***
    - accused does not need to be capable of rationale decision making or be able to analytically reason
* **Mental disorder** means a disease of the mind
  + arteriosclerosis (***Rabey***); brain damage (***Revelle***); chronic alcoholism (***Beard***); delusion (***Abbey***); sexsomnia (***Luedecke***); epilepsy (***Sullivan***); erotomania (***Fraser***); bipolar (***Warsing***); psychopathic personality disorder (***Craig***)
    - FASD, autism spectrum disorder, nor parasomnia (***Parks***) have been recognized as diseases of the mind
  + Whether a condition counts as a disease of the mind is a question of law to be determined by a judge
  + Whether an accused is or is not suffering from a disease of the mind capable of robbing the accused of his capacity to appreciate the nature and quality of his acts is a question of fact to be determined by the trier of fact

## *R v Whittle,* SCC 1994

By virtue of **s. 16** of the CC, persons suffering a disease of the mind are exempted from criminal liability and punishment. Such persons are sick as opposed to blameworthy and should be treated rather than punished. However, they are not exempt from being tried. The test for fitness to stand trial is predicated on the existence of a mental disorder and focuses on the ability to instruct counsel and conduct a defence

## Issue 2: Not criminally responsible by reason of mental disorder

* **Part XX.1** contains detail provisions providing for mental assessments by physicians and for determination of the fitness of persons suffering from mental disorders to stand trial
* **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;
  + **(2)** Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proven on the balance of probabilities
  + **(3)** The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue
    - the effect of **ss. 16(2)** and **16(3)** to to typically put the onus on the accused to establish on a balance of probabilities that she is differing from a mental disorder.
* Where an accused is found NCRMD a court or Review Board may, pursuant to **s. 672.54**
  + **(a)** If the accused is not a significant threat to safety of public, order that the accused be **discharged absolutely**;
  + **(b)** Direct that the accused be **discharged subject to such conditions** as the court or RB considers appropriate;
  + **(c)** Direct that the accused be **detained in custody in a hospita**l, subject to appropriate conditions
* The **672.54** option that is chosen must be the least onerous and least intrusive to the accused having regard to the need to protect the public, the mental condition of the accused, and the need to reintegrate the accused into the general public
* Classic Trick Question: An accused is incapable of understanding that their act was morally or legally wrong. Are they entitled to the defence of NCR by reason of MD? Answer: only if the incapacity is due to a disease of the mind.

## Not Criminally Responsible by reason of Mental Disorder Analysis (comes from CC s.16).

If these factors are met, the accused is NCRMD

1. The accused is suffering from a mental disorder;
   1. Mental disorder means diseased of the mind (***Cooper, Bouchard-Lebrun***)
   2. Disease of the mind embraces any illness disorder to abnormal condition which impairs the human mind and its functioning, excluding self induced states caused by alcohol or drugs and transitory mental states such as hysteria or concussion (***Cooper v R***)
2. That rendered the accused incapable of appreciating;
   1. To appreciate may involve estimation and understanding of the consequence of that act (***Cooper v R***)
3. The nature and quality of the act or omission; or
   1. includes the ability to perceive the physical consequences and the impact of the act (***R v Abbey***)
   2. An accused’s failure to appreciate the penal consequences of his or her actions does not in law render the accused insane within the meaning of **s. 16(1)**(***R v Abbey***)
4. Of knowing that it was wrong
   1. “Wrong” means legally AND morally wrong (***R v Chaulk)***
   2. A person may know that the act is contrary to the law, but by reason of disease of mind is incapable of knowing that it is morally wrong. Defence of MD should not be made unavailable just because the accused knows that a particular act is contrary to the law (***R v Chaulk***)

**Insanity**

* ***Chaulk*** is the leading case for determining the meaning of “wrong”

**Automatism**

* “unconscious, involuntary behaviour, the state of a person who, though capable of action, is not conscious of what he is doing. It means an unconscious, involuntary act, where the mind does not go with what is being done.” (***R v K, Rabey***)
* primarily focused on voluntariness, not consciousness
* test will have to do with impairment of consciousness rather than complete lack of it
* leading case is ***Stone***
* two types of automatism:
  + sane- typically results in complete acquittal
  + insane- undertake the same analysis for insanity under s. 16

### Summary

* **1)** The history of the automatistic state matters
  + **i. Disease of the mind:** accused is potentially subject to detention in medical facility (***Rabey*, *Stone*, *Leudecke***)
  + **ii. Self-induced Intoxication:** The accused must proceed by way of the intoxication defence (**s. 33.1**)
  + **Transitory Accident:** The accused is entitled to an acquittal (***Parks***)
* **2)** Following ***Stone***, an accused pleading non-insane automatism must establish that there is evidential basis for the defence by a souring involuntariness and calling an expert witness
* **3)** The accused must also establish on the balance of probabilities that she was acting involuntarily
* **4)** Policy factors, especially the likelihood of recurrence, can negate a finding of non-insane automatism

## *R v Taylor* (1992), 77 CCC (3d) 551

**Ratio:** TJ erred in holding that accused must be capable of making rational decisions beneficial to him. The “limited cognitive capacity” test strikes an effective balance between the objectives of the fitness rules and the constitutional right of the accused to choose his own defence and to have a trial within a reasonable time.

## *M’Naghten’s Case*

**Ratio:** Set out the defence of insanity – now codified in **s. 16(1)** Defence of mental disorder

**Facts:** M shot and killed Drummond, secretary to UK PM Robert Peel but thought he was shooting the PM. M was

under a delusion he was being persecuted by the government: “They have accused me of crimes of which I am not guilty, they do

everything in their power to harass and persecute me; in fact they wish to murder me.” M pleaded not guilty.

**Issue:** At the time the act was committed, did M have the use of his understanding so as to know that he was doing a wicked act?

**Held:** For M – acquitted of murder due to defence of NCRMD

**Reason:** “Jurors ought to be told in all cases that every man is to be presumed sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a (1) defect of reason, (2) from disease of the mind, (3) as not to know the nature and quality of the act he was doing; or, (4) if he did know it, that he did not know he was doing what was wrong.”

* If the jurors should be of opinion that the prisoner was not sensible, at the time he committed it, that he was violating the laws both of God and man, then he would be entitled to a verdict in his favour: but if, on the contrary, they were of opinion that when he committed the act he was in a sound state of mind, then their verdict must be against him

***M’Naghten*’s** key points

1. Accused bears the burden of establishing that he is insane
2. It must be proved that the accused was suffering from ‘a disease of the mind’
3. The disease of the mind must have been operative at the time of the offence
4. The disease of the mind must have rendered the accused unable to appreciate the nature/quality of the act he was doing
5. Alternatively, if he did know what he was doing, the disease of the mind must have rendered the accused incapable of knowing that what he was doing was (legally) wrong

**S. 16(1) Defence of mental disorder**- no person is criminally responsible for an act committed or an omission made while (1) suffering from a mental disorder that (2) rendered the person incapable of appreciating (3) the nature and quality of the act or commission (4) of knowing that it was wrong

## *R v Cooper*, [1980] SCC- Definition of “disease of mind”, meaning of “to appreciate” in s. 16

**Facts:** Accused and victim were both patients at the Hamilton Psychiatric Hospital; both attended a church dance, and “after an unsuccessful attempt at sexual intercourse” the appellant strangled the victim. Accused testified that he did not intend to kill the deceased. A psychiatrist testified that the accused had a long history of mental deficiency and illness and had first come under psychiatric care at the age of seven. Since the age of 17 he had been a psychiatric patient, and when not an in-patient he was under out-patient care. **At the time of the offence he was an out-patient**. He was diagnosed at various times as being a case of borderline mental deficiency. As well, at various times he was diagnosed as a case of psychosis, personality disorder and anti-social type. Several months after the death he was diagnosed as 'personality disorder, mixed type, showing schizoid, anti-social, and inadequate features; borderline mental retardation'. There was also a history of bizarre behaviour and hallucinations. The doctor testified that at the time of the killing the accused would be in such a state of clouded consciousness that he would not be able to form the intent to kill and would not be sufficiently aware to have the capacity to take life. He would, however, have the capacity to form the intent to choke and cause some bodily harm. The doctor, however, also testified that the accused was not suffering from a disease of the mind.

**Issue:** Whether there was evidence that, on a balance of probabilities, the accused had a disease of the mind that rendered him incapable of appreciating the nature and quality of the act. What is the meaning of the phrase “disease of the mind”? What is the meaning of the phrase “incapable of appreciating the nature and quality of the act” in **s. 16**?

**Held:** For D – new trial ordered. Accused appeal allowed.

**Reason (Dickson):** disease of the mind embraces any illness disorder or abnormal condition which impair the human mind and its functioning, excluding self induced states caused by alcohol or drugs and transitory mental states such as hysteria or concussion. Disease of the mind is not simply psychiatry. Some mental states may be recognized as being within the definition of disease of the mind although, medically speaking, a psychiatrist might not so regard them. “To “know” the nature and quality of an act may mean merely to be aware of the physical act, while to “appreciate” may involve estimation and understanding of the consequences of that act. In the case of the appellant...in using his hands to choke the deceased he may well have known the nature and quality of that physical act of choking. It is entirely different to suggest, however, that in performing the physical act of choking he was able to appreciate its nature and quality, in the sense of being aware that it could lead to or result in her death. TJ erred in confusing the legal issue of whether the accused’s disorder could constitute disease of the mind with the factual issue of whether the accused was suffering from disease of the mind at the relevant time. Once evidence is sufficient to indicate that accused suffers from a condition that could constitute a disease of the mind, the judge must leave it to the jury to find whether the accused had disease of the mind at the tim the act was committed

## *R v Bouchard-Lebrun*, [2011] SCC- Intoxication & disease of mind; internal/external distinction

**Facts:** While on drugs, the accused illegally entered the building where the victim lived and brutally attacked him by punching and kicking him many times. Another occupant of the building went to the victim's aid but the accused threw him down the stairs and then stomped on his head. The accused was arrested and charged with committing aggravated assault and with breaking and entering a dwelling-house with intent to commit an indictable offence and attempting to break and enter. The accused pleaded not guilty to all the charges against him because at the time which offence was committed the accused was in a state of psychosis or had a disease of the mind as a result of taking the pill. Alternatively, he was in an extreme state of intoxication. TJ accepted psychiatric evidence that accused was suffering from toxic psychosis caused by the voluntary consumption of drugs. TJ said due to state of extreme intoxication the accused had to be acquitted of breaking and entering. But, TJ convicted accused for aggravated assault due to self-induced intoxication not being a defence to general intent offences

**Issue:** Can “toxic psychosis that results from a state of self-induced intoxication caused by an accused person’s use of chemical drugs constitute a “mental disorder” within the meaning of” CC **s. 16**, thereby exempting the accused from criminal liability?

