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# Appellate Procedure

In finding accused guilty, there is a trier of law (always judge) and trier of fact (sometimes jury, otherwise judge)

Appeals to the court of appeal

* Accused has right to appeal on a question of law, question of fact, or mixed question of law and fact (typically inexact terms such as reasonable or obscene)
* Crown only has a right to appeal on a question of law

Appeals to the supreme court

* Only granted with leave
* Crown and accused can only appeal on question of law
* Or as of right when judge on court of appeal dissents

# Constitution

**Federal powers** (s. 91 CA 1867)

* Criminal law including procedure but not administration of courts of criminal jurisdiction (s. 91(27))
* Penitentiaries (s. 91(28)) 🡪 those imprisoned for 2 years or over (under 2 years are in provincial reformatory prisons)

**Provincial Powers**

* Administration of justice in the province s. 92(14)
* Reformatory prisons s. 92(6)
* Punishment by fine, penalty, or imprisonment to enforce valid provincial laws (s. 92(15))

**Challenges to invalidate law**

1. is the law the federal government is creating within the criminal law powers?
2. is the provincial law actually a crime, and impedes on the federal government power?

These require us to look at the pith and substance of the impugned law

*Margarine Reference*

* restricting the sale of margarine does not qualify as a law with a criminal public purpose
* Crime: law requires criminal public purpose
* Crimes are injurious to the public
* Can look for some evil or effect (social, political, or economic interests)

*Reference re Firearms Act*

* Federal government created a mandatory firearms database
* federal government can legislate criminally if the law falls under “public safety”
  + Unsure the scope of this though
* Legislating and licensing guns is a valid exercise of criminal law power pursuant to public safety

*Switzman*

* Legislation aimed at prohibiting communication set against political/ideological views that were viewed as dangerous was viewed to be within the power of the criminal law
  + But need to be wary of this case because it is pre-Charter (freedom of expression)

*Morgentaler*

* Nova scotia law that prohibited abortions in particular places
* If the law is passed as a criminal law purpose (regulating or prohibiting a socially undesirable concept rather than regulation from a healthcare standpoint), it will be viewed as *ultra vires* of provincial legislative jurisdiction
* Provincial legislation that was struck down earlier as a federal law makes the provincial legislation suspect

## Codification of the Criminal Law

*Frey v Fredoruk*

* Peeping tom
* Courts reluctant to create offences retroactively; need clear laws established before the prosecution; retroactively creating offences imposes a great deal of uncertainty in the criminal law (no fair notice to individuals as to the criminality of their conduct)

s 9: no person shall be convicted of an offence at common law except for contempt of court

s 8(3): common law defences are still valid

*United Nurses of Alberta*

* Challenged constitutionality of contempt of court (offence at common law) by stating that it is not codified and thus breaches the principles of fundamental justice
* Judge stated that that it does not, as long as rules are clearly laid out they do not breach it. Additionally the CCC makes a clear exception for contempt of court (provides support)

*Amato v The Queen*

* Common law defences can be prospective

*R v Jobidon*

* Accused hockey player kicked another after racist remarks; killing him due to malfunctioning epiglottis
* While criminal offences must be codified, certain legal concepts may be added or removed by the Courts
  + Provides what are essentially policy reasons to read out an element of the crime (consent) in the case of fist fights
* Liability may be established by not only the code alone but also the interpretation of the code
* In relation to fist fights, the law will not recognize consent to cause serious hurt and non-trivial harm
* Note: strong dissent

**Why are we concerned with the principle of codification of law?**

* Fair notice
* Certainty and stability
* Provides guidance to officials in enforcing the law
  + Constraint of discretion 🡪 helps prevent law enforcement from abusing the system
* Idea is that criminal law is grounded in a rule-based system
* Thought to be a constitutional right in Canada and international right that criminal law be set out in advance, and not be imposed after the fact (rule of law is fair notice)
* Knowledge of the law is not required, but constructive (or fair) notice is required 🡪 ignorance of the law is no excuse

**s 7 Framework**

1. Does the claimant fall within the reference to “everyone” in s 7?
2. Has the right to life, liberty or security of the person been violated?
3. If so, was the violation contrary to the principles of fundamental justice?

