**Criminal Law Framework**

**Will the accused be convicted of the offence?**

Interpretation: purposive first, then strict if ambiguity exists (*Pare*)

1. **Is the law constitutionally valid?**
   1. **Separation of Powers**
      1. Federal powers: s 91 CA 1867
         1. Criminal law including procedure but not administration of courts of criminal jurisdiction (s. 91(27))
         2. Penitentiaries (s. 91(28)) 🡪 those imprisoned for 2 years or over (under 2 years are in provincial reformatory prisons)
      2. Provincial powers: s 92 CA 1867
         1. Administration of justice in the province s. 92(14)
         2. Reformatory prisons s. 92(6)
         3. Punishment by fine, penalty, or imprisonment to enforce valid provincial laws (s. 92(15))
         4. Property and civil rights (s 92(13))
      3. Two types of challenges to invalidate law:
         1. is the law the federal government is creating within the criminal law powers (and not entrenching on the provincial property and civil rights powers)?
         2. is the provincial law actually a crime, which thus impedes on the federal government power?
      4. Required to look at the pith and substance of the law to determine this (*Margarine*)
      5. Criminal law requires a criminal public purpose (injurious to the public, target some evil or effect (social, political, economic interests)) (*Margarine*)
      6. Criminal law can relate to “public safety” (*Firearms*)
      7. 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 (*Malmo-Levine*)
      8. Criminal law prohibiting communication of certain political/ideological views viewed as dangerous is within the federal government’s power (*Switzman*) (note: pre-Charter)
      9. If the law is passed with a criminal public purpose (e.g. 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 (*Morgentaler*)
   2. **Codification of the Criminal Law**
      1. s 9 *Code*: no person shall be convicted of an offence at common law except for contempt of court
         1. Contempt of court at common law is constitutional (*United Nurses of Alberta*)
      2. s 8(3) *Code*: common law defences are still valid
      3. Courts reluctant to create offences retroactively because it imposes uncertainty in the law (*Frey*)
      4. While criminal offences must be codified, certain legal concepts may be added or removed by the Courts (*Jobidon*) (e.g. consent not recognized in relation to street fights)
   3. **Charter**
      1. 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?
      2. s 7 is qualitative, not quantitative (*Bedford*) (societal concerns addressed at s 1 (*BC Motor Vehicle*))
      3. There needs to be a sufficient causal connection between the impugned law and the harm to the accused (*Bedford*)
         1. This is satisfied when the government’s conduct elevates the harm to the accused imposed by third parties (*Bedford*)
      4. Test for new principles of fundamental justice: (*Malmo-Levine*)
         1. legal principle
         2. Significant societal consensus that it is “vital or fundamental to our societal notion of justice”
         3. Capable of being identified and applied with precision
      5. Existing PFJ: arbitrariness, overbreadth, gross disproportionality, vagueness (*Bedford*), moral involuntariness (*Ruzic*)
         1. Overbroad laws may violate s 7 as they are against the PFJ (*Heywood*; *Budreo*)
            1. geographical scope, temporal scope, and scope of population captured can be used to determine if the law was too broad (*Heywood*)
      6. Harm principle is not a PFJ (*Malmo-Levine*)
         1. 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 (*Malmo-Levine*)
         2. But it still plays a strong role (*Labaye*)
      7. Court may read down or interpret a law to make it constitutional (*Canadian Foundation for Children*)
      8. Certainty is not required within the law; all that is required is that the law sufficiently delineates an area of risk (*Canadian Foundation for Children*)
      9. s 1 framework
         1. *Oakes* test:
            1. pressing and substantial objective
            2. proportionality

rational connection

minimal impairment

Overall balance

* + - 1. The onus is on the party attempting to limit the rights, on a balance of probabilities
      2. Internal rationality between proven and presumed facts no longer required (*Laba*)
  1. **Burden of Proof**
     1. Presumption of innocence is a fundamental element of criminal law; in light of the consequences, state must prove guilt beyond a reasonable doubt (*Woolmington*)
     2. Presumption of innocence protected constitutionally: s 11(d)
     3. Court may interpret a defence as an element of an offence and thus subject to the presumption of innocence (s 11(d)); thus Crown has the onus (*Keegstra*)
     4. beyond a reasonable doubt is a standard higher than a balance of probabilities but lower than absolute certainty (though it is much closer to absolute certainty than BOP) (*Starr*)
     5. Page 324: what “reasonable doubt” should and should not contain (*Lifchus*)
  2. **Statutory Interpretation**
     1. Purposive interpretation should be used first, and if any ambiguity remains then they should use a strict interpretation (*Pare*)
     2. words should be read in their entire context and with the intention of Parliament in mind (*Bell*)
     3. Concept of a “single transaction” should be used with reference to “while committing” (*Pare*)

1. **Actus reus**
   1. Break up the elements of the crime
   2. **Voluntariness**
      1. Accused must have some other course of action (*Kilbride*)
      2. Must be willpower to do an act (*King*)
      3. “A defence that the act is involuntary entitles the accused to a complete and unqualified acquittal” (*Ruzic*), otherwise it would infringe s 7 *Charter* (*Daviault*)
      4. Deals with physical involuntariness; “moral” involuntariness is not a factor at this stage of the analysis and is rather dealt with in defences such as the defence of duress (*Ruzic*)
   3. **Act or omission**
      1. 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)
   4. **Circumstances**
   5. **Causation of prohibited consequences**
      1. Did the prohibited consequences occur?
      2. Did the accuse cause the prohibited consequences?
         1. **Factual causation**
         2. is there any logical connection between the conduct of the accused and the consequence? (but-for test) (*Winning*)
         3. **Legal causation**
            1. Concerned with whether there is a sufficient link between the accused’s actions and the consequences to hold the accused responsible for his/her actions (*Smithers*)
            2. If the crime is first-degree murder in the context of a domination offence (s 231(5)), the act must be a substantial contributing cause (*Harbottle*)

This is most likely applicable to *all* first-degree murder charges based on the logic used in *Harbottle*

* + - * 1. Otherwise, is the act at least a contributing cause outside of the *de minimus* range? (*Smithers*)

Preferable to use the term “significant contributing cause” to describe this causation standard (*Nette*)

* + - * 1. Thin skull principle (accused generally takes his victim as he finds them) (*Smithers*)
        2. **Intervening causes** (part of legal causation)

Self-preservation/self-defence in response to the accused will not sever the chain of causation (*Pagett*)

Act done in performance of a legal duty will not sever the chain of causation (*Pagett*)

Inducing a person to engage a gunfight who kills another in the course of their shooting could constitute causation (*JSR*)

Causation can be established despite the victim’s decision not to receive medical treatment (*Blaue*, s 224 *Code*)

224 Where a person, by an act or omission, does any thing that results in the death of a human being, he causes the death of that human being notwithstanding that death from that cause might have been prevented by resorting to proper means.