**Held:** For Crown – D cannot raise defence of disease of mind, so excluded from raising **s. 16.**  **s. 33.1** applies here; external trigger.

**Ratio:** No defence of intoxication is available for crimes of assault because of **s. 33.1**

**Reason:** The accused was not suffering from disease of the mind, so defence of MD is not available. Conviction upheld. In this case, it is clear that the trigger is external. Courts should begin with general principle that temporary psychosis (caused by self-induced intoxication?) is “covered by the exclusion from ***Cooper***” (so is not a disease of the mind)

* But, accused can rebut the presumption in **s. 16(2)** by showing that, at the material time, he was “suffering from a disease of the mind that was unrelated to the intoxication-related symptoms”.
  + Can rebut the presumption by comparing the accused with a normal person and ask whether a normal person would, upon becoming intoxicated in the way the accused did, have manifested the same sort of psychosis
    - If yes – then the psychotic trigger is external and there is no disease of the mind
    - If no – then the trigger is internal and there is arguably a disease of the min

How do we define “appreciating” in **s. 16(1)**?

* ***R v Cooper***: ‘appreciate’ imports an additional requirement to mere knowledge of the physical quality of the act. The requirement is that of perception, an ability to perceive the consequences, impact, and results of a physical act. An accused may be aware of the physical character of his action (choking) without necessarily having the capacity to appreciate that, in nature and quality, that act will result in the death of ahuman being.

## *R v Abbey*, [1982] SCC- Appreciate the nature and quality of the act

**Ratio:** Accused’s inability to appreciate, due to a disease of the mind, the penal consequences of their actions does not render the accused insane within the meaning of **s. 16**. Making a mistake as to how you are going to be punished does not fall within **s. 16**.

**Facts:** Upon his arrival at Vancouver International Airport from Lima, Peru, the accused's shoulder bag was searched and found to contain two plastic bags with 5.5 ounces of 50 per cent pure cocaine. When asked what was in the bags, the accused answered "naturally, cocaine", and advised the police in a written statement about the events leading to his arrest. He is very open with the facts. In his defence, the accused raised insanity, some weird paranoid delusion and thought that he was exempt from criminal liability and so he had no issue admitting what he had. Psychiatric evidence suggested that he suffered a disease of the mind known as hypomania which, although not rendering him incapable of appreciating the nature and quality of act, involved delusions

* TJ acquitted accused by reason of insanity because he failed to appreciate the penal consequences of his act

**Issue:** What is the meaning of “appreciating the nature and quality of the act” in **s. 16(1)** of the CC?

**Held:** For Crown – D was capable of appreciating the nature and quality of one’s act therefore the defence of MD not available

**Reason:** The nature and quality of the act includes the ability to perceive the physical consequences and impact of the act. It refers to the physical character of the act, and requires sufficient mental capacity to measure and foresee the consequences of conduct. The TJ erred in concluding that an inability to appreciate the penal consequence brought the accused within **s. 16(1)** and therefore NCRMD. The ability to appreciate the nature and quality of one’s act include the ability to perceive the physical consequences and impact of the act, not the penal consequences. The accused knew that he was importing an illegal substance, and knew that it was a crime. But he was under the belief that he would not be punished. He appreciated that consequences of his actions (that he was committing a crime), but did not appreciate that he would be punished. Therefore the defence of mental disorder is not available to him. In this case, D was incapable of appreciating the consequences of his actions. He had a delusion that he was protected from punishment – thus D was unable to appreciate the penal consequences.But, a person is not entitle to defence of insanity because disease didn’t incapacitate him from understanding the nature and quality of his actions – he understood precisely that he was importing cocaine into Canada. This is in effect ignorance of the law – the question was whether since that stemmed from disease of mind. A delusion which renders an accused incapable of appreciating the nature and quality of his act goes to the mens rea of the offence, and results in a verdict of not guilty by reason of insanity.

* Punishment is not an element of the offence itself, and **an inability to appreciate the penal consequences of an act does not go to mens rea** and does not bring into operation the "first arm" of the insanity defence.
* The "second arm" of **s. 16(2)** requires an ability to know that an act is "wrong", which means "wrong according to law". Provision is concerned with knowledge of wrongness, not appreciation of consequences, whether physical or penal.

## *R v Chaulk*, [1990] SCC- Knowing that it was wrong = legally and morally wrong

**Ratio:** In **s. 16(1)** wrong can mean either legally or morally. Extends defence to individuals who know that it is ordinarily wrong to commit the crime but because of a mental disease they think it is appropriate for them to kill someone or commit this crime

**Facts:** The two accused were convicted of first degree murder. The defence raised at trial was insanity within the meaning of **s. 16.** Expert evidence led that the accused suffered from paranoid psychosis which made them believe they had the power to rule the world and killing was a necessary means to that end. They knew the laws of Canada existed but believed they are above the ordinary law, thought the law was irrelevant to them and thought they had a right to kill victim.

**Issue:** is the meaning of the word “wrong” in **s. 16(1)** restricted to “legally wrong” or more broadly to include “morally wrong”?

* if “wrong” only means “legally wrong” , then the accused is in the same position as ***Abbey*** - he knew that the act was legally wrong, but thought he was morally innocent. Because he knew act was legally wrong, not entitled to the defence

**Prior Proceedings:** Convicted at trial of first degree murder, appeal to Manitoba CA dismissed, appealed to SCC.

**Held:** Conditionally discharged – no longer danger to the public (but, in 1999 charged with two more murders)

**Reason:** In considering the capacity of a person to know whether an act is one that he ought to ought not to do, the inquiry cannot terminate with the discovery that the accused knew the act was contrary to the formal law. The court must also ask whether the accused knew that the act was morally wrong. A person may know that the act is contrary to the law, but by reason of disease of the mind is incapable of knowing that the act is morally wrong. Thus the defence of MD should not be made unavailable just because the accused knows that a particular act is contrary to the law. The accused in this case is entitled to the defence of MD because, although he understand what he was doing was legally wrong, he was incapable of understanding, by reason of disease of the mind, that was he was doing was morally wrong. The term ‘wrong’ as used in **s. 16(1)** must mean more than simply legally wrong. In considering the capacity of a person to know whether an act is one that he ought or ought not to do, the inquiry cannot terminate with the discovery that the accused knew that the act was contrary to the formal law.The court must also ask whether the accused knew that the act was morally wrong – more generally, something that ought not to be done “because he knows, first, that the act is contrary to the formal law or, secondly, that the act breaches the standard of moral conduct that society expects of its members.” “In applying **s. 16(1)** to a particular set of facts, it may be established that the accused who attempts to invoke the insanity defence is capable of knowing that he ought not to do the act because he knows, first, that the act is contrary to the formal law or, secondly, that the act breaches the standard of moral conduct that society expects of its members” Thus: “The insanity defence should not be made unavailable simply on the basis that an accused knows that a particular act is contrary to law and that he knows, generally, that he should not commit an act that is a crime. It is possible that a person may be aware that it is ordinarily [legally] wrong to commit a crime but, by reason of a disease of the mind, believes that it would be “right” according to the ordinary morals of his society to commit the crime in a particular context. In this situation, the accused would be entitled to be acquitted by reason of insanity.”

* If, due to a disease of the mind, an accused is incapable of knowing that an act should not be done—that is, is morally wrong—then even if that accused knows that the act ordinarily constitutes a crime, he should be entitled to a defence of not criminally responsible by reason of mental disorder – overrules ***R v Schwartz***

**Note:** An issue was also raised in this case about the constitutionality of **s. 16(2)** and **(3)** because of the presumption of sanity (which is contrary to the principle that the state has the burden of proving guilty beyond reasonable doubt)., and the reversal of burden of proof. These provisions were held to violate **s. 11(d)**, but justified under **s. 1.**

### Insanity Summary

* General idea derived from ***M’Naghten***
  + **CC s. 16(1) Defence of mental disorder** – No person is criminally responsible for an act committed or an omission made while **(1)** suffering from a[disease of the mind] **(*Cooper, Bouchard-Lebrun***) **(2)** that rendered the person incapable of appreciating (***Cooper***) **(3)** the nature and quality of the act or omission (***Abbey***) ***or*** (4) of knowing that it was wrong (***Chaulk***)
* ***Cooper*** – knowledge vs appreciation
* ***Abbey*** – certain consequences are irrelevant, just need to know that it was wrong
* ***Chaulk*** – wrong is either legal or moral
* Disease of the mind does not include self-induced state (***Bouchard-Lebrun***) or transitory mental states (***Cooper***)

### Problems with s. 16(4)

* **s. 16(4)**- “Everyone shall, until the contrary is proven, be presumed to be and to have been sane.”
  + **(1)** provision allows sanity… to be presumed which violated the basic principle that the state bears the burden of proving guilt beyond a reasonable doubt
  + **(2)** the provision requires an accused to prove his or her insanity, on a balance of probabilities, in order to rebut the presumption of sanity. This gives rise to a reversal on the burden of proof such than an accused could be found guilty of a criminal offence despite a reasonable doubt in the mind of the trier of fact about the accused’s insanity (***Chaulk***)
* **Held: 16(4)** meets the rational connection test from Oakes. It impairs an accused’s rights as little as possible and the salutary benefits outweigh detrimental effects.

