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Sources of Criminal Law

- 1892 parliament enacted Canada's first criminal code
- There is still no criminal code in England
- Our code is federal and applies across Canada (including Quebec)
- The criminal code declares offences, defenses, and procedure
- All crimes in Canada are statutory but there are other jurisdictions where it is part statutory and part common law
- **3 types of law that involve criminal law**; Common law, (judge made law), statute law (criminal code, other statutes creating criminal offences), division of powers in the charter of rights and freedoms (what the province can do)
- **Section 91 (27)** of the constitution states that only federal governments can enact criminal convictions, provincial government have other areas of the law they can control -(Highway traffic act is provincial)

(a) Common Law

Frey v. Fedoruk (pg. 2-5)

Facts:

- Supreme court of Canada case 1950
- Civil action by peeping tom for false imprisonment
- Court of appeal ruled that a **Common law criminal offence** had been committed, the peeping tom was an offence because it provoked violent retaliation (even though "peeping" was not an offence in the CC)
- Frey had been seen on Fedoruks property peeping into his window while mom changed
- Frey was arrested without a warrant and then Frey sued for damages for malicious prosecution and for false imprisonment.
- A trial judge dismissed the suit on the grounds that Frey had been guilty of a criminal offence at common law and therefore there was legal justification for the arrest without warrant.
- Frey appealed to the supreme court for false imprisonment

Issue:

- Whether or not there was a common law crime

Decision:

- SCC dismissed appeal and conviction quashed.

Reasoning:

- Supreme court disagrees with the Court of Appeal – just because the act provoked violent retaliation does not mean it is an offence. This cannot be the case because….if it we did this all the time there would be grave uncertainty & too much discretion to police officers, crowns and judges as to what constitutes a crime. The Supreme Court does not want common law criminal laws- they want laws to be in the criminal code or in another statute. – they do not want judges making the laws or else people in society wouldn't know how to act.
- Parliamentary Supremacy- if they want a law they will make it a statute or else too much discretion to police, judges, etc.

Ratio:

- Shortly after this case was decided they abolished common law criminal **offences.** You cannot be charged with a common law offence.

Important Note:

- Parliament added "trespassing at night" to the Criminal Code – now we have a statute addressing this type of crime
- **S. 8(1)** common law **defenses** remain- but the SCC could make this a statute and put it in the criminal code to get rid of common law altogether

Relevant Statutes:

S. 8 (1)
S. 9,
S. 177,
S. 162,

(b) Statute

R. v. Clark (pg. 11-16) –Statutory Interpretation

Facts:

- Supreme court of Canada case
- The appellant is convicted for having masturbated near the uncovered window of his living room in which his neighbors (mother and two daughters) could see him
- S. **173 a & b**–"It is an offence to willfully perform an indecent act in a public place in the presence of one or more persons"
- The trial judge agreed that he had committed the act in a public place, however that he did not do so with "the intent to insult or offend any person"
- Clark was acquitted of the charge laid against him for **173 (b)- 173 (a)** he is still charged for
- Clark argues that he was not in a public place, as his living room is not public, also that visual access is not the same thing as physical access, that the neighbors purposely moved to a window of theirs that was closer so they could get a better view
- Clark asks for an appeal

Issue:

- Whether or not the accused person was performing indecent acts in violation of the criminal code?

Decision:

- Appeal allowed. Conviction quashed. SCC did not agree with lower courts

Reasoning:

- Supreme court looks to the intent of parliament regarding the meaning of the word "access", they also look to the common understanding of the word
- Section **174 (1) (b)** makes it clear that **"public place**" is not meant to include private places that are exposed to public view
- Nudity law argument says his house is not a public place
- "The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" *Bell ExpressVu Limited Partnerhsip*

Important Note:

- **In order for a higher court to overturn a finding of fact from a lower court there is a very high threshold**- it does not happen very often – appeal courts do not hear witness testimonies- whereas trial judge hears examination and cross-examinations. The only time it would happen is if the appellant court found that the facts established by the trial court were clearly wrong, or unsupported.
- Should the mother and daughters be charged with Voyeurism since they recorded the man? **(s.162)**

Relevant Statutes:
S. 173 (a) (b)
s. 174 (1)
s. 150 – definition
s. 213

R. v. Pare (pg. 18-20) –Legislation Interpretation- Doctrine of Strict Construction

Facts:

- The accused (aged 17) lured a 7 year old boy and indecently assaulted him and then proceeded to strangle the boy when the boy threatened to tell his mom about what happened
- The accused is charged with first degree murder **s. 231 (5)-** (death that is caused while committing an indecent assault)
- The accused believes there is ambiguity
- Appealed
- Counsel for the respondent/accused argued that it was not first degree because first degree requires that the death occur while the assault is being committed, not after
- Opposing council argue that because he stopped and took those 2 minutes to deliberate, it was planned and more like first degree murder
- The conviction of first degree murder was restored

Issue:
Was the killing committed "while committing" an indecent act? How do we interpret "while committing"?
Decision:
Appeal granted. Conviction restored (First degree)
Reasoning:

- The literal meaning could be determined either contextually or acontextually, and as such, they may have one meaning when disembodied from the criminal code, but another meaning altogether when read within the context of the scheme and purpose of the legislation. This latter is the meaning that needs to be ascertained
- R v Kjeldsen and R v Sargent both adopted the narrow and literal meaning of "while committing"
- Support for the notion that "while committing" does not require a coincidence of the murder with the indecent assault - only that there be a close causative and temporal link between the two, in R v Stevens
- History of doctrine of strict construction dates back to a time when death penalty was attached to a large variety of offenses, and served as a means to ease the draconian laws at the time
- Reasonable doubts in the readings of statutes should still be resolved in favour of the accused

Ratio:

- "While committing", as read in **s. 231(5)** of the criminal code, should not be read literally, as this does not appear to be a reasonable reading of the words attributed to Parliament
- **If a murder is committed while the illegal domination of the victim remains ongoing as one continuous sequence of events, then it occurs while committing indecent assault, and thus is captured under first degree murder** → doctrine of strict interpretation applies
- There was no separation between the killing and the sexual assault, it was all part of the same transaction and is therefore first degree murder

Important Note:

- **The Doctrine of Strict Construction-** If ambiguity exists the accused must receive the most generous interpretation- to make sure you do not infringe on the individuals human rights according to the charter
- Some murders were so threatening to public that parliament chose to impose exceptional penalties on perpetrators – murders that are automatically elevated to first degree are any that involve: kidnapping, hijacking, forcible confinement, rape, indecent assault – thus regardless of ambiguity it is first degree

Relevant Statutes:
S. 214
S. 231 (5) – Murder while committing additional indecent act

(c) Division of Powers under the Constitution Act 1867

The Constitution Act 1867 (pg. 23-24)

- Formerly the British North America Act
- The queen with the advice and consent of the senate and House of Commons makes laws for the peace, order and good government of Canada.
- The Parliament of Canada has legislative authority over:
    - The criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters
    - The establishment, maintenance, and management of penitentiaries
- Exclusive powers of provincial legislature:
    - Makes laws in relation to the establishment, maintenance and management of public and reformatory prisons in and for the province
    - Property and civil rights in the province
    - The administration of justice in the province, including the Constitution, maintenance and organization of provincial courts, both civil and of criminal jurisdiction and including procedure in civil matters in those courts
    - The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subject enumerated in this section

***Section 91 of the constitution outlines who has jurisdiction to make laws**

(d) Charter of Rights and Freedoms (pg. 34-35)

- Another potential source of substantive criminal law is the Charter of Rights & Freedoms, entrenched by the Constitution Act (1982)
- Supreme law of Canada
- The Charter applies to both provincial and federal laws
- **S.7 of the Charter** (Right to life, liberty…)
- **A statute**: defines present rights and obligations. It is easily enacted and easily repealed.
- **A Constitution (by contrast to statute in the constitution):** is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and when joined with a bill or charter of rights, for unremitting protection of individual rights and liberties. Once enacted its provisions cannot easily be repealed or amended

*But when it was created, we didn't know what the future would look like exactly

- The judiciary is the guardian of the constitution and interprets provisions
- The purpose of the charter is to guarantee and to protect, within the limits or reason, the enjoyment of rights and freedoms it's enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not an authorization for governmental action
- Even if you prove that a division of the charter has been violated, the state may argue under section 1 of the charter that in this particular situation it was allowed

Hunter v. Southam (pg. 35-38)- Power of Charter

Important Note:

- The Canadian Charter of Rights of Freedom sets out certain rights and freedoms and you have to follow them. If something contradicts what's said in the Charter, then it's void
- The charter should be interpreted generously

Relevant Statutes:

- **S.8 of the Charter**—Search and Seizure
- **Section 24 (1) & (2)** – evidence to be excluded (perhaps if it was found without a warrant

Canadian Foundation For Children, Youth & the Law v. Canada (pg. 47)-Spanking Law

Facts:

- **S. 43** says that every school teacher/parent or person standing in the place of a parent is justified in using force as a form of correction

Issue:

- Is **s. 43** constitutional? Does it delineate a risk zone for criminal sanction?
- Is **s. 43** too vague (reasonable force)? Because we aren't entirely sure what conduct it permits.
- The term reasonable has different meanings in factual and statutory contexts

Decision:

- **S. 43** is constitutional

Reasoning:

- Why it's constitutional/ Provisions set on the statute:
    - Only allowed if:
        - Force is reasonable and intended for corrective/educational reasons
        - Child over 2 and under 13 and cannot suffer from a disability preventing them from understanding why the force is being used
        - No objects
        - Can't be out of anger has to be corrective/reasonable under the circumstances
        - Not used on teenagers (they may retaliate)

*If these are met then the accused can be saved under this provision

- Court says not overbroad because parliament did put in the limitation of "reasonable", reasonable has been used before. But perhaps the provisions above should have been written into the code?

Ratio:

- **S. 43** is constitutional because it is not vague. A law is unconstitutionally vague if it "does not provide adequate basis for legal debate" and "analysis": "does not sufficiently delineate any area of risk": or "is not intelligible"

Important Notes:

- Policy Reason- We have the principle of **Vagueness** so that a law must set an intelligible standard both for the citizens it governs and the officials who must enforce it – so everyone knows exactly what behavior is expected of them.
- Vagueness is not argued on the basis of whether a provision has been interpreted consistently in the past, but whether it is capable of providing guidance for the future
- Canada is party to the UNCRC
- Does the provision protect people? And allow them to use force. If we didn't have it then all force would be grounds for an assault charge.
- The criminal law often uses the concept of "reasonable" to accommodate evolving mores and avoid successive "fine-tuning" amendments. It is implicit that with this, current social consensus on what is reasonable may be considered- it is wrong for caregivers or judges to apply their own subjective notions of what is reasonable.

Relevant Statutes:

s. 43

Canada (Attorney Gen.) v. PHS Comnity Serv. Society (pg. 59-63)- Challenge Charter

<u>Three separate charter challenges</u> were considered and it was found that there was arbitrariness and gross disproportionality

- To determine **Arbitrariness**:
    - Identify the laws objective
    - Identify relationship between state interest and the law or decision in question (in this the minister)
- **Gross disproportionality**:
    - The states or legislatives actions to a problem that are so extreme as to be disproportionate to any legitimate government interest.

Facts:

- An injection site was set up where people supervised people administrating drugs in BC downtown
- Vancouver (harm reduction)
- Authorities asked for their exemption to be renewed and it failed.
- The minister's refusal to grant such an exemption was not in accordance with principles of the fundamental justices as it was **arbitrary** and **grossly disproportionate** in its effects.
- So the SCC found that the exemption should be granted because the minister came to his decision in an unconstitutional way.

Issue:

- Can the minister not renew his exemption for the site?
- Does the ministers refusal to grant exemption to the clinic accord with principles of fundamental justice?

Decision:

- The minister should grant the exemption/renewal

Reasoning:

- The ministers reasoning for shutting down the clinic was unconstitutional
- **<u>Three separate charter challenges</u>** were considered and it was found that there was arbitrariness and gross disproportionality
- To determine **Arbitrariness**:
    - Identify the laws objective
    - Identify relationship between state interest and the law or decision in question (in this the minister)
- **Gross disproportionality**:
    - The states or legislatives actions to a problem that are so extreme as to be disproportionate to any legitimate government interest.
    - The effect of shutting down the clinic would cause way more harm to society than the benefits of shutting it down
    - The site was saving lives and it wasn't harming anyone

Ratio:

- Courts have identified 3 charter challenges, arbitrariness, gross disproportionality and overbreadth – you only need to prove one of these

Relevant Statutes:

S.8 of charter

R. v. Oakes (pg. 63-66)- Reverse Onus & Presumption of Innocence

- To later be named the ***Oakes Test*** :
  Two central criteria must be satisfied when proving that a limit is reasonable and justified **(ie. When it is saved under s.1 of the Charter and when it is allowed to violate the presumption of innocence):**
  1. The objective which measures responsible for a limit on a Charter right and freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom"
  2. The party invoking S.1 must show that the means chosen are reasonable and demonstrably justified – this involves a **proportionality test:**

Proportionality Test You must satisfy:

1. The measure adopted must be carefully designed to achieve the objective in question
2. The means, even if rationally connected to the objective in the first sense, should impair "as little as possible" the right or freedom in question
3. There must be proportionality between the *effects* of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "Sufficient importance"

*Proportionality Tests looks at the punishment fitting the crime.

Facts:

- Oakes was caught with weed
- Defendant had the burden of proving his innocence
- Oakes appealed to the Supreme court of Canada claiming it violated his charter rights

Issue:

Does **s.8 of the Narcotic Control Act** impose a presumption of guilt in violation of **s.11(d) of the Charter**

Decision:

Conviction overturned. Reverse Onus created by the section is unconstitutional

Reasoning:

- Dickson, writing for the majority, states that it is clear that the *Act* creates a reverse onus on the defendant, and they must determine if it violates the *Charter* right to the presumption of innocence. – Apply Section 1 Test
- The onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and justified in a free and democratic society rests upon the party seeking to uphold the limitation

Ratio:

- The onus is on the person who wants to uphold the provision- so whoever is challenging that a provision was not upheld

Important Note:

- The burden should fall on the crown to prove guilt – the individual is innocent until proven guilty
- Know the onus and know the standard
- Charter prevails over common law and Statute law
- The rights and freedoms guaranteed by the charter are not absolute. **It may become necessary to limit rights and freedoms** in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance

Relevant Statutes:

S. 1 of Charter- To guarantee rights and freedoms set out in the charter, help us understand when the state is permitted its still justified – the court has to deicide whether it is upheld
S. 11(d)- presumption of innocent- right to a fair hearing/trial

Introduction to the Criminal Process

(a) Classification of Offences (pg. 70-72)

- Indictable Offences (Treasons, Felonies, and Misdemeanors)
- Felonies (murder, rape, burglary)
- **3 types of offences in the Criminal Code:**

Summary Conviction:

- Trial before a provincial judge without a jury and without a preliminary inquiry.
- Max penalty for a summary conviction is $5000 or 6 months imprisonment or both. Unless otherwise provided **(s. 787)**
- Always provincial court with a J.O.P (rarely is in superior court)
- Accused does not have to personally attend court- can send someone on their behalf

s.11 of Charter states that if a person faces 5 or more years prison time, they must be tried with a jury. Thus parliament could technically establish a penalty of 5 years less 1-day for this type of offence to stay within charter parameters.

Indictable Offences:

- These are the more serious offences**.**
- Usually the offence section sets out the punishment applicable for the crime. If it doesn't, **S. 743** of the CC provides a max of 5 yrs. Prison.
- Individuals charged with this type of offence must be present at all stages of the proceedings
- There are 3 types of indictable offences: which determine the trial forum
    1. The most serious offences are given into the exclusive jurisdiction of the Superior Court of Justice
    2. The least serious offences are absolutely within the jurisdiction of Provincial Court judge
    3. For bulk of indictable offences remaining, the accused gets to choose the mode of trial (tried by a provincial court no jury, a judge without a jury, or by judge and jury**.**

Where provincial court judge and the crown are both able to override the accused decision and compel a jury trial if they see fit and for the crown if the offence is punishable by more than 5 years

S. 561 of CC also states that the accused may re elect their trial forum on the basis of a combination of (the original election, the point in time in the process when the accused wishes to re elect, whether the crown consents to the re elect)

Dual Offences (hybrid):

- Not actually a third category
- It simply means that the Crown has an election as to whether to proceed by indictment or by summary conviction
- If the crown select summary conviction- such offences are in all respects summary conviction offences
- If Crown chooses indictment, the forum for trial will depend on the type of the indictable offence involved
- **S. 34 (1)** in CC equates crown election offences with indictable offences
- The Crown may make their decision based on the fact that: the higher availably penalty for indictable offences, a prior criminal record by accused, a desire to require the accused to appear in court, giving the accused the choice on trial (indictment)

The trial court is determined by the classification of the offence

Sidenote; We see reliance on human rights documents to help us interpret our principles in a variety of these cases in the textbook

(b) Presumption of Innocence

- **S. 2 of the bill of rights** & **S. 11 (d) of Charter**
- Throughout the web of English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoners guilt beyond a reasonable doubt (subject to the defense of insanity, and also to any statutory exception)

- If there is any reasonable doubt the prosecution has not made out the case and the prisoner is entitled to an acquittal

Woolmington v. DPP English Case (pg. 77-83) – Before Presumption of innocence

Facts:

- 1935 case showing what it was like before presumption of innocence
- Woolmington is convicted of murdering his wife
- the jury disagrees, but in the end he was convicted and sentenced to death
- Woolmington had claimed that it was an accident
- Woolmington had to prove why it wasn't him that killed his wife (**this is not how we do it in common law)**

Issue:

Is the onus on the defendant or crown to prove innocence or guilt?

Decision:

Convicted. Sentenced to death.

Ratio:

It is actually the job of the prosecutor to prove that the accused is guilty. If they cannot do that then the accused is subject to an acquittal – the courts cite other cases in history which show that there is no onus on the accused to show they are innocent, the state must prove they are guilty

Important Notes:

- The crown must prove death as a result of voluntary act of the accused, and malice of the accused (meaning the death was intentional and unprovoked)
- Once the Crown shows that both of these things occurred, the accused has a chance to prove with evidence that the act on his part was either unprovoked or unintentional
- Because none of this happened, the appeal would have been allowed and the conviction would have been quashed

(c) Proof beyond Reasonable Doubt

R. v. Lifchus (pg 84-86)

Facts:

- 1997 Individual charged with fraud
- The trial judge told the jury that the term "beyond a reasonable doubt" means exactly what it sounds like and that the words refer to their regular everyday meaning
- The individual was found guilty of fraud
- The accused appealed on the grounds that the judge did not properly instruct the jury
- Appeal accepted and a new trial was ordered
- Defendant successful
- Crown Appeals

Issue:

How do we interpret "Beyond a reasonable doubt"?

Decision:

- SCC dismissed the crowns appeal

Reasoning:

Proof Beyond a Reasonable Doubt:

- The concept is inexplicably intertwined with the presumption of innocence.
- A reasonable doubt is not a doubt based on sympathy or prejudice rather it is based upon reason and common sense.
- It is logically connected to the evidence or lack of evidence.
- It does not involve proof to an absolute certainty,
- More is required than proof that the accused is probably guilty- if this was the case the jury would acquit (hung jury).
- **S 11 (d) of the charter** & *Oakes Test*

*Instructions to a jury may sounds like this: The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty

Ratio:
"Beyond a Reasonable Doubt" these words have specific legal meaning. Thus, it is critical that the trial judge properly inform the jury.

Relevant Statutes:
s. 11 (d) of the Charter

R. v. Starr (pg 87-88)

Facts:
- Case emphasizes the importance of explaining proof beyond a reasonable doubt to jury
- The accused has been charged with 2 counts of first-degree murder
- The majority of the court decided that the reasonable doubt instruction given in the case was also misleading and the jury did not understand the term fully
- The accused appealed

Issue:
How to explain "Beyond a reasonable doubt"
Decision:
Appeal was allowed
Reasoning:
The term was not fully defined in this case even though it was explained. The jury was not told that the standard of proof in a criminal trial is higher than the probability standard used in making everyday decisions and civil trials.
Ratio:
The term "reasonable doubt" cannot be explained by giving examples or using an analogy, as the words have very different meanings in law compared to everyday life. Thus, it must be EXPLAINED- but because analogies can't be used, this is hard to do. Reasonable doubt is less than absolute certainty, but more than probably guilt

Important Note:
Beyond a reasonable doubt is much closer to absolute certainty than to balance of probabilities

(d) Section 11(d) Charter (pg 94)

- The presumption of innocence has taken on a constitutional dimension
- **Persuasive burdens of proof** (AKA legal or ultimate burdens) apply at the end of a case, never shift in the sense it is known from the start who bears the burden, and the trier of fact must find against the burden-holder in a borderline case
- Sometimes the onus is changed by parliament to be on the accused – a reverse onus
- *R v. Oakes*, Oakes concerned the constitutionality of a **persuasive burden** on the accused.
- **Evidentiary Burdens** refers to the burden of pointing to evidence to put a legal issue into play. It can be discharged through cross-examination of opposing witnesses or by calling witnesses. Reverse onus can also occur in this instance as well

R. v. Oakes (pg. 95-99)

Facts:
- Arrested for possession of weed & trafficking
- He was caught with possession of hashish oil and a cheque for $600, which he argues, is unrelated to the drugs and was from workers comp.
- He was found guilty
- Oakes brought a notion to challenge the constitutional validity of **s.8 of the Narcotic Control Act** which he maintained imposes a burden on an accused to prove he/she was not in possession for the purpose of trafficking
- Oakes argued that s.8 violates the presumption of innocence in **s. 7 and s.11 (d) of Charter**
- Crown had said to the accused that they need to prove that they did not have these drugs on your person for the purpose of trafficking on a balance of probabilities – so its not a full burden, but still the crown is

putting a burden on the accused- NOT allowed because they could still be charged without proving beyond a reasonable doubt.
- Trail judge agreed and acquitted the trafficking charge
- Possession charge still stands
- ***Rational Connection Test*: the potential for a rational connection between the basic fact and the presumed fact to <u>justify a reverse onus provision</u>. You apply the rational connection test to see if S.11 (d) of the charter has been violated**

Important Notes:
- When you are analyzing a crime- if it is a new provision or no one has been charged with the offence before- you need to look at the offence and see if there is any onus on the accused to argue their innocence- if there is, you have strong support from the charter.

*See previous discussion on *R v. Oakes*

- The following must occur if someone is to be ***presumed innocent until proven guilty*:**
  - An individual must be proven guilty beyond a reasonable doubt
  - It is the state which must bear the burden of proof (crown has the persuasive burden- they have to prove guilt)
  - Criminal prosecutions must be carried out in accordance with lawful procedures and fairness

(e) The Harm Principle-Section 7 Charter

- **Harm Principle:** a description of an important state interest rather than a normative "legal" principle. Holds that the actions of individuals should only be limited to prevent harm to other individuals
- Criminal law should be restricted to only dealing with offenses that cause harm, or should it also have a role in controlling the moral values of society?
- The harm principle opposes government power as a means to moral ends- it should only prevent harm. – John Stuart Mill Article/Argument

R. v. Malmo-Levine (pg 108-114)- Harming no one but yourself

Facts:
- Regards the marijuana laws & Harm Principle
- The appellants contend that the harm principle is a principle of fundamental justice for the purposes of S.7 that operates to put limits on the type of conduct the state may criminalize.
- The appellants believe there is a double threshold
- Principles of fundamental justice must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result
- For a rule or principle to constitute a principle of fundamental justice for the purposes of s.7, it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty, or se
curity of the person
- They do not accept the proposition that there is a general prohibition against the criminalization of harm to self – behaviors that involve harm to self should still be put in CC because society could bare the implications or repercussions of this harm
- There is no consensus that tangible harm to others is a necessary precondition to the creation of a criminal law offence
- Some feel that the harm principle has become useless because claims of harm have become so pervasive (harm can be argued on any side of virtually any criminal law issue)
- Harm in the legal sense has taken a multitude of forms including, economic, physical, and social – it is also very difficult to measure harm
- When dealing with harm issues, harm has to be defined precisely, it cant be arbitrary

Issue:

Is there a principle of fundamental justice under **S.7 Charter** that a criminal prohibition will offend the *Charter* where it can be established that the conduct involved no risk of harm (ie. If no one but me is being harmed, can you make the action illegal? Doesn't that violate my charter rights of freedom to do what I want?

Decision:

- NO
- Contrary to the appellant's views, it is not agreed that there is a consensus that the harm principle is the sole justification for criminal prohibition.
- There are many other crimes that do not cause harm to others that are found in the CC (ie. Incest, prostitution for profit, cannibalism)

Ratio:

- Overall it is not believed that the harm principle provides a manageable standard under which to review criminal or other laws under S. 7 of the *Charter*

R. v. Labaye/R. v. Kouri (pg. 114-119) –Harm Principle

Facts:

- 2 cases came up to the SCC together because they have similar situations- however the SCC came to two radically different conclusions
- Montreal swinger's establishment
- Being charged with keeping a common bawdy house for the practice of indecency under **s. 201 (1) of the CC** an inditable offence
- 7-2 majority vote of the SCC abandons the community standard of tolerance test for indecency in favor of an objectively determined harms approach.
- Majority finds that both accused should be acquitted
- At trial, accused was convicted because it was found that his/her apartment fell within the realm of "public place".
- Sexual harm was found because the exchanges took place in the presence of other members of the club
- None of the types of harm required by the harm test were found when reviewed by SCC
- Appeal allowed and conviction set aside

Issue:

- Interpreting fundamental justice in **s. 7 of constitution** and interpreting legislation in terms of harm to others (parliament is free to do so)
- Constitution on one side and parliaments ability to enact interpreted legislation on the other side

Decision:

- Appeal Allowed and conviction set aside
- Labave & Kouri was 3 years after Malmo-Levine
- Labave & Kouri were found to not violate the harm principle/test
- Malmo-Levine was in violation

Reasoning:

- Defining indecency under the CC is a notoriously difficult task (Chief Justice McLaughlin raised this point we should have fair notice and certainty)
- Indecency has 2 meanings, one moral and one legal
- 2 requirements for the description of the harm required for indecency:
    - Inquiry needs to be based on what society, through laws and institutions, has deemed essential to "harms" proper functioning
    - The harm must be serious in degree

Ratio:

- Fundamental justice as harm to others- it is an unworkable principle

Important Note:

- The test developed by the cases has evolved from one based largely on subjective considerations, to one emphasizing the need for objective criteria, based on harm (so that law officials and the rest of society know exactly what is considered to be illegal)

Harm Test (Objective Test):

The analysis to be performed in a particular case has two steps (the crown must prove the two beyond a reasonable doubt)

- Has the crown established a harm or significant risk of harm to others that is grounded in the norms, which our society has formally recognized in the Constitution or similar fundamental law? And proved it beyond a reasonable doubt
- Is the harm in its degree incompatible with the proper functioning of society?

- First part of Test: Why does McLaughlin say that the conduct of individuals in the Labave and Kouri cases does not even meet the first level of the harm test? Because they pay membership fees, there is a doorman, they were interviewed- they knew what they were getting into and they had previous exposure. Yes, the exchange of STD is a potential, but it is not related to the crime before the court of indecent exposure.
- McLaughlin still addresses the second part of the test, even though it would be acquitted if the first step failed

Relevant Statutes:
s. 201

The Act Requirement: Actus Reus

- Crown must always prove actus reaus (prohibited act) – as a general rule no person can be convicted of an offence at common law
- Commissioned by a person, or an omission, needs to be voluntary, and if consequences are listed they must be caused by that act

(a) Commission of an Unlawful Act

R. v. Lohnes (pg 190-196)- Public "Disturbance"

Public Disturbance Test S. 175 (1)(a):

- Section 175(1)(a) creates a two-element offence consisting of:
  (1) commission of one of the enumerated acts, which
  (2) causes a disturbance in or near a public place.

  *Crown must prove actus reus and mens rea beyond a reasonable doubt

Facts:

- Mr. Lohnes (the complainant) was convicted on the ground that his conduct in itself constituted a disturbance – as he went over to his neighbor's house and yelled at him for making noise with his machines.
- This case requires the court to consider, for the first time, what constitutes a public disturbance under **s. 175 (1)(a)** which states it is an offence to cause a disturbance in or near a public place by, inter alia, fighting, screaming, shouting, swearing, singing or using insulting or obscene language.

Issue:

- Does forcible emotional upset suffice? Or must there be an externally manifested disturbance of a public nature? The word "disturbance" encompasses a broad range of meanings

Reasoning:

- The court looks to precedence to see how the provision was past interpreted, where is the provision in the CC and consider policy.
- Section 175(1)(a) creates a two-element offence consisting of: (1) commission of one of the enumerated acts, which (2) causes a disturbance in or near a public place.
- SCC considers the French and English interpretation of the word "disturbance" in order to help them interpret the provision, they also consider the distinction between noun (disturb) and verb (disturbance), they also do policy considerations (we have the freedom to voice our opinion and yell- but if we are disturbing more than one person/public in general then it is not ok)
- The word disturbance is capable of many meanings. The task is to choose the meaning which best accords with the intention of Parliament.

Ratio:

- The context of "disturbance" in section 175 (1)(a) suggests that parliament did not intend to protect society from mere emotional disturbance. Interpretive aids suggest that this law is directed at publicly exhibited disorder.

Important Note:

- You look in your CC to see if there are any other provisions in the code that will help you to interpret 175. – You need to find where the words such as "dwelling house" or "pubic place" are defined so you know how to interpret the provision.
- If there is an ambiguity between French and English provisions and they are not consistent, courts must chose the most restrictive interpretation

Relevant Statutes:

S 175

R. v. Burt (pg 197-201)- Actus Rea Requirement

Facts:

- 1985 an individual is charged and convicted because he lent his car to a friend (who caused excessive noise) but he is being charged and convicted with the offence
- Does this violate **S.7 of the Charter**?
- fine up to 1000, imprisonment , suspended license or combination of any of these

Issue:

Does there need to be an actus reus? Can someone be charged if they did not commit the crime?

Decision:

In this situation it did not meet *s.1 Test* analysis, not allowed to violate Charter right. Charge quashed

Reasoning:

- How does the court come to the determination? What do they look at?
  - There's no proof in this fact pattern that the owner was involved in anyway.
  - If the section was made to stop people from lending their cars, there would have been more included in the provision about it
- They looked at the purpose of the legislation- which did not violate the charter, but when they look at the effects of the provision it does violate the charter
- They then go to the test under S.1 and if that passes then the proportionality test (3 parts) – it did not pass
- Also consulted old English cases (common law) which state there needs to be an actus reus

Ratio:

- There needs to be an actus reus. Or the charter violation needs to pass the *S.1 Test/Proportionality Test*

Important Notes:

- You need the mental ailment and the crime- in order to be convicted

Relevant Statutes:

S.7 of the Charter

Possession S. 4(3):

- To be in possession, requires:
  - 1. Knowledge of the criminality associated with the item
  - 2. Consent (per Marshall v R)- must show that there was evidence of consent to prove unlawful act
  - 3. Control (per R v Terrence) – must have control over subject matter to prove unlawful act

Different Types of Possession:

- **Personal possession**
- **Constructive possession**- is complete when they know about the object, puts it in a particular place for future use.
- **Innocent possession** – taking something to turn it into the police or picking it up in order to dispose of it

Marshall v. R. (pg 202-205) - Possession

Facts:

- Trafficking marijuana
- Gets in a car with people for a road trip to Vancouver from Calgary
- Not a lot of money, in high school
- On there way back from Vancouver they get stopped for speeding
- Marshal knows there is marijuana in the car, but he never smokes it and doesn't use it
- How do you define it?
- The boys throw it out the window (Marshall never touched it)
- Guy who was driving did not have a license and was detained- the others were sent home
- Before they went home they got the marijuana back
- Marshall did not touch it
- Boys are stopped again on there way home for a burnt out light bulb
- They find the marijuana (large quantity and a pipe- charged with possession purpose of trafficking)
- In the car Marshall passed the pipe to one of his friends- but he did not smoke it. Can he be charged with possession?
- Trial judge does convict Marshall- asking him why he stayed in the car and did not hitchhike or call his parents
- It was actually belonging to the detained child
- Marshall appeals
- The boy uses the defense that he never agreed to have marijuana in the car, he just agreed to the road trip- he did not give consent to have substances in the car
- Crown said Marshall should be convicted because he didn't tell the police about the drugs
- Judge said he is not obligated to tell the police that so that argument doesn't hold

Issue:

- Should he have been charged with possession? What is necessary to meet the requirements of possession in **s.4(3)**

Decision:

In favor of Marshall

Reasoning:

- Appellate court looks to **s. 4(3)** to see what possession means

Ratio:

In determining possession, per s.4(3) of the Criminal Code, there must be evidence of consent to prove the unlawful act.