Causation established if accused’s causes bodily harm that is of itself of a dangerous nature and where death results, despite that the immediate cause of death is improper medical treatment applied in good faith (s 225 *Code*)

Causation established if accused’s actions causes bodily injury that result in death, despite that the bodily injury caused only accelerates the death from a disease or disorder (s 226 *Code*)

Principles of (1) reasonable foreseeability of the intervening cause and (2) whether intervening act is an independent act are merely analytical tools in determining whether the accused’s actions are morally blameworthy (if it is a significant contributing cause or not) (*Maybin*)

Reasonable foreseeability of the intervening cause (more appropriate when intervening acts are natural events)

Do not need to foresee the specific conduct, but rather the general nature of the intervening acts and accompanying risk of harm that may ensue as a result of the accused’s actions

Whether the intervening act is an independent act of the accused’s actions (more appropriate when intervening acts are those of a person exercising their free will)

Are the intervening acts 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

1. **Mens rea**
   1. Tie in the multiple actus reus elements with the associated mens rea requirement
   2. **Regulatory offence or true crime?**
      1. Provincial act? Regulatory. (*Sault Ste Marie*)
      2. Criminal code? Criminal.
      3. Offence concerned with public welfare? (*Beaver*: narcotics offence not, *Pierce Fisheries*: undersized lobsters are)
         1. Regulatory: An otherwise lawful act that is restricted for the public good (*Beaver*, *Pierce Fisheries*)
         2. Criminal acts are inherently wrongful and are prohibited altogether because of that (*Beaver*, *Pierce Fisheries*)
   3. **Regulatory offences**
      1. Presumed to be strict liability unless there is clear legislative indication to the contrary (*Sault Ste Marie*)
      2. 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
      3. Absolute liability: Crown must prove actus reus beyond a reasonable doubt to convict
         1. Cannot have imprisonment as a potential punishment (even indirectly, e.g. through the failure to pay a fine), otherwise it will violate s 7 *Charter* (*Re BC Motor Vehicle*)
      4. Generally, offences relating to pollution fall in the category of strict liability offences (*Sault Ste Marie*)
      5. Generally, offences with “cause” and “permit” without any knowledge implied fall in the category of strict liability offences
   4. **True Crimes**
      1. Statutory presumption where no form of mens rea is provided is subjective fault (intent or recklessness) (*Buzzanga*)
      2. Court will go to great lengths to read in a mens rea requirement for true criminal offences (*Beaver*)
      3. Subjective fault
         1. Objective evidence may inform whether the accused had subjective fault (*Buzzanga*)
            1. But it must still be established that the accused had the subjective fault element
         2. *Mistake of fact*
            1. Defence: an honest belief in the existence of circumstances, which, if true, would render the act or omission innocent (*Beaver*)

The accused raises it (defence in this sense) but successful raising it negates mens rea (unlike other defences) (*Papajohn*)

* + - * 1. Reasonableness of belief not part of the analysis where subjective fault is required (*Papajohn*)

But relevant where it is a regulatory offence because negligence standard is objective (*Papajohn*)

* + - 1. **Intent** (purposely (usually (*Hibbert*)), wilfully (sometimes, context dependent (*Buzzanga*)))
         1. Motive is legally irrelevant to criminal responsibility (*Hibbert*, *Lewis*, *Barbour*), motive not to be confused with intent (*Hibbert*, *Lewis*, *Imrich*)

Be critical of mistake *Steane* made

* + - * 1. Intent established if: (*Buzzanga*)

Prohibited outcome was their conscious purpose, or

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

* + - * 1. “purpose” means intent for s 21(1)(b) in the sense that the accused meant to do it (not their motive/desire) (*Briscoe*)
        2. Accused is still able to raise the defence of duress (*Hibbert*)
      1. **Knowledge**
         1. Accused’s intention/conscious purpose is not relevant (*Theroux*)
         2. Subjective knowledge of some fact (*Theroux*)
         3. Elements of fraud (*Theroux*)

*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)

* + - * 1. They do not actually need to subjectively know that an act is dishonest; dishonesty is determined on an objective standard
      1. **Wilful blindness**
         1. substitute for knowledge where knowledge is a component of the mens rea (*Briscoe*)
         2. 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 (“deliberate ignorance”; accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge) (*Briscoe*)
      2. **Recklessness**
         1. 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 (*Sansregret*)
         2. cannot consent to street fights (*Jobidon*)
    1. Objective fault
       1. **Penal negligence**
          1. Two contexts where objective fault applies:

Where it is the complete fault element of the offence (e.g. dangerous driving)

Where there is a predicate offence and objective fault only relates to a part of the offence (e.g. unlawful act manslaughter)

* + - * 1. Marked departure from the standard of care expected of a reasonable person in similar circumstances (*Creighton*; *Hundal*)

Helpful to look at the marked departure in two separate questions: (*Roy*)

(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

* + - * 1. Other crimes with an even higher standard of objective fault (e.g. criminal negligence 🡪 marked and substantial departure)
        2. 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 (*Creighton*)

However, voluntary intoxication or drug use does not negate liability if they are unable to foresee the nature of the risk due to the voluntary consumption of drugs (*Creighton*)

Circumstances do not include personal traits (*Creighton*)

Personal traits should be considered in sentencing (*Creighton*)

In determining this, court should consider the actual state of mind of the accused; helpful on inculpatory or exculpatory standard (*Beatty*)

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 (particularly in licensed activities, where some particular level of knowledge is required to engage in the activity) (*Creighton*)

* + - * 1. a momentary lapse, without more, does not constitute a marked departure from the standard of reasonable care (at least in context of dangerous driving) (*Beatty*), similarly simple misjudgment due to poor conditions (*Roy*)
  1. **Constitutional considerations** (subjective fault for some crimes)
     1. Fault element of negligence and reverse onus violates s 11(d) but justified under s 1 (*Ellis-Don*)
     2. s 7 right to security of a person may be violated if government action triggers exceptional state-induced psychological stress *(Transport Robert*)
        1. But, s 7 does not protect against the regular stress/anxiety that a reasonable person would suffer from government regulation of an industry (stigma that results is not as large as in criminal offences) (*Transport Robert*)
        2. Substantial fine does not trigger this exceptional level of stress (*Transport Robert*)
     3. Subjective fault required for murder (subjective foresight of death) (*Martineau*), attempted murder (*Logan*), and crimes against humanity and war crimes (*Finta*) due to the stigma associated with the offence and special nature of the unavoidable penalties
     4. 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 (*DeSouza*)
        1. No principle of fundamental justice prevents Parliament from treating crimes with certain consequences more serious than crimes which lack those consequences (*DeSouza*)
        2. Statutory presumption that all offences require subject fault does not get entrenched to the Constitution (*DeSouza*)
     5. No person can be imprisoned without mens rea and the seriousness of the offence must not be disproportionate to the degree of moral fault (PFJ) (*Creighton*)

1. **Participation (aiding/abetting)** (skip this if irrelevant)
   1. s 21(1) *Code*: Every one is a party to an offence who
      1. actually commits it;
      2. does or omits to do anything for the purpose of aiding any person to commit it; or
      3. abets any person in committing it
   2. 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*))
   3. All modes of party liability under s 21(1) are all equally culpable under the law (*Thatcher*)
      1. 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 (*Thatcher*)
   4. Elements of aiding/abetting: (*Briscoe*)
      1. *Actus reus*
         1. Doing or omitting to do something that assists (aiding) or encourages (abetting) the perpetrator to commit the offence (*Greyeyes*, *Briscoe*)
            1. Aid = assist or help the actor, abet = encouraging, instigating, promoting or procuring the crime to be committed
         2. Don’t forget to go through the four stages of actus reus though
      2. *Mens rea*
         1. For the purposes of aiding or abetting (intention (*Hibbert*))
            1. *Pickton*: main focus of s 21(1)(b) and (c) is on the intention with which the aid or encouragement has been provided
         2. With knowledge of the perpetrator’s intention to commit the crime (knowledge)
            1. Recall that wilful blindness is a substitute for knowledge (*Briscoe*)
   5. More than a “mere presence” at the scene of the crime is required to ground liability (*Dunlop*)
      1. 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
      2. 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
      3. Person is not guilty merely because he is present at the scene of a crime and does nothing to prevent it
   6. Exception for aiding a buyer in the purchase of narcotics (*Greyeyes*)
      1. 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 (*Greyeyes*)
2. **Do the actus reus and mens rea coincide?**
   1. A series of acts may be part of the same transaction (*Cooper*)
      1. They do not need to be completely concurrent (*Cooper*)
      2. *Williams* example of actus reus and mens rea not coinciding
   2. Was there a continuation of the act? (*Fagan*)
      1. At the time the necessary mens rea was formed
   3. Second approach (not Canadian law): 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 (*Miller*)
3. **Other consideration:** Certain legal concepts may be added or removed by the court (*Jobidon*)