# capacity-based defences: Automatism

**Automatism:** unconscious, involuntary behaviour, the state of a person who, though capable of action, is not conscious of the involuntary act, where the mind does not go with what is being done (***R v K*)**

* automatism is an actus reus defence - it negates voluntariness

**Three ways to view states of automatism. The cause of automatism matters** (how the automatism came about )

1. It is a result of an underlying disease of the mind
   1. If so, accused must proceed under **s. 16** and seek determination of NCRMD (***Rabey, Stone, Leudecke***)
   2. accused is potentially subject to a detention in a medical facility
   3. If defence is successful, accused is guilty of the crime, but NCRMD
2. It is a result of voluntary intoxication (i.e. “extreme intoxication akin to insanity or automatism”, such as that found in ***Bernard, Daviault, Bouchard-Lebrun***)
   1. If so, accused must proceed by way of defence of intoxication, subject to limitations by CL and **s. 33.1** (***Bouchard-Lebrun***)
3. It is the transitory result of a condition/event related neither to a disease of the mind nor to self-induced intoxication
   1. If so, the accused proceeds by defence of non insane automatism (***Parks, Stone***)
   2. If so, and trier of fact determines accused was indeed acting with automatism when the prohibited act was committed, **accused is entitled to an absolute acquittal** on the grounds that the *actus reus* was not performed voluntary under the direction of a conscious mind (like in ***R v King***)
   3. not held to be NCRMD, but is acquitted on the grounds tat she did not perform the AR of the offence voluntarily, under the direction of a conscious mind (***King, Jiang***)
   4. Only if the state is a transitory accident is the accused entitled to an acquittal
   5. if successful, the accused is acquitted on the grounds that he did not perform the AR voluntarily (***R v Parks***)

Therefore the central question in deciding any case involving the defence of automatism is whether or not the accused was suffering from a disease of the mind, or intoxicated, or not.

## Automatism Analysis

1. Defence must establish proper evidential foundation for defence of non-insane automatism (***R v Stone***)
   1. The defence must satisfy the TJ that there is evidence upon which a properly instructed jury could find that the accused acted involuntarily on a balance of probabilities (***R v Stone***)
      1. Evidence can include: psychiatric evidence, medical history of automatistic like dissociative sates, corroborating evidence of bystanders, evidence of motive (usually disproves automatism), severity of triggering stimulus (***R v Stone***)
      2. **Note:** this is a much higher standard than the “air of reality” test
2. Classifying the automatism as sane or insane (***R v Stone***)
   1. Beginning from proposition that defence to be left with the jury is insane automatism by reason of MD (***R v Stone***)
   2. Consider the internal/external cause, and the recurring danger policy considerations (***R v Parks, R v Stone***)
      1. External cause requires comparing accused’s automatistic reaction to a “psychological blow” to the way a normal person might react. A claim of “psychological blow” requires evidence of an extremely shocking trigger before non-insane automatism may be left with the trier of fact (***R v Stone***)
      2. Automatism caused by mere stress is presumed to be triggered by an internal factor and so gives rise to defence of insane automatism only (***R v Stone***).
      3. Any condition which is likely to present a recurring danger to the public is treated as a disease of the mind (***R v Parks, R v Stone****)*

**Note:** An accused can be found NCRMD even though he had no mental disorder because of these policy considerations. If the trigger is external, and it is repeated, then for policy reasons we can classify a person as suffering from a disease of the mind, even though they do no actually have a mental disorder (***R v Luedecke, R v Stone***)

## *R v K*, 1971 ON HC - definition of automatism

**Facts:** Accused charged with manslaughter in death of his wife

**Reasons:** Automatism describes unconscious, involuntary behaviour. It is the state of a person who, though capable of action, is not conscious of what he is doing. An act is not to be regarded as involuntary because the doer does not remember doing it - loss of memory afterwards is never a defence in itself, so long as the person doing the act was conscious at the time

## *R v Rabey,* [1980] SCC- cause of automatism is external not internal

**Ratio:** Test for Sane vs Insane Automatism. Automatism requires an external trigger; internal factors trigger defence of MD

**Facts:** D and victim were dating – studying for test one day. D found in victim’s notebook a note that victim considered members of the opposite sex more exciting and desirable than the D, to whom she referred as “a nothing”. D had never dated any other girl for a length of time, had minimal sexual experience, and was infatuated by the victim. D took the note home thinking about it at night and underlining certain portions. Next day, D ran into her by chance and violently assaulted the victim after she informed him that he was just a friend. He then choked her while crying out “you bitch”. Accused asserted automatism as the defence.

**Issue:** How does court determine if automatism is sane or insane? Is defence of non insane automatism available to accused?

**Ratio:** Non insane automatism is a defence, and the relevant question to determine whether automatism is sane or insane is whether the cause is external or internal. If the situation would have been sufficient to drive a normal person into a state of automatism, then the cause is external and the defence is available. If the malfunctioning mind comes from an internal sources such as the accused’s “psychological or emotional makeup, or some organic pathology,” then the malfunction is a disease of the mind. If the malfunctioning of the mind “is the transient effect produced by some specific external factor” then the malfunction does not constitute a disease of the mind.

**Held:** For Crown. Acquittal overturned, new trial ordered – D was denied the defence of non-insane automatism

**Reason:** The accused behaved in a manner inconsistent with a normal person’s response to the circumstances, so the trigger must have been internal.If a malfunctioning of the mind arises from an ***internal*** source such as the accused’s “psychological/emotional makeup, or in some organic pathology,” then the malfunctioning falls within the concept of (or is due to) a disease of the mind. But, if the malfunction “is the transient effected produced by some specific **external** factor,” then it does not fall within the concept of disease of the mind – an external factor means no disease of the mind. TJ erred in holding that the “psychological blow” (girlfriend rejection him), which was said to have cause the dissociative state, was an externally originating cause and she should have held that D was in a dissociative state at the time he struck the victim and he suffered from a disease of the mind. But a normal person would not have reacted this way. If a normal person would have reacted differently, then the accused’s reaction can only be based on an internal condition, a disease of the mind. The ordinary stresses and disappointments of life do not constitute an external cause with the effect of allowing the accused out of the category of a disease of the mind. TJ should have held that, if the accused was in a dissociative state, that state arise from a disease of the mind. Since it was internal and not external, no defence of automatism

**Martin JA:** “In my view, the ordinary stresses and disappointments of life which are the common lots of mankind do not constitute an external cause constituting an explanation for a malfunctioning of the mind that takes it out of the category of “a disease of the mind”. “The emotional stress suffered by the respondent as a result of his disappointment with respect to Miss X cannot be said to be one external factor producing the automatism within the authorities, and the dissociative state must be considered as having its source primarily in the respondent’s psychological or emotional make-up.” His infatuation with this young woman had created an abnormal condition in his mind under the influence of which he acted unnaturally and violently to an imagined slight to which a normal person would not have reacted in the same manner.

**Note:** Following ***Rabey***, insane/sane automatism is drawn using internal/external distinction. Question was whether the situation would have been sufficient to drive a normal person into a state of automatism; if not, then conclusion was that the source of the automatism was not due to external factors, but instead due to internal factors attributable to a disease of the mind.

## *R v Parks*, [1992] SCC- Automatism; Expansion of test for automatism

**Ratio:** Likely recurrence negates sane automatism

**Facts:** Early morning, D killing his mother-in-law and wounded his father-in-law in their home when they were asleep. They lived far from the D (23 km), who went by car. Immediately after, D went the police and said that he killed two people. D presenting a defence of automatism, claiming he was sleepwalking. He had sleepwalked before and several members of his family had a history of sleep walking. Past year was stressful for D and he had trouble waking up from sleep.

**Issue:** Does sleepwalking raise non-insane automatism, insane automatism, or neither? When might public policy influence whether an accused can raise the defence of non-insane automatism? Should sleep walking be considered a mental disorder?

**Ratio:** After considering internal and external factors that might trigger a non-insane automatistic state, a court must determine the likelihood of recurrence of an accused’s automatic state to determine if the accused should be found to have been suffering from a disease of the mind. Policy factors, particularly the likelihood of recurrence, can negate finding of sane automatism.

**Held:** For D – acquitted based on non-insane automatism.

**Reason:** Only those who act voluntarily, with the requisite intent to commit an offence, should be punished by criminal sanction. Sleepwalking does not stem from a disease of the mind but rather is a physical sleep disorder. In this case, recurrence was unlikely. “In his reasons, the CJ finds that the evidence and expert testimony from the trial of the accused support the TJ’s decision to instruct the jury on non-insane automatism. In distinguishing between automatism and insanity the TJ must consider more than the evidence; there are overarching policy considerations as well. Of course, the evidence in each case will be highly relevant to this policy inquiry.” A **policy approach should be taken to non-insane automatism** that relies on both the source and the recurring danger interpretations of “disease of the mind.” Having found that an accused was suffering from non-insane automatism, a court might nonetheless decline to recognize the accused’s defence on “policy” grounds.

* There are two policy considerations in automatism cases:
  + **1) Continuing danger:** any condition likely to present a recurring danger to the public should be treated as insanity, rather than non insane automatism
  + **2) Internal cause:** a condition stemming from the psychological or emotional make up of the accused, rather than some external factor, should lead to a finding of insanity rather than non-insane automatism
* It is clear from the evidence that there is almost no likelihood of recurrent violent somnambulism (sleep walking)
* There are no compelling policy factors that preclude finding that accused’s condition was non-insane automatism

**Note**: LaForest seems to suggest that, having found that an accused was suffering from non-insane automatism, a court might nonetheless decline to recognize the accused’s defence on “policy” grounds.