Relevant Statutes:

S. 4 (3)

R. v. Terrence (pg 206-209)- Possession

Facts:

- Watching t.v.
- Friend comes by and asks if he wants to go for a drive in his brother in laws car
- Car turns out to be stolen- Terrence did not know
- OPP chase them, friend gets out and runs away- leaving Terrence in the car
- Charged with theft- inditeable offence

Issue:

What is necessary to meet the requirements of possession in **s.4(3)**

Decision:

- Court said he didn't steal the car, didn't steal the license plates –it was the other guy
- Ruled in favour of Terrence

Reasoning:

- Another tool used by courts to help them decide is to look at other appellate courts decisions
- Look to Quebec court of appeal- in a similar situation they found that in order to be found with possession there must be consent given and you must have some control over the subject matter- this was not the case in this situation so they upheld the trial decision – Terrence was not driving and was unaware of the situation when he got into the car- **no consent and no control**

Ratio:

In determining possession, per s.4(3) of the Criminal Code, there must be evidence of control to prove the unlawful act.

R. v. Morelli (pg 209-213)- Possession of Child Pornography

Facts:

- CC states you can be charged with making, distributing, possessing, and accessing child pornography
- **Constructive possession**
- This is on a computer though- so this is different from when its on tapes and films

Issue:

Does just viewing Child pornography on the Internet constitute possession?

Decision:

SCC rules that they should not be charged with possession – it has to be stored on the computer for possession- just looking at it would be a charge for accessing

Reasoning:

- How are you going to define possession in this case?
    - Knowing what you have possession of
    - You have to be able to transfer it, so it has to be a physical form
- Having control over the item

Ratio:

- In the case we looked at he was charged with possession when it should have been accessing

Important Note:

- Thus as a crown you must be sure to pick which charges you are laying because you want to be successful

R. v. Chaulk (pg 220-223) – Child Pornography

Facts:

- Possession of child pornography
- Stored on computer for several months
- Worried about having it/knowing he was in trouble, he tries to get rid of it and claim that he never had possession of it
- Defense is made that- it was **innocent possession**, he had it for a very short period of time and it was deleted

Issue: Is it possession if it is being accessed and viewed on the internet browser and not actually saved to the computer? What about the fact that it is automatically saved to the computers Cache?

Reasoning:

- He had admitted to deleting it so that he wouldn't look guilty- which shows that he knew it was bad. He also kept it for a long period of time and revisited it

(b) Consent Making Act Lawful

- What effect does consent have with regards to the actus reus of the offence

R. v. Jobidon (pg 223-236)- Consent and Bodily Harm

The Jobiden test: Consent is vitiated when adults intentionally apply force that cause serious assault or non-trivial bodily harm

Facts:

- At bar drinking, get into a fight and consent to a fistfight
- People are around watching the fight
- Jobidon punches victim and he falls unconscious and is rushed to the hospital where he later dies
- Should Jobiden be charged with manslaughter?
- **s.222 (5)(a)- Homicide**
- **s.265 assault**
- It was not an unlawful act as there was consent
- The trial judge acquitted this individual
- Court of appeal says he should be convicted of manslaughter because it is a defense to the charge if there was bodily harm that was caused
- Defense council states if any ambiguity it should be interpreted in favor of my client because his liberty is being withheld considering the manslaughter charge

Issue:

- Can consent given before a fight exempt someone from being blamed for causing serious bodily harm?

Decision:
Consent is no defence for causing serious bodily harm

Reasoning:

- They look at **s. 150 s. 286 and S. 14 – <u>no person can give consent to their death</u>**. To further analyze if the consent given before the fight would exempt him from being blamed.
- Consent is an essential element of the assault. Not a defense but an essential element of the crime- actus reus
- pg 228 – previous case cited – consent is no answer to a charge of assault when actual bodily harm is intended or caused
- When we are looking at consent we have to look at policy issues. If we allow this consent to exempt the person from causing death- we may give people a reason to engage in fights. So in order to deter them from doing so, we cannot have consent stand as a defence for bodily harm
- Justice Sopinka (dissenting opinion): - was not concerned with the general effect it would have on society
- The more serious the injury it is the more difficult it is for him to establish the role of consent.

Ratio:

- We need to keep it so that consent does not allow one to cause bodily harm.
- **The Jobiden test states**: Consent is vitiated when adults intentionally apply force that cause serious assault or non trivial bodily harm

Important Note:

- Vitiate consent= NO consent
- The court distinguishes sports separate from this type of consent – because we see a lot of fights and bodily harm in these contexts.

Relevant Statutes:
s.8 and s.9 CC were also referenced
s. 150
s. 286
s. 14
s. 225 (a)
s. 265

R. v. Cuerrier (pg 239-246)- Fraud & Consent

Fraud Test (Cuerrier Test):
Three criteria are set out which should be proven **by the prosecution** on these grounds:
- the accused committed an act that a reasonable person would see as dishonest,
- there was a harm, or a risk of harm, to the complainant as a result of that dishonesty, and
- the complainant would not have consented but for the dishonesty by the accused.

Must prove Dishonesty and Deprivation

Facts:
- person who is HIV + does not tell his sexual partners about it
- charged with aggravated assault
- has sex without telling people, no one was infected
- but does this constitute fraud?

Issue:
- What does fraud mean? S. 268
- Should not disclosing HIV only become an issue of public health and be separate from criminal law. OR should it still be considered an offense for failure to disclose?

Decision:
The Supreme Court ruled that Cuerrier's failure to disclose his HIV status constituted fraud.

Reasoning:
- All judges came to the same conclusion that the situation constituted fraud- however the judges were divided on how to implement the ruling into the law (it was argued that we shouldn't even be putting this in the criminal code)
- There is great divide in SCC of what fraud means (3 different views on how to interpret fraud)
- **Justice Corey** (Majority opinion)- we need to **look at the language** of newly amended provision – how it was interpreted previously and applied in the test, principle approach. In the past fraud = dishonesty, nondisclosure, deprivation or risk of deprivation. You cant just consent to sex it has to be consent to sex with someone who has HIV. This test is a good test, because only in limited circumstances will someone be able to positively argue fraud. Three criteria are set out which should be proven in a prosecution on these grounds:
  - the accused committed an act that a reasonable person would see as dishonest,
  - there was a harm, or a risk of harm, to the complainant as a result of that dishonesty, and
  - the complainant would not have consented but for the dishonesty by the accused.
- **L'Heureux-Dube** -Fraud should be interpreted Case by case
- **Justice McLaughlin**- creates a clear cut line you can understand- provides provisions and reasons under which a situation constitutes fraud
- The women's consent to unprotected sexual activity, therefore, was not validly given as it was obtained through fraudulent means.
- The court did, however, rule that an HIV-positive person who practices safer sex does not necessarily have a legal responsibility to disclose his or her status.

Relevant Statutes:
s. 268

s. 265 (3)- consent

R. v. Mabior SCC 2012 – Failure to Inform, Fraud, Consent

Fraud vitiating consent to sexual relations S. 265 (3)(c):

Import Cuerrier test:

- Applying the test:
  - **Dishonest act**= failure to disclose: this amounts to fraud where the complainant would not have consented had he/she known the accused was HIV +
  - **Deprivation=**Denying the complainant knowledge that exposed them to the risk of serious injury/bodily harm. Sexual contact posing a significant risk of or causes actual serious bodily harm: A significant risk of serious bodily harm is established by a realistic possibility of transmission of HIV (high viral count and no condom)- would need to have both

Facts:

- Mr. Mabior, was infected with HIV and failed to disclose his condition before engaging in sexual intercourse with 9 women.
- He is charged with **s. 273** (indictment- prison for life)
- He was convicted with 6 counts of aggravated sexual assault and acquitted on 3 of the other charges.- because it does not fall within Cuerrier because viral load and condom used and it does not constitute significant risk.
- Court of appeal of Manitoba said that using either of them negates significant risk- set aside convictions.
- None of the complainant contracted the disease.
- Crown appealed

Issue:

- Does an HIV positive person who engages in sexual relations without disclosing his condition commit aggravated sexual assault?

Decision:

Appeal allowed in part. 3 complainants have convictions restored (only had low viral load, no condom) & 1 is dismissed (because a condom was used & low viral load).

Reasoning:

Look to the *Cuerrier* test and imported it to determine if failure to disclose that one has HIV may constitute fraud vitiating consent to sexual relations under s. 265 (3)(c) of CC. **They changed it though to requiring a "realistic possibility of HIV transmission"** – this prevents us from setting the bar for criminalization from being too high or too low.

- The test examines the term "fraud" under **s. 265(3)(c).** Must contain 2 elements: dishonest act and deprivation- denying the complainant knowledge that exposed them to the risk of serious bodily harm
- During the Currier case the courts looked to parliament and other common cases, the charter, for interpretation of "fraud" – which are now considered for this case
- Applying the test:
  -**Dishonest act**= failure to disclose: this amounts to fraud where the complainant would not have consented had he/she known the accused was HIV +
  *this was the case with all complainants
  -**Deprivation=**sexual contact posing a significant risk of or causes actual serious bodily harm: A significant risk of serious bodily harm is established by a realistic possibility of transmission of HIV

  *This was the case in ¾ complainants

Looked at what "Realistic possibility of HIV transmission" means- there must be a high viral count and no condom use. **If a condom is used and viral therapy is regularly sought, then the individual will not be charged under s. 265 for not disclosing their condition – You need to have both**

- Courts looked to the history of the term "fraud" -Why was the term fraud super broad, then specific and now wanting to be generalized again? In the 1980's the term "fraud" was based on Victorian aged norms – which aren't the most relevant and we had the charter values that came in at this time. We needed a new definition of "fraud". The court also looked to other jurisdictions to determine the meaning of "vitiating consent by fraud" –in many of the other jurisdiction you needed actual transmission. They didn't necessarily advocate the ideals of other countries but they did say that we couldn't keep a definition of "fraud" too general then we would be criminalizing too many behaviors that were more innocent.

Ratio:

- A person with HIV who engages in sexual relations without disclosing their condition commits aggravate sexual assault when they commit the dishonest act (failure to disclose) and when they deprive the sexual partner posing a significant risk of or causes actual serious bodily harm. Only when there is a low possibility of transmission of HIV will they not be charged under s. 265 (both condom use and a low viral load).

Important Notes:

- Many interveners involved in the case
- Interveners considered whether this belongs in criminal law? Or should it be civil law?- because if we criminalize this people may be deterred from getting tested
- The crown wanted to make it law that HIV individuals have to disclose to all partners in all sexual interactions – they looked to other countries to see how this was dealt with
- We need to punish criminal conduct and deter this behavior.
- In this case to it was found that they were not distinguishing between purposely withholding info and failure to inform (ie. If the person had a low viral count and used a condom and was asked by the complainant if they had HIV – they would be able to lie and say no and still not be charged- because they took the safety precautions).

Relevant Statutes:

s. 265
s.273

(c) Omissions- Legal Duties to Act

- Should there be criminal liability for failure to act?
- Do you have a legal duty to act?
- **Traditional view of CC is to prevent people from acting in a certain way. There has been reluctance towards using a failure to act as an actus reus.**
- There are provisions where if you fail to act you may be criminally liable
- Violation of **S.9 of CC**
- Canadian criminal law is still unsettled on liability regarding omissions

Moral and Legal Duties (pg 260-261)

Fagan v. Commissioner of Metropolitan Police (pg 264)- Actus Reus & Mens Reus Overlap

Facts:

- Mr. Fagan is convicted of assaulting a police officer
- Police officer tells him to move his car and park in a specific spot and is directing him
- Mr. Fagan runs over the foot of the officer and words are exchanged
- Mr. Fagan turns off his car while on the police officers foot
- Defense argues that there was no actus reus (it was an accident) there was only an omission and that cannot constitute the crime
- We agree that there is a failure to act, no actus reus – court decides that the individual should be convicted.

Issue:

- Did the prosecution prove that the facts amount to an assault?
- Do the *mens rea* and *actus reus* have to occur at the same time?

Decision:

- Appeal dismissed. Accused is guilty

Reasoning:

- The continuing act of being on the officers foot, turning off the car and slowly pulling off = actus reus during this the mens reus occurred and the two converged at some point causing the offence
- Dissent argues that we do not have the actus reus and the mens reus converging at the same time. The act ended before the intention occurred
- James, writing for the majority, held that Fagan's conduct could not be describes as a mere omission. At the outset there was an act constituting a battery, but it was not criminal because there was no element of intention. However, the action became criminal from the moment that the intention was formed (when he refused to move and shut off the engine) which followed directly from the continuing act. The action and intention did not have to occur at the same time, because the action was a continuing act that overlapped with the intention to create a crime. Therefore, as the act and intention were present in the offence, he must be found guilty.
- Bridge, in the dissent, stated that the defendant cannot be found guilty because after the intention was formed he did nothing that could constitute the *actus reus* required for assault.

Ratio:

- The *actus reus* and *mens rea* do not need to occur at the same time; they can be superimposed on each other when there is a continuous act.

Important Note:

- However the actus reus may not happen initially- but as long as the actus reus and the mens reus converge then you have a crime

R. v. Miller (pg 268-270) English Case– An Omission can = Actus Reus

- **An omission can be treated as AR** if a person creates a situation in which harm to a person or property will occur, and he or she intentionally or recklessly fails to take steps to prevent the harm; if the accused does not live up to the created duty, then it is a crime by omission.

Facts:

- Man is drunk, starts a cigarette, causes a fire, doesn't put out the fire and moves to another bedroom
- Is charged with arson
- Found guilty at trial
- Court of appeal dismisses the case
- Appealed the higher court of lords

Issue:

- Can we resort to the common law when it comes to omissions?
- Is the actus reus of an offence present when a defendant accidentally commits an offence and then fails to take action to correct the offence?

Decision:

Appeal Dismissed. Original conviction upheld. House of Lords said that the person has a duty to take reasonable steps to distinguish the fire or call department

Reasoning:

- Diplock, writing for the court, states that the actus reus can be deemed to have occurred, because Miller created a situation that would result in harm if he recklessly failed to prevent the harm. As the appellant created the liability himself it would make no sense to excuse him of criminal liability.

Ratio:

- **An omission can be treated as actus reus** if a person creates a situation in which harm to a person or property will occur, and he or she intentionally or recklessly fails to take steps to prevent the harm; if the accused does not live up to the created duty, then it is a crime by omission.
- NO we cannot resort to the common law when it comes to omissions, this would go against **S.9 of CC.**

R. v. Thornton (pg 279-283) – Legal Duty & Common Law Crimes

Facts:

- Charged with Common nuisance **s. 180**
- Accused knows he has HIV and donates to Red Cross
- Does not disclose condition

- Unlawful act or failure to discharge a legal duty?
- **S.216**- breached a legal duty -Provision 216 that applied to this case, this man had a duty of care when he donated his blood and the duty was breached when he did not disclose HIV
- Trial judge convicts
- Crown said there was a failure to discharge a legal duty
- Defense argues: There is nothing in the CC about donating HIV infected blood
- **Court of appeal** agrees with defense argument that there is not provision about donating HIV blood. So the court of appeal looks to common law and convicts him of a common law crime. -Appeal court Judge looks at **s.219** which outlines what legal duty is and states that legal duty can be derived from either statute or common law (**s.180**)– Court references dicta from *Donoghue v Stevenson* (as common law) and we know from that case that there is a common law duty to refrain from conduct that can cause serious harms to others.
- *Donoghue v Stevenson* is an analogous case showing that the defendant did have a legal duty – thus he was guilty
- SCC says by doing the above actions, the Court of Appeal breaches **S.9 of CC** because we no longer do common law crimes.

Issue:
Is there a legal duty for an individual to disclose they are HIV-positive when donating blood?

Decision:
- **SCC** said he had a legal duty to disclose the info under **s. 216** and he therefore committed Criminal negligence under **s. 219**

Reasoning:
- SCC said that -Legal duty in **180** is not exactly the same as **219** but we should import the same meaning of legal duty in the two
- **S.219 criminal negligence** – (B) if you omit to do something that is in your duty you are negligent. – Criminal negligence encompasses both statute and common law duties
- We have many cases that imported common law duties (for ex. If you are a parent and your spouse or a third party is abusing your child, you have a common law duty to do something)
- In this case they say you knew you were HIV + and it could harm third persons, yet you donated.- That constitutes an offence in CC

Ratio:
Yes there is a legal duty to report the condition

Important Note:
- Court of Appeal and SCC all interpreted s. 216 differently in this case- the Court of Appeal went against s.9 in their decision because they found that it was a common law crime when interpreting s. 216
- Court of appeal messed up because they made it a common law crime- SCC was able to ground the charge in a statute and still come to the same conclusion/decision.

Relevant Statutes:
S. 216
S. 180
S.9
S. 219

R. v. Peterson (pg 286-297)- Necessities of Life/ Person under "charge"

Trial judge found son to be responsible as:
- Old man was dependent (couldn't care for himself)
- The 2 parties were related and son was aware of dependency
- Son controlled the fathers living conditions
- Son had control the fathers personal care
- Son choose not to provide necessaries of life
- Old man was incapable of taking himself out of the son's care

Consider these factors for S. 215

Facts:

- Life expectancy has increased. Therefore people are having kids later and thus may find themselves looking after their parents and children at the same time.
- Son was found to be responsible for looking after his dependent father- he failed to provide the necessities
- Charged under **s. 215 of CC**
- He appeals the conviction- stating that the evidence does not prove that his father was under his care

Issue:

What does "under the charge" mean and when is some considered to be under someone else's charge?

Decision:

Appeal dismissed. Father was under the charge of the son

Reasoning:

- SCC notes that Son was responsible for personal care, daughter for financial documents (the kids had signed off on this)
- Neighbors testimony and daughter testimony (backed up brother saying dad was stubborn- judge said that because the daughter hadn't actually visited or lived there in the last 6 months - not credible source)
- Expert witness- doctor says that the man had been showing signs of dementia and could not obviously care for himself or look after himself and this had been going on for about a year.
- What else did the court look at when determining whether the son was responsible for father –they looked to other cases and concept of "control", looked up the dictionary definition, and considered the relationship of the two parties involved, took into consideration what neighbors saw/witnessed. Looked at the fact that they signed a document by power of attorney and divided duties between mans kids
- Pg. 291 necessities of life – the offence is made out by conduct showing a marked departure from the responsibilities of a person who has someone "under their charge" (under his care)
- Why does court of appeal agree with trial judge: based on facts it was easy to see that man was on decline and accused could have gone to a facility for help at any time. Father was not mentally competent so they would not accept his incompliance as a defense
- Dissenting Judge: comments on a need for reform to section of cc to clearly define what is "neglect" as we are entering an era where kids are taking care of their parents and their own children at the same time.
- Trial judge found son to be responsible as:
    - Old man was dependent (couldn't care for himself)
    - The 2 parties were related and son was aware of dependency
    - Son controlled the fathers living conditions
    - Son had control the fathers personal care
    - Son choose not to provide necessaries of life
    - Old man was incapable of taking himself out of the son's care

Important Note:

- Provision does not just apply to family members, you could have a friend under your charge
- This is the first case in which "under charge" s. 215 (1)(c) is being questioned
- Should this type of offence be in the CC?
- Where do we draw the line, we allow adults and young people to take risks, so should we not allow elderly to do this? Some have compared the laws for elders to those of children (we do what is the best for the child, Should we do whatever is the best for the elder?)

Relevant Statutes:

s. 215

(d) Voluntariness -Defining Conduct that is Not Voluntary (pg 300-301)

- **Voluntariness is a requirement for every offence not just criminal**. The voluntariness of someone's action will be measured based on whether conduct is a product of conscious choice
- Defining conduct that is not voluntary (how the SCC defined voluntariness)
    - *R v. King*: (TASCHEREAU) There has to be an mens reus whenever there is an actus reus –there has to be a willpower to do an act whether the accused knew or not that it was prohibited by law. King was not convicted because there was not a mens reus

- *Rabey v.* R: (RITCHIE) Automatism- unconscious involuntary behavior. There is an unconscious involuntary act, where the mind does not go with what is being done. The person though capable of action is not conscious of what he is doing. (DICKSON) absence of volition in respect of the act involved is always a defense to a crime. No act can be a criminal offence unless it is done voluntarily. A defense that the act is involuntary entitles the accused to a complete and unqualified acquittal. – The crown must prove it was a voluntary act. **If you don't have voluntariness you will be acquitted – you need a mens reus**
- *R. v. Parks*: (LA FOREST) Although spoken of as a defense, automatism is a subset of the voluntariness requirement, which is a part of the actus reus component of criminal liability – kills mother in law while sleep walking – his behavior was found involuntary and he was acquitted
- *R v. Stone*: (BASTARACHE) Automatism is a state of impaired consciousness- the individual is capable of action but has no voluntary control over the action. A defense of automatism amounts to a denial of the voluntariness component of the actus reus. Bastarache also held that the accused had to prove any defense of automatism on a balance of probabilities in this case. –**Reverse onus** – onus of proof put on accused for defense.

Pg. 304 Case 5 – gives examples of cases that were involuntary- no conviction/charge

R. v. Lucki (pg 306) – Involuntary Acts

Facts:

- Operating a motor vehicle in Saskatoon
- Did not stay to the right side of the highway
- Skidded when making a turn and hit on coming traffic- inconveniencing other drivers
- **S. 125 (9) *The Vehicles Act*** of the province of Saskatchewan
- The required conduct for the offence is driving a vehicle, and the circumstance is failing to keep to the right and inconveniencing people on a public highway.

Issue:

- There are many sections under the act that do not require a mens rea and only actus reus. Is this one of them?
- Did Lucki commit the necessary *actus reus*?
- Did he possess the necessary *mens rea*?

Decision:

Judge ruled no- it was not a voluntary act and therefore he is not to blame /not guilty
Judgment for the defendant

Reasoning:

GOLDENBERG: Was seen to be on the wrong side of the road as a result of making an involuntary act – caused by the condition of the roads – therefore accused is not to blame. Although there are many sections under the *Act* that do not require *mens rea*, however this is not one of them. He says that the legislature did not intend for a person to be convicted under the section for such an instance. As he did not voluntarily commit the action – it was impossible for him not to do it – he cannot be to blame for the outcome. It does not matter if there is *mens rea* required, even if this is an offence of strict liability the defendant is still not because the conduct is involuntary.

Ratio:

- An action being involuntary is not the same thing as it being performed without *mens rea*.
- A person is not held liable for involuntary conduct.

Important Notes:

We cannot make generalized rules where no mens rea is needed, because innocent people would be found guilty for involuntary acts

R. v. Wolfe (pg 307)- "Reflex"

Facts:

- Appellant found guilty following a trial on a charge of assault causing bodily harm.

- After finding of guilt, the trial judge granted the appellant a conditional discharge
- Appellant appeals the finding of guilt
- Appeal allowed- guilt set aside, acquittal entered
- Appellant is a part owner of a hotel in Kingston
- Complainant was told to not enter premises on some occasions for good reason
- Despite being prohibited from the premises, the complainant entered the property
- Appellant ordered him to leave, but complainant refused
- While Appellant was phoning police, complainant punched him- appellant turned quickly and hit complainant with telephone which caused a serious cut on the forehead

Issue:

- Did the trail judge properly convict Mr. Wolfe?

Decision:
Appeal allowed- charged acquitted

Reasoning:
Dissenting judge argues that the wording of the trial judges report contains sarcasm in a way and thus she did not really consider the action to be a reflex.- however this was not argued very strongly

Ratio:

- If the trial judge regarded the appellant's action to be a "reflex", no offence would be committed because some intent is necessary in an assault causing bodily harm. Instead the trial judge found it not to be a reflex and charged him.

Important Note:

- The judge could have done when they said there was no reflexive action they could have given a conditional discharge…
- if there was actus reus then you would look to see if there was mens reus (intent)

R. v. Swaby (pg 307-310)- Voluntary Act & Actus Reus Required

Facts:

- 2 individuals in a car
- Followed by police
- Car stops, J ran into a backyard close by, the accused drove off
- Accused was found with unregistered, restricted handgun in the backyard of where J was also was found
- J pleaded Guilty to possession of the handgun and received a sentence of time served
- The accused was tried before judge and jury on indictment containing eight counts
- Accused was convicted of being an occupant in a vehicle knowing that there was a present, unlicensed, restricted weapon contrary to **s. 91 (3)**
- According to J, the gun belonged to the accused. According to the accused the gun belonged to J
- Accused appealed
- Court of appeal allowed the appeal, set aside the conviction **and ordered a new trial**

S. 91(3)

- **Crown had to prove occupancy of the vehicle and the appellants knowledge of the weapon**
- **Crown had to prove that the coincidence of occupancy and knowledge was attributable to something amounting to voluntary conduct on the part of the appellant – it must be interpreted to exclude the possibility of conviction for what would amount to an involuntary act**

***Possible defense S. 94**- just acquired knowledge of weapon- given time to deal with situation

Reasoning:

- The act must be the voluntary act of the accused for the actus reus to exist
- There must be some short period of time afforded to the person who has just acquired the knowledge of a weapon to deal with the situation (for example. If a taxi driver became aware of a weapon brought in his cab) – This would stand as a defense it Is stated in **s. 94**

- It is the conduct of the driver following the coincidence of occupancy and knowledge that counts, and if the driver acts appropriately to get either the gun or himself out of the vehicle- if he does so, there is no voluntary act for criminal law to punish
- If the appellant only acquired the knowledge of the weapon at the point when J was leaving the vehicle, he would be entitled to an acquittal
- Appellant testified that at no time until after the charges were laid, did he know there was a gun in his car

Ratio:

- Voluntary conduct is necessary element for criminal liability (even if the provision creating the offence does not expressly require it)

Relevant Statutes:

s. 91 (3)
s. 94 (1)- unauthorized possession in a motor vehicle- new provision

R. v. Ryan (pg 310-312)- Australian Case – Reflex & Involuntary Act?

Facts:

- The accused read a novel about a hero who decided to rob a service station to obtain money to invest in a sweepstake. The hero in the book went to the station with a gun, tied up the attendant, took the money and subsequently won the sweepstake. He then paid back the attendant using the winnings and gave the rest to his parents
- The accused decided to copy this process and emulate his hero
- According to the accused, while tying up the attendant the attendant made a sudden movements and the gun accidentally discharged- killing the attendant.
- The jury dismissed this as being an "accident" and convicted him of murder. Accused was sentenced to life in prison
- The accused appealed and argued that the jury ought to have been informed about involuntariness, which would have resulted in an acquittal – the firing of the gun was a reflex.

Issue:

- Is an act to be called involuntary merely because the mind worked quickly and impulsively?

Decision:

- Appeal refused. Judge said you didn't think it through, but you did have time to think and you decided to act quickly and it was a conscious decision therefore actus reus is there.

Reasoning:

- WINDEYER: the word involuntary is sometimes used as meaning -an act done seemingly without the conscious exercise of the will an "unwilled" act: sometimes as meaning an act done "unwillingly", that is by the conscious exercise of the will, but reluctantly or under duress so that it was not a "willful" act.
- The word "reflex" being used in this case does not refer to the normal definition of the word. The accused loaded the gun and brought it to the store. (they compared the case to others that had a "reflex" act involved and found that it was not the same (ie. Like a swarm of bees coming out of nowhere so you freak)
- **He voluntarily put himself in the position he was in** – even though it was the final pull of the trigger that lead to the lethal act- he voluntarily created the situation.
- We cannot use reflex as a mere excuse. It cannot be applied to a case where a fully conscious man has put himself in such a situation
- The death was a probable and foreseeable consequence

Ratio:

If the accused voluntarily creates the situation (as seen here) then there is no excuse for quick impulsive actions occurring during the situation.

Important Note:

- The act which caused the death was…. an act of the accused
- **The question for the jury is not regarding involuntariness but whether or not this homicide is murder**

Relevant Statutes:
Homicide?
Murder?

Kilbride v. Lake (pg 312-316) New Zealand- Strict Liability Offence

Facts:

- Kilbride was charged under the *Traffic Regulations Act* for operating a motor vehicle without a current "warrant of fitness" (registration) displayed.
- He did in fact have one, and it was displayed, however it was somehow removed when he left the car – which was also the time that the officer gave him the ticket for the offence.
- He subsequently proved that the car was registered and that the warrant had been displayed when he left the car. However, the offence simply states that you must display the warrant at all times, and when the officer gave the ticket the warrant was not displayed.
- He was convicted at trial, which he appealed.
- Originally accused said I cant be convicted I did not have the intent/MR to commit the crime.
- Opponent said this is not a mens rea issue it is a liability offence you owe a duty to drive your car with all the proper components including registration – you don't need the mens rea because this is not of mens rea kind- mens rea is irrelevant.

Issue:

- Can something done perfectly innocently by a defendant become an offence by reason of an intervening cause beyond his control, and which produced an effect outside of his knowledge?
- Cleary the accused operated his vehicle, but we aren't sure whether the omission was voluntary (him omitting to display the registration)

Decision:

- Appeal allowed, conviction quashed.

Reasoning:

- WOODHOUSE: holds that this is not a *mens rea* issue. He quotes Halsbury's, which states, "a person cannot be convicted of any crime unless he has committed an act prohibited by law, or failed to live up to a legal duty. The act or omission must be voluntary". Therefore, the defendant must be shown to be responsible for the physical ingredient of the crime to be convicted. Until this is proven, the question of *mens rea* is irrelevant. The *actus reus* must be committed voluntarily, and it is not the line of conduct that produces the prohibited event, but the event itself. Here, the prohibited event is permitting a vehicle to be on the road accompanied by an omission to display a warrant. Both must occur simultaneously; however, in this case only the first aspect was present. It was the extraneous cause that resulted in the conditions for conviction becoming present, and the defendant did not voluntarily bring this about. Therefore, as the *actus reus* is not proven, the *mens rea* issue does not matter.
- In order for him to be responsible it has to be a voluntary act and he did not even know this existed. And he had no other course/option open to him. He had no idea it was no displayed. He did not have free and conscious choice. It was not a voluntary omission.

Ratio:

- Disregarding any mental elements of an offence, a person cannot be criminally responsible for an act or omission unless it was done or omitted in circumstances where there was some other course open to him.
- If the *actus reus* of the offence is committed involuntarily, then the defendant cannot be convicted.