*R v Heywood*

* Case banning those convicted of sexual assault to visit certain public spaces (e.g. parks)
* Overbroad laws may violate s 7 as they are against the principles of fundamental justice
* In Heywood, geographical scope (applies to parks devoid of children), temporal scope (life, no chances of review), and scope of population captured (those convicted of sexual assault against adults) was used to determine if the law was too broad
  + Potential but not exhaustive list of factors to use in other cases

*R v Budreo*

* another piece of legislation that more narrowly prohibits those convicted of sexual violence in the past from visiting certain places
* reference to community centre was too broad because there may not be children present; unconstitutional

*Canadian Foundation for Children*

* Law permitting use of force by way of correction “if the force does not exceed what was reasonable under the circumstances” was constitutionally challenged for vagueness
* Certainty is not required within the law; all that is required is that the law sufficiently delineates an area of risk
* Court may read down a law to make it constitutional
  + in assessing whether a law is too vague, do not consider whether the provision was too vague in the past, but whether there is sufficient guidance going forward (after the reading down)
* Using expert opinion and social consensus to determine what is reasonable, law was read down:
  + corporal punishment against children under 2 years of age, against teens, force that causes bodily harm, hitting with the weapon, hitting in the face, correcting while frustrated, etc. is not reasonable
  + teachers cannot use force for correction but available to remove student from a class

## Statutory Interpretation

Traditional approach: doctrine of strict construction

*R v Pare*

* CCC provides that murder is first degree if it occurs “while committing” one of the listed offences (e.g. sexual assault)
* Question of how to interpret “while committing”
* purposive interpretation should be used first, and if any ambiguity remains then they should use strict interpretation
* Concept of a “single transaction” should be used
  + Does not need to be strictly happening at the same time
  + Continuing domination of the victim gives continuity to the sequence of events culminating in the murder
    - “exploitation of the position of power created by the underlying crime and makes the entire course of conduct a ‘single transaction’.”

*Bell ExpressVu*

* Reaffirmed Pare holding (strict liability only relevant if ambiguity exists after purposive interpretation)
* words should be read in their entire context and with the intention of Parliament in mind

## Harm Principle

John Stuart Mill, On Liberty

* Harm principle: only purpose for which power can be rightfully exercised over any civil is to prevent harm to other persons
* government coercion should be limited as much as possible (leave as much space as possible for liberty)

Lord Wolfenden Report: created a committee that asked whether state should interfere with people’s private lives when they do not harm others

* Core conception: private morality should not be criminalized
  + Concerns acts devoid of harm or is in which only consenting parties are harmed (e.g. same sex relationships)
  + “Not the law’s business”
* But they feel as though there should be some conception of public morality (unlike Mill’s theory)
  + Concerns illegitimate harm between non-consenting parties (e.g., murder, theft, rape, etc.)
  + Appropriate for criminal law

Devlin: “The enforcement of morals” (criticism directed at Wolfenden report)

* Criminal offences are against societies, not individuals, and we can see this through the fact that an individual does not choose to go through with a charge
  + Not about harm to the individual but something broader; society is injured (and not physically)
* Tolerance shifts, not morality
* Ultimately morality is necessary for good government and the welfare of society
* Stated that treason is clearly criminal because it is a response to an attack on its foundation, and other private moral crimes can also be an attack on society and should be punished
* *society must be able to preserve themselves whenever there is a threat to their shared morals*
* You cannot separate public and private morals
  + Example: getting drunk at home (private sin)
  + if one person does it, it’s fine, but it we permitted this to be unregulated then everyone could get drunk at home, and then there would be nothing left to society, and thus it would fall apart
* where should standards be drawn from?
  + Standard is reasonable person standard
  + Interim standard of majority vs some other reasonable standard

HLA Hart: “Immorality and Treason”

* Need to be very critical of what is criminal because morality concerns feelings towards things, and most feelings are from ignorance, misunderstanding, and superstitions
  + We should insist that something more than mere feeling or disgust exists before we turn it into criminal law
  + It should be subject to some sort of reasonable thought
* Disagrees with Delvin on a few points:
* Practices that offend morality are not necessarily harms
* Disagrees that the legal enforcement of a moral code is necessary for society to survive
* Warns against the danger of populism
* Disagrees that morality does not shift
  + Society will not fall apart if societal morals change; it may just be that society’s moral code will change and adapt to the new one if people violate it and do not view it as immoral any longer
* We should respect individual autonomy unless there is a justifiable principle such as harm to others and some other principles

*R v Malmo-Levine*

* Accused had possession of marijuana; reverse onus to prove that he did not have
* Test for whether a principle is a principle of fundamental justice
  + (1) Must be a *legal principle*
    - Indicator is that it is used in a rule in common law, statute, international law instruments
    - Must be a principle from legal texts rather than in public policy
  + (2) *Significant societal consensus* that it is “vital or *fundamental to our societal notion of justice*”
    - Bases on its own determination of the situation 🡪 whether the court thinks it’s okay
    - General acceptance among reasonable people
  + (3) *Capable of being identified and applied with precision*
    - applied in a way that yields understandable results
* *The harm principle is not a principle of fundamental justice*
* Parliament may create criminal law to uphold public purposes unrelated to protecting others from the risk of harm such as upholding morality, paternalistic laws, and protecting other social norms (e.g. cruelty to animals)

