1. Standard of proof

a. *Golden thread* - presumption of innocence combined with the requirement that guilt be proved BRD; constitutes the golden threat which is seen throughout common law systems.

b. Three applicable standards in criminal law:

i. Reasonable doubt

1. *Definition - persuasive burden*. Not speculative, must rise from the evidence, must not be a frivolous or imaginary doubt. Burden of proof lies with the prosecution, shifts to the accused only where exceptions allow. Not based on sympathy or prejudice, but rather reason and common sense. Does not require absolute or moral certainty. {Lifchus}

2. *Synonyms not helpful* - cannot be understood or elucidated by providing synonyms for reasonable; nor can judge charge jury by saying conviction appropriate if "sure" that D. is guilty before charging re: BRD. {Lifchus}

3. *More than mere BOP, less than absolute certainty* - charges must explain reasonable doubt standard, discuss its special legal significance, and charge that it is a higher standard than the mere balance of probabilities, but less than absolute certainty: must specify how much less. {Lifchus}

4. *Exceptions to BRD requirement:*

a. *Insanity* - party raising (usually the accused, for obvious reasons) must show that they were incapable of differentiating between right at time of commission on balance of probabilities; upheld under s.1 via Oakes, in spite of s.11(d) violation.

b. *Reverse onus offences*- (eg. impaired driving: an intoxicated person in driver's seat of a vehicle must show on balance of probabilities that they were not in that seat for the purposes of operating the vehicle). Unlike the P4P presumption, this one has been upheld under s.1 through Oakes in spite of s.11(d) violation.

ii. Balance of probabilities

1. *Definition* - persuasive burden, requiring at least a 51% likelihood. {Lifchus}

iii.Air of reality

1. *Definition* - evidentiary burden, threshold which if met requires that there be a further burden delivered. {Lifchus} Evidence must be adduced which, if believed, would constitute the defence in question. {*Cinous*-Burn}

2. Actus Reus

a. *Definition* - criminal act itself; the physical action, but with a view to the circumstances and consequences surrounding the act (eg. the absence of consent). *Contemporaneity* requires that the actus reus and the mens rea coincide; there must be some temporal overlap between the two, some moment of simultaneousness.
however.

b. *Components*

i. Physically voluntary

1. Demands that the prohibited conduct be a *product of the will of the accused*. Based on the notion of conscious control.

a. *Consciousness* - a central characteristic, necessary but not sufficient, as one can be conscious but still incapable of controlling one's actions.

b. *Control* - also necessary; must have been able to opt for an alternate, non-harmful course of action.

c. D. ordered deported, but was brought back to England against her will, and therefore charged with an offence. However, her actions were involuntary, precluding culpability. {*Larsonneur*-Deport}

d. Physical element in the offence must be produced by the actions of the defendant, and not the actions of another party. {*Kilbride*-Ticket}

ii. Act or omission

1. Most offences require proof of a positive act, stealing, breaking, touching, etc. - conduct.

a. *Positivity* - criminal law generally favours criminal punishments for *actions*, and not *omissions*. But, culpability should not be precluded merely because the most recent action taken by an accused amounted to an omission rather than a commission. {Miller}

b. *Omissions* - a person will not be criminally liable for failing to act unless he or she is under a legal duty to act. For instance, one does not have a duty to offer assistance unless there is a recognized duty of care at common or civil law.

c. *Status offences* - occur where there is no act and no omission, but rather punishment for a "state of being" rather than what a person did or did not do; law very uncomfortable with these offences. Difficult to find in contemporary law, as most offences have underlying acts / omissions, and membership in

terror organization not codified as offence, although terroristic acts are.

d. *Definitional* - Most issues with the *act* component of the *actus reus* are definitional. The code includes definitions for some offences.

e. *Standard of proof* - presumptively judged subjectively.

   i. Sexual assault {*Ewanchuck*-Wood}:

      1. *Objective test for whether assault occurred.*

      2. *Objective test for whether assault is sexual in nature* - Objective test for whether assault is *sexual*: in light of all circumstances, is the sexual or carnal context of the assault visible to a reasonable observer? Factors include the nature of the contact, situation, words, gestures, threats, etc. Can also be *informed* by the intent of the person committing the act. If the motive of the accused is sexual gratification, then this helps evidence that the nature of the assault was in fact sexual. Does it violate sexual integrity of victim? {*Chase*-Neighbour}

         i. Conduct of accused in groping breasts of victim revealed that his motive was sexual; this would therefore make obvious the sexual context of the assault to an observer. {*Chase*-Neighbour}

         ii. Father grabs son's genital area as disciplinary response to child having done this to others; purpose *not* sexual gratification, assault was one of a sexual nature. {*R.v.V(KB)*}

      3. *Subjective test for whether victim consented to assault* - Accused can claim that the words an actions of a complainant raise a reasonable doubt concerning assertion of subjective non-consent (eg. that she did not in fact consent). Perception of state of mind not relevant; what is being argued is whether or not the complainant actually felt what she purports to have felt concerning consent. {*Ewanchuck*-Wood}

         a. *Consent must be freely given* - vitiated if given under fear, threat of coercion, etc. See s.265(3). There is no consent where complainant subjectively believed that she was choosing between sexual contact with D. or being subject to application of force. Not whether she preferred not to have sexual activity, but whether there were only two choices - force, or compliance. {*Ewanchuck*-Wood}

         b. *Requirement of positive vitiation of consent troubling* - s.265(3) applies in circumstances where the complainant does not resist / submits by reason of the application of force; should also apply to silence / passivity. Otherwise, would require physical resistance of some sort

by the victim for the offence to be established. {*Ewanchuck*-Wood}

iii.In prescribed circumstances (sometimes)

1. Not just the act or omission itself, but the circumstance in which it occurred. For instance, act of operating not illegal, unless within the specific circumstance of impairment.

    a. *Necessary* - where specific circumstances are prescribed in definition, must be proven in order for conviction to be obtained.

    b. *Exceptions* - presumptively subjective mens rea re: prescribed circumstances for subjective mens rea offences; however, for sexual assault, whether the assault is *sexual* is *objectively* based.

iv.With prescribed consequences (sometimes)

1. *Necessary* - where specific consequences are prescribed in definition, must be proven BRD for conviction to be obtained. Can be multiple causes, but so long as the actions of the accused are contributing beyond the *de minimis* range, this is sufficient: does not need to be sole cause or main cause.

2. *Punishment based on consequences acceptable* - there is nothing to stop Parliament from treating crimes with certain consequences as more serious than others which lack those consequences. Conduct may have more or less serious consequences, depending on circumstances of case; same assault might kill one, injure another, and have no effect on a third. Distinguishing criminal responsibility on the basis of the amount of harm actually caused is acceptable. {DeSousa}

3. *Causation* - apply *Nette* formulation, *significant contributing cause* to determine whether act *caused* the consequences; must establish legal and factual causation. Remoteness is preempted by statute, as is contributory negligence. {*Nette*-Hog}

    a. *Factual causation* - whether a logical link can be drawn between the accused's conduct and the prohibited consequences. Does not relate to intention / foresight / risk, but to whether, in view of the facts, A caused B. {*Smithers*-Hockey} *But for* formulation. {*Nette*-Hog}

        i. Eaton's did not rely on false info provided by D. in obtaining credit, so it cannot logically be said that her statement *caused* her to receive credit. {*Winning*-Eatons}

        ii. *Constructive causation* - analogous to car racing cases; both drivers are held to have caused injury, as there is one danger, and each party acting in concert bears equal responsibility for its continued lifespan subject to withdrawal or an intervening event. {*SR*-Creba}

1. In Creba, decision of parties to engage in gunfight caused Creba's death, despite lack of evidence concerning which party's bullet struck her. {*SR*-Creba}

iii. *Considerations* - not metaphysical subtleties, nor semantic differentiation between "cause" (foreground, eg. blow to head) and "condition" (background, eg. thin skull), nor does it require apportionment between causes and conditions. {*Smithers*-Hockey}

1. Factual causation established regardless of whether the victim had a faulty epiglottis; death was caused by kick; *thin skull* does not intervene. {*Smithers*-Hockey}

b. *Legal causation* - whether the causal connection is sufficiently strong to support criminal liability. Governed by *Nette* test; must be a *significant contributing cause* (*Smithers* formulation re: outside of *de minimis* range no longer applies). {*Nette*}

i. *Intervention* - act of a third person, not acting in concert with the accused, may have the effect of relieving the accused of criminal responsibility; this requires *voluntary intervention* - free, deliberate, and informed intervention. {*Pagett*-Shield}

1. *Thin skull rule applies* - must take victim as found, therefore the thin skull rule does not apply as an intervening factor. {*Smithers*-Hockey}

a. While the victim may have had a malfunctioning epiglottis, this does not vitiate culpability due to the thin skull principle. {*Smithers*-Hockey}

2. *Independence of intervention* - voluntary intervention, such as that which is performed in pursuit of self preservation, or that done in performance of a legal duty is excusable, if it is *independent* - if *caused by accused's own behaviour*, does not operate as intervention. {*Pagett*-Shield}

a. Cannot use another person as human shield if this is necessary due to one's own actions, eg. provoking gunfight w/ police. {*Pagett*-Shield}

3. *Killing blow* - there is no principle to support that the killing blow must be dealt by the D. or one acting in concert with the D. {*Pagett*-Shield}

a. One gently nudges a bassinet in front of a speeding train; the killing blow was struck by the train, the conductor not acting in concert with the D. Certainly, such a fact would not excuse the D. from culpability. {*Pagett*-Shield}

4. *Exception* - under s.231(2), in differentiating between first and second degree murder, where you apply *substantial contributing cause* instead of *significant contributing cause*. {Harbottle}

ii. *Remoteness* - there is a possibility that the original act may be so remote that it is de minimis, therefore not a significant contributing cause (eg. victim of a stabbing is knocked down the hospital stairs while being discharged, dies

as a result).

iii. *Death*

1. *Murder* – to determine whether accused guilty of murder, first step to determine whether murder was committed (s.229, s.230 definitions). Remaining question is whether 1st or 2nd degree (s.231). If Crown relying on s.231(5), then in differentiating between first and second degree murder, where you apply *substantial contributing cause* instead of *significant contributing cause*. {Harbottle}

2. *Statutory provisions concerning legal causation re: death*

a. *Failure to obtain proper treatment is not an intervention* – s.224 - example of thin skull rule. Those who use violence on other people must take victims as they are found; does not lie within D.'s mouth to say victim must accept certain treatments. {*Blaue*-Xfusion}

i. Victim refused blood transfusion (JW), but stab wounds still operative cause of death. {*Blaue*-Xfusion}

b. *Good faith treatment, proper or improper, is not an intervention* - s.225

c. *Crumbling skull not an intervention, acceleration no excuse* - s.226

3. <u>Mens Rea</u>

a. *Definition* - guilty mind; mental element, or fault; an act does not become guilty unless the mind is guilty. Essential ingredient of criminal offences; presumed as a requirement, unless negatived by express language or necessary implication. *Contemporaneity* requires that the actus reus and the mens rea coincide; there must be some temporal overlap between the two, some moment of simultaneousness. Criminal liability for a particular result is not justified except where the actor possesses a culpable mental state in respect of the *result*. {*Martineau*-B&E}

i. *Variability* – no uniform definition of fault for offences; different in each offence, and definitional enterprise left largely for the courts to determine at common law. Lack of consistency between offences. Further, while mens rea is a presumptive requirement for criminality, many offences do not include specific mens rea requirements. All offences are presumptively subjective unless otherwise stated.

b. Offences with special mens rea considerations

i. *Predicate offences* - in circumstances of predicate offences, unlikely that subjective foresight of consequences is required. Consider unlawful act manslaughter, unlawfully causing bodily harm, assault causing bodily harm, aggravated assault; objective foresight

of consequences will suffice for these offences. {Creighton}

ii. *Stigma offences* - constitutionally impermissible for an offence to carry the potential for imprisonment without some minimal level of *mens rea* (subjective). To do otherwise would be to offend PFJ, allowing for penal punishment of the morally innocent. {*Vaillancourt*-Pool} More stigma attaches to criminal than non-criminal violations; proportional to gravity of conduct, consequences, and fault. {*Finlay*-Guns}

1. Stigma offences

    a. *War crimes / crimes against humanity* - must be aware of conditions which make actions more blameworthy than their underlying offences - the factual conditions which render given actions a crime against humanity; however, not required that the actor know that the actions were *inhumane*. {*Finta*-War}

    b. *Murder* - special mental element re: intentionality. {*Vaillancourt*-Pool}

    c. *Robbery / theft* - must be some proof of dishonesty. {*Vaillancourt*-Pool}

2. Non-stigma offences

    a. Careless storage of firearms. {*Finlay*-Guns}

    b. *False advertising* - implies carelessness, not dishonesty. {*Wholesale*}

iii. *Manslaughter* - fault element requires objective foreseeability of bodily harm which is *neither transitory nor trivial*; trivial assault, not foreseeably likely to result in death, would not give rise to manslaughter if it did result in death. {*Cribbin*-Drown}

1. *Unlawful act manslaughter* - fault requirement for unlawful act manslaughter requires mens rea for the underlying unlawful act, which cannot be an absolute liability offence; also requires objective foreseeability that the unlawful act gives rise to risk of bodily harm that is *neither trivial nor transitory*. {*Creighton*}

2. *Foreseeing death not required* - requirements of manslaughter are conduct causing the death of another person, and fault *short* of intention to kill. Need to deter dangerous conduct which may injure or kill others, and this supports the view that death need not be objectively foreseeable; only injury. {*Creighton*}

iv. *Accessory after the fact* - Crown must show more than generalized knowledge that the principle has committed *some crime*. Knowledge of the offence committed by the person aided was an essential element to being convicted of being an accessory after the fact. However, wilful blindness imputes knowledge, and where established BRD then the offence can be made out. {*Duong*-Fact}

1. Accused must have known, for instance, that the principle had committed murder, and with that knowledge, assisted. {*Duong*-Fact}

v. *Felony murder*

1. *Crime with a weapon* - s.213(d) - provision holds that first degree murder, regardless of foreseeability of death if one commits a crime with a weapon upon one's person. However, cannot have stigma / extreme penalty of murder without intentionality / subjective foresight; this provision does not even require objective foresight, ergo inconsistent with PFJ; do not need to convict of murder to deter weapon use. {*Vaillancourt*-Pool}