Important Note:

- You have to separate actus reus from mens rea (Voluntariness is an actus reus issue)

Strict Liability:

- In criminal law, **strict liability** is liability for which *mens rea* (Latin for "guilty mind") does not have to be proven in relation to one or more elements comprising the *actus reus* (Latin for "guilty act") although intention, recklessness or knowledge may be required in relation to other elements of the offence.
- The liability is said to be strict because defendants will be convicted even though they were genuinely ignorant of one or more factors that made their acts or omissions criminal. The defendants may therefore not be culpable in any real way

ACTUS REUS: **It has to be an act or omission, it has to be voluntary and it has to be proven beyond a reasonably doubt**

(e) Causation (pg 319)

- When the criminal code prohibits a consequence or result of an act it is necessary to determine if the actions actually caused the outcome. Canadian law does not take an overly strict approach to causation and allows a person to be held liable for consequences that they may have not caused entirely on their own (extra parties), condition of victim (thin skull, or extra intervening events. – this is where causation issues usually arise- are they at fault- especially with manslaughter* where it may not have been intentional.
- In some offences, the actus reus requires the causing of certain consequences. These offences include: all homicides, willful damage to property **(s 430),** arson **(s. 433),** and causing bodily harm **(s. 221)** or death **(s. 220)** by criminal negligence
- Parliament has generally defined causation broadly for the purpose of homicide offences (manslaughter, murder, infanticide) **S. 222 (1)**
- There are also specific and more restrictive causation rules under the first degree murder provision in **s. 231 (5).** Specific causation rules in **s. 224-226** deal with certain issues of remoteness between the accused's actions and the victims actual death and some intervening causes such as treatment.
- Some offences specify a particular outcome (ie. homicide- requires proof that the act of the accused caused death). Causation must be proven by the Crown beyond a reasonable doubt.
- Our code has no general principles regarding causation but only a number of special rules concerning homicide **(ss. 222 and 224-228**) **Where the factual situation does not fall within one of the statutory rules of causation in the code, the common law general principles of criminal law apply to resolve any causation issues that may arise –** *Smithers*

- ***The causation standard (test) expressed in** *Smithers* **is applicable to all forms of homicide (murder manslaughter, infanticide).** *Smithers* **says the test is whether the act was a contributory cause of the offence.**

Test of causation:

- **Was there an unlawful act in this case?**
- **Was there causation? Did the unlawful act cause the death?**

- *HARBOTLE* **(extra is required for 1st degree because it is so severe) SO WE USE SUBSTANTIAL CAUSE TEST FOR FIRST DEGREE MURDER (shows that there was an increased degree of moral culpability for s.231 (5) 1st degree murder coupled with proof of mens rea for murder = guilty verdict for 1st degree)**

- **Courts have indicated that the general test in homicide cases is one of significant contributing cause – proven beyond a reasonable doubt**

- *** Beyond de minimis= "More than a trivial cause" –** After Nette case we see that they replace "beyond de minimis" with "significant contributing cause"

Smithers & Nette Cases – **test for causation/significant contributing cause**

- **Causation has 2 components:** factual causation and legal causation
  - **Factual Causation (aka "but-for cause)**: Logical link between the accused conduct and the prohibited consequence. If the crown cannot prove that the link exists- causation is not found. Factual causation is concerned with an inquiry about how the victim came to his/her death, in a medical, mechanical, physical sense and with the contribution of the accused to that result. **The trier of fact usually asks: "But for" the action(s) of the accused, would the death have occurred?**
  - **Once factual causation is established you have to look for legal causation**
  - **Legal Causation**- concerned with whether or not the accused person should be held responsible in law for the death that occurred. (Should that person should be criminally responsible for the act). Legal causation is informed through the wording of the section creating the offence and principles of interpretation. "Who among those who have factually caused a death should be held liable for causing that death in the eyes of criminal law**". Should the accused person be held responsible in law for the death of the person?**
  -

***Actus reus and mens reus are SEPARATE: **Causation is actus reus!**

Smithers v. R. (pg 320-326)

Causation Test for Manslaughter

Facts:

- Smithers (defendant) was a black player on a hockey team, and members of the opposing team (particularly Cobby) racially insulted him during a game.
- About 45 minutes after the game he ran up to Cobby and punched him twice in the head, and Cobby doubled over (took place in parking lot). Then he kicked him in the stomach and Cobby fell to the ground and within five minutes appeared to stop breathing.
- Cobby was dead on arrival at the hospital and the cause of death was determined to be "spontaneous aspiration from vomit" during an autopsy – choking on his own vomit. Cobby's epiglottis malfunctioned, and this led to his death.
- Smithers was convicted of manslaughter at trial and the conviction was upheld on appeal.
- The crown argued that the jury should have been limited to only hearing the expert evidence (given by the doctor) and not all the other evidence (other witnesses, parents, players, etc). But the judge ruled that no the jury should consider all of the evidence.

Issue:

Was the kick a sufficient cause of the death to attract criminal liability? (Legal causation?)

Decision:

Appeal dismissed- conviction upheld

Reasoning:

- Was there an unlawful act in this case?- YES

- Was there causation? Did this unlawful act cause the death?
- The court articulates its test- It needs to be proven that the kick was a contributing cause of death.
- Even if the epiglottis was malfunctioning, if the kick was a contributory action to the death then Smithers is responsible.
- Court said they should import the Thin Skull principle- you take your victim as you get them
- Maybe the epiglottis malfunctioned but we import the thin skull principle and the kick was contributory to the death. The proper test was implemented and therefore the appeal was dismissed.

Ratio:
Yes, the kick was sufficient
Relevant Statutes:
s. 236

R. v. Harbottle (pg 327-329)

Standard of Causation for 1st Degree- Substantial Cause Test

- Crown must establish that accused has committed an act or serious of act that are substantial and integral cause of death
- The accused may be found guilty of first degree murder **s.231 (5)** if the Crown has established beyond a reasonable doubt that:
  - The accused was guilty of the underlying crime of domination or of attempting to commit the crime
  - The accused was guilty of the murder of the victim (Factual Causation)
  - The accused participated in the murder in such a manner that he was a substantial cause of the death of the victim
  - There was no intervening act of another which resulted in the accused no longer being substantially connected to the death of the victim; and
  - The crimes of domination and murder were part of the same transaction that is to say, the death was caused while committing the offense of domination as part of the same series of events. (Pare)

Facts:
- Accused was involved in the murder of a young woman
- The accused held the girls legs down while the other defendant strangled the girl
- Crown must establish that accused has committed an act or serious of act that are substantial and integral cause of death

Issue:
Court needs to figure out what the test for causation is in the context of this case? What test should we apply for causation of first-degree murder?

Decision:
On the facts, the Court found that Harbottle's conduct in holding the victim's legs while she was strangled to death was sufficient to be a substantial and integral cause.

Reasoning:
- Court says look at the sentence and the stigma, we need to have a restrictive causation test (the substantial causation test requires that the accused play a very active role in the killing – usually a physical role. Although there are instances where substantial cause of death could be found without the person having physically done the killing)

Ratio:
- The Court held that the standard for this provision must be strict requiring a "substantial and integral cause".
- Court looks to *Smithers case* – and distinguishes it as this is first degree murder and not manslaughter so we need more stricter criteria

Important Note:

- **POLICY: There is distinction in the degree of causation required for the different homicidal offences. There is a different causation test for first degree murder**
- This standard does not apply to all first-degree murder, where the standard articulated *in* *R v Nette* still applies.

Relevant Statutes:
s. 231 (5)- first degree with predicate offence
s 745- life imprisonment

R. v. Nette (pg 330-337)- Addressing the Jury on Murder

Facts:

- man breaks into old women's house
- Is going to rob her
- Ties her up
- She is found died a few days later
- Disclosed to an undercover cop that he did it, but then changed his story saying that she was dead when he got there
- Nette was arrested and charged with first-degree murder under **s. 231 (5)**
- The Crown achieved a conviction at the lower court (upheld by the British Columbia Court of Appeal) using the *Smithers* test, which the defence said was too low of a threshold.

Issue:
What is the proper threshold of causation required for first-degree murder?

Decision:
Appeal dismissed. Conviction Upheld

Reasoning:

- Court has to determine test of causation
- Looks at factual and legal causation
- look to the common law tests
- civil law is of no assistance here says the court
- Harbottle- but we should have the same test for all offences
- they look at substantial cause test which they say applies to **s. 231 (5)** – first degree murder.
- ARBOUR says *smithers* is an appropriate test – but wants to explain the test in a different way to the jury – use "significant" instead of "not significant" (call it substantial test). The judge states that the *Smithers* test applies for all forms of homicide and the additional test used in *R v Harbottle* applies in the case of first degree murder, rather than to all forms of homicide. On the topic of jury instruction, she held that it is better to state the test positively as a "significant" cause rather than negatively and that this is really the same concept as *de minimus*, which they take to mean a cause that is "not insignificant". They state that this test is still met by the appellant's actions and the jury would have decided the same thing with the new charge.
- test is applied!!!
- L'HEUREX -DUBE for Dissent says we need to keep the test explanation the way it was in Smithers or else we are changing the law. With the changing of the phrasing in the jury instruction from "not insignificant" to "significant"- They say that this new test creates a much higher threshold of causation than the *Smithers* test, and that there is more than a semantic difference between "significant", "not insignificant", or "more than trivial".

Ratio:
When addressing a jury, the standard of causation for second-degree murder should be positively stated in that the actions of the accused must have been a "significant contributing cause" of death. However, the *Smithers* causation standard still applies to all forms of homicide (even first degree)

Important Note:

- Worked to reconcile *Smithers* and *Harbottle*

Relevant Statutes:
s. 231 (5)

R. v. Talbot (pg 337-339)

- Ontario Court of Appeal
- You can use it when referencing but it is not binding
- Someone is kicked and someone dies
- What should we be using with regards to the *Smithers test*
- Also talks about the "But for" test which refers to factual causation **("But for" test**- victim wouldn't have died "but for" the act hadn't occurred...)
- Tries to clarify *Smithers/Harbottle*- he endorses the ARBOUR view from *R v. Nette*
- To determine legal cause they used the normative inquiry

The jury does not consider legal and factual causation separately, but at the same time: Jury is asked to decide whether the accused's actions significantly contributed to the victims death. A contributing cause can be a cause that exacerbates as existing fatal condition, thereby accelerating death **(s.226)

R. v. Maybin SCC 2012

Facts:

- The accused, 2 brothers began to beat the victim inside of a bar (over a pool table issue)
- After serving several blows to the head, the victim fell unconscious
- A bar tender then came outside and struck the victim in the head
- Medical evidence was inconclusive as to which blows caused death
- Victim dies from brain bleeding
- Trial judge acquitted the brothers & bouncer-did the trail judge err in law and did the bouncers actions sever the chain of causation?
- Crown Appealed
- Court of appeal used **"but for"** approach and said that but for the actions, the victim would not have died. Also that the risk of harm caused by the bartender (intervening actor) could have been reasonably foreseen to the accused. BC Court of appeal used a reasonable **foreseeability approach** to make their decision. Dissenting for court of appeal used the **independent act test**
- Appeal was allowed- Acquittals set aside and a new trial ordered

Issue:

- Did the appellant's assaults remain a **significant contributing cause of death** despite the intervening act of the bouncer because the intervening act was reasonably foreseeable and not an intentional independent act? (or did the intervening act break the line of causation?) Who is to blame for causing death?

Decision:
Appeal dismissed.

Reasoning:
KARAKATSANIS: Consults the **test for causation** used in *Smithers* (causation with regards to manslaughter is found when the actions are a "contributing cause of the death, outside the *de mininmis range*". In *Nette,* this Court affirmed the validity of the *de minimis* causation standard expressed in *Smithers* for culpable homicide. Writing for the majority, Arbour J. noted that causation in homicide cases involves two aspects: factual and legal causation.

- **Factual causation –** inquiry about how the victim came to his or her death, in a med-ical, mechanical, or physical sense, and with the contribution of the accused to that result" (*Nette*, at para. 44). The trier of fact usually asks: **"But for"** the action(s) of the accused, would the death have occurred?
- **Legal causation** is based on concepts of moral responsibility and is not a mechanical or mathematical exercise. Should the accused person be held responsible in law for the death of the person?

*Arbour's causation test (significant contributing cause)

- I agree with the Court of Appeal that the trial judge erred in the factual causation inquiry in this case. He stopped with his assessment of the medical cause of death and did not consider the contribution of the

appellants to that result by asking whether the deceased would have died "but for" the actions of the appellants. The intervening of the bouncer is part of the legal causation analysis

- The doctrine of intervening acts is used, when relevant, for the purpose of reducing the scope of acts which generate criminal liability.
- The fact that the intervening act was reasonably foreseeable, or was not an independent act, is not necessarily a sufficient condition to *establish* legal causation. Even in cases where it is alleged that an intervening act has interrupted the chain of legal causation, the causation test articulated in *Smithers* and confirmed in *Nette* remains the same.
- In my view, the chain of causation should not be broken only because the specific subsequent attack by the bouncer was not reasonably foreseeable. Because the time to assess reasonable foreseeability is at the time of the initial assault, rather than at the time of the intervening act, it is too restrictive to require that the precise details of the event be objectively foreseeable.
- I conclude that it is the general nature of the intervening acts and the accompanying risk of harm that needs to be reason- ably foreseeable.
- Overall the court is saying that yes we are using the Nette and the Smithers tests and going with significant contributory cause- which does not help to settle the big disputes between the tests in those cases. The court says you can use the tests but then doesn't really explain the differences or tell you what to do if they are opposite results, or when to use the tests.
- Reasonable Foreseeability- at the time of the initial assault- When Maybin hits the victim, that's when we look at reasonable foreseeability. Legal causation does not require that the precise future consequences be foreseen. Applying reasonable foreseeability here, it is reasonably foreseeable that when you start a fight in a bar, it is expected that other staff and people will get involved.
- Reasonable foreseeability, independent actor test, etc - You can use these tools to see if significant contributory cause was met.
- In this case, did the court endorse the thin skull principle? – One would think that the thin skull principle still applies in this case because they endorse it in the *Smithers* case

Ratio:

- The dangerous and unlawful acts of the accused must be a significant contributing cause of the victims death
- The general nature and risk of harm associated with the intervening act was reasonably foreseeable, and the act was in direct response to the appellants unlawful actions – Did not break chain of causation

Important Notes:

- ***There are lots of tools that can be used to analyze whether an intervening act break the chain of causation in a case***
- The tools acknowledge that an intervening act that is reasonably foreseeable to the accused may well not break the chain of causation, and that an independent and intentional act by a third party may in some cases make it unfair to hold the accused responsible.
- These approaches may be useful tools depending upon the factual context. However, the analysis must focus on first principles and recognize that these tools do not alter the standard of causation or substitute new tests. The dangerous and unlawful acts of the accused must be a significant contributing cause of the victim's death.

Relevant Statute:
S. 222(1)- homicide
S. 224 – chain of causation
S. 225

The Fault Element

(a) Strict Liability & the Constitutionalization of Mens Rea

We will be looking at different types of offences:
Each area enacts regulatory offences -things that are offences within their jurisdiction: for the protection of public from the risk of harm. Either will be absolute liability or strict liability *(R v. City of Sault St. Marie)*

Absolute liability offences: crown has to prove beyond reasonable doubt that the accused committed the act- but do not have to prove any additional fault (like guilty knowledge or negligence). Once this is done, the accused has **no defense** they will be convicted

Strict Liability Offences: Crown does not have to prove any fault. Crown has to prove act beyond reasonable doubt, however the accused has the opportunity to prove du diligence or absences of negligence on a balance of probabilities (They can say that they at least exercised reasonable care). This type of offence has also survived charter challenges

*Absolute and Strict are basically the same- except that in Strict the accused has a potential defense available. When an offence is committed that involves a substantial term of imprisonment, you cannot deprive the person of having a defense available to them to try and prove on a balance of probabilities that it was an honest and reasonable mistake/took reasonable care. This would violate their charter rights, so it cannot be an Absolute liability offence.

Public Welfare Offence: evolved as a means of doing away with the requirement of mens rea for petty police offences. No mens rea required, thus administrative effiency and higher deterrence because there is no excuse/defense for the person's actions. Absolute & Strict liability offences. Pollution offences are public welfare offences. Words like "cause" and "permit" fit much better into an offence of strict liability.

True Crime: the offence is criminal and the crown must establish a mental element, namely that the accused who committed the prohibited act did so intentionally or recklessly with knowledge of the facts constituting the offence or with willful blindness toward them

The mens rea of a criminal offence may be either subjective or objective, subject to the principle of fundamental justice that the moral fault of the offence must be proportionate to its gravity and penalty.

Subjective men rea= the accused has intended the consequences of his/her acts, or that knowing of the probably consequences of those acts, the accused has proceeded recklessly in the face of the risk. The requisite knowledge or intent may be inferred directly from what the accused said or says about his or her mental state, or indirectly from the act and its circumstances – *Said to underline that no one will be punished for anything he or she did not intend or at least advert to, and it supports ones feelings that a morally innocent person will not be punished.*

Objective mens rea= is not concerned with what the accused intended or knew. Rather the mental fault lies in failure to direct the mind to a risk, which the reasonable person would have appreciated. Objective mens rea is not concerned with what was actually in the accused's mind, but with what should have been there had the accused proceeded reasonably. – *The Modified Objective Test (that is considering individual differences and comparing similar people to those like them with similar human frailties) would theoretically protect some of the individuals the subjective view would protect, but by no means all* (*Tutton*). *It would introduce a differentiation between individuals in criminal proceedings that seems foreign to our law- however well-meant. The qualified objective approach loses most of the practical advantages sought to be attained by the objective approach. – you also wouldn't have to deal with the difficulties of instructing a jury!!!!*

Mens Rea offence (true crime): we may get some hints from the importance of the language.

Beaver v R (pg. 367) – Mens Rea Offence (True Crime)

Facts:

- Max Beaver got his brother to agree to sell heroin to an undercover RCMP officer.
- Defense was that the brother was told by Max that it wasn't heroin.
- Charged with possession and sale of an illegal narcotic. Max was the one in actual physical possession of the drug but Louis was charged by association
- In defense, Louis claimed that he thought the package was milk sugar and that they were only trying to defraud the RCMP officer.
- At trial, the judge instructed the jury by telling them that if they find that they were in possession their actual knowledge was irrelevant

Issue:

- The issue before the Supreme Court was whether a conviction based on possession requires knowledge of the nature of the object. (Is mens rea an essential element of the offence?)

Decision:

- Was a reasonable defense – he was told it was something else – however that mistake did not negate the MR for the trafficking offence. Louis Beaver acquitted

Reasoning:

- The Court held that knowledge was required. CARTWRIGHT J., writing for the majority stated that it is a fundamental principle of criminal law that the *mens rea* of an element of an offence must be proven to secure a conviction. It has been established that provisions in the Drug Act are criminal law, and that any offence that allows a punishment of prison requires proof of *mens rea*.
- Defense says that if you are unaware the crown will not be able to imprison me because they have to prove that I have knowledge of what the substance is
- **Penalty** is also pretty serious- this helps to determine why MR is an essential determinant of the offence
- The Court held that Beaver did not know the character of the substance, and he was acquitted of possession. However, he did represent the substance as a narcotic and therefore was convicted on the charge of selling a narcotic. Because he set out with the intent to sell a drug- just didn't know what the drug was
- *Oakes case* – possession automatic for trafficking- reverse onus – similar events. Beaver is pre charter though and Oakes was after the charter
- In true crimes in order for conviction the crown has to prove the act and the fault element – they have to know that they did something bad/committed the act

Ratio:

- The Court held that an offence based on possession, such as possession of a narcotic, requires **the Crown to prove that the accused had subjective knowledge of the nature of the object in possession**

* It has always been a principle of common law that mens rea is an essential element in the commission of any criminal offence against the common law. In the case of statutory offences, it depends on the effect of the statute.

R v City of Sault Ste. Marie (pg. 373) –Goes through the 3 types of offences

***Helps to provide some guidance in to identifying strict liability offences. The distinction between true crime and regulatory offences was central to the decision in this case.**

1. **True crimes**: offences that require *mens rea*. Presumption of mens rea (Beaver, Sault Ste Marie). If parliament leaves it silent assume MR must be proven unless explicitly said it does not.
2. **Offences of strict liability**: offences in which there is *no necessity for the Crown to prove the existence of mens rea* but the defendant can get off by proving that they acted reasonably in the circumstances. Public welfare offences tend to fall in this category, as they are not in the *Code*, but have the risk of large fines or imprisonment associated with them.
3. **Offences of absolute liability** – *The Crown does not need to prove mens rea*, and the defendant has no chance to exculpate himself by showing he was acting reasonably. These are generally only offences with very minor fines as punishment.

Things to consider when analyzing the type of offence

- Is there the potential of jail time- if it had then it would have to be mens rea or strict liability.
- If its absolute liability offence it doesn't care what you did or didn't do and what you know or didn't know. – you committed the offence. End of story. NO defence.
- If its strict liability the company would have the ability to show that they did take precautions to prevent the incident from happening. Due diligence
- Beaver case was a true crime case (you need knowledge for possession) vs public welfare case (which they said in Sault st. Marie would usually fall into strict liability)

Facts:

- Sault Ste. Marie was responsible for the disposal of garbage in their city.
- They entered into an agreement with a third party to dispose of garbage in a particular area.
- This party created a landfill that leaked into the nearby river causing pollution.

- S. 32(1) of the *Ontario Water Resources Act* (now s. 30(1)) stated that every person or municipality that discharged, deposits or causes or permits the discharge or deposit of pollution into water is liable under summary conviction at the first offence for a fine of not more than $5000, and on subsequent offences of a fine not more than $10,000 or to imprisonment for less than a year.
- The charge was dismissed at trial as the judge held that the city was not itself responsible for the disposal operations, but a conviction was entered at trial on the basis of strict liability under the *Act*.

Issue:

- What is a public welfare offence and is it a strict liability offence?

Decision:

- Appeal and cross appeal dismissed. New trial ordered. Public welfare offence & Strict liability offence

Reasoning:

- DICKSON says: We need to decipher whether or not this was a true crime- In which you cannot be convicted without mens rea or if it was strict liability or absolute.
- Dickson, writing for a unanimous court, goes through all of the reasons for and against public welfare offences in other jurisdictions and comes to the conclusion that they are to have a lesser fault requirement then true crime offences (those in the *Code*). However, when they are serious and have the risk of hefty fines or imprisonment the defendant should not be absolutely liable; they should have the chance to **excuse themselves if they can show, on a balance of probabilities, that they lived up to reasonable standards in the situation**. He defines three types of offences:
- The courts site that administrative reasoning have been cited for preferring strict liability crimes are preferred because then you don't have to prove mens rea in every case. If it is an absolute liability offence it may better deter people from committing such acts.
- He goes on to state that another reason why specific offences fall under the latter two headings are because they are created in provincial statutes. Provinces have no control over criminal law under the *Constitution Act* therefore they cannot be "true crimes".

In deciding that it was a strict liability offence the courts look at the fact that it is a pollution statute / a regulatory offence, look to the penalty- a person should at least be able to have the defense available to them that "they exercised reasonable care"

Ratio:

- Offences that are created in provincial statutes can only be absolute or strict liability offences, because provinces have no jurisdiction to enact criminal law.
- **In general, public welfare offences are strict liability offences.**

If parliament decides they want it to be a mens rea offence or don't want it to be, then they have the power to do that.

Reference Re Section 94(2) of the Motor Vehicle Act (BC) (pg. 396)-Absolute Liability

*Government has passed a statutory provision and wants to know if it is consistent with the Charter. Legislature says they are going to tell everyone what type of crime this is. They say it is an absolute liability

*Crown only needs to prove the prohibited act beyond a reasonable doubt – no defenses.

Facts:

- **S. 94(2)** of the *Motor Vehicle Act* stated that a person who drives a motor vehicle on a highway while his license is suspended is guilty of an offence, and is liable to a fine between $300 and $2,000, and imprisonment between a week and six months (on the first offence). The government is arguing that this does not violate s.7 of the *Charter*.
- The Court of Appeal ruled that this violated because absolute liability offences cannot have mandatory prison sentences. Having mandatory prison sentences for crimes that have no defense violates the principles of fundamental justice and the right to be presumed innocent. However, they did not answer whether or not merely having imprisonment available as an option for an absolute offence, was contrary to s.7.

Issue:

Can absolute liability offences have imprisonment available as a punishment?

Decision:
Appeal Dismissed. The Section violates s.7 of the Charter and is not saved by s.1 of the Charter and is of no force and effect

Reasoning:

- LAMER, writing for the majority, states that even having imprisonment available as a punishment for an absolute liability offence always violates s.7 of the Charter, and renders the section of the legislation of no force or effect unless it is justified by s.1. He states that the principles of fundamental justice rest not just in the procedural context, but also in our rights. The combination of imprisonment and absolute liability always violates s.7 and must be saved by s.1 in order for it to remain valid.
- **S. 8-14 of Charter are examples of principles of fundamental justice.**
- Lamer does not find that this section is saved by s.1, as it does not "minimally impair" the impugned right (this judgment is pre-Oakes). In her concurring judgment, Wilson talks more about the objectives of imprisonment, and how they are not served by imprisoning people without a chance to defend themselves.
- We have to make sure we don't punish people who are morally innocent.
- If you look at the penalty and the penalty is imprisonment that is going to deprive the person of their liberty- you cannot have an absolute liability crime with a term of imprisonment because that violates s.7 of charter.
- They are not talking about prison terms that result from situations in which people didn't pay fines; they are talking about offences where imprisonment is the penalty in the CC.
- Courts said as a general rule they are not going to succeed under s.1 – it has to be a very exceptional circumstance (Administrative expediency isn't going to cut it)
- **Court said you cant have absolute liability (where the crown has to prove the prohibited act beyond a reasonable doubt but the defendant can prove negligence on a balance of probabilities (as a defense)- lower standard for the defendant**

Ratio:

- Absolute liability offences that have imprisonment available as a punishment violate s.7 of the *Charter*. Imprisonment without a chance of defense is contrary to the principles of fundamental justice.

Relevant Statutes:
S. 94(2)- Motor vehicle Act
S. 7 Charter

Vaillancourt v R (pg. 432)- Objective vs Subjective Foreseeability

Facts:

Subjective foresight- meaning to cause the death- the act was intentional **S. 212 (a) (ii)** -murder
Objective foresight- doing something that you know may cause death or is likely to cause death. **S. 212 (C), S. 213** Anything he/she knows or **ought** to know – manslaughter
When proving mens rea for murder crown must prove fault requirement

- Vaillancourt was convicted of second-degree murder resulting from a robbery at pool hall.
- He had a knife and thought that his friend also had a knife when in fact his friend had a gun.
- He explicitly told his friend before the event that he did not want to have guns involved. – because it could go off accidentally and kill someone, he just wants to rob. Friend gives bullets to him – so he assumed the gun was no longer loaded
- During the robbery, his partner fired a shot and someone was killed. – Vaillaincourt argues that because he had the bullets he had no idea the gun would go off/be used.
- The charge falls under **s. 230 (d)** (old 213 (d) provision) which negates any necessity for *mens rea* of killing to be proven before a conviction can be entered.
- The defendant is challenging this section, stating that it is contrary to **s. 7 and 11 of the *Charter*.**
- ***Accused argues that there is no mens rea- no fault element, because he did not intend to kill anyone***
- Crown has to prove the armed robbery, but because you prove the robbery doesn't mean I can be convicted of murder…. The crown would have to prove the murder as well.

Felony murder= constructive murder

Issue:

- S. 230 (d) contrary to S.7 of the charter because it imposes absolute criminal liability?

Decision:

Appeal allowed. New trial reordered

Reasoning:

- LAMER, writing for the majority, clearly decides that this section is contrary to the *Charter* as it establishes an absolute criminal liability.
- He states that it is a principle of fundamental justice that there must be at least a minimal mental state requirement before criminal liability can be imposed.
- A failure to require this is contrary to s.7.
- He goes on to say in *obiter* that all crimes of **murder require a subjective fault** element to be proven because of the limits on freedom that their punishments impose.
- Murder statute used to say that if the act is unlawful it is murder – robbery is unlawful therefore any death resulting from that act would be murder. The court looks to other jurisdictions to decide on what to do and they have found that this unlawful act murder is no longer allowed in other common law countries and has been abolished. Other common law jurisdictions have either abolished it or changed it so that mens rea must be found.
- Looking at the dicta of the court,
- For some cases you need to have fault element but it can be subjective or objective. Because of the stigma or penalties of some crimes, a subjective mens rea is required (theft, murder) – the lower threshold for other offences would be objective mens rea
- **It is a principle of fundamental justice that a murder conviction can rest on nothing less than proof beyond a reasonable doubt of subjective foresight**
- I'm coming to the decision that 213 fails to be because it does not meet the lower threshold of objective foreseeability. (Thus, they got rid of (D) and renamed the statute as s. 230)
- Of course its important that people not get killed in armed robberies in pool halls and we understand why parliament made the rule but it fails section 1 test /charter analysis and there are other options available to parliament if they are really concerned about this. Thus, it has to be changed.

Ratio:

- All crimes with significant stigma attached, such as culpable homicide and constructive murder, require proof of the *mens rea* element of objective foresight of death. **There must be a fault requirement**.

Notes:

Pg. 434 – 435 the court takes you through the old provisions of murder.
Old section 212 is now **section 229 – culpable murder**

R v Martineau (pg. 442) –What type of fault requirement is required for murder?

Murder – requires subjective foresight of death
Subjective foresight- meaning to cause the death- the act was intentional **S. 212 (a) (ii)**
Overall: you need a subjective foresight with regards to death for a murder conviction. "knows" is subjective but when you say "ought to know" it is objective.
After this case the rule became: there are no objective standards for murder; key to Martineau is that you can't call it murder unless it has subjective foresight of death.

Facts:

- Martineau and friend were out with weapons – knowing they would commit a crime
- Martineau thought that they were only going to commit a "B & E".
- They broke into a trailer, robbed the occupants at which time Martineau's accomplice shot and killed the husband and wife living there.
- Martineau is charged with second degree murder under **s. 230 (a)** with which states that homicide is murder if it is committed during a break and enter and a death ensues when a person means to cause bodily harm to commit the crime or get away, even if he doesn't want to kill the person, or think that it is likely that they will die.
- Martineau was convicted at trial
- The conviction was quashed upon appeal, which the Crown appealed to the Supreme Court.

Issue:
Does a charge of murder require intent and is it subjective or objective intent that is required? Is s. 230 (a) constitutional?

Decision:
Appeal dismissed

Reasoning:

- LAMER following his decision in *R v Vaillancourt,* again states that he believes that with all murder charges, there must be objective foreseeability with regards to death. He goes on to say that in order for it to not violate the Charter, Murder must have subjective intent, as it is the most heinous and punished crime, and therefore this high threshold should be set, saying "**a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight of death.**" He decides that this section, as well as the rest of s.230 should be deemed contrary to the *Charter* and casts significant doubt on the validity of any felony murder sections of the *Code*. When they look at **s. 230** there is no subjective foreseeability with death thus they say it violates the charter. **The introductory paragraph of s. 230 removes from the Crown the burden of proving beyond a reasonable doubt that the accused had subjective foresight of death- THUS UNCONSTITUTIONAL.**

***it is a principle of fundamental justice that subjective foresight of death is required before a conviction for murder can be sustained. – this is because of the stigma attached to the conviction and the penalties.**

- L'HEUREUX-DUBE, writing a lone dissenting opinion, believes that there was in fact objective foresight in this case, particularly with the second killing, and therefore that the conviction should be reinstated. She also states that policy considerations in the legislation indicates that crimes such as those listed in s. 230 should be considered murder as a deterrent. She thinks that requiring only objective foresight is not contrary to the principles of fundamental justice. Absolutely fine as long as we have a fault element. She feels its fine to have objective foreseeability of death. Its very nice to talk about other jurisdictions that have a fault element with regards to murder but it is not all subjective some of them have objective- thus its not a strong argument. Then she looks to police statistics to show that there is a pressing policy issue here. She says they spent so much time talking about stigma and there isn't much difference between the stigma of manslaughter and murder. Objective foreseeability of death is constitutional.
- SOPINKA agrees with Lamer that **s. 230 (a)** should be struck down as contrary to the *Charter*. However, he does not agree that all instances of murder must require subjective intent to be proven in order to obtain a conviction, as the scope of this case is not wide enough to justify such a far-reaching policy decision (leaning on the ideas of judicial restraint).
- Court is saying subjective foreseeability with respect to death. Why the difference between murder and manslaughter? The penalty for manslaughter can be much less than murder (depending on the case). Manslaughter you can have the lower threshold of objective foreseeability because the penalties vary.
- Courts also discuss 229 (c) "knows or ought to know" - LAMER looks at this section and says we need to rethink this too. The provision is "ought to know" is objective – the statute is disjuncted you can be convicted if you "ought to know" it was likely to cause death. It says "knows" which is objective- and we need subjective for murder. We have imposed a subjective test for murder. The provision needs to be rewritten without that language in it.

*If the SCC said that this provision should not be in the CC but yet it still is….so then you don't use it as the Crown. But s. 213 was taken out in 1991….so how come 229 didn't go with it?

*Judiciary cant rewrite provisions unless its unconstitutional- they can strike it down

Ratio:

- **S. 230 (a)** is contrary to the *Charter*.
- A person cannot be convicted of murder without proof of subjective foresight of death.

R v Shand (pg. 455) –s. 229 –Culpable Homicide

s. 229(c) is satisfied where the following elements are present:
1. Accused must pursue an unlawful object other than to cause the death of the victim or bodily harm to the victim knowing that death is likely
2. Unlawful object must itself be an indictable offence requiring MR (subjective MR)
3. The accused must intentionally commit a dangerous act (subjective MR) in furtherance of the unlawful object
4. The dangerous act must be distinct from the unlawful object only in the sense that the unlawful object must be something other than the likelihood of death, which is the harm that is foreseen as a consequence of the dangerous act
5. The dangerous act must be a specific act, or a series of closely related acts, that In fact results in death, though the dangerous act need no itself constitute an offence
6. When the dangerous act is committed, the accused must have subjective knowledge that death is likely to result. (Subjective knowledge that it can cause death)
Court finds 229 (c) applicable – the act must be intentional and there must be subjective foresight of death.