## *R v Stone*, [1999] SCC- Analysis for defence of non-insane automatism

**Ratio:** Sane automatism defence dead.

**Facts:** D stabbed wife after she vigorously and harshly insulted him – charged with murder. D claims he blacked out during the stabbing. He pleads insane automatism, non-insane automatism, lack of intent and alternative provocation. When he came to he had stabbed her 47 times with a hunting knife that he kept in the car. D claimed both insane and non-insane automatism. The judge only left the issue of insane automatism with the jury. D appealed the judge’s charge to the jury.

**Issue:** Is the defence of non-insane automatism available to the accused? Can mere words cause an accused to enter an involuntary state to dispel criminal sanction? Was it improper of the TJ to not instruct the jury on the sane automatism in this case.

**Ratio:** If the accused advances the defence of automatism, the presumption is insane automatism and the burden shifts to the accused to prove non-insane automatism on the balance of probabilities. Very difficult to prove non-insane automatism after this case. Incorporates the internal/external source approach to disease of the mind, and the recurrence of danger approach- so policy plays a major role in determining whether a condition is a disease of the mind. Accused must rebut presumption voluntarily acting, in order to avoid placing the onerous burden of proving voluntary action on the Crown. **Accused must prove: voluntariness, psychiatric evidence, evidence of trigger akin to a shock, evidence of a documented history of something like automatistic states would be helpful (but once you show this, you must turn to s. 16 and the accused is no longer entitled to the defence of non-insane automatism), bystander evidence of appearing like he was in such a state.**

**Held:** For Crown – D convicted of manslaughter (jury likely accepted defence of **s. 232** provocation which reduced murder to manslaughter)

**Reason:** TJ did not err. Law presumes that people act voluntarily. So… the accused must rebut the presumption of voluntariness. But this goes against **s. 11(d)** of the *Charter* presuming innocence by shifting the burden of proof onto the D to prove their innocence – but justified under **s. 1** because criminal law presumes voluntariness

* + ***Rabey***: “The Crown always bears the burden of proving a voluntary act... The prosecution must prove every element of the crime charged. One such element is the state of the mind of the accused, in the sense that the act was voluntary. The circumstances are normally such as to permit a presumption of volition and mental capacity. That is not so when the accused, as here, has placed before the court… evidence to raise that he was unconscious of his actions at the time of the alleged offence. No burden of proof is imposed upon an accused raising such defence beyond pointing to facts which indicate the existence of such a condition.”
  + Crown does not hold the burden of proving voluntariness because it is presumed.
* **BUT** **s. 16(2)** presumes that there is no mental disorder, while defence of automatism presumes insanity

Given the above, the accused relying on the defence of automatism is presumed insane in the absence of contrary evidence.

* Mitigating factor: an accused who is found NCRMD as a result of insane automatism may nonetheless be absolutely discharged by the RB after it has conducted its investigation and assessment of the accused
  + ***Luedecke***: “Where that personalized assessment does not demonstrate the requisite significant risk, the person found NCRMD must receive an absolute discharge. Even where a significant risk exists, the disposition order must be tailored to the specific circumstances of the individual and must, to the extent possible, minimize the interference with that individual's liberty.”

**So – two-step approach to automatism**

* 1) Establish the proper evidential foundation
  + Defence must establish, on a balance of probabilities, that there is sufficient evidence to find that the accused acted involuntary – this means is there enough evidence that a properly instructed jury could acquit, if not then no obligation to submit this defence to the jury
* 2) Classifying the automatism as sane or insane
  + The jury is to begin from proposition that the defence to be left with the jury is insane automatism by reason of MD
  + Consider, among other things, the internal and external cause, and the recurring danger
    - * But catch-22, establishing automatism sometimes requires pointing to prior instances of automatism. This raises the issue/danger of recurrence, which means that the automatism is likely due to an underlying disease of the mind, meaning mental disorder

### According to Bastarache in *Stone*

1. Proving voluntariness BARD is burdensome for the Crown;
2. Thus, the accused must prove involuntariness on BOP;
3. Moreover, the law presumed that automatism is a disease of the mind;
4. Thus, an accused relying on the defence of automatism is presumed to be insane in the absence of evidence to the contrary

### Bastrache’s 4 Principles of the defence of non-insane automatism

1. Shifts the onus and burden of proof onto the accused
   1. The defence of non-insane automatism negates the voluntariness of the AR. Because the law presumed that people act voluntarily, the accused must rebut the presumption of voluntariness
   2. The justification Bastarache provides for the presumption of voluntariness is that it is too onerous for the Crown to prove voluntariness beyond a reasonable doubt. But it doesn't make sense to say that we can presume the accused acted with the requisite fault element in order to a void placing the onerous burden of proving the MR of the Crown.
2. When the defence of automatism is raised, the default is that it is insane automatism, unless the accused can prove it is non-insane automatism
   1. TJ start from the proposition that the condition the accused claims to have suffered from is a disease of the mind”
   2. **Botterell:** Is this really the kind of thing you can take judicial notice of? Also, how can this statement be reconciled with **s. 16(2)** of the CC which presumes sanity? For the purposes of insane automatism you are presumed sane, but for non-insane automatism you are presumed to have MD? How does this make sense?
3. Incorporation both the internal/external approach to disease of the mind and the recurrence of danger approach
4. Public policy to play a role in determining whether a condition is a disease of the mind

## *R v Luedecke*, [2008] ONCA- Application of Stone

**Facts:** Accused and complainant were at a house party. Complainant fell asleep on a couch and was woken up by the accused having sex with her. Accused was charged with sexual assault. Accused testified that he had a lot to drink and not much sleep and that he has “sexsomnia”. Accused raised the defence of non-insane automatism. D admits to sexually assaulting victim, but claims he was asleep when sexual activity occurred – unaware what was happening and unable to control his actions.

* TJ: sleepwalking was a disease of the mind - absolute discharge due to no threat to public safety

**Issue:** Is the accused's automatistic state sane or insane? Was his automatistic state the result of a mental disorder or was it more properly characterized as a non-mental disorder automatism?

**Ratio:** Where triggers are common, the automatism is insane. Sexsomnia properly characterized as automatism by reason of MD.

**Held:** For Crown, appeal allowed – new trial ordered to determine whether accused’s automatism by reason of MD should result in verdict of not guilty or NCRMD verdict, focus on whether automatism should result in absolute acquittal or due to insanity.

**Reason:** TJ failed to appreciate the hereditary nature of D’s condition, failed to give effect to D’s well established history of sexsomnia, and failed to appreciate the strong likelihood of the recurrence of the events that triggered his sexsomnia. The accused continues to constitute a significant danger to those around him - triggers like stress, alcohol and fatigue are likely to recur. The triggers included stress and lack of sleep, which are likely to reoccur as they are a part of everyday life. So the accused is likely to engage in criminal behaviour again. In short, the accused continued to constitute a significant danger to those around him. It is not necessarily that the condition has to recur but it is enough if the symptoms are likely to recur. To satisfy the continuing danger element in ***Stone*** there must be evidence establishing a significant risk – the risk must be a real risk of criminal conduct involving physical or psychological harm to individuals in the community. A risk of trivial harm or minuscule risk or significant harm will not suffice to deprive individual of their liberty. Where there is a significant risk, disposition must be tailored to the specific circumstances of the individual and must minimize the interference with their liberty.

**Note:** At the new trial in 2009, Luedecke was found NCRMD. No disposition with respect to detainment or treatment was made, however, he was released into the community on conditions. At RB hearing in October 2009, he was absolutely discharged

**Note:** This case is weird because the accused can be found to be NCRMD even though he had no mental disorder. If the trigger is external, and it is repeated, then for policy reasons we can classify a person as suffering from a disease of the mind, even though they do not actually have a mental disorder.

### Automatism Summary

* Etiology of the automatism is relevant (if due to insanity or self-induced intoxication, must proceed via **s. 16** or **s. 33.1**)
* If the state arises was a result of a disease of the mind, then we proceed via **s.16/**NCRMR, and the accused is potentially subject to a detention in a medical facility ***(Chaulk, Rabey, Stone, Luedecke***)
* If the state arises as a result of self-induced intoxication, then the accused must proceed by way of the intoxication defence, subject to the limitations of **s. 33.1** (**Daviault, Bouchard-Lebrun**)
* If the state arises as a result neither of a disease of the mind nor self-induced intoxication, then the accused is entitled to an acquittal (***Parks***)
* Following ***Stone***,an accused pleading non-insane automatism must establish an evidential basis for the defence by asserting involuntariness and by calling expert witnesses
* The accused must also establish on the balance of probabilities that she was acting involuntarily – the onus and BOP is shifted (“the law presumes voluntariness”)
* Policy factors, esp. the likelihood of recurrence, can negate a finding of non-insane automatism, so the default starting point of the inquiry is now mental disorder automatism
* Defence of non-insane automatism requires basis for the defence (involuntariness, expert witness) – ***Stone***
  + Burden is shifted to D to prove, on balance of probabilities, they were acting involuntary (presumes voluntariness)
    - Policy factors (eg. likelihood of recurrence) may negate finding of non-insane automatism and the default point of inquiry is that it was due to a mental disorder

## Necessity

Necessity is NOT a Criminal Code defence, rather it is a common-law defence recognized via **s. 8(3)** of the *CC*

* It’s a “residual defence” catching cases that slip through the cracks where defences are unavailable when they should be
  + eg. Deadly blizzard, you come across a cottage, break in, eat the food – obvious B&E and theft that was performed consciously, but the choice was somewhat involuntary out of necessity
* We know voluntariness is a material element of the *actus reus* and that the Crown bares the burden of showing it was voluntary. The issue here is that the voluntariness wasn’t “normative” because it prevents the accused from actualizing his choice in an immediate manner – it wasn’t his choice, he was forced to behave in a particular way because of the situation

**s. 8(3)-** every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament.

The basic idea is that in certain circumstances, the accused has no choice but to break the law. The accused’s choice wasn’t “normatively voluntary”

Is necessity a justification or an excuse?