2. *Death while committing certain offences* - s.213(a) - olds that felony murder is where a person causes the death of a person while committing certain offences, regardless of whether they possess subjective foresight of likelihood of death ensuing. Would punish those who commit crime intentionally no more harshly than those who do not; inconsistent with PFJ; do not need to do this to deter risky behaviour {*Martineau*-B&E}

c. Types

i. *Subjective* - nature of what was in the mind of the accused person at the time of the commission of the act. Absent express contrary intention in statute, mens rea for true crimes can be satisfied by proving any of the following four bases {*Buzzanga*-Flyer}:

1. Intent

a. Desired or sought the prescribed harm (*direct*), or otherwise desired some other end, was *substantially certain* that this act would bring about harm, and chose to perform act anyways (*indirect*). Presumed that in so doing, resolved to bring about harm, intentional. *Wilful* equivalent to intentional. Generally relates to conduct/consequences component of *actus reus*. {*Buzzanga*-Flyer}

i. Must have intended to promote hatred, and not merely have intended to distribute material which was reckless in view of this outcome. {*Buzzanga*-Flyer}

ii. *Objective component* - can look at what reasonable person would have desired in the circumstances; this is merely to inform the inquiry into what the accused did in fact desire / intend; the standard is subjective, but objective considerations can inform the investigation. {Tennant}

iii. *Common sense inference* - sane and sober person usually intends the natural and probable consequences of actions infer as a matter if common sense, reasonable foreseeability. {Tennant}

iv. *Motive is not intent* - intent, the exercise of free will in doing some thing, rather than motive, the purpose which drives exercise of will. Motive is

always relevant and admissible; absence of a motive is exculpatory, presence of a motive is inculpatory, but not an element of the crime itself. {Tennant}

v. *Domination can vitiate intent* - where an act is done by a person subject to the power/will of other persons, esp. where that other party is a brutal enemy, cannot say that the dominated party intended consequences of actions. {*Steane*-Nazi}

1. Where pressed into service under coercion by a brutal enemy such as the Nazi regime, cannot be said that one intended the consequences of actions. {*Steane*-Nazi}

vi. *Definition of purpose, does not equal motive* - could be immediately intentional (eg. not accidental). But, could also mean to bring about end, invoking *desire.* Latter definition is problematic, as not consistent with policy; further, negatives intent for *mens rea* where one is genuinely opposed or indifferent to consequence. Ergo, doesn't require that D. view outcome of act as being *desirable* in itself. {*Hibbert*-Lobby}

2. Knowledge

a. has subjective knowledge of some fact or some state of affairs. Relates to circumstances component of *actus reus*.

3. Wilful blindness

a. aware of need for some inquiry declines to make inquiry because does not wish to know the truth.Equivalent to knowledge at law. Must prefer to wish to remain ignorant. Requires finding that the defendant intended to cheat justice, by feigning ignorance. Must know or strongly suspect that inquiry would fix with knowledge. Defence of mistake is defeated by finding of wilful blindness. Relates to circumstances/consequences component of *actus reus.*

i. *Outcome of inquiry* - what the result of the inquiry would have been had it been made is irrelevant; hypothetical result of inquiries which were never made do not matter. The *mens rea* is established through the lack of inquiry. {DeWong}

ii. *Not mens rea of itself* - rather provides a doctrinal substitute for actual knowledge wherever this is a component of the mens rea. Occurs where one deliberately chooses not to make inquiries where it becomes clear these are required. {*Briscoe*-Golf}

1. Strong, well founded suspicion that someone would be killed, and the D. deliberately decided not to inquire; therefore, wilful blindness found. {*Briscoe*-Golf}

iii. *Defence of honest belief* - if D. satisfied wilful blindness *mens rea*, then this cannot be excused via honest but mistaken belief defence. Reason is that if

the D. *should* have made inquiry concerning belief, but didn't, then we impute actual knowledge instead. {*Sansregret*-Fear}

4. Recklessness

a. knowledge of risk or danger, persistence in course of conduct which creates risk that prohibited result will occur; engages in conduct anyways. Sees the unjustifiable risk, but takes the chance. Relates to circumstances/consequences component of *actus reus.* {*Buzzanga*-Flyer}

i. *Recklessness is wilfulness qua s.429 offences* - knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not for offences in s.430-s.446.

ii. *Defence of honest belief* - not trumped by recklessness; if the defendant honestly believes and relies on a mistake of fact concerning the recklessness of the act, then the defendant is not culpable.

iii. *Negligence is not recklessness* - neg. is judged through objective reasonable person standard, and a departure from the behaviour of that hypothetical person creates civil liability. Recklessness involves a subjective mental element, where one who is aware of the potential danger of actions, nevertheless persists in their pursuit. {*Sansregret*-Fear}

ii. *Objective* - imputation of what a reasonable would have intended at the time of the commission of the act. No stigma offences. Only applicable if specifically stated in statute: {*Buzzanga*-Flyer}

1. Criminal negligence

a. *Marked and substantial* departure from conduct of a reasonable person; wanton reckless disregard for lives / safety of others. Modified from objective standard, as departure must be marked. Marked departure applies to mens rea, not actus reus. Same mens rea applies regardless of whether the alleged act is one of omission or commission. This is because *negligence itself is criminalized* in this section. {*Tutton*-Insulin}

i. *Ordinary person* - The ordinary person is not pugnacious, excitable, possessed of specialized knowledge, etc. The ordinary person is just that: ordinary. {Creighton}

ii. *Lack of expertise* - Where persons engage in activities outside of their area of expertise, knowledge, or ability, they may be found at fault, not because of this inability but rather because of the attempt to engage the activity without accounting for deficiencies. {Creighton}

iii. *Rationale* - what is punished is not the state of mind, but rather the consequence of mindless action, which is why the provision requires that the act *show* wanton or reckless disregard for life and safety. Intentionality dealt with elsewhere in the code, so to require subjective mens rea in crim. neg. would render redundant. {*Tutton*-Insulin} Criminality of negligence is elevated to such a serious level by the level of wanton and reckless disregard for the lives and safety of others. {*Gingrich*-Brakes}

1. Marked departure where one has problems with brakes on heavy truck but negligently fails to take any steps to rectify. {*Gingrich*-Brakes}

iv. *Subjectivity can operate as defence* - for instance, if the D. can raise a reasonable doubt that a reasonable person would have been aware of the risks of conduct. {*Hundal*-Load}

v. *Personal factors not relevant in dangerous driving* - Personal factors are not relevant in dangerous driving - licence requirement assures that all who drive meet reasonable standards for capability, health, capacity, and a reasonable amount of knowledge concerning driving. {*Hundal*-Load}

1. *Unless they amount to incapacity* - Short of incapacity to appreciate the risks involved, personal characteristics are not relevant. However, particularized such that reasonable person placed in circumstances of the accused at the time of the act. {*Beatty*-Line}

vi. *Explanations must be objectively reasonable* - if explanation offered by the accused, such as sudden illness, trier of fact must be satisfied that reasonable person in same circumstances ought to have been aware of the risk and of the danger involved for conviction to be obtained. {*Hundal*-Load}

vii. *Examples* - ss. 219, 220, 221, 222(5)(b).

2. Penal negligence

a. Marked departure from conduct of reasonable person (not marked and substantial). However, requires a marked departure, not just any departure, and allows for exculpatory defence - acquitted if reasonable doubt concerning whether reasonable person would have appreciated risk, or would have done something to avoid danger. {*Beatty*-Line}

i. *Modified objective test* - Not attributed with personal characteristics, but just the circumstances. So, age, experience, and education are not relevant. Ordinary person, unmodified, placed into the circumstances that the accused found himself in. {*Beatty*-Line}

ii. Applies in *crime of negligence* (penal negligence) {*Beatty*-Line}, versus unlawful acts with negligence components (criminal negligence) {Creighton}

iii. Examples - s. 86(1) - "careless use or storage of a firearm," s. 249 - "dangerous driving," s. 436 - "arson by negligence"

3. Strict liability

a. Once actus reus proved, guilt only eluded through advancement of successful due diligence defence. No true crimes. {*Sault Ste Marie*}

i. *Presumptive position of regulatory offences is strict liability - absent explicit contrary intent*, regulatory offences are read as strict liability offences. {*Pierce*-Lobster}

ii. *Requirements in addition to due diligence cannot adjoin penal consequence* - by requiring a "timely retraction" in addition to due diligence as defence to strict liability defence, the false advertising legislation went beyond a mere strict liability offence, entered the realm of absolute liability. Given presence of penal consequences, this is a prima facie violation of s.7. {*Wholesale*}

1. While regulatory offences can have penal consequences of up to five years, presence or absence of such consequences does not mean that it is this type of offence necessarily. {*Wholesale*}

iii. *High standard for s.7 violations* - s.1 can only rescue violations of s.7 for the purposes of administrative efficiency in exceptional situations - for instance, natural disasters, war, epidemics, etc. {*MVA Reference*}

iv. *Must be a defence available, otherwise absolute liability* - if the only defence available to a strict liability defence is negatived by legislation or common law principle (eg. ignorance of the law), then it is effectively an absolute liability offence. {*Pontes*}

4. Absolute liability

a. Once actus reus proved, liability attaches, no defence (eg. due diligence is negatived) can be raised. No *mens rea.* No true crimes. {*Sault Ste Marie*}

i. *Cannot combine absolute liability and penal consequence* - laws which have potential to punish penally those who have done nothing wrong offend PFJ - cannot combine absolute liability and imprisonment re: s.7, as to do otherwise would be to punish the morally blameless. {*MVA Reference*}

1. s.94(2) creates an absolute liability offence in which guilt is established through actus reus, namely that person drives motor vehicle while licence is suspended, regardless of

whether they knew that the licence had been suspended. {*MVA Reference*}

d. *Classification of offences as true crimes or regulatory offences* - must consider the nature of the offence and the prohibited conduct, the scope and purpose of the statute and regulations, the purpose or object of the legislation, the stigma attached to conviction, and the seriousness of the penalty.

   i. *Presumptive position of regulatory offences is strict liability* - absent explicit contrary intent, regulatory offences are read as strict liability offences. {*Pierce*-Lobster}

   ii. *Presumptive position of offences in Criminal Code is true crime*. {*Buzzanga*-Flyer}

   iii. *True crimes are abhorrent* - those actions which are so abhorrent to the basic values of human society that they must be prohibited completely. Other conduct is prohibited not because it is inherently wrongful, but because lack of regulation would lead to dangerous conditions. {*Wholesale*}

   iv. *Regulatory offences aim at the future* - criminal offences punish previous bad conduct, while regulatory offences are aimed at the future, at avoiding future harm by promoting best practices in the present. {*Wholesale*}

   v. *Policy rationale* – concerning the difficulty of proving mental culpability, proof of fault is too great a burden in time and money on the courts, given that regulations are the primary means of enforcing government policy. {*Sault Ste Marie*}

4. <u>Contemporaneity</u>

a. Symmetry approach – presumptive approach

   i. *Mens rea* must attach to every element of actus reus. But, this is not a PFJ, full symmetry is not required. Strong presumption that every component of actus possesses a corresponding mental element; this is presumed unless clearly stated otherwise. {Creighton}

b. Continuance approach

   i. Mens rea not needed at inception of actus - not necessary that it be present at inception of actus reus, can be superimposed upon an existing, continuing act. Cannot be superimposed onto a completed act, but rather only those acts which are continuing, are not spent. Acts become criminal the moment that the intention is formed to produce the apprehension which was flowing from the continuing act; when criminality is desired. {Fagan}^

c. Duty approach

i. Unintentional acts which are followed by intentional omission to rectify that act or its consequences can be regarded in toto as an intentional act, satisfying contemporaneity (eg. starting a fire by accident, then doing nothing to extinguish it). This stands opposed to the *continuance* theory set out in *Fagan,* because it regards the sequence of events as a single act, rather than the superimposition of mens rea onto a continuing act. {Miller}^

d. Overlap approach

i. Not necessary for the guilty act and the intention to be *completely* concurrent; some overlap is sufficient to establish criminal culpability.An act which is initially careless becomes criminal when the accused acquires knowledge of the nature of the act and yet refuses to alter course of action. Episodes can be considered "continuing transactions", so that the coincidence of mens rea and actus reus *at some point* during transaction sufficient to establish culpability. {Cooper}

1. HIV+ D. has unprotected relations with victim both before and after learning of infected status; did not have guilty mind before, and after, RD as to whether D.'s conduct actually resulted in transmission. Ergo, acquitted of aggravated assault. {*Williams*-HIV} - the actus reus had been completed before the mens rea could have arisen.

2. *Symmetry not required, but meaningful element is required* – not a PFJ that mens rea / fault must be proved as to each separate element of the offence, there must be a meaningful mental element relating to a *culpable* aspect of *actus reus.* Restatement of the meaning of symmetry. {DeSousa}

   a. In murder, it is the consequence (death) which makes this offence more significant than an assault. Therefore, fault element must connect to the death to make out a charge of murder. {DeSousa}

   b. Contrast with impaired driving; the culpable act is the impaired driving, and not merely the drinking; therefore, mens rea must coincide with this element of the crime. {DeSousa}

   c. *Predicate offences* - in circumstances of predicate offences, unlikely that subjective foresight of consequences is required - do not need to intend or be reckless concerning the specific harm. Consider unlawful act manslaughter, unlawfully causing bodily harm, assault causing bodily harm, aggravated assault; objective foresight of consequences will suffice for these offences. {Creighton}

      i. See also objective mens rea in sexual assault, or subjective foresight required re: stigma offences.

      ii. Predicate offences are those where the underlying offence is associated with additional aggravating consequences (eg. assault w/ bodily harm).

d. *Does not have to be precise consequence prohibited* - no authority for the argument that the *mens rea* must attach to the *precise* consequence which is prohibited to be consistent with *Charter*. {Creighton}^

i. *Respect of the result* - criminal liability for a particular result is not justified except where the actor possesses a culpable mental state in respect of the *result*. {*Martineau*-B&E}

e. *Intention not required for <u>all</u> consequences* - for instance, minimal element of application of force is sufficient for conviction of sexual assault causing bodily harm. {Bernard}

5. <u>Defences</u>

a. *Definition* - excuses and justifications for committing the actions which mitigate or abrogate culpability.

b. Types

i. Due diligence

1. *Definition* - applies to strict liability circumstances, where D. can show that while offence committed, took reasonable steps to avoid this.

ii. Mistake of fact / honest but mistaken belief

1. *Definition* - defence regarding offences which have requisite circumstances, such as *sexual assault* (where the required circumstance is that the touching is non-consensual, eg. the defendant honestly but mistakenly believed that the victim consented to the touching).