*R v Labaye*

* Accused operated a “group-sex” club. Charged with s 210 CCC 🡪 keeping a common bawdy-house for the “practice of acts of indecency”
* Test for indecency (cumulative)
  + (1) nature of the harm
    - (1) conduct that significantly interferes with autonomy/liberty, or
    - (2) conduct that predisposes individuals to anti-social behaviour, or
    - (3) conduct that will cause physical or psychological harm to those involved
  + (2) degree of the harm
    - Harm that is incompatible with the proper functioning of society
* Must have a generous measure of tolerance for minority practices in order to have a diverse society
* While the harm principle is not a PFJ, it still plays a strong role in criminal law

*Bedford*

* Prostitutes challenged constitutionality of three laws governing prostitution
* Recognized three principles of fundamental justice:
  + arbitrariness (no rational connection between the effect and object of the law)
  + overbreadth (some part of the law has no rational connection between the effect and object of the law)
  + gross disproportionality (law’s effect on claimant’s interest is so grossly disproportionate to its object that it cannot be rationally supported 🡪 balances negative effect on individual and purpose of the law)
* Analysis for s 7 is qualitative, not quantitative
* There is a sufficient causal connection between the impugned law and the s 7 interest affected when the government’s conduct elevates the harm to the accused imposed by third parties
  + Unclear how tangential the harm must be to the law
* s 7 does not only restrict what can be criminalized because the rights of accused are engaged, also engages because the rights of third parties are affected
* The specific prostitution provisions were in violation of the principles of fundamental justice
  + common bawdy-house: grossly disproportionate
    - Effect of forgoing significant safety measures which puts prostitute in significant risk is grossly disproportionate to nuisance that it creates
  + living on the avails: overbroad
    - Captures a variety of non-exploitative relationships (e.g. receptionist) which are not concerned with the law’s purpose
  + grossly disproportionate
    - Significantly increased the risk of prostitutes is grossly disproportionate to object of keeping it off the street and limiting nuisance created
    - Analysis is qualitative: if it would prevent one women from being killed, harmful effects are established

Post-*Bedford*

* Law focused on criminalizing the purchase of sexual services
* Stated a clear statement of purpose, stating that its purpose is to reduce exploitation and respect the dignity of those engaging in sex work (rather than prevent nuisances)

## Burden of Proof

*Woolmington*

* Presumption of innocence is a fundamental element of criminal law
* In light of the consequences of being found guilty (liberty stripped, stigma attached, etc.), the state must prove beyond a reasonable doubt the guilt of the accused

Presumption of innocence is a constitutional right 🡪 s 11(d) Charter

If this is violated, it must be justified under s 1 to be constitutional

*R v Oakes*

*Oakes* test:

1. pressing and substantial objective
2. proportionality
   1. rational connection
   2. minimal impairment
   3. Overall balance
3. The onus is on the party attempting to limit the rights, and must be proven on a balance of probabilities

*Oakes* case

* Once caught with possession of a narcotic, reverse burden to establish that he was not in possession for the purposes of trafficking; unjustifiably violates s 11(d) of the Charter

*R v Laba*

* Internal rationality between proven and presumed facts no longer required (but law must still be rationally connected to the objective)

*R v Keegstra*

* Court may interpret a defence as an element of an offence and thus subject to the presumption of innocence (s 11(d), Crown has the onus)
  + truthfulness was considered an element of the crime even though it was listed as a defence

*R v Starr*

* beyond a reasonable doubt is a standard higher than a balance of probabilities but lower than absolute certainty (though it is much closer to the latter rather than the former)

R v Lifchus (page 324): what the definition of “reasonable doubt” should and should not contain

**Criminal liability:**

* conduct requirement (*actus reus*)
* mental requirement (*mens rea*) (as well as other mental elements; i.e. regulatory offences)

# Actus Reus

1. **Voluntariness**

* Requires criminal conduct to be committed under the conscious control of the accused
* *R v Larsonneur*
  + Generally thought to be wrongly decided; disregards voluntariness requirement
  + Women got notice to leave UK; she left to Irish Free State; they deported her; she was charged and convicted of being in UK after notice to leave
* *Kilbride v Lake*
  + Accused displayed warrant of fitness on car but it went missing for an unknown reason
  + Accused must have some other course of action
* *R v King*
  + Accused injected with anaesthetic and did not hear warning not to drive; later charged with impaired driving following a crash
  + “there must be a willpower to do an act” (none because he was unconscious)
  + Actus reus not established on the basis of voluntariness
* *R v Ruzic*
  + “A defence that the act is involuntary entitles the accused to a complete and unqualified acquittal”
    - *Daviault* 🡪 protected by s 7 right
    - *Stone* 🡪 automatism subset of involuntariness
  + presumption that the individual is an autonomous and rational agent is an organizing principle of criminal law