Facts:

- Ontario court of appeal case
- Shand accompanied two friends to a drug dealer's home with the intention of stealing some marijuana.
- Drug dealer said he didn't have any for them (but his gf was standing with a bag of weed and started to move to the basement- they chase her)
- At one point, Shand produced a gun and one of the persons in the home was shot and killed
- One of Shand's companions claimed the shot occurred accidentally when the victim approached Shand while the pair argued.
- Another person present in the home claimed that Shand threatened the home's occupants with the gun before striking the drug dealer in the face with the gun, pointing the gun at the victim, and firing.
- The drug dealer told police that he heard the gun accidentally discharge as Shand struck him on the head with it, but testified in court that Shand grabbed him and pointed the gun at his head, causing him to stumble, and that the gun went off as he fell.
- The drug dealer's girlfriend gave a similar statement to police to her boyfriend's, later changing her story in court because she noted there were no bumps or bruises on Shand's head to show that he had been struck with the gun.
- Shand did not testify, but conceded that he was guilty of manslaughter and possession of a loaded, restricted firearm.
- The jury convicted Shand of B and E with intent, armed robbery, and second-degree murder.
- He was sentenced to life imprisonment with no parole eligibility for 15 years.
- Defendant argues that 229 (c) MR requirement had not really been established and was unconstitutional with regards to s. 7 of the Charter (S. 7 requires that a minimum MR of intent to cause serious bodily harm to be show for a conviction for a murder charge) – The crown didn't do this.

Issue:

1. Is **s. 229 (c)** unconstitutional;
    - Because it permits a conviction for murder without proof of an intent to cause serious bodily harm to the victim?- it does not require subjective foresight for murder- it says you can convict upon proof that the accused "ought to have known that death was likely to result" – *Martinuea* pg 445 – so is this allowed? Or is this unconstitutional, do you NEED to prove subjective foresight because this is a murder charge?
    - because it is vague?
    - because it is overbroad?
2. Did the trial judge make a mistake in pinpointing what the dangerous act was? – He said it was the initial act of entering the house (SCC says it was entering the basement)- So maybe he applied the test correctly but to the wrong facts?

- Defendant also argues that 229 (C) does not apply here as there must be a dangerous act separate and distinct from the unlawful object (he says that the gun was apart of the robbery and thus this requirement is not satisfied)

- SCC rules that the provision does not intend that the dangerous act need to be distinct in the sense of being unrelated to the acts carrying out the unlawful object.. In fact they must be related and the dangerous act must be committed in pursuance of the unlawful object in order to fall within the provision. THUS ROULEAU finds that the trial judge had an adequate factual basis to charge the jury on s. 229 (C)
- The legal principles are there and they are right. The trial judge gave us some idea of what we have to prove to use 229 (c). The question is - If they believe the gun went off accidentally, then is 229 (c) applicable?

Decision:
Appeal dismissed

Reasoning:

- **ROULEAU writing for a unanimous court, holds that the ruling by the Supreme Court in *R v Martineau* does not make s. 229(c) unconstitutional, but rather only the "ought to know" section is unconstitutional- because "ought to know" is objective.** A reading of the decision to render the entire section unconstitutional would conflict with the pains Lamer CJ went to to clarify that section. Finding the section constitutional, he then addresses the jury instructions. He finds no fault in the instruction that would have caused the jury to make an error as finders of fact. He does feel that some clarification on the term "likely" may have been helpful but does not find this to be fatal to the decision reached..
- Courts say please provide us with some examples so that we can understand whether the section does include subjective foresight. The following questions are posed: did he know the gun was loaded, were there other witnesses, was there a safety on the gun? These provide some guidance as to whether the mens rea of 229 (c) is fulfilled.

3. Was there subjective foresight present in the action of taking out the gun and using it to scare the drug dealers? Even though he did not mean to use it to shoot them, when you take the gun out you have to know there is a threat of death and therefore an awareness of death as a possibility.
4. There is a difference between the possibility of something happening and intending to do something (because I stand there with a loaded gun and point it at someone- there is the potential that I could kill someone- but that doesn't mean that's what I intend to do).

Court finds 229 (c) applicable – the act must be intentional and there must be subjective foresight of death.

s. 229(c) is satisfied where the following elements are present:
1. Accused must pursue an unlawful object other than to cause the death of the victim or bodily harm to the victim knowing that death is likely
2. Unlawful object must itself be an indictable offence requiring mens rea
3. The accused must intentionally commit a dangerous act in furtherance of the unlawful object
4. The dangerous act must be distinct from the unlawful object only in the sense that the unlawful object must be something other than the likelihood of death, which is the harm that is foreseen as a consequence of the dangerous act
5. The dangerous act must be a specific act, or a series of closely related acts, that In fact results in death, though the dangerous act need no itself constitute an offence
6. When the dangerous act is committed, the accused must have subjective knowledge that death is likely to result.

Unlawful object= Robbery
Dangerous act= entering the basement bedroom and drawing his gun in attempts to subdue the occupants of the room (do not frame the dangerous act too broadly)

Ratio:
S. 229(c) is not unconstitutional as a whole; only the "ought to know" section should be read out.

- Canada has no uniform definition of fault requirements that apply to offences in regards to either subjective or objective foreseeability. OR specified which specific fault elements apply to each offence. Therefore it is left to the judiciary to decide- which leads to a lack of clarity. Parliament has not been inclined to define them.

Relevant Statutes:
S. 229 (c)

Important Notes:

- Culpable homicide is murder where a person, for an unlawful object, does anything that he knows …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.

Doing these two things reveal the subjective knowledge that committing the acts will likely lead to death:

- Death is the result.
- Subjective mens rea was active throughout.
- **S 229(c)** refers to someone doing something that's dangerous…and that dangerous act results in the death of someone. The dangerous act in turn establishes the knowledge that death is likely to occur.

(b) Subjective Mens Rea

R v Theroux SCC (pg. 363 & 500) –Fault Requirement for Fraud (MR & AR) S. 380

MR- Its function in criminal law is to prevent the conviction of the morally innocent- those who do not understand or intend the consequences of their acts. **Typically, mens rea is concerned with the consequences of the prohibited actus reus.**

The test for MR for fraud is subjective. Whether the accused subjectively appreciated that certain consequences would follow from his/her acts- Subjective knowledge of the prohibited act. Subjective mens rea – look at the act itself and what become obvious, Statements made by the accused, actions of the accused, other witnesses.

Test for Fraud (Crown must prove beyond a reasonable doubt)

- The *mens rea* for fraud is established by proof of:
    - Subjective knowledge of the prohibited act
    - Subjective knowledge that the prohibited act could have as a consequence of deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk)
- The *actus reus* of the offence of fraud will be established by proof of:
    - The prohibited act, be it an act of deceit, a falsehood or some other fraudulent means
    - Deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victims pecuniary (monetary) interests at risk

***Whether the conduct and knowledge required by these definitions are established, the accused is guilty whether he actually intended the prohibited consequence or was reckless as to whether it could occur.**
Whether or not the accused believes there actions were moral does not matter.

Facts:

- Théroux was a businessman involved in developing a new subdivision.
- He took deposits from people towards building a house in the subdivision and told them that their deposits were insured. He even had posters about the insurance on the wall in his office.
- Unfortunately, the deposits were not insured and he knew this, however, he honestly believed that the project would be completed and therefore that the deposits would be safe. So he claims he is not at fault.
- The project was not finished as his company went bankrupt. Many people completely lost their deposits.
- He was convicted of fraud under **s. 380 (1)(a)** and his appeal was dismissed by the Quebec Court of Appeal, conviction upheld.

Issue:
What constitutes the mens rea of the offense of fraud? Does it matter whether or not he honestly believed there was no risk to the money?

Decision:
Appeal dismissed
Reasoning:

- MCLACHLIN, writing for the majority, delivers a very clear outline of the offence of fraud for the majority. She states that it is clear that the defendant committed the two actus reus elements of the offence:

dishonest act and deprivation. The **dishonest act** is proved by proof of deceit, which is clear in this case as he knew that there was no insurance. The **deprivation** is proved because there was a risk of deprivation of the depositors' funds caused by the deceit.

*McLachlin outlines what the constituent elements are for actus reus and mens reus

- **Recklessness**- it is established when it is shown that the accused, with such knowledge, commits acts which may bring about these prohibited consequences, while being reckless as to whether or not they ensue.
- She says the Mens rea= subjective knowledge of the prohibited act
- However, the mens rea issue is trickier. Generally, to prove mens rea the Crown must prove that the defendant subjectively understood the consequences of the act and committed the actions anyway. If you know that you will kill someone, but think that killing is permitted, you can still be charged with murder. The question is whether one subjectively understands that their actions could result in a prohibited outcome. The mens rea for fraud consists of the subjective awareness that one was undertaking a prohibited act that could cause deprivation in the sense of depriving another party of property, or putting that property at risk. The fact that the defendant didn't think that the deprivation would occur does not matter. McLachlin also says that recklessness will result in this criminal responsibility. She goes on to say that you can draw an inference that a defendant understood that their action could lead to a prohibited outcome and that this inference can be rebutted. The inference cannot be rebutted in this case.
- After rejecting English case law that said that fraud requires someone subjectively realizing that his or her conduct falls below a reasonable standard of care, McLachlin finishes by stating that this definition of fraud is pragmatic. When someone deceives another, they should not be able to escape conviction just because they didn't think that the deceit would result in loss, even though they realized that it could. The defendant satisfied the actus reus and mens rea necessary for conviction in this case. He knew his statement to be false, and it can be inferred that he knew that he was placing the depositors' $ at risk.
- The proper focus to determining the mens rea of fault is to ask whether the accused intentionally committed the prohibited acts, knowing or desiring the consequences proscribed by the offence.

In this case/Application to Facts:

Actus reus:

1) Misrepresentation about the deposits being secured 2) deprived investors of their money.

Mens rea:

1) He knew that he lied about the insurance 2) he knew (obvious) that there is a risk to deprive the investors. The fact that he believed that the company would not become insolvent doesn't change the fact that he knew he lied and that he knew there was A RISK of deprivation. Doesn't matter how probable he thinks the risk is, it is irrelevant.

Ratio:

- To prove *mens rea* for fraud the Crown must prove that the defendant subjectively was aware that their actions could lead to a prohibited outcome; their view of the morality of this outcome is irrelevant.
- Subjective awareness that one was undertaking the prohibited act which could cause deprivation of another or put their property at risk. Hoping the deprivation would not take place is no defence.

R v Buzzanga and Durocher (pg. 490) –Willful Blindness & Promoting Hatred

The accused must have one of the following to show Subjective mens rea (awareness of risk) positive state of mind:

- Intent/Knowledge
- Recklessness/Willful blindness

The general mens rea which is required and suffices for most crimes where no mental element is mentioned in the definition of the crime, is either the intentional or reckless bringing about of the result with the law, in creating the offence, seeks to prevent and, hence, under this section is either the intentional or reckless inciting of hatred in the specified circumstances.

In general, *mens rea* is satisfied as long as the outcome was intended or achieved through recklessness, however, including the term "willfully" implies that recklessness will not suffice to prove the necessary *mens rea*, unless recklessness is also mentioned in the provision.

Facts:

- The two appellants were trying to get the attention of French Canadians living in their area to take charge in a political debate regarding a French language school in their area, and to encourage them to fight for it.
- They circulated a pamphlet that was supposedly written by anti-French bigots to stir people to action, although they had written it themselves.
- They were charged under the now **S. 319 (2)** with inciting hatred against an identifiable group and convicted at trial.
- Defendants argued that they did not intend "to raise hatred towards anyone"

Issue:

- The threshold question to be determined is the meaning of "willfully" in the term "willfully promotes hatred" in **s. 319 (2)** of the CC
- It primary meaning is "intentionally", but it is also used to mean "recklessly" depending on the context in which it is used. – So which do we use in this situation?

Decision:

Appeal Allowed. New Trial Ordered

Reasoning:

- MARTIN, writing for the court, discusses how you deal with the concept of the reasonable person in criminal law. In general, you do not want to impose the thoughts of a reasonable person on a defendant, as you need to prove that they were subjectively intending to commit the crime. Instead, you want to find an objective process whereby you can determine someone's subjective state of mind.
- In this case it is clear that while the defendants might reasonably have been able to see the consequences of their acts (i.e., making French people feel discriminated against), it is clear that this was not their intent. They clearly had the intention of rallying support for the school in mind at the time of the offence, and **therefore they cannot have had the necessary mens rea to be convicted for this offence.**
- You cannot always believe the accused's evidence of their state of mind at the time of the offence. It is accepted but not always conclusive.
- Proceeding to the element analysis, Martin determines that all of the external elements of the offence were present in this case. They actually did something – distributing flyers – to promote the hatred. Their communication went outside of a private group – the general public, and it was determined that the flyers objectively promoted hatred.
- Next, he looks at the fault elements. The section of the *Code* says that one must "willfully" promote hatred in order to be convicted. It means willfully promoting the hatred. **What does "willfully" mean?** To answer this he looks at many sources, and determines that it generally means intending to cause an outcome, or recklessly causing the outcome. Recklessly denotes a state of mind where the party foresees that his actions may cause the prohibited result, but proceeds anyway. However, the defence argues that the term "recklessly" is included in some sections of the *Code*, but not this one, so it cannot be used. **Thus, MARTIN finds that under this section of the code, "willfull" means with intention of promoting hatred, and does not include recklessness.**
- He then attempts to define "intention". As he concluded that proof of an intention to promote hatred is essential to constitute the offence: under **319 (2)-** it is necessary to consider the mental attitude which must be established to constitute intention to promote hatred. Some say that it must include direct intention, or "desire", while others say that only indirect intention, or foreseeing that the outcome is certain, but not necessarily desiring the outcome. The court accepts that both are legitimate definitions of intention. The difference between indirect intention and recklessness is that you must be certain that the outcome will result in indirect intention, but in recklessness you only need to realize that the result may occur. MARTIN finds that the actors foresight that a consequence is highly probable, as opposed to substantially certain, is not the same thing as an intention to bring it about. The actor's foresight of the certainty or moral certainty of the consequence resulting from his conduct compels that if he acted so as to produce it, then he decided to bring it about in order to achieve his ultimate purpose.
- On balance, Martin finds that the trial judge misunderstood "willfully" and focused on the intentional nature of the defendant's conduct in distributing the pamphlets, rather than on the question whether they actually intended to produce the consequence of promoting hatred. In the result, a new trial is ordered.
- MARTIN concludes that the appellants "willfully" promoted hatred under S. 319(2) if :
    - Their conscious purposes in distrusting the document was to promote hatred against that group

- OR they foresaw that the promotion of hatred against that group was certain or morally certain to result from the distribution of the pamphlet, but distributed it as a means of achieving their purpose

- Wilfully has not been interpreted consistently in the case law.
- The statutory use of willfully – wilfully is not in **319(1)** but is in **319(2)** So the courts look at **319 (2)** – (1) is about a public context, with the risk of inciting breach of peace (2) is different.
- **319(1)** does not have a *mens rea* "word" so they substitute a general standard. (Because this is a true crime – can't be absolute liability) Establish subjective intention or recklessness.

Ratio:

- Courts will endeavor to infer the state of mind of an accused using objective methods.
- *Mens rea* is required to prove all criminal offences unless the section expressly states that it is not required.

Sansregret v R (pg. 506)- Recklessness v Willful Blindness, Consent

Negligence vs. Recklessness

Negligence is tested by the objective standard of the reasonable man- a departure from his accustomed sober behavior by an act or omission which reveals less than reasonable care will involve liability at CIVIL LAW but forms no basis for CRIMINAL LAW. **Recklessness,** to form a part of the criminal mens rea, must have an element of the **subjective.** It is found in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. AKA the conduct of one who sees the risk and who takes the chance.

Willful Blindness vs. Recklessness

Recklessness involves knowledge of the danger or risk, and persistence in course of conduct, which creates a risk that the prohibited result will occur. **Willful blindness** arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant.

- The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it
- The culpability in willful blindness is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry.

A court can find willful blindness only where it can almost be said that the defendant actually knew. He suspected the fact, he realized its probability, but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny the knowledge.

*Recklessness = subjective mens rea

Facts:

- Sansregret and the complainant lived together. Their relationship had been violent
- On September 23, 1982, the complainant ended their relationship. A few days later Sansregret attacked the complainant with a file-like object. The complainant managed to calm him down by holding out hope of some sort of reconciliation and engaging in intercourse.
- The complainant reported the incident to the police, but Sansregret's parole officer encouraged her not to press charges, as it would interfere with his parole.
- Sansregret again broke into the complainant's house where he picked up a butcher knife and entered the complainant's bedroom. The complainant, fearful for her life, again tried to calm him down by pretending that there was some hope of reconciliation. They engaged in intercourse shortly later, but the complainant stated that she engaged in intercourse only to prevent further violence.
- She later filed charges against the appellant for rape.
- Sansregret was acquitted at trial as the judge found that he had mistakenly believed she had consented and under the ruling in Pappajohn the trial judge felt she had no choice but to uphold stare decisis.
- The Court of Appeal overturned that ruling finding there was not an air of reality about the mistaken belief in consent, and Sansregret appealed to the Supreme Court.

Issue:

- Is willful blindness relevant to a mistake of fact in consent in a sexual assault charge?
- Did she consent?

Decision:

- Appeal Dismissed. He was willfully blind. Deliberately ignorant

Reasoning:

- MCINTYRE (majority) entered a conviction on the basis that even if the accused was not subjectively aware that there was no consent, he was wilfully blind to the lack of consent. The culpability of wilful blindness is the accused's refusal to inquire whether the complainant was consenting, when he was aware of the need for some inquiry, but decided not to inquire because he did not want to know the truth. Because the appellant was willfully blind to the consent of the complainant, the defense of mistake of fact cannot apply.
- He argues he believes that she consented.
- Reckless – has nothing to do with negligence. It is subjective mens rea.
- Glanville Williams – if you suspect something and you refrain from further inquiry to not be fixed with knowledge -Deliberately omitting to make further inquiries:
    - Willful blindness is tentative knowledge
    - You suspect something and you realize it's probable and you refrain from further knowledge

Ratio:

- The defense of mistake of fact does not apply in a sexual assault case where the accused was willfully blind to the lack of consent.

R v Currie (pg. 509) – Willful Blindness Test

Wilfull Blindness – subjective test:
When assessing for willful blindness you must ask whether or not the accused suspected something and willfully chose to do nothing to inquire further about it. NOT whether someone in their situation would make further inquiries (that would be objective).

Facts:

- Young adult drinking in a bar and a stranger approaches him to cash a cheque for him, and will give him an extra $5.
- Accused goes to the bank and cashes the cheque. Claims he had no idea that the cheque was stolen – looked honest, looked respectable. Claims he was just trying to help.
- Also he had a friend at the bar to corroborate his story, and testimony matched statements to police.

Issue:
Was the appellant willfully blind?
Decision:
Appeal allowed
Reasoning:

- Trial judge was confused about the meaning of wilful blindness. He applied an objective test about whether the accused SHOULD have been suspicious. But this is not the test, it's a SUBJECTIVE test for wilful blindness about whether that accused suspected and did nothing.
- Court says we are not concerned about what a person ought to have done, but we care about what the person knew when he was committing the act.
- If the person is willfully blind can that fulfill the mental component of a crime?- You deliberately chose not to make the inquiries, it's deemed knowledge if your suspicions are aroused and you don't make these inquiries
- You have to be deliberately ignorant, not just failure to inquire

R v Briscoe 2010 SCC (pg. 512) – Def'n Willful Blindness (leading case)

This case is now the controlling authority in defining willful blindness as "deliberate ignorance"

Willful Blindness -> deliberate ignorance
You deliberately fail to inquire further about something when you know you should

Facts:

- Courtepatte, a 13-year-old girl, and a young friend were lured into a car on the false promise of being taken to a party. Briscoe drove the group (Laboucan and three youths) to a secluded golf course.
- Laboucan had said earlier in the day that he would like to find someone to kill and Courtepatte was chosen as the victim.
- Upon arrival, Briscoe opened the trunk and, at Laboucan's request, handed him pliers.
- Briscoe stayed at the car as the others went onto the golf course under the guise of seeking the party.
- Briscoe rejoined the group around the time that one of the youths hit Courtepatte from behind with a wrench. For a moment, Briscoe held on to Courtepatte and angrily told her to be quiet or shut up.
- Briscoe then stood by and watched as Courtepatte was brutally raped and murdered.
- All five persons involved were charged with kidnapping, aggravated assault and first-degree murder and the two adults, Briscoe and Laboucan, were jointly tried by a judge alone. Charged with "knowledge of the likelihood of death"
- Briscoe was acquitted.
- The trial judge found that the *AR* for being a party to the offences was proven, but not the *MR* because Briscoe did not have the requisite knowledge that Laboucan intended to commit the crimes.
- The Court of Appeal overturned the acquittals and ordered a new trial, holding that the trial judge erred in law by failing to consider willful blindness.

Issue:

- What is required to make a finding of willful blindness- Can willful blindness satisfy the requirement of "knowledge of the likelihood of death"? (this is the issue we are focusing on in this excerpt).

Decision:

- Appeal dismissed.

Reasoning:

- CHARRON: writing for the court, rejected the argument brought forward by the appellant that willful blindness was but a heightened form of recklessness. Willful blindness is best understood as "deliberate blindness" as it connotes "an actual process of supression a suspicion". From the statements made to police by Briscoe where he is quoted "That's what I seen. And I was like ahh fuck I don't wanna know" it is clear that there was a deliberate supression of questioning and a strong suspicion that someone was to be killed. CHARRON says that willful blindness does not define the mens rea required for particular offences. Rather it can be substitute for actual knowledge whenever knowledge is a component of the mens rea.
- Deemed knowledge when your suspicions are aroused and you do nothing
- Endorse Prof. Stewart definition of "deliberately ignorant"- he states that the expression of "deliberate ignorance" seems more descriptive than "willful blindness" as it connotes an actual process of suppressing a suspicion. Using this description, wilfull blindness is of narrow scope and involves no departure from the subjective focus on the workings of the accused's mind – it is more than just a failure to inquire.

Ratio:

- Willful blindness is an active process of suppressing a suspicion.
- Willful blindness substitutes for actual knowledge when knowledge is a required component of the *mens rea* of the offence.

(c) Objective Fault

R v F(J) Case

There are now 3 degrees of objective fault requirements:

- Due diligence with the onus reversed for regulatory offences. This is a standard of simple negligence like that long applied for the tort of negligence
- A **marked departure** from the objective norm as a Charter standard for **crimes with objective fault requirements** (Beatty) (**gross negligence**)
- A **marked and substantial departure** from the objective norm for offences based on **criminal negligence** (**s. 219)** F. (J.) (**worse than gross negligence**)

i. Criminal Negligence (s. 219)

  - What the accused ought to have thought about their actions vs. what they actually thought about their actions
- Negligence as a standard is controversial: concern over sanctioning as criminals, those that did not choose to act that way. Should we be locking people up because they did not act as a reasonable person would have? AND if we do allow objective fault, can we ever allow subjective factors?
- Section **219 – 221**- CRIMINAL NEGLIGENCE: these sections of the CC refer to both acts and omissions

R v Tutton & Tutton SCC (pg. 519) –Progression of Criminal Negligence

Facts:

- The Tuttons believed that their diabetic son had been cured by divine intervention so they did not give him his insulin and he died.
- Doctor had told them that if their son did not receive his insulin then he would die.
- They were charged with manslaughter by **criminal negligence** under ss. 202 (**now s. 219**) and s. 197 **(now s. 215)** of the CC for not giving insulin. Negligence and omissions are looked together here. It is argued that the test should be objective not subjective. (They are concerned with the conduct and not the state of mind) – comparing to what a reasonable person would have done. But why cant they use a subjective test?
- The type of crime changes the understanding of recklessness
- The Tuttons were convicted at trial but the Court of Appeal ordered a new trial, which the Crown appealed to the Supreme Court.

Issue:

- What is the *mens rea* requirement for manslaughter by criminal negligence – subjective intent or objective intent? How do we define criminal negligence in s. 219?

Decision:

- Appeal Dismissed

Reasoning:

- Spent 18 months debating this issue and it ended in a 3-3 split: McIntyre endorsed an objective test, Wilson endorsed a subjective test
- There is no problem proving the external elements of this offence. The parents had a duty to deliver their son with the necessaries of life arising in **s. 197.** They omitted to perform this duty, and this omission caused death. The case wholly depends on the interpretation of the fault elements of the offence. The parents believed that their son had been cured – what is the difference between knowledge and belief? The Court of Appeal stated that omissions must be judged on the basis of subjective intent – if you had an honest belief that you were doing the right thing then you should not be punished. However, in this case, despite their honest beliefs, the parents' omission still directly caused their son's death.
- **Majority** states that the standard of assessing whether they did something wrong or not is a **subjective one**. Did they know, or were the reckless/willfully blind in relation to the death of their son?
- WILSON: Argues for subjective test for mens rea for criminal negligence. She looks to Sault Ste-Marie. Can't have absolute liability with serious stigma/imprisonment. Recklessness – it seems ambiguous so we have to interpret in a subjective way because of what is at stake. P. 526 "wanton or reckless disregard" requires more than just an objective standard – it requires a degree of awareness or advertence to the threat to the lives or safety of others. It is not the role of the judiciary to change the law. Puts forward Prof. Hart's solution: p. 527
  - Did the accused keep those precautions, which any reasonable man with normal capacities would in the circumstances have taken? OBJECTIVE – (Is Wilson thus importing an objective test ?)
  - Could the accused, given his mental and physical capacities, have taken those precautions?
- This looks like Lamer's suggestion – applying subjective factors to an objective test. BUT Wilson says she is absolutely against Lamer's test because: his is a fluctuating standard. Worried that if we apply Lamer's approach it will lead to a lower standard when the trial judge instructs the jury. Sometimes the standard will be too low because they have certain features, even if they knew what they were doing, and others that don't have these certain features might be convicted where they didn't have the knowledge. You may convict people who shouldn't be convicted or not convicted people who should be convicted. Hart's test only looks at capacity. Can you physically or mentally do what would have been expected

- The other two judges go for an objective test. McIntyre says that the wording of s. 202 is "negligence". He emphasizes this word, and determines that recklessness can be interpreted in these objective standards. He thinks that the negligence in s. 202 can be determined objectively. This will have the effect of punishing mindless acts, and will act as deterrence to future cases He says that this is not a subjective test, it is just taking into account all of the facts, including the accused's state of mind, in determining if the actions were reasonable. This is a modification of the objective test. You must take all of the circumstances into account, including what the accused knew at the time.
- MCINTYRE: What is punished is not state of mind but acting mindlessly. The objective standard of reasonableness is the test – look for a marked departure from the conduct of a reasonably prudent person.
- Council raises Sansregret v r. → In the interpretation of recklessness in Sansregret they hold that it is a subjective standard. Council wants the court to apply the subjective mens rea. BUT McIntyre holds that the type of crime changes the understanding of recklessness. For criminal negligence, an honest belief is not a defence unless the honest belief is reasonable. They had received instruction from doctors and seen him get sick before without insulin – the jury must consider what a reasonably prudent person would have done in their situation.
- Lamer tries to strike a middle course; he says there is an objective test, but a generous allowance must be made for factors that are particularly relevant to the accused – such as "youth, mental development and education". These are characteristics that are relevant to understand the capacity of the individual to assess the situation, and the reasonable person must possess these same attributes.-this is letting in an element of subjective standard. –If we are adjusting the standard for all these extra factors and it defeats the purpose of having objective test at all.
- NOTE: the court is not deciding the constitutionality of the criminal negligence for 222(5)(b) which would be affected by the decision of this case but is not before the court.

Ratio:

- There is no definite test that comes out of this case; judges across Canada essentially chose to adopt either a subjective or objective test depending on how they interpreted the decisions in this case.

R v Creighton (pg. 538)- Criminal Negligence Test & Manslaughter Test

Manslaughter (Modified Objective Test for MR) **-3 Part Test** (McLachlin):

- Establish *AR* – activity must constitute a marked departure of the care of a reasonable person in the circumstances.
- Establish *MR*– the activity must have been done while there was objective foresight of harm (not death) that can be inferred from the facts. The standard is of the reasonable person in the circumstances of the accused.
- Establish capacity – look at personal characteristics of the accused, were they capable of appreciating risk of harm flowing from their conduct?

Criminal Negligence causing death Test:

Negligence is an objective test – it is a marked and substantial departure from the standard of a reasonable person. What would a reasonable person in the situation of the accused have done? **Where the accused is charged with the offence of unlawful act manslaughter, the trier of fact must ask:**

1. Would they have been aware that the likely consequence of their actions would result in death?
   - if the answer is no then no criminal conviction.
   - If it meets this test, then go to 2.
2. were they unaware?
   - (a) because they didn't turn their mind to it OR
   - (b) did they lack the capacity to turn their mind to it.

If (a) to the above Q, the accused must be convicted. If the person lacks the capacity of realizing they will not be convicted. If they answer yes to (b) then go to 3

3. In the context of the offence, would the reasonable person with the capacities of the accused have made him/herself aware of the likely consequences of the unlawful conduct and the resulting risk of death? (human frailties do not include voluntary intoxication or impairment through drug use, or an emergency which diverts ones attention from an activity) Human frailties encompass personal characteristics habitually affecting an accused's awareness of the circumstances, which create risk. – ex . Illiteracy – can't read a drug bottle. Must be traits the accused cannot control and otherwise manage in the circumstances.

***You essentially have to prove recklessness (they knew the risks associated with their acts and did it anyway) show a marked and substantial departure from a reasonable person who would be in their same situation**

Facts:

- Creighton, an experienced drug user, administered cocaine to a willing woman who subsequently died.
- He refused to contact the authorities when she stopped breathing after taking the drug, but his friend eventually did.
- He was charged with manslaughter and manslaughter by criminal negligence.

Issue:

- Is the *mens rea* required for manslaughter subjective or objective?
- If it is objective, how much weight should be given to the personal characteristics of the accused?
- Is the objective standard contrary to s. 7 of the *Charter*?

Decision:

Appeal Dismissed

Reasoning:

- **LAMER** gives the minority (5-4) decision. He states that there is no general constitutional principle that states that crimes need subjective *mens rea*. He says that **only specific heinous crimes that carry with them a certain stigma require subjective *mens rea*.** Although manslaughter involves the killing of a person, it does not involve intentional killing and therefore is not as stigmatic as murder. He says that the *Charter* requires a minimum of objective *mens rea*. He also goes on to say that the test for manslaughter is an objective test; however, a mere objective test would violate s. 7 – therefore it needs to be a modified objective test that takes the specific circumstances of the individual into considerable note. He says that you must consider the capacities of the individual in determining whether they ere able to live up to the objective reasonable standard, and then alter the standard accordingly if they were not. It cannot be from intoxication it has to be a physical or mental incapacity that limits their ability to reasonably foresee- you have to consider what a reasonable person with that disability/frailty would do. Look for marked departure, were they aware? Was there something that would stand in the way of them being aware?
- *THIS IS NOT A SUBJECTIVE TEST
- **MCLACHLIN** (LA FOREST agrees) agrees that the test is objective, and that only objective *mens rea* is required for manslaughter. However, she disagrees with the alterations to the objective standard that Lamer attempts to make. She says that we are moving into the subjective realm. She finds that the common law requirement of "objective foreseeability of the risk of bodily harm" is constitutional. Lamer disagreed and stated that you needed to have objective foreseeability of harm causing death – for him foreseeability of simply bodily harm is unconstitutional. According to McLachlin, to do this would require the courts to abandon the thin skull test and require the Crown too prove to much in order to get a conviction for manslaughter. She states that manslaughter is treated to be much less blameworthy than murder, and that this must be considered.
- She says that the reasonable standard should not be concerned with "frailties" of the accused's character, and that public policy demands a single, uniform legal standard to be identified. The standard is what a reasonable prudent person would have understood in the circumstances – therefore situations of greater danger will require a greater expertise in the standard of care. We do need to look at capability but not personal factors. In the end she sets out a three-part test that must be satisfied for a conviction in manslaughter:

Ratio:

- Objective *mens rea* is in line with the *Charter*, and is all that is required for a conviction in manslaughter.
- The objective standard is whether a reasonable person in the circumstances would have foreseen the risk of harm from their actions. If this is satisfied, then the necessary mens rea has been proven. You should not incorporate personal characteristics into the reasonable standard, as it has to be an unchanging standard that is easy to understand. Only if an accused lacked the capacity to understand the risk flowing from their actions can they be excused.

R v Beatty SCC (pg. 547)- Fault Element Criminal Negligence- Dangerous Driving (major case)

Fault Element for Criminal Negligence → "Marked Departure from the Objective Norm" test
In any crime requiring objective fault when there is a risk of imprisonment you must show a marked departure from the objective norm.