* Justification is doing something you are entitled to do (eg. self-defence – you have a right to protect your own life)
* Excuse is that you should not have done what you did, but given the circumstances should not be liable (pity)
* In Canada, it is clear that necessity is an excuse (***Perka***)
* Necessity is recognized in Canada as a common law excuse
* necessity, duress and self defence are affirmative defence because the accused has to provide evidence that notwithstanding they have done everything that would constitute an offence, they should not be convicted of it

The rationale for the defence is that it is inappropriate to punish actions that are “normatively involuntary: where this form of involuntariness is measured on the basis of society’s expectation of appropriate and normal resistant to pressure (***Perka***)

“Normatively involuntary” - although the actions of the accused weren't physically involuntary, we accept that they didn't really have a choice in the circumstances but to do the thing (***Perka***)

### Analysis for defence of necessity”

* 1) The accused must be in a situation of imminent peril;
  + assessed on a modified objective test (a reasonable person in the situation of the accused) (***Perka, Latimer***) - the accused person must, at the time of the act, honestly believe, on reasonable grounds, that he faces a situation of imminent peril that leaves no reasonable legal alternative open (***Latimer***)
  + not enough that peril is foreseeable/likely- must be on verge of occurring and virtually certain to occur (***Latimer***)
  + peril can be to the accused or to a third party (***Latimer***)
* 2) The accused must have no reasonable alternative to disobeying the law if the peril is to be avoided;
  + Assessed on a modified objective standard (reasonable person in the situation of the accused) (***Perka, Latimer***)
  + involves a realistic appreciation of the alternatives open to a person; the accused need not be placed in the last resort imaginable, but he must have no reasonable legal alternative (***Latimer***)
* 3) There must be proportionality: the harm inflicted must be less than the harm sought to be avoided
  + Assessed on purely objective standard (don’t care what accused thought in terms of proportionality, just want to know what reasonable person would of thought) (***Latimer***)

**Necessity is NEVER a defence to murder** (***R v Dudley and Stephens***)

### Justification v Excuse

* practically speaking the distinction does not matter.
  + for excuse, we admit that the action was wrong, but do not accept responsibility for it (are not punished for it)
  + for justification, we accept responsibility but deny that the action was wrong
  + necessity and duress operate as excuse based defences (***Perka v The Queen***)
  + self defence is a justification based defence

## *R v Dudley and Stephens*, [1884] UK- Necessity is never a defence to homicide

**Ratio:** Necessity is never a defence to murder.

**Facts:** Sailors become stranded in the middle of the ocean on a life boat after their ship sinks. There are several attempts at survival – they eat a turtle, they drink their own urine. Eventually the youngest, Parker, falls ill and the remaining men decide to kill him prematurely so that they can survive. They do – and are eventually rescued 4 days later by a passing German ship.

**Issue:** Should the accused be charged with murder? Are there any defences available to them, given the circumstances? Could the accused avail themselves of necessity as a defence?

**Parties Arguments:** Dudley and Stephens are not claiming self defence, they said they had no choice, it was either him or us and he was sick anyways. They said they were only doing what they needed to do to survive and it was the lesser evil.

**Ratio:** While necessity constitutes a defence, outside context of self-defence, necessity cannot be raised as defence to murder.

**Held:** For Crown - necessity is no defence to murder. Accused’s convicted of murder.

**Reasons:** The necessity of hunger does not justify robbery, let alone murder. The men are not entitled to kill the cabin boy,

particularly as he posed no threat to them. Defence of necessity would operate as a justification rather than an excuse.

* + This is not a justification – by killing Parker they ensured he had no chance of survival

## *Perka v The Queen*, [1984] SCC- Outlines test for defence of necessity

**Facts:** Accused were drug smugglers who were taking drugs from Columbia to Alaska, when off the shore of Canada, the rough seas caused their engine to overheat (also making it impossible to offload the drugs, as it would make the problem worse). As a result, they entered a Canadian bay to make repairs. Accused were then caught and charged with importing a narcotic and possession of a narcotic for purpose of trafficking contrary to the *Narcotics Control Act*. Accused argued that necessity forced them to commit this crime and that as such they should be acquitted

**Issue:** What are the criteria an accused must satisfy to successfully raise the defence of necessity? Is the defence of necessity available to the appellants?

**Ratio:** 3 requirements for necessity: (1) urgent situation of clear and imminent peril, (2) No reasonable alternative to disobeying the law - compliance must be demonstrably impossible, (3) Proportionality between the harm inflicted and the harm avoided.

**Held:** For Crown. Defence of necessity could not apply. Conviction upheld, accused had a reasonable alternative- get rid of drugs

**Reason:** Necessity is best conceptualized as an excuse – the rationale for the defence is that it is inappropriate to punish actions that are “normatively involuntary” where this form of involuntariness is measured on the basis of society’s expectation of appropriate and normal resistance to pressure. “The essential criteria for the operation of the defence is the moral involuntariness of the wrongful action measured on the basis of society’s expectation of appropriate and normal resistance to pressure.” It would be inappropriate to punish actions that are “normatively involuntary” where this involuntariness is measured on the basis of societal expectation of appropriate and normal resistance to pressure. The acts may still be wrong, but are excused.

**Test for Necessity Defence** (almost looks like *Oakes* test):

1. Accused must be in a situation of imminent peril
   1. Determined by a modified objective standard that looks reasonably at the circumstances of the accused
   2. typically this means peril to life or limb, but can also be peril to property
2. Compliance with the law must be demonstrably impossible – the accused must have no reasonable legal alternative to disobeying the law if the peril is to be avoided
   1. it is not that there is NO alternative, but there is no reasonable alternative
   2. Involuntariness means inevitable, unavoidable, and where no reasonable opportunity for alternative course of action to not break the law was available
   3. This is also a modified objective standard
3. There must be proportionality – the harm inflicted by breaking the law must be less than the harm sought to be avoided
   1. This is purely an objective standard

**Modified objective standard:** What a reasonable person would have done in the circumstances, but also consider what the accused honestly believed to be true

## *R v Latimer*, [2001] SCC- Affirms test for defence of Necessity

**Ratio:** Necessity open for other people

**Facts:** D charged with 1st degree murder of severely disabled daughter – she had cerebral palsy causing frequent, painful seizures. She was totally dependent on the D. When doctors wanted to perform surgery on her which D considered to be mutilation, he chose to kill her rather than have her undergo the procedure. On October 24, D killed her by carbon monoxide poisoning – raised defence of necessity. Accused found guilty of the second degree murder of his daughter.

**D’s Argument:** I had to do this, my child was in constant pain, she was not going to recover.

**Issue:** Was the TJ correct in refusing to leave the defence of necessity with the jury? This is a question of law.

**Ratio:** Can still use the defence of necessity where it is someone else’s necessity from nature.

**Held:** For Crown – necessity not available to the defendant. Appeal dismissed, conviction upheld for second degree murder and sentenced to life imprisonment with no possibility of full parole for 10 years. SCC says that he loses on all three branches of the test, he would of lost even if one branch failed but all three actually failed.

**Reason:** Affirms the test in ***Perka***.Court agrees with the TJ that there was no “air of reality” (***Ewanchuck***) to the defence. There must be an air of reality to EACH COMPONENT of the necessity criteria for a TJ to leave the defence of necessity with the jury. In applying the ***Perka***test: The first two criteria must be determined using a modified objective test. “The accused person must, at the time of the act, honestly believe, on reasonable grounds, that he faces a situation of imminent peril that leaves no reasonable legal alternative open.” The modified objective test accounts for personal characteristics of an accused that legitimately affect what may have been expected of that accused in the circumstances. The third criteria must be determined using a purely objective standard, because "evaluating the gravity of the act is a matter of community standards infused with constitutional considerations.” A subjective approach would not allow considering of social vales pursuant to what constitutes a transgression.

* + Accused was obviously not in imminent peril. And his daughter, although having low quality of life, had no immediate threat to his life. If accused believed his daughter was in imminent peril, it was unreasonable. Impending surgery was not a threat to his daughters life.
  + Furthermore, accused could not establish that there was no other reasonable, legal alternative – he could have allowed her to live and make her life as comfortable as possible such as placing her in a home or having surgery
  + Finally, the harm caused by the accused was not proportional to any harm avoided. Killing another human in order to relieve your own suffering is not proportional to the existence of that suffering.

### Test from *Perka*

1. Was there imminent peril?- Modified objective
   1. Assessed on a modified objective test 🡪 the accused person must, at the time of the act, honestly believe, on reasonable grounds, that he faces a situation of imminent peril that leaves no reasonable legal alternative open
   2. not enough that peril is foreseeable or likely – it must be on the verge of transpiring and virtually certain to occur
   3. Peril can be to accused or to third party
   4. Court says there was no imminent peril because she was not facing death, it is true that she was facing the surgery but that is not imminent peril. But there was nothing about her condition that placed her in a dangerous situation. In fact, the surgery may have improved her condition. Accused suffering can constitute imminent peril but in this case there is nothing that placed Tracy in the position where death was the alternative
   5. **Note:** this case suggests that it doesn't have to be imminent peril to the accused
2. No legal alternatives? - Modified objective
   1. Assessed on a modified objective standard
   2. Involves a realistic appreciation of the alternatives open to a person; the accused need not be placed in the last resort imaginable, but he must have no reasonable legal alternative
   3. There is no air of reality to the proposition that the appellant had no reasonable legal alternatives, he had one alternative which was helping Tracy to live and minimizing her pain as much as possible. The accused was aware that there were alternatives, and he rejected them.
3. Harm inflicted proportional to harm avoided? - purely objective
   1. It is difficult to imagine a circumstance in which the proportionality requirement could be met for a homicide.
   2. Assessed on a purely objective standard must be objective since evaluating the gravity of the act is a matter of community standards infused with constitutional considerations (***Latimer***)
   3. Harm inflicted (death) was completely disproportionate to the harm avoided (lifetime of suffering)

## Duress

Duress is both a statutory and a common law defence

* **s. 17** defence of duress applies only to *principal* offenders
  + Defence of duress for a principal is narrower
* Common law defence available to parties (aider, abettor, accessories)

**s. 17 – Compulsion by Threats** (***Ruzic*** case modified and developed the defence to find immediacy/presence unconstitutional)

A person who commits an offence under **(1)** compulsion by threats of **(2) ~~immediate~~ death or bodily harm** **(3) from a person ~~who is present~~** when the offence is committed is **(4) *excused*** for committing the offence **IF** **(5) the person believes that the threats will be carried out** and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion

* **BUT** this section does not apply where the offence that is committed is high treason or treason, **murder**, piracy, **attempted murder**, **sexual assault**, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, **robbery**, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson or abduction and detention of young persons

Common Law defence of duress is also available to parties via the operation of **CC s. 8(3)**

**s. 8(3)** Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament.

An accused charged as a principal can ONLY use statutory defence of duress in **s. 17** (***Ruzic, Ryan***)

An accused charged as a party can use the common law defence of duress, preserved in **s. 8(3)** of the CC

* CL defence of duress is much broader than the statutory defence. Statutory defence is limited by the enumerated offences listed in **s. 17** that the defence does not apply to.

