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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
		1. i.e. lions, tigers and bears ..excludes leopards
	+ Presumption of constitutional validity
	+ Avoidance of absurdity
		1. When interpretation leads to absurd results
	+ Strict Construction
		1. 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
		1. Is there discordance?
			- Two versions must be reconciled
			- Narrower version favoured
		2. Common or dominant meaning to ordinary rules consistent with Parliament’s intent
		3. 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): If there is disharmony within the statute, than an unordinary meaning that will produce harmony is to be given to the words if it is reasonably capable of bearing that meaning

* The words of an Act are to be read in their entire context and in there 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 criminal code 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 others that it is associated with in the statute.**

 **The rule of strict construction is only applied when there is still ambiguity in the definition of the word**

**Facts -**Attorney-General (ont) appeals against acquittal of respondent following submission that there was no case to answer. Respondent had assets consistent of 1,173 pairs of assorted ladies’ and men’s shoes and boots which he did not include to his trustee or when he was examined.

**Legal 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) of the *Code*

* What is the meaning of ‘conceals’ for the purposes of s.350 of cc

**Reasons for Judgement**

Conceal for the purposes of s 350 of the CC requires a positive act

When a wod 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 (2) a negative non-physical act on the part of the accused. Judge sides with interp. (1) and there is not evidence that accused did any (1).

J.A – need to look at what parliament intended first before applying strict instruction – don’t jump immediately in interpretation

**Held -** Appeal is dismissed

# *\*\*R. v. Pare (SCC, 1987) – ‘while committing’ = single transaction*

**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.

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.

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

**Prior Proceedings**

Accused was found guilty. Accused appealed and court substituted verdict of second degree for the jury’s verdict of first

* Superior Court
	+ Judge Bienvenue - ‘while committing’ can mean ‘committed at the same time’ OR ‘on the same occasion
	+ Jury found first degree
* Court of Appeal (Quebec)
	+ Beauregad J. - Restrictive interpretative – ‘while committing’ must be contrasted with ‘after finishing committing’
	+ Dismissed appeal + substituted second degree for first – concluding the murder + indecent assault must be simultaneous to mean ‘while committing’ vs. a close temporal connection
	+ Lebel J. – ‘while committing’ meant close temporal connection

**Legal Issue – counsel for appellant submit**

Two errors in law made by Court of Appeal

1. S. 214(5) of *Code* created substantive offence of murder
2. Erred in its interpretation of the words ‘while committing’ in s. 214(5)

**Reasons for Judgement**

* Literal Meaning
	+ Pare committed the murder following the indecent act thus not ‘while committing’
	+ Not a decisive argument in itself
* 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 first degree murder
* The liberal interpretation of the words ‘while committing’ in the criminal code was based on:
	+ The difficulty in determining the beginning and end of the indecent assault.
* A strict construction would have led to arbitrary and irrational distinctions.
	+ Strict construction operates when there is ambiguity in the provision
		- Counsel for the accused argued that the doctrine of strict construction required the court to adopt the interpretation most favourable to the accused
		- Difficulty in defined the beginning and end of an indecent assault (is it when he ejaculated, lost all physical contact?)
	+ “Act causing death and acts constituting rape etc. may all form part of one continuous sequence of events forming a single transaction’ = death was caused ‘while committing’

**Held -** Appeal allowed and conviction of first degree restored

# *R. v. Scott (BC.CA, 2000) - Two Step Test for The Golden Rule*

**Ratio** - Two-stage test: 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 2. 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 is charged with robbing three stores. A gun was apparently used- but it was never recovered, making it hard to determine whether or not it was an imitation firearm. Scott charged on six counts: three robberies, with an additional charge of using an imitation firearm in each of them. So: robbery on counts 1,3,5; using imitation firearm on counts 2,4,6. Trial judge acquitted him under the doctrine of strict construction (on the imitation firearm counts) 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.

**Legal** **Issues**

* What was parliament’s meaning of ‘imitation firearm’ in s. 85(2)? (specific)
	+ 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?
* Are the courts required to interpret statutes in the strictest sense possible? (broad)

**Reasons** **For** **Judgment**

* Braidwood J.A.:
	+ Parliament did not intend to create an absurdity (disharmony)
		- Yet 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
* McEachern, C.J.B.C.:
	+ Parliament did not intend to create an absurdity (disharmony)
		- Yet an absurdity is created if ‘imitation’ is read in an ordinary manner
	+ So real firearms can be regarded as imitation firearms in an ordinary understanding of “imitation”
	+ Alternatively, read “imitation” in a non-ordinary manner and adopt Braidwood J.A.’s reasoning

In favour of The Crown by applying an ordinary meaning

* Prowse, J.A. (Dissenting), two readings:
	+ 1. Parliament did not intend to create an absurdity, and it did not do so.
		- Rather, Parliament made its intention very plain, and that was to clearly distinguish “real” firearms from imitation firearms.
		- The trial judge was right- no firearm was located.
	+ 2. Parliament may have intended to capture the sort of situation that has arisen in R. v. Scott
		- Unfortunately, the wording of the statutory provision fails to give effect to that intent
		- S. 84(1): “imitation firearm” means any thing that imitates a firearm, and includes a replica firearm
			* “Replica firearm” means… any device that is designed to exactly resemble… a firearm, and that is not itself a firearm.
	+ Concludes that no imitation firearm can be a real firear
	+ Ratio 2: It is not the role of courts to substitute their own views for views that have been clearly expressed by Parliament. Only where there is genuine ambiguity can the principle of strict construction be appealed

### Constitutional Constraints on Criminal Law

* Generally speaking there are 3 reasons for constitutional invalidity of criminal legislation
	+ Legislation *ultra vires*
		- Outside of the scope
		- S. 91(27) + 92(14) of Act 1867
	+ Legislation infringes on aboriginal rights
		- Treaty Rights = official agreements between crown + native people
		- Aboriginal rights = flow from custom and tradition of native people
	+ Legislation is inconsistent with the *Charter*
* Brief overview of charter
	+ Guarantee of Rights and Freedoms (s. 1)
	+ Fundamental Freedoms (s. 2)
	+ Democratic Rights (ss. 3-5)
	+ Mobility Rights (s. 6)
	+ Legal Rights (ss. 7-14)
	+ Equality Rights (s. 15)
	+ Enforcement (s. 24)
	+ Application (ss. 32-33)
* Federalism
	+ Courts can:
		- Enforce and apply common law defenses
		- Invalidate criminal law legislation
	+ Courts Cannot
		- Create new criminal offences
		- Enforce common law offences

**Section 1 of the *Charter*:**

“The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

* + - The section is also known as the **reasonable limits clause** or **limitations clause**, as **it allows the government to legally limit an individual's *Charter* rights.**
		- When the government has limited an individual's right, **there is an onus upon the crown to show, on the** [**balance of probabilities**](http://en.wikipedia.org/wiki/Balance_of_probabilities):

**The Oakes Test for s. 1 of the Charter**

* + Test to determine whether a violative law is reasonably and demonstrably justified in a free and democratic society (whether it is saved by s. 1) (two-stage test)
	+ Which means that it must have a justifiable purpose and must be proportional

|  |
| --- |
| OAKES TEST*The SCC developed this test to apply to s.1 and determine if a law limiting rights and freedoms is reasonable and demonstrably justified in a free and democratic society.*1. The objective of the law limiting the right or freedom must be of sufficient importance (pressing and substantial) to warrant overriding it.
2. Proportionality Test:
	1. Rational Connection – Measures chosen must be rationally connected with the objective. The measures must be fair and not arbitrary; they must be designed to apply to the one specific case at hand
	2. Minimal Impairment - means must impair the right as little as reasonably possible.
	3. Proportionality - Weigh objectives and deleterious effects. Proportionality between the adverse effects of the measures and the beneficial effects of the law. More severe effect only in severe conditions (e.g.: terrorism laws).

\*\* The *Oakes* test, being a fact-specific inquiry, must by applied flexibly having regard to the factual and social context of each case |

**Section 11(d) of the *Charter* - Presumption of innocence:**

11. Any person charged with an offence has the right:

(*d*) To be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal (our CJS is premised on this fundamental presumption)

* It is the duty of the prosecution to prove the accused’s guilt beyond a reasonable doubt
* unless subject to insanity or other statutory provisions.

# *\*\*R v Oakes (1986) SCC – provision requiring disproving presume fact violates s.11*

**Ratio:** The constitution is the supreme law of the law and any law that is inconsistent with the provisions of the constitution is, to the extent of the inconsistency, of no force or effect

A provision that requires an accused to disprove on a balance of probabilities the existence of presumed fact, which is an important element of the offence in question violates the presumption of innocence guaranteed under s.11(d)

**Facts:**

* Appeal concerns the constitutionality of s. 8 of the *Narcotic Control Act.* If found guilty of possession, you were presumed to have been in possession for the purpose of trafficking, unless you could prove otherwise
* Brought motion challenging the validity of s.8 arguing that it reversed the onus on the accused to prove that he was not in possession for the purpose of trafficking. He argued it violated the presumption of innocence guaranteed by s.11(d) of the charter

**Issue:**

* Does the reverse onus provision of s.8 NCA violate the charter guarantee?
* If yes, is this right subject to reasonable limits set out under s.1 of the charter?

**HELD**: S. 8 violates the accused’s Charter rights and was not saved by s. 1. It is of no force or effect

**REASONS FOR JUDGMENT:** If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt

* + This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue
* Oakes is compelled by s. 8 to prove he is *not* guilty of the offence of trafficking. He is thus denied his right to be presumed innocent [under s. 11(d)]… This is radically and fundamentally inconsistent with the societal values of human dignity and liberty which we espouse, and is directly contrary to the presumption of innocence enshrined in s. 11(d).”
	+ The Supreme Court was able to articulate both that guilt must be proved beyond a reasonable doubt, and that the burden of proof was on the prosecution
* s. 8 violates s. 11(d) of the *Charter* and could not be saved by the Oakes Test:
1. Object must be of sufficient importance to warrant overriding a constitutionally protected right.

 *PASSED: Curbing of drug trafficking is of sufficient importance to be pressing &substant’l concern.*

1. Proportionality Test:
	1. Measure must be rationally connected to the objective sought.

*FAILED: The means chosen are not rationally connected because they catch even those carrying a minuscule amount of narcotic. – Not necessary to continue the test –look above for the rest of the test.*

**s. 7 *Charter:* Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.**

* Meaning of ‘fundamental justice’? (*Ref. Re Motor Vehicle Act*)
* Given a **substantive**, rather than a natural (or procedural) meaning
* The principles of fundamental justice are **not merely procedural safeguards**
* S. 7 must be read in connection with/in the context of ss. 8-14, which are clearly not merely procedural safeguards (*noscitur a sociis*)
	+ Procedural: did the state follow the proper procedures in limiting a right?
	+ S.7 = can still have your s.7 right violated even if state did everything procedurally possible.
	+ Natural justice = procedure
	+ Substantive = beyond procedural, they are also substantive
* If Parliament had wanted to enshrine principles of natural justice, it could have said so; it didn’t; so it couldn’t have wanted to (*expression unius*)
* More controversially: “the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardians of the justice system.” (74)
	+ The legal system is to be interpreted broadly and the legislature has a role to play.