Example with dangerous driving charge S.249(c):

- **ACTUS REUS**: Prohibited conduct- The trier of fact must be satisfied beyond a reasonable doubt that,viewed objectively, the accused was, in the words of the section, driving in a manner that was "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." - We are not looking at the consequences (killing of people) we are looking at whether the person drove in a dangerous way. When you look at the prohibited act look at the words of the statute not the consequences.
- **MENS REUS**: The trier of fact should be satisfied on the basis of all the evidence, including evidence about the accused's actual state of mind, if any, that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances. (it is not necessary for the crown to prove that the accused had a positive state of mind, such as intent, recklessness or willfull blindness)- if they do have one of these though, then they have the mens rea and you move on. What constitutes a "marked departure" from the standard expected of a reasonably prudent driver is a matter of degree. The lack of care must be serious enough to merit punishment.

Facts:

- Man has been working all day and driving home on a hot summers day
- He is going the speed limit on the highway
- For a second he has a momentary lapse of consciousness and crosses into the other lane and hits a car, killing three passengers
- He is charged with 3 counts of dangerous operation of a motor vehicle causing death under **s. 249 (4)**
- Morally blameworthiness?
- Judge rules that the requisite MR can only be found when there is a "marked departure" from the standard of care expected of a reasonable person in the circumstances of the accused. – we do this because it is almost impossible to determine the particular state of mind of a driver because driving is such a routine behavior. – Thus we cannot base it on a subjective method, it must be objective (compared to what a reasonably prudent driver would do)
- How do we figure out that the person intended to commit the act, or that they have the intent, how do we know they were reckless- couldn't you make this argument for any MR crime?
- **There are certain defenses** that would avail to the accused (to help him/her be acquitted) The judge says that:
    - If the accused (honest and reasonable mistake of fact)
    - The accused mental state is relevant (would the reasonable person have appreciated the risk) – they then look at what the reasonable person with that same condition would have done

***Marked departure goes to the MR**

- Subjective MR can be really relevant in assessing whether the test has been met – if the person meant to drive recklessly, then MR is proven – but often this isn't the case
- The objective test has therefore been modified to suit the criminal setting (because of potential harsh punishments faced by the person) it requires proof of a marked departure from the standard of care that a reasonable person would observe in all the circumstances.
- Because the accused mental state is relevant in a criminal setting, the objective test must be modified to give the accused the benefit of any reasonable doubt about whether the reasonable person would have appreciated the risk or could and would have done something to avoid creating the danger.
- Person was held not to be responsible. Although he had the actus reus of failing to confine his car to his lane causing a dangerous situation for those using the highway, there is no evidence that any deliberate intention to create a danger for others – his momentary lapse of consciousness is insufficient to find criminal culpability- No mens rea. – SCC agrees with lower court he did meet the "marked departure".

*They are not agreeing with Lamer's argument that they should consider the individual characteristics – just what the reasonable person would have done.

R v F(J) (pg. 558) –3 Degrees of Objective Fault Requirements

- This resolves the split decision in R v Tutton
- FISH (majority) said that the fault element required for conviction at trial was essentially common to both counts of manslaughter (Criminal negligence & Failure to provide the necessaries of life)
- Under both counts, the jury was required to determine not what the respondent knew or intended, but what he ought to have foreseen.
- FISH has done more than decide that criminal negligence in s. 222(5)(b) is based on objective fault. He also drew a distinction between a "marked and substantial" departure from the required level of care, which is required for a conviction of criminal negligence, as opposed to a mere "marked departure" from that standard, required as a charter standard for other objective fault crimes.
- **There are now 3 degrees of objective fault requirements:**
  - Due diligence with the onus reversed for regulatory offences. This is a standard of simple negligence like that long applied for the tort of negligence
  - A **marked departure** from the objective norm as a Charter standard for **crimes with objective fault requirements** (Beatty) (**gross negligence**)
  - A **marked and substantial departure** from the objective norm for offences based on **criminal negligence** (**s. 219)** F. (J.) (**worse than gross negligence**)
- The majority in F. (J.) confirmed (As in Beatty) that negligence is a form of fault, not AR

ii. Crimes based on Predicate Offences

- *DeSousa* concerns the offence of unlawful act causing harm.
- *Creighton* concerns the manslaughter category of unlawful act causing death
- *R v Godin* aggravated assault
- In each case the unlawful act is interpreted to require objective foresight of harm.
- *DeSousa* also held that the unlawful act must be a provincial or federal offence that the fault for the predicate offence must be proven and that this cannot be absolute liability
- However where the predicate, or underlying offence is one of negligence the gross departure limit must be applied to it.
- In the view of the majority in F. (J.) manslaughter by criminal negligence would require a marked and substantial departure from the objective norm.

*Court reduces the requirement for culpability for a number of crimes

R v DeSousa SCC (pg. 560)-Mental element required by S.269 (Unlawful Act Causing Harm)

For S. 269 there are two requirements that must be fulfilled:

1. there must be an underlying offence (the "unlawful act") with a valid mens rea requirement for that crime satisfied. Has to be a strict liability or true crime (objective mens rea crime) and there has to be a fault element proven → Not absolute offence
2. the "unlawful act" must be at least "objectively dangerous" so that a reasonable person would realize that the act created a risk of bodily harm. –crown must prove that the bodily harm caused by the underlying unlawful act was objectively foreseeable. Due to the lack of *stigma* or any sort of significant prison sentence attached to the offence it did not warrant a higher "subjective fault" requirement (*R. v. Martineau*).- This is why they say that you do not need subjective foresight of the consequences.

Facts:

- During a New Year party in Toronto in 1987, a fight broke out.
- Several people started throwing bottles including DeSousa who threw a bottle that ricocheted off the wall and hit Teresa Santos in the forearm causing serious harm.
- DeSousa was charged with unlawfully causing bodily harm contrary to **s.269**
- Accused argued that s.269 should be declared to have no force or effect on the grounds that it violates S.7 of the Charter.
- An assault is not an essential element of the offence charged in this case; if an assault caused bodily harm the accused would be culpable under s.267(1)(b)
- Under s.269 the accused must have committed an underlying unlawful offence (aka a predicate offence) and have caused bodily harm to another person as a result of committing that underlying offence.

- One Q is what is the fault here, objective or subjective?
- What does unlawful mean? Either a provincial or federal offence – Court looks to previous cases and the meaning behind "unlawful" in regards to manslaughter provision
- The issue here is the mental element- it is fine in a criminal offence to have fault that is objective. Does not have to be subjective fault – it will not violate the constitution unless it is an Absolute Liability offence with prison attached.

Issue:
- What is the underlying mental element required for s.269? Is it unconstitutional?

Decision:
S. 269 is not unconstitutional

Reasoning:
- SOPINKA, for the Court, held that s.269 did not violate s.7.
- The charge itself is broken down into two separate requirements.
  1. there must be an underlying offence (the "unlawful act") with a valid mens rea requirement for that crime satisfied. Has to be a strict liability or true crime (objective mens rea crime) and there has to be a fault element proven → Not absolute offence
  2. the "unlawful act" must be at least "objectively dangerous" so that a reasonable person would realize that the act created a risk of bodily harm. –crown must prove that the bodily harm caused by the underlying unlawful act was objectively foreseeable. Due to the lack of *stigma* or any sort of significant prison sentence attached to the offence it did not warrant a higher "subjective fault" requirement (*R. v. Martineau*).- This is why they say that you do not need subjective foresight of the consequences.
- The concept of "unlawful" as it is used in s. 269 does not include any underlying offence of absolute liability!!!
- SOPINKA did not want to freeze a particular definition of "unlawful" under s.269 as the term is still disputed. But he did say that it does at least require that the unlawful act be at least objectively dangerous. –you need objective foresight of bodily harm for both criminal and noncriminal unlawful acts underlie s.269 prosecution.
- For true crimes and predicate offences – you need objective foresight of bodily harm
- The Court dismissed the argument that the offence would punish the morally innocent by not requiring proof of intention to bring about the consequences. Instead the offence aims to prevent *objectively dangerous* acts (this justification was elaborated on in *R. v. Creighton*).
- Appellant argues that there should be subjective mens rea with regards to fault requirement- Court looks to other cases and say that we have to keep it as objective or else other offences would be a problem. There are other offences in the criminal code where you don't need subjective intention as to regards to the consequences – so there shouldn't be any needed for this provision either.
- Foresight of consequences is not required in order to hold the actor responsible for the result of his/her unlawful activity- you do not have to predict all possible outcomes! – this can not be used as a defense. One is not morally innocent or exempt simply because they did not foresee one of the many potential consequences of an unlawful act.

R v Creighton (pg. 569) 1993 –Case previously discussed
Court divided on whether the objective test for unlawful act manslaughter required reasonable foresight of death or merely reasonable foresight of bodily harm.
- Trafficked an elicit drug and injected the individual with the drug
- Individual died
- SCC comes to different decisions regarding the fault requirement.
- Argument between Minority and Majority
- Majority (MCLAUCHLIN): Reasonable foreseeability of bodily harm is required not reasonable foreseeability of death. There already isn't as much stigma related to manslaughter compared to murder. If we followed Lamer's reasoning we could be convicting people of who should be convicted of manslaughter but with aggravated assault. Once someone engages in an unlawful act and they foresee that there could be bodily harm caused they know death may occur from those acts- they assume the responsibility.

- Minority (LAMER): Reasonable foreseeability of the death is required. Its not just about the action but the individual who committed the action. The only basis upon which subjective foresight of death or the risk of death could be found to be required would be to find that the offence is one of those crimes for which "because of the stigma attached or the penalties, a mens rea reflecting the particular nature of the that crime is required"
  - 2 main branches to the analysis of social stigma:
    - Court must look at the conduct being punished to see if it is of sufficient gravity to import the stigma on the individual. There may well be no difference between the actus reus of manslaughter or murder, arguably both give rise to the sigma of being labeled by the community and state as causing the death of another.
    - The second branch of the stigma test concerns the moral blameworthiness of the offender found guilty of committing the offence (not the actual offence itself). More stigma will attach to someone who knowingly engaged in conduct that led to death then one where death accidentally occurred.

*None of the SCC judges see subjective foresight of death or harm being required

- Why a higher threshold? Why objective foresight? – Stigma attached to the conviction, sentence, threshold for murder
  - Manslaughter no min. sentence- vs. Murder 10 years or 25 years
  - Threshold for murder- you need subjective intent to cause death.
- There is a real focus on stigma and penalty when the threshold is being determined for convicting someone
- What do we have to prove with the unlawful act? SCC consults the *DeSousa case*
- Symmetry between prohibited act and the offence – the more severe the consequences the more the mens rea has to be subjective (if it is a death charge- the mens rea has to be subjective and you have to foresee that actual death)
- Court says no violation of charter principle and you have to prove objective foreseeability of bodily harm
- Man was charged with manslaughter- court said it was objectively foreseeable that bodily harm would result from injection of this drug, and the provisions from the offence are satisfied.
- Conviction upheld

Mistake of Fact and Mistake of Law

(a) Mistake of Fact

MISTAKE OF FACT

- Pappajohn fault element – provided there is no wording to the contrary -If you have a subjective mens rea requirement in the offence. The Mistake has to be honest mistake of fact. Reasonability only applies to credibility. Where the fault element is objective negligence the mistake must be both honest and reasonable. If you have a due diligence offence (public welfare) mistake has to be both honest and reasonable and onus is on the accused in these regulatory offences. If we have an absolute liability offence the mistake of fact is not relevant at all.
- You need to look at the particular elements of the crime (subjective, objective, absolute liability, regulatory etc – this will determine if mistake of fact is relevant at all)

Pappajohn v R (pg. 601) SCC- Rape & Sexual Assault

Mistake of Fact

Mistake as a defence applies whenever facts are present, in which an accused believes and has reasonable ground to believe, which if true would render his act innocent and not a crime. It is available as a defence when it prevents the accused from having the mens rea required for the crime.

There must be sufficient evidence presented by the accused (by his testimony) or by the circumstances in which the act occurred (Air or reality) – to make the defence available. Then it is put to the jury

Test: Honest lack of knowledge must be established (Subjective Test) – For mistake of fact to be a defense.

Pappajohn v R

If the person was willfully blind (that proves knowledge) or reckless they cannot use mistake of fact defence.

(Sansregret) **- s 273.2 CC**

S. 265 (includes all forms of assault) **For Sexual Assault:**
Crown must prove **AR**- sexual intercourse (or for assault you have to show that the person applied intentional unwanted force to another) **MR-** knowledge that no consent was given or genuine consent withheld (ie. They were forced into it being threatened, etc) and that they meant to do it/meant to apply force.

Facts:

- Pappajohn put his house up for sale through a real-estate company.
- He met with a female real-estate agent from the company at a bar. They had lunch together, including drinks, over the course of approximately three hours, after which the two went to Pappajohn's house where they engaged in sexual intercourse.
- Evidence is the same for the state and defense up until they get to the house. That is when the two parties' stories go separate directions.
- After the event the woman was seen running out the house naked, wearing a bow-tie, with her hands bound. Woman runs to a priest's house and calls police.
- The agent claimed that she was raped, however, Pappajohn claims that short of a few coy objections she had consented. (This is where the evidence differs)
- Pappajohn was convicted at trial which he appealed as the judge refused to put to the jury whether Pappajohn should be able to claim that he mistakenly believed that she had consented.
- His appeal was dismissed by the Court of Appeal and was appealed to the SSC

Issue:

- **Is a mistaken belief in consent (mistake of fact) available in defense to the charge of rape?** Jury should be assessing this when they are considering if he is guilty of rape. The jury is told of the defenses so that they can assess whether the person is guilty. IF there are any defences open to the accused upon the evidence the trial judge must instruct the jury. But this is not put forth to the jury. They aren't going to put it forward unless there is evidentiary basis for it. Defenses can only be put forward if there is in the evidence some basis upon which the defense can rest.– **Should the jury have been educated about mistake of fact.- Did the trial judge make an error by not putting it to the jury?**

Decision:

Appeal dismissed

Reasoning:

- McIntyre, writing for the majority, first discussed the question of when a defense should be put to a jury. He held that a defense should be used when there is "some evidence which would convey a sense of reality in the submission." On the facts, he found that there was no evidence, other than the statement of the accused that if believed, would have allowed for the possibility of consent. Accordingly, the lower court ruling was upheld. I agree with trial judge there was no evidentiary basis to put forth the defense of mistaken belief. Agrees with DICKSON with regards to the content of the defense.
- **Test: Honest lack of knowledge must be established (Subjective Test) – For mistake of fact to be a defense. -**If the appellant honestly through that the complainant was consenting to the acts of intercourse as they occurred, then the mens rea would not be present and appellant would be entitled to an acquittal. – the honest lack of knowledge would be shown and the subjective element of the offence is not proved.
- A man cannot be adjudged guilty and subjected to punishment unless the commission of the crime was voluntarily directed by a willing mind. Mens rea – consisting of some positive state of mind, such as evil intention or knowledge of the wrongfulness of the act or recklessness disregard for consequences, must be proved by the prosecution. The mens rea, which is required, will vary with the severity of the crime. It can only be determined by detailed examination of the actus reus of the offence.** Mens rea is not required in all statutory offences – offences concerned with public welfare, health and safety do not require a mens rea.
- With rape, the essence of the crime consists of the commission of an act of sexual intercourse where a woman's consent, or genuine consent, has been withheld. Intention or recklessness must be proved in relation to all elements of the offence, including absence of consent
- Mistake as a defence applies whenever facts are present, in which an accused believes and has reasonable ground to believe, which if true would render his act innocent and not a crime. It is available as a defence when it prevents the accused from having the mens rea required for the crime. ***Mistake of fact is more accurately seen as a negation of guilty intention than as the affirmation of a positive defence.
- Culpability rests upon commission of the offence with knowledge of the facts and circumstances comprising of the crime. If according to an accused's belief concerning the facts, his act is criminal, then he

intended the offence and can be punished. If, however, his act would be innocent, according to facts as he believed them to be, he does not have the criminal mind and ought not to be punished for his act.

- There must be sufficient evidence presented by an accused, by his testimony, or by the circumstances in which the act occurred –to make the defense available.
- DICKSON (dissent) stated that the defense was derived from the mens rea requirement, which is a **(subjective test)**, and consequently the mistaken belief did not need to be reasonable, it just needed to exist (strict knowledge). You have to prove there is an act of sexual intercourse where a women's consent or genuine consent has been withheld. Sufficient evidence has to be put forth by the accused to show that an honest belief in consent or absence of knowledge that consent has been withheld occurred. This shows that he would not have the MR of the offence – even though he committed the AR – he did not commit MR. The dissent is just saying that there is a sufficient evidential base and thus the defence should be put to the jury so they can decide whether the charge should be there. The evidence shown was: The clothes were not ripped- they were folded, there didn't appear to be a struggle, she was there for a long time before attempting to leave, keys were on the dresser. (Majority said this doesn't mean anything- no evidence)
- Difference between majority and dissent is not on the constituent elements of the offence, but on whether the defense should have been put forth to the jurors. The majority and dissent agree on the laws it is just the mistake of fact that they diverge on
- SCC said to the court of appeal that we cannot be using the old provisions and telling women that they should cover up and not dress revealing and stop "asking" to be raped.
- AR- Sexual intercourse. MR- no consent or genuine consent withheld

Ratio

- For a defence of mistake of fact in consent to be available to the accused, there must exist some reasonable evidence, which would convey a sense of reality.

Notes:

- **S. 265 (4)** of CC as amended now provides explicit direction on belief of consent.
- The direction in this case was clarified in *R v Sansregret.*

Sansregret v R (pg. 614) 1985- Willfully Blind & Mistake of Fact (Previously Read Case)

***Trial Judge should have run willfully blind test and in determining that the individual was willfully blind he would have known that the defence of mistake of fact would not avail.**

Facts:

- Turbulent relationship and she kicks him out and he breaks into the house
- Has a knife and threatens to hurt her and her new bf.
- She fears for her life, tries to calm him down by talking about getting back together
- They have sex and he leaves. She wants to report him to the police.
- Probation officer says don't pursue charges because it will interfere with probation
- She claimed that when he came into the house through the basement he was armed and she needed to console him so she engaged in sexual relations because she feared for her life. – this happens twice.
- He says both times she had a discussion with me and ultimately consented
- He is charged with rape, unlawful confinement, robbery, breaking and entering with intent to commit an indictable offence, and possession of a weapon.
- Pappajohn is dealing with first provision under **sexual assault s. 143(a),** and this is **(b)** – consent because she feared for her life. **-S. 143 (b)(1)**
- **The accused appeals asserting that the defence was mistake of fact (in this case he claims that he believed that the complainant had consented)**
- **The defence is open to an accused under s. 143 (b) (i) as well as under subs. (a) and that it is honest of such belief that is determinative in considering the defense. NOT reasonableness.**

Issue:

- Was there mistake of fact with whether or not she consented? Does the defence avail?
- Knowledge that the consent wasn't given or reckless or willfully blind
- Reckless meaning -when someone sees the risk but takes the chance anyway

- The defendant knew from previous situations when he broke in previously, she was going to run to the police, but she was told not to because of his probation- so he knew that she was going with it out of coercion.
- Recklessness will not override mistake of fact- willful blindness will though
- If you are deliberately ignorant that is relevant to mistake of fact (the person knew)
- Court says recklessness wont work- but why? Why cant they both apply to mistake of fact?
- Willful blindness surrogate for genuine knowledge
- If the person was willfully blind- what success does that have on their defence- they cannot use the mistake of fact as a defence. But if it is recklessness then they can. But the trial judge deemed the person willfully blind but proceeded with mistake of fact defense- WRONG.
- Pg. 623 – Mcintyre- "recklessness or willful blindness should be treated in the same way with regards to mistake of fact"
- In new provisions (introduced in the 80's) the courts make a distinction between Recklessness and Willful Blindness.

Outcome (readings):

- The trial judge looks to Pappajohn case – says facts are quite dissimilar, however the ratio of that case is clear and gives no alternative but to acquit the accused.
- SCC says that the trial judge found that the appellant did not enter the house with intent to make a sexual assault on the complainant, that the complainant consented to intercourse only because of fear for her life and that the appellant honestly believed that the complainant was giving a free and genuine consent to intercourse. **THIS IS WRONG THROUGH. TRIAL JUDGE ERRED.**
- Rape (s.143(a)) the act of having sexual intercourse without consent. The issue in this case falls with subs (a) the question is: did the accused have an honest belief that the women gave her consent?
- In subs (b) (i) the honest belief in consent must encompass more than the fact of consent. It must include an honest believe that it has been freely given and not procured by threats. – the defence would apply then, subject to what is said later about willful blindness, in favour of an accused who had an honest believe that the consent was not the result of threats but one freely given.
- MENS REA for rape- must involve knowledge that the women is not consenting, or recklessness as to whether she is consenting or not and for s.143 (b)(i) knowledge that the consent was given because of threats or fear of bodily harm, or recklessness as to its nature.
- An honest belief on behalf of the accused that the women consenting to intercourse freely and voluntarily and not because of threats would negate the mean rea under s.143 (b)(i) and entitle the accused to an acquittal
- SCC goes through distinction between negligence (in civil law) and recklessness (criminal law)- **recklessness** to form a part of the mens rea must have an element of the subjective.
- This case could have been thrown out on the basis of recklessness (there was tons of evidence pointing to it), however the trial judge did not do so because of her application of the "mistake of fact" defence.
- SCC says that the trial judge erred in not drawing the inference that the appellant knew that the complainant had complained of rape as a result of the incident that occurred the first time. – he therefore knew how she felt about him and would not consent.
- The idea of willful blindness in situations like this has been said to be an aspect of recklessness. However keep the two separate!! A finding of recklessness could not override the defense of mistake of fact in a case like this. The mere honesty of the belief will support the "mistake of fact" defence, even where it is unreasonable. HOWEVER a finding of **willful blindness** as to the very facts about which the honest belief is now asserted would leave **no room** for the application of the **"mistake of fact" defence** because, where willful blindness is shown, the law presumes knowledge on the part of the accused- in this case knowledge that the consent had been induced by threats.

  CANNOT HAVE BOTH WILLFULL BLINDNESS AND MISTAKE OF FACT
- **WILFULL BLINDNESS = KNOWLEDGE** (but only where it is almost certain that the defendant actually knew)- in this case there is tons of evidence showing that he suspected she wouldn't consent, he realized its probability and then refrained from obtaining the final confirmation from her because he wanted in the event to be able to deny it – he wanted to cheat the system. – THIS IS WILFULL BLINDNESS.
- SCC says trial judge should have applied the willful blindness test. And never should have given effect to the "mistake of fact" defence. However that is not to be said that anytime an accused forms an honest though unreasonable belief he will be deprived the mistake of fact defence.

SCC- DEFENCE DOES NOT AVAIL!

Sexual Assault:

-If you are trying to understand the constituent elements of sexual assault look to provisions for assault (some stipulations under assault provision apply to sexual assault) **s. 265**

-Under sexual assault it just talks about the penalty – thus you look at assault provision to get the definition.

-**S. 272**- weapon, bodily harm, - assault (Threatening to cause bodily harm to complainant or some one else and uses that as a coercive measure for sexual assault. If you don't engage in sexual intercourse with me I will harm your mother..etc)

-**S. 273 (1)**- Consent regarding sexual assault (no one else can consent on your behalf, you cannot be forced into consent by someone of higher power (adult, etc), inititally says yes but then stop- you need to stop).

-**S .273 (2)** not a defense under charge that the accused believe the person consented when there is alcohol or drugs, or **recklessness or willful blindness (deliberate ignorance)**

-**S. 274** no corroboration is required for a conviction. Judge cannot tell jury that it is dangerous the convict without corroborated evidence

-**S. 275-** rules regarding having to complain right away about being raped – these are changed and 275 says you can complain whenever.

-**S.276** looks at sexual history or when the court can ask about sexual history – you cant just say because this person has had sexual relations before in their life they aren't a credible witness or they didn't give consent because they have slept with the person before.

-**S. 278** Yes you can be convicted of assaulting your spouse (male or female)

For Sexual Assault:

Crown must show/prove:

AR (3 elements must be proven)

1. Touching (objective)- sufficient for crown to prove that actions were voluntary
2. Sexual nature of the contact (objective) – don't need to prove MR of this aspect
3. The absence of consent (subjective)

MR – sexual assault is a general intent crime- therefore the crown only needs to prove that the accused intended to touch the complainant to satisfy the MR (showing intention to touch and knowing or being reckless of or willfully blind to a lack of consent on the person being touched)

- It is open to the accused to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place. If (as in this case), the trial judge believes the complainant that she subjectively did not consent, the crown has discharged its obligation to prove the absence of consent.
- The trier of fact may believe that the complainant really did not consent, but her actions raised reasonable doubt and thus acquittal still occurs. However, the trier of fact may only come to one of two conclusions: consent or no consent. **THERE IS NO DEFENCE OF IMPLIED CONSENT RECOGNIZED IN SEXUAL ASSAULT** (*Ewanchuck*)
- Consent is a matter of the state of mind of the complainant while belief in consent is subject to s.273.2 a matter of the state of mind of the accused and may raise the defence of **honest but mistaken belief in consent.**
- The finding that the complainant did not want to consent to the sexual touching cannot co-exist with a finding that reasonable doubt exists on the question of consent.
- S. 265(3) outlines situations in which consent or participation does not count (ie. If it is given out of fear, threats, force, fraud, authority, etc) – in these situations, the court is concerned with why the complainants made the choice they did. Did they freely make up their mind about the conduct in question or was there some other reason for it?
- The approach to consenting out of fear is subjective, the complainants fear need not be reasonable nor must it be communicated to the accused in order for consent to be vitiated.
- Because sexual assault only is a crime when there is no consent, the law recognizes the defence of mistake of fact – removing culpability from those who honestly but mistakenly believed that they had consent to touch the complainant. – by removing the required mens rea. The defence must be raised by the accused. It does not impose a burden on the accused. It is simply a denial of the mens rea
- When considering the honest mistake of fact (belief in consent) defence, the mens rea of the accused is examined , the evidence must show that the accused at the time believed that the person had agreed and given consent. The accused must believe that through her words, the complainant had said yes. **(s.273.1) defines consent**
- A lack of agreement does not mean yes!- the defence would not avail if there was neither a yes or no. There has to be an honest belief they said yes through either words or actions
- **S. 273.2(b)** requires that the court apply a quasi objective test to the situation. First the circumstances known to the accused must be ascertained Then the issue arises, if a reasonable man was aware of the circumstance would he act the same? Or take further steps before proceeding with sexual activity? If the answer is yes and the accused did not take further steps, then NO DEFENCE. If the answer is no or maybe, then the accused would not be required to take further steps and defence will apply.

R v Ewanchuk 1999 SCC (pg. 669)- Mistaken Belief in Consent/Fact

Facts:

- Women in parking lot of mall approached by Ewanchuck about a potential job offer
- Ewanchuk brought the 17-year-old woman into his van for a job interview.
- After the interview Ewanchuk invited the woman to his trailer in behind- where she would be working if she got the job. He took her into his trailer and began to make a series of advances.
- Each time she would say "no" to his advance and he would stop but then continue.
- She testified at trial that during her time in the trailer she was very afraid and thus did not take further action to stop the sexual conduct.
- Before she left, Ewanchuk paid her $100 and told her not to tell anyone.- but she ran to the police
- At trial, Ewanchuk successfully argued that, although the woman had initially said "no" to his sexual touching, because he had continued and she had failed to object further this constituted "implied consent". Trial judge agreed to this-Crown had not successfully proven the absence of consent beyond a reasonable doubt. But this was found to be wrong- there is **no such thing as implied consent for sexual assault** therefore the trial judge made a mistake of the law.
- Crown appealed on the issue of a complied consent defence.
- The acquittal was upheld on appeal with Justice John McClung commenting "it must be pointed out that the complainant did not present herself to Ewanchuk or enter his trailer in a bonnet and crinolines" and that Ewanchuk's conduct was "less criminal than hormonal".- SCC said that the appeal judge should never had said this. Looking at her past history should not have been conducted either it is not relevant to her giving consent in this case. McClung also said that a case like this should not go to the courts, she should have just slapped him and left. McClung also took to the press after the SCC made statements about his findings and made the matter worse.
- **S. 265**- a conviction for sexual assault requires proof beyond a reasonable doubt of 2 basic elements: The ACTUS REUS of assault is unwanted sexual touching. MENS REA Crown needs to establish that there was an intent to commit the touching act by the accused and there must be proof that the accused was reckless (knew what he was doing and did it) or willfully blind
- Crown has to prove touching and that it was sexual and that the 17 year old did not consent to the sexual touching.
- But it is Ewanchucks word against his. You need to look at the subjective state of mind of the plaintiff/both parties (would someone have gotten something out of it?)
- There is either consent or No consent in regards to sexual assault- there is no such thing as implied consent under this provision- THUS TRIAL JUDGE WAS WRONG
- If the conduct is ambiguous or the person is just quiet and doesn't say anything then that is not consent- the accused cannot speculate consent. They need to have a clear agreement by the plaintiff.
- Look to sexual assault provision saying that willful blindness and recklessness are not encompassed as a defense.
- The accused did not testify. The state has to prove that he did it. So he elects to not testify
- Through cross-examination of plaintiff the court says that even though he stopped when she asked him to, he kept trying again. Each of these times he restarted, he would need to regain consent. Each time that she asked him to stop he stopped, which shows that he knows she wasn't giving consent- THEREFORE NO MISTAKE OF FACT. (He knew there was no consent being given be her)- Therefore it does not go to trier of fact.

Issue:

- Is there a defence of implied consent available in sexual assault?

Decision:

Appeal Allowed

Reasoning:

- Major, writing for the majority, held that there was no defence of "implied consent" to sexual assault and overturned the ruling of the Court of Appeal. The accused must raise a reasonable doubt that there was consent. Consent can be shown in one of two ways:
    - the "complainant in her mind wanted the sexual touching to take place"; or

- "the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused".

- The trial judge erred in that they didn't take "no" to mean "no" . Trial judge accepted the evidnce that she did not consent, but then he erred when he considered the actions of the complainant and not her subjective mental state when determining the question of consent.
- L'Heureux-Dubé, in a concurring judgment, held that the defence could not be used unless the accused took sufficient steps to ascertain consent. Here, the accused did not make any attempt to ensure that the accused had consent when he moved from a massage to sexual touching. She also castigated McClung's opinion severely, arguing that it relied on myths and stereotypes about women and sexual assault.
- Where a complainant expressed nonconsent, the accused has a corresponding escalating obligation to take additional steps to ascertain consent. – which did not happen here so euwachuck cannot rely on the defence.

Ratio

- There is no defence of implied consent in sexual assault. (its either consent or no consent)

(b) Mistake of Law

Mistake of Law (s. 19 of CC)

- Ignorance is not an excuse for committing an offence
- As a general rule an accused who did not know about a law will not have a defense (this is different from mistake of fact where there is usually a defense available to the accused)
- A real difference between mistake of fact and mistake of law (consider policy and why you think this is)
- **S. 19 cc** ignorance is not an excuse

R v Campbell & Mlynarchuk (Albta) 1972 (pg. 742) – Should we remove s.19 (Ignorance of the law)

Mistake of fact= defence Mistake of fact and Mistake of law= defence
Mistake of law = NO defence
Mistake of law is not a defence, unless it negatives a malicious intent required for the crime. – that does not happen in this case. (For example. Where the law requires that a person willfully or maliciously, or knowingly does something wrong, mistake of law could be a defence as negating intention, to show that, because of the mistake in understanding of the law, there was no willful intent or malice

Facts:

- Campbell was a go-go dancer who danced naked in a public theatre in Edmonton.
- Her boss had told her that a judge on the SC of Alberta had ruled that "bottomless dancing" was legal.
- This was true, however the decision had been reversed on appeal.
- She was arrested for violating **s.167(2**)) by taking part in an immoral performance in a theatre. Being naked in a public place is an offence and to perform in the nude makes it an immoral performance
- Argues that she cant be convicted because she was told by her friend that he knew someone who was charged and the judge ruled that it was fine so I cant be charged. Court said we have to distinguish between mistake of law and mistake of fact (mistake of law is what we are dealing with here) – because she didn't have the actual law right. She was correct in that the case her friend refers to the trial court decision allowed the act but then it was overturned later on appeal- so she had the law wrong/mistaken. She didn't have the current law.

Issue:

- Was this a mistake of fact or a mistake of law? (Mistake of law)

Decision:

- Appeal dismissed; conviction upheld, but discharged. (absolute discharge)

Reasoning:

- Campbell claimed her mistake of fact applies as a defence. However, KERANS rejects this and says that **s.19** applies to this case. This was not a mistake in fact; **it was a mistake in law** that made her "ignorant of the law". He says that the principle that the ignorance of the law should not be a defence is not justified because it is fair, but because it is necessary – even though it will sometimes produce anomalous results. Therefore he finds that the dancer's conviction must stand, as she is only ignorant of the law – which is no defence.