2. *Standard of proof* - depends on mens rea of offence; if subjective mens rea (eg. sexual assault) then mistake judged on a subjective standard, so there is no requirement that the D.'s belief be reasonable (unlike other jurisdictions). {*Seaboyer*-Shield} - however, if mens rea of offence is objective, then judged on objective standard {*Beatty*-Line}. If D. raises AOR, then Crown must disprove BRD {*Pappajohn*-Bowtie}

3. *Reasonable steps* - s.273(2) holds that the defence is only available in sexual assault if the D. took reasonable steps to ascertain that the victim was consenting. {*Seaboyer*-Shield} Objective-subjective, in that it requires reasonable (objective) steps to be taken in the circumstances known to D. at the time (subjective). If the result of this inquiry is an honestly held though mistaken and (un)reasonable belief, then the defence will still protect. {Boyle}
   a. *Two stage inquiry* - first, determine what circumstances were known to the accused, then determine whether reasonable person would take further steps

before proceeding with sexual activity. If yes, then accused was obliged to take further steps, and failure to do so negatives mistake of fact defence. If no or maybe, then the accused was not so obliged, defence applies. {Malcolm}

4. *Must be active consent* - for mistake of fact to succeed as a defence to sex assault, evidence must show that the D. believed that the victim communicated consent to engage in sexual activity. Not sufficient that the D. believed that the victim consented in her mind but did not communicate this. Must communicate "yes" through either words or actions. {*Ewanchuck*-Wood}

    a. *Not implied consent* - there is no defence of implied consent in Canadian law. {*Ewanchuck*-Wood}

    b. *Change of heart must also be explicit* - Once the complainant has expressed unwillingness, the accused must ascertain that the mind of the victim has truly changed before proceeding with further intimacies. Silence, time, etc. do not indicate change of heart. This would be reckless or wilfully blind conduct which is unacceptable. {*Ewanchuck*-Wood}

        i. Consider that D. testified that he stopped each time that victim said no. This undermines mistake of fact defence entirely, as it shows that he understood that her communications did in fact convey a lack of consent to sexual conduct. {*Ewanchuck*-Wood}

5. *No third party required in mistake* - defence not limited to situation in which mistake induced by information received from third party. {*Pappajohn*-Bowtie}

6. *Defendant does not have to testify to plead mistake of fact*. {*Ewanchuck*-Wood}

7. *Mistake does not have to be reasonable* - subjective, not objective standard, applies concerning the D.'s state of mind. If person withholds consent in own mind, but does not communicate this to accused, could be unjust to convict. Unjust to ignore the actual belief of the accused in favour of an attributed belief. {*Pappajohn*-Bowtie}

8. *Operation of mistake defence* - prevents accused from having mens rea which the law requires for the crime charged; more of a negation of guilty intention than affirmation of a positive defence, although follows AOR / BRD defence reqs. If knowledge, intention, or recklessness required for certain offence, and D. mistaken re that mens rea, then culpability is negatived. {*Pappajohn*-Bowtie}

9. *Wilful blindness / self induced intoxication preclude this defence* - there can be no honest belief where there has been self-deception to the point of wilful blindness (s. 273.2). Law does not reward deliberate ignorance concerning the true state of facts. This is not incompatible with Pappajohn re: reasonableness of belief, because in case of wilful blindness, we impute knowledge to D. - in this case, we impute knowledge that the victim had not consented, so honest belief to contrary is irrelevant. {*Sansregret*-Fear}

iii.Ignorance of the law

1. *Definition* - s.19 holds that ignorance of the law is not a defence - however, this provision only applies if there is an offence. Therefore, if genuine misconception concerning law or fact arises which negatives the offence definitionally (eg. due to *colour of right*) or the regulatory offence was not published in the *Gazette*, then s.19 has no applicability. Ignorance of the law is therefore a "defence" in such circumstances. {*Howson*-Tow} Operates as an excuse. {*Jorgensen*-Film}

    a. While D. intended to drive w/ greater than 0.80 BAC, he did not intend to break compliance w/ probation in so doing. Negates "wilful" mens rea of the failure to comply offence (Fed redrafted s.733 as a result of this decision). {*Docherty*-Comply}

    b. *Colour of right* - honest but mistaken belief that one has a right in law to property taken, a mistake of law concerning property rights. {*Howson*-Tow}

        1. D. acting with colour of right where he believed, genuinely though wrongly, that the law gave him power to hold vehicle until expenses paid. Negatives mens rea required. {*Howson*-Tow}

    c. *Treated as mistake of fact* - mistake as to civil law (eg. whether a custody order is of effect) can be treated as a mistake of fact, rather than a mistake of law, thereby avoiding the application of s.19 {*Hammerbeck*}

        i. D. mistakenly believed that custody order was of no legal effect, and this led D. to take child contrary to *Criminal Code* - this was treated as a mistake of civil law. {Hammerbeck}

        ii. This exception may no longer be effective, and therefore the correct tack to take concerning mistake of law is Forster re: definitional offence. {Pontes}

    d. *Limited to where mens rea is negated* - mistake of law only applies in limited circumstances, where knowledge of the law is required in order to make out the offence on a definitional level. {*Jones*-Bingo}, only a defence where knowledge that one's actions are contrary to the law is part of the *mens rea* for an offence. {Forster}

        i. D. claimed that he did not know his licence was suspended (this was done automatically) - no defence, as D.'s lack of knowledge was a question of fact, not law. Mistake of fact does not help w/ absolute liability, as there is no mens rea to negative. {*Prue*}

    e. *Policy considerations* - rule against allowing ignorance of the law stems from (1) evidentiary problems (proving that person was not aware of the law), (2) encouraging ignorance where knowledge is desirable, (3) would create a law unto each person, and (4) ignorance of the law is itself blameworthy. {*Jorgensen*-Film}

iv.Officially induced error

1. *Definition* - operates as an exception to the principle that ignorance of the law is not an excuse. {*MacDougall*} Does not offend the four policy considerations which concern the ignorance of the law as a general defence. Further, existence of other exceptions concerning ignorance of law as a defence (colour of right as mens rea, or lack of publishing in Gazette) implies that ignorance principle should not apply where manifestly unjust. {*Jorgensen*-Film}

2. *Availability* - applies as a defence to violation of (1) regulatory statute where the accused has (2) reasonably relied on erroneous legal opinion or advice (3) of an official responsible for admin/enforcement of the particular law. {*MacDougall*}

    a. Defence of officially induced error cannot stand absent due diligence. When not receiving notice, should have been concerned and acted on this information. Further, administrative practices are not advice. {*Levis*-Renewal}

3. *Operation of officially induced error* - not a full defence, as it does not negative culpability. Instead, excuses behaviour of accused via *stay of proceedings*. Not the same as due diligence either; diligence may be required in obtaining advice (not reasonable to rely on official advice unless inquiries have been made to this end) - however, due diligence provides excuse, rather than acquittal. Due diligence is not a defence applicable in context of a mistake of law. Applies to true crimes and to strict/absolute liability offences. {*Jorgensen*-Film}

4. *Process for determination* - on BOP, accused must (1) determine whether error was of law, or of mixed law and fact. If purely of fact, then defence fails. If error was one of law, then (2) demonstrate that accused considered legal consequences of actions, (3) demonstrate that the advice came from appropriate individual - objective standard re: whether reasonable person would believe that the official is responsible for advice concerning law in question, (4) advice was reasonable in the circumstances (low threshold, due to knowledge disadvantage of D.), (5) advice was erroneous, (6) advice was relied upon (shown by receipt of advice previous to action, for instance). {*Jorgensen*-Film}

    a. OFRB understood as body which approves films for play, no other body logical re: advice for whether film is illegally obscene for sale in Ontario. {*Jorgensen*-Film}

    b. *Factors in reliance on advice* - efforts made to obtain information, clarity or obscurity of the law, position and role of official who gave information, clarity / definitiveness / reasonableness of the information. {*Levis*-Renewal}

5. Policy - for true crimes, the BOP should be on the Crown BRD to show that an officially induced error was not made, according with s.11(d) / s.7.

v. Intoxication

1. *Definition* - where an intoxicant negates the mental element required, or the voluntariness of the actus reus, would therefore compel an acquittal; however, this

would excuse illegality on the basis of self-induced intoxication, seems to imply that a defence should be denied, or that the intoxication itself should substitute the usual blame requirements.

2. *Does not defend against objective mens rea crimes* - the reasonable person is never intoxicated, and so therefore voluntary intoxication never protects against such culpability concerning such offences.

3. Statutory

    a. Governed by s.33(1) of the *Criminal Code.*

        i. *Defence not available if marked departure* - if accused, by reason of self-induced intoxication, lacked the basic intent or voluntariness to commit the offence, but markedly departed from standard of care, then the defence of intoxication is not available.

        ii. *Constitution of marked departure* - inducement by self of state of intoxication rendering one unaware of or incapable of consciously controlling behaviour, and thereby voluntarily or involuntarily interferes / threatens to interfere with bodily integrity of others.

    b. *Policy* - Statute effectively substitutes one standard of fault (intent) for another (marked departure); this is problematic, because the new element is not functionally equivalent to required element.

4. Common law

    a. *Specific intent offences* - where specific intent is essential element of an offence, evidence of a state of drunkenness which makes D. incapable of forming that intent can be considered, and if compelling, leads to acquittal. Holds that drunkenness does not excuse, but can be incompatible with the crime charged. {Beard}

        i. *Burden of proof* - onus is on the D. to raise an AOR, thereafter Crown must disprove BRD.

        ii. *Difference between general and specific intent offences* - acts done to achieve an immediate end are general intent, and acts done to achieve a specific, ulterior motive are specific intent offences - deliberate steps taken towards illegal goal. Consider intention as applied to acts in relation to their purposes, and intention as applied to acts apart from their purposes. {George-$22}

            1. D. violently manhandled a person and knew that he was carrying out an assault; this is an offence which cannot be excused by voluntary drunkenness which is not akin to

insanity. {George-$22}

2. *General intent offences* - mens rea in certain offences which amounts to an intention to have committed the actions which constitute the offence. Ordinary inferred by proof that the assault was committed by the accused. {*Daviault*-Coma}

    a. *Having care or control of motor vehicle while one's ability to drive is impaired is a general intent offence*. {*Daviault*-Coma}

iii. *Can still be culpable for component offences* - specific intent offences may contain components which are general intent offences. A state of voluntary drunkenness might excuse the former, but never the latter. Judge must consider all included offences of which there is evidence regardless of whether the Crown makes reference to such offences. {*George*-$22}

1. D. assaulted victim for purposes of robbery; while this theft is specific intent, the common assault part is general intent, for which D. has no excuse. {George-$22}

b. *Alcohol consumption akin to insanity* - distinction between insanity due to drunkenness, and drunkenness which negates capability to form specific intention. If insanity occurs, then furnishes D. with same answer to criminal charge as insanity induced by other cause. {Beard}

i. *Operation of defence* - negatives the mental element of offences. Voluntary intoxication is not a crime, not itself morally blameworthy; ergo to be compatible w/ Charter re: punishing only the morally blameworthy, must recognize circumstances where extreme intoxication, though voluntary, has robbed D. of capacity to form intent. Person who intends to drink does not intend to commit sexual assault necessarily, and consequences of extreme intoxication are not predictable. {*Daviault*-Coma}

ii. *Level of extremity required* - must be such that it is akin to automatism or insanity, this is required to raise a reasonable doubt re: ability to form mens rea to commit a crime. One who is so drunk that he/she is an automaton; can move arms legs, but cannot form simple intent. {*Daviault*-Coma}

iii. *Standard and burden of proof* - accused must establish this level of drunkenness BOP. Unlike other defences, does not follow defence AOR, Crown BRD model of proof. This would also likely require testimony from accused re: amount and effect of consumption, in accordance with expert evidence. {*Daviault*-Coma}

iv. *Does not defend against crimes which involve assault or threat of violence* - while this defence does operate against general intent offences, following s.33.1 this form of drunkenness does not operate against crimes which involve

assault or the threat of violence as an element of the crime.

c. *Mere increased readiness to violent passion* - merely drinking to the point that one's mind is not robbed of specific intent, but rather one is merely more readily able to give way to voluntary passion does not rebut mens rea, that man intends natural consequences of actions. {Beard}

i. *Historical approach* - voluntary drunkenness thought of as an aggravating factor, rather than a defence; no reason to give a debaucher a better legal situation than a sober man. However, rigidity of this rule relaxed in the 19th century. {Beard}

vi.Mental disorder

1. *Definition* - NCRMD, unable to differentiate between right and wrong (*in some sense*) at the time of the commission of the offence. See s.16 of the *CC* - requirements are that accused suffering from (1) mental disorder which rendered that person either: (2) incapable of appreciating the nature and quality of the act or omission, *or* (3) knowing that it was wrong.

2. *Standard of proof* - following presumption of innocence in the *CC* (s.16(2)), the *party claiming* (usually the accused) has the responsibility of proving NCRMD on BOP (s.16(3)); {*Swain*}.