#### Absolute Liability offences – Cannot be combined with imprisonment

1. Just have to prove *actus reus*
2. There is **no defence available**
3. Liability irrespective of fault

**Advantages:**

* Protection of public safety requires a high standard of care and attention – social interests
* Administrative efficiency; no need to prove individual intent, effective way of ensuring compliance
* Less stigma and lower penalties

**Disadvantages:**

* Violates fundamental principles of penal liability (*Ref. Re Motor Vehicle Act*)
* No evidence that higher standard of care results from absolute liability
* If regulations too strict, will be viewed as unfair
* Stigmatization of conviction

Principles of fundamental justice entail that absolute liability and imprisonment cannot be combined i.e. the combination of absolute liability and penal law is an unconstitutional one. 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 an absolute liability offence and penal sanctions (imprisonment) violates s.7 of the *Charter*

**FACTS:**

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

**LEGAL ISSUE:** Can an offence that carries at least the possibility of imprisonment be an absolute liability 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 the principles of fundamental justice and, if imprisonment is available as a penalty, such a law then violates a person’s right to liberty under s. 7 of the *Charter*
	+ Such a law can only be salvaged if the authorities demonstrate under s. 1 of the *Charter* that such a deprivation of liberty in breach of those principles of fundamental justice is, in a free and democratic society, under the circumstances, a justified reasonable limit to one’s rights under s. 7
* **\*\*Absolute liability and imprisonment cannot be combined \*\***

**REASONS FOR JUDGMENT:**

* Term ‘principles of fundamental justice’ 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
	+ Sections 8-14 address specific deprivations of the right to life, liberty, and security of the person in breach of the PFJ
* It does not necessarily follow that because of s. 7 of the *Charter* absolute liability offences can no longer be legislated
	+ To the contrary, there are and will remain certain public welfare offence where the public interest requires that the offences be absolute liability offences…just no imprisonment

# *R v Malmo-Levine (2003) SCC ‘Harm principle’ is not a pFJ*

**Ratio –** Harm is not a required element of a crime. Parliament can legislate based on morality alone.

**FACTS:** Malmo-Levine Levine charged with possession of cannabis (marijuana) for the purpose of trafficking. He **claims that he was not harming anyone by smoking marijuana**.

*In short, for a rule or principle to constitute a principle of fundamental justice for the purposes of s. 7, it* ***must be a legal principle*** *about which there is* ***significant societal consensus*** *that it is 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.*

**The harm principle is not the constitutional standard for what conduct may or may not be the subject of the criminal law for the purposes of s. 7.**

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

#### Vagueness & Overbreadth

**It is a principle of fundamental Justice 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 (Vagueness)*

**RATIO -** Vagueness in law not permitted because it does not give fair notice to citizens and does not 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 is 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 principles of fundamental justice, s.7 of Charter

# *R. v. Heywood, 1994 SCC (Overbreadth)*

**RATIO -** s. 179(1)(*b*) is overly broad to an extent that it **violates the right to liberty** proclaimed by s. 7 of the *Charter* and it cannot be saved by s.1 of the *Charter*

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).

LEGAL ISSUES: 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 FOR JUDGMENT:

* 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 principles of fundamental justice will be violated because the individual’s rights will have been limited for no reason
* The law in question is overly broad for a number of reasons:
	+ **1**. Overly broad in its geographical scope, embracing all public parks and beaches no matter how remote and devoid of children they may be
	+ **2**. Overly broad in its temporal aspect as the prohibition applies for life without any process for review
	+ **3**. It is overly broad in the number of persons it encompasses. Not all sex offenders are child predators
	+ **4**. The prohibitions are put in place and may be enforced without any notice to the accused
* The law was struck down because the court was able to think of scenarios where an entirely innocent person could be criminalized solely based on his actions in the past
* And 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 (i.e. if consequences are an element he must have cause those consequences)

**Three C’s:**

Conduct

* Positive Act OR
* Omission

Circumstances

* Sexual assault requires that assault take place in *sexual circumstances*

Causation

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

Conduct

* Conduct can be positive or negative
	+ Positive conduct is straightforward: punching, kicking, kissing, etc.
	+ Negative conduct is a failure to do something, but this can result in criminal liability where the accused was under a positive legal duty to act
* 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 common law (could even be private law
		- 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
	+ Two common offences that fall under omissions are s. 220 - criminal negligence causing death and s. 215 – failing to provide the necessaries of life (*R. v. Kirby*)
* The rule for liability with omissions is that there had to have been a legal duty imposed on the accused
	+ This duty is preferably found under the *Criminal Code* or some other statute, but can come from the common law

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 *actus reus* 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

#### Fraud (Side note) (s. 380)

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

* i) offence has two elements: dishonest act; and deprivation
* ii) the dishonest act is established by proof of deceit, falsehood or "other fraudulent means"(very general), determined by an objective test.
* iii) element of deprivation is 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)

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

* i) **subjective** knowledge of the prohibited act
* ii)**subjective** knowledge that the prohibited act (*actus reus*) 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. Theroux*, 1993 SCC (Fraud)

• Test for fraud: Whether the accused subjectively appreciated those consequences [the risk of deprivation] as at least a possibility (*mens* *rea*)

• The accused is guilty whether he actually *intended* the deprivation or was *reckless* as to its occurrence. The accused’s belief that the conduct is not wrong, or that no one will be hurt in the end, affords no defence.

* Dissent
	+ Sopinka J
		- Important to distinguish an accused's belief that act is honest from an accused's belief in facts that, if true would deprive the act of its dishonest character
		- Recklessness presupposes knowledge of likelihood of prohibited consequences

Offence grouped into three categories

* "True Crimes" - offences in which *mens rea,* consisting of some positive (subjective) state of mind must be proved
* Strict liability - offences in which, no *mens rea* needs to be proved BUT where a defence of reasonable care/due diligence is available
* Aboslute Liability - offences in which no *mens rea,* no due diligence defence
	+ Public Welfare offences

### DEFINING ACTUS REUS

#### Sexual Assault

Defining the Offence:

* + Sexual assault (s. **271**)
	+ Sexual assault: with a weapon; causing bodily harm; with threats or with accomplices (s. **272**)
	+ Aggravated sexual assault (s. **273**)

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*)

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 ACTUS REUS)**;
	+ 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)

* The ***Actus reus*** of 265(1)(a) – Assault, is applying force to another person, directly or indirectly, *without that person’s consent*;
* The ***Mens rea***is bringing about the *actus reus intentionally*, *knowing* that the complainant is not consenting or being *reckless* or wilfully blind as to the presence or absence of consent
	+ - Includes intent, knowledge, and/or recklessness
* In short, a sexual assault is an assault that takes place in *circumstances of a sexual nature*
* 3 components of sexual assault (***ACTUS* *REUS***):
	+ (1) An assault
	+ (2) Of a sexual nature
		- Assault with intent to have intercourse or 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*) – the test comes from *Chase*
		- Even if there is not intent of sexual gratification, an assault can be of a sexual nature if the sexual integrity of the victim is violated (*V. (K.B.)*)
	+ (3) Where consent is not obtained
		- The consent element will be evaluated subjectively, and it cannot be implied (*Ewanchuk*)
	+ A sexual assault is an assault that is committed in sexual circumstances (*Chase*): \*\****Actual test\*\****
	+ **“The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, may be relevant.”**
	+ **“The intent or purpose of the person committing the act may also be a factor in considering whether the conduct is sexual.** If the **motive** of the accused is **sexual gratification**… it may be a factor in considering 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*) at para 11, pg 160
	+ **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) – Defines ‘sexual assault’ + creates test for ‘sexual nature’

**Ratio –** Sexual assault is an assault within any one of the definitions of that concept in 265(1) of CC, which is committed in the circumstances of a sexual nature, such that the sexual integrity of the victim is violate.

**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?**

* Only a test for the actus reus 🡪 to find out if the act has a sexual nature then we question it objectively
* The mens rea remains subjective 🡪 did you intend to commit the actus reus?

**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” as indicated in the *Criminal Code*?

INITIAL RATIO (NBCA): Angers J.A: “Sexual” should be interpreted as its natural meaning as limited to the sexual organs or genitalia - Otherwise touching someone’s beard would be sexual assault. They employ principles of stat interpretation, this seems way too narrow. So 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.

# *R v V(KB) (1993) –* Father grabbing son’s genitals = violation of sexua integrity = sexual nature

**Ratio –** Even if there not intent of sexual gratification, an assault can be of sexual nature if the 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 three occasions, violently clutched the little boy’s scrotum and there was evidence of bruising and severe pain.

**Dissent (Sopinka)** - **TJ failed to accord any weight to the absence of any motive or intent on the part of the accused to seek sexual gratification in doing what he did. The weight to be accorded this factor in determining whether the assault is of a sexual nature will depend on the circumstances of the case**

The assault was a misguided form of discipline and a cruel, unjustified attack upon a helpless

child. It was assaultive; it was contemptible; it was deserving of punishment; but it was *not* sexual assault.

**Holding:** It was clearly open to the trial judge 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.
* Assault:
	+ *Actus reus*: application of force without that person’s consent
	+ *Mens* *rea*: intentionally applying that force, knowing that the victim isn’t consenting

🡪 Consent: expressly given (orally or in writing), or impliedly (agree to do x knowing x may lead to y)

Background:

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*)
* 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
* The **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 is possible where it is obtained by a **false or fraudulent representation** **of the nature and 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) - consent can be implied but implied consent is limited

**Ratio –** Hockey player impliedly consent to violent physical contact – ‘but for the element of consent, the game of hockey involves a continuous series of assaults’

However, there are some acts that 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 an 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. Cey was acquitted at trial.

**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. 🡪 There is a difference – it goes beyond the scope of the consent given to play

**-The issue is not whether the accused intended to cause harm. It is only whether he intended to apply force**

**Dissent**: The trial judge found that there was no intent to injure; thus, the accused’s conduct was within the bounds of what the victim impliedly consented to.

**Holding:** Crown’s appeal was allowed and a new trial ordered due to trial judge’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

**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....

The TJ found that there was no intent to injure = that’s why Cey was initially acquitted…but Gerwing thought otherwise at CA level = and ordered it back.

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
* 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’?