However, he gives her an absolute discharge from her conviction (so she has no criminal record), as go-go dancing is not really a problem in Edmonton. He says the same thing about her boss, who was also convicted and discharged.

- POLICY: We need to keep s.19 because then everyone would get up in court and plead ignorance that they just didn't know the law and then this would be horrible for the courts and very inefficient. The defence also would be very prejudicial as people who are involved in the law as a job would not be able to use the defence because they would have experience with the law.
- The appellant raises that she did not have the MR for the offence because she only did the act because she thought it was legal.
- Mistake of fact is a defence and mistake of mixed fact and law is a defence (because it has a mistake of fact component) – but only a mistake of law IS NOT A DEFENCE
- It is a mistake of law to misunderstand the decision of a judge or of his reasons, or to conclude that the decision of any particular judge correctly states the law unless it is from the SCC.
- Mistake of law is not a defence, unless it negatives a malicious intent required for the crime. – that does not happen in this case. (For example. Where the law requires that a person willfully or maliciously, or knowingly does something wrong, mistake of law could be a defence as negating intention, to show that, because of the mistake in understanding of the law, there was no willful intent or malice. – THERE IS NO SUCH SPECIAL INTENTION REQURED FOR THIS CRIME.
- The only required MENS REA is that the appellant intended to do what she did.
- Excuse or legal justification is a defence at law when showing that the act complained of was authorized by some other law. However there is no defence available when a person has made a mistake as to whether or not the act is excused by another law or authorized by another law.
- Although mistake of law is not a defence- judges may take sympathy on the accused if they feel they had an honest and reasonable mistake in belief regarding the law and may lower the sentence. (as in this case with the absolute discharge)

Ratio:

- Under s.19 ignorance or mistake of the law is no defence.
- A mistake of fact that would lead to the accused's actions being lawful if those facts had been correct can apply as a defence.

Mental Disorder and Automatism

(a) Mental Disorder

S. 16- Mental Disorder/Insanity

- Those who commit criminal acts but cannot be found criminally responsible because their mental processes are impaired. Does not speak to voluntariness of actions but to cognitive function that assume voluntary conduct
- It is a verdict of not criminally responsible on the account of mental disorder – it is not an acquittal.
- You do not automatically go free you can be subject to detention or other conditions until it is decided that they are no longer a threat to society.
- It was argued that it violates the charter but it was found that it did not.
- Provisions on fitness to stand trial allows the court on its own motion, or the crown, or the accused to be assessed if they are fit to stand trial. There is a presumption that everyone is fit to stand trial. It must be shown on a balance of probabilities that someone is not fit to stand trial. By the party raising the claim that they are not fit. There are conditions that must be met when proving this.
- S. 16 - you must show that the mental disorder is so severe that they cannot appreciate the consequence of their actions, or know that the actions are wrong. Accused must suffer from a DOM/mental disorder. A person who cannot understand the nature/ consequence of the act but who does not have a mental disorder does not count under s.16.
- You must take a holistic approach as to what constitutes a disease of the mind. We will look at what impact evidence from a psychiatrist might have on the situation.
- Penal consequences is not going to be helpful in terms of having a helpful defense under s.16
- Look at s.16 and the interpretation section (s. 2) defines mental disorder.
- **Burdon of proof that an accused is suffering from a mental disorder falls on the party raising the issue. Mental disorder must be proven on a balance of probabilities**
- A person found NCR-MD then goes to the disposition hearing with review board and are given an absolute discharge – if evidence suggests that they are of no threat to society

Pg. 564 of CC s. 672.1 -672.95 provisions deal with persons who have mental disorders *Be sure to look at the definitions at the beginning of the section. These provisions are relatively new. 3 different situations and different dispositions. Post Swayne case- accused people are not held liable on account of their mental disabilities

Cooper v R SCC 1993 (pg. 784)-Treatment of medical evidence & DOM Defence

- They **must appreciate** not only the **nature of the act** but the **natural consequences** that would flow from it! If they do, then s.16(2) does not apply to them as a defence. Because mens rea encompasses having the consequences and intent of an act as a requisite element in the commission of a crime.
- One might say that, in a legal sense, "disease of the mind" embraces any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding, however, self induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion. In order to support a defense of insanity, the disease must be such of insanity as to render the accused incapable of appreciating the nature and quality of the violent act or of knowing that it is wrong.
- Underlying all of this is the concept of responsibility and the notion that an accused is not legally responsible for the acts resulting from mental disease or mental defect.

Facts:

- Cooper was convicted pursuant to s. 212(a)(ii) (now **s. 229**).
- Relationship between 2 people at psychiatric hospital- incident occurs at church dance
- During an argument while on a walk (the two left the dance) Cooper grabbed the victim by the throat after having kissed her scared that she would tell people about kiss.
- She died of manual strangulation but the accused testified that he had no recollection of causing her death.
- The accused had consumed a considerable amount of alcohol prior to the church dance/ murder and he argued that he did not have the required MR to commit the murder (that he did not foresee that grabbing the victim by the throat would cause her death). Defence argues that the accused did not have the intent to murder-If they can prove he had no mens rea then there would be no detaining him.
- It is the trial judge who raises the idea of him not being mentally competent which would still lead to some form of detainment (defense of insanity). The trial judge raises this idea based on the testimony of the father, police officer (where accused told an inconsistent story), physiatrist & medical records, etc. Accused changes his story multiple times – this is revealed in the witness's testimonies.
- The Court of Appeal held that the trial judge had not adequately explained the intent required for murder to the jury.
- The case opens up the difficult and broad Q of the obligation of a trial judge to charge on insanity in circumstances where the accused has a lengthy psychiatric history, but the medical evidence says that he does not suffer from "disease of the mind"

Issue:

- Was there enough evidence for a properly charged jury to conclude, on a balance of probabilities, that the appellant had a disease of the mind to an extent that rendered him incapable of appreciating the nature and quality of an act of which he was charged or knowing that it was wrong. "wrong" meaning legally wrong.

Decision:

- Appeal allowed, original conviction restored

Reasoning:

- In order to convict under **s. 212(a)(ii),** there must be a subjective intent to cause bodily harm and subjective knowledge that the bodily harm is likely to result in death. The Court holds that the distinction between **s. 212(a)(i)** and **(ii)** is only a "slight relaxation"; the recklessness requirement requires that the individual not only foresee a danger of death, but a likelihood. At some point the illegal act or *AR* must coincide with the intent. The requisite *MR* need not continue throughout the commission of the wrongful act, but it is sufficient that the intent and the act coincide at some point. It was open to the jury to infer that the accused intended to cause the victim bodily harm when he seized her by the throat and that he knew that strangulation was likely to result in death. The trial judge's charge with respect to the requisite *MR* and the accused's intoxication contained no errors that would justify a new trial.
- We are not bound by what the psychiatrists constitutes as a DOM. We can look at it and listen to it – but this is a legal term and not solely a medical term- medical and legal perspectives can differ. The words disease of the mind were purposely chosen to have a broader meaning so judges would not be limited- POLICY
- "it is the function of the psychiatrist to describe the accused's mental condition and how it is considered from the medical point of view. It is for the judge to decide whether the condition described is comprehended by the term "disease of the mind".

- A trial judge can permit the psychiatrist to be asked directly whether or not the condition in question constitutes a "disease of the mind".
- A personality disorder can constitute a disease of the mind. Doctor said that although the accused probably knew he was causing serious bodily harm, he was incapable of forming an intent to kill and he could not have known that any harm he was causing might result in death.
- Once the evidence is sufficient to indicate that an accused suffers from a condition which could, In law, be a disease of the mind, the judge must leave it open to the jury to find, as a matter of fact, whether the accused had disease of the mind at the time the criminal act was committed. The jury is to decide whether it fulfills either branch of s.16 defence. They say that the job of the trial judge was to instruct the jurors and help them make the decision- which she failed to do.
- In most situation the pertinent issue is not whether the person suffered from a disease of the mind, **but whether the condition that constitutes a disease of the mind rendered the accused incapable of appreciating the nature and quality of the act or of knowing that it was wrong**
- The jury must decide whether the disease of the mind rendered the accused incapable of knowing appreciating the nature and quality of the act. S.16 in referring to this does not just mean a lack of cognitive awareness, but also emotional, and intellectual awareness of the significance of the conduct Is in issue.
- If someone takes drugs and tries to claim a DOM – that will not avail. We want to make sure that people who have a DOM are not found criminally responsible for their acts.
- Court said that trial judge made a mistake.
- We only need to establish if there was a disease of the mind **at the time of the offence**. And if it meets either of the branches of s.16
- Court also said we must distinguish between English cases and Canadian.
- **We must delineate between knowing something (having mere knowledge of doing the act) and appreciating something (being aware of the unsavory consequences of the act). "Appreciating" not to be synonymous with "knowing**"
- To "know" the nature and quality of an act may mean to merely be aware of the physical act. While to "appreciate" may involve estimation and understanding of the consequences of that act. The accused may well have known the nature and quality of the physical act of choking. However it is entirely different to suggest that in performing the choking act he was able to appreciate its nature and quality, in the sense of being aware that it could lead to or result in her death. They must appreciate not only the nature of the act but the natural consequences that would flow from it! If they do, then s.16(2) does not apply to them as a defence. Because mens rea encompasses having the consequences and intent of an act as a requisite element in the commission of a crime.
- We have to prove that he had a disease of the mind at the time of the walk and that not only did he know he was choking her but also that choking her could lead to death or may lead to death.
- The judge erred in that they did not analyze the medical evidence from the doctor as it may have related to the defence of insanity particularly with the accused's appreciation of the nature and quality of his act. The evidence would have led the jury to find a disease of the mind, HOWEVER the real issue before the jury should have been whether he was able to appreciate the nature and quality of his act.

R v Abbey SCC 1982 (pg. 797)- Inability to appreciate penal sanctions of crime

Facts:

- Respondent was found not guilty on account of insanity, of importing cocaine into Canada and of unlawful possession of cocaine for the purpose of trafficking.
- A hypomaniac, respondent knew he was doing wrong but **believed that, if caught, he would not be punished**. – his lawyer argues that he should not be punished Because he was not able to comprehend the penal sanction associated with the crime – which he showed by believing that he would not be punished.
- The trial judge found that respondent's incapacity to appreciate the nature and quality of his acts met the test of **s. 16(2),** and more particularly, that he did not "appreciate" the consequences of punishment associated with the commission of the offence.
- This appeal is from a judgment of the BC Court of Appeal upholding the verdict reached by the trial judge.
- His defence was that he was insane at the time

Issue:

- The question raised in the first ground of appeal is therefore whether "appreciation of the nature and quality of an act" is limited to appreciation of the physical consequences of the act or also includes appreciation of the penal consequences to the accused.

- Should the question of "personal penal consequences" be relevant at all,

Decision:

Appeal allowed. New trial ordered

Reasoning:

- Medical evidence suggested that he suffered a DOM which, although not rendering him incapable of appreciating the nature and quality of his act, involved a delusional belief that he was committed to a course of action, no harm would come to him and he would not be punished.
- **DICKSON** The requirement that the accused be able to perceive the consequences of the physical act is a restatement, specific to the defence of insanity, of the principle of *mens rea* as a requisite element in the commission of a crime. The mental element must be proved with respect to all circumstances, and consequences, that form part of the *actus reus.* Punishment is not an *element* of the crime itself, but may be the *result* of the commission of the criminal act. "Wrong", used in the second half of **s. 16(2)**, means wrong according to law, and as it has been established that respondent's act was forbidden by law, respondent's inability to "appreciate" the penal consequences was irrelevant to the question of legal sanity
- Irresistible impulse does not exist as a defence but may be symptomatic of a disease of the mind giving rise to a defence of insanity
- With respect, the trial judge has confused the "ability to perceive the consequences, impact and results of a physical act" *(Cooper v. The Queen,* at p. 1162) with a belief, however unjustified, that the legal sanction imposed for the commission of the prohibited act, the "legal consequences", was somehow inapplicable to him. The delusion under which Abbey was supposedly labouring was that he would not get caught, or, if caught, would benefit from some undefined immunity to prosecution. Such a delusion by no means brings him under the first arm of the insanity test in s. 16(2) as developed in the recent cases.
- ***Overall:*** There was no admissible evidence of important facts regarding Abbey's conduct upon which the medical opinions were based. And the judge misconstrued the recent cases dealing with the interpretation of the insanity defence in s. 16(2). A failure to "appreciate" the penal sanctions attaching to an offence does not render the accused "incapable of appreciating the nature and quality" of his act so as to bring the insanity defence into play.
- **His delusion must lead him to not appreciate the consequence of the act** (being delusional about nothing happening to you – ie not being punished- does not count as a defense). The Mental disease counts as a defense if it led him to be delusional about not understanding the **consequences of the act**.
- **The fact that he did not understand the penal sanctions is not covered by the defense of the insanity**- the trail judge erred by lumping the first and second arms of s.16(2) together and collapsing them into one another. Not understanding the penal sanctions is irrelevant to the question of legal sanity.
- The accused had the actus reus and was aware he had committed the actus reus of each of the offences.

Ratio:

- A failure to "appreciate" the penal sanctions attaching to an offence does not render the accused "incapable of appreciating the nature and quality" of his act so as to bring the insanity defence into play.

Notes:

- The requirement that the accused be able to perceive the consequences of a physical act is a restatement, specific to the defence of insanity, of the principle of mens rea, or intention as to the consequences of an act, as a requisite element of commission of a crime. The mental element must be proved with respect to all circumstances, and consequences, that form part of the actus reus.
- A delusion that renders the accused" incapabale of appreciating the nature and quality of his act" goes to the mens rea of the offence and brings into operation the first arm of s. 16(2): he is not guilty by reason of insanity. A delusion which renders an accused incapable of appreciating the penal sanctions attaching to the commission of a crime are applicable to him does not go to the mens rea of the offence, does not render him incapable of appreciating the nature and quality of the act and does not bring into operation the "first arm" of the insanity defence.
- In s. 16(2) "wrong" means contrary to the law
- The Interpretation of **Morally wrong** should use an **objective test.**

R v Chaulk SCC 1990 (pg. 799)- Mental Disorder Defence s. 16

- The common law ruling allowing the crown to adduce evidence of insanity over and above the accused's wishes was not in accordance with principles of fundamental justice under s.7 and could not be saved by s.1
- The majority fashioned a new common law rule, which would only allow the crown to raise the issue of insanity against the accused wishes if the trier of fact had concluded that the accused would otherwise be found guilty. The issue of insanity would be tried after a finding of guilt, but before a conviction was entered. The court also found that the crown could adduce evidence of insanity during the trial, if the accused had put his/her mental state in issue.
- **The SCC has recognized that evidence of mental disorder short of full-blown defense under s. 16 may be admitted on the issue of mens rea.**

Facts:

- Chaulk and Morrissette, aged 15 and 16 respectively, broke into house, plundered it of valuables and then stabbed and bludgeoned him to death.
- Evidence was adduced at trial that the pair were psychotic and thought that they were going to rule the world - killing the victim did not matter as he was a "loser".
- They knew that it was contrary to the law to kill people, but they thought that they were above the law.
- They were convicted by a jury and an appeal was unanimously dismissed.

Issue:

- Is the reverse onus provision of **s.16(4)** inconsistent with **s. 11(d) of the Charter**?
- What is the meaning of "wrong" in **s.16(1)**

Decision:

- Appeal allowed. New trial ordered

Reasoning:

- **LAMER** (Majority) explained that there is a presumption of criminal capacity for an adult. For a minor child, the reverse is true. For a child over 14, the presumption of incapacity is rebuttable. A claim of insanity undermines the voluntariness of either the *AR* or the MR. It can also provide an excuse to criminal conduct, where intention is present; the focus is on incapacity to form a mental element – **a mentally disordered person does not have the capacity to distinguish between right and wrong.**
- Lamer holds that "wrong" means more than legally wrong or knowing the law of the land; it also means morally wrong. The test requires that the defence establish that due to the mental illness, the accused could not appreciate that his conduct: "conformed to normal and reasonable standards of society", "breaches a standard of moral conduct" and "would be condemned". The person is also incapable of knowing the act is morally wrong in the circumstances according to the moral standards of society.
- In the case at bar, Lamer finds that the individuals, due to their megalomania, may have been unable to appreciate the moral wrongness of their actions, and thus the mental disorder defence applies. As a result, a new trial is ordered.
- **MCLACHLIN** (dissent) presented an alternative argument to validate **s.16.** She contends that since sanity is a pre-condition to criminal responsibility, it falls outside of the scope of the presumption of innocence, which concerns only the *AR* and *MR*
- On the meaning of the word "wrong", McLachlin disagreed with the majority. She raises the concern that the application of a moral standard might be too vague. The jury is left to speculate about whether the mental illness affected the defendant's ability to appreciate an abstract moral code. The issue is complicated further by the facts that society does not agree on standards of morality. Where an accused euthanizes someone (such as *Latimer*) and believes that it is right – can that person then "hide behind" a mental disorder defence to get absolved of criminal responsibility? McLachlin suggeair sts that "wrong" should be interpreted simply as "what one ought not to do". She asks why are we treating sane and insane people differently with regards to moral codes. – She says why should deficiency of moral appreciation due to mental illness have different consequences than deficiency of moral appreciation due to a morally-impoverished upbringing? It is not the courts place to make determination on questions of morality, nor is it fair to expect a jury to be able to agree on what is morally right or morally wrong. A person's criminal responsibility should not hinge on questions of whether an act would be generally perceived as immoral.

- **MCLACHLINS views are concerning because it comes down hard on people** who are mentally ill and would deprive them of being put in a treatment facility where they can be treated and instead sends them to prison. She takes the defence away.

Ratio:

- The "wrong" that an accused must be unable to appreciate for their condition to be deemed a mental disorder is the moral wrongness of their action

R v Oommen SCC 1994 (pg. 801)- Assessing thought capacity

- A review of the history of our insanity provision and the cases indicates that 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.** The accused must possess the intellectual ability to know right from wrong in an abstract sense. **But he or she must also possess the ability to apply that knowledge in a rational way to the alleged criminal act**.
- **S. 16(1)** embraces not only the intellectual ability to know right from wrong, but the capacity to apply that knowledge to the situation at hand.

We also need to remember that what constitutes a disease of the mind can change over the years- conditions that were mental disabilities in the 90's may have changed over time

Facts:

- Accused (with a motive) kills friend sleeping in his apartment
- Accused had suffered with psychosis for a number of years
- He believed that a local union was conspiring to kill him (and that his friend was too)
- Thus he killed his friend in order to "protect" himself
- At the trial for 2nd degree murder, the accused pleads with insanity
- Psychiatrists testified that the accused possessed the general capacity to distinguish right from wrong and would know that to kill a person is wrong but that, on the night of the murder, his delusion deprived him of that capacity and led him to believe that killing was necessary and justified under the circumstances as he perceived them.
- It was established that about the time of the killing, Mr. Oommen called a taxi dispatcher several times to request the police.
- Trial judge rejected his defence of insanity under **s.16(1)** because he found he had a general capacity to know right from wrong
- It was later found that the trial judge erred in his interpretation of s. 16(1)- Court of Appeal said that trial judge got it wrong because under the delusions, he did not know that killing was wrong
- He believed he had to do it, he felt if he didn't do it then she was going to kill him. – is this enough though?

Issue:

- **What is meant by the phrase "knowing that [the act] was wrong"** in **s. 16(1)?** Does it refer only to abstract knowledge that the act of killing would be viewed as wrong by society? Or does it extend to the inability to rationally apply knowledge of right and wrong and hence to conclude that the act in question is one which one ought not to do? Should the accused be acquitted under s.16? Did he have the capacity at the moment he committed the offence? **The courts were looking at the general capacity of the person- this is not enough.**

Decision:

Appeal dismissed. New trial ordered.

Reasoning:

- **MCLACHLIN S.16 (1)** embraces not only the intellectual ability to know right from wrong in an abstract sense, but also the ability to apply that knowledge in a rational way to the alleged criminal act.
- An accused need not establish that his delusion permits him to raise a specific defence, such as self-defence, to be exempted from criminal responsibility.
- Here, the evidence was capable of supporting a conclusion that the accused was deprived of the capacity to know his act was wrong by the standards of the ordinary person.
- There was no question at trial that Mr. Oommen had killed Ms. Beaton. Nor was there much doubt that Mr. Oommen's insane delusions provoked the killing.
- Dr. Trichard testified that a person suffering from this mental disorder would not lose the intellectual capacity to understand right from wrong and would know that to kill a person is wrong. However, the

person's delusions would affect the person's interpretation of events so that the individual would honestly believe killing to be justified under the circumstances. In the abstract, the person would know killing was wrong.

- **The only issue was whether this delusion exempted Mr. Oommen from criminal responsibility under s. 16(1) on the ground that he lacked the capacity at the relevant time to know the difference between right and wrong.**
- It was suggested that Mr. Oommen could be exempted from criminal responsibility only if he could make out the defence of self-defence. I do not agree. There is no suggestion in the authorities that the accused must establish that his delusion permits him to raise a specific defence, such as self-defence.
- The evidence was capable of supporting an affirmative answer to the question of whether the accused was deprived of the capacity to know his act was wrong. – in the moment he thought there was a conspiracy to kill him, so he believed that he needed to kill the plaintiff – this shows that in the moment he thought his actions were justified he did not know right from wrong.
- First, there was evidence that the accused honestly felt that he was under imminent danger of being killed by Ms. Beaton if he did not kill her first, and that for this reason, believed that the act of killing her was justified. This delusion would have deprived the accused of the ability to know that his act was wrong; in his eyes, it was right. Second (and this may be to say the same thing), there was evidence capable of supporting the conclusion that the accused's mental state was so disordered that he was unable to rationally consider whether his act was right or wrong in the way a normal person would.

(b) Automatism

The accused has committed a criminal act in the state of impaired consciousness resulting in involuntary behavior. The mind does not go with what is being done. If that state is caused by a mental disorder then under s.16 they wont be criminally responsible (could be detained in an institution). If the cause of the impaired consciousness is from some other factor then the accused will be acquitted. If the accused pleads with non-insane automatism, the Crown can counter that the cause of the automatism is a mental disorder (so they can still be put in an institution).
Automatism →You are not aware of what you are doing (either due to disease of the mind – insane automatism or external factor- noninsane automatism) Acquittal
Insanity Defence→ You are aware of what you are doing but you think it is okay. Your ability to judge right from wrong is compromised. Institutionalized

R v Rabey (pg. 802)- Automatism and Insanity Defences

- Automatism a term used to describe unconscious, involuntary behavior, the state of a person who, though capable of action, is not conscious of what he is doing. It means an unconscious, involuntary act, where the mind does not go with what is being done.
- With automatism we must first ask: Was the accused suffering from a disease of the mind?
- Trier of fact must determine whether the facts in a given case disclose the existence of such a disease (after the judge decides what constitutes a disease of the mind)
- Any malfunctioning of the mind or mental disorder having its source primarily in some subjective condition or weakness internal to the accused may be a "disease of the mind" if it prevents the accused from knowing what he is doing. But transient disturbances of consciousness due to certain specific external factors does not fall within the concept of disease of the mind. (In some situations, mental disturbances may not be properly categorized and will be determined on a case by case basis).
- The absence of volition (voluntariness) always results in an acquittal and the crown bears the burden of proving voluntary acts.

Facts:

- U of T student develops a crush on a colleague (whom he is close with)
- One day, he sees that she had notes in a book of hers saying mean things about him
- As they both worked in a lab, one day he removed a rock sample from the geology lab. At noon, he met the complainant by chance and, as they were talking to each other, the appellant suddenly grabbed her around the arms and struck her on the head.
- She lost consciousness momentarily. When she came to, he choked her

- The appellant advanced the defence of non-insane automatism. He testifies himself and remembers grabbing the friend and hitting the plaintiff but cant connect the dots. He has a psychiatric test and no mental illness is shown.
- He was acquitted at trial, the trial judge finding that the appellant was not insane within the meaning of **s. 16** and that he had acted in a state of automatism brought about by an external cause.
- On appeal to the Court of Appeal, the acquittal was reversed and a new trial ordered, the Court holding that the psychological blow suffered was not an externally originating cause of the dissociative state.
- Court of Appeal ordered a new trial on the charge of wounding on the basis that the defence of sane automatism was not available. Defence of insanity or lack of mens rea would be more applicable in this case.
- Another student nearby saw this happen and said that the defendant appeared to be glossy eyed and out of it and attacked the bystander who then went to get help
- Defendant tells the police officer in a statement that he couldn't stop hitting the plaintiff

Issue:

Does any defense avail to this defendant? Does automatism that results from a "psychological blow" (ie. Rejection) constitute a defence for the accused causing bodily harm with intent to wound? Should the accused be confined to an institution for the criminally insane?

Decision:

I would allow the appeal, set aside the judgment of the Ontario Court of Appeal, and send the case back to see if insane automatism can work. Restore the verdict of acquittal

Reasoning:

- Several individuals give a testimony, and the defendant describes it as being similar to when someone hits you on the head and you do something and you don't remember.
- Doctor said he had no mental disorders. It was a rare dissociative state that would most likely not reoccur. Other doctor said it was not a dissociative state but a state of rage because of the rejection and that if it was not rage then it was a disease of the mind.
- SCC define automatism- capable of action, don't know what you are doing.
- The appellant was neither conscious nor able to control his conduct so that it was involuntary. (this is sometimes spoken of as non insane automatism , to distinguish it from cases in which the state of automatism is attributable to disease of the mind)
- **What do we have to decide when a case like this comes up**? Whether the person suffers from mental disease (this will determine if they are insane automatism or non insane automatism)
- How do we determine if something is an external factor or internal? Examples of external factors (ex. Seeing something traumatic like a loved one dying). In this case they had to distinguish between the two (the trial judge erred in this distinction. So the SCC ordered a new trial.
- Disease of mind is decided by the trial judge and then goes to the jury to determine if the person in the particular case did in fact have a disease of the mind.
- POLICY Considerations: Its difficult to lock them up if its not a voluntary act. Also if we know it was a one time random thing that wont happen again do we lock them up? If we allow this defence to avail in circumstances like this or others (where you see a loved one killed) there is a worry people will overuse this as an excuse in court. Also if it will not reoccur do we want someone to be confined to an institution? **S. 545**
- SCC says that they can only accept that an external event can go to a defense of automatism if and only if an ordinary person in that position would also act in such a way.
- You also need to have the mens rea
- What is being said here is that at the relevant time, the appellant was in a state where though capable of action, he was not conscious of what he was doing and more particularly he was not suffering from a DOM and was therefore not insane.
- SCC says - Court of appeal focused on external cause and said that the "ordinary stresses and disappointments of life" aka rejection could not constitute an external cause producing automatism. The dissociative state primarily occurred from psychological and emotional makeup of the appellant - to exclude the defence of automatism, it lay upon the crown to establish that the appellant suffered from a disease of the mind at the time of the attack. The existence of the mental disease must be demonstrated in evidence. Here there is no such evidence.
- SCC – this is not to say that emotional stress can never constitute an external factor

- SCC- The fact that other people would not have reacted as he did should not obscure the reality that the external psychological blow did cause a loss of consciousness.
- There should be a threshold requirement for precipitating the state of automatism. (ie. Dissociation from a little anxiety can constitute automatism- it has to be a somewhat substantial shock to the system)

Automatism Defence vs Insanity Defence

- In both instances, the issue is whether an accused had sufficient control over or knowledge of his criminal act to be held culpable. **The two defences ARE SEPARATE THOUGH**
- Both are concerned to prove mental irresponsibility, the essential difference being that in the case of insanity the defect of the understanding must originate in a disease of the mind, whereas in the defence of automatism the criminal law is not concerned with any question of the disease of the mind.
- Automatism may be subsumed in the defence of insanity in cases in which the unconscious action of the accused can be traces to, or rooted in, a disease of the mind. Where that is so, the defence of insanity prevails.

➢ **Automatism**: action without conscious volition, - doing something without knowledge of it and without memory afterwards of having done it- a temporary eclipse of consciousness that nevertheless leaves the person so affected able to exercise bodily movements – this may be due to a disease of the mind or it may occur as the result of a temporary blow or by the influence of drugs or other intoxication.
- In the usual case in which an accused pleads insanity, he has the burden of overcoming the presumption of sanity.
- **The defense of automatism should be available whenever there is evidence of unconsciousness throughout the commission of the crime that cannot be attributed to fault or negligence on his part. Such evidence should be supported by expert medical opinion that the accused did not feign memory loss and that there is no underlying pathological condition which points to a disease of requiring detention and treatment.**

➢ **S. 16(2)** a person is **insane** when he is in a state of natural imbecility or has a disease of the mind to an extent that renders him **incapable of appreciating the nature and quality** of an act or omission or of knowing that an act or omission is wrong. -No burden of proof is imposed upon an accused raising such a defence beyond pointing to facts, which indicate the existence of such a condition.
- Whether lack of consciousness relates to MR or AR or both may be important in a case in which the offence charged is one of absolute liability, but the conceptual distinction does not concern us here.

R v Parks (pg. 818) –Insane and Non Insane Automatism, Peace Bond, Sleepwalking

- When a defence of non insane automatism is raised by the accused, the trial judge must determine whether the defence should be left with the trier of fact. First he must determine whether
- When the accused raises the defence that he was unconscious of his actions at the time of the alleged offence- no burden of proof is imposed upon him raising the defence beyond pointing to facts which indicate the existence of such a condition.
- If the foundation is present, then the judge moves to the second task: he must consider whether the condition alleged by the accused is, in law, non-insane automatism. If the judge is satisfied that there is some evidence pointing to a condition of non insane automatism then the defence can be left to the jury.
- The issue for the jury is one of fact: did the accused suffer from or experience the alleged condition at the relevant time? Because the crown must always prove that the accused acted voluntarily, the onus rests on them at this stage to prove the absence of automatism beyond a reasonable doubt.
- In this case, there is no doubt that the proper foundation has been laid for the defence of automatism. At issue here is the question of whether sleepwalking classifies as non-insane automatism or does it stem from a disease of the mind, thereby leaving only the defence of insanity.
- Once the defendant raises automatism as a defence the burden is on the Crown to prove voluntariness, or alternatively to prove "insane" automatism which results in a non-criminal responsibility verdict but may result in an alternative disposition under **s.672.54.**

Facts:
- Parks attacked his parents-in-law when he was sleepwalking.
- He drove 23 km to their house while sleepwalking and stabbed them in their sleep
- His mother-in-law died, and his father-in-law was seriously injured.
- He did not remember any of the actions and there was no reasonable motive
- He was charged with murder and attempted murder.
- Parks did not have any mental conditions, although several members of his family had sleep problems.

- Parks had been working long hours at work and had recently been charged with a theft from his employer.
- At his murder trial he raised the defence of sleepwalking and was acquitted by the jury. The trial judge ruled that his defence should be left to the jury as non insane automatism – entitling him to an acquittal rather than as a form of the defence of insanity which would lead to not guilty by insanity and institutionalization. SCC agreed with trial judges decision of putting forward defence of automatism and not insanity.
- He was acquitted both at trial and at the Court of Appeal. Trial judge put it to the jury
- SCC concludes that in sleep walking case it was fine for the trial judge to leave it to the jury about whether or not the defense of non insane automatism should be available.
- The accused's family had a history of sleeping issues but the aggression in sleep walking is not common.

Issue:

Does sleepwalking constitute non-insane automatism or it is a "disease of the mind" under **s.16**

Decision:

Appeal Dismissed. Sleepwalking avails and falls within non- insane automatism. But the judges say to be very careful about whether or not this would avail in another circumstance. Accused was acquitted and no peace bond implemented.