3. *Disease of the mind* - a legal concept, although it requires a medical component, ultimately whether an ailment meets this definition is a question of law for the judge. For example, Personality disorders or psychopathic personality disorders are capable of constituting a disease of the mind. Definition will evolve with medical knowledge. Further, presence of disease not sufficient for NCRMD, as must meet the rest of the definition in s.16(1). {*Simpson*}

a. *Disease of the mind not meaningful of itself* - not a term of art in law or psychiatry; it is a working concept. There is no differentiation to be made between physical or mental illnesses at law. While psychoses are clearly diseases of the mind, really can include any mental disorder which can manifest in violence and is prone to recur. {*Cooper*}

b. *Evidence of experts not conclusive* - this is a question of law, not a question of fact. Therefore, the opinion of experts as to whether a disorder is a "disease of the mind" is not binding on the trier of law (this is separate from whether the D. suffered from a disease of the mind, a matter for the trier of fact). {*Cooper*}

c. *Broad interpretation of disease of mind* - any illness, disorder, abnormal condition which impairs the human mind and its functioning, save for self induced states (re: alcohol and drugs, which must fall under intoxication defences) is included; NCRMD on this basis will succeed where other components of defence under

s.16 are met. {*Cooper*}

d. *Approach to disease of the mind analysis* - can consult either or both in making determination. Further, must make reference to policy factors if there is no conclusive determination as to whether there is a disease of the mind:

   i. *Internal cause theory* - applied in Rabey, where differentiation between insanity and automatism was determined based on the source of the alleged loss of control; internal source is insanity, external source is automatism. However, this line is often blurred, holistic approach is required. {*Stone*-Wife}

   ii. *Continuing danger theory* - any condition which is likely to present a recurring danger to the public should be treated as a disease of the mind. However, finding of no continuing danger does not necessarily preclude a finding of disease of the mind. {*Stone*-Wife}

   iii. *Policy analysis* - according with Dickson's approach in Rabey, must consider policy in order to ensure that feigning is accounted for. Applies in second stage of the automatism analysis; this is why the BOP lies with the accused, for instance. {*Stone*-Wife}

      1. *Shifting policy values pre-and-post verdict* - pre-verdict, social defence concerns dominate, particularly whether there is a continuing danger posed by the D. Where this occurs, there will be further inquiry into dangerousness in order to protect the public. Post verdict, emphasis shifts to personalized assessment of dangers posed by the D. who has been found NCRMD. {*Luedecke*}

4. *Nature and quality of the act* - emotional and intellectual awareness required for act to be understood. Must be aware of the act itself, and be able to understand the consequences of the act. More than mere knowledge that it is taking place. Not merely lacking remorse, guilt, or other emotional content, even where this stems from disease of the mind. {*Cooper*}

   a. Difference between being aware that one is choking someone, versus that this action will lead to death. {*Cooper*}

   b. *Timing of lack of understanding / awareness is critical* - must not be awareness and understanding before or after commission, but rather at the very time that the offence is committed. {*Cooper*}

   c. *Consequences at issue* - it is the physical consequences of the act, and not the penal sanctions as a result of being arrested for the act which are at issue in s. 16. Not knowing of the penal sanctions does not undermine the mens rea of the offence, does not bring into operation NCRMD defence. {*Abbey*}

i. This position was reinforced in *Landry*, in which the accused knew that the act would result in death, therefore could not claim NCRMD under first branch of the test when killing friend he believed was Satan. However, did not know right from wront. {*Landry*-Satan}

d. *No defence of irresistible impulse* - while an irresistible impulse may be evidence of an NCRMD condition, it is not a defence itself. {*Abbey*}

e. *No defence of diminished responsibility* - requires that the impairment meet the full definition required in s.16 re: capability of understanding. No relief is provided to D.'s who were partially impaired. {*Abbey*}

5. *Meaning of wrong* - morally vs. legally wrong so narrow in serious offences that there is no ready means of differentiation. Means more than merely contrary to law, read in context of the *Criminal Code* (could have used unlawful instead, contrary to law rather than mauvais in French). Therefore, NCRMD excuses on the basis of the inability of the D. to make meaningful moral distinctions. {*Chaulk*}

a. *Legally wrong is not justifiable or tenable* - what is illegal and what is morally wrong rarely differs. In any case, not judged by the standards of the offender, but by the awareness that society considers the act as wrong. To do otherwise would be to hold some NCRMD offenders culpable where they knew that an act was formally a crime, but did not know that it was morally wrong - untenable position. {*Chaulk*}

b. *Accused must merely be incapable of understanding that the act was in <u>some sense</u> wrong* - this position recognizes that both morality and awareness of the formal law guide decisions of rational actors. Those without ability to make such decisions are not criminally responsible for their deviations. {*Chaulk*}

c. *Centre of inquiry* - whether the accused lacks capacity to discern whether act is right or wrong, therefore make rational choice concerning whether to persist in course of action. {*Oommen*-Conspiracy}

i. D. had general capacity to distinguish right from wrong. However, on night of killing, did not know that killing victim was wrong; visions led him to believe that the killing was justified and necessary. {*Oommen*-Conspiracy}

ii. D. did not know that it was wrong to kill his friend, because he suffered from delusion which led him to believe that he was killing Satan on God's orders. {*Landry*-Satan}

d. *General capacity does not preclude NCRMD* - there are situations where accused has capacity generally to differentiate b/w right and wrong, but at time of commission is so obsessed with delusions or so subject to impulses that D. is unable to bring mind to bear on actions, discern right or wrong. In such situations, s.16 is satisfied. This is different from the case of a psychopath, who knows that acts are wrong in the eyes of society, and chooses to commit them

anyways. {*Oommen*-Conspiracy}

6. *Outcome* - traditionally, would not be raised in proceedings because NCRMD would lead to indefinite detention; this was ruled unconstitutional in *Swain*. Now, discharged absolutely if not significant threat to safety of public, and any conditions on discharge must be least onerous and restrictive in view of public safety, reintegration of accused, and other needs of accused. See s.673 of the *CC*. NCR verdict is neither guilt nor acquittal, nor finding of significant threat to society. This must be a further decision made at discretion of court or review board. {*Winko*}

    a. *Denial of treatment ill serves* - neither mentally ill offenders nor society itself are well served by being punished for offences which they should not be held morally responsible for. To serve fair treatment and public safety, new approach is required. Therefore, legislative response protects society by treating the root cause of behaviour (eg. the mental illness), and offender by ensuring that punishment is not levied where not morally deserving. {*Winko*}

    b. *Process concerning disposition* - Court or a review board conducts hearing to determine whether person should be held in institution, released with conditions, or released absolutely. Dispositions must be made in accordance with s.672(54) of the *CC*. Findings must be reviewed within twelve months (unless absolute discharge) and every twelve months thereafter - s.672(81)(1). Hearings required to make restrictions more stringent. Attempts to serve both assessment and treatment requirements. {*Winko*}

7. *Accused can adduce evidence of insanity at any time during trial; Crown restricted.* {*Swain*}

    a. *Accused must introduce evidence of insanity first* - Ability of the Crown to raise evidence of insanity over wishes of D. interferes with control of D. over own defence. However, where D. adduces evidence which puts mental capacity of D. at issue but falls short of raising NCRMD defence (re: s.16), Crown can raise own evidence of insanity. {*Swain*}

    b. *If no insanity evidence adduced by accused, Crown must wait for guilty verdict* - this is the so called bifurcated trial - Crown can raise the issue after a guilty verdict has been reached, but before a conviction has been entered. If the trier of fact found that the accused was insane at the time of the offence (BOP), then the NCRMD (not guilty by reason of insanity) verdict would be entered. Otherwise, a conviction would be entered. {*Swain*}

    c. *Rationale for allowing Crown interference* - may be circumstances where there is an accused who is NCRMD, but refuses to adduce cogent evidence to this end; in such circumstances, Crown should be able to adduce evidence reflecting the fact that (1) society has an interest in ensuring that the outcome of the trial is valid. Further, (2) public must be protected from dangerous persons requiring

hospitalization. This does not interfere with the accused's ability to conduct defence, as evidence not adduced until defence concluded, or where the accused's own evidence has put capacity at time of offence into issue. {*Swain*}

vii.Automatism

1. *Definition* - unconscious, involuntary behaviour - person capable of action, but not of knowing what they are doing. In cases where the cause is *not* a mental disorder, a claim of automatism leads to an acquittal, because it negatives the *voluntary aspect of the actus reus*; otherwise, NCRMD process applies {*Rabey*-Rock}, as insane automatism subsumed by s.16 {*Stone*-Wife}

    a. *Unconsciousness not correct terminology* - automatism describes unconscious, involuntary behaviour, person is capable of action but not conscious of what is being done. However, does not accord with medical definition (unconscious means comatose). Impaired consciousness better term. {*Stone*-Wife}

    b. *Insane / mental disorder automatism not correct terminology* - true automatism only includes involuntary behaviour which does not stem from a disease of the mind; where involuntary behaviour stems from a disease of the mind, this amounts to s.16 mental disorder, not automatism. {*Stone*-Wife}

2. *Central question in automatism defence* - was the accused suffering from a disease of the mind? Question of law re: what constitutes a disease of the mind (see mental disorders), but question of fact in determining whether this is actually present in a given circumstance. Differentiation between a malfunction of the mind caused by transient external factors (concussion) versus internal factors (schizophrenia). {*Rabey*-Rock}

    a. *Strong preference for NCRMD post-Stone* - TJ must begin from premise that automatism is caused by disease of the mind, and then look to evidence to determine whether it is convincing that the condition is or is not a disease of the mind. {*Luedecke*}

3. *Burden of proof* - lies with the defendant on BOP. Similar to presumption of innocence in s.16, Crown enjoys presumption that persons act voluntarily in order to avoid onerous BRD burden on Crown. {*Stone*-Wife}

    a. *Presence of trigger* - D. must show, BOP, evidence of an extremely shocking trigger (beyond ordinary disappointments of life) or psychological blow or drug reaction, and must establish that a normal person *might* have reacted by entering into an automatic state as a result. {*Stone*-Wife}

    b. *Contextual (modified) objective test* - not subjective; this is acceptable because there has already been inquiry as to whether there is evidence suggesting to AOR that D. *subjectively* acted involuntarily (as part of the actus reus). {*Stone*-

Wife}

4. *Ordinary stresses and disappointments* - the common lot of mankind does not constitute an external cause / psychological blow which provides an explanation for malfunctioning of the mind absent internal cause. Therefore, if no cause for a dissociative state can be found in internal makeup of D., then there is no disease of the mind within meaning required by s.16 for NCRMD. {*Rabey*-Rock}

5. *Emotional shock absent physical injury* - such circumstances may be able to ground automatism defence via external cause - including perhaps murderous attack w/ knife, other extraordinary events. This question does not need to be answered in present circumstances - although Dickson in dissent holds that psychological blow, physical blow, and drug reaction automatism should all be judged on subjective standard, available wherever evidence indicates lack of consciousness not attributable to fault or negligence on part of D. {*Rabey*-Rock}

6. *Non-mental disorder automatism can apply if not disease of mind* - Must be a disease of the mind for mental disorder automatism to apply. Otherwise, non-mental disorder automatism is the applicable defence if there is an AOR to the possibility of unconsciousness on the part of the D. Further, Crown holds burden to prove that a disorder constitutes a disease of mind where they raise claim. {*Parks*-Sleepwalk}

    a. Expert testimony reveals that D. was in fact sleepwalking; this is not a neurological or psychiatric condition; no medical treatment is possible. {*Parks*-Sleepwalk}

viii.Provocation

1. Definition - partial defence, only applies to the offence of murder. Reduces murder to manslaughter, but does not lead to complete acquittal. Governed by s.232(1) of the *CC*; requires commission in the heat of passion caused by sudden provocation; must have been acted on, on the sudden before there was time for passion to cool.

a. What amounts to provocation - s.232(2) - wrongful act or insult of such a nature so as to deprive ordinary person of the power of self control. Cannot be provoked where the other party is doing something that they had the *legal right* to do, or where insulting party was incited to do so by the accused in order to provide D. with an excuse.

i. Legal right - refers to a right sanctioned by law, not merely something which one may do without incurring legal liability. {*Thibert*}

1. One does not have a legal right to taunt a cuckolded husband in a parking lot. It's not illegal, but nor is it sanctioned. {*Thibert*}

b. Concession to human infirmity - provocation defence recognizes that all human beings are subject to uncontrollable outbursts of passion and anger which may

lead them to do violent acts. {*Hill*-Brother}

2. *Burden of proof* - for AOR, must be some evidence to suggest that the provocation would have caused the ordinary person to be deprived of self control, and some evidence to show that the accused was actually deprived of self control. If AOR, Crown must disprove BRD. {*Thibert*}

    a. *Would an ordinary person be deprived of self-control by act or insult* - determined on objective standard; reasonable person *under the circumstances*. This standard necessary to avoid relieving the excitable while punishing the even-tempered. CJS sets standards for behaviour, desirable to encourage rational response. {*Hill*-Brother}

        i. *Modification* - narrow objective test, which would have precluded consideration of circumstances of the accused (mental deficiency, impotency) set aside. Must include attributes of person, including age, sex, race, physical infirmity, shameful incident, or any attribute of the accused which would make the insult *more offensive*. Not necessary that this be made explicit in charge, as reasonable jury will assume. {*Hill*-Brother}

            1. Drunkenness is not a factor which is to be taken into consideration, nor idiosyncrasies; ordinary person has normal temperament, is not excitable or drunk. {*Hill*-Brother}

            2. Race of person not relevant consideration if provoking insult concerns physical characteristic. {*Hill*-Brother}

            3. *Special significance* - characteristics must be assigned to the ordinary person, such as the age, sex, and other factors which would give the act or insult a special significance. {*Thibert*}