# R v Cuerrier (1998) SCC – Fraud vitiates consent + modern def. sig. risk of bodily harm

**Ratio –** In order for fraud to vitiate consent in the context of sexual assault:

* There must be a dishonestly deceptive agent (which included the non-disclosure) related to obtaining consent
* The dishonesty must result in deprivation, which may consist of actual harm or a risk of harm
* The harm in question must be serious with a substantial risk

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

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

**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, there could be no real consent.

**Reasons:** Cory J. (Majority): “**No consent is obtained where the complainant submits or does not resist by reason of ‘fraud’”**. Both essential elements of fraud are made out in this case: 1. Dishonesty – non-disclosure of HIV status. 2. Deprivation or risk of deprivation 🡪 Risk of contracting a serious disease. Without disclosure of HIV status then there is truly no consent 🡪 **The consent cannot simply be to sexual intercourse – it must be consent to have intercourse with a partner who is HIV positive.**

* **-Argued that the recent change in the wording means Parliament was trying to move away from the rigidity of the common law requirement that it must relate to the nature and quality of act. But it still MUST relate to a serious risk of harm.**
* L’Heureux-Dubé J.: More expansive approach; argues that *any* fraud designed to induce the complainant to engage in sexual relations will vitiate consent. “The focus on the inquiry into whether fraud vitiated consent so as to make certain physical contact non-consensual should be on whether the nature and execution of the deceit deprived the complainant of the ability to exercise his or her will in relation to his or her physical integrity with respect to the activity in question.” (The test – significant risk of serious bodily harm – is unnecessarily restrictive.)
* McLachlan J.: Fraud vitiates consent in sexual assault cases where it concerns a failure to disclose sexually transmitted disease. Refuses to reject traditional common law approach to fraud in sexual assault cases; returns to pre-*Clarence* idea that fraud w/t sexually transmitted diseases can vitiate consent. Refers to courts inability to change legislation (what she believes above judges are doing)

**Holding:** The appeal is allowed, the orders of the Court of Appeal and that of the trial judge 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 harm. **“commercial fraud theory of consent”**
* McLachlan: refuses to reject traditional common law 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 common law 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 Corey that fraud need not go to the nature and quality of act but disagrees with the claim 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
* NOTE: Botterell likes McLachlin’s reasoning in this case. Thinks it would have been better for the application of law.

# *• R. v. Mabior,* [2012] SCC 93 (“Realistic possibility” – how HIV+ people avoid liability)

**Ratio: Significant risk of bodily harm, as described in *Cuerrier*, will be met only if there is a “*realistic* *possibility*” of transmission.**

**•** HIV+ individuals must inform partners of status to avoid sexual assault, UNLESS i) they have a low viral load, and ii) they use a condom

**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

**Reasons:** The significant risk of bodily harm is still applicable. BUT there needs to be a “realistic possibility” of transmission for it to prove significant risk.

The accused had a low-viral load, and if he wore a condom, there would have been a very low likelihood of transmission. But the accused was properly convicted of 5 of the counts of sexual assault when he failed to take the precaution of using a condom.

-low viral load and proper use of condom does not constitute fraud, because there is no significant risk of serious bodily harm. **The low viral load and condom use lower the level of risk below the threshold of significance.**

##### Consent and Sexual Assault

Consent can be part of the actus reus and mens rea 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
* *Mens rea*: "is established by showing that 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" (*Mens rea* is purely subjective)
* *Actus reus*: same as assault, but in circumstances of a sexual nature (objectively evaluated)
* ss. 273.1 and 273.2 provide definitions of consent and non-consent, applicable to sex assault (but not other forms of assault)
* s 273.1(1) "consent" means for the purposes of ss 271, 272, 273, the voluntary agreement of the complainant to engage in the sexual activity in question.
* s 273.2 deals with "where no consent is obtained"
* Agreement made by third party, complainant unable to give consent; the accused abuses a position of authority; the complainant expresses (by words or conduct) disagreement with the sexual activity; the complainant having expressed consent; no longer gives consent to the sexual activity

# • *R. v. Ewanchuk* 1999 (SCC) (No implied consent in sex assault, subjectivity of consent)

**Ratio:** No defence of implied consent for sexual assaults. 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 stopped. He took his 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 (the defense of) ‘implied consent’ in the context of sexual assaults? Lastly, is there a defense of mistaken belief in consent in sexual assault offences?

**Prior Proceedings:**

TJ and AltaCA: determined there is an implied consent for sexual assault (they were wrong)

**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” [26], [LHD:85]
	* In court the complainant would have to testify in order for the court to determine what was going on in their head at the time of the “sexual assault”.
	* If there is such thing as implied consent, it would go to the *actus reus*, 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))
* It follows from the subjective nature of consent for *actus reus* purposes that there can be no doctrine of implied consent in sexual assault:
	1. If there were a doctrine of implied consent for *actus reus* purposes, then a complainant could subjectively withhold consent, but impliedly consent via her 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 (Cannot consent when unconscious, must be able to withdraw consent)

Ratio: •It is not possible for someone to consent to a sexual activity that takes place when they are unconscious.

 • the definition for consent for sexual assault requires the complainant to provide actual active consent throughout every phase of the sexual activity. It is not possible for an unconscious person to satisfy this req't

• a person must be able to withdraw consent, which is not possible if unconscious

Facts: (Choking until unconscious, anal sex prior consent not allowed)

* 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

* Instructive in thinking about extent to which intoxication can result in an incapacity to consent
* Degree of intoxication necessary to render a complainant incapable of consent to sexual activity is extremely high

**Facts:**

* Tariq was not intoxicated (no blood alcohol)
	+ His belief
* Pl. woke up in hotel room with someone she didn't know, blacked out at bar
* Unprotected sex
* Pl. made phone call, if she was capable making the phone call was she aware enough to consent?
* Tampon has been removed
* Pl. subjective mental state is most important\*
	+ Was she voluntarily participating
	+ He should have been able to act completely reasonable - what was he aware of at the time? Mens Rea - didn't care that she was highly intoxicated

**Crown's Position:**

* Tariq guilty on one of two principles
	+ Complainant did not consent
	+ Complainant lacked capacity to consent

**Mr. Tariq Position:**

* Not guilty
	+ She did consent/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, it is impossible to address the issue of the consent without addressing the issue of consent
* Setting aside the issue of capacity, cannot find the Crown has prove beyond a reasonable doubt, the absence of consent
* “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)
* What stands out from all these cases is that consent to sexual acts does not require a high level of consciousness
	+ Does not require that the complainant be able to properly evaluate those risks and consequences with a clear mind unencumbered by the effects of alcohol
* Case law suggests court must be able to identify evidence that establishes beyond a reasonable doubt that the complainant's cognitive capacity is sufficient impaired by the consumption of alcohol
* 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.” (*R v Tariq* at para. 126)
	+ Attaching conduct to statutory interpretation

**Discussion:**

* NB: A drunken consent is still a valid consent
	+ Need to specify the degree of drunkenness or intoxication
	+ Need to be clear about what it is that the complainant is supposed to have consented to
* AB: It may be that a highly intoxicated individual can consent to some relatively simple and low-risk behaviours, higher-risk behaviour can be invalidated by lesser forms of intoxication
* 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…while intoxication, self-induced or otherwise might rob a complainant of capacity this is only a possible, not a necessary result

**Principle**

**Two Part Test of Consent**

* Inability to appreciate sexual nature of the act or inability to say no
	+ Evidence of intoxication
* Nature and quality of the act

##### 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. For all practical purposes, an accused’s belief would need to be reasonably held because he must take reasonable steps, and if he takes reasonable steps, then…

* + 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 mens rea (act not committed knowingly, intentionally, recklessly)
	+ 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 (Dickson in *Pappajohn*) – **no longer the law** after s. 265(4) was enacted
	+ Mistake is a defence when it prevents the accused from having the mens rea, which the law requires (*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
		- **MENS REA** of sexual assault is the bringing about of the *actus reus* knowingly or intentionally, or recklessly (Dickson in *Pappajohn*)
	+ Wilful blindness will substitute for knowledge and thus when the accused is wilfully blind they still have the required mens rea (*Sansregret*)
* The confusion in *Pappajohn* was revisited in *Sansregret* where the court simply found a way around their previous ruling by holding that if an honestly held but unreasonable belief is present they will simply find *mens rea* through wilful blindness

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**
		- Showed that *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**
* In short, Parliament chose to read in a reasonableness requirement in cases involving mistaken belief in consent in the context of sexual assault
* Even after s. 273(b) was enacted, a mistakenly held belief still does not need to be reasonably held. Only requires that reasonable steps are taken to ascertain consent. As long as this is done, the accused can still arrive at an unreasonable belief in consent, and be exculpated

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

* CC s 273.2 imposes a reasonable steps requirement
* For a trial judge to direct a jury to the defence of mistaken belief in consent, there must be an **air of reality** to the claim of mistake (*Ewanchuk, Osolin*)
* In order 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 of the case, and can be more or less, depending on those circumstances (*Crangle*)
* So the *MENS REA* of sexual assault is determined by looking at the subjective intent/knowledge/recklessness of the accused, however several objective measures (reasonable steps, statutory provisions) are used to determine if the subjectivity was present

# *Pappajohn v. The Queen*, [1980] SCC (honestly held mistake of fact is applicable to sexual assault)

**RATIO**: (Dickson J): Mistake is a defence where it prevents an accused from having the requisite *mens rea*.

* + Mistake of fact is properly seen as a negation of guilty intention rather than as a positive defence.
	+ It should apply in cases where there is an honest belief in consent, or an absence of knowledge that consent has been withheld.
	+ There needs to be some *evidence* that lends credence to the claim of mistaken belief (not just appellant)
	+ The mens rea of sexual assault is not just the intent to have sex, but the intent to have it without consent

FACTS: (Real-estate agent, light bondage, no consent)

* Accused was selling his house, and had lunch with his agent. Some liquor was consumed. They went to his house and three hours later the agent ran out of the home naked with a bowtie round her neck and her hands tied. She denied any consent, and testified to physical and mental resistance. Defendant claimed that there was consent, and that the binding was for sexual pleasure. At trial the judge refused to allow the jury to consider whether he believed she had consented, leaving them only with the issue of whether or not she did in fact consent

LEGAL ISSUE:

* (1) Is a defence of mistaken belief in consent available?
* (2) If so, what evidentiary threshold is required (must it be based on reasonable ground)?

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

REASONS/ANALYSIS:

* There must be evidence for the mistaken belief, an accused cannot simply claim he thought the victim had consented
	+ In this case, the court finds there was not enough evidence to support a mistaken belief
* Dickson J. dissents (regarding the lack of evidence)
* What he says about consent is supported by the majority
	+ 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, (Wilful blindness substitutes for knowledge, MBC is not availabl

**RATIO**: Where the accused is deliberately ignorant as a result of blinding himself to reality, the law presumes knowledge of the nature of consent. In these circumstances the defence of mistake of fact regarding consent is not available because the honest belief will not be present

FACTS: (Abusive relationship, break-in, unreasonable belief in consent)

* The accused had lived with the complainant and been in relationship. They had separated. He broke in one night and was 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 her with death (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. The defendant contended that he mistakenly believed she had consented to the sexual activity.

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

HELD: Judgment for the plaintiff

REASONS FOR JUDGMENT:

* 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)
* The accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting
* Willful blindness 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, willful blindness 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 willful blindness it is justified by the accused’s fault in deliberately failing to inquire when he knows there is a reason for inquiry

🡪 Did she consent? No, consent needs to be freely given without force as is present here: 273.1 🡪 No consent was given because it was extracted by threats/fear (Ewanchuk)

***\*Mistaken belief in consent in a fact pattern? Take to s. 273(2)***

# *R. v. Cornejo*, [2003] ONCA (Air of reality. If there is no air of reality, MBC defence is not put to jury)

**RATIO**: The defence of MBC should not have been put to the jury because there was not reasonable evidence to come to the conclusion that a reasonable person would have properly interpreted the circumstances to be one in which consent was given.