2. **Act or omission**

* vast majority of crimes require positive acts
* Canada limits omissions to pre-existing legal duties to act
* Legal duties can arise from federal and provincial statutes and the common law (*Thornton* 🡪 potentially, SCC did not contest or show disapproval of this; not precedent though)
* **Specific omissions**
  + s 50 🡪 knowing a person is about to commit high treason or treason does not, with all reasonable dispatch, inform a justice of the peace or other peace officer, or make other reasonable efforts to prevent that person from committing treason
  + s 129 🡪 omits without reasonable excuse to assist a peace officer in the execution of his duty in arresting a person or preserving the peace, after having reasonable notice that he is required to do so
  + s 252(1) 🡪 everyone who has the care, charge, or control of a vehicle, vessel, or aircraft, that is involved in an accident with (a) another person, (b) a vehicle, vessel, or aircraft, or (c) in the case of a vehicle, cattle in the charge of another person, and with the intent to escape civil or criminal liability fails to stop the vehicle/vessel/aircraft, give his name and address, and where any person has been injured or appears to require assistance, offer assistance
* **General omissions**
  + Common nuisance
    - 180 (1) Every one who commits a common nuisance and thereby (a) endangers the lives, safety or health of the public, or (b) causes physical injury to any person is guilty of an offence.
    - (2) For the purposes of this section, every one commits a common nuisance who does an unlawful act or fails to discharge a legal duty and thereby(a) endangers the lives, safety, health, property or comfort of the public; or (b) obstructs the public in the exercise or enjoyment of any right that is common to all the subjects of Her Majesty in Canada.
  + Criminal negligence
    - 219 (1) Every one 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 or safety of other persons.
    - (2) For the purposes of this section, duty means a duty imposed by law.
* **Legal duties in Criminal Code**
  + Failure to provide necessaries of life
    - 215 (1) Every one is under a legal duty
      * (a) as a parent, foster parent, guardian or head of a family, to provide necessaries of life for a child under the age of sixteen years;
      * (b) to provide necessaries of life to their spouse or common-law partner; and
      * (c) to provide necessaries of life to a person under his charge if that person
        + (i) is unable, by reason of detention, age, illness, mental disorder or other cause, to withdraw himself from that charge, and
        + (ii) is unable to provide himself with necessaries of life.
  + Undertaking surgical/medical treatment
    - 216 Every one who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing.
  + Undertaking to do an act if an omission may be dangerous to life **\*\***
    - 217 Every one who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.
  + Undertakes/has authority to direct someone who does work
    - 217.1 Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.
* *R v Browne*
  + Friend consumed drug to avoid police detection, became sick, accused promised to take her to the hospital but friend died. Charged with criminal negligence
  + Undertaking (s 217) must be something more than a mere promise
    - “I’ll take you to the hospital” is not enough
  + Should not consider their relationship; different than that of parents and spouses
* *R v Thornton*
  + Accused donated HIV positive blood, knowing that he was HIV positive and charged with committing a common nuisance
  + Even if the court found a duty, it must be violated in a way that meets some criminal law threshold (endangering the lives/safety/health of the public)
  + CA: Legal duty includes the common law, and there is a common law duty to “refrain from conduct which it is reasonably foreseeable could cause serious harm to others” (standard in tort law applied in criminal law)
  + SCC: s 216 imposed a duty of care on the accused, which the accused breached by not disclosing that his blood contained HIV antibodies (but did not refute the prior decision 🡪 may be able to use tort law in finding legal duties)
* *R v Cuerrier*
  + Non-disclosure of HIV-positive status foreclosed possibility of valid consent (therefore imposing duty of disclosure)

3. **Particular circumstances**

* Some offences require that an act occur in a particular circumstance
  + E.g. driving is legal but driving *while impaired* is not; consent is a circumstance in assault