**Our Cases**

* ***Carker*:** read to understand the potential harshness of the unmodified immediacy and presence requreiemnts in **s. 17**
* ***Pacquette***: read to understand the principal/party distinction in the context of the law of duress
* ***Hibbert***: read to understand the role played by moral involuntariness in the defence of duress; also sets out the nature of the objective test
* ***Ruzic***: read to emphasize the importance of moral involuntariness
* ***Ryan***: read to understand the constitutional validity of **s. 17**, and the relationship between **s. 17** and the common law defence of duress - a relation that is complicated and somewhat controversial

|  |  |
| --- | --- |
| **Necessity** | **Duress** |
| 1. A situation of clear and imminent peril | 1. Threat of immediate death or bodily harm |
| 2. No reasonable legal alternative | 2. No safe avenue of escape |
| 3.Proportionality between harm inflicted and harm avoided | 3.Proprotionality between threat and criminal act to be executed |

### Framework

Is the Accused a principal or a party?

1. Principal - turn to **s. 17** requires threat of immediate bodily harm
   * (a) compulsion by threats?
   * (b) of ~~immediate~~ death or bodily harm? (***Ryan***)
   * (c) from a person ~~who is present when the offence is committed~~? (***Ryan***)
   * (d) person believes the threats will be carried out?
   * (e) person is not party to a conspiracy or association [organized crime]?
   * Exceptions:
     + high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson or an offence under sections 280 to 283 (abduction and detention of young persons)
2. Party- turn to common law- require moral involuntariness
   * 1. Explicit or implicit threat of death or bodily harm proffered against the accused or 3rd person. Threat may be of future harm
   * 2. The accused reasonably believed that the threat would be carried out (modified objective standard)
   * 3. The non-existence of a safe avenue of escape (modified objective standard) - ***Hibbert***
   * 4. Close temporal connection between the threat and the harm inflicted by accused (modified objective standard)
   * 5. Proportionality between harm threatened and the harm inflicted by the accused (modified objective standard)
     + includes that the accused will adjust conduct due to the nature of the threat
   * 6. The accused is not a party to a conspiracy or association

**Note:** CL defence of duress requires **moral involuntariness** and **no safe avenue** **of escape** and there is no list of exceptions

## Analysis for Defence of Duress (under either s. 17 or common law defence) (R v Ryan)

1. There must be an explicit or implicit threat of death or bodily harm directed against the accused or a third party (***R v Ryan***)
2. The accused believed that the threat would be carried out (**modified objective standard**) (***R v Ryan, SCC***);
3. The non-existence of a safe avenue of escape (**modified objective standard**) (***R v Ryan, SCC***);
   1. Accused person cannot rely on CL defence of duress if he had opportunity to safely extricate himself from the situation (***Hibbert***)
   2. Modified objective standard takes into account particular circumstances and frailties of the accused (***Hibbert***)
4. A close temporal connection between the threat and the harm threatened (***R v Ryan, SCC***);
5. Proportionality between the harm threatened and the harm inflicted by the accused. The harm caused by the accused must be equal to or no greater than the harm threatened (**modified objective standard)** (***R v Ryan*, SCC**).
6. Accused cannot be party to conspiracy or association

## *The Queen v Carker* (No 2), [1967] SCC- Narrow interpretation of duress in s. 17

**Ratio:** Narrow definition of duress.

**Facts:** Accused damaged plumbing fixtures in prison cell where he was incarcerated. D convicted of unlawfully and wilfully damaging public property. D admits to doing so, but claims he was under duress. The compulsion of threats came from other prisoners in separate cells who threatened to stab him when they had first chance to do so.

**Issue:** Could the accused avail himself of the defence of duress?

**Ratio:** For an accused to avail himself of duress, the threats bodily harm or death must be immediate and the threats must come from someone who is physically present at the time of the threats.

**Held:** Crown appeal allowed, conviction restored. D not entitled to defence of duress, notwithstanding the fact that he genuinely feared for his safety.

**Reason:** Upheld the narrow statutory interpretation of **s. 17** – **the threat of harm must be immediate** and the one making the threat must be **present** at the time the offence is carried out. Court held that there was no immediate threat of death or bodily harm to the accused because the other prisoners were not in the accused's prison cell at the time of the threats. The threats were also future threats, not to be carried out immediately but at a later time. Court stated that the CL rules of duress had been exhaustively defined under **s. 17** thus the defence was no longer available at common law (neither of these are true anymore).

* is it virtually inconceivable that immediate death or grievous bodily harm could have come to the accused because those who were uttering the threats against him were locked up in separate cells. Also the people issuing the threats weren't present, because they were in different cells

**Note:** This case originally overthrew the common law defence of duress, saying that defence was exhaustively defined in **s. 17**

* ***R v Paquette*** weakened that position:
  + **s. 17** is available to principals, and principals alone
    - **s. 17** defence requires threats of immediate bodily harm by one who is present
  + Common law defence is available to parties, and parties alone – so a principal may use either defence
    - This defence requires moral involuntariness coupled with no safe avenue of escape

**Takeaway:** This case interprets **s. 17** very narrowly, requiring immediate death or bodily harm and the requirement that the person making the threat be present at the time the offence is carried out. SCC also held that the defence of duress had been exhaustively defined in **s. 17**. so this case seems to say that the common law defence of duress doesn't exist

**Note:** Following ***Paquette***, **s. 17** was held to be available to principals only, and CL defence was available to parties only.

## *R v Paquette*

**Facts:** During a robbery at the Pop Shoppe, an innocent bystander was killed by a bullet form a rifle fired by Simard. The robbery was committed by Simard and Clermont, both of whom, together with the appellant were jointly charged with non-capital murder. Simard and Clermont pleaded guilty to this charge. The appellant was not present when the robbery was committed or when the shooting occurred. The charge against him was founded upon **s. 21(2)**. The appellant made a statement to police regarding his involvement stating that on the day of the robbery, Clermont phoned the appellant for a ride as his car was broken. Clermont asked the appellant where he used to work to which he said Pop Shoppe. Clermont told him to drive there because he wanted to rob it and when the appellant refused, Clermont pulled his gun and threatened to kill him. Simard was picked up later and also had a rifle. The appellant drove them to the shop. The appellant was threatened with revenge if he did not wait for the two men. The appellant stated in his statement that he was afraid and drove around the block.

**Crown’s Position:** Appellant could not rely upon the defence of duress in **s. 17**  because of the exception, “A person who commits an offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed is excused from committing the offence if he believes that the threats will be carried out and if he is not a party to a conspiracy or association whereby he is subject to compulsion, but this section does not apply where the offence that is committed is treason, murder, piracy, attempted murder, assisting in rape, forcible abduction, robbery, causing bodily harm, arson”

**Issue:** Does **s. 17** apply to party offences?

**Held:** Appeal allowed. Judgement of the CA set aside, and restore verdict of acquittal.

**Ratio:** The application of **s. 17** is limited to cases in which the person seeking to rely upon it has himself committed an offence as a principal offender. A CL or judge made defence of duress applies to those who committed an offence as a party to the offence. In cases where it is not clear whether an accused acted as principal offender or as a party to the offence, the TJ would have to instruct the jury about both the statutory defence of duress in the Code and the CL defence of duress.

**Reasons: S. 17** says “a person who commits an offence” and it does not use the rods of party to an offence. This is significant in the light of the wording of s . 21(1) which in paragraph **(a)**, makes a person a party to an offence who actually commits it.

## *R v Hibbert*, [1995] SCC- Defence of duress has a “safe avenue of escape” Rule

**Facts:** D was with B, a drug dealer. D was friends with C. B shot C. D charged as party to offence with attempted murder. D testified that he accidentally ran into B who indicated that he had a gun and ordered D to take him to C’s apartment. D initially refused and B punched him. D feared for his life and believed B would shoot him if he did not cooperate. D stated he repeatedly pleaded with B not to shoot C. However, C testified that during the incident D said nothing and made no effort to intervene. After the shooting, B drove D away from the scene. D then claimed that B threatened to kill him if he went to the police. Next morning, D turned himself in. D claims he believed he had no opportunity to run away or warn C without being shot.

* TJ left duress with jury. Jury found D guilty of aggravated assault rather than attempted murder.

**Issue:** Is there a “safe avenue of escape” rule applicable to the common law defence of duress? If so, how is the availability of a “safe avenue of escape” to be determined? On a subjective or on an objective basis?

**Ratio:** The CL defence of duress requires moral involuntariness and no safe avenue of escape. There is a “safe avenue of escape” rule applicable to CL defence of duress. It is determined on a modified objective standard (takes into account particular circumstances and human frailties of the accused).