FACTS: (Co-workers, golf tournament, ‘mmhhhmm’)

* Complainant and accused worked together. After golf tournament where they both consumed a fair amount of alcohol, the accused telephoned the complainant a few times and when he learned the complainant’s boyfriend was no longer coming over he asked if he could come over to which the complainant (tired at the time) replied “mm-hmm”. When he got no response at her house, he opened the door, and entered. The complainant was asleep for the majority of the sexual encounter (didn’t actually have intercourse), however the accused contends that she aided him in taking her clothes off. Trial judge ruled that that the pelvic movements of the complainant allowing the accused to take her clothes off satisfied the air of reality threshold.

LEGAL ISSUE: Did the trial judge err in allowing the jury to hear the defence of mistaken consent? Did the accused take reasonable steps in order to determine if she was consenting to the sexual activity?

HELD: Appeal allowed (Accused had won on trial), acquittal set aside, new trial ordered

REASONS FOR JUDGMENT:

* 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:
	+ → That the accused honestly believed the complainant consented
	+ → That the accused have been mistaken in this belief
* Held: Circumstances required C to take reasonable steps to ascertain consent, he took no steps. S273(3) bars defence.
* **First do reasonable steps test; THEN air of reality test**

🡪 Belief does not have to be reasonable, just has to have been honestly held: accused really has to believe it

🡪 Dickson got the law right, everyone agrees with his interpretation regardless of his dissent

🡪 Morgan: Q was honest belief of consent

🡪 If your belief of consent came from self-reduced intoxication, you may not rely on this

🡪 Drunk, result of willful recklessness or blindness, or failed to take reasonable steps to ascertain your partner was consenting: can’t use defense of believing there was consent

🡪 Exam Q: sexual assault involving alcohol- have to think of degree of intoxication and ability to give consent/rely on your own beliefs if consent is present

##### Consent and Public Policy

# *R. v. Jobidon, [1991], SCC (Can’t consent to serious bodily harm/death)*

**Ratio:** There *are* common law limitations on consent: in some cases **public policy considerations** imply that consent to bodily harm cannot legitimately be given. 🡪 **Consent to assault in a fight vitiated if serious bodily harm is [both intended] and caused**. **A person cannot consent to death or damage beyond the transient and trifling in nature** 🡪 can’t rely on person’s initial consent

**Facts:** Jobidon and Haggart were fist fighting in an outside parking lot. Jobidon threw a punch, which caused Haggart to fall onto the hood of a car and was knocked unconscious. Jobidon continued to throw at least 4-6 morepunches. Haggart later died of his injuries. The trial judge acquitted Jobidon acquitted grounds that Haggart’s consent to the fight negated assault (b/c no *actus reus*). Ontario Court of Appeal 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:** Gonthier (Majority):

* + Summary of the common law re. consent:
		- The Canadian Position:
			* Disagreement in Canada about whether consent is vitiated when physical harm occurs.
			* **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.**
			* In addition, 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.”
		- Courts don’t think you should be able to consent to this level of the application of force.
		- **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.
		- The intent of the actors was for the good of the people involved and often a wider group of observers (SPORTS – something organized, official recognition, willing equal participants, financial resource, rules = provision of limits on what can and cannot be done & also provides the way a game should be played).
* Sopinka– concurring, different reasons
	+ Consent is an essential element of defining what constitutes a crime.
		- Consent is an essential element of the *actus reus* of assault, and cannot be read out of the offence 🡪 if there is consent then we have not established the *actus reus*.
	+ There is no generally accepted exception to this principle with respect to intentional infliction of physical harm. Parliament has chosen to apply this to all assaults, except for murder, to provide certainty in the law.
	+ Absence of consent is a requirement – but is restricted to those who give clear and effective consent free from coercion and 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 had limits of its own, in particular, Haggart did not consent to being pummeled while unconscious**
			* I.e. although they may have consented to a few punches in the fight, they did not consent to the level of injury that occurred.

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

**Note: Botterell thinks that Sopinka’s reasoning is a better analysis of the issues than that of the majority. But the law after *Jobidon* is Gonthier’s ratio and reasoning 🡪 It applies to fist fights happening outside of sporting events because there is no social value to them.**

#  R. V. Paice (2005) SCC - *(serious harm both intended AND caused needed to vitiate consent)*

**Ratio:** Charron : “**Jobidon requires serious harm *both intended and caused* for consent to be vitiated.”** (not one or the other)🡪 Self-defence cannot be invoked if one has consented to the assault

-Otherwise, if the test were (either intended OR caused) then the result would be to criminalize numerous activities that were never intended by Parliament to be considered assault. E.g. playful wresting match.

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

### Voluntariness

* Voluntariness adds a mental component to the *actus reus* requirement.
* The essential characteristic of voluntariness is conscious control of action
	+ **General rule**: The accused must perform the prohibited act voluntarily
	+ Where there is a **lack of voluntariness there is no *actus reus***, and so no crime
* The voluntariness requirement as emerged through the common law. There is no specific *CC* req’t for voluntariness
* General idea: It is unjust to punish someone for doing something if they didn’t do voluntarily
	+ There has to be some alternative method open to you, another choice that you could have done
	+ And if one cannot choose otherwise, then one cannot act voluntarily (can't be made criminally responsible for something under circumstances unless it was done with some other course open to him)
* **The *actus reus* occurs when a willing mind makes a definite choice or decision, regardless of whether they knew it was illegal**. (*King*)
* *Actus reus* requires the notion of a **conscious 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. (eg. Duress, involuntary action)
* **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)*
* *Must be a “willing mind at liberty to make a choice or decision” (King)*
* **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*)

General Picture -

* Criminal liability for omissions requires a failure to abide by a legal duty
* Can arise in two ways
	+ If statutory offence section explicitly contemplates liability for omissions
		- Statutory offences
			* Offences extending to omissions that include a defined statutory legal duty - failing to exercise reasonable care an explosive
				+ Every one who has an explosive substance in his or her possession or under his care and control is under a legal duty to use reasonable care to prevent bodily harm or death to persons or damage to property by that explosive substance
				+ Here it is clear what the legal duty is

* If there is a failure to abide by a legal duty that is generally recognized by statute or by common law
	+ Legal Duties
		- Via statute, common law
			* General bases
				+ General relationships involving care and protection
				+ Specific undertakings to act (contractual undertakings)
				+ Causal responsibility for dangerous situations
		- Do these people stand within one of these relationships? Was there some sort of undertaking to do something? Did accused create dangerous situation + fail to take steps to mitigate

**Summary of voluntariness:**

* The actus reus must be performed voluntarily in order to give rise to criminal liability (*Larsonneur*, *Kilbride*, *King*, *Shaw*)
* Controversial what voluntariness amounts to, but not implausible to think in terms of an ability to have done otherwise (Holmes J, Woodhouse J, Taschereau J).

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

**Facts:** Larsonneur was a French citizen and her passport allows her to stay in the UK as long as she complies with the conditions. This is changed and she has to leave the UK. She goes to the Irish Free State (not part of the UK). 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

Note: Botterell is skeptical of the outcome in *Larsonneur*. It does not seem that she committed the *actus reus* because she did not go back to the UK voluntarily

# *Kilbride v. Lake*, [1962] N.Z. S.C. (Prohibited acts must be done or omitted voluntarily)

RATIO: It is a cardinal principle that, a person cannot be made criminally responsible for an act or omission, unless it was done or omitted, in circumstances where there was some other course open to him

• The act or omission must be voluntary, otherwise, any act or omission must be involuntary

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.

LEGAL 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 FOR JUDGMENT:

* 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 *mens rea*
	+ 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 *actus reus* cannot be produced at all
* It cannot be said that the *actus reus* was is any sense the result of the appellants conduct

ARGUMENTS: that there is no mens rea component necessary to convict on this offence, which makes it a strict liability offence (respondent).

# R. v. King, [1962] S.C.R. 746 (No *actus reus* unless the prohibited act is the result of a willing mind “at liberty to make a definite choice or decision)

**Ratio: No *actus reus* unless the prohibited act is the result of a willing mind “at liberty to make a definite choice or decision” (265)**

**Facts:** King was charged with impaired driving. He had been to the dentist to have two teeth extracted. A nurse gave him sodium pentothal. There was evidence that the accused was not aware of the effect that sodium pentothal would have on him. After the procedure, the accused drove away from the dentist’s office and struck a parked car. He was convicted at trial, but the Ontario Court of Appeal directed an acquittal.

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

**Reasons:** There must be willpower to do an act for it to constitute the *actus reus* of the act.

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

🡪 He didn’t understand the effects of the drugs- didn’t intend the natural consequences of his actions- wasn’t voluntarily driving impaired

# R. v. Shaw, [1938] O.R. 269 (If you know the risks you’re guilty)

**Ratio: Where a person knows or ought to reasonably know that partaking in a certain behaviour may put others at risk s/he must refrain from doing so - or else be held liable if an actual offence occurs.**

**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.

* Why? Because Shaw misrepresented the state of his physical health on his license application(s)
* There is evidence that Shaw had a condition that he would have random faints and misrepresented his condition when he applied for a license.
* There was evidence that Shaw did not appreciate the seriousness of his condition. (possible defense against a charge of causing death by criminal negligence)

🡪 Perfectly aware of condition, lied on driving test

#  R v Jiang [2007] BCCA (Driver falling asleep due to sleep “episode”)

FACTS: Driver fell asleep at the wheel, and struck two children, killing one, and causing serious bodily harm to another. Expert witness, Dr testified that the accused was suffering from undiagnosed severe chronic insomnia, which is what caused the "intrusive" sleep episode. The 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 *actus reus* for the crime.

# *Tifaga v. Department of Labour*, [1980] NZ (Work visa refused for going to jail)

RATIO: If you know your actions will lead to a prohibited act, you must take steps to prevent their occurrence. 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.

**LEGAL** **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 to the accused since the impossibility had been brought about by the accused’s own fault.
* The accused made the conscious and voluntary choice to go to New Zealand. When accepting the visa to come to NZ, he was accepting an implied term that he must leave is requested to do so.
* The principle in Kilbride v Lake (intervening act or cause) is not available to him, 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 – compare with *Tifaga*

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.

LEGAL ISSUE - Did the accused voluntarily violate the immigration provisions? 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.

### Ommission

* When you want to find liability through omission you must find a positive legal duty
* In certain cases, **an omission to act (neglect or failure to do something) 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 known* of your duty (an 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 (for preventing others from acting) (*Instan*)
* Criminal liability for omissions can arise in two ways in Canada:
1. If the statutory offence section explicitly includes omissions (*Colucci*)
2. If there is a legal duty to act recognized by statute or common law (*Instan, Kirby, Miller*)

*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 the breach of duty an offence, or the consequences that resulted from breach of duty? Look at causation – did omission contribute to what happened?
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* (*Kirby*)
	+ *Failing to report treason, etc*
* *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) For the purposed of this section everyone commits a common nuisance who does an unlawful act or *fails to discharge a legal duty*.
* ***Common Law***:
* Three general common law bases for legal duties:
	1. **General relationships involving care and protection** (some of which are codified –s.215 duty of persons to provide necessities) (*Instan*)
	2. **Specific undertakings** to act which give rise to legal duties (e.g., CC s. 217; contractual – *Beardsley*)
	3. **Causal responsibility for dangerous situations of your own creation** (*Beardsley*? *Miller*)
* Contractual obligations (depends on terms) (i.e. lifeguards under contractual duty)
* **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*)

Statute duties can arise either explicitly (*Kirby* s.215) or by implication (Moore, Kirby s.220)

Common law duties can arise due to their relationship (*Instan*, *Kirby*) as a result of specific undertaking (*Instan*) or as a result of being causally implicated in the creation of dangerous conditions (*Miller*).