4. **Causation of prohibited consequences**

* E.g. dangerous driving *causing death*, unlawful act *manslaughter*
* **Factual causation**: is there any logical connection between the conduct of the accused and the consequence?
  + *R v Winning*
    - Credit card application with false info charged with obtaining credit by false pretenses
    - Since they did not rely on her false info, she could not have obtained credit by false pretenses
* **Legal causation**: is this causal connection is sufficiently strong to support criminal liability?
  + *Smithers v The Queen*
    - Hockey player kicked victim causing his death due a malfunctioning epiglottis
    - To establish causation, the act must be at least a contributing cause outside of the *de minimus* range
    - Thin skull principle: generally, he who assaults another takes his victim as he finds them
  + *R v Harbottle*
    - Appellant held victim’s legs so she would not get away while other person strangled her
    - First-degree murder requires a substantial contributing cause (due to higher blameworthiness)
      * Accused must form an “essential, substantial, and integral part of the killing”
      * Must play an active role, usually a physical one (note, see below)
    - Accused can be found to have substantially contributed to the death without physically causing the killing
      * E.g. holding the victim down counts as a substantial cause because but for the actions, the victim could have escaped
  + *R v Nette*
    - Two men robbed old lady’s house; they left her hog-tied and left; she died partly as a result of being hog-tied
    - it would be preferable to use the term “significant contributing cause” to describe the standard of causation
    - Substantial contributing cause not required for second-degree murder/manslaughter
* **Intervening Causes**:
  + *Pagett v The Queen*
    - Accused used girl as a human shield who died from officers’ shooting; charged with manslaughter
    - Argument that he shouldn’t be criminally responsible when someone else was immediately responsible for the death is rejected (court: there are exceptions)
    - Provides causes that will not break the chain of causation (non-voluntary conduct in response to the accused):
      * Self-preservation in response to conduct of the accused
        + E.g. self-defence, or if someone escapes accused’s custody and dies while escaping via reasonable plan
      * Act done in performance of a legal duty
  + *R v JSR*
    - Accused and his adversary exchange gunfire; adversary kills a third party
    - Accused’s actions could constitute causation for the death of the bystander because the death would not ensue “but for” the accused’s actions (factual causation) and each shooter induced each other to engage in a gun fight (legal causation)
  + R v Menezes
    - If you engage in a drag race with another party and someone is killed, then you are responsible for the other party’s killing of a person, unless you withdraw from the race and the other party is aware of the withdrawal
  + *R v Blaue*
    - Blaue is responsible for her death in light of the victim’s decision not to receive medical treatment (blood transfusion)
    - Issue would not arise in Canada because of s 224 CCC
  + *R v Maybin*
    - Accused punched victim until unconsciousness, bouncer intervened and further punched the victim, unclear which blow caused death
    - Principles of (1) reasonable foreseeability of the intervening cause and (2) intervening act is an independent act are merely analytical tools in determining whether the accused’s actions are morally blameworthy
    - When the intervening acts are natural events, reasonable foreseeability is more appropriate
    - When the intervening acts are those of a person exercising their free will, the focus is on the independence of their actions
    - Reasonable foreseeability
      * Need not foresee the specific conduct, but rather some general danger that may ensue as a result of the accused’s actions
    - Independent act
      * Intervening acts are in response to the accused?
        + Was the accused merely setting thee scene and allowing for other circumstances to coincidentally intervene, or did the accused trigger/provoke the action of the intervening party?
      * Can look at the time, place, and nature of the intervening acts to determine whether the actions were independent/foreseeable

# Contemporaneity

*Actus reus* and *mens rea* must coincide to establish the offence.

*Fagan* (first approach)

* Persisting on the officer’s foot was a continuation of the act and thus actus reus and mens rea coincided

*Miller* (second approach)

* Person threw lit cigarette away, then woke up to it smoldering and decided to go to another room; arson charge
* Arson requirements: *actus reus*: starting a fire, *mens rea*: wilfully/recklessly
  + throwing the cigarette (*actus reus*) and moving to another room knowing it is smoldering (*mens rea*)
* Unintentional act followed by an intentional omission to rectify that act can be regarded in toto as an intentional act
  + Creates a duty to rectify the situation

*Cooper*

* Adopts *Fagan*’s approach in Canada (due to our more restrictive approach in criminalizing duties)
* A series of acts may be part of the same transaction
  + thus *actus reus* and *mens rea* may be held to be concurrent even though they are not completely concurrent, as long as both elements were established as part of that same transaction
* E.g. series of hits with a baseball bat are part of the same transaction

*Williams*

* Person had sex with partner for 5 months before knowing of his HIV status, but then continued having sex; charged with aggravated sexual assault which require an intentional act; unknown when she contracted HIV
* No contemporaneity between the act and intent
* Because it could not be proved that the act and intent occurred at the same time
* However, convicted of attempted aggravated assault because those elements could be established

Distinguishing *Miller* and *Williams*: In *Miller*, there was an opportunity to remedy it, but in *Williams* there was no ability to reverse what occurred

# Absolute and Strict Liability

*Beaver v The Queen* (Pre-*Charter*)

* Person charged with possession of a prohibited narcotic but claimed he thought it was milk sugar
* Categorizing a crime as a true criminal offence means that courts will always require proof of mens rea and that the courts will do anything they can to interpret a statute to require mens rea unless they explicitly state that it is not required
* For regulatory offences, the implication is that courts do not require mens rea
* Reasoning for categorizing as a crime: little similarity to public welfare offences