Reasoning:

- LAMER held that the expert evidence showed that Parks was indeed sleepwalking at the time of the attack, that sleepwalking is not a neurological disorder, and that there is no medical treatment for sleepwalking aside from good health. –**Sleepwalking not a DOM**
- Sleep walking falls into a separate category- unconscious behavior in a state of somnambulism - non insane automatism
- One expert emphasizes that sleepwalking runs in the family, suggesting there is an internal component to it.
- LA FOREST went into detail analyzing automatism. In determining whether or not automatism springs from a disease of the mind one should look to determine if it is caused by internal (in the mind) or external factors. One should also consider whether the condition is continuing. Although these are not determinative, a finding that automatism is internal and continuing suggests a disease of the mind. In this case there was no evidence of a recurrence of sleepwalking causing a similar outcome. Again La Forest states that whether or not something is a disease of the mind is a legal question – although expert evidence helps, it is not determinative.
- There is also non-insane automatism, which is where the automatism is caused by external factors, it is not continual, and is not linked to any disease of the mind. This applies as a complete defence resulting in the disposition of an acquittal. Although some critics are against applying this defence to sleepwalking, La Forest states that it cannot lead to an opening of the floodgates because it is so rare, and that it must be done to uphold the principles of voluntariness required for a conviction.
- **Once the defendant raises automatism as a defence the burden is on the Crown to show that the acts were voluntary. They can also prove that the actions were the result of "insane" automatism.**
- SCC says that if the defence of insanity had been put to the jury in replacement of or in combination of the defence of automatism there would have to have been in the record evidence tending to show that sleepwalking was the cause of the respondent's state of mind. This is not the case here. This is not to say that sleepwalking could never be a disease of the mind- in another case it could be.
- In distinguishing between automatism and insanity, the trial judge must consider more than evidence. Also the overarching policy considerations. Automatism is a subset of the voluntariness requirement – which in turn forms part of the AR component of criminal liability. When the automatistic condition stems from a DOM that has rendered the accused insane, then the accused is not entitled to a full acquittal but to a verdict of insanity. – this would be called **insane automatism.** The distinction between insane automatism and non-insane automatism is the crucial issue in this appeal.
- If we allow this person to be acquitted and they are on the streets, is there danger to public?
- Dissent struggles with whether they should apply the common law peace bond principles because what if it happens again, should he just get off Scott free?
- So they set limitations and want to grant a peace bond so that he could have some monitoring- but this would be for his whole life….is that constitutional? How would it be implemented? Lamer suggests a sleep clinic
- 2 theories are introduced: **The continuing danger theory** (any condition likely to present a recurring danger to society should be treated as insanity) **The internal cause theory** (a condition stemming from the psychological or emotional makeup of the accused, rather than an external factor, lead to a finding of insanity).
- The crown argues that the sleeping was caused by entirely internal factors – thus insanity.

- Recurrence of a disorder suggests insanity but the absence or small chance of recurrence does not preclude insanity. **If there is a chance of it recurring- that is an additional reason for classifying the condition as a DOM.** But if there is no chance of it recurring that does not mean it is not a DOM.
- Because neither of the 2 theories are relevant in this case, we must look at policy. If we allow automatism as a defense will it lead to floodgates? Would people abuse the defence as an excuse? – this is unlikely in this case.
- In the end there are no compelling policy factors that preclude a finding that the accused's condition was one of non insane automatism. It is for the crown to prove that somnambulism stems from disease of the mind (neither the evidence nor policy in this case overcome the crowns burden in that regard). The accused should be acquitted.

PEACE BOND IDEA:

- The court then divided over whether a peace bond should be considered and imposed upon the accused in order to ensure that nothing like this happens again. LAMER – the accused is simply set free without any consideration of the safety of the public- thus peace bond idea should be but to the trial judge for consideration. Although a peace bond may impose on accused's liberty (violate s.7 of charter) it would be saved under s.1 because it is concerning the greater good. SOPINKA- in order to put the idea to the trial judge there must be evidence that the behavior will reoccur and we don't have that in this case. MCLACHLIN- I am all for helping the public but should we be putting the accused through more hearings now that he is acquitted? What about his liberty? Generally the courts don't do peace bonds unless asked by the crown which didn't happen here. There was no application for a peace bond. This is something parliament should consider in general in the future. LA FOREST- to be effective in keeping a peace bond there is usually a complainant who will complain if the accused does not keep the conditions of the bond. We don't have a complainant in this case. As well there is usually a surety to enforce that conditions are being followed. We also don't have that in this case. As well,because the peace bond would be implemented to protect the public from a reoccurance- the conditions implemented would have to be for life. This is kind of ridiculous- definitely violating liberty and we would need a life long surety- absurd.

R v Stone (pg. 836)- Insanity and Non Insane Automatism Test

TEST FOR INSANE AND NON INSANE AUTOMATISM

- **NON INSANE** →Trial judge should start with assumption that the condition constituted a DOM and look to evidence to see if that presumption has been rebutted. this case deals with automatism and more specifically "psychological blow" automatism. The accused must show that he lacked voluntariness rather than consciousness as a key legal element of automatism (**since automatism amounts to a denial of voluntariness component of the actus reus**)- then sets out the test for establishing automatism. First, the accused needs to establish a proper basis for the defence of automatism on a balance of probabilities (as above). Generally the burden falls on the crown to prove voluntariness however an accused claiming automatism needs to raise evidence sufficient enough to permit a properly instructed jury to find a reasonable doubt as to voluntariness in order to rebut the presumption of voluntariness- This burden shift violates **s.11(d) of the Charter** but is saved by **s.1.** In law, there is a presumption of voluntariness. In order to establish this burden the accused must give expert evidence to go along with their claim of automatism. They must provide expert evidence confirming their assertion of automatism and a lack of voluntariness. This burden is met when the trial judge concludes that there is evidence upon which a properly instructed jury could find that the accused acted involuntarily on a balance of probabilities. They looked at cases like Chaulk and said yes it violates s.11 but is saved under s. 1. The crown then has the burden of proving voluntariness beyond a reasonable doubt to the trier of fact. If the crown fails to do so the accused will be acquitted. (Justice BASTARACHE)
- **INSANE** → The accused raising the defence must prove an evidentiary basis for the defence on a balance of probabilities (including expert evidence). The judge reviews the evidence and must then decide whether mental disorder or non-mental disorder automatism should be left to the jury. The judge must decide whether there is a "disease of the mind" present (The judge must determine whether the condition the accused claims to have suffered from satisfies the legal test for disease of the mind. This involves assessing policy, the internal cause theory and the continuing danger theory. – MUST BE A HOLSITIC APPROACH- does society require protection from the individual, should they be evaluated). If one is present, then a special verdict will be entered as per **s.16.** (because any person whose conduct is involuntary because of the condition that is the product of a mental disorder falls within the area of the "insanity" defence). If none is present, then only the defence of non-disorder automatism can be left to the jury. The question will then be if the accused acted involuntary on a balance of probabilities – if he did, then he is acquitted.

**** it is in rare cases that the automatism is not caused by a disease of the mind. Thus the judge will start from the assumption that the condition raised is a DOM and whether the evidence takes the condition out of this category.**

Facts:

- Stone was driving to see his two sons from a previous marriage with his wife. She did not want him to see them
- On the drive back she continued to berate him, telling him he was a loser, that he was terrible in bed, that he had a small penis, and that she was going to go to the police with trumped up assault charges.
- He pulled the car over and put his head down.
- He testified that he blacked out and felt a "woosh" go through his body.
- When he came to he had stabbed her 47 times with a hunting knife from his car
- He hid her body in his truck's tool chest, picked up a six pack, drove home, left a note for his daughter, and took off to Mexico.
- After a few weeks in Mexico he decided to return to Canada and turn himself in.
- In his defence, Stone pleaded insane automatism, non-insane automatism, lack of intent, and provocation (be convicted of manslaughter instead of murder).
- The judge allowed for a defence of insane automatism which was presented to the jury.
- The jury convicted him of manslaughter and sentenced him to seven years.
- The verdict was upheld by the Court of Appeal.
- He decided to have a jury trial
- Accused argued that he had a problem, because mental disorder was never put to the jury.
- Defence argued that he lost consciousness when his mind snapped under the weight of the verbal abuse from his wife- psychological blow. He argued that the judicial reasoning that took the issue of voluntariness away from the jury violates the presumption of his innocence and his entitlement to the benefit of a jury trial guaranteed by s.11 of the charter and is not saved under s.1

Issue:

What should the jury have heard and what should the defence raise, if anything, in order to have the defence properly put before the jury. Should non insane automatism be put before the jury?

Decision:

Appeal dismissed - DOM found. Therefore only insane automatism defence should be put the jury. (trial judge was right).

Reasoning:

- A 5-4 split in the SCC came on the issue of whether sane automatism should have been left to the jury. BASTARACHE ruled that the judge made the correct decision in not putting it to the jury.
- The majority also decided to reverse the onus of proof
- Justice Binnie (dissent) is saying that it is the right of the accused to have this presented to the jury. We cannot take this away from the accused. If we impose a burden on the accused to establish voluntariness- we will run into charter problems. He should have had the plea of non insane automatism left to the jury. He does not agree that judge made classifications of what constitutes insane automatism and non insane automatism can relieve the crown of their burden to prove all the elements of the offence (including voluntariness) As well making the accused prove involuntariness on a balance of probabilities conflicts with the charter. As well the internal cause theory used by the crown to deprive the appellant of the benefit of a jurys consideration of his voluntariness also violates s.11. We also cannot assume that a lack of voluntariness must mean a mental disorder when there is no other external cause. It was wrong for the courts to require the appellant to substitute his defence of involuntariness for the plea of insanity. There are cases where automatism has been found where sane people lose control over their actions- it was up to the jury not the judge to decide if the appellant had brought himself within the physical and mental condition identified.

- There was significant evidence given by psychiatrists for the Crown and the defence. They both agreed that Stone's situation sounded like he had a condition induced by the words that put him in an "dissociative state", and that if this were true he would have been unable to control his actions, however, there is no way to prove that this happened beyond his testimony.
- BASTARACHE, (majority 5-4 split), clearly differentiates between insane and non-insane automatism. Insane automatism results from a disease of the mind, and is completely covered by **s.16.** If it is successfully proven then a special verdict will be entered. On the other hand, non-insane automatism does not stem from a disease

of the mind and, if successful, results in an acquittal of the defendant. He says that "true" automatism does not result from a disease of the mind; when that happens it is a mental disorder.

- Automatism is a subset of voluntariness requirement- court goes through Rabey case- burden is on the crown to show beyond a reasonable doubt. Court said we should have the same burden put on the accused for all these defences. (ie. Defense of insanity- accused has burden on balance of probabilities, defense of intoxication- person who was drunk has to prove on a balance of probabilities that they were so intoxicated) therefore why should the burden in this defence be different? SCC for non insane automatism- accused has to prove automatism on the balance of probabilities.
- When charging the jury about automatism, the judge must be careful to emphasize the importance of voluntariness in criminal convictions, and concerns about the repute of the administration of justice associated with the defence of automatism.
- In the case at bar, the trial judge did not err in not charging the jury about automatism because the accused did not establish evidence on a balance of probabilities that would lead to the defence being accepted. SCC agrees that it should not have been put to the jury but says that the trial judge didn't consider the right factors- you didn't look at it holistically. Only mental disorder automatism should have been put to the jury. But non insane automatism should not be.
- Why is the court so concerned here with expanding the basis of non insane automatism? we don't want it to be too expansive of a defence because it could lead to floodgate or people faking it and taking advantage.
- Defence has to show that act of the accused was not voluntary and you must provide expert evidence (both a legal and evidentiary burden). – judge will examine all of this to see if the burden has been met. Look at witnesses, triggers, medical evidence, and assess these holistically and decide whether a properly instructed jury could make the decision and then it is given to the jury to decide.
- Does this person follow s. 16 do they have a disease of the mind, if so do they fall within s. 16. It is only when they don't suffer from s.16 that we should consider non insane automatism.
- What are the factors we need to consider: **triggers**- that could lead to it reoccurring.
- If the accused is charged with defence of mental disorder automatism they are not criminally responsible by s.672.34 and under s.672.54 they could be discharged absolutely or detained, or conditional discharge.

R v Luedecke (pg 846) – Automatism (Hereditary Sleepwalking)

- Internal causes generally seen to be a DOM. External causes generally seen as Non insane Autom.
- In looking at the risk of repetition of the event and danger to the public, the trial judge should not limit their analysis to the risk of further violence while in an automatistic state, but also to the reoccurrence of the factors or events that triggered the accused's automatistic state.
- Automatism is not a defense in the true sense but is a denial of the commission of the actus reus of the crime.
- Automatism claims raise legitimate questions about an accused's mental status and his/her potential danger to the public.
- Automatism claims, which by their very nature assert that the accused acted while in a abnormal and impaired mental state, inevitably bring into play the exemption to criminal liability created by **s.16** of the CC.
- Differences between insane and sane automatism is the presence of a mental disorder. Definition is in **s.2** of cc
- Canadian courts have adopted a very broad definition of "mental disorder"
- Disease of the mind- embraces any illness, disorder, or abnormal condition which impairs the human mind and its functioning, excluding however self induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion.

Facts:

-Georgian bay at a party
-Man goes to nearby cottage and women wakes up to find the man having sexual intercourse with her (she doesn't know him)
-He wakes up and goes to the living room- seems out of it
-She asks who he is – he tells her- she doesn't know him
-He took drugs (mushrooms) and had drank at the party before the incident
-(parasomnia) sleep disorder where he gets up and has no idea what he is doing
-Had a history of the behavior with past GF and had been to a sleep clinic once before
- Medical expert says that doing drugs, drinking and lac of sleep triggered the incident

-Crown says no automatism – you put on a condom and sexually assaulted the person you are guilty – you knew what you were doing.
-Trial judge says that the acts were involuntary and that he had no control over his actions and they were not the product of a mental disorder- acquits the accused
-Crown appeals- case goes to court of appeal and they go through the defence of non-insane automatism – they say it is a small subset of voluntary action (someone can in a state of automatism complete acts that are quite intricate yet are still not voluntary)

Issue:
What is the cause of the automatism? (sleep disorder, drugs, mental disease, etc)

Decision:
Appeal dismissed- new trial ordered (with outcome either being automatism with an acquittal or mental disorder resulting in an NCR-MD verdict) In the new trial it was agreed that the outcome should be NCR-MD

Reasoning:

- First must decide whether there is a disease of the mind (look at factors: psychiatric testimony and then what do we do with the expert testimony – judge will look at facts of case and expert testimony to decide if there is a disease of the mind- if he feel there is then he gives it to the jury to decided if s.16 has been met.
- Medical expert says that parasomnia is not a disease of the mind
- Court of appeal felt that the trial judge erred in categorically indicating that somnambulism is not a disease of the mind - in *Parks* (another case on sleep walking) it is made clear that sleepwalking may or may not be a disease of the mind depending on the facts - so its case by case basis. The trial judge did not take into account that the condition is something that probably would happen again- alcohol, lack of sleep, drugs, etc are all things common to young people and it is likely that a combination of these things will reoccur, also didn't take into account that there were prior incidents of this (with previous girlfriends). – we need to look at the history. **Trial judge relied too much on the opinion of the medical experts**. Also trial judge did not take into account the hereditary nature of the sleep condition (if it is **internal condition/genetic predisposition then it is a disease of the mind** and the non insane automatism should not avail). – it is not that the disposition cause the particular automatism, but it does predispose the individual to that condition thereby increasing the risk of reoccurrence.
- Defence says that there would be large societal implications for the accused if he is found NCR-MD- the stigma attached would be horrible. Argues that no reasonable person in society would view parasomnia as a mental disorder- it does not deserve the label. It must be that verdicts in automatism cases bear some resemblance to the community's concept of those who should or should not be found NCR-MD
- The new mental disorder regime implemented in 1991 in the CC is intended to overcome the improper stereotyping of persons found NCR-MD and to provide for individualize assessment and treatment of those individuals.
- Par. 115 defense council – concerned that clients in the future are going to be found not criminally responsible. – Court of appeal was sympathetic to this argument. **If we are going to broaden the defence of mental disorder- then there should be further responsible on members of the justice system to state why they are not criminally responsible.**

R v Bouchard- Lebrun (2011) SCC –Post Daviault and post s 33.1

Even if it is self induced intoxication being raised as a defense- YOU ALWAYS START WITH DISEASE OF THE MIND. If there is no disease of the mind then you go to self-induced intoxication.

s. 33.1 Self Induced Intoxication (Not a defence if below conditions are met)

- This provision applies where three conditions are met: (1) the accused was intoxicated at the material time; (2) the intoxication was self-induced; and (3) the accused departed from the standard of reasonable care generally recognized in Canadian society by interfering or threatening to interfere with the bodily integrity of another person. Where these three things are proved, it is not a defence that the accused lacked the general intent or the voluntariness required to commit the offence

Facts:

- 2 individuals on a bus and hitchhiking to go visit their parents. They both took ecstasy pills while on their way

- The appellants decide they want to go beat up a guy. They brutally assaulted two individuals while they were in a psychotic state caused by chemical drugs he had taken a few hours earlier. .
- The victim suffered serious and permanent harm.
- After being convicted by the Court of Québec on two counts of aggravated assault and assault, the appellant tried unsuccessfully on appeal to obtain a verdict of not criminally responsible on account of mental disorder
- Pleads not guilty claiming he has a toxic psychosis
- With leave of this Court, the appellant is now appealing the judgment of the Quebec Court of Appeal, which rejected the argument that a toxic psychosis resulting from the voluntary consumption of drugs is a "mental disorder" within the meaning of *s.16*
- It has never been in dispute, in any of the courts, that the appellant was in a serious psychotic condition at the time of the offences and that the effects of that condition diminished gradually until they disappeared on October 28, 2005. The essential issue in this appeal is instead how that psychosis affects the appellant's criminal responsibility
- Because this is an assault – general intent crime and intoxication is being raised as a defense we have to look at s. 33.1

Issue:

- Does a toxic psychosis that results from a state of self-induced intoxication caused by an accused person's use of chemical drugs constitute a "mental disorder" within the meaning of s. 16? Can a single episode constitute a mental disorder?

Decision:

Appeal dismissed – No defense. Court of appeal did not err (So then we would look at the defense of self induced intoxication) DOM defense does not avail and then the self induced intoxication defense is raised- but then you run into problems with s. 33.1)

Reasoning:

- **Court says we need to establish whether there is a disease of the mind here. Even if it is self induced intoxication being raised as a defense- YOU ALWAYS START WITH DISEAS OF THE MIND. If there is no disease of the mind then you go to self-induced intoxication.**
- Was the court of appeal right? Does s.16 avail to the accused (is there a disease of the mind) When we look at insanity we look at whether they had the capacity for the criminal intent and understand the nature of the act and that it was wrong. Burden of proof on the accused – we know it violates s.11 of the charter but is saved under s.1. The only issue in this appeal is whether psychosis results from a mental disorder. We need to rely on medical evidence to assess whether there is a disease of the mind. Analyzes the stone decision (internal cause of factors, continuing danger, factors, holistic approach) all need to be considered to establish whether there is s.16 available.
- Thus, the appellant is arguing indirectly that the toxic psychosis he developed after taking a "*poire bleue*" pill resulted from an underlying disease of the mind that became apparent as a result of his intoxication. According to him, *any* toxic psychosis, even one that results, as the trial judge found in this case, from a single episode of intoxication, must be considered a "mental disorder" within the meaning of s. 16 . The appellant's reasoning therefore rests on the premise that intoxication can never be the real or underlying cause of toxic psychosis and that toxic psychosis must originate in a pre-existing mental condition.
- Courts look to *Cooper* case for definition of "disease of the mind"
- It is common ground that the appellant was in a psychotic condition that prevented him from distinguishing right from wrong. The main issue is whether a toxic psychosis caused exclusively by a single episode of intoxication constitutes a "mental disorder" within the meaning of s. 16 .
- It can be seen at this point that the appellant's position poses a serious problem. To argue that toxic psychosis must always be considered a "mental disorder" is to say that the legal characterization exercise under s. 16 depends exclusively on a medical diagnosis. If the appellant's position were accepted, psychiatric experts would thus be responsible for determining the scope of the defence of not criminally responsible on account of mental disorder. This argument conflicts directly with this Court's consistent case law over the past three decades and cannot succeed. It would shift the responsibility for deciding whether the accused is guilty from the judge or jury to the expert.
- The psychotic state could have resulted from a number of combinations of things (not just the drugs triggering a predisposition). Therefore, because of the heterogeneous nature of the circumstances in which a toxic psychosis at the material time may be medically diagnosed, I consider it unwise to adopt an approach as broad as the one proposed by the appellant.
- What must therefore be determined is what state a normal person might have entered after consuming the same substances in the same quantities as the accused. Since certain factors such as fatigue and the pace of

consumption may influence the effects of drugs, this comparison must take account of all the circumstances in which the accused consumed the drugs that triggered the psychotic condition. If a normal person might also have reacted to similar drug use by developing toxic psychosis, it will be easier for the court to find that the mental disorder of the accused was purely external in origin (*Rabey*) and was not a disease of the mind within the meaning of the CC- if a normal person took this combo they would have acted the same way.

- Must also consider whether this was a onetime happening. Thus, if the circumstances of a case suggest that a pre-existing condition of the accused does not require any particular treatment and is not a threat to others again, the court should more easily hold that the accused was not suffering from a disease of the mind at the time of the alleged events.- if he avoids drugs in future he wont be a problem.
- The courts look at when alcohol can be used as a defence – they find that Self-induced intoxication only prevails for specific intent crimes (house of lords 1920 decision *DPP and Beers* case?). Prohibited conduct be committed with the intent to achieve a particular outcome (for example s.88 is a specific intent crime, s.348) ulterior intent = specific intent. SCC case called Leary – talked about self-Induced intoxication.

Ratio:

- The foregoing conclusion leads to the question whether s. 33.1 is applicable. 3 requirements are met. Therefore it applies in this case! Intoxication is not a defence!

Intoxication

- Ingestion of drugs or alcohol may prevent the crown from proving that the accused is at fault for the crime.
- The defence of Intox. Is not available for general intent crimes.
- DPP v Beard case – has been distinguished in both England and Canada regarding the demarcation between general and specific intent crimes.
- Why do courts detain the distinction between specific intent and general intent? What are the policy reasons? They will still convict for general intent part, just not the specific intent part.

R v Daviault (pg. 891)- Extreme Intoxication and General Intent Crimes

Up until this case, the law had said voluntary intoxication is a defence for specific intent crimes as it prevents the required intent and voluntariness for those crimes. However nothing had been said about it being a defence for general intent crimes.

It is decided in this case that if someone is extremely intoxicated and there is an absence of awareness (creating an automatism situation) one can make the argument that there is reasonable evidence to raise the defence of voluntary intoxication for a general intent crime. Claimant has burden to show on a balance of probabilities they were drunk to the requisite extent. This would mean they did not have the MR for crime and have been acting voluntarily

Specific Intent Crimes- assaulting a police officer
General Intent Crimes – Sexual Assault or Assault

BUT

Criminal Code Section 33.1 – limits intoxication defense for general intent crimes
Then we have the creation of s. 33.1 (after Daviault) – which **denies the defense of extreme intoxication to any General Intent crime that causes interference of the bodily integrity of another person**. Applies to any federal act under parliament. You can use for things that are not infringing bodily integrity. – so it limits when the defence can be used with regards to general intent crimes.

Facts:

- Daviault, an alcoholic, gives brandy to a 65 year-old woman in a wheelchair.
- She had one drink and fell asleep. Daviault, who had already had seven or eight beers during the day, drank the rest of the 40-ounce bottle of brandy.
- This put him at a level of intoxication that would lead to coma or death in most
- He sexually assaulted the woman; however he was so drunk he did not remember
- Expert evidence was adduced at trial stating that a blood alcohol level as high as Daviault's could have

resulted in an episode of "l'amnésie-automatisme", also known as a blackout.
- Daviault was acquitted at trial, as the judge held he was so intoxicated he was unable to form the MR, but the Court of Appeal substituted a conviction.

Issue:
- Does voluntary intoxication to a point that closely resembles automatism act as a defence for crimes of general intent?

Decision:
- Appeal allowed. New trial ordered

Reasoning:
- Cory, majority, needs to decide if the defence could be available to him - finds that voluntary intoxication can act as a defence in crimes of general intent only if the intoxication was such that the person was in a state of automatism. Allowing people to be convicted even though they were acting autonomously violates s.7 and s.11(d) of the Charter. Allowing convictions in these cases the court would essentially be substituting the intent to get drunk for the intent to commit the crime, which is unfair. Mens rea and voluntariness are two of the most important aspects of any crime, therefore, any reasonable doubt concerning them should act as a defence. They are very clear when they state that this only operates in cases of extreme intoxication resulting in autonomous actions – it does not apply when the defendant was just drunk. Proposes the rule that whenever there is severe intoxication and a general intent crime- we put it to the jury to decide if there was the required mens rea. We can't just say that because someone decided to drink a lot, that the crown has met their burden to prove. If we let the defence avail then people could abuse it? They may just get drunk and get away with things.
- **The majority also holds that the burden is on the claimant to establish that they were drunk to the requisite extent on a balance of probabilities** (similar to automatism). This prima facie violates the Charter, but it is saved by s.1.
- Sopinka, in the dissent, argues that denying this defence is not contrary to the Charter. He does not think that voluntariness to commit the actus reus of an offence is a principle of fundamental justice. He states that automatism does not apply in cases where the accused has brought the state on by his or her own fault. He holds that although the distinction between general and specific intent crimes is illogical for some things, it makes sense for this – therefore the Leary rule applies and the defence of drunkenness does not apply in general intent.

Defenses

- Self Defense
- Duress (w necessity)
- Provocation (partial defence)

(a) Air of Reality for Defenses

- Self Defence, Duress, Intoxication- not derived from the fault element of the particular offence, they can apply even though the accused committed the AR & MR**.**
- All of these will result in an acquittal of the accused. Crown has the burden to disprove that these were present beyond a reasonable doubt. If the accused can show that they did one of these defenses they must be acquitted.
- Defence that **excuses** a crime- these defences acknowledges that the action is wrongful but these cases hold that in the circumstances the accused should not be punished for the particular criminal offence. (Duress, Intoxication)
- **Justification Defences**- these challenge the wrongfulness of the action. (ie. Perka) the accused is not punished because in the circumstances the values of society are better promoted by disobeying the statute instead of observing it. (Self Defence)
- **Necessity** is a common law defence (which still exist even though offences don't)
- **Duress** -Partly Statutory and partially common law
- **Self Defence**- completely codified/statutory- CC

The accused if raising the defence, has an evidential burden- must show that there is some evidentiary basis to support the defence→ there must be an air of reality. If no party has pleaded the defence it is up to the trial judge to put the defences available based on the facts to the jury and have them decide

R. v Cinous (pg. 913) - Air of Reality Test

There is one Air of Reality test, but should there be different tests for each of the defenses? (one for necessity, one for self defence, etc). **NO- one standard for all defences.**

*When doing air of reality test for self-defence, must do it both objectively and subjectively. Therefore you would be looking at the 3 elements from the test 2 times.

- Unlawful attack, (objective and subjective)
- Reasonable apprehension of harm and death, and (objective and subjective)
- Reasonable apprehension of no alternative to not be hurt or killed (objective)

****Air of reality defenses in comparison to insanity- different burden of proof**

Facts:

- C was involved in criminal underworld.
- C was with X and Y and said he knew they were planning on killing him.
- C went in to store. When came back saw an opportunity and shot X and Y

Issue:

- Is there an air of reality to the defence of self-defence?

Decision:

Defense does not avail.

Reasoning:

- Court concludes that there should just be one reasonable standard of can this fairly be put to a jury or not. If there is evidence that is raised by either party – but no party has pleaded the particular defence it is up to the trial judge to put the defences available based on the facts to the jury and have them decide. If it meets air of reality test is should be put to the jury. If they do not meet evidentiary or air of reality tests then it should not be put the jury. There is a distinction made between evidential burdens (defense only has to raise evidence they only have an evidential burden) and other legal burdens? Court looks at totality of evidence to see if the test is met. Air of reality test is a question of the law
- Unlawful attack, (C has this, both objective and subjective)
- Reasonable apprehension of harm and death, and (C has this both obj and sub)
- Reasonable apprehension of no alternative to not be hurt or killed (this is wear it fails, on the objective part)
- It is not enough for an accused to establish a subjective conviction that he had no choice but to shoot – the accused must be able to point to a reasonable ground for that belief
- The belief he had no option but to kill must be objectively reasonable
- For 34(2) to succeed at the end of the day a jury would have to accept that the accused believed on reasonable grounds that his own safety and survival depended on killing the victim at that moment

Ratio:

Air of reality – whether there is evidence on record upon which a properly instructed jury acting reasonably could acquit.

- Must be some evidence on all 3 elements of the defence of self-defence to give it to the jury
- Both a subjective and an objective elements (no a modified test)

(b) Necessity

Test for Necessity is laid out in ***Perka v R*** case by Justice Dickson

- **Purely a common law offence**
- **Victim is a third party**
- **Defence of excuse** (you are morally blameworthy but you didn't have a choice
- The crown always has the burden of proof to disprove necessity beyond a reasonable doubt once it is raised by the defence.
- Crown must prove that is was a voluntary act and not out of necessity- he must disprove each of the following 3 criteria in the test. The defense does have to raise evidential foundation for the defence of necessity to be put to the jury.

- **there must be an emergency involving clear and imminent peril**, to be determined using a **modified objective test**, placing a reasonable person in the claimant's shoes; The normal human instincts cry out for action. It needs to be an urgent situation.
- **there must be no reasonable legal alternative to what is performed**, also determined using a **modified objective test**; and the person must have had no reasonable legal alternative, or any other choice.
- **one must look at the proportionality of the illegal act compared to the harm avoided** using a standard **objective test**, as allowing for subjective input would make the criminal law inconsistent. The harm inflicted by the person in the circumstance must be less then the harm sought to be avoided.
  - Necessity can be classified as either a justification or an excuse! – Know the definitions.
  - In some instances the court might come to the conclusion that this is wrongful act but in some situations people should be acquitted.
  - **Excuse**- does not dismiss the wrongfulness of the right
  - **Justification**- not a wrongful act in the context
  - How does the court distinguish necessity as justification or excuse?
    - As a justification you would say using necessity you are avoiding a greater harm)
    - As an excuse you would say you are using necessity saying that it was hard/impossible to follow the law in the situation – challenge the wrongfulness of the act

When we discuss this defence in the context of involuntariness what are we talking about- It is a **morally involuntary** choice that was made- The accused does have a choice (but not like a real reasonable choice) often they act illegally or they die.

R. v Dudley & Stephens English Case (pg. 957) -No defense of necessity available for a charge of murder

Facts:

- The defendants were aboard a ship which sank on July 5, 1884.
- They and two other crew members (Brooks and Parker) managed to get to a lifeboat with limited rations.
- On the 24th, having finished the rations and being unable to catch any fish, Dudley pushed his penknife into Parker's jugular vein while Stephens stood by to hold the youth's legs if he struggled.
- The three fed on Parker's body, with Dudley and Brooks consuming the most and Stephens very little.
- The crew was rescued on the 29th of July.
- They were forthcoming about what had happened, believing themselves to be immune from prosecution under the Custom of the Sea.

Issue:

Is necessity a defense to a charge of murder? If so, under what circumstances?

Decision:

Judgment for the crown. They were convicted. Defence of necessity does not avail.

Reasoning:

- Coleridge, writing for the court, found that there was **no common law defence of necessity to a charge of murder**, either on the basis of legal precedent or the basis of ethics and morality:
- Further, he questioned who was qualified to make the decision of who should live and who die were the principle to be allowed. Coleridge further observed that such a principle might be the "legal cloak for unbridled passion and atrocious crime". However, they were sensible of the men's awful predicament so while they were sentenced to the statutory death penalty, there was a recommendation for mercy. The sentence was eventually commuted to six months imprisonment.

- It is not correct to say that there is any absolute necessity to preserve ones life.
- The difficulty they have is in who is going to decide what is necessary or whose life is more important. What principles apply?
- Was it really necessary to kill someone who wasn't trying to kill you? What about the fact that one of the boat members never agreed to killing the boy. Clearly he felt he could wait until they got help instead of resorting to such drastic measures- so was it really necessary.

Ratio:

There is no defence of necessity to a charge of murder

Perka v R. (pg. 960) –Test for Necessity

Test for Necessity (DICKSON)

- The burden or proof is always on the Crown to disprove necessity beyond a reasonable doubt once it is raised and thus prove voluntariness. For it to apply:
  - **there must be an emergency involving clear and imminent peril**, to be determined using a **modified objective test**, placing a reasonable person in the claimant's shoes; The normal human instincts cry out for action. It needs to be an urgent situation.
  - **there must be no reasonable legal alternative to what is performed**, also determined using a **modified objective test**; and the person must have had no reasonable legal alternative, or any other choice.
  - **one must look at the proportionality of the illegal act compared to the harm avoided** using a standard **objective test,** as allowing for subjective input would make the criminal law inconsistent. The harm inflicted by the person in the circumstance must be less then the harm sought to be avoided

Facts:

- The appellants were drug smugglers taking marijuana from Colombia to Alaska when their ship encountered troubles off the coast of Vancouver Island.
- They were forced to unload the cargo and set up camp on the shore as the ship was going to sink and they were going to be injured.
- They were arrested by Canadian authorities and charged with importing and trafficking drugs.
- They stated that they never intended to bring the drugs into Canada and tried to employ the defence of necessity: they had to come ashore to prevent their death.
- They were acquitted at trial, but the Court of Appeal ordered a new trial which was appealed to the SC.
- Crown says defence of necessity should not go to the jury and should go out the window.
- **How does the court distinguish necessity as justification or excuse** (as a justification you would say using necessity you are avoiding a greater harm) as an excuse sense you would say you are using necessity saying that it was hard/impossible to follow the law in the situation – challenge the wrongfulness of the act

Issue:

- Is the defence of necessity a justification or excuse?- the court categorized **necessity as an excuse** in this case.