**Held:** Accused appeal allowed, new trial ordered.

**Reasons:**Court cited ***Paquette*** and held that the common law defence of duress remains available for parties to offences. **One who commits a criminal act *under threats*** of death or bodily harm may also be able to **invoke an excuse based defence** (either the statutory defence set out in **s. 17** or the common law defence of duress). This is so **regardless of whether or not the offence at issue is one where the presence of coercion also has a bearing on the existence of *mens rea*.** An accused person cannot rely on the common law defence of duress if he had an opportunity to safely extricate himself from the situation of duress. The rationale for this rule is that in such circumstances the condition of “normative involuntariness” that provides the theoretical basis for both the defences of duress and necessity is absent. If the accused had the chance to take action that would have allowed him to avoid committing an offence, it cannot be said that he had no real choice when deciding whether or not to break the law. There is a “safe avenue of escape” rule applicable to the CL defence of duress but an accused cannot rely on the common law defence of duress if he had an opportunity to extricate himself safely from the situation of duress.

* If so, how is the availability of a “safe avenue of escape” to be determined? On a subjective or on an objective basis?
  + The question of whether or not a safe avenue of escape existed is to be determined according to an objective standard.  However, the personal circumstances of the accused are relevant and important, and should be taken into account – **modified objective test.** In circumstances of necessity or duress, an accused’s behaviour is normatively involuntary because there was no realistic alternative court of action available to the accused.
  + if the accused could have escaped the situation without undue danger the decision to commit the offences becomes a “voluntary one”

## *R v Ruzic -* Immediacy and presence requirements of s. 17 struck down

No immediacy requirement, no presence requirement, threats may be with respect to third parties. The immediacy and presence requirements of **s. 17** are unconstitutional and so are struck down

**Facts**: Ugoslavic citizen who landed at Pearson carrying 2g of heroin. She says that there is this guy, each time he approaches her he knows more about her, behaviour was intimidating. Threatened to harm her mother if she did not act as drug mule

**Issue**: (1) Do the immediacy and presence requirements of **CC s. 17** violates **s. 7** of the charter? (2) Is it a PFJ that morally involuntary conduct should not be punished? (3) What is the relationship between **s. 17** and the common law defence of duress?

**Reasons**: “Punishing a person who's actions ar involuntary in the physical sense is just because it conflicts with the assumption in criminal law that individuals are autonomous and freely choosing agents” “It is a principle of fundamental justice that only voluntary conduct… should attract the penalty and stigma of criminal responsibility. Depriving a person of liberty and branding her with the stigma of criminal liability would infringe the principles of fundamental justice if the accused did not have any realistic choice”

**So**: according to Lebel, due to its restrictive language, **CC s. 17** violates the accused’s **s. 7** rights

**Upshot:** **s. 17** should now be read as: A person who commits an offence under compulsion by threats of immediate death or bodily harm to herself or to others from a person who is present when the offence is committed is excused from committing the offence if the person believed that the threats would be carried out.

As per the common law defence of duress, it arises generally when a person is subjected to an external physical danger, e.g. threats of death or bodily harm, and in reacting reasonably to those threats, commits a criminal act to avoid the threatened harm. The defence, like all common law defences is made available via **CC s. 8(3)**

### Elements of Common-law defence of duress:

1. Must be a threat of death or serious bodily harm to accused or to another person
2. The accused must have honestly, i.e. subjectively, believed that the threats would be carried out
3. Must be the case that a reasonable person in accused’s position would have reacted in the same manner as the accused
4. The accused must have had no reasonable avenue of escape

## *R v Ryan*, [2013] SCC

**Ratio:** Expanded definition of duress

**Facts:** Accused was abused by her husband for a number of years. He would physically abuse her, threaten to kill her and their daughter, and held a gun to her head on a few occasions. He isolated her from her family and friends and she felt that she had no escape. Eventually, she feared that her husband would finally go through with his threat to kill her so she attempted to hire someone to hill him. The attempt failed but the RCMP found out about it. RCMP set up a sting operation where they offered to kill her husband, she fell for it. Accused was charged with counselling an offence not committed. Accused argues defence of duress.

* TJ and CA acquitted her based on defence of duress

**Issue:** May a battered wife, whose life is threatened by her abusive husband, rely on the defence of duress when she tries to have him murdered? Is duress available as a defence where the threats made against the accused were not made for the purpose of compelling the commission of an offence?

**Ratio:** Duress is available only in situations in which the accused is threatened for the purpose of compelling the commission of an offence. Defence of duress is available when a person commits an offence while under compulsion of threat made for the purpose of compelling him to commit it. Duress also requires no safe avenue of escape, a close temporal connection, and proportionality between the harm caused and the harm avoided, measured on the modified objective standard.

**Held:** Crown appeal allowed but stay of proceedings. Accused not entitled to the defence, but due to uncertainty in the law and various procedural issues it would be inappropriate to order a new trial.

**Reason:** The accused here wanted her husband dead because he was threatening to kill her and her daughter, not because she was being threatened for the purpose of compelling her to have him killed. CA erred in finding there is no principled basis upon which the accused should not be able to rely on duress. Duress cannot be extended so as to apply where self defence is unavailable. CA essentially said since D would be entitled to self-defence if her husband attacked her, then she should also be entitled to defence of duress in hiring a hitman to do what she would be entitled to do as a principal. While the accused had been subject to threats from her spouse, she was not threatened in order to commit an offence as the defence of duress requires. The immediacy and presence of **s. 17** are unconstitutional.

Three main differences between self defence and duress:

* Self-defence is attempt to stop threats by force. Duress involves succumbing to threats by committing offence
* Self-defence is completely codified (ie. no CL defence of self-defence), duress is only partly codified
* The underlying bases of the two defences are fundamentally different: **duress is an excuse** involving normative involuntariness, whereas **self-defence is justification** involving voluntary, reasoned action. In self defence you are acting appropriately, while in duress you are acting badly but are excused. Self defence is more readily available than duress.

**Thus:** Duress available only in situations in which the accused is threatened for the purpose of compelling the commission of an offence. Even if Ms. Ryan was subject to threats from partner, she was not threatened in order to commit an offence. Duress not available to her. Accused wanted her husband dead because he was threatening harm, not compelling her to commit an offence

### s. 17 Statutory Defence of Defence:

1. There must be threat of death or bodily harm directed against the accused or a third party;
   1. No immediacy requirement. The person doesn’t have to be present at the time at which the threats are made.
   2. Threats toward third parties count
2. The accused must **subjectively** believe that the threat will be carried out (***Ruzic*** say belief need not be reasonable)
   1. **But**, this presumably no longer true given **modified objective standard** of evaluating no safe avenue of escape, close temporal connection, and proportionality in the common law defence of duerss
3. The offence must not be on the list of **excluded offences**; - only difference between CL and statutory test.
4. The accused cannot be a party to a conspiracy or criminal association

* These are assessed on a **modified objective standard**

### Common Law Defence of Duress: (for exam take through these 6 things)

1. An explicit or implicit threat of death or bodily harm proffered against the accused or a third person
   1. The threat may be of future harm.
   2. Established in ***Paquette*** and confirmed in ***Ruzic***
2. The accused **reasonably believed** that the threat would be carried out
3. The non-existence of a safe avenue of escape, evaluated on a **modified objective standard** (***Hibbert***)
4. A close temporal connection between the threat and the harm threatened
   1. This is evidence that the threats made a difference, that you were compelled by the threats
5. Proportionality between harm threatened and harm inflicted by the accused, evaluated on a **modified objective standard**
6. The accused is not a party to a conspiracy or association.

Defence of duress, in statutory and CL forms, is the same (except for the principal/party distinction, and exceptions in **s. 17**). Therefore, principals who commit one of the enumerated offences cannot rely on the defence of duress while parties can (***Ryan***).

## *R v Aravena* (2015 ONCA)- Constitutionality of Exceptions in s. 17

**Ratio:** Expanded definition of duress. CL defence of duress remains available to persons charged as parties to murder.

**Facts:** Duress case involving a biker gang and a series of killings. 5 co accused were members of the Winnipeg chapter of the Bandidos motorcycle gang. They rounded up 8 members of the Toronto chapter and murdered them by confining them to a barn, disarming them, and then shooting them one at a time.

**Held:** Yes.

**Reasons:** Subject to a successful constitutional challenge, the perpetrator of murder cannot avoid culpability even if he committed a murder in the fact of a true “kill or be killed” option. Murder exception to the duress defence in **s. 17**  the CC is not before the court here. However, it follows that subject to any argument the Crown might advance justifying the exception as it applies to perpetrators under **s. 1** of the Charter, the exception must be found unconstitutional.

* has the potential to change the defence of duress yet again, going to the SCC
  + is duress available to the charge party to murder? ONCA seems to say yes
  + Are the exceptions in **s. 17** constitutional? Exceptions are likely constitutional

### Summary

* Both the statutory and the common law defence of duress are recognized defences, and are characterized as excuses
* the immediacy and presence requirements of **s. 17** have been found to be unconstitutional (***Ruzic, Ryan***); the list of exceptions remain - but see ***Aravena***
* **s. 17** is not available to parties to an offence; but the common law defence of duress is
* **s. 17** not available for certain offences (look at statutory language of **s. 17**) and this raises obvious constitutional issues

# Self-Defence

Self-defence is a *justification* (whereas duress is an excuse) for committing a crime.

* In duress, the accused was not entitled to commit the crime, but they were under a reasonably believed threat
* In self-defence, you have the *right* to protect your own bodily autonomy and are entitled to do so

**34(1)** A person is not guilty of an offence [usually an assault or homicide] if…

1. they **believe on reasonable grounds** that force (or a threat of force) is being used against them or another person
   1. you can claim self defence if your friend is being beat up
2. the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
3. the **act committed is reasonable** in the circumstances according to **s. 34(2)**

**34(2) Factors-**  In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, the following factors:

1. the nature of the force or threat;
2. extent to which use of force was imminent and whether there were other ways to respond to potential use of force;
3. the person’s role in the incident;
4. whether any party to the incident used or threatened to use a weapon;
5. the size, age, gender and physical capabilities of the parties to the incident;
6. the nature, duration and history of any relationship between the parties, including any prior use or threat of force and the nature of that force or threat; - **codification of battered spouse**

**(f.1)** any history of interaction or communication between the parties to the incident;

1. the nature and proportionality of the person’s response to the use or threat of force; and
2. whether the act committed was in response to a use or threat of force that the person knew was lawful.