            4. *Cultural background can be important* - ordinary person must be one from the background in which the behaviour and insult would be relevant; this constitutes a factor which would give the wrongful act or insult special significance. {*Nahar*-Singh}

                a. Actions could be seen as reflecting badly on both husband and wife in Sikh community - include smoking, socializing with men other than husband/family, etc. {*Nahar*-Sikh}

                b. Reaction of an average Vietnamese male to infidelity on part of his wife was *not* considered in defence of provocation, cultural factors only relevant if slur is racial in nature: *R. v. Ly* (BCCA 1987)

                c. *Absent evidence that D. shares cultural beliefs, not applicable to provocation* - not sufficient to lead evidence that a group has certain beliefs, that these could affect the gravity or seriousness of conduct for members of the group, and that the accused is a member of that group. Any member could hold belief to varying degrees depending

on myriad factors. To assume otherwise would be to stereotype. As the taunt did not focus on D.'s cultural beliefs, it's irrelevant. {*Humaid*-UAE}

i. D. did not provide evidence that he subscribed to the notions of infidelity and honour attributed to Islamic culture by expert evidence. {*Humaid*-UAE}

ii. Expert testifies that Islamic culture is male dominated, great significance played by family honour. Therefore, infidelity treated serious violation of honour, worthy of harsh punishment by males. {*Humaid*-UAE}

d. Not a culturally driven sense of appropriate response - provocation does not deal with appropriate responses, but rather as a concession to human frailty, definitionally with inappropriate response. Will not therefore avail an accused who acts in of accordance with belief system which entitles husband to punish wife's infidelity. Difference between a loss of control (provocation) and believing that cultural beliefs advocate or endorse homicide (murder).

i. Evidence is not that Islamic men react in a rage when faced with infidelity, but rather that there are serious cultural consequences for Islamic women who are unfaithful. {*Humaid*-UAE}

e. Ordinary person does not have values irreconcilable with Canadian values - will not be affixed with values which are antithetical to fundamental Canadian values, including those concerning gender equality, accepting violence against women, etc. {*Humaid*-UAE}

b. Did the accused in fact act in response to provocative acts - based on the facts, whether or not the accused was in fact provoked into the ultimate response; subjective approach. An assessment of what actually occurred in the mind of the accused. {*Hill*-Brother}

c. Was the accused's response sudden, before time for passion to cool - based on the facts, subjective approach. {*Hill*-Brother}

i. Unpreparedness - the provocation must hit a mind unprepared for it at the subjective branch of the test. The background / history between the victim and the D. are relevant to this consideration. However, even where there is a long history of affronts over long period of time, inducing desire for revenge, this does not preclude provocation, so long as there was no intent to kill until immediately before the last insult. {Thibert}

1. Can hardly claim that you are unprepared to receive insult when you have provoked, for instance by pointing a gun at someone. {Thibert}

2. Taunted by man who has broken up marriage could provoke one so as to lose the power of self control. {Thibert}

3. Rejection in romantic relationship does not constitute basis for provocation defence, however (could be dangerous to hold otherwise). {Thibert}

3. *Relation to intent* - question is whether provocation vitiates intent for murder, or rather whether it operates outside of the fault requirements for offences as a free standing excuse. Court held in *Campbell* that provocation operates notwithstanding existence of intent to kill; therefore, freestanding defence which finds its basis in human frailty.

   a. *Provocation not related to fault requirement* - s.232 / provocation does not negative the fault requirement for murder, but acts as a partial defence. In other words, does not impose liability where subjective fault does not exist, but rather reduces that liability even though fault exists. {*Cameron*}

4. *Outcome* - finding of manslaughter instead of murder, which means that instead of mandatory minimum of life imprisonment, no parole for 10-25 years (2nd) or 25 years (1st), instead punishable with no minimum sentence.

5. *Not defence of anger* - anger cannot negate the intention to kill, nor is this a valid basis for reducing the offence of murder to manslaughter. Even high degree of anger, short of provocation, cannot reduce murder to manslaughter. Anger can form component of provocation defence, but only where other elements are met. Anger could also cause someone to enter automatic state (psychological blow automatism).

6. *History of provocation* - applied to three situations, chance falling out between men, discovery of wife cheating by husband, or discovery of sodomy on son by father. Privileges the emotion of anger as an excusatory factor to some degree. Plays a role in excusing violence against women. {*Parent*-Assets}

ix. Self-Defence

1. *Definition* - deals with circumstances where it is permissible for an individual to use force to protect self. Governed by statute, *CC* ss.25, 26, 27, 34, 35, 37, 38, 39, 40, 41. Can be applied in controversial circumstances, such as in the case of battered women who kill domestic partners in circumstances where there is no immediate threat. Must be judged not only by own motives, but also by reasonable community standards.

2. *Excess force* - if more force is used than is authorized under ss. 34-37, then the accused is criminally liable for this force under s.26 of the *CC*. If this force causes the death of the attacking party, then the defending party is guilty of murder. {Faid}

3. Sections

a. s.34(1) – apprehend harm to self other than death or GBH

i. s.34(1) - if you are unlawfully assaulted and you did not provoke the assault, you can repel force by force, if the force that *you* use is not *intended* to cause death or GBH, and is no more than necessary to defend yourself.

1. s.34(1) is not always excluded where death or GBH occurs; only excluded where the defender *intends* to cause death or GBH in defending against the assault. {*Pawliuk*}

2. Four requirements for self-defence under s.34(1) - unlawful assault, not provoked, lack of intent to kill or cause GBH, force used no more than necessary for self defence. Each component is both subjective and objective. *Kong* (ABCA 2005)

3. See s.34(2) for requirements re: AOR, subjective-objective on each component, etc. *Kong* (ABCA 2005)

4. Accused in fistfight cannot claim self defence - not available to either combatant under s.34(1), as would violate requirement that the assault was not provoked. Cannot say that assault not provoked when engaging mutual combat. *Jobidon*

5. Overview

a. Intention - cannot intend to cause death or GBH.

b. Provocation - cannot provoke.

c. Apprehension - none required.

d. Result - can cause death or GBH if not more than necessary for defence.

b. s.34(2) – apprehend death or GBH to seld

i. s.34(2) - if you are unlawfully assaulted and you cause (or *intend*) death or GBH in defending yourself, this is justified if you were under the reasonable apprehension of death or GBH from the assault, or if you believe on reasonable grounds that there was no other way to protect yourself.

1. s.34(2) applies where defender *causes* or *intends* death or GBH. Requires that the accused was under *apprehension* of death or GBH from the

attacker's assault. {*Pawliuk*}

2. *Three requirements for self-defence under s.34(2)* - unlawful assault (either occurring or imminent), reasonable apprehension of death or GBH, reasonable belief that it is not possible to preserve oneself except by causing death or GBH. {*Cinous*-Burn}

    a. *Each component of s.34(2) test is both objective and subjective* - D.'s perception is the subjective part of the test; must show not only that it was reasonable to believe matter under the circumstances, but that D. in fact did so believe. {*Cinous*-Burn}

3. *AOR required on all components of s.34(2)* - for defence to be put to jury, must be all components must be satisfied considering both objective and subjective standards. Reasonableness cannot be established via direct evidence; therefore, must determine whether could be reasonably inferred by jury. {*Cinous*-Burn}

    a. *Mere assertion insufficient for AOR* - while the credibility of the D. is not at issue in AOR, it is not sufficient for the D. to merely claim the elements of the defence on the stand for it to be put to the jury. Question is whether inference favourable to D. *could* (not should) reasonably be drawn by the jury. {*Cinous*-Burn}

4. *Apprehension of fear must be reasonable* - apprehension of fear re: death or GBH under s.34(2) must be reasonable, based on reasonable and probable grounds. Therefore, can still invoke this provision, even if mistaken re: fear, if the apprehension was reasonable. *Reilly* (SCC 1984)

    a. *Intoxication not relevant to apprehension* - a reasonable person is in full possession of faculties. A drunken man is one who's ability to reason have been impaired. While drunken persons can hold reasonable beliefs, and thus the defence is not precluded under s.34 (2), cannot use alcohol as an excuse for holding unreasonable beliefs for the purposes of this section. *Reilly* (SCC 1984)

    b. *Prison environment syndrome* - inmate charged with murder; claimed that other inmates planning to kill him, so took preemptive action. Accepted expert evidence concerning belief that person could apprehend assault without immediacy. *McConnell* (ABCA 1995)

    c. *Perception affected by psychiatric disorder* - Asperger's syndrome sufferer assaults roommate, claims self defence; expert evidence concerning syndrome's effect on perceptions adduced. *Kagan* (NSCA 2004)

d. Diminished intellectual capacity - accepted evidence re: intellectual capacity concerning reasonable apprehension in s.34(2), could not have had same perception as ordinary man. Applicable where capacity out of broad band of normal adult capacity. *Nelson* (ONCA 1992).

e. See battered women defence.

5. *Reasonable belief that no alternatives to causing death / GBH* - not merely that D. articulates reason for holding belief (eg. enmity with police), but must be objectively reasonable. Not reasonable to hold that one could not resort to police help due to criminality, not that one standing outside of vehicle had no choice but to shoot one sitting inside a vehicle parked at a populated gas station. {*Cinous*-Burn}

6. Overview

a. Intention - can intend to cause death or GBH.

b. Provocation - can provoke.

c. Apprehension - must apprehend death or GBH.

d. Result - can cause death or GBH.

c. s.35 - *assaulted another person without justification*

i. s.35 - in a circumstance in which you have assaulted another person without justification, but did *not* do so intending to cause death or GBH, or alternatively have without justification provoked an assault on yourself or another person, can use force to defend yourself if you are under reasonable apprehension of death or GBH from the person you have provoked/ attacked, and you believe (reasonably) that it is necessary to protect yourself from death or GBH.

1. *Duty to retreat* - must have declined further conflict / retreated from it as far as it was feasible to do so before necessity to preserve self from death or GBH arose.

d. s.37 - apprehend harm to other person under your protection

i. s.37 - you can use force to defend yourself or someone under your protection from assault, so long as you use no more force than is necessary to prevent the assault or its repetition. You cannot wilfully inflict excessive harm concerning the nature of the assault that the force intended to protect

against.

1. *Definition of others is generous* - justifies defence of others, not just oneself. Not limited to formal guardianship; anyone who requires protection which the accused may be able to provide. *Webers* (ONSC 1994)

2. *Gap filling provision* - applies where s.34 does not, for instance where accused provoked assault but did not apprehend death or GBH, alternatively where accused intended to cause GBH or death despite that they did not apprehend GBH or death. *McIntosh* (SCC 1995)

4. *Duty to retreat* - there is no requirement to retreat in s.34; however, this can be relevant to considerations, as this could raise doubt concerning whether the accused reasonably apprehended a risk of death or GBH, or believed that killing the assailant was the only means available to avoid harm. *Druken* (NFCA 2002)

5. *Doctrine of excessive force inapplicable in Canada* - incompatible with self defence statutes. Would deal with s.34(2), in that it requires intention to cause death (otherwise would be s.34(1) with no intention to cause death, therefore not necessary to reduce from murder to manslaughter). *Brisson* (SCC 1982) Where killing has resulted from excessive force, there is no s.34 justification, partial or otherwise. Could still be manslaughter if without intent proven BRD, of course. *Faid* (SCC 1983).

    a. *Reduces murder charge to manslaughter* – applies where D. uses force to defend against real or apprehended attack, honestly believed that use of force justified, but force was excessive in that it exceeded what accused could *reasonably* have considered necessary. *Reilly* (SCC 1984)

x. Battered Woman Defence

1. *Definition* - form of self defence involving women who kill spouses following a cycle of severe abuse, follows s.34(2) generally. (but sufficiently unique so as to warrant its own section) A battered woman is one who has gone through the *Walker* cycle twice. Any woman can go through the cycle once. Merely being a battered woman does not entitle one to an acquittal; question of fact as to whether perceptions and actions were reasonable. {*Lavallee*-BWS}

2. *Four principles of BWD defence* – jury should be informed how *expert evidence* may be of use in elucidating these. (1) Why an abused woman might stay in abusive relationship, (2) nature and extent of violence in battered women relationships, (3) accused's ability to perceive danger re: reasonable apprehension, (does not need to be imminent), and (4) whether the accused reasonably believed that there was no other option. {*Malott*-Drug}

a. *Utility of expert evidence re: BWD not limited to self defence – also* applicable to other circumstances where the reasonableness of actions or perceptions is at issue - for instance in provocation, duress, or necessity. Battered women may kill their partners other than in self-defence. {*Malott*-Drug}

3. *Walker Cycle of Violence* - three distinct phases of violence; (1) tension building, where there is increasing friction and abuse, causing woman to withdraw, which causes more aggressive action by abuser, (2) acute battering caused by explosive release of tension, (3) loving contrition, where abuser showers woman with affection, gifts. {*Lavallee*-BWS}

4. *Battering relationship subject to stereotypes* - requires expert evidence, as this issue is beyond the knowledge of the average juror. This is particularly true considering that what the ordinary man would do in the position of a battered spouse is irrelevant, because men do not find themselves in that situation. Expert testimony required in cases of BWD. {*Lavallee*-BWS}

5. *Previous threats applicable beyond existence of assault, ability to carry out* - threats were relevant in determining whether victims threatened the accused and had present ability to effect their purpose, but also, in determining the D.'s state of mind regarding the imminence of the assault, and the fact that she could not otherwise preserve herself. Threats made throughout relationship are relevant to the D.'s state of mind. {Petel}

6. *Temporal issue* - under s.34(2)(a), there is a temporal requirement re: the apprehension of death or GBH. However, this section does not require *imminent* danger, although caselaw has read this into the defence; for instance, that it is unreasonable to apprehend death or GBH until a physical assault is in progress. However, this does not apply within the context of BWD. {*Lavallee*-BWS}

   a. *Cycle begets predictability* - in an isolated incident between strangers, no predictability possible. However, battered spouses can accurately predict the onset of violence before the first blow is struck, even if outsiders cannot. In some circumstances, battered women can recognize circumstances which make a final episode of violence different than others (eg. can foresee coming of exceptionally brutal violence). {*Lavallee*-BWS}

   b. *Onerous to wait for assault to commence* - requiring battered woman to wait until the gun is uplifted, until the assault is in progress before it is deemed reasonable would be onerous. Firstly, while this would probably increase the "correctness" of apprehension, correctness is not required - only *reasonableness* is required. Secondly, this would amount to sentencing woman to murder by instalment, particularly given advantage of men in combat. {*Lavallee*-BWS}

7. *Alternative avenue issue* - under s.34(2)(b), there is a magnitude requirement, re: inability to otherwise preserve oneself. {*Lavallee*-BWS}

    a. *Obvious question concerns intolerability of violence* - if so terrible, why not leave abuser; left unchecked, this leads to inferences that violence not as bad as claimed, etc. Not for jury to judge fact that battered woman stayed in relationship. Self defence doctrine does not require person to retreat. Further, position of battered woman akin to hostage: may not be other reasonable places to go, may be children / childcare implications, may be no means of income, etc. {*Lavallee*-BWS}

        i. If held hostage, and captor says that you will be killed in three days, are you not justified in seizing opportunity to kill captor on first day? {*Lavallee*-BWS}