#  *R. V. Colucci* 1965 (an omission to act can result in criminal liability – Broad rule)

**Ratio: an omission to act (failure to do something) 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 particulars with intent to deceive certain shareholders of a company known as Terminus Mines Limited contrary to s. 343(1)(b).

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

**Reasons:** A statement which omits the material constitutes an act of deceit according to s. 343(1). The *actus reus* of the offence could be an omission. There was no question that the material omitted was material to the fraud

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

#  R. v. Instan 1893 –old aunt (There must be a *legal duty* to act if an omission can result in liability)

**Ratio:** You don’t get liability from just a failure to do something even if it’s a factor that causes the death of a person. **There must be a duty to do something**. **The non-performance of a moral obligation or a legal duty is a crime.**

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

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

**Holding:** 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

•The *circumstances* gave rise to the *legal duty* to provide a duty of care, and the omission of action caused the *consequences* of the accelerated death of the victim

# *People v. Beardsley* (1907) (No legal duty created by moral obligation – only legal duty to family)

**Ratio: No legal duty created by a mere moral obligation**. Respondent had not assumed in fact or by implication care or control over his companion. **Legal duty exists only to a spouse or family**

**Facts:** Beardsley cheating on wife with victim. Beardsley and Blanche were drinking and she took some morphine pills. Beardsley tried to stop her but she kept taking them. Beardsley tells a friend to take her to another place because his wife might come home. She dies in the other place. Beardsley is charged with manslaughter.

**Issue:** Was Beardsley 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.

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

**Note**: But what about the fact that he took positive steps to hide her? Did he prevent her from getting help? Is this causation? If this was a wife, child, employee, there would have been a legal duty to act.

# *R. V. Kirby*, 245 D.L.R. (4th) 564 (Criminal liability results from omission if legal duty exists-duty from stat language)

**Ratio:** **There are certain situations where an omission to act may lead to criminal liability. But that can only arise if there is a legal duty, not merely a moral duty, to act. Necessaries of life include intervention to prevent serious harm or death**

**Facts:** **Wife suicide.** Kirby and his wife were in the washroom together. There was talk of suicide. Mrs. Kirby hanged herself with the shower curtain. Kirby did nothing to prevent her from hanging herself 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) of *Criminal Code2nd*

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

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 offense.

**Reasons:** Parliament clearly intended to make the omission to provide necessaries of life, in certain circumstances, a crime. “Necessaries of life” includes anything necessary to preserve life, such as medical aid or intervention to prevent serious harm or risk of death. S. 215 clearly sets out a duty to act in certain circumstances

To convict the accused on a charge of criminal negligence causing death, the Crown must prove three things:

* + 1. The accused omitted to do something that was his duty to do.
		2. He showed a wanton or reckless disregard for the life or safety of the deceased.
		3. That his conduct caused, in the sense of being a contributing factor to, the death.
* *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*: 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 a failure to act where you are under a legal obligation to do so, & where your action or failure to act results in the death of the individual

2. MR: Objective, ‘marked departure’ from reasonable person standard [LESS than subjective awareness – only considered penal neg, not crim neg]

* *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:** A formal conviction will be entered only on Count 1, the charge of criminal negligence causing death. Count 2 will be stayed - both counts arose from same underlying set of facts

**Note:** Liability from omission 🡪 **we get the duty from statutory language**

Second conviction stayed because it arose out of the same underlying facts (*Kineapple*)

# *R. V. Fagan*, [1969] 1 Q.B. 439 (omission to stop committing a prohibited act = liability [car on cop foot])

**Ratio:**It is not necessary that *mens rea* is present at the inception of the *actus reus*, as long as it is present during the continuation of the prohibited act (application of force)

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

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

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 offense.

“An unintentional act followed by an intentional omission to rectify that act or its consequences can be regarded *in total* (as a whole) as an intentional act.” = thereby sufficient to fulfil AR requirement.

**Reasons:**

* The *actus reus* and the *mens rea* did not coincide because the *mens rea* was formed after the *actus reus* had been completed (simultaneity principle)
* The *actus reus* was complete when Fagan drove the car onto the police officer’s foot
* The *mens rea* 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. The fallacy of the appellant’s argument is that it seeks to equate the facts of this case with such a case as where a motorist has accidentally run over a person and, that action having been completed, fails to assist the victim with the intent that the victim should suffer.”

* When Fagan told the cop to “fuck himself” then he had the intent to remain on his foot.
	+ This is the *mens rea* and you add it to the *actus Reus* of being on the foot.

**Dissent:** You cannot commit an *assault* though an omission: has to be an act. The subsequent inception of *mens rea* cannot convert an act, which has been completed without *mens rea* into an assault. ***Actus Reus* and *mens rea* must coincide** to constitute an assault 🡪 no guilty act without a guilty mind.

**Holding:** **Continuous Act 🡪** The *actus reus* 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 – views whole event as one act. Allows *actus Reus* and *mens rea* to coincide).

# *R. V. Miller*, [1982] 2 W.L.R. 937 (Duty created from negligence - Continuous act [squatter arson])

**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:** (Squatter arson) Miller began squatting in an unoccupied 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 preparing to go to sleep. He fell asleep before he had finished smoking 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 on which he was sleeping and set it alight. Miller later woke, saw and realised that the mattress was smouldering but did nothing about it. He moved into an adjoining room, leaving the mattress smouldering, and went to sleep in the company of a friend. A police constable saw that the house was on fire. Damage to the extent of £800 was caused to it.

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

**Reasons:**

* Court of Appeal:
	+ The whole of the accused’s conduct is a continuing act (*Fagan*) and there is an overlap with the *mens rea*.
	+ **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.” (288-9)
		- Clearly his failure with knowledge to extinguish the incipient fire had in it a substantial element of adoption on his part of what he had unintentionally done earlier, namely set it on fire.
* House of Lords:
	+ 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** (H.L.) 🡪 principle that arises from this case
		- 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 to

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

**Note:** It doesn’t matter which theory is applied in this case because of the facts

### Causation

1. **But For Cause**
2. **Significant contributing cause**
3. **Substantial causation test – only to elevate 2nd to 1st under 231(5)**
* Causation is important bc some *actus reus* of some offences req’ a certain consequence.
	+ Ie. 222(1) Homicide/manslaughter requires someone to die, 220 Crim neg causing death
* Causation in the criminal law is actually comprised of two elements:

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
	+ So the fire caused the smoke bc the smoke would not have occurred had the fire not also occurred
	+ A counterfactual test: ask what would have happened if something that did occur had not occurred
* **2)** **Remoteness** (aka 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 the (legal causation) inquiry is to fix upon some wrong-doer the responsibility for the wrongful act which has caused the damage**. It is in search of the responsible agent. 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 they [the origins] are too remote.”
	+ Conceptually backwards: what are typically held to be too remote are the consequences of certain actions; but the general point – that **sometimes the relationship between cause and effect is too attenuated to be legally significant** – is well taken (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
	+ must turn to the common law to find the test/rules for legal causation (also sometimes called the juridical causation, imputable causation, or remoteness inquiry)
* The first test that comes about 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*)-later replaced by “significant contributing cause (*Nette*)
	+ It need not be the sole cause of the prohibited consequence; it need only contribute to the bringing about of the consequence
* 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
	+ Talk of a “contributing cause outside the de minimus range” was replaced by talk of a “**significant contributing cause**”

##### BUT FOR CAUSE

# *R. v. Winning* (1973) (But-for test – no causal effect on consequences)

**Ratio: A wrongful act that has no cause or effect on the outcome of a situation cannot be viewed as illegal.** If a wrongful act is performed that has no bearing on the 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 pretenses?

**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.

**Holding:** 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. Appeal allowed.

##### REMOTENESS

# *People v Lewis* (1899) (Cal. SC) (But for test-shooting, victims slits throat)

**Ratio**: But for test creates a causal connection between the accused’s acts and the prohibited consequence

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

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

**Analysis**: But for the shooting, the victim wouldn’t have slit his own throat. This creates the causal connection. Looking at the situation as a continuous series of events, it is evident that 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) (Remoteness - Stabbing victim dies bc of bad treatment)

Ratio: a prohibited consequence arising out of a separate event will be too remote to create liability

**Facts**: victim was stabbed, and sought treatment. Victim rec’d bad treatment and later died due to the treatment.

**Held**: Not guilty

**Reasons**: the death was too remote from the prohibited consequence. The bad medical treatment was a separate event. The original wound was no longer operative

**Ratio:** Medical treatment must be palpably wrong to break the chain of causation---D’s acts have to be material cause of victim’s death

# *R. v. Smith*, [1959] (consequence will NOT be too remote if the act is still operative)

**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**: the difference between *Jordan* and *Smith* is that the original wounds in the latter were still operative, whereas the wounds in *Jordan* were no longer operative

**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

-what was reasonably foreseeable (but the thin skull principle applies – must take your victim as you find them)

* ***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*).
	+ Did the results flow from the acts of the accused?
	+ The accused would not be guilty if another cause resulted in the death (*Lewis*)
	+ A break in the causal chain can result in the accused’s action no longer acting as an operating or substantial cause at time of death (*Jordan*)
* 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** (*Blaue*)
* **Thin Skull Rule**: one who assaults his victim must take him as he finds him. Can’t assume victim will not have unforeseen side effects. (*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
	+ **Thin Skulled** – Victim’s actions irrelevant. The victim didn’t do anything that made them die. (E.g.: allergic reaction, sudden complications, predispositions)
* The 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 second cause overwhelms the original cause and makes it insignificant then the death may not flow from the original cause** (*Smith*)
* Death resulting from any normal treatment employed to deal with a felonious injury may be regarded as caused by the felonious injury (*Jordan*)
* It does not matter if victim acts to his own detriment, or if a third 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*)
	+ **An accused is liable for any injuries if they are the result of a reasonable response by a third party to the accused’s unlawful acts** (*Pagett*)

# *R. v. Blaue,* [1975] (Thin-Skull Rule)

**Ratio:** **Thin-skull reasoning. Take your victim as you find him/her.** The reasonableness or the 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 know them and be responsible for the consequences.

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

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 inflicted by Blaue 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.

**Holding:** Cause of death was not "lack of blood transfusion" but rather the stab wound 🡪 victim's refusal to stop a natural result does not break the chain of causation

# R. v. Shilon, (2006) (reasonably foreseeable risk of substantial harm = legal cause)

**Ratio:**  where conduct is inherently dangerous and carries with it a reasonably foreseeable risk of immediate and substantial harm ***from the act***, the test for legal causation will have been met - Inherently dangerous activity, reasonably foreseeable risk of immediate and substantial harm = committed by Shilon through driving at such high speeds

**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 in fact of victim’s death? 2. Were Shilon’s actions too remote to count as a legal cause of victim’s death?