**SO:** individuals acting in self-defence must act reasonably in the circumstances

* That individual’s belief that they were in a situation requiring self-defence must be a reasonable belief

**BUT:** in *acting reasonably* (not the belief)

* “A person defending himself against an attack, reasonably apprehended, cannot be expected to weigh the exact measure of necessary defensive action.” (Martin JA in ***R v Baxter***) –– but, the force used must still be reasonable
* “Detached reflection cannot be demand in the presence of an uplifted knife.” (Holmes J in ***Brown v United States***)

## Analysis for Self Defence

Is laid out in **s. 34(1)** of CC: An accused is not guilty of an offence if:

1. They believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
2. The act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
3. The act committed is reasonable in the circumstances
   1. Cite **s. 34(2)** of the CC to discuss whether the act committed is reasonable in the circumstances

These requirements are assessed on a **modified objective standard** (***R v Lavallee***)

Note that the old self defence provision required that the threat of harm be imminent. There is no language of imminency in **s. 34**, so presumable the threat could be of future harm, as long as it is sill somehow connected

* self defence remains a justification, rather than an excuse. It is not that you did something wrong and are given a break, it is that you didn't do anything wrong at all
* **Key requirement:** individuals who act in self defence must act reasonable in the circumstances. (1) Their belief that they are being threatened with death or bodily harm must be reasonable (2) The response to the threatening situation must be reasonable in the circumstances
* But reasonable is not measured too strictly;
  + “A person defending himself against an attack, reasonably apprehended, cannot be expect to weigh to a nicety, the exact measure of necessary defensive action” (***R v Baxter***)
* need to show that a reasonable person would have acted similarly in the circumstances
* no restrictions on what it applies to

## *R v Lavallee*, [1990] SCC- s. 34(1) is a modified objective test

**Ratio:** Self-defence applies even when you are not directly/immediately in harm. Expert evidence can assist in determining what is reasonable in the circumstances; reasonableness is a modified objective test.

**Facts:** L and her partner Rust had an abusive relationship, however she kept coming back. On the night of the killing, there was a party at their house. R hit her and told her that she was going to "get it" when the guests left. He threatened to harm her, saying "either you kill me or I'll get you". During the altercation R slapped her, pushed her, hit her on the head. At some point, he handed L a gun, which she first fired through a screen. L contemplated shooting herself, however when R turned around to leave the room she shot him in the back of the head. She was charged with murder. A psychiatrist gave expert evidence at trial describing her state of mind, and that she felt as though she was "trapped" and that she would have been killed if she did not kill him.

**Issue:** Can expert evidence be used to inform a judge and jury about battered woman's syndrome?

* “The narrow issued raised on this appeal is the adequacy of a TJ’s instructions to the jury regarding expert evidence. The broader issue concerns the utility of expert evidence in assisting a jury confronted by a plea of self defence to a murder charge by a common law wife who had been battered by the deceased.” More generally: is the fact that a woman has been battered relevant to whether she ought to be entitled to claim self defence?

**Ratio:** Jury is not compelled to accept expert testimony on the topic of battering on mental state of victims, but fairness and integrity of the trial process demand that the jury have the opportunity to hear them. Question the jury may ask is whether, given the history, circumstances and perceptions of the accused, her belief that she could not preserve herself from being killed except by killing first was reasonable. To the extent that expert evidence can assist the jury in making that determination, such testimony is both relevant and necessary

**Held:** For D. Appeal allowed, acquittal restored. Expert evidence accepted. The fact that a woman has been abused is relevant in determine whether her perceptions of her situation were reasonable ones. Reasonable for the accused to believe, in the circumstances, that she was going to be battered when the party was over, and she was entitled to take the steps she did.

**Reason:** The question is whether the fact that a woman has been subject to domestic violence, or is in an abusive relationship, should be taken into account by a trier of fact in determining whether her perceptions of her situation were reasonable ones – it’s really a question about the nature of the reasonable person and the modified object test. Expert evidence may be used in assisting a jury in understanding how “battered women” might act and to understand their mental state at the time of the offence. It is about what the accused reasonably perceived given her situation and her experience. It is up to the jury to decide whether, in fact, the accused’s perceptions and actions were reasonable. They are entitled to beliefs that for other people would be unreasonable - this justifies the response rather than excusing it.

* “ Where evidence exists that an accused was in a battering relationship, expert testimony can assist the jury in determining whether the accused has a ‘reasonable’ apprehension of death when she acted by explaining the heightened sensitivity of a battered woman to her partner's acts”. “The issue is not, however what an outsider would have reasonable perceived but what the accused reasonable perceived, given her situation”
  + this seems to change the objective test to a subjective test. so reasonable in **s. 34(1)** is really a modified objective test - the accused’s circumstances are contextualized, but not personalized.
    - It is NOT about what an outsider would have reasonable perceived, but what the accused reasonable perceived, given her situation and her experience
* A deeper issue raised by this appeal is how we understand battered spouse syndrome. One view is that battered women suffer from a disorder that makes them not fully responsible for their actions. This views it as an excuse. A second view is that battered women, due to their special relationship with the victim, are entitled to certain perceptions and entitled to do things that others are not entitled to do. This second view provides a justification based defence and this is the better view

**Note**: No defence of battered woman syndrome - accused charged with murder cannot take the stand and plead BWS

## *R v Malott, [1998] 1 SCR 223*

**Facts:** She and her common law spouse were supposed to go get drugs from his alleged drug trade. Accused shot and killed her common law spouse, and attempted to kill his girlfriend. She took a taxi after shooting her common law spouse to the girlfriend’s house. It was a violent and abusive relationship

**Accused’s Argument:** Raised defences of self defence, provocation, self induced intoxication. She raised self induced intoxication because she was hoping that if she was in a state of advanced intoxication when she allegedly murdered her common law spouse, then she would be acquitted of murder but convicted of the lesser included offence of manslaughter.

**Prior Proceedings:** Convicted of second degree murder at trial, appeal to CA dismissed

**Held:** SCC dismisses appeal.

**Note:** ***Malott*** updates ***Lavallee*** and attempts to clarify how evidence of an abusive relationship should function in the context of a pleas of self defence.

**Reasons:** “It is clear from the foregoing that “battered woman syndrome” is not a legal defence in itself such that an accused woman need only establish that she is suffering from the syndrome in order to gain an acquittal. Rather, “battered woman syndrome” is a psychiatric explanation of the mental state of women who have been subjected to continuous battering by their male intimate partners, which can be relevant to the legal inquiry into a battered woman’s state of mind.”

* “To fully accord with the spirit of ***Lavallee***, where the reasonableness of a battered woman’s belief is at issue in a criminal case, a judge and jury should be made to appreciate that a battered woman’s experiences are both individualized, based on her own history and relationships, as well as shared with other women, within the context of a society and a legal system which has historically undervalued women’s experiences. A judge and jury should be told that a battered woman’s experiences are generally outside the common understanding of the average judge and juror, and that they should seek to understand the evidence being presented to them in order to overcome the myths and stereotypes which we all share. Finally, all of this should be presented in such a way as to focus on the reasonableness of the woman’s actions, without relying on old or new stereotypes about battered women.” (para. 43)
* “[T]he trial judge could have more expansively explained and emphasized the relevance of the expert evidence on battered woman syndrome to Mrs. Malott’s claim of self-defence. In this connection, the trial judge’s charge to the jury was not perfect. But as my colleague Major J. correctly points out at para. 15, it is unrealistic for an appeal court to review a trial judge’s charge to a jury based on a standard of perfection. In deference to this well-established principle, I agree with Major J.’s conclusion that the charge was sufficient. For these reasons, I would dismiss the appeal.”

## *People v Goetz, [1988] NYCA*

**Facts:** G is riding the subway when four hooded youths approach him and demand money from him. None of the youths are armed. G has been assaulted several times while riding the subway and is frightened by gangs of young men. For that reason, he carries a handgun with him. G removes his handgun from his knapsack, stands up and shoots the four youths.

**Held:** Defence of self defence is available. Accused was acquitted.

**Reason:** To use an entirely subjective test to determine whether a defendant appropriately used deadly physical force would be very dangerous, in that it would permit a jury to acquit every defendant who believed that his actions were reasonable, regardless of how bizarre the rationale. The Court explained that the justification statute requires an objective element, in that deadly physical force is only permissible if a *reasonable person* would believe that he is in imminent fear of serious physical injury or death. This would prevent the slippery slope of a different reasonable test necessary for every single defendant claiming justification.

**Note:** If ***Lavallee*** stands for the proposition that, in determining whether the actions of an accused were reasonable,a attention must be paid to the perception of the accused, previous interactions between the accused and the victim etc., then this is **wrongly decided** because it doesn't follow that the accused was justified in his use of force. Based on ***Lavallee***, in determining whether the actions of an accused were reasonable, attention must be paid to the perceptions of the accused, previous interactions between the accused and the victim [subway muggers], etc. – modified objective test – then doesn’t it follow that G was justified in using force? The accused knew the youth weren't armed, so he could have just pulled out his gun and waived it at them to score them off. Also, he had no prior relationship with these particular youths. Even if you accept his belief in the threat of harm was reasonable his response probably wasn’t.

### CC s. 34 Summary

* self defence remains a justification, not an excuse
* an accused is not guilty of an offence if he or she
  + (a) believes on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
  + (b) the act that constitutes the offence is committed for the purpose of defencing or protecting themselves or the other person from that use or threat of force; and
  + (c) the act committees is reasonable in the circumstances