8. *Policy considerations*

    a. *Issues with stereotyping in battered women defence* - possible that women who are not able to fit within stereotype of victimized, passive, helpless, dependent battered woman who will not have claims to defence fairly decided. Could put at disadvantage women of strength, initiative, professionals, etc. {*Malott*-Drug}

    b. *Must avoid learned helplessness analysis* - shifts legal debate from objective rationality of actions to preserve own life to personal inadequacies which apparently explain failure to flee from abusers. Comports with stereotypes, and should be avoided. {*Malott*-Drug}

xi. *Duress*

1. *Definition* - closely related to defence of necessity; address liability in situations of extremity. While necessity deals with *circumstances* that produce extremity, where as duress deals with situations where person produces extremity through threats or coercion. Thus, necessity is called *duress of circumstance*. Where unclear whether an accused is a principle or secondary offender, both defences would be left to the trier of fact. {*Hibbert*-Lobby}

2. *Duress and mens rea* - has been contended that duress negates subjective mens rea. However, this is only in limited circumstances - cannot negative mens rea required to be a party to an offence within the meaning of s.21(1)(b) or s.21(2) of the *CC,* for instance. {*Hibbert*-Lobby}

    a. *Duress can provide a defence in two ways* - either as an excuse which negates criminal liability, or rather as a means of negating criminal fault. For duress to negative criminal fault, would require special type of mens rea which is not often found in definitions of criminal offences. {*Hibbert*-Lobby}

b. *Duress can be relevant to mens rea, albeit rarely* - depends on the structure of the offence, whether the mental state specified by the Fed in defining the offence is such that the presence of coercion can have a bearing on the existence of mens rea. However, s.21 is not susceptible to this; w/ s.21 duress would apply as an excuse, not as a means of raising BRD re: elements of offence. {*Hibbert*-Lobby}

c. *Moral involuntariness* - person acts in a morally involuntary fashion when deprived of reasonable choice concerning whether to break the law. This is used as a synonym for where one had no real choice but to commit the offence. This does not negate the mens rea for the offence, but rather acts as an ex post facto excuse; conflicts with physical voluntariness, which provides an acquittal. {*Ruzic*-Heroin}

3. Common law

a. *Definition* - ruled out of existence by statute in *Carker,* but of increasing importance following renewal in *Paquette*, and the gutting of the statutory defence in *Ruzic*. Applies to both principal and secondary offenders. *Common law defence revived for secondary offenders* - as s.17 did not apply, and s.8(3) kept alive common law defences, the common law defence of duress can apply for secondary offenders. {Paquette}

b. Requirements

i. *Threat of serious injury or death* - the accused must be subject to a threat of death or serious injury to himself or to another person; although the threat of harm need not be immediate. must be "a close temporal connection between the threat and the harm threatened." {*Ruzic*-Heroin}

ii. *Threat must be sole cause of the commission* - the accused must be committing the offence solely as a result of the threat. The accused must believe that the threat will be carried out if he/she fails to commit the offence. {*Ruzic*-Heroin}

iii. *Gravity* - threat must be of such gravity that it may well cause a reasonable person placed in the same situation as the accused to respond to the threat by committing the offence in question; Gravity of threats in common law defence also judged on modified objective standard. {*Ruzic*-Heroin}

iv. *Safe avenue requirement* - duress presents a choice between two alternatives; one of which is so disagreeable that a serious infraction of the law seems preferable. The safe avenue requirement is a specific example of this requirement; only when all other licit choices have been ruled out does duress excuse illicit behaviour. {*Hibbert*-Lobby}

1. *Standard of proof* - whether there is a safe avenue is to be judged on a modified objective basis, one which takes into account particular circumstances and human frailties of accused. D.'s own perception of surrounding facts can be highly relevant to determining whether actions were reasonable Not being used to determine fault, but rather used in weighing excuse after fault has been established, and so does not conflict with *Creighton* re: standard for negligence in crime. {*Hibbert*-Lobby}

v. *Can't be voluntary member of criminal association* - the accused must not be a voluntary member of a criminal association whereby he or she knew that he/she may be subject to compulsion by threats. {*Ruzic*-Heroin}

4. Statute

a. *Definition* - governed by s.17 of the *Criminal Code*. Applies where one commits an offence under compulsion by threats of ~~immediate~~ death or bodily harm from a person ~~who is present when the offence is committed~~. {*Ruzic*-Heroin} This excuses (acquittal) where the subject of the threats believes that they will be carried out, and is not party to a conspiracy or association leading to subjection to compulsion. Also provides for offences excluded from applicability of defence. Applies only to principle offenders.

i. *Statutory defence limited to primary offenders* - s.17 is limited to circumstances where the person relying on the provision has himself committed an offence. Uses explicit words "person who commits an offence" not "person who is party to an offence." s.17 does not apply where criminal liability as a party is determined through s.21(2), s.21(1)(b) or s.21(1)(c). {*Paquette*}

ii. *Defence through this section* - likely no longer applicable after *Ruzic*. Withdrawal of a criminal defence will not necessarily a breach - this can be allowable, for instance where defence is inconsistent with the very evil prescribed. Moral involuntariness therefore nevertheless deserves protection under the *Charter*. {*Ruzic*-Heroin}

iii. *Immediacy and presence requirements of s.17 unconstitutional* - because they could lead to convictions for persons who had voluntariness undermined through the coercion of a third party, for instance through threats to third parties. {*Ruzic*-Heroin}

iv. *Excluded offences* - not clear whether the list of excluded offences in s.17 will pass s.7 muster, or whether it will be struck down for same reasons as the immediacy and presence requirements. However, at present time, there is *no* defence of duress at either common law or statute for s.17 offences. {*Ruzic*-Heroin}

6. Parties

a. *Overview* - governed by s.21 of the *Criminal Code*. One is a party to the offence if one fulfills one of the following criteria. Historically, the word "party" would have applied only to those culpable but not the principal; has come to mean, in common usage, all of those involved in the offence in a manner which is criminally culpable. All involve some form of act or omission.

b. *s.21 to be decided by trier of fact* - The extent of one's participation in a crime within the meaning of s.21 is a matter of fact to be left to the jury where there is an AOR to multiple such classifications. {*Mena*}

c. *Types*

i. Actor

1. Actually commits the act; the principal. s.21 (1)(a)

ii. Aid

1. Does or omits to do anything for the purpose of aiding a purpose to commit the offence. s.21(1)(b)

a. *Desire not a part of purpose* - mens rea doesn't require that D. view outcome of act as being desirable in itself; s.21(1)(b) "purpose provision" for party culpability cannot be negated via duress. {*Hibbert*-Lobby}

b. *Mere presence insufficient* - presence is not sufficient to make one an aider or an abetter unless there is a further act, or a duty to act. {*Dunlop*}

c. *Mental states not susceptible to duress* - cannot be *negated* by duress; however, conduct still possibly *excused* by duress. {*Hibbert*-Lobby}

iii. Encourager / abettor

1. Abets or encourages a person in committing it. s.21(1)(c)

iv. Common unlawful purpose

1. Where two or more persons form an i*ntention in common* to carry out an unlawful purpose. When one robs a bank with an accomplice who uses a loaded gun, one should not be surprised when someone is shot in the course of this enterprise, even if this was not specifically discussed. s.21(2)

a. Consider the "gunfight" at the Eaton centre. {*SR*-Creba}

b. *Desire not a part of purpose* - mens rea doesn't require that D. view outcome of act as being desirable in itself; s.21(1)(b) "purpose provision" for party culpability cannot be negated via duress. {*Hibbert*-Lobby}

c. *Meaning of "intention in common"* - could mean merely that parties have same unlawful purpose in mind or could require more, concerning subjective desirability of the outcome held in common between parties; latter view is better supported by the authorities, means something more than mere intention to commit or aid in same offence. {*Hibbert*-Lobby}

d. *Mental states not susceptible to duress* - cannot be *negated* by duress; however, conduct still possibly *excused* by duress. {*Hibbert*-Lobby}

d. *Blameworthiness* - impossible to distinguish between the blameworthiness of principle accused from the blameworthiness of an accomplice (absent defence such as duress). {*Harbottle*-Murder}

7. Omission offences

a. *Definition* - a person will not be criminally liable for failing to act unless he or she is under a legal duty to act. For instance, one does not have a duty to offer assistance unless there is a recognized duty of care at common or civil law.

b. Specific omission offences

i. Explicitly punish the failure to act in a certain fashion, given a certain circumstance. Imply a legal duty, punish the failure to discharge that duty (self-contained).

1. *Duty to prevent high treason* - s.50 - must make reasonable efforts to prevent person from committing high treason.

2. *Duty to assist at accident* - s.252 - must not fail to stop and render assistance at scene of accident.

3. *Provision of necessaries of life* - s.215

4. *Take reasonable care with explosives* - s.80

5. *Duty to guard opening in ice* - s.263(3)

6. *Failure to collect toll* - s.393

7. *Duties relating to burial*- s.182

8. *Duty to assist a police officer* - s.129

c. General omission offences

i. Includes (1) common nuisance causing *endangerment* (s.180), (2) criminal negligence (s.219), criminal negligence causing death (s.220) or bodily harm (s.221). Sufficient to fail to discharge some legal duty (eg. either at common law or duties imposed by statute, including the Criminal Code.). Note that there is overlap between general and specific

1. *Criminal code duties*

a. *Duty to take reasonable care with explosives* - s.79

b. *Duty of parent (and others) to provide necessities of life to a child* - s.215

c. *Duty to provide necessaries to spouse* - 215(1)(b)

d. *Duty to provide necessaries to person under your charge* - s.215(1)(c)

e. *Duty of persons undertaking to give medical treatment, or other act which could endanger life must have and use reasonable knowledge, skill and care* - s.216

f. *Duty to do an act where omission of act is dangerous to life (with undertaking)* - s. 217

i. *Undertaking is key* - Legal duty under s.217 therefore does not stem from the relationship or lack thereof between the parties, but rather from the undertaking in itself; absent a special relationship within the meaning of s. 215, the relationship is irrelevant. {*Brown*-Taxi}

ii. *Definition of undertaking* - to justify the onerous penal sanctions contemplated by s.217, must have a high threshold definition; something like a commitment, although not necessarily one requiring reasonable reliance. Ultimately, standard is a *clearly made* undertaking with *binding intent*. {*Brown*-Taxi}

g. *Duty of persons directing work* - s.217(1)

2. *Other duties* - duties established at common law and those enacted in PG legislation may also be considered valid for the purpose of s.219 / s.180. Division of powers question, in that allows the PG to legislate within the bounds of criminal law power. QC's Charter of Human Rights and Freedoms imposes duty to aid those in peril, for instance. Common law also difficult, as common law offences are negatived in s.9 of the CC, and may be inconsistent with PFJ / s.7 of the Charter.

a. *Unlawful act includes common law proscriptions* - implied by interpretation of "duty imposed at law" (s.219), which includes common law duties. {*Thornton*-Donor} eg. relationships of dependency, undertakings, care re: dangerous items.

i. "Neighbour principle" from common law is sufficient to ground a legal duty, lay charges under s.180. Donating HIV contaminated blood knowingly meets this definition. {*Thornton*-Donor}

8. Access to information in sex assault cases

a. *Rape shield provisions partially struck down* - these provisions were seen as inconsistent with this defence, as evidence concerning other sexual acts (eg. which had been consensual) could be adduced to support the existence of D.'s mistaken belief concerning consent. This evidence would not be admissible under s.276. It should be noted that s.277, prohibiting the use of sex history evidence to impeach victim's credibility is not unconstitutional. {*Seaboyer*-Shield}

i. *Provisions protect only against two inferences* - prohibited inferences are that a person is more likely to have consented to the alleged assault (ie. due to her prior sexual experience) and, that she is less credible as a witness by virtue of her prior sexual experience. Prohibited inferences rise from the sexual nature of the activity, as opposed to inferences from other potentially relevant features of the activity. {*Darrach*}

1. *Prior sexual history can be permissible* - but not general sexual reputation, because this always serves credibility, which is a prohibited inference. {*Darrach*}

ii. *Provisions protect three PFJs* - integrity of the trial by excluding evidence that is misleading, protecting the rights of the accused, as well as encouraging the reporting of sexual violence and protecting "the security and privacy of the witnesses. s.7 / s.11(d) can be respected without the accused being entitled to the most favourable procedures that could possibly be imagined. {*Darrach*}

iii. *Legislative response, s.276* - separate application to the TJ, ideally before trial, must be made in order to attempt to adduce evidence of complainant's sexual activity at trial. Only relevant if s.276(3):

1. Contains detailed particulars of the evidence sought to be adduced (s.276(2)(a))

2. Relevant to an issue at trial; (s.276(2)(b))

3. Must have significant probative value that is not substantially outweighed by the danger of prejudice. (s.276(2)(c))

4. Consistent with considerations in s.276(3).

b. *Personal records* - lawyers in sexual assault cases have been able to access the personal records of female victims - records ranging from counselling, hospital, and school records

to personal diaries and letters. personal nature of therapeutic records is irrelevant to disclosure obligations; like all other information in Crown's possession, therapeutic records of the complainant must be disclosed to the accused. {*O'Connor*}

i. *Legislative response, s.278* - drafted s.278.1 in response to *O'Connor*; the constitutionality of this provision was upheld in *Mills*; records are not admissible in sex assault cases except for where criteria in s.278(3) are met in consideration of factors in s.278(5):

1. Must make notice to the person in possession of the record, who has the right to retain counsel with respect to disclosure of the record.

2. For this to be admissible, application must be made in writing, identifying the record, the person in control of the record, and the grounds on which the record is relevant to an issue at trial.