**Holding: guilty**

**Reasons:** it was an available inference that the police officer’s death occurred in the ambit **of the risk created by the actions of the driver** of the pick-up [Shilon] and that the driver ought reasonably to have foreseen such harm.

# R V. Maybin (2012) (Remoteness – scope of what is reasonably foreseeable

**Ratio:**  It’s the general nature of the intervening acts and the accompanying risk of harm that needs to be reasonably foreseeable at the time at which the original act is committed – you don’t have to foresee the precise way the consequence occurs.

**Facts**: Maybin brothers started a fight in a bar with one patron. After they hit him many times, he fell onto the pool table, unconscious. A bouncer then appeared, and when other patrons said the unconscious man had started the fight, hit him very hard while he was still past out. The patron died of his injuries.

**Issues**: What is the scope of what has to be reasonably foreseeable?

**Holding**: One brother guilty of manslaughter, one brother guilty of assault causing BH; bouncer guilty of assault causing BH.

**Reasons**: The assault of the bouncer was not independent of the appellant’s unlawful acts and the appellants actions remained a significant contributing cause of the victim’s death. The dangerous and unlawful acts of the appellants were not so remote to suggest that they were morally innocent of the death.

##### Thresholds + standards of Causation

* How much causal ‘oomph’ must an accused’s conduct have provided in order for the accused to be responsible for the prohibited 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* changed 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)

# *Smithers v. The Queen*, [1978] 1 S.C.R. 506 (Standard = Outside the de minimis range*/Thin skull*)

**Ratio:** Causation standard: The accused's act need merely be a **contributing cause of death outside the *de minimis* range** – more than trivial; “not insignificant.”

**Facts:** Fight after hockey game. Accused kicks deceased. Within 5 minutes, victim dies b/c chokes on his own vomit; epiglottis failed (rare reaction).

Charged with manslaughter s.222 🡪 must directly or indirectly cause the death of the victim.

**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**.” (365) 🡪 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.” (365)
* 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.
* This was another **thin-skull** situation. Take your victim as you find them.

**Holding:** Kick was at least a contributing cause of death, outside the *de minimis* range, and that was all that the Crown was required to establish. \*\*Leading case on Manslaughter Causation

# *R. v. Harbottle*, [1993] 3 S.C.R. 306 (*Standard for* MURDER *is a level of* substantial causation)

**Ratio: The standard level of causation for s. 231(5) is a level of substantial causation**

**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 Harbottle’s holding of the girl’s feet a contributing factor to the girl’s death to constitute a conviction of first-degree murder?

**Reasons:**

* + “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.
	+ 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 by 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.**

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:** 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. Appeal dismissed.

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

#  R. v. Nette, [2001] 3 S.C.R. 488 (“significant contributing cause” – standard for causation)

**(Standard for culpable homicide, and other crimes where the *actus reus* has a causal element (arson, reckless driving causing bodily harm) = accused’s actions were a significant cause)**

**Ratio:** **There is only one standard of causation for homicide offences (Manslaughter/2nd degree murder) – “Significant contributing cause”. *Harbottle* didn’t change the *Smithers* test, it only raised the standard for 1st degree murders**

**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.

Nette argued:

* + *Harbottle*  replaced the *Smithers* standard with a standard of substantial contributing cause for all homicide offences, and that as a result, the TJ’s instruction to the jury was incorrect
	+ The TJ erred in referring to the *Smithers* standard as being satisfied by a ‘trivial cause’

Crown argued:

* + 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:** Nette was tried before a judge and jury. The jury returned a verdict of second degree murder and the Court of Appeal dismissed the 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:**

* Arbour: the test for 2nd degree murder should be neither:
	+ Substantial contributing cause (*Harbottle*); nor
	+ Contributing cause outside the *de minimis* range (*Smithers*)
* Rather
	+ Test of causation for homicide should be the same for all varieties of homicide [71] 🡪 manslaughter, 2nd degree murder and 1st degree murder
	+ Test should be framed in terms of significant cause [71]
	+ 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.) [64-65]
* “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*.” (per Arbour, [88])
* The causal culpability of the accused must be higher if the accused is going to be convicted of first-degree murder 🡪 substantial = immediate and direct
* 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.

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

**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).)**

**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
		- Arbour: lg. of substantial contributing cause is not a standard for cause in fact; rather, used to determine (legal causation) whether the moral blameworthiness of the accused warrants conviction for first degree murder for purposes of, e.g., s. 231(5)
		- LHD (Dissent): no need to re-interpret *Smithers* test for causation; talk of significant contributing cause in effect heightens *Smithers* threshold
			* i.e. “not an insignificant cause vs. Not a significant”
			* he thought he was keeping it the same but making it clearer, but in reality it seems to have changed

##### 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

*Actus non facit reum:*

* 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
	+ Pretty artificial “under the direction” is misleading
		- i.e. there is no mental state related to criminal negligence (they’re not thinking)
			* but we still find them criminally liable in certain scenarios
* What we are actually trying to figure out is what is the fault element
	+ Each offense has its own mens rea requirement + there are different ways in which one can satisfy the requirement
	+ Must determine what an individual offense’s requirement is
		- i.e.
			* purpose or intention
			* knowingly or with wilful blindness
			* recklessly
			* criminally negligent manner
			* penally negligent manner
	+ The one form of fault criminal does not like is the tort standard of negligence
* The *Canadian Criminal Code* 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 actus reus there must be an equivalent fault element (mens rea) that can be attributed
	+ Some element must be attached
	+ 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
	+ Crim code does not define different forms of mens rea, so we have to turn to the case law to determine what is considered mens rea in each scenario
		- There is no unified concept
		- Reflects an underlying unifying legal principle – **there should be no criminal responsibility without fault**

3 key subjective faults -

* What does it mean to intend?
* What does it mean to act recklessly?
* What does it mean to act with wilful blindness?

### 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”. (It is important to distinguish motive & intent)
	+ 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”
		- There is a continuum where motive is important to be introduced in cases. This is usually due to the details of the case. Lewis v. The Queen the SCC ruled the judge did NOT err by failing to address the absence of motive.
	+ Also, motive may be relevant for determining circumstances (ie. sexual nature). Motive, such as for the purposes of sexual gratification are motive indicators (BUT, 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*) – hard case to justify because it arguably conflates motive and intent…although he had no guilty motive he did the act intentionally but was still acquitted
* 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
* 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 (*Buzanga and Durocher*) – this is still a subjective measure…did they actually foresee it?
	+ **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**
* Honest beliefs that a prohibited consequence will not occur do not negate the guilty mind when there is knowledge that the consequence could occur -See mens rea of fraud (*Theroux*)

Identify 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**?
15. **Mistake of law**?

# R v ADH (2013) – USing strict construction to determine fault element

**Ratio –** When parliament’s intent is unclear, the presumption of subjective fault ought to have its full operation

Facts: Women who does not know she is pregnant gives birth in a Walmart bathroom. She thinks the baby is dead and leaves it there after she cleans herself up. Baby was not dead.

Issue: Does s 218 of the Code require proof that the accused knew that the acts of alleged abandonment or exposure of a child were such that the abandoned child’s life was, or was likely to be endangered or his or her health permanently injured?

# R v Lewis (1979) – Motive can be relevant, but not essential to prove mens rea

**Ratio –** While motive can be relevant evidence in a case, it is not essential to prove mens rea

Motive is no part of the crime and is legally irrelevant to criminal responsibility. It is not an essential element of the prosecution’s case as a matter of law

**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 mens rea 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. Motive is not part of the crime and is legally irrelevant to criminal responsibility.
* Propositions as to motive formulated by Dickson J
	+ (1) As evidence, motive is always relevant and evidence of motive is admissible
	+ (2) Motive does not have to be proven by the Crown
	+ (3) Proved absence of motive (and absence of proved 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

# R v Steane (1947) – Guilty intent cannot be presumed, it must be proven

**Ratio:** The guilty intent of an accused cannot be presumed. It must be proven by the crown. There must be a distinction between an act done with intent, and an act done with the intent of bringing about specific consequences. This case arguable conflates motive and intent. A better analysis would be defence of duress.

**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, contrary to regulation 2A of the *Defence (General) Regulations, 1939*. He was forced into agreeing to work for them by threats of violence to his wife and kids (would be put in concentration camps) 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.
* Did the TJ misdirect the jury with regard to whether the acts were done with intention of assisting the enemy?

**Reasons for Judgment**

Lord Goddard CJ

-The TJ misdirected the jury with regards to the full defence of the accused.

-A man is taken to intent 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. The learned judge 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.

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

# R v Buzzanga and Durcoher (1979) ONCA – CITE FOR INTENTION \*\*\*

**Ratio:** If a person acts with intention to bring about the prohibited consequence. Can be foresight or intention or

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 – the purpose of this process however, is to determine what the particular accused intended, not to fix him with the intention that a reasonable person might be assumed to have in the circumstances, where doubt exists as to the actual intention of the accused”

**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.*

**LEGAL ISSUE:** What is the meaning of the word ‘wilfully’ in s. 281(2) of the *Criminal Code* in the term “wilfully promotes hatred”?

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

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

* Two ways to *intend* a consequence:
	+ (1) Consciously/wilfully/intentionally act to bring about a certain consequence OR
	+ (2) Foresaw the prohibited consequence was **certain or morally certain to result** from their act, even if intention was to bring about a difference consequence (Foresight is also assessed subjectively)

CONCLUSION (INTENT/MOTIVE)

* Three main cases:
1. *Lewis*: introduces distinction between motive and intent: motive is evidentially relevant, but legally inessential
2. *Steane*: a difficult case, and arguably 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

### Recklessness + Wilful Blindness

* “Willful blindness does not define the mens rea required for particular offences. Rather, it can substitute for actual knowledge whenever knowledge is a component of the mens rea.” (Charron J. in Briscoe)
* You can substitute willful blindness with the knowledge in the criminal code – it is a way to impute knowledge to the accused
* An individual would be wilfully blind with respect to some aspect of the *actus reus* (ie. consent)
	+ “The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused’s fault in deliberately failing to inquire when he knows there is reason for inquiry”
* Wilful blindness does not define the *mens rea* required for particular offences. Rather, it can substitute for actual knowledge whenever knowledge is a component of the *mens rea* *(Briscoe*)
	+ ie. drug trafficking, possession
* Even if a person makes inquiries, they can still be wilfully blind if they harbour suspicions and refrain from making further inquiries (*Lagace*)
* No specific level of suspicion required, only that it is “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 Lagace – (2003) A person can be wilfully blind even if they make inquiries

**Ratio:** A person can be willfully blind even if they make inquiries

No specific level of suspicion is required, on that it is a ‘real suspicion in the mind of the accused’

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 (mens rea for fraud is knowledge) Despite evidence that the accused inquired about the cars several times 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

LEGAL ISSUE: Was the accused aware that the cars he was receiving were stolen?