Offences Winter Term *(actual offences start on page 9)*

The difference between murder and manslaughter is the mens rea requirement. (same actus reus requirement as manslaughter)

**Homicide (murder/manslaughter)**

* s 222(1) A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.
* (2) Homicide is culpable or not culpable.
* (3) Homicide that is not culpable is not an offence.
* (4) Culpable homicide is murder or manslaughter or infanticide.
* **CULPABLE HOMICIDE (enough for manslaughter, need to prove this plus additional requirements for murder)**
* (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; or
  + (d) by wilfully frightening that human being, in the case of a child or sick person.
* **MANSLAUGHTER**
* s 234 Culpable homicide that is not murder or infanticide is manslaughter.
* **MURDER**
* s 229 Culpable homicide is murder
  + intentional or reckless: (a) where the person who causes the death of a human being
    - (i) means to cause his death, or
    - (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;
  + Transferred intent: (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; or
  + (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 desires to effect his object without causing death or bodily harm to any human being.
* s 230 is unconstitutional
* **FIRST DEGREE MURDER**
* s 231 (1) Murder is first degree murder or second-degree murder.
* (2) Murder is first degree murder when it is planned and deliberate.
  + Contracted murder: (3) Without limiting the generality of subsection (2), murder is planned and deliberate when it is committed pursuant to an arrangement under which money or anything of value passes or is intended to pass from one person to another, or is promised by one person to another, as consideration for that other’s causing or assisting in causing the death of anyone or counselling another person to do any act causing or assisting in causing that death.
* Police officers: (4) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder when the victim is
  + (a) a police officer, police constable, constable, sheriff, deputy sheriff, sheriff’s officer or other person employed for the preservation and maintenance of the public peace, acting in the course of his duties;
  + (b) a warden, deputy warden, instructor, keeper, jailer, guard or other officer or a permanent employee of a prison, acting in the course of his duties; or
  + (c) a person working in a prison with the permission of the prison authorities and acting in the course of his work therein.
* While committing or attempting to commit domination offences: (5) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder in respect of a person when the death is caused by that person while committing or attempting to commit an offence under one of the following sections:
  + (a) section 76 (hijacking an aircraft);
  + (b) section 271 (sexual assault);
  + (c) section 272 (sexual assault with a weapon, threats to a third party or causing bodily harm);
  + (d) section 273 (aggravated sexual assault);
  + (e) section 279 (kidnapping and forcible confinement); or
  + (f) section 279.1 (hostage taking).
* Criminal harassment: (6) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder when the death is caused by that person while committing or attempting to commit an offence under section 264 and the person committing that offence intended to cause the person murdered to fear for the safety of the person murdered or the safety of anyone known to the person murdered.
* Terrorist activity: (6.01) Irrespective of whether a murder is planned and deliberate on the part of a person, murder is first degree murder when the death is caused by that person while committing or attempting to commit an indictable offence under this or any other Act of Parliament if the act or omission constituting the offence also constitutes a terrorist activity.
* Criminal organization: (6.1) Irrespective of whether a murder is planned and deliberate on the part of a person, murder is first degree murder when
  + (a) the death is caused by that person for the benefit of, at the direction of or in association with a criminal organization; or
  + (b) the death is caused by that person while committing or attempting to commit an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of or in association with a criminal organization.
* Intimidation of a justice system participant or journalist: (6.2) Irrespective of whether a murder is planned and deliberate on the part of a person, murder is first degree murder when the death is caused by that person while committing or attempting to commit an offence under section 423.1. 🡪 intimidation of a justice system participant or journalist
* (7) All murder that is not first degree murder is second degree murder.
* **PROVOCATION**
* 232 (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.
* (2) Conduct of the victim that would constitute an indictable offence under this Act that is punishable by five or more years of imprisonment and that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section, if the accused acted on it on the sudden and before there was time for their passion to cool.
* (3) For the purposes of this section, the questions
  + (a) whether the conduct of the victim amounted to provocation under subsection (2), and
  + (b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,
* are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.
* (4) Culpable homicide that otherwise would be murder is not necessarily manslaughter by reason only that it was committed by a person who was being arrested illegally, but the fact that the illegality of the arrest was known to the accused may be evidence of provocation for the purpose of this section.

**Offences (Organized)**

Note: in order to establish culpable homicide, required to establish the underlying act and also the causation of death.

Order of analysis: culpable homicide (includes actus reus and mens rea of the underlying act) THEN murder. That way if murder is not established but culpable homicide is, the accused is guilty of manslaughter *so long as* objective foresight of non-trivial bodily harm is ALSO established (*Creighton*)

Homicide Offences Logic

* Homicide is directly or indirectly causing the death of a human being (s 222(1))
* Homicide can be culpable or not culpable (s 222(2))
* Only culpable homicide is an offence (s 222(3))
* Culpable homicide includes a category of offences that involves causing the death of another person (s 222(4))
  + Murder, manslaughter, infanticide (s 222(4))
* When homicide is culpable homicide (s 222(5))
  + (a) unlawful act (any unlawful act, regulatory offences included), (b) criminal negligence, (c) inducing someone to kill themselves, or (d) frightening
* Manslaughter is a residual offence (in case the homicide does not fall into murder/infanticide, but is culpable, the accused may be charged with manslaughter (s 234)

Homicide Provisions

**Assault** – s 265(1)(a)

1. *Actus reus:*
   1. Act: direct or indirect application of force to that person
   2. Circumstance: lack of consent
2. *Mens rea:*
   1. *Intentional* application of force to that person (*Smithers*)
      1. Where you intend to apply force to a group of people, any person that is hit would likely suffice
      2. Also, some jurisdictions have transferred intent but Ontario is unclear
   2. *Recklessness* or *knowledge* as to whether consent existed (*Sansregret*)
      1. Cannot consent to street fights (*Jobidon*)

**Note**: Below is also **culpable homicide** *minus* the objective foresight of non-trivial bodily harm mens rea requirement

**Manslaughter** s 222(5), s 234 (*Creighton*) (note: actus reus is culpable homicide, only difference is mens rea)

1. *Actus reus*:
   1. Culpable homicide: Act: unlawful act (any unlawful act, regulatory offences included), criminal negligence, inducing someone to kill themselves, or frightening
   2. Causation of consequence
      1. (1) consequence: death
      2. (2) causation
2. *Mens rea*:
   1. Mens rea for predicate offence (must be *at least a marked departure* from the standard of care expected of a reasonable person in similar circumstances) – note in case of regulatory offence as unlawful act
   2. *Objective* foresight of non-trivial *bodily harm* (*Creighton*)

**Murder** s 229(a) (intentional or reckless) (note: actus reus is culpable homicide, only difference is mens rea)

1. *Actus reus*:
   1. Culpable homicide: Act #1: unlawful act (any unlawful act, regulatory offences included), criminal negligence, inducing someone to kill themselves, or frightening
   2. Causation of consequence
      1. (1) consequence: death
      2. (2) causation
2. *Mens rea*:
   1. Mens rea for predicate offence (must be *at least a marked departure* from the standard of care expected of a reasonable person in similar circumstances) – note in case of regulatory offence as unlawful act
   2. For (i): Subjective intention to cause death (*Buzzanga*, *Hibbert*)
   3. For (ii): Subjective intention to cause bodily harm that the accused subjectively knows is likely to cause death (*Cooper*, *Simpson*)
      1. Knowledge of risk is higher than ordinary recklessness (*Cooper*)
      2. For the purposes of (ii), recklessness is an “afterthought” (*Cooper*)
         1. because a finding of the first part necessitates a finding of reckless whether death ensues (*Cooper*)
3. Contemporaneity of AR/MR: needs to be present at some point in the same transaction, but not necessarily exactly when death is likely (*Cooper*)
   1. A series of acts may from part of the same transaction (*Cooper*)

**Murder** s 229(b) (transferred intent) (note: actus reus is culpable homicide, only difference is mens rea)

* Accused means to kill victim 1 but accidentally kills victim 2.
* Intention to “cause death of a human being” in s 229(b) means causing death of a human being *other* than the accused him or herself (*Fontaine*)
* Same in other respects to s 229(a) except the analysis is for intent to kill victim 1 rather than victim 2, and then transferring that intent by virtue of the section.