*R v Pierce Fisheries*

* Fisher caught undersized lobsters contrary to the Fisheries Act
* For a regulatory offence, mens rea is not required unless the statute says otherwise
* Prohibition against catching undersized lobsters is of general public interest

*R v Sault Ste Marie*

* City charged with pollution (a contractor they hired polluted)
* Created a new regime for regulatory offences
  + Created a half-way house: strict liability
* Three categories of offences
  + Absolute liability
    - Crown must prove actus reus beyond a reasonable doubt to convict
  + Strict liability
    - Crown must prove actus reus beyond a reasonable doubt, then the onus shifts onto the accused to prove due diligence on a balance of probabilities
  + True crimes
    - Crown must prove actus reus and mens rea beyond a reasonable doubt
* Regulatory offences are presumed to be strict liability unless there is clear indication of legislative intent to the contrary (e.g. statute states no due diligence defence, absolute liability offence)
* Generally, offences relating to pollution fall in the category of strict liability offences
* Generally, offences with “cause” and “permit” without any knowledge implied fall in the category of strict liability offences

*Re BC Motor Vehicle Act*

* Absolute liability offence for driving with a suspended licence with mandatory imprisonment
* ss 8-14 of the Charter inform the principles of fundamental justice
* Principle of fundamental justice: morally innocent should not be punished
* Absolute liability offences are inconsistent with this principle
* Absolute liability cannot have imprisonment or probation orders as a potential penalty (or a fine which if not paid results in imprisonment), otherwise it is unconstitutional (offends s 7 liberty interest, not in accordance with PFJ)
* Do not incorporate public interest in s 7; that is left for s 1 analysis
* PFJs are not restricted to due process; rather include substantive

*R v Transport Robert*

* HTA offence that imposed significant fine for absolute liability offence of wheel falling off
* S 7 right to security of a person may be violated if government action triggers exceptional state-induced psychological stress
* But s 7 does not protect against the regular stress/anxiety that a reasonable person would suffer from government regulation of an industry (a highly regulated trucking industry falls under this)
  + The stigma that results is not as large as in criminal offences (only applies negligence)
  + substantial fine does not trigger this exceptional level of stress ($100,000)

*R v Wholesale Travel Group Inc*

* Corporation charged with misleading advertising; advertised as wholesale prices when they were not
* Plurality judgment
* Majority held fault element of negligence, as well as reverse onus, is constitutional (violated under s 11(d) but constitutional)

*R v Ellis-Don*

* Unanimous judgment on question posed in Wholesale
* Reverse onus violates s 11(d) but is justified under s 1

Regulatory offence or true crime?

* Provincial offence? If so, regulatory (provinces cannot create crimes, s 91(27) Constitution Act)
* Criminal Code? If so, criminal.
* Other federal statutes require more analysis.
* Offence concerned with public welfare? (*Beaver*: narcotics offence not, *Pierce* *Fisheries*: undersized lobsters are)

# Mens Rea

**Forms of mens rea**

Statutory presumption where no form of mens rea is provided is subjective fault (intent or recklessness) (*Buzzanga*)

Subjective fault

* Intent
  + Purposefully (*Hibbert*)
  + Wilfully (sometimes 🡪 e.g. wilfully promoting hatred) (*Buzzanga*)
* Knowledge
* Wilful blindness (substitute for knowledge)
* Recklessness

Objective fault

* Penal/criminal negligence
* Objective foresight of some consequences

**Intent**

*R v Barbour*

* motive is not part of the crime and is legally irrelevant to criminal responsibility

*R v Imrich*

* motive is not to be confused with intent
* while it may help a prosecutor’s case, it is not necessary to prove in order to convict someone

R v Steane (not Canadian law!)

* confuses intent and motive
* accused convicted of assisting the enemy with the intent to assist the enemy
* was doing it for the sake of saving his family (motive), not assisting the enemy

*R v Hibbert*

* Hibbert forced by third party (with threats of violence) to call his friend down (the eventual victim), where Baily, the principal actor, killed his friend; Hibbert charged with aiding and abetting a murder
* “Purpose” as defined in s 21(1)(b) CCC is whether an actor meant to do it
  + i.e. same as intention; did something on purpose rather than by accident
  + It does not concern motive or desire; does not indicate the ultimate ends the actor is trying to achieve
* While the definition of purpose may differ in another offence, it is very likely consistent with intent
* accused is still able to raise the defence of duress

Only crime where motive is relevant in Canada is terrorism (because of the way it’s defined): An act of terror for a political, religious, or ideological purpose

*R v Buzzanga* (leading case for intent)