* + If wilful blindness can be established it can be substituted for knowledge

HELD: Accused was wilfully blind. While he did make inquiries as to the legality of the cars, those inquiries were not deep enough (however new trial was ordered for the TJs mistake in evidence)

REASONS FOR JUDGMENT:

* 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 arguably met in this case
* Argument #2: The appellant could not have been wilfully blind because he did, in fact, 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 she preferred to remain ignorant of the truth**
* \*Further appeal that the TJ left out important evidence in his decision, which was helpful to the accused defences (good character, prices reasonable with non-stolen vehicles, number of phone calls made, etc.) THEREFORE the conviction did not stand.

# R v Sansragret

“Willful blindness 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, willful blindness 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.”

**Recklessness –**

General Idea – recklessness is a subjective form of fault

* Doctrine
	+ To establish that the accused was reckless the crown must show
		- That the accused was subjectively aware that her conduct could create a risk or danger of the prohibited circumstance or consequence
		- 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 actus reus
	+ Sexual Assault (absence of consent)
	+ Arson (reckless with respect to damage by fire)
* 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 or action would create a risk or danger of the prohibited consequence, and**
		- **(ii) that the accused acted anyway, in the face of that risk** – Doctrine
* Recklessness is considered a lower form of mens rea 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 or the commission of a prohibited act

Only case we have is *R v G (2003)*

* + Recklessness is a subjective form of fault (take home message)
	+ Key factual assumption – neither boy in fact appreciated that there was any risk whatsoever of the fire spreading in the way it eventually 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 G (2003) UKHL – RECKLESSNESS IS SUBJECTIVE AWARENESS OF RISK + PERFORMING THE ACT KNOWING THAT IT IS UNREASONABLE TO DO SO

**RATIO:** 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

**FACTS**: **Two young boys** (11 and 12 years old) lit some newspapers and threw them under a **wheelie bin**. The bin caught on fire and set fire to another bin, which then set fire to a Co-Op shop. The fire caused approximately £1m worth of damage. Boys charged with causing damage to the Co-Op premises, not the garbage bins

* + Assumption: neither boy in fact appreciated that there was any risk whatsoever of the fire spreading in the way it eventually 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?

**ANALYSIS**:

* Criminal Damage Act 1971, s. 1
	+ A person who without lawful excuse destroys or damages any property belonging to another, intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence
* 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].”
	+ I.e., a person can be negligently reckless
* Trial judge in *R. v. G*, unhappily applies *Caldwell*

**RATIO**:

* House of Lords rejects reasoning in Caldwell.
* Four considerations/arguments:
	+ (1) Caldwell is contrary to fundamental mens rea principle – No criminal liability without fault
	+ (2) Caldwell’s 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
	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. T
2. Penal Negligence
	1. Kirby, Hundal, Beatty, R v L(J)
	2. Failure to provide the necessities of life - a marked departure from the standard of care expected of a reasonable person
3. Criminal Negligence
	1. Tutton, Anderson, R v J(F)
	2. A marked and substantial departure from the standard of care expected of a reasonable person
	3. Five provisions in the code - 220, 221, 222(5)(b), 249.2, 249.3
4. Subjective Fault - intention, knowledge, recklessness
	1. Wilful Blindness (Lagace, Sansregret)
	2. Mere unreasonableness - should never give rise to criminal liability
* Objective standards of fault focus on what the accused ought to have thought or contemplated about his or her actions, as opposed to what he or she did actually think about
	+ Manslaughter is standard objective fault 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*)
		- Personal characteristics relevant to incapacity are still considered
* **Modified objective (TEST) fault** arises with crimes of negligence, which there are two types:
	+ (1) Penal negligence – lower level of fault than criminal negligence
		- With penal negligence you look for a **marked departure** *(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)
	+ (2) Criminal negligence
		- Section 219 (not an offence, just defines what criminal negligence is) – 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, not 219.
		- 220 (crim neg causing death), 221 (crim neg causing bodily harm), 222 (5)(b) (causing death by criminal negligence)
			* 220 and 222(5)(b) are the exact same processes
		- With criminal negligence you look for **a marked and substantial departure** (*Tutton, Anderson, R v. J(F)*)
* 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 also arises with the offence of unlawful act manslaughter, where it must be objectively foreseeable that the death was a cause

*Criminal Negligence (CC. s.219(1))*

* 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*, the SCC was deadlocked 3-3 on whether or not *mens rea* 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)*
	+ If *Beatty* was applied to a present case, mens rea would still be marked and substantial departure BUT actus reus would be ‘showing wanton or reckless disregard’ as is stated in the *CC*
	+ *JF*: SCC tells us difference bw 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)
* Statutory enactments can change the fault standard (*The State v. Williams*)
* There are only 2-3 offences of criminal negligence (causing death, causing bodily harm) for which the mens rea is marked and substantial departure
	+ There are also penal negligence offences which mention negligence and they require only a marked departure

##### Offence of Crim Neg Causing Death

# R v Tutton and Tutton (1989) Crim neg Subjective/Objective Debate

FACTS:

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

PREVIOUS HOLDINGS:

* Convicted at trial. New trial was ordered by ONCA 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.

LEGAL ISSUE: Is the test for criminal negligence subjective or objective?

HELD: New trial ordered, no member of the SCC accepted the distinction between omissions and commissions. Court is split 3-3 whether objective or subjective test is to be used

REASONS FOR JUDGMENT:

* **Objective Test:**
* McIntyre J.
	+ 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: reasonableness - 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
	+ Criminal negligence does not import in its terms some element of malice or intention
		- In regular cases, the act coupled with the mental state or intent is punished, in negligence cases, the act which exhibits the requisite degree of negligence is punished
* 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 criminal negligence would make it an absolute liability offence; contrary to *Sault Ste. Marie* and Charter s. 7.
	+ “reckless disregard” requires some degree of advertence/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 3things:

* + - * 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 F(J) – Acquittal/Conviction screw up s.215 is a predicate offence t0 s.220

**Ratio:** 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.

* the 215 charge only req’d a finding that the accused’s acts were a marked departure, whereas the crim neg charge req’d that the accused’s acts be a marked and substantial departure, which was based on the exact same omission. Therefore it **was incomprehensible that the jury could acquit the 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 to be quashed, bc the accused has already been acquitted of failing to provide the necessaries of life, and it order for a new trial to be ordered, he would need to be tried of the same crime that he has already been acquitted of.

##### Neg as an element

* + Dangerous driving is an offense of penal negligence because it involves dangerous conduct, but not subjective fault because involves lack of attention

# R v Hundal (1993) – Dangerous driving – modified objective test

**Ratio:** 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 the circumstances

**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 CC. s. 249(4), Dangerous operation of motor vehicles, vessels, and aircraft

**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:

 Fours reasons why objective fault is suitable

* + Licensing requirement – but why is that relevant?
		- Licensing establishes that you have a minimum amount of skill (an objective standard that all drives are expected to meet)
	+ Automatic/reflexive nature of driving – again, relevance?
		- Driving is such an automatic activity, no thought to it.
		- This suggests that we don’t want to know what the 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. That is to say the objective test should not be applied in a vacuum but rather in the context of the events surrounding the incident”
		- Consider contextual factors such as unforeseeable consequences/conditions (weather), condition of car, heart attacks, etc.

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

* ***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”***
* ***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”***
* **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 – e.g., involuntariness from a heart attack
	+ Voluntariness speaks to the *actus reus*.
	+ Marked departure is still needed, but all the same 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) SCC CITE FOR DANGEROUS DRIVING PENAL NEGLIGENCE

**Ratio:** The test for a charge of dangerous driving of a moto vehicle causing death under s.249(4)

1. Actus Reus – the accuse was driving in a manner that was [objectively] dangerouns to the public having regard to all the circumstances
2. Mens Rea – 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. Moreover, 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 of the danger involved in the conduct manifested by the accused

**FACTS**: Accused was charged with three counts of dangerous driving causing death after his pickup truck, for no apparent 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 and collided with the other vehicle. 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.

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

**HELD**: Appeal allowed, acquittal restored

**ANALYSIS:**

* **Charron J. (majority)**
* 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
	+ This test ‘modifies’ the purely objective norm for determining civil negligence in two ways:
	+ (1) There must be a ‘marked departure’ from the conduct of a reasonable prudent driver
	+ (2) Because in considering the possibility of excusing condition we need to know whether a reasonable person in the position of the accused would have been subjectively aware of the risk that the accused was creating- and that means that we are asking questions about what the accused in fact knew at the time she acted.
		- 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

**McLachlin C.J. (concurring)**

* The *actus reus* requires a marked departure from the normal manner of driving
* The *mens rea* is lacking the requisite mental state of care expected f a reasonable person
* This is generally inferred from the *actus reus*
* However, evidence in a particular case may negate or cast a reasonable doubt on that inference.

**Fish (concurring)**

* Agreed with Charron regarding actus reus
* Mens rea: “Is not the marked departure from the norm of a reasonable prudent driver but the fact that a reasonable prudent drier in the accused circumstances would have been aware of the risk of that conduct and if able to do so would have affected to avert it”

**REASONS**: 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, *actus reus* is what the criminal code says it is, and the *mens rea* is the modified objective test
* For criminal negligence there are two possible readings:
	+ From McLachlin in *Creighton*: *actus reus* is marked and substantial departure from reasonable person and *mens rea* is marked and substantial departure
	+ If *Beatty* is used, *actus reus* is from *CC* (‘showing wanton or reckless disregard’) and *mens rea* would still be marked and substantial departure
* With unlawful act manslaughter offences, after the actus reus and mens rea of the unlawful act are established, all that is needed is to show that the unlawful act caused the death, and 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

Statutory Provisions – Murder/Culp Hom/Mansl

222(1): defines homicide

222(2): introduces a 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
* There are three types of culpable homicide in the *Criminal Code*: manslaughter, murder, infanticide (not dealt with for us)
* **Section 222(1-4)** of the *Criminal Code* set out what homicide and culpable homicide are



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 him bodily harm that he knows is likely to cause death, and is reckless whether death ensues or not (Last part is redundant)
		- i and ii are the same culpability (*Nygaard –* not briefed)
	+ (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
	+ (2) There must be subjective knowledge that the bodily harm is of such a nature that it is likely to result in death (*Cooper –* not briefed)
		- Following the decision in *Cooper*, the reference to recklessness can be considered an ‘afterthought’ because an intent has already been established, and the accused has already shown deliberate disregard for the integrity of the victim
* 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)
	+ HOWEVER 229(c) still seems to stick out. Doesn’t look great.
* In *R. v. J.S.R.*, it was held that **229(c)** would be satisfied provided that a jury was convinced beyond a reasonable doubt that the 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
		- It is important that the victim is not the target of the unlawful object, or else it would be more effective to charge under 229(a)
* Although some offences do not require a subjective fault element, there are others that do have this requirement
	+ After the *Charter* came into force, the SCC decided a number of cases that measured statutory fault requirements against the principles of fundamental justice in s. 7
* In *Vaillancourt*, the court held that it is a principle of fundamental justice 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 principles of fundamental justice, 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) SCC – s.213(d) now s.230(d) is repealed

**RATIO**: It is a principle of fundamental justice that, absent proof beyond a reasonable doubt of **at least objective foreseeability of death**, there surely cannot be a murder conviction

* + Lamer J. was trying to restrict this decision to only this part of the *CC* and so did not examine subjectivity vs. objectivity (*Martineau* he states minimum is Subjective)

**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

LEGAL ISSUE:

* Is s. 213(d) of the *Criminal Code* inconsistent with the provisions of either s.7 or s.11(d) of the *Charter* and thus of no force or effect?
* This effectively raises manslaughter to murder, even if there is no intention to kill.