**Murder** s 229(c) (unlawful object) (see facts of *Shand*) (***note***: actus reus addition here)

Objective fault element has been held to be unconstitutional (*Martineau*)

1. *Actus reus*:
   1. Culpable homicide: Act #1: unlawful act (any unlawful act, regulatory offences included), criminal negligence, inducing someone to kill themselves, or frightening
   2. Pursuit of unlawful object
      1. Unlawful object must be conduct, which if fully prosecuted, would amount of a serious crime, that is an indictable offence under the *Criminal Code* (*Shand*)
      2. Distinct from the act that causes the death of the victim (*Vasil*, *Shand*)
         1. But distinctness does not mean unrelated (they are naturally connected) (*Shand*)
            1. Dangerous act is a constituent part of the unlawful object (*Shand*)
         2. The degree of distinction that is required is very small (the unlawful object cannot be the dangerous act) (*Shand*)
            1. So long as the unlawful object was something other than to cause the death of the victim or bodily harm that was likely to cause the death of the victim, then it will be held to be sufficiently distinct from the dangerous act and s 229(c) will apply (*Shand*)
      3. Must be one’s purpose or goal (e.g. carrying a gun does not quality) (*Shand*)
         1. The end that they sought to achieve (the accused’s reason for acting as they did) (*Shand*)
   3. Commit a dangerous act causing death
      1. Needs to be committed in furtherance of the unlawful object (*Shand*)
      2. Does not need to be a criminal offence (or any offence generally) itself (*Shand*)
      3. Need to define the dangerous act with sufficient specificity (“clearly identified and defined”) (*Shand*)
         1. In order to determine (1) if it can cause death and (2) if in the moment the accused knew it would likely cause death (*Shand*)
            1. The jury should be instructed to avoid reasoning backwards; e.g. because death occurred, it immediately means that the accused knew that death is likely (*Shand*)
         2. e.g. not entering the house with a loaded gun, but drawing a loaded gun in an attempt to subdue occupants of a room who are in a confined space (*Shand*)
         3. Series of closely related acts (continuing transaction) is allowed for (*Shand*)
            1. But, a general course of conduct only loosely connected to the milling could not be considered a single transaction for the purpose of defining a dangerous act (*Shand*)
   4. Causation of consequence
      1. (1) consequence: death
      2. (2) causation
2. *Mens rea*:
   1. Mens rea for predicate offence (must be *at least a marked departure* from the standard of care expected of a reasonable person in similar circumstances) – note in case of regulatory offence as unlawful act
   2. Subjective fault for the unlawful object (*Shand*)
   3. Subjective knowledge that death is likely to result from the dangerous act (*Shand*)
      1. Likely in this context is something more than an awareness of risk or a possibility of death (*Cooper*, *Shand*)
         1. Knowledge of risk required is higher than ordinary recklessness (*Cooper*, *Shand*)
      2. To determine: looking at the accused’s state of mind and all of the surrounding circumstances (*Shand*)
         1. Very fact specific inquiry, e.g. factors include: whether safety was on or off, appellant acting out of fear/panic, conduct of appellant as observed by others, appellant’s knowledge of the presence and location of a person or persons who could be hurt (*Shand*)
      3. If the dangerous act was done as a reaction and out of panic, this may tend to show that the required subjective foresight of death was not present (*Shand*)

**Unconstitutional:** Murder s 230 (constructive murder)

* “zombie provision”
* Murder requires at minimum objective foreseeability (which is not provided by this provision) (*Vaillancourt*)
  + Due to s 7 Charter, PFJ require that mens rea “reflect the particular nature of that crime”
  + Murder is one of those crimes because of the “Special nature of the stigma” and punishment involved
* Later, SCC stated murder requires subjective knowledge of the likelihood of death; “ought to have known” is inconsistent with the constitutionally required mens rea for murder (*Martineau*, *Sit*)
  + PFJ that subjective foresight of death is required before a person is labelled and punished as a murderer (*Martineau*)
  + Fails minimal impairment stage of s 1: (*Martineau*)
    - Flexible sentencing scheme of manslaughter is in accord with the principle that punishment should be proportionate to the moral blameworthiness of the offender
    - Alternative means it does not minimally impair *Charter* rights

First Degree Murder

First establish second degree murder. Once that is established, state that the murder may have been committed in circumstances that may be sufficient to establish first degree murder.

**Planned and deliberate** (s 231(2))

* Definition of planned and deliberate
* Planned
  + Calculated scheme or design which has been carefully thought out, and the nature and consequence of which have been considered and weighed (*Widdifield*)
  + But it does not need to be a complicated one; can be a simple plan (*Widdifield*)
  + Important element is the time involved in developing the plan (*Widdifield*)
    - The time between the development of the plan and doing of the act is largely irrelevant (*Widdifield*)
* Deliberate
  + Intentional should not be used to describe deliberate (*More*)
  + Deliberate means “considered”, “not impulsive”, “slow in deciding”, “cautious” (*Widdifield*, *More*)
  + Implies that the accused must take time to weigh the advantages and disadvantages of his intended action (*Widdifield*)
* s 229(a)(ii) (intention and reckless murder provision) is capable of being planned and deliberate (*Nygaard*)

Contracted murder is planned and deliberate (s 231(3))

**Murder of a police officer, etc.** (s 231(4))

* Additional mens rea requirement (*Collins*)
* There is an onus on the Crown to establish beyond reasonable doubt that the victim was: (*Collins*)
  + (1) a person who falls within the designation of the occupations set forth in the provision, AND
  + (2) acting in the course of his duties to the *knowledge* of the accused **or** with *recklessness* on his part as to whether the victim was such a person so acting
* Otherwise it would offend s 7 of the Charter since it would not achieve its objective and require no additional moral culpability (*Collins*)

(4) Irrespective of whether a murder is planned and deliberate, murder is first degree murder when the victim is

(a) a police officer, police constable, constable, sheriff, deputy sheriff, sheriff’s officer or other person employed for the preservation and maintenance of the public peace, acting in the course of his duties;

(b) a warden, deputy warden, instructor, keeper, jailer, guard or other officer or a permanent employee of a prison, acting in the course of his duties; or

(c) a person working in a prison with the permission of the prison authorities and acting in the course of his work therein.

**While committing or attempting to commit crimes of domination**

* *Pare*: leading case: a death is caused “while committing” an offence enumerated under s 231(5) “where the act causing the death and the acts constituting the enumerated offence all form part one continuous sequence of events forming a single transaction”
  + require a close temporal and causative link between the events to form a single transaction (*Pare*, *Russel*)
  + *Pare*: accused murdered a boy two minutes after indecently assaulting him, motivated by a fear that the child would tell his mother about the incident – held to form a single transaction
  + *Russel*: accused sexually assaulted person, then a few minutes letter went to the basement and killed the tenant living there – held to form a single transaction
* The victim of the murder and victim of the enumerated offence need not be the same person (*Russel*)
  + “while committing or attempting to commit” only requires the killing to be connected, temporally and causally, with an enumerated offence (*Russel*)
* Constitutional under s 7 of the Charter (*Arkell*)

(5) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder in respect of a person when the death is caused by that person while committing or attempting to commit an offence under one of the following sections:

(a) section 76 (hijacking an aircraft);

(b) section 271 (sexual assault);

(c) section 272 (sexual assault with a weapon, threats to a third party or causing bodily harm);

(d) section 273 (aggravated sexual assault);

(e) section 279 (kidnapping and forcible confinement); or

(f) section 279.1 (hostage taking).