Decision:

- Appeal dismissed, new trial ordered with a proper charge to the jury.

Reasoning:

- DICKSON (majority) states that it is a longstanding principal that someone in situations that make it unrealistic and unjust to attach criminal liability to cannot be convicted of crimes committed in the circumstances. The Crown does not challenge the claim that there is a common law defence of necessity; it was established in R v Morgentaler (1976). However, they object to the trial judge charging the jury concerning necessity based on the facts of this case and to him placing the burden of proof of the defence on the Crown, rather than the accused. He delineated the test properly and laid it out for the jury but he did not lay out whether there was a reasonable legal alternative (trial judge did not do this)
- The Court says that necessity does not justify what someone has done as being lawful, they just excuse them from punishment
- Court distinguishes voluntariness in this case from voluntariness in previous cases we have discussed. – example of homeless man who breaks into a building to avoid freezing to death.

- Court did not believe their story- thought it was fabricated
- The crown said that this decision should never avail in any other similar circumstances. Court does not accept this argument at all.
- Pg. 969- Court says that if the situation was clearly foreseeable by a reasonable observer it was not voluntary.
- If necessity defense is raised, the CROWN HAS THE BURDEN to prove that it was a voluntary act. There does have to be evidential foundation for the defense to go to the jury.
- Dickson goes on to say that it does not matter if you were engaged in illegal or negligent activity when the necessity arose – all that matters is that you were in a state of emergency. Further, there needs to be an "air of reality" in all three steps of the test for a judge to charge the jury about the defence of necessity. Once it is raised, the Crown must disprove the evidence of necessity. You need to have proof of all three steps in order to succeed.

R. v Latimer SCC (pg. 972)

To charge a jury with respect to the defence of necessity there must be an air of reality for all three aspects of necessity.

Facts:

- Tracy, Latimer's daughter, was 12 years old and had very severe cerebral palsy and was constantly in pain.
- She was to have an operation that would reduce the pain (hip surgery), but it was going to inflict a lot of pain in the process. Parents did not want to put her through anymore pain or have her on a feeding tube, etc. It was all too much.
- Rather then put his daughter through continued pain, Latimer killed her by putting her in his truck and blocking the tailpipe where she died of carbon monoxide poisoning.- does this while the wife and other children are at church.
- Latimer denied it at first saying she had died in her sleep, but eventually confessed.
- He said that he had considered more inhumane ways to kill her, and decided that this was the best.
- Latimer was convicted of second-degree murder at trial and his appeal was dismissed. Originally charged with first-degree murder. Jury had a hard time convicting him of this and instead convicted him of second degree murder

Issue:

- When must the defence of necessity be charged to a jury?

Decision:

- Appeal dismissed

Reasoning:

- Court says we have to apply the test created by DICKSON to see if necessity can avail here.
- The court states that the defence of necessity does not apply here because there was no air of reality in respect to any of the three necessary elements for necessity. Tracy was not in immediate peril as there was no indication that she was going to die any time soon and Latimer had no reason to believe that there was.
- There were obviously lots of legal alternatives to killing her. – Apply modified objective test -what would the reasonable person do- try all the other options available to them (feeding tube, surgery for hipbone, or court essentially just says don't do anything and let it run its course).
- The proportionality test fails because killing someone is more serious then them being put through pain (although this raises the question of whether death is ever better than pain). Generally in cases of necessity it is the accused that is in an emergency and going to suffer if they do not act illegally, not someone else who is in the "emergency" while the accused faces no risk.
- Court says that trier of fact should not be considering this defence
- Latimer also argued that having second-degree murder impose a mandatory life sentence amounted to "cruel and unusual punishment" in this case, and that he should receive a constitutional exemption from the minimum sentence. This argument is rejected because he cannot show that the sentence is "grossly disproportionate" to the punishment for the most serious crime known to man – murder.

- **Should the jury be told about the penalty attached to the charge? Should they have been told that the man would go to jail for a minimum of 10 years? In this case they were not given this information.** In this case the judge said this is not for you to know- I am the one who assigns the sentence your job is to say if they are guilty of the charge or not. Would this cloud their decision and instead of them weighing whether the person broke the law would they know be deciding whether the persons acts were morally blameworthy to deserve the sentencing? OR should they know what stigma they would attaching to the sentence?
- Court has to look if its objective test, subjective test, or modified objective test. We are going to look at whether a reasonable person in these circumstances is going to do what Mr. Latimer did and look at the surrounding circumstances. You need to consider the surgeries she's gone through, her age, the pain she's gone through, her relationship with her father, what would the surgery do for her- worse or better?

c) Self-Defense

s. 34 of the CC Self Defence provision is completely codified

Test for Self Defence is demonstrated through *Latimer* case

- **Completely statutory offence**
- **Justified act**
- **Victim of the otherwise criminal offence are the person suffering from the threat/harm**
- **Self defence should be made more available to people than duress**
- **The defence is examined after the AR and MR has been proven beyond a reasonable doubt by the crown – the defence does not go**
- **TEST-**The woman/defence must prove that she had reasonable apprehension of death or bodily harm at the time the incident occurred.
- **34(1)** not guilty if they believe on reasonbale grounds that force is being used against them or another person or a threat, and the act is reasonable under circumstances and don't in protection
- In determining reasonableness considered relevant circumstance of the person, other party and act and the court also should look at nature of force/threat, extent of whether it was immanent, where there other options, etc **34(2)(f)** specifically speaks to battered women syndrome and shows how Lavallee is considered in this new revision of the provision. – Still need to consider what "imminence" is in regards to this provision
- If you look at 34(2) they used the "reasonable person" which points to objective test but then when they list the factors to consider it seems to import some subjectivity. So which is it or is it modified objective? SCC is exactly concerned about this. They argue that distinction between subjective and objective has become too blurred. – one of the criticisms of this new provision is that is it really a objective test?
- **Test for self-defense:** Look to the criminal code (entirely codified) s. 34 (1) and (2) lays out conditions for the defence reasonable belief in force or threat of force. – this provision is new and we are just developing case law on this provision

R. v Lavallee (pg. 923)

*Case was decided before the Self Defense provision was updated.
*Battered woman syndrome
*Importance of using expert evidence to explain the battered woman syndrome

Facts:

- Lavallee and her common law partner (the victim) had an abusive relationship
- On the night of the killing, there was a party at their house. Lots of people present. Rust hit her after she was talking to another man and she felt that she would later be in danger – she even told a friend about this. She runs upstairs and hides in the closet. He finds her and kicks her belongings. He hands her a gun hoping she will kill herself and she does not. He then tells her we are going to finish the party and then that she was going to "get it" when all the guests left. He threatened to harm her, saying "either you kill me or I'll get you".
- As he leaves the room she shoots at him – claiming she aimed above his head
- She was charged with murder.
- A psychiatrist gave expert evidence at trial describing her state of mind, and that she felt as though she was "trapped" and that she would have been killed if she did not kill him.
- The jury acquitted her at trial, but this was overturned at the Court of Appeal who ordered a new trial. Lavallee appealed this order to the Supreme Court.

- What she is trying to establish is that self defence should apply
- The issue with this case is that she was not in the moment under immanent danger- was her life in danger at that moment? Also she has had opportunities to leave him and go call police.

Issue:
- Do we need expert evidence to help assess whether this women has reasonable apprehension of death as the guy was walking out of the room

*Some of the arguments could be made that a jury or the reasonable person may just say why didn't she walk away, or she wasn't in immanent danger. But if we bring in an expert to explain battered woman syndrome then they can shed some light on why she didn't call police, or why she didn't leave.

Decision:
- Appeal allowed- acquittal restored.

Reasoning:
- **THIS IS THE TEST-**The woman/defence must prove that she had reasonable apprehension of death or bodily harm at the time the incident occurred.
- The jury's acquittal seems to have heavily relied upon the psychiatrist's assessment of the appellant and his testimony. He stated that she felt as though she was trapped, and that she felt as if she would be killed if she did not act first. However, the appeal court stated that this evidence was not admissible because it swayed the jury and did not elaborate on the facts but merely provided an opinion.
- WILSON, for the court, vehemently disagrees. After going into the history of spousal abuse and the effects that it has on the women who are abused, and the relevant law, even though the laws are changed now to be more equitable, we still need an expert. She held that expert evidence is very much admissible and helpful in establishing the necessary elements were present for **s. 34(2)** to provide a defence. People would raise the question of why didn't the accused just leave her husband? – So WILSON feels we need an expert witness to discuss the stereotypes, battered woman syndrome, ect in order to give a fair playing field of the situation. This section (34(2)) requires the accused to have reasonably believed that she was in danger, and that she had no other option to stop it other than causing death or grievous harm.
- The Court holds that expert evidence is very helpful in determining how a reasonable person would have acted in the situation. It allows the jury to understand the situation that the woman was in and what she was thinking. In this case, it helps them realize that despite the fact that she shot him while he was walking away, she still thought that her life was in serious danger. She believed that he was going to kill her later on that night if she did not act first. This expert testimony helps prove that the defence was not too far removed temporally, or too violent to have been reasonable in the circumstances. Therefore, the trial judge did not err in allowing Dr. Shane's testimony to be used as evidence available to the jury.
- Why do we need to be careful with using expert testimony as evidence? The layperson in a jury may take their word as given. That they just believe whatever the expert says. We need to assess what the expert is saying- but there is a worry that the jury would just believe them. Even though the other side can cross examine. There is still a POLICY concern.
- We are not saying that every woman subject to abuse would get away with it.
- In Nova Scotia case it was found that you have to wait until the assault is under way – why does WILSON not accept this? Because if the accused had to wait- she would have probably been killed. They are not saying its going to win everytime, but that we should be looking at factors and saying that the assault has to be underway in the exact moment.
- Court said there are lots of reasons that this person is not leaving the relationship. Traumatic Bonding – dependent on the abuser, fear that abuse will be worse if they leave, cant part from children/pets, hope that the abuser will change, has nowhere else to go, etc- these are reasons considered for why accused did not leave.
- EXPERT EVIDENCE SHOULD BE ALLOWED IN THIS CASE
- Trial judge instructed jury appropriately

Ratio:
- Self-defence applies even when you are not directly or immediately in harm.
- Expert testimony can be very helpful in claims of self-defence as it helps the jury/judge understand the condition that the accused was in when they acted and allows for an objective determination if their actions were reasonable in the circumstances.

- Actions that claim to be in self-defence but are too temporally removed or violent in the circumstances to be considered reasonable will not satisfy the **s. 34(2)** requirements to be a defence.

(d) Duress

- Accused commits an offence in response to pressure
- **It is an excuse**
- **Statutory and common law offence**
- **Victim are third parties**
- **S.17** some of it has been found to be unconstitutional. Personal danger must be imminent at the time of the offence (this is what violates s.7 of the charter- they are acting in a morally involuntary manner). It also excludes certain offences. And only applied to principle offenders- it is clear when you look at the words that it applies only to a person who commits an offence.
- Duress is not available to people who are charged with murder (or any other offences listed under s.17)
- Contrast to self defence- we have codified the offence but also have common law defence of duress (which Is much less restricted and more flexible than s.17- usually applied when one commits a morally involuntary response to threats where there is no safe avenue of escape – modified objective standard)
- Moral voluntariness also applies to defence of duress (Crown must prove AR and MR beyond reasonable doubt and then look at evidence and see if the person should be acquitted because they had no other realistic choice. Then you can't be liable. So you assess defence after AR and MR established
- Here the person has the MR and AR for the offence, and defence of duress is basically saying you have the MR and AR we are going to see if we can acquit you because your act is morally involuntary (its an excuse not justification) but it is morally involuntary because you didn't have a choice. Was it a realistic choice
- **We cannot equate moral involuntariness with moral innocence**- because you are blameworthy, you did do it.
- We cannot attach the stigma of the crime to someone who committed the crime because they had no other choice. – this would go against s. 7 of Charter
- There must be proportionality between harmed that is threatened and harm committed by the accused person
- Defence of duress has had a very long history
- Defence is raised as a response to a threat
- **Statutory defense and common law defence**
  - **YOU NEED TO LOOK AT THE FOLLOWING TO SEE IS S.17 (<u>STATUTORY</u>) APPLIES TO A CLIENT (for principles/Person who committed the offence)**
    - Court says that in Ruzic they eliminated two requirements and so we need to look at common law to fill in those aspects- no safe way to escape situation (modified objective standard- reasonable person similarity situation) and close temporal connection between threat and execution, and we need to think of proportionality test (modified objective standard- reasonable person similarity situated- harm caused must not be greater than harm avoided).

  - **<u>COMMON LAW</u> DURESS DEFENCE (for parties)**:
    - S. 8(3) common law defenses still exist. Can be future harm and threat of death or bodily harm to a third party, the accused reasonable believed that the threat would be carried out, that there is no safe avenue of escape (modified objective test) close temporal connectivity between threat and harm threatened, proportionality (modified objective test), cant be part of a criminal organization.
- S.2 of CC defines bodily Harm

- **Differences between statutory and common-law defense of duress**
  - We have excluded offences for s.17 the statuary defense
- **Similarities**
  - 6 common characteristics that must be proven in both common law defence and statutory defence
  - Presence and immediacy are no longer needed in either (As RUZIC case removed it as a requirement for statutory defence)

R v Ruzic (pg. 995)

*Immanency and Presence are no longer necessary under s.17
*we cannot equate moral involuntariness with moral innocence

Facts:

- Ruzic was a 21 year old woman from Belgrade, Yugoslavia.
- A street thug approached her while she was walking her dog in Belgrade and threatened to kill her mother if Ruzic did not do as he asked. He knew everything about her, although she didn't know who he was. He assaulted her, and threatened her mother. (threat to oneself and threat to others)
- She was provided with a false Austrian passport and had three packages of heroin strapped to her body and was told to fly to Toronto and deliver the heroin to a restaurant.
- She was arrested upon arriving in Canada and was **charged with possession of a false passport and importing narcotics.**
- At trial she successfully challenged the constitutionality of **s.17** and raised the common law defence of duress and was acquitted.
- The Crown's appeal was dismissed.
- Looks like s.17 applies to her because she is the principle person involved. When her attorney looked at the provision they believe it is in violation of the charter

Issue:

- Do the immediacy and presence requirements of **s. 17** infringe **s.7 of the Charter?**
- Does the common law defence of duress require immediacy and/or presence?

Decision:

- Appeal dismissed

Reasoning:

- LEBEL, (unanimous court) holds that as Ruzic is the primary actor s.17 does apply to her. However, she has a problem because the person who made the threats is halfway around the world. She argues that the requirement that the threat be immediate and present is too limited and that it violates s.7 of the Charter. She argues that she is still acting involuntarily despite the fact that the person making the threat is so far away. The court accepts this, and says that moral voluntariness is a principle of fundamental justice protected under s.7; it is required for criminal liability. The court therefore states that s.17 is unconstitutional in part because of this violation, but they do not specifically address which parts are unconstitutional.
- LEBEL As soon as charter was passed members of the judiciary is to look at procedural and substance of the legislation and see if it violates the charter then it wont be saved under s.1
- Moral voluntariness also applies to defence of duress (Crown prove AR and MR beyond reasonable doubt and then look at evidence and see if the person should be acquitted because they had no other realistic choice. Then you cant be liable
- Here the person has the MR and AR for the offence, and defence of duress is basically saying you have the MR and AR we are going to see if we can acquit you because your act is morally involuntary (its an excuse not justification) but it is morally involuntary because you didn't have a choice. Was it a realistic choice
- **We cannot equate moral involuntariness with moral innocence**- because you are blameworthy, you did do it.
- We cannot attach the stigma of the crime to someone who committed the crime because they had no other choice. – this would go against s. 7 of Charter
- S. 17 Person has to be present when the offence is committed- ad immediacy requirement person administering the threat must be at the scene of the crime
- Concerns that this defence will not avail in certain situations
- They look at the common law as well- and find that in a general consensus in other countries is that this requirement of immediacy is not a requirement so we shouldn't have to have it either. Cause it violates the charter and we can still have a viable defence without the immediacy and presence requirements.
- *BC Motor Vehicles Act* – s.7 charter violations- you are only able to justify it under s.1 in EXTRAORDINARY circumstances. Court say this provision is in violation and not saved under s.1
- Crown has the burden to prove that the accused not acting under duress beyond a reasonable doubt
- LeBel then lays out the common law rules for duress, which state that the threat only has to be made to

yourself or someone else (not included in s.17). It does not talk about the threat needing to be immediate. It also requires no easy route of legal escape but does require a close temporal connection between the threat and the harm. They say that she meets these requirements, despite the fact that it seems like she had lots of ways out, and the appeal is dismissed.

Ratio:

- The immediacy and presence requirements of s.17 are unconstitutional, however it is unclear what parts, if any, of s.17 remain constitutional.
- The common law rules for duress do not have an immediacy requirement but they require a close temporal connection between the threat and the harm.

R v Ryan (SCC) 2013- When to raise statutory duress or common law duress

Facts:

- Nicole Ryan alleged that she was subject to repeated abuse and torment by her husband,
- At trial, the trial judge accepted she was subject to such abuse. The husband was never called to testify.
- In September 2007, Ms. Doucet began to think about having her husband murdered.
- Over the course of the next seven months, she spoke to at least three men whom she hoped would kill him. In December 2007 or January 2008, she paid one man $25,000 to carry out the killing, but he then refused, demanding more compensation.
- She approached another person and was contacted by a third, an undercover RCMP officer, posing as a "hit man".
- She met with a hit man and agreed to pay him to kill her husband. The agreed upon price was $25,000, with $2,000 paid in cash that day.
- The killing was to take place the coming weekend.
- Later that same night, she provided an address and a picture of her husband to the "hit man."
- Shortly after, she was arrested and **charged with counseling the commission of an offence** not committed contrary to **s. 464(a) (pg. 347 of cc)**
- At trial, there was no issue that the elements of the offence had been proved and the trial judge, Farrar J. (as he then was), indicated that he was satisfied beyond a reasonable doubt that the requisite elements of the offence of counseling the commission of an offence had been established
- The Crown argued that on the facts of this case, the components of duress were not present. But it did not argue at trial, as it did later on appeal, that the defence of duress was not available in law to the accused. The trial judge accepted her version and acquitted her on the basis she had established she was acting under duress.
- MR and AR and its looks very clear that she will be convicted of the crime
- But she raises defense of duress
- The only reason she commissioned this crime is because she felt her and her daughter were going to die- she said she had no other choice.
- She had gone to the police and they said you should take a civil action and they didn't investigate any further- trial judge acknowledges this
- Trial judge acknowledged abuse and threats to defendant and their daughter (if they tried to leave he would kill them both) so the defendant was very fearful-

Issue:

- Does the defence of duress apply in this case? Is the defence available against the accused and not for the purpose of compelling the defence

Decision:

- We would allow the appeal and enter a stay of proceedings. – defence was not available –acquittal set aside.

Reasoning:

- SCC describes this area as "patchwork" we need to clear up how to navigate the defences and what the test is.
- Duress and necessity are excuses- the three all arise when a person is subjected to an external danger and commit a criminal act in order to avoid the harm that danger presents. But there are differences between the 3
- Court said self-defence should be made more available to people than duress. Why is the court so worried that when one fails, the other should be made available?
- The Court accepted the Crown's argument, which was made for the first time, that duress was not available. Duress is available when one is compelled to commit a crime against an innocent third party. In

this case, given the facts found by the trial judge, the husband would not be an innocent victim. Rather he would be the author of his own misfortune. Moreover Ms. Doucet was never compelled to act as she did. The Court alluded to the possibility of invoking self-defence as a possible defence.

Similarities and differences between self-defense and duress:

- Both take place after AR and MR have been established so they don't go to that aspect and are brought on after these have been established
- Both in response to a threat
- In Self Defence- the victim is someone who brought on the threat whereas in Duress the victim is a third party
- Test for self-defense: Look to the criminal code (entirely codified) s. 34 (1) and (2) lays out conditions for the defence reasonable belief in force or threat of force. – this provision is new and we are just developing case law
- Duress – common law and statute (s.17) – look to statutory and if it doesn't cover your instance then go to common law (because it is broader). Common law applies to the parties of the offence. Statuary applies to the person who commits the offence (the principle). RUZIC CASE established that - Immediacy and presence are unconstitutional (these two components of s.17 violate the charter – and precludes threats of future harm and not justified under s.1). Statutory does apply to the accused personally but also directed as a third party. So s.17 will cover someone acting to protect a third party (you kill someone out of duress because threats were made to one of your friends). There are a list of excluded offences where you cant use statutory offence (s.17)

(e) Provocation (Partial Defence)

- Defence of provocation is codified/statutory **S. 232**
- There needs to be an air of reality to the claim that the accused acted with provocation
- If air of reality is established matter is left to Jury, Crown has to disprove provocation beyond a reasonable doubt
- Defence used to exist in common law before it was codified
- Very controversial defence
- People say that anger is an excusatory factor in the defence of homicide and should this be the case? Whereas mercy is not considered (as in Latimer) so why for certain emotions like anger we reduce murder to manslaughter but not for other emotions
- Should provocation apply to all crimes?
- What words or acts are capable of constituting provocation? What is meant by the exclusion in the provision?
- **S. 232**- "ordinary person"- what does that mean?

RULES/ TEST FOR PROVOCATION → *R v Hill* sets out test for provocation

- Two part test for Provocation:
  1. **Objective test** (reasonable person) – wrongful act or insult
  2. **Subjective test-** was the accused actually provoked- Was it sudden or was there time for the person to calm down and for their passion to cool?

- **Objective test**

  There needs to be an objective test for the first part so that people who are more prone to anger don't benefit over others who are more level headed – we don't want to award people who have more of a temper and punish people who are more calm/cool.
  - We want to encourage people to act in a rationale way so that is why we look at the objective test. The old provision would not allow characteristics of the accused to be considered for objective test but now we do look at the characteristics (because of legislation passed in England)
  - DICKSON: how do we decide whether we can look at other characteristics of the accused? Is it mandatory to instruct the jury to consider the characteristics of the accused? With the **objective test (part 1)** are we allowed to import the characteristics of the accused? – YES you look at the accused objectively but compare them to the reasonable person in the category they are in. You consider age, sex, and race of the accused and the jury (trier of fact) can be instructed on these characteristics. But only if the characteristics is relevant to the issue at hand. (for example- the accused was being taunted about a physical disability and they kill the person. The accused is also black- do we need to tell the jury they were black? – NO because they were being taunted for their disability not their race). So the characteristic needs to be relevant. The courts are nervous about allowing characteristics of the accused to be considered because we don't want the objective test to become subjective and we don't want to over instruct the jury. But some people just see us as contextualizing the objective test. Providing context to the issue at hand so jury can properly apply the objective test.

- **Subjective Test**
  - Actually must have acted in response to provocation (must be shown to be going on in the accused's mind) Has to be at the time, cannot be after the person is not in a rage anymore or has calmed down.
  - S. 232 (2)

R. v Hill (pg. 1008) – Policy rationale behind why we have provocation

Facts:

- Hill was convicted of second-degree murder for a fatal stabbing.
- He was sixteen when the incident occurred and testified that he had reacted to the victim's uninvited homosexual advances.
- He relied on the defences of provocation and self-defence.
- The Court of Appeal ordered a new trial because the trial judge failed to charge the jury that the objective "ordinary person" standard for the defence of provocation had to take account of the age and sex of the accused.
- Crown said that Mr. Hill is really upset because partner dumped him and they were having an altercation and it looked as if the relationship was going to end. Mr. Hill out of anger stabs his partner– this is the crowns argument
- Mr. Hill argues that he was acting in defence and has provocation available to him. When he was sleeping on the couch his partner made some advances and he pursued this man to the bathroom and that he grabbed him and Mr. Hill in self defence shoved him away and picked up a hatchet to scare his partner but actually striked him.
- There is a police chase and Mr. Hill denies knowing his partner to the police and then admits to knowing him and raises self-defense and provocation.
- Court of appeal said we need to look at sex and age of the accused when considering "ordinary person" and the trial court erred in not doing this.

Issue:

- How is the objective test for the provocation defence to be formulated and to what extent are characteristics peculiar to the individual accused to be taken into account?
- When we say the "ordinary person" to what extent do you look at the characteristics of the accused?

Decision:

- Appeal Allowed

Reasoning:

- Courts look at the policy rationale behind the defence of provocation why do we have it in our code? – people are not perfect we make mistakes, we are not infallible- thus, the defense was created and we codified it
- WILSON (dissent) noted this about the legal position of children: If the legal system is to reflect accurately the view of children as being in the developmental stages en route to full functioning capacity as adults, the standard against which children's actions are measured must be such as can logically culminate in the objective standard of the ordinary person upon their arrival at full adulthood.

Ratio:

- There must be a cut-off point where children become treated as "reasonable persons", and that they must approach this point incrementally.

R. v Trans (pg. 1020)

Facts:

- Wheel on commercial truck became detached on highway. s.85(5) says no defence to show due diligence/penalty is fine. No possibility of imprisonment
- Ex husband walks into ex wife's house to return keys- which he didn't and finds ex wife with new boyfriend. He attacks them and goes to the kitchen and grabs weapons and brutally attacks the boyfriend and kills hi. Severely injured the ex wife.
- Accused raises defence of provocation
- Convicted of manslaughter instead of murder by trial judge – provocation reduces charge from murder to manslaughter.
- Court of appeal says no air of reality and trial judge erred

Decision:

Provocation defence does not avail

Reasoning:

- Not all state interference with an individual's psychological integrity will engage s.7.
- The right to security of the person does not protect the individual operating in the highly regulated context of commercial trucking for profit from the ordinary stress and anxieties that a reasonable person would suffer.
- Court said he did not comply with **s. 232** – he came in unannounced and where was the insult that caused him to lose control?
- Can only use when the accused has the intent for murder.

Court uses the 2 part test (First part objective test) (second is subjective)

- **Objective test** (reasonable person) – wrongful act or insult
- **Subjective test-** was the accused actually provoked- Was it sudden or was there time for the person to calm down and for their passion to cool?
- We have got to prove the objective element first (wrongful act or insult) it is a Q of fact for the jury/trier of fact whether the insult constitutes provocation.
- Reasonable person and ordinary person are used interchangeable and we have changed our approach to the defence because we look at contextual factors (age, sex, etc) we have to be very careful that we don't start importing a subjective test into first branch of test.
- 1029- impact of charter values – tiny print on top of page – impact of charter values on this defence. Charter values do have an impact on how we interpret the provision
- we need to look at whether the response to provocation/insult was their time for passion to cool? Because we don't want to be endorsing acts of revenge. It has to be acting in the moment.
- **Air of Reality must be proven first and then trial judge puts it to the jury and then the jury decides and goes through subjective and objective test. (you must prove that there is some evidence/air of reality that points to the objective and subjective test to be necessary)**
- There was no air of reality to the defence of provocation because there was no insult- She was just having sex there was no insult. The accused was watching his ex wife and had told his grandmother that he had found out who the boyfriend was and was going to go hurt him. Court said there was no suddenness and no air of reality for either branch of the test.
- SCC agrees with court of appeal- it is a charge of murder not manslaughter because the defence does not avail.

R v Parent (1033)

- Divorced and husband is forced to sell assets in order to make ends meet
- His wife shows up to buy assets
- HE goes to the sale with a gun and wife says "I told you I would wipe you out"
- He shoots her and argues defence of provocation
- The defence works in trial but case goes to SCC

- MCLACHLIN: there should be a new trial
- Crown says that when accused said he was angry the trial judge mistakenly used it to go to the mens rea instead of defence provocation.
- When someone is angry and kills someone you will not succeed because you have not proven the elements of s. 232.

R v Pappas (2013) SCC

Facts:

- Man defrauding government (not paying taxes), the victim knew this and accused threatens to harm his mother if he stops paying this man money (this was the insult)
- Accused pleads with him saying lets just stop this.
- Kills victim and puts his body in his car and gets rid of all the physical evidence
- Police stopped him on the plane on his way to London
- Accused of second degree murder
- Trial judge was having issues with whether air of reality avails. Reject the defence of provocation
- Goes to court of appeal: should it have been left with the jury? Yes the trial judge did not make any errors
- SCC then gets it
- Look at the ongoing relationship between he two. Accused can not just assert the defence he needed to have evidence
- There is some merit for the first branch of the test but not for the second.

Reasoning:

- Looks at the cinous test (if there is any or some such evidence then the air of reailty hurdle is cleared) If no evidence for air of reality then the defence cannot go to the jury. There needs to be some evidence for each branch of each test for any defence ever raised. So some evidence to point to an assault and some evidence to point to the fact that it was all in the moment- no time for passions to cool
- If there is direct evidence for both elements of the offence then it should go to the jury.
- Look at the comment "you're the best cash I have, and I have great insurance"
- Looks at *Trans case* and comes to the conclusion that that aspect was fulfilled.
- FISH it was fine to leave both elements to the jury and both standards were met

Parties to an Offence

- On what basis is someone's involvement in a criminal offence enough for them to be liable for an offence. There are different types of participating but we will focus on S. 21 (Aiding and Abetting)

Aiding and Abetting S. 21

Aiding: Material assistance in the commission of a crime
Abetting: verbal encouragement or comparable forms of enticement

If you are found to be aiding and abetting under s.21 then you are Guilty as parties to the same offence as the person who actually commits the offence

CROWN has to prove:
AR→ acts of encouragement and assistance (not mere presence)
MR (accused intentionally aidith and abettith the offence) -Prior knowledge that the offence was going to be committed (planned and you are there with the knowledge of this intentional sexual assault)

R v Dunlop & Sylvester 1979 SCC (pg. 1068)-What is Aiding and Abetting?

Facts:

- Gang rape
- Women survives
- 13 years old and brought to a field by a group of men
- Several people are charged with (At the time rape) Sexual intercourse without consent

- Dunlop and Sylvester said they were not involved much, they just delivered beer while the acts occurred and then left (they did not help or engage in the acts being performed)
- They said they should be completely absolved of this crime
- S. 21 (1) allegation that trial judge made mistake in charging the jury and there was insufficient evidence to go to the jury with a defence

Decision:

Cannot be convicted of aiding and abetting of the acts

Reasoning:

- SCC makes it clear that if those men were just standing there and not doing anything else that is not enough for them to be liable under s. 21 (1) you need more. Like encouragement or assistance, keeping a watch, holding her down, etc
- Look at several old cases
- Look of case at Ontario court of appeal where man and women (who were fighting) go in car with friend and friend shoots the husband (issue was whether the women/girlfriend could be convicted of the offence- jury should have been instructed that if she just watched and didn't do anything then you cant convict her of the crime- but jury was wrongly instructed and trial judge erred)
- The two did not have the mens rea required for aiding and abetting
- What about the fact that they are just standing there and not doing anything to help the girl. They are not encouraging it but they are also omitting to do anything. Can they be charged?
- Crown said that trial judge left jury with the belief that mere presence is enough to convict- THIS IS WRONG.

R v Brisco (pg. 1081) – Leading Case/Most Recent

- **S. 21 (1)(b)(c)**
- AR→ (commission or omission that assists perpetrator to commit the offence)
- MR→ need to be established (proven beyond a reasonable doubt by crown) render assistance for the purpose of aiding the perpetrator to commit the offence- you need intent and knowledge. You have to know that the perpetrator intends to commit the crime and you have to show that the person intended to help the principle in commission of the crime

Facts:

- Group of people and sexual intercourse
- Kidnapping, aggravated assault, first degree murder
- Briscoe said he was not involved at all I just watched I didn't do anything
- He did drive to the scene of the crime, held the victim down, brought weapons- you knew what was happening
- Goes to SCC

Decision:

New trial ordered

Reasoning:

- the judge should have instructed the jury to consider willful blindness because if the believe he was willfully blind that would have satisfied mens rea of crime (but trial judge did not do that

Portillio (pg 1089) Court of Appeal

- A lot of parties committing an offence, so you need to consider each accused separately with aiding and abetting
- To be convicted the accused must be show to have participated in the killing (doing something that caused the death or helping to cause the death)