* Accused charged with wilfully promoting hatred; conscious purpose was not to spark hatred but rather support for the French
* Wilful in this context is synonymous with intention, but it depends on the context. However wilful rarely implies recklessness
* Presumption where no form of mens rea set out is that the minimum level of mens rea is subjective fault
* Intent established if:
  + (1) Prohibited outcome was their conscious purpose, OR
  + (2) They foresaw that the prohibited outcome was certain or morally certain to result from their action, but proceeded to act as a means of achieving their purpose

**Knowledge**

Murder (s 229(a)(i) 🡪 intent; s 229(c) 🡪 knowledge CCC)

*R v Theroux* (fraud)

* Accused accepted deposits for a building project having told them he insured their deposits
* Elements of fraud
* *Actus reus*
  + Dishonest act: The prohibited act (act of falsehood, deceit, or some other fraudulent means), and
  + Deprivation caused by the prohibited act, which may consist of actual loss or the placing of the victim’s pecuniary interests at risk
* *Mens rea*
  + Subjective knowledge of the prohibited act, and
  + Subjective knowledge that the prohibited act could have as a consequence the deprivation of another (deprivation is defined as at least placing of the victim’s pecuniary interests at risk)
* They do not actually need to subjectively know that an act is dishonest; dishonesty is determined on an objective standard
* Accused’s intention/conscious purpose is not relevant
* Negligent misrepresentation which induces an incorrect understanding in a customer’s mind and causes some deprivation, as well as sharp business practices, are excluded; higher level for criminal dishonesty

**Wilful blindness (substitute for knowledge)**

*R v Briscoe*

* accused drove the victim to the crime scene, provided a weapon, held the victim and told her to shut up, and told the criminals that he doesn’t want to see what they’re doing
* Wilful blindness does not define the mens rea required for a particular offence; rather it is a substitute for knowledge where knowledge is a component of the mens rea
* Doctrine of wilful blindness imputes knowledge to an accused where suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries
* Better described as deliberate ignorance; accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge

**Recklessness**

*R v Sansregret*

* Recklessness occurs when the accused sees a risk and takes a chance
  + where the accused is aware that there is a danger that his conduct could bring about the result prohibited by the criminal law, and nevertheless persists, despite the risk
* Recklessness does not necessarily override the defence of mistake of fact (but wilful blindness does)

**Objective standards of fault**

Penal negligence: Marked departure from the standard of care expected of a reasonable person in similar circumstances (*Creighton*) (rather than ordinary negligence, a mere departure)

There are other crimes where the legislature imposes an even higher standard of objective fault (E.g. criminal negligence 🡪 marked and substantial departure)

Two contexts where objective fault is relevant:

1. Where it is the complete fault element of the offence (e.g. dangerous driving)
2. Where there is a predicate offence and objective fault only relates to a part of the offence (e.g. unlawful act manslaughter)

*Hundal*

* Charged with dangerous driving causing death for running a red light and hitting a car who was in the intersection; witnesses testify he was driving in a reckless manner before the crash
* Marked departure from the standard of care expected of a reasonable person in similar circumstances
  + Objective fault standard for crimes

*Creighton*

* Person injected drugs into friend who later died; charged with unlawful act manslaughter (the unlawful act being trafficking)
* Uniform standard of reasonable person in the circumstances of the accused is used, with a sole exception of traits resulting in an incapacity to appreciate the nature of the risk which the activity in question entails
  + Circumstances do not include personal traits
  + Where individuals lack sufficient knowledge, experience, or physical ability, they may still be punished for their decision to attempt the activity without having accounted for their deficiencies
  + If person is engaging in a licensed of activity where some degree of knowledge is required, we should assume some degree of capacity to do so
  + Personal traits should be considered in sentencing
* Dissent (Lamer): Frailties preventing from foreseeing and enhanced foresight due to special knowledge; personal traits should be considered

*R v Beatty*

* driver is charged with dangerous driving causing death; witnesses note his vehicle was being driven in a proper manner before the accident and for no apparent reason crossed the solid lane
  + a momentary lapse, without more, it does not constitute a marked departure from the standard of reasonable care
* Elements of the offence of dangerous driving
* *actus reus*: sourced from the text of the provision (not a marked departure):
  + s 249(1): a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place
* *mens rea*: conduct amounts to a marked departure from standard of care of a reasonable person (draws on from *Creighton* and adds the caveat below)
  + In determining this, court should consider the actual state of mind of the accused
  + Might be relevant on an inculpatory standard (had some state of mind that makes clear that is a marked departure) or exculpatory standard (evidence showing that a reasonable person in the context might not have seen then risk)