Sexual Assault

1. *Actus reus*:
   1. Touching (*Ewanchuck*)
      1. Objective (*Ewanchuck*)
      2. Any application of force
      3. No de minimus range; even small, trifling matters can have a profound effect on the plaintiff (*JA*)
   2. Sexual nature of conduct (*Ewanchuck*)
      1. Objective, multi-factorial assessment: is the sexual context of the assault visible to a reasonable observer? (*Ewanchuck*, *Chase*)
         1. Relevant factors in determining whether the conduct meets the sexual natural requirement: (*Chase*)
            1. Part of the body touched
            2. nature of the contact
            3. the situation in which it occurred
            4. the words and gestures accompanying the act,
            5. Threats, which may or may not be accompanied by force, and
            6. all other circumstances surrounding the conduct
            7. Intent/purpose of the person committing the act may also be a factor (*Chase*)
         2. The part of the body touched may be determinative (*V(KB)*)
            1. Open to conclude that the “sexual integrity” was violated even where the accused’s purpose is inconsistent (*V(KB)*)
   3. Absence of complainant’s consent (*Ewanchuck*)
      1. Complaint’s internal state of mind; what the complainant in her mind thought at the time the alleged sexual assault occurred (*Ewanchuck*)
         1. Accused’s perception of the complainant’s state of mind is irrelevant; this is only relevant for the mens rea component (honest but mistaken belief, negating mens rea)
         2. Open for accused to claim that the complainant’s words and actions raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place
            1. The inquiry at this stage is purely one of credibility of the complainant’s assertion
      2. To be legally effective, consent requires “ongoing, conscious and present consent to the sexual activity in question” (*JA*)
         1. Complainant cannot consent while unconscious (s 273.1(2), *JA*)
            1. Complainant cannot provide prior consent to the sexual activity (s 273.1(2), *JA*)
      3. Consent must freely be given (s 265(3), *Ewanchuck*)
         1. s 265(3) no consent is obtained where the complainant submits or does not resist by reason of
            1. the application of force to the complainant or to a person other than the complainant;
            2. threats or fear of the application of force to the complainant or to a person other than the complainant;
            3. fraud; or

consent vitiated by fraud where there is: (*Cuerrier*, *Mabior*)

(1) dishonest act, and

Through falsehoods (*Cuerrier*, *Mabior*)

Any deception counts, not only those going to the nature and quality of the sexual act (*Cuerrier*)

failure to disclose HIV status (requires the accused to have knowledge of their HIV status) (*Cuerrier*, *Mabior*)

Sabotaging condoms counts (*Hutchinson*)

(2) deprivation

significant risk of serious bodily harm (*Cuerrier*, *Mabior*, *Hutchinson*)

established when there is a realistic possibility of transmission of HIV (*Mabior*); there is no such risk when the viral count is low (<1,500 copies per millilitre of blood (*Mabior*)) and a condom is used (*Mabior*)

risk of pregnancy counts (causes profound changes to a woman’s body) (*Hutchinson*)

tort case though same principle applies: woman claiming to be on birth control but was not is found not to meet this threshold (*PP*)

* + - * 1. the exercise of authority.
    1. s 273.1(2) no consent is obtained if
       - (a) the agreement is expressed by the words or conduct of a person other than the complainant;
       - (a.1) the complainant is unconscious; (*JA*)
       - (b) the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph (a.1);
       - (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
       - (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
       - (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

1. *Mens Rea*
   1. Intention to touch (*Ewanchuck*)
   2. Knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched (*Ewanchuck*)
      1. Consent for this purpose means the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused (*Ewanchuck*)
      2. **Honest but mistaken belief** arises here (*Pappajohn*, *Ewanchuck*) (honest but mistaken belief that the complainant had affirmatively communicated by words or conduct her agreement to engage in the sexual activity)
         1. At common law, this belief does not need to be reasonable (*Pappajohn*), but see the quasi-objective amendment all the way below (at (iii)(5))
            1. Although ‘reasonable grounds’ is not a precondition to the availability of a plea of honest belief in consent, practically speaking, those grounds determine the weight to be given to the defence (*Pappajohn*)
            2. Judge shall instruct the jury, when receiving all of the evidence relating to the determination of honesty of the accused’s belief, to consider the presence of absence of reasonable grounds (s 265(4))
         2. Absence of serious injury to the complainant, absence of damage to clothing and amount of time spent together cannot by itself advance a suggestion of a mistaken belief (specifically for air of reality) (*Pappajohn*)
      3. **Limits of honest but mistaken belief**
         1. Belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and therefore provides no defence (s 273.2(c), *Ewanchuck*)
         2. Accused cannot rely on purported belief that the complainant’s expressed lack of agreement to sexual touching in fact constituted an invitation to more persistent or aggressive contact (*Ewanchuck*)
         3. Once a complainant says no, the accused must then obtain an unequivocal “yes” before the accused may touch again the complainant in a sexual manner (*Ewanchuck*, s 273.1(2)(d))
         4. Accused’s stopping for a period of time after hearing “no” may be evidence that the accused did not have a mistaken belief as to consent (*Ewanchuck*)
         5. Accused must take reasonable steps, in the circumstances known to the accused at the time, to ascertain that he complainant was consenting (s 273.2(b), *Darrach*)
            1. Sufficiently grounded in subject fault to pass s 7 scrutiny: accused’s actual knowledge, and reasonable steps requirement (can still make an unreasonable mistake) (*Darrach*)
            2. *Lincoln* (MBCA) articulated this test in two parts: (1) ascertaining the circumstances known to the accused at the time (2) whether the reasonable person in those circumstances would have taken further steps before proceeding with sexual activity
         6. No defence available where no consent obtained by virtue of ss 265(3), 273.1(2), (3) (s 273.2(a)(iii))
            1. See above in *actus reus*; if any of those subsections apply, no defence of honest but mistaken belief in consent is available

**Defences**

**NOTE**: For all defences, look for whether the question prompts you to assess the air of reality or the merits (ultimate success) of the defence. Analyze accordingly.

Provocation

Partial defence leading to a charge of murder being reduced to manslaughter if successfully proven.

**Operation of the defence**

* There must be an air of reality to the defence before it is charged to the jury (*Tran*)
  + Meaning the evidence must be reasonably capable of supporting the inferences necessary to make out the elements of the defence (*Tran*)

**The provision**

232 (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.

(2) Conduct of the victim that would constitute an indictable offence under this Act that is punishable by five or more years of imprisonment and that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is **provocation** for the purposes of this section, if the accused acted on it on the sudden and before there was time for their passion to cool.

(3) For the purposes of this section, the questions

(a) whether the conduct of the victim amounted to provocation under subsection (2), and

(b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,

are questions of fact, **but** no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.

(4) Culpable homicide that otherwise would be murder is not necessarily manslaughter by reason only that it was committed by a person who was being arrested illegally, but the fact that the illegality of the arrest was known to the accused may be evidence of provocation for the purpose of this section.