HELD: Appeal allowed, 213(d) is unconstitutional

* + (bc an accused could be convicted of 2nd degree murder even if he wasn’t objectively aware that death would ensue – ie if the accused was drunk)

REASONS/ANALYSIS:

* 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 of the *Charter* (Oakes Test)
	+ 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

Lamar’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

DISSENT: **McIntyre J.**

* The principal complaint in this case is not that the accused should not have been convicted of a serious crime deserving of severe punishment, but simply that Parliament should not have chosen to call that crime ‘murder’
	+ No PFJ violated simply because a serious crime is called “murder” and not something else
* Parliament had good reasons to criminalize carrying weapons and it’s not the courts job to substitute their judgement for this.

NOTE: Lamar argues as *Obiter* for a constitutionally required minimum fault requirement for murder, which is AT LEAST objective. However this is revisited in Martineau where a subjective foresight of murder is required.

# R v Martineau (1990) SCC – s.213(c) unconstitutional

**RATIO**: It is essential that to satisfy the principles of fundamental justice, 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

* + **Some type of subjective foresight of death is required**
	+ As a result the “ought to know” is ineffective in 229(c)
	+ ALL of s. 230 is unconstitutional, bc it allows for conviction without subjective intent/knowledge or foresight. It has yet to be repealed, but it is no longer in force or effect

**FACTS**: The accused and his accomplice had set out to commit a robbery, and the accused carried with him a pellet pistol while is 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) of the *CC*

* + 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 he or she knows 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/ANALYSIS:**

* 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.”

**DISSENT - L’Heureux Dube J:**

* Those who are critical of all forms of the "felony-murder" rule base their denunciation on the premise that *mens rea* is the exclusive determinant of the level of "stigma" that is properly applied to an offender.  This … ignores the pivotal contribution of *actus reus* to the definition and appropriate response to proscribed criminal offences.  If both components, *actus reus* as well as *mens rea,* are not considered when assessing the level of fault attributable to an offender, we would see manslaughter and assault causing bodily harm as no more worthy of condemnation than an assault
	+ Murder is a legal concept and so consequently, it does not have to be defined in terms of intentional killing, so long as some elevated fault element is specified

Also point about changing parliament’s intention is not part of the courts role!

##### The Elements

1. All culpable homicide that is not murder or infanticide

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

3. Death caused by an unlawful act, that factor coupled with some form of mens rea (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 of the CC (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 actus reus will be actus reus 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 mens rea 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]

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

Creighton’s Puzzle

* But still, Creighton raises a puzzle
* For considering: *constructive liability* exists where liability is imposed on an actor for a result without requiring proof that the result was foreseen or foreseeable
* Moreover, as we have seen in *Martineau*, constructive murder is unconstitutional – there must be at a minimum subjective foresight of death
* But according to the SCC in *Creighton*, constructive *manslaughter* turns out to be constitutional

#### 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 him bodily harm that he knows is likely to cause death, and is reckless whether death ensues or not

|  |  |
| --- | --- |
| 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)
 |

* Recklessness can be ignored under this provision
* Murder is not a ‘lesser offence’ under 229(a)(ii) than 229(a)(i)

# R v Cooper (1993)

Aspect of recklessness can be considered an afterthought since to secure a conviction under this section it must be established that the accused had the intent to cause such grievous bodily harm that he knew it was likely to cause death. One who causes bodily harm that he knows is likely to cause death must, in those circumstances, have a deliberate disregard for the fatal consequences which are known to be likely to occur. That is to say he must, of necessity, be reckless whether death ensues or not.” (Cooper at 129, per Cory J.)

#### 229(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…

# R v Droste

* R v Droste – wants to kill wife + ends up killing children
	+ Semi first-degree murder but convicted on the ground he committed murder on the grounds in 229(b) – because he fulfilled the planning + deliberation
	+ Df. Argued – he didn’t intend to kill his kids, only to kill his wife (killing them was an accident/unintentional killing)
	+ Dickson – it was clearly murder and the doctrine of transferred intent
		- You don’t have to kill the person you planned + deliberated to kill, only that there was planning + deliberation involved when you killed someone
* the rationality behind [s. 231(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 the intended victim. A mistake or accident as to the victim is not a mitigating factor.” (135)
* “planning and deliberation with relation to the killing of a specific person makes the offence first degree murder when in the course of carrying out the plan the accused in fact kills someone else instead.” (136)

# R v Fontaine

* R v Fontaine – tries to kill himself and by mistake kills another person by crashing his car into others
	+ Found guilty under a bunch of convictions
	+ Df. Argument – first degree murder (he never intended to kill another person)
	+ Crown argued – 229(b) applies to just a situation
	+ Response – suicide is not a criminal offence, so it doesn’t make sense to label somebody as a murderer – his intent was to take his own life
* ”Given the early English treatment of murder and suicide as different crimes, the fact that suicide in Canada is no longer a crime, and the high moral culpability attached to the crime of murder, I conclude that the words of the provision in s. 229(b) of the Criminal Code are reasonably capable of more than one meaning.  Given that ambiguity, the statutory interpretation rule of strictly construing penal legislation in favour of the accused would result in a conclusion that s. 229(b) refers to the killing of another and not the killing of oneself.” (para. 45)

#### 229(C) – More controversial

* 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 desires to affect his object without causing death or bodily harm to any human being.
* **\*Note on exam – do not read in to ‘ought to know’ because it makes the provision unconstitutional**

|  |  |
| --- | --- |
| Actus Reus | Mens Rea –  |
| - An act - In order to bring about a further unlawful object - That causes/results in the death of a human being - Where the unlawful object is distinct from the victim’s death  | * Subjective foresight of likelihood of death
 |

# R v Shand (2011) ONCA – disucssion of mens rea emerging from Martineau

* Could not read shand without understand what happens in 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.” (para. 43)
* The 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.” (para. 46)
	+ Crown wins
		- The only plausible reading of Martineau is a subjective reading
* 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), as this provision could potentially be used in a later retrial of Martineau for murder. Lamer C.J.C. 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 by the Charter 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.” (para. 164)

##### 1st v 2nd Degree Murder

* 231(2) – murder is in the first degree when it is planned + deliberate
* Cc s. 231(3) Hiring someone to murder counts as planning + deliberation
* 231(4) - murder of police officer
* 231(5) – did you commit the murder while committing one of those inhibited offenses
	+ The causal connection must be of substantial cause
* Section 231 of the *Criminal Code* 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) 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, of course, to say 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* – not briefed)
* S. 231(3) provides that murder for hire or contract killing automatically counts as murder that is planned and deliberate, regardless of the degree of actual planning and deliberation involved

Murder of a Peace Officer

* 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
	+ This class of people includes police officers (and other persons employed for the maintenance of the 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 it doesn’t mean you haven’t committed murder, just that you haven’t committed first-degree murder

‘While Committing’

* 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 *CC* 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 the victim of the underlying offence and the victim of the murder are the same person (*Russell*)
* Constitutionality of s. 231(5) has been challenged but the court has held that this section does not offend the principles of fundamental justice 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*)

FIRST Degree cases – see *Harbottle* (pg. 36) and *Paré* (pg. 5)

Summary: Murder = 222-> 229 -> 231 (for first degree)

## 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 (X thinks: he is going to pick up a bat and hit Y until Y is dead).
	+ 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 negative murder, but may negative 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 murder & it demonstrates coupling of mens rea requirement 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
	+ Refueling 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 mens rea (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 (not contravening s. 7 right to liberty).
* Murder committed “while committing” an enumerated offence

BONUS: s. 231(7): all murder that is not first degree murder is second degree murder.

MAJOR DIFFERENCE B/W THE 2: AFFECTS 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

UAM Summary –

* 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 uf 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)

* Cut by glass that came from broken bottle during bar fight
* Important – establishes the principle that, at least in the context os s.269 – objective foresight of the risk of bodily harm is constitutionally sufficient
	+ The act must both be unlawfull and one that is likely to subject another person to danger harm or injury
	+ Likely to subject another person – objective foreseeability
* Fault element
	+ Would a reasonable person have understood that the action might result in bodily harm?
* AR for 269 – AR for predicate offence plus unlawful act
* MR – any MR for predicate offense combined with subjective foreseeability

# R v Creighton (1993) SCC UA Manslaughter (Objective Forseeability of risk of bodily harm)

**RATIO:**

* The *mens rea* 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 *actus reus* is acting in a manner that is a marked and substantial departure from the standard of a reasonable person, and the *mens rea* 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 common law 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
* Df. 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

S. 222 – unlawful act manslaughter

* + A person commits culpable homicide when he causes the death of another human being
		- By means of an unlawful act
			* (not a form of murder)

**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
		- Objective fault –

Lamer (Dissent) –

* S. 7 requires at least objective foresight of the risk of death for unlawful act manslaughter, objective foresight of the risk of bodily harm is insufficient
	+ For every AR element, there must be some fault element
* But s.222(a) can be interpreted so as to read in the requirement of objective foresight of death
* So s.222 can be made constitutional
* “[I]n accordance with the requirements of s. 7 of the Charter, the proper interpretation of unlawful act manslaughter under s. 222(5)(a) of the Code requires the Crown to prove beyond reasonable doubt: (a) that the accused has committed an unlawful act which caused the death of the deceased; (b) that the unlawful act must be one that is objectively dangerous (i.e., in the sense that a reasonable person would realize that it gives rise to a risk of harm); (c) that the fault requirement of the predicate offence, which cannot extend to offences of absolute liability, was in existence and (d) that a reasonable person in the circumstances of the accused would foresee the unlawful act giving rise to a risk of death.” (164 [emphasis added])
* Application to the facts –
	+ Expert drug user – so he is subjectively aware of the risks of cocaine + quantity used so objective test satisfied based on his obvious subjective awareness

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
* Objective test –
* “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.” (185)
* **The legal standard of care for all crimes of negligence is that of a reasonable person. Personal factors are not relevant, except on the question of whether the accused possessed the necessary capacity to appreciate the risk**
* Upshot –
	+ No subjective fault requirement for manslaughter although subjective fault may be required for underlying unlawful act or predicate
	+ Fault is objective – restricted objective foreseeability of risk of bodily harm
		- Modified standard – reasonable person in the situation of the accused, personal characteristics only relevant insofar as they go to incapacity

##### 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
	+ Complete the picture a little more
* Left over from when murder was capital offense
	+ Juries were reluctant to punish mothers by death
* Typically, younger mothers with small support systems, give birth alone at home or public washroom

# R v Boroweic (2016) SCC

**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
* 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.

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 the purposes of CC s. 233 “mental disturbance” is to be 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