*R v Roy*

* there was limited visibility due to poor conditions, and the accused guessed that he could see 300-400 feet away but it may have been 100 feet
  + Simple misjudgment of speed and distance in difficult conditions (similar to a momentary lapse in *Beatty*)
* Consistent with *Beatty*
* Helpful to look at the marked departure in two separate questions:
  + (1) in light of all relevant circumstances, a reasonable person would have foreseen the risk and taken steps to avoid it if possible, and
  + (2) whether the accused’s failure to foresee the risk and take steps to avoid it was a marked departure from the standard of care expected of a reasonable person in the accused’s circumstances
* Reiteration of *Beatty*:
  + Dangerous driving does not own its own support the inference that the required fault element was present
  + Only driving that constitutes a marked departure from the norm may reasonably support that inference

**Constitutional Considerations**

Subjective fault required for murder, attempted murder, war crimes, and crimes against humanity (theft suggested in a number of cases in *dicta*)

*Martineau*

* Because of the stigma associated with murder (and special nature of unavoidable penalties), subjective fault is required for all elements of the actus reus
* violation of s 7 to find accused guilty of murder without subjective foresight of death

*Logan*

* Attempted murder has the same degree of stigma; therefore subjective fault is required for all elements of the actus reus as well

*Finta*

* What distinguishes a crime against humanity from any other criminal offence is that the cruel and terrible actions which are essential elements of the offence were undertaken in pursuance of a policy of discrimination or persecution of an identifiable group or race **(not the law anymore most likely!)**
* war crimes and crimes against humanity require subjective fault (still good law!)

*DeSouza*

* Threw a bottle at a bar and the shards hit a bystander; charged with unlawfully causing bodily harm
* There must be an element of personal fault in regard to a culpable aspect of actus reus, but not necessarily in regard to reach and every element of actus reus
* No principle of fundamental justice prevents Parliament from treating crimes with certain consequences more serious than crimes which lack those consequences
  + Acceptable to distinguish between criminal responsibility for equally reprehensible acts on the basis of harm actually caused
* Statutory presumption that all offences require subject fault does not get entrenched to the constitution (no PFJ)

*R v Creighton*

* Only mens rea requirement for manslaughter is objective foresight of bodily harm
* The constitution does not require the ideal
* No person can be imprisoned without mens rea and the seriousness of the offence must not be disproportionate to the degree of moral fault

# Participation

* 21 (1) Every one is a party to an offence who
  + actually commits it;
  + does or omits to do anything for the purpose of aiding any person to commit it; or
  + abets any person in committing it

All of these modes of participation are treated the same under the law. Someone who aids or abets is a party to the offence and is thus charged with the offence.

Sentencing is discretionary for some crimes and the level of participation is considered at that stage, but other crimes, such as murder, have mandatory life sentences (no discretion for level of involvement).

More than one person can commit a single offence (e.g. two or more strike blows on a victim with the requisite mens rea and the beating causes the victim’s death (*McMaster*))

*R v Thatcher* (politician kills ex-wife)

* Crown’s theory was that Thatcher either carried out the murder himself or he aided and abetted someone else in doing it
* All modes of party liability under s 21(1) are all equally culpable under the law
* As a result, the jury does not need to decide unanimously which form of participation the accused engaged in to convict them of the offence (it is possible to charge the jury under multiple modes of participation)

*R v Pickton*

* The main focus of s 21(1)(b) and (c) is on the intention with which the aid or encouragement has been provided

*R v Briscoe* (actus reus and mens rea for aiding/abetting; wilful blindness)

* Elements of aiding/abetting:
* *Actus reus:*
  + Doing or omitting to do something that assists or encourages the perpetrator to commit the offence
* *Mens rea:*
  + For the purposes of aiding or abetting (intention)
  + With knowledge of the perpetrator’s intention to commit the crime (knowledge)

*R v Greyeyes* (aiding a buyer in the purchase of narcotics)

* In the context of trafficking, there is an exception when someone assists the buyer
* Guilty of trafficking only if there is more than “incidental assistance” to the sale/transfers that they will be seen they are aiding trafficking, otherwise aiding possession

*Dunlop and Sylvester v The Queen*

* Sets minimum standard which is required to be convicted of aiding/abetting
* More than a “mere presence” at the scene of the crime is required to ground liability
* Something more is needed; encouragement of the principal offender; an act which facilitates the commission of the offence (such as keeping watch on or enticing the victim away, or an act which tends to prevent or hinder interference with accomplishment of the criminal act, such as preventing the intended victim from escaping or being ready to assist the prime culprit
* Presence, if accompanied by other factors, such as prior knowledge of the principal offender’s intention to commit the offence or attendance for the purpose of encouragement
* Person is not guilty merely because he is present at the scene of a crime and does nothing to prevent it

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