**Elements of the defence**

**(1) Conduct of the victim that would constitute an indictable offence under this Act that is punishable by five or more years of imprisonment**

* The offence must be capable of being punishable by five or more years (i.e. minimum punishment can be less so long as 5+ years is available)

**(2) offence sufficient to deprive the ordinary person of self-control?** (objective)

* no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do (s 232(3))
  + “legal right” does not mean conduct that is merely not prohibited by law; rather only includes conduct specifically sanctioned by law (*Thibbert*, *Tran*)
* no one shall be deemed to have given provocation to another by doing anything that the accused incited him to do (s 232(3))
* Ordinary person has a normal temperament and level of self-control (*Hill*)
  + Not exceptionally excitable, pugnacious, or in a state of drunkenness (*Hill*)
* Ordinary person must be *informed by contemporary norms of behaviour*, and in particular, *Charter* values (*Tran*)
  + Not appropriate to ascribe: homophobic views; sense of possession of female partner, conceptions of “honour” (*Tran*)
* Particular characteristics of the accused that are not peculiar or idiosyncratic can be ascribed to an ordinary person without subverting the logic of the objective test of provocation (*Tran*)
  + Age, sex, or race do not detract from person’s characterization as ordinary (*Tran*)
  + It may be appropriate to incorporate traits that are relevant to the insult (*Hill*, *Tran*) (but note that it must be informed by contemporary norms of behaviour 🡪 e.g. not appropriate to ascribe homophobic views (*Tran*))
    - E.g. it may be appropriate to ascribe to the ordinary person racial characteristics if the accused were to be a recipient of a racial slur (*Tran*)
* Particular circumstances in which the accused finds himself will also be relevant in determining the appropriate standard against which to measure the accused’s conduct (*Tran*)
  + But care must be taken not to subvert the logic of the objective inquire and assimilate circumstances that are peculiar to the individual into the objective standard (*Tran*)
  + E.g. deceased wrongfully firing the accused from his long-term employment may be taken into account, but not the accused’s peculiar relationship or feelings about his employer

**(3) was the accused deprived of self-control by the offence?** (subjective)

**(4) did the accused act on the sudden and before there was time for their passion to cool?** (subjective)

* Accused must have killed because he was provoked and not being the provocation existed (*Tran*)
* Must make an unexpected impact that takes the understanding by surprise and sets the passions aflame (*Tran*)
* Suspecting something and making efforts to surveil means discovery is not sudden (*Tran*)

Articles on provocation

* The three traditional situations where it applied (referred to by *DPP v Camplin*):
  + (1) Sudden falling out between men
  + (2) Discovery by a man of his wife committing adultery
  + (3) Discovery by father of someone “committing sodomy on his son”
* Grant, Chunn & Boyle, The Law of Homicide: Why special rules for homicidal rage? Why not pity, despair, or other emotions?
  + E.g. mercy killing of a family member (*Latimer*)
* Berger, Emotions and the Veil of Voluntariness: Emotions don’t happen to us; they are part of us. Need to subject emotional responses to critical evaluation.
* Horder, Provocation and Responsibility: Provocation endorses possessiveness of men toward women as natural and justifiable
  + Problematic because the vast majority of provocation cases is the idea of adultery as justifying provocation
  + Ideas that the husband’s “possession” has been taken from him and justifies the response

Self Defence

Self-defence is a justification (*Ryan*). The impugned act in a case of self-defence is considered right (*Ryan*). Self-defence challenges the wrongfulness of an action which technically constitutes a crime (*Ryan*).

See comparison between self-defence and duress on page 20

**The provision and elements of the defence**

34 (1) A person is not guilty of an offence if

(a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;

* Firstly assessed subjectively (*Cinous*)
  + Mere assertion by the accused of the element of the defence is not sufficient in itself to clear the air of reality hurdle (*Cinous*)
    - However, as in this case, the accused’s testimony going beyond merely asserting the elements of the defence and providing a comprehensive account of his perceptions and explanations for them satisfies the hurdle (*Cinous*)
* Secondly assessed under a modified objective standard (*Cinous*, *Nelson*, *Kagan*, *Lavallee*)
  + Excludes intoxication (*Reilly*)
  + Intellectual disability considered (*Nelson*) (note: not every intellectual variation should be considered; only an impairment not within his control, which relate to his ability to perceive or react to events, and an impairment that clearly takes him out of the broad band of normal adult intellectual capacity)
  + Accused’s disabilities may be relevant (*Kagan*)
    - Anxiety, distrustful personality (from Asperger’s) considered (*Kagan*)
  + Previous relationship of violence (*Lavallee*)
    - The issue is not what an outsider would have reasonably perceived, but what the accused would have reasonably perceived, given her situation and her experience (*Lavallee*)
    - Given the history of their relationship, battered women may have heightened knowledge of her partner’s violence (*Lavallee*)

(b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and

* Assessed subjectively

(c) the act committed is reasonable in the circumstances.

* Informed by the factors in s 34(2)

**Factors**

(2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:

(a) the nature of the force or threat;

* *Lavallee*: gun; threatened to kill her
* *Petel*: threatened to kill her and daughter

(b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;

* Whether there were reasonable alternatives to the accused’s actions, including retreat (*Cain*, *Cinous*)
* Although no obligation to retreat from home (*Forde*, *Lavallee*, *Antley*)
* Self-defence does not require imminent danger, although that is one of the factors considered (*Lavallee*)

(c) the person’s role in the incident;

* A person wilfully engages in (or provokes) a fight (*Paice*)
  + Although the case may have been decided differently with the new self-defence provisions, the case still informs this factor (*Paice*)

(d) whether any party to the incident used or threatened to use a weapon;

* *Lavallee*: threatened to kill her by use of a gun

(e) the size, age, gender and physical capabilities of the parties to the incident;

(f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;

* Context of history among the parties (*Lavallee*)
* Special knowledge of timing and degree of harm may be derived from long relationship of violence (*Lavallee*)
  + *Petel*: error not to instruct jury on this history (“judge’s answer may have led the jury to disregard the entire atmosphere of terror which the respondent said pervaded her house”)

(f.1) any history of interaction or communication between the parties to the incident;

(g) the nature and proportionality of the person’s response to the use or threat of force; and

* A person is not expected to “weigh a nicety” the exact measure of defensive action or to stop and reflect upon the risk of deadly consequences from such action (*Kong*)
  + objective measurement of proportionate force in self-defence cases requires a tolerant approach (*Kong*)
  + “Detached reflection cannot be demanded in the presence of an upturned” (*Brown*; approved of in *Deegan*)
* whether accused’s act was disproportionate (*Faid*)
  + No half-way house (no partial justification) (*Faid*)
  + However, jury should consider the mens rea (*Faid*)
    - In the event that such an intent was not present or there is a reasonable doubt, they should find the accused guilty of manslaughter (*Faid*)

(h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

**No defence for force used against them in administration/enforcement of law**

(3) Subsection (1) does not apply if the force is used or threatened by another person for the purpose of doing something that they are required or authorized by law to do in the administration or enforcement of the law, unless the person who commits the act that constitutes the offence believes on reasonable grounds that the other person is acting unlawfully.

Duress

There are two defences for duress: (1) statutory defence, (2) common law defence.

The statutory defence is applied when the accused is a principal offender, while the common law defence is applied when the accused is a party to the offence (but not the principal offender) (*Paquette*, *Ruzic*, *Ryan*)

Because of the *Charter*, the statutory defence has changed significantly. See the elements provided in the framework instead of the text of the statute, except for the excluded offences.

Note: some of the excluded offences may be unconstitutional (and there may be some excluded offences that apply to the common law defence).