9. Fitness to stand trial

a. *Definition* - occurs where mental disorder persists or arises after the alleged offence, such that the accused is not capable of participating meaningfully in the trial proceedings. Governed by s.2 of the *CC*. Presumed under s.672(22) to be fit to stand trial. However, unfit if proven BOP that, due to mental disorder, previous to rendering of verdict, the accused cannot (1) understand nature / object of proceedings, (2) the possible consequences of proceedings, or (3) communicate with counsel, then unfit to stand trial.

b. *Timing of application* - accused, prosecution, or court can make application re: fitness at any point previous to the issuance of the verdict.

c. *Limited cognitive capacity* , strikes balance between fitness rules and the right of accused to choose own defence, have trial within a reasonable time. Unfit if unable to understand process, communicate with counsel. Persons suffering from disease of the mind under s.16 of the *CC* are exempt from criminal liability and punishment. They are sick, not blameworthy. However, they can still be tried. {*Whittle*}

d. *Outcomes* - Does not prevent accused from being tried subsequently where the accused becomes fit to stand trial at a later date. The burden concerning subsequent fitness is on the party making the application on BOP, s.672(32). Concerning unfit offenders, multiple orders available, must be reviewed every 12 mos., can be:

i. Detained in custody in a hospital: s. 672.54(c)

ii. Discharged into the community subject to conditions: s. 672.54(b)

iii. Subject to a compulsory or mandatory treatment order of 60 days in the hospital or community where there are reasonable medical grounds to believe a treatment order

will render the accused fit: s. 672.58 to s. 672.62;

e. *Permanent stay of proceedings if not likely to ever become fit* - proceedings against an accused found unfit to stand trial could be permanently stayed if the person is not likely to ever become fit to stand trial, and does not pose a significant threat to the safety of the public. {*Demers*}

10. Classification of offences by intent

a. General intent offences

i. Assault: R. v. George

ii. Assault causing bodily harm: R. v. Penney

iii. Assault of peace officer (s. 270(1)(a)): R. v. Tom

iv. Aggravated assault (s. 268): R. v. Godin

v. Break and enter (s. 348 (1)(b)): R. v. Breese (1984) (may be general or specific intent).

vi. Criminal Harassment (s. 264): R. v. Lafreniere

vii. Incest (s. 155): R. v. B.(S.J.)

viii. Indecent assault: R. v. Resener

ix. Manslaughter: R. v. Mack

x. Mischief: R. v. Schmidtke

xi. Rape: Leary v. R.

xii. Sexual assault: R. v. Chase

xiii. Unlawful confinement (s. 272(2)(b)): R. v. B.(S.J.)

xiv. Wilful obstruction of a peace officer (s. 129(a)): R. v. Grandish

b. Specific intent offences

i. Aiding and abetting—s. 21(1)(b) or (c): R. v. Fraser (1984) although not clear whether a co-principal (by being party to a joint venture) requires specific or general intent; being a principal offender to sexual assault is a general intent offence, a co-principal by common venture to sexual assault may be a specific intent offence since an essential requirement to that route to liability is an intent to act in concert with others to

commit the (basic intent) offence.

ii. Arson—s. 433: R. v. Hudson (1993)

iii. Assault with intent to resist arrest—s. 270(1)(b): R. v. Tom

iv. Assaulting a police officer: R. v. Vlcko

v. Attempted murder: R. v. Kireychuk

vi. Attempt at any offence: R. v. Colburne

vii. Break and enter: R. v. Campbell

viii. Break and enter with intent to commit): R. v. Breese

ix. Discharging a Firearm with intent to (s. 244): R. v. Foti

x. Murder: D.P.P. v. Beard

xi. Possession of stolen property: R. v. Bucci

xii. Receiving stolen property: R. v. Bucci

xiii. Robbery: R.v. George

xiv. Sexual Exploitation s. 153: R. v. Audet

xv. Sexual Touching–s. 151: R. v. Bone

xvi. Theft: Ruse v. Read

xvii. Uttering a Threat–s. 264.1: R. v. Bone

xviii. Wilfully Causing a fire—s. 436(1)(a) [as it then was]: R. v. Swanson

11. <u>Cases</u>

- *R v. Lifchus (SCC 1997)*

  - Proof beyond a reasonable doubt is inextricably intertwined with the presumption of innocence. Burden of proof rests with prosecution throughout, never shifts to D.

  - Not based on sympathy or prejudice, but rather reason and common sense; logically connected to the evidence, must not result from imaginary or frivolous doubt.

- Does not require proof to absolute certainty, but requires significantly more than probability of guilt; not a moral certainty either.

- Reasonable doubt is not an ordinary expression, but rather has a special legal meaning; cannot be made analogous to the standard used by people in everyday decisions.

- Cannot be understood or elucidated by providing synonyms for reasonable; nor can judge charge jury by saying conviction appropriate if "sure" that D. is guilty before charging re: BRD.

- Not necessarily a matter of particular words, but must be consistent with the principles above nonetheless.

- *R v. Starr (SCC 2000)*

    - Charges must explain reasonable doubt standard, discuss its special legal significance, and charge that it is a higher standard than the mere balance of probabilities.

    - Trial judge must not only explain that BRD is less than absolute certainty, but must specify how much less; must also explain how much more required for BRD than BOP.

    - BRD cannot be measured, or described through analogy. It is difficult to explain, and it is because of this difficulty that it is all the more important that it is explained to jury.

    - BRD falls much closer to absolute certainty than it does to BOP (closer to 100% certainty than 51% certainty required for criminal culpability).

    - Mistake in charge re BRD is not always fatal, any such error must be corrected or addressed elsewhere in the charge in order for the delivered verdict to stand; unfairness and prejudice caused by improper instructions must be addresses.

    - When read as a whole, the charge must make clear to the jury, without any misapprehension, the correct burden and standard of proof to apply.

    - Dissent

        - Lifchus is not an automatic vitiator of charge where there is deviation in form; must ensure that BRD would not be understood where charge read holistically.

        - It is not desirable that a jury isolate and focus on one component of the charge in order to make their decision; in the same way, it is not appropriate for a reviewing court to limit its focus to only one component of the charge.

- *Fagan v. Commissioner of Metropolitan Police (QBCA, 1969)*

- To constitute an offence, such as assault, some intentional act must have been performed; assault cannot arise from a mere omission to act.

- Mens rea is the intention to cause the harmful effect of an act; not necessary that it be present at inception of actus reus, can be superimposed upon an existing, continuing act.

- Mens rea cannot be superimposed onto a completed act, but rather only those acts which are continuing, are not spent; ITC, was continuing act, so they coincided.

- Acts become criminal the moment that the intention is formed to produce the apprehension which was flowing from the continuing act; when criminality is desired.

- *R. v. Miller (UKCA, 1982)*

- Justice and good sense require that culpability should not be precluded merely because the most recent action taken by an accused amounted to an omission rather than a commission.

- *Duty theory* - Unintentional acts which are followed by intentional omission to rectify that act or its consequences can be regarded in toto as an intentional act, satisfying contemporaneity. This stands opposed to the *continuance* theory set out in *Fagan*.

- Intentional omission to rectify an unintentional act or its consequences, or reckless omission to do so where recklessness is sufficient mens rea constitutes culpability.

- Regardless of whether a person apprehended the damage when initiating the actus reus, culpability arises when that person does become aware and does not act to avoid it.

- *R. v. Cooper (SCC 1993)*

- Not necessary for the guilty act and the intention to be completely concurrent; some overlap is sufficient to establish criminal culpability.

- An act which is initially careless becomes criminal when the accused acquires knowledge of the nature of the act and yet refuses to alter course of action.

- Episodes can be considered "continuing transactions", so that the coincidence of mens rea and actus reus at some point during transaction sufficient to establish culpability.

- Dissent

    - Lamer held in dissent that the accused must have conscious awareness of the likelihood of harm when conduct becomes likely to cause harm for mens rea and actus reus to have coincided; awareness not necessary thereafter, however.

- *R. v. Williams* (SCC 2003)

    - Decision involving HIV transmission; in this case, contemporaneity becomes issue, because D. had unprotected relations with victim both before and after learning of own HIV positive status.

    - SCC held that there was a possibility that the D. had transmitted virus to the victim previous to learning of HIV status. There was no intentionality previous to learning of status, and after learning the status, there was a reasonable doubt as to whether D.'s conduct had actually resulted in transmission. Ergo, acquitted; but was found guilty of *attempted* aggravated assault.

- *R. v. Larsonneur* (UKCA 1933)

    - Case in which the Court failed to consider mens rea for an offence; in this case, D. had been ordered deported, but was brought back to England against her will, and therefore charged with an offence. However, her actions were involuntary, precluding culpability.

- *Kilbride v. Lake* (NZSC 1962)

    - There are certain offences, called strict liability or absolute liability offences, in which a guilty mind is not required in order for D. to be found criminally culpable.

    - However, the physical element in the offence must be produced by the actions of the defendant, and not the actions of another party.

    - Further, one cannot be found responsible for acts unless they were omitted or committed in circumstances where there were other choices available.

- *R. v. King* (SCC 1962)

    - There can be no actus reus unless it is the result of a willing mind at liberty to make a definite choice or decision; willpower to do act, regardless of knowledge of its legality.

    - SCC also recognizes moral involuntariness, as in circumstances involving duress.

- *Dunlop and Sylvester v. The Queen* (SCC 1979)

    - Not guilty because merely present at the scene of the crime and failing to prevent it. Absent evidence of encouragement or aid, there is not sufficient means to hold one culpable as an accomplice for failing to act in the aid of another person.

    - Presence is not sufficient to make one an aider or an abetter unless there is a further act, or a duty to act.

- Quebec has *good samaritan* legislation, which sets out the specific duties which are required at law, particularly concerning the duty to aid in circumstances of criminal victimization.

- *R. v. Browne* (ONCA 1997)

  - Facts

    - Drug dealer charged under s.217, as he knew that partner had ingested drugs, and did not immediately contact authorities to get help. Crown is effectively alleging that the duty arose as soon as D. became aware that partner had not vomited the drugs; D. alleges that there was no duty, and even were there to be a duty, it arose only when partner began to show signs of illness. D. acted immediately after this latter time, and so discharged duty successfully if duty only arose at that point.

  - Issue

    - What is required in order to establish an "undertaking" within the meaning of s. 217?

  - Rule

    - Legal duty only arises in s.217 where an undertaking in the nature of a binding commitment has been clearly made. Must be something in the nature of a commitment, generally (not necessarily) upon which reliance can reasonably said to have been placed.

  - Principles

    - s.217 requires that a legal duty arises where one "undertakes" to do an act, and the act or omission is or may be dangerous to life.

    - Legal duty under s.217 therefore does not stem from the relationship or lack thereof between the parties, but rather from the undertaking in itself; absent a special relationship within the meaning of s.215, the relationship is irrelevant.

    - Relationship only relevant in determining whether there was wanton or reckless disregard under s.219(1), and not relevant to whether there was an undertaking.

    - *Undertaking* -To justify the onerous penal sanctions contemplated by s.217, must have a high threshold definition; something like a commitment, although not necessarily one requiring reasonable reliance. Ultimately, standard is a *clearly made* undertaking with *binding intent*.

- ITC, TJ made an error in considering the relationship first, before using this relationship to inform determination concerning undertaking. However, the correct consideration was to consider undertaking first, and then legal duty.

- *R. v. Thornton* (ONCA 1991)

  - Facts

    - D. aware of own HIV infection, and consequences of donating contaminated blood. Nevertheless, donates; caught by Red Cross screening, charged with criminal nuisance endangering public (s.180).

  - Issue

    - Is there a duty at common law to not endanger others? Are common law duties a valid consideration in the criminal law? If so, is this a valid duty for the purposes of s.180?

  - Rule

    - Common law duties do constitute valid duties requiring discharge within the meaning of s.180; there is a duty (under civil negligence) to avoid doing that which may foreseeably harm one's neighbour. This duty was breached in a manner which endangered public safety, ergo guilty of common nuisance.

  - Principles

    - D. contends that "unlawful act" means only those acts which are proscribed by legislation; however, this is not necessarily the case; includes also those acts which are proscribed at common law - implied by Court interpretation of "duty imposed at law" (s.219), which includes common law duties.

    - While a "legal duty" is not the same phrase as "duty imposed by law", the meaning of the phrase is ultimately the same for purposes of s.180 / s.219; ergo includes both statutory and common law duties.

    - The "neighbour principle" from common law is sufficient to ground a legal duty sufficient to lay charges under s.180; while subject to qualifications, requires everyone to refrain from conduct which could injure another person.

      - ITC, donating HIV contaminated blood knowingly meets this definition, and ergo there is an offence known to law.

    - ITC, evidence indicates that donation of HIV contaminated blood, given that the screening procedures are not 100% effective, does place public in danger.

- In s.180, *endanger* does not have a special meaning; sufficient to accept ordinary meaning, that one has exposed another to danger, harm, risk, etc.

- *R. v. Thornton* (SCC 1993)

  - D. had a duty of care under s.216, which was criminally breached.

- *R. v. Coyne* (NBCA 1958)

  - "Duty imposed by law" for purposes of s.180 / s.219 may be one arising from the common law; for instance, duty to exercise reasonable caution when using firearms.

- *R. v. Popen* (ONCA 1981)

  - Parent under duty at common law to take steps to protect child from foreseeable violence used by the other parent or a third person; establishes that common law duties are suitable for establishing culpability under s.180 / s.219.

- *R. v. Cuerrier (SCC 1998)*

  - Non-disclosure of HIV positive status vitiates possibility of valid consent; this is effectively enforcing a common law duty to disclose in some circumstances.

    - McLachlin holds that this is effectively legislating concerning the nature of consent; appears inconsistent with the abolition of common law offences in s.9 of the CC.

- *R. v. Winning (ONCA 1973)*

  - Facts

    - D. applies for credit card from Eaton's using false information, but pays account. Charged with obtaining credit under false pretences.

    - Eaton's did not rely on info in application save for the name and address, and both of those pieces of information were accurate.

  - Issue

    - As Eaton's did not rely on information given in order to extend credit, is there *causation* within the meaning of the law to charge her with an offence?

  - Rule

    - Relates to causation, as the credit was not extended in reliance on other information; therefore, the false information uttered did not cause credit to be

extended.