* *Ryan* **Left open:**
* the constitutional status of the statutory exclusions, and what, if any, exclusions apply at common law
* SCC noted though that “some courts have found some of these exclusions to be constitutionally infirm”
  + E.g. *Fraser*: Nova Scotia court finding that exclusion of robbery violates s 7 of *Charter*
* *Aravena* (*ONCA*, 2015): whether murder can be excluded under the defence of duress
  + duress defence could excuse a choice to assist in a murder
  + But the court does not suggest that it would be readily made out
* *Willis* (*MBCA*, 2016): disagreed with *Aravena*
  + Found the statutory exception on murder at least is constitutional
  + Moral involuntariness involves an assessment of proportionality and said “it is never proportionate to murder to avoid the threat of death”
    - Thus does not violate the PFJ

Duress and Mens Rea

* Due to how intention and purpose is defined, duress will almost never negate the mens rea of an offence, except where the coercion is specified by Parliament as a component of mens rea (*Hibbert*)
* They are *excused* through operation of the defence of duress (even though actus reus and mens rea for the offence are made out) (*Hibbert*)

Comparison between self-defence and duress

* Differences:
  + Self-defence is a justification (challenges the wrongfulness of an action which technically constitutes a crime) (*Ryan*)
    - Duress is an excuse (built upon principle of moral involuntariness) (*Ryan*)
    - Relevant because: Justifications should have wider breadth because it is righteous. Excuses are concessions to human frailties so it should be interpreted narrower (*Ryan*)
  + Self-defence: victim is the person threatening (lawful in defined circumstances to meet force with force) (*Ryan*)
    - Duress: victim is generally an innocent third party (a crime not against the attacker) (*Ryan*)
  + Self-defence: motive for attack or threat is irrelevant (*Ryan*)
    - Duress: purpose of the threat is to compel the accused to commit an offence (*Ryan*)
  + Self-defence is completed codified (*Ryan*)
    - duress is partially codified and partially governed by judge-made law (*Ryan*)
  + Self-defence includes a series of factors that inform reasonableness
    - Duress includes a series of mandatory factors that must be present to establish the defence
* Similarities:
  + Self-defence and duress both have a proportionality requirement

Statute text

17 A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if the person believes that the threats will be carried out and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion,

but this section does not apply where the offence that is committed is high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson or an offence under sections 280 to 283 (abduction and detention of young persons).

Note: statutory defence has been modified significantly by the courts because of constitutional challenges (e.g. *Ruzic*)

|  |  |
| --- | --- |
| **Statutory defence** | **Common law defence** |
| (1) accused is a principal offender (s 17, *Paquette*, *Ruzic*, *Ryan*) | (1) accused is a party to the offence (but not the principal offender) (*Paquette*, *Ruzic*, *Ryan*) |
| (2) compulsion by threats of death or bodily harm (against the accused or another party) (modified objective standard) (s 17) | (2) compulsion by threats of death or bodily harm (against the accused or another party) (modified objective standard) (s 17) |
| (3) no safe avenue of escape (modified objective standard) (*Ruzic*, *Ryan*) | (3) no safe avenue of escape (modified objective standard) (*Ruzic*, *Hibbert*, *Ryan*) |
| (4) close temporal link between the threat and offence (*Ruzic*, *Ryan*) | (4) close temporal link between the threat and offence (*Ruzic*, *Ryan*) |
| (5) proportionality between the harm threatened and the harm inflicted by the accused (modified objective standard) (*Ryan*)  Involves two parts: overall proportionality, moral judgment | (5) proportionality between the harm threatened and the harm inflicted by the accused (modified objective standard) (*Ryan*)  Involves two parts: overall proportionality, moral judgment |
| (6) the accused is not a party to a conspiracy or association whereby the accused is subject to compulsion and actually knew that threats and coercion to commit an offence were a possible result of this criminal activity, conspiracy or association (s 17, *Ryan*) | (6) the accused is not a party to a conspiracy or association whereby the accused is subject to compulsion and actually knew that threats and coercion to commit an offence were a possible result of this criminal activity, conspiracy or association (*Ryan*) |
| (7) not an excluded offence  note: some of these excluded offences may be found to be unconstitutional pursuant to the *Charter* (*Ryan*) | (7?) *Ryan* left open that the common law defence includes some excluded offences similar to the statutory defence |

**#2 Compulsion by threats of death or bodily harm (against the accused or another party)** (modified objective standard)

* an explicit or implicit threat of death or bodily harm proffered against the accused or a third person (*Ryan*)
* The threat may be of future harm (does not need to be immediate) (*Ryan*)
* issue of severity (of the threat) is better dealt with at the proportionality stage, which acts as the threshold for the appropriate degree of bodily harm (*Ryan*)
* Modified Objective Standard
  + the accused *reasonably believed* that the threat would be carried out (*Ryan*)
  + Modified objective standard of the reasonable person similarly situated (reasonable person in the same situation as the accused and with the same personal characteristics and experience) (*Ryan*)

**#3: No safe avenue of escape** (modified objective standard)

* Defence does not apply to persons who could have legally and safely extricated themselves from the situation of duress (*Ryan*)
* Modified objective standard of the reasonable person similarly situated (reasonable person in the same situation as the accused and with the same personal characteristics and experience) (*Ryan*)
  + *Ruzic*: woman from Belgrade did not go to authorities because she believed they were corrupt due to the nature of the climate in which she resided

**#4: Close temporal link between the threat and offence committed**

* Helps demonstrate the presence of no safe avenue of escape (but still a separate requirement) (*Ryan*)
* If the threat is too far removed from the accused’s illegal acts, it will be difficult to conclude that a reasonable person similarly situated had no option but to commit the offence (*Ryan*)
* Does not preclude availability of the defence in cases where the threat is of future harm (*Ryan*)
* Temporal link is necessary to demonstrate the degree of pressure placed on the accused (*Ryan*)
  + Ensures that the threat put so much pressure on the accused that between the threat and commission of the offence, the accused lost the ability of act freely (truly acted in an involuntary manner) (*Ryan*)

**#5: Proportionality between the harm threatened and the harm inflicted by the accused** (modified objective standard)

* Two elements: (*Ryan*)
  + (i) the harm threatened is equal or greater than the harm caused (*Ryan*)
    - *Ruzic*: harm to mother greater than possession and use of a false passport and unlawful importation of narcotics
  + (ii) general moral judgment regarding the accused’s behaviour in the circumstances (*Ryan*)
    - Whether the acts of the accused accord with what society expects from a reasonable person similarly situated in a particular circumstance (*Ryan*)
    - Examine if the accused demonstrated “normal” resistance to the threat” (*Ryan*)

**#6 the accused is not a party to a conspiracy or association whereby the accused is subject to compulsion and *actually knew* that threats and coercion to commit an offence were a possible result of this criminal activity, conspiracy or association** (subjective standard)

* Cannot rely on defence if they knew that their participation in a conspiracy or criminal organization came with a *risk of coercion* of threats to compel them to omit an offence (*Ryan*)
* Subjective standard (knowledge) (*Ryan*)
* Voluntary assumption of risk argument (*Ryan*)

Not Criminally Responsible By Reason of Mental Disorder (“NCR”)

**The provision**

16 (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

(2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.

(3) The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue.

2(1) “mental disorder” means “disease of the mind”

Any party (Crown or defence) may raise this defence. The party that raises it must prove the two parts of the test on a balance of probabilities (ss 16(2), 16(3)).

**Dispositions**

Indefinite detention struck down as unconstitutional by virtue of unjustifiably violating the person’s s 7 liberty right (*Swain*)

Now, there are mandatory annual hearings to review detention every twelve months (s 672.81)

Options for the review board: (s 672.54)

1. accused detained within a secure mental health institution
2. conditional release into the community with oversight by the review board
3. unconditional discharge (with no oversight by the review board and no sentence or constraints on their liberty).

Principles that the review board must balance:

1. fair treatment
2. public safety

s 672.54 gives priority to public safety in release decisions (“paramount consideration”). If there is ever a doubt in a decision, it should be decided in favour of public safety.

**Test:**

The first part of the test involves a characterization of the mental state of the accused (*Bouchard*).

**(1) Did the accused suffer from a mental disorder in the legal sense at the time of the alleged events?** (*Bouchard*)

* A mental disorder is defined as a “disease of the mind” for the purposes of s 16 of the *Criminal Code* (s 2 *CC*)
  + This preserves the case law surrounding mental disorders
* Determining what mental conditions constitute a disease of the mind is a question of law (*Cooper*, *Bouchard*)
  + “disease of the mind” is a legal term (*Cooper*, *Bouchard*)
    - Therefore it is for the judge to decide what mental conditions are within the meaning of the phrase, not medical experts (*Cooper*, *Bouchard*)
      * Therefore, what medical evidence states is a disease of the mind will not always be linear with what the law recognizes as a disease of the mind (*Bouchard*)
        + Judges consider policy implications as well (unlike medical experts) (*Bouchard*)
    - However, medical expertise plays an essential part on the legal characterization exercise (*Bouchard*)
      * But judge is not bound by medical evidence (*Bouchard*)
* Determining whether the accused suffered from the mental disorder is a question of fact (*Cooper*, *Bouchard*)
* Disease of the mind
  + **Includes** any illness, disorder or abnormal condition which impairs the human mind and its functioning (*Cooper*)
  + **excludes** self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion (*Cooper*)
  + Malfunctioning of the mind that results exclusively from self-induced intoxication cannot be considered a disease of the mind, since it is not a product of the individual’s inherent psychological makeup (*Bouchard*)
  + Toxic psychosis induced by self-intoxication is presumed to be excluded as a disease of the mind, unless it can be shown that the “malfunctioning mind” was not the result of the intoxicant alone (*Bouchard*)

The second part of the test involves examining the effects of the mental disorder (*Bouchard*).

**(2) Did the mental disorder render the accused incapable of appreciating the nature and quality of the act or omission or of knowing that it is wrong?** (*Bouchard*)

* **(a) incapable of appreciating the nature and quality of the act**
  + Appreciation is more than “knowledge” of the act (*Cooper*)
  + Appreciation involves understanding of the *physical* consequences of the act (*Cooper*, *Abbey*)
    - E.g. could understand physical act of choking, but not understand that it could result in the person’s death (*Cooper*)
  + Understanding of legal/penal consequences are not relevant (*Abbey*)
* **(b) incapable of knowing that it was wrong**
  + Wrongfulness refers to moral wrongfulness, not simply that prohibited by law (*Chaulk*, *Oommen*)
    - Specifically, “wrong” means contrary to the ordinary moral standards of reasonable men and women, not legally wrong (*Chaulk*, *Oommen*)
    - Importantly, it is not judged by personal standards of the offender but by his *awareness* that society regards the act as wrong (*Chaulk*)
    - As with the rest of this branch of the test, incapacity to make moral judgments must be casually linked to the disease of the mind (*Chaulk*)
  + the inquiry focuses not on general capacity to know right from wrong, but rather on the ability to know that a particular act was wrong in the circumstances (*Oommen*)
    - The accused must possess the intellectual ability to know right from wrong in an abstract sense (*Oommen*)
    - The accused must also possess the ability to apply that knowledge in a rational way to the alleged criminal act (*Oommen*)
      * embraces not only the intellectual ability to know right from wrong, but the capacity to apply that knowledge to the situation at hand (*Oommen*)

Offences Fall Term

**Manslaughter by unlawful act of assault** (example)

1. *Actus reus*:
   1. Voluntariness
   2. Act: direct or indirect application of force to that person
   3. Circumstance: lack of consent
      1. Cannot consent to street fights (*Jobidon*)
   4. Causation of consequence:
      1. (1) consequence: death
      2. (2) causation
2. *Mens rea*:
   1. Intentional application of force to that person (*Smithers*)
      1. Where you intend to apply force to a group of people, any person that is hit would likely suffice
      2. Also, some jurisdictions have transferred intent but Ontario is unclear
   2. Recklessness or knowledge as to whether consent existed (*Sansregret*)
      1. Cannot consent to street fights (*Jobidon*)
   3. Objective foresight of non-trivial bodily harm (*Creighton*)

**Assault** – s 265(1)(a)

1. *Actus reus:*
   1. Act: direct or indirect application of force to that person
   2. Circumstance: lack of consent
2. *Mens rea:*
   1. *Intentional* application of force to that person (*Smithers*)
      1. Where you intend to apply force to a group of people, any person that is hit would likely suffice
      2. Also, some jurisdictions have transferred intent but Ontario is unclear
   2. *Recklessness* or *knowledge* as to whether consent existed (*Sansregret*)
      1. Cannot consent to street fights (*Jobidon*)

**Unlawful act manslaughter** (any unlawful act) (*Creighton*) – s 222(5)(a)

1. *Actus reus*:
   1. Act: unlawful act
   2. Causation of consequence
      1. (1) consequence: death
      2. (2) causation
2. *Mens rea*:
   1. Mens rea for predicate offence (must be *at least a marked departure* from the standard of care expected of a reasonable person in similar circumstances) – note in case of regulatory offence as unlawful act
   2. *Objective* foresight of non-trivial *bodily harm* (*Creighton*)

Also: manslaughter by criminal negligence also possible – s 222(5)(b)

**Manslaughter by criminal negligence**

1. *Actus reus*:
   1. Voluntariness

* Act: in doing anything, or 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
  1. Causation of consequence:
     1. (1) consequence: death
     2. (2) causation

1. *Mens rea*:
   1. Marked and substantial departure from the standard of care of a reasonable person in similar circumstances
   2. Objective foresight of non-trivial bodily harm (*Creighton*)

**Dangerous driving** (*Beatty*) – s 249

1. *actus reus*:
   1. sourced from the text of the provision (not a marked departure):
   2. s 249(1): operating 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
   3. Note: if dangerous driving causing bodily harm or death, also need causation of consequence
2. *mens rea*:
   1. conduct amounts to a marked departure from standard of care of a reasonable person (draws on from *Creighton* and *adds the caveat below*)
      1. In determining this, court should consider the actual state of mind of the accused
         1. 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)
      2. **NOTE**: see *Roy* for separate questions in addressing this, but consider the things above in the analysis

**Fraud** – s 380 (*Theroux*)

1. *Actus reus*
   1. Act:
      1. Dishonest act: The prohibited act (act of falsehood, deceit, or some other fraudulent means), and
   2. Causation of consequence:
      1. Deprivation caused by the prohibited act, which may consist of actual loss or the placing of the victim’s pecuniary interests at risk
2. *Mens rea*
   1. Subjective knowledge of the prohibited act, and
   2. 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)

**Domination offences** (“while committing”) (*Pare* 🡪 concept of a “single transaction”)

231(5) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder in respect of a person when the death is caused by that person while committing or attempting to commit an offence under one of the following sections:

(a) section 76 (hijacking an aircraft);

(b) section 271 (sexual assault);

(c) section 272 (sexual assault with a weapon, threats to a third party or causing bodily harm);

(d) section 273 (aggravated sexual assault);

(e) section 279 (kidnapping and forcible confinement); or

(f) section 279.1 (hostage taking).

**RECALL THAT LEGAL DUTIES (or unlawful act) NEED TO BE PART OF THIS ANALYSIS**

**Criminal negligence** – s 219 (ex: *Browne*)

* 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.

**Common nuisance** – s 180 (ex: *Thornton*)

* 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.

Common nuisance elements broken down

1. *Actus reus*
   1. Act
      1. Commits a common nuisance 🡪 everyone who does an unlawful act or fails to discharge a legal duty and thereby
         1. endangers the lives, safety, health, property or comfort of the public, or
         2. obstructs the public in the exercise or enjoyment of any right that is common to all the subjects of Her Majesty in Canada
   2. Causation of consequences
      1. endangers the lives, safety or health of the public, or
      2. causes physical injury to any person is guilty of an offence
2. *Mens rea*
   1. Predicate offence (unlawful act/failure to discharge legal duty)

**Legal Duties in Criminal Code**

Note: legal duties can potentially be sourced from provincial statutes and the common law (*Thornton*). Not precedent though, but indication that this might be the case.

* 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 **\*\*** (*Brown*)
  + 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.

**\*\*** Undertaking (s 217) must be something more than a mere promise (*Brown*) (should not consider their relationship (friends) because it’s different than that of parents and spouses; “I’ll take you to the hospital” is not enough)