– *Smithers v. The Queen (SCC 1978)*

- Facts

    - After roughhousing during hockey game, A. threatens victim with harm. Then waits for victim until leaving the arena, attacks, kicks victim, who doubles over. Victim stops breathing five minutes later, determined via autopsy that victim had asphyxiated on own vomit.

- Issue

    - Sufficient causation from kick to stomach and subsequent death to charge with manslaughter? Does the possibility of victim having a weak esophagus interfere with the chain of causation?

- Principles

    - To constitute the crime of manslaughter, there must not only be an assault (or other infliction of harm), but a person must die as a result thereof.

    - Factual causation determination does not relate to intention / foresight / risk, but to whether, in view of the facts, A caused B.

    - Sometimes this will require assistance from experts (ITC), sometimes not (eg. gunshot to vital organ); for the jury to decide what evidence is compelling.

    - Factual causation is not metaphysical subtleties, nor semantic differentiation between "cause" (foreground, eg. blow to head) and "condition" (background, eg. thin skull), nor does it require apportionment between causes and conditions.

    - As the kick was outside of the de minimis range, it was at the very least a contributing cause of death, and so the jury had the right to find est. BRD.

    - There are many acts which are not dangerous of themselves, which are unlikely to cause death, which nevertheless if undertaken render one guilty of homicide; for instance, a trivial assault causing death (eg. via intervening physical ailment)

    - In committing an *intentional* crime, where this leads to death, the actor is always guilty of manslaughter, in spite of intention to cause a different or lesser harm.

    - Crown does not have to prove intention to cause death or injury, but only intention to commit this secondary crime which made unintended consequence; lack of foresight or anticipation of death is not a defence to manslaughter.

- One who assaults another takes the victim as found; so, if the victim is a hemophiliac, or has a weak epiglottis, or refuses blood transfusions, then this does not break the chain of causation; idea of the thin skulled man.

- *R. v. Cribbin (ONCA 1994)*

  - Facts

    - D. assaulted victim, non-life threatening injuries; left victim unconscious, victim drowned in his blood.

  - Issue

    - What is the threshold for causation? Is the *de minimis* too broad to satisfy the presumption of innocence / PFJ?

  - Rule

    - PFJ / presumption of innocence is not offended by the de minimis test.

  - Principle

    - Fault element of manslaughter requires objective foreseeability of bodily harm which is neither transitory nor trivial; trivial assault, not foreseeably likely to result in death, would not give rise to manslaughter if it did result in death.

    - *De minimis* is indistinguishable from substantial cause in terms of *vagueness*, although the latter test does set a higher bar, they are both equally *certain*.

    - Murder requires subjective foresight; manslaughter requires objective foreseeability of serious bodily harm.

    - It would be a rare case in which the jury found that, in committing an assault, that the D. intended the death of the victim, but did not actually cause death. Causation is not a central factor of the law of murder.

    - *Consequences* - Causation is a central factor of the law of manslaughter; the vehicle through which an act will be defined as assault or some other offence vs. as a homicide.

    - Where a reasonable person would have foreseen the risk of bodily harm that is not trivial nor transitory, and unlawful act is at least a contributing cause, beyond de minimis, to the death BRD, then the accused is guilty of manslaughter,

- PFJ / presumption of innocence is not offended by the de minimis test, owing to the fact that moral culpability is ensured by the inclusion of objective foresight.

- *Pagett v. The Queen (UKCA, 1983)*

  - Facts

    - Gunfight w/ police officers; D. used girl as a human shield against her will. She was shot and killed, D. was charged with her murder.

  - Issue

    - Notwithstanding that the killing blow was not dealt by the D. or another person acting in concert with the D., can the D. be convicted of her murder?

  - Rule

    - There is no principle to support that the killing blow must be dealt by the D. or one acting in concert with the D.

  - Principles

    - There is no principle to support that the killing blow must be dealt by the D. or one acting in concert with the D.

      - Further, consider a situation in which one gently nudges a bassinet in front of a speeding train; the killing blow was struck by the train, the conductor not acting in concert with the D. Certainly, such a fact would not excuse the D. from culpability.

    - The intervention of a third person, not acting in concert with the accused, may have the effect of relieving the accused of criminal responsibility; this requires voluntary intervention - free, deliberate, and informed intervention.

    - Involuntary intervention, such as that which is performed in pursuit of self preservation, or that done in performance of a legal duty is excusable.

      - However, reasonable act performed for the purpose of self-preservation, being an act c*aused by accused's own behaviour*, does not operate as a *novus actus interveniens.*

        - So, if it were reasonable to use a person as a human shield, if this is necessary due to your own actions (eg. provoking a gunfight w/ with the police), then this is not a novus actus interveniens.

- Nor does this doctrine protect actions performed in pursuit of a *legal duty* which are themselves caused by the act of the accused.

- Acts must be voluntary and independent of the wrongful act of the accused to be a *novus actus interveniens*.

- *R. v. S.R. (J.)* (ONCA 2008)

  - Facts

    - Jane Creba killed in gunfight involving the accused.

  - Issue

    - Does D.'s conduct, a gunfight near the Eaton Centre, constitute a contributing cause of Creba's death, notwithstanding that it cannot be determined which party fired the bullet which caused her death?

  - Rule

    - Analogous to car racing cases; both drivers are held to have caused injury, as there is one danger, and each party acting in concert bears equal responsibility for its continued lifespan subject to withdrawal or an intervening event.

    - But for the decision to engage in a gun fight next to the Eaton Centre, with the resulting exchange of bullets, Creba would not have been killed.

- *R. v. Blaue* (UKCA 1975)

  - Facts

    - D. stabbed a young woman with a knife; she refused life saving blood transfusion.

  - Issue

    - As, but for the refusal of the victim to accept reasonable treatment she would not have died, can the D. be held culpable for murder, or only assault? Does the refusal to accept treatment constitute an intervening cause?

  - Rule

    - Stab wounds were still the operative / substantial cause of death. Victims taken as found.

- Principle

    - Those who use violence on other people must take victims as they are found; does not lie within D.'s mouth to say victim must accept certain treatments.

    - The issue of cause of death is one of facts for the jury; *however,* where there is no conflict of evidence and law needs simply be applied, judge can advise outcome of fact application in charge to the jury.

- *R. v. Harbottle* (SCC 1993)

    - Facts

        - Two men forcibly confine, sexually assault, and murder woman. D. held legs while accomplice strangled.

    - Issue

        - Sufficient to be considered first degree murder?

    - Rule

        - Yes.

    - Principles

        - Impossible to differentiate whether jury found 1st degree guilt on the basis of evidence of premeditation or commission of confinement; either sufficient. However, if charge was incorrect, and jury found on confinement, need retrial.

        - "Caused" is sufficient to include principal perpetrator as well as those who assist in a murder, where this assistance is a "substantial cause" of death.

        - "Physically caused" is too stringent a test to determine causation for first degree murder; implies that there must have been a pathological involvement in death.

        - Impossible to distinguish between the blameworthiness of principle accused from the blameworthiness of an accomplice (absent defence such as duress).

        - First degree murder is not a distinct offence, but rather an aggravated form of offence of murder, which only has implications in view of sentencing.

        - *Substantial causation* requires that the accused play a very active role in the killing; this is much higher than the requirement for manslaughter (exceeding *de minimis)*; this test is only applicable, therefore, to first degree murder after

homicide causation already proved *de minimis*, guilt established.

- First degree (s.235) murder requires that Crown prove, BRD:

    - Guilty of underlying crime or attempt;

    - Guilty of murder;

    - Participation in murder meeting *substantial cause* requirement;

    - No intervening act of third party such that chain of substantial causation broken;

    - Underlying crime is part of same transaction w/ murder.

- *R. v. Nette (SCC 2001)*

    - Facts

        - Victim hog tied during house robbery, left in this condition, asphyxiated. Post-mortem could not determine whether any single condition caused death - number of factors involved.

    - Issue

        - What is the correct standard of causation to apply in murder and manslaughter cases? Is it substantial cause, or merely beyond *de minimis*?

    - Rule

        - Reformulated standard of causation for all homicide offences to be "significant contributing cause." For the purposes of sentencing, standard for first degree murder under s.235(1) is "substantial cause" - but this only applies once causation has already been proved BRD as "significant contributing cause".

    - Principles

        - Factual causation - concerned with inquiry as to how victim came to die, and with the contribution of the accused to that result. Must be established alongside legal causation. But for, easy test.

        - Legal causation - imputable causation, concerned with the question as to whether accused person should be held responsible for the death that occurred. Informed by legal considerations - definition in statute.

- Causation analysis - not two part analysis, but rather in jury charge, TJ conveys degree of factual and legal causation which must be found in order for there to be criminal responsibility.

- Only in a very rare case would it occur that the D. would have intended the death BRD, but did not in fact cause the death.

- *Remoteness in causation* - statutes preempt any speculation concerning whether the act of the accused is too remote to have caused the result alleged.

    - Where a person causes dangerous bodily injury and this leads to death, that person has caused the death regardless of whether there is improper medical treatment. (s.225)

    - Where, through threats, fear of violence, deception, or by wilfully frightening a child or sick person, etc. one causes death, this is culpable homicide. s.225(5)(c),(d)

- *Contributory negligence* – this is not a concept which is recognized in criminal law, nor is there a mechanism for apportioning harm from criminal conduct, except for as a factor in sentencing (after causation has been found).

- To determine whether accused guilty of murder, first step to determine whether murder was committed (s.229, s.230 definitions). Remaining question is whether 1st or 2nd degree (s.231).

    - If the Crown relies on s.231(5), must determine whether accused's participation direct and substantial to warrant first degree murder.

- Standard of causation for homicide - not desirable or warranted to have a different standard of causation for murder than for manslaughter; further, would be difficult for juries to grasp nuanced difference.

    - *Substantial cause* - only relevant to s.231(5) determinations; not relevant for determining causation of death, but rather whether causation significant to warrant first degree.

    - *Beyond de minimis* - latin terminology is confusing and vague. However, reformulation using different terms is not necessarily a meaningful approach. However, standard should not be expressed in the negative.

    - *Reformulation* – significant contributing cause is the standard ultimately relied upon.

- Dissent

- Latin is confusing - *Smithers* standard in English is a contributing cause which is not trivial or insignificant; this is not alteration, but accurate translation.

- Test of causation is the same for all homicide offences, not appropriate to apply different standard for manslaughter and murder - must exceed *de minimis.*

- Changing wording of the Smithers test such that it amounts to a "substantial contributing cause" changes the meaning of the test; equates "significant" with "not insignificant."

- *R. v. Tolson (QB 1889)*

- Existence of the term suggests that there is such a thing as *mens rea* which exists separately from the actual definition of each crime; this is not the case, as the mental element required for each crime may differ widely (malice aforethought in murder).

- Suggests that, at law, there is no crime which is done from laudable motives, that immorality is essential to crime. However, this is not the case. Like most legal maxims, *mens rea* too short to be meaningful, better the title of a treatise than the concept itself.

- Fault requirement for any particular offence is to be found in the wording of the relevant enactment (fraudulently, willingly, knowingly, etc.)

- *R v. Buzzanga and Durocher* (ONCA 1979)

- Facts

- Charged with wilfully promoting hatred against Francophones; D.'s are Francophone themselves, released anti-Francophone pamphlet; claim that this was done in the hopes of creating a pro-Francophone reaction. Thus, claim that they lacked the intent component of wilfully promoting hatred, as this was not the subjective intention of their actions.

- Issue

- What is the meaning of the word "wilfully" for the purpose of s.218.2(2) of the Criminal Code? Does this mean that the D.'s must have intended to promote hatred, or rather only that they wilfully distributed materials which incidentally/recklessly promoted hatred? Sufficient to intend the action, or must also intend the consequences to be culpable?

- Rule

- TJ focused on intentionality in acts of the D.'s, rather than the intentionality of consequences as was required by the wording of the offence itself.

- Principles

    - People are usually able to foresee the consequences of their actions reasonable to assume that the accused foresaw consequences of act, and therefore intended them. Inference increases in strength with likelihood of consequences.

    - Must determine what accused subjectively intended, and not affix to accused the objective standard of what a reasonable person would have foreseen.

    - Best evidence concerning mens rea is acquired where accused testifies to state of mind, and this is perceived as truthful by the jury.

    - Authorities disagree; some hold that wilfully also means recklessly, so that unintended consequences are also captured. Can also be held to mean simply that act is intentional, not accidental.

        - Also disagree on whether consequence intended if desired (*direct intent),* or if rather, test of intention not desirability of consequence, but rather if D. resolved to bring it about, regardless of whether desired or distasteful (*indirect intent*).

        - ITC, means *intention* to promote hatred, and therefore does not include recklessness.

    - Where no mental element mentioned in the definition, assumed that includes the *intentional* or *reckless* bringing about of the result of the act

    - Where *intention* to produce consequence defined explicitly in offence, act must include the *conscious purpose* to bring it about. *Foresight* of certainty of consequence *not sufficient* or synonymous.

        - However, authority also shows that a person intents a consequence when foresees that this consequence is certain or substantially certain.

    - According to Diplock, where intention to produce a result is necessary element, no distinction should be drawn between the state of mind of one who desires the result, and the state of mind of one who is aware that act likely to produce result, and does act anyways to achieve some other purpose.

    - In general, person who foresees that a consequence is certain / substantially certain and acts anyways to achieve other purpose, that constitutes intentionality.

        - Foresight and moral certainty of consequences compel conclusion that the actor decided to bring about the consequence in question.

- Even if recklessness is subsumed by wilfulness (which it is not), this would require subjective foresight on the part of the actor that the conduct would bring about consequence. Absent proof of this BRD, conviction cannot stand.

- *R. v. Tennant and Naccarato* (ONCA 1975)

  - Where liability imposed subjectively, the objective reasonable person standard is merely evidence from which conclusion may be drawn that accused foresaw same circumstances. Where liability imposed objectively, reasonable person is basis for liability

  - *Common sense inference* - sane and sober person usually intends the natural and probable consequences of actions infer as a matter if common sense, reasonable foreseeability.

  - *Motive* - matter of fact, not of law. Not the same as intention. Mens rea deals with intent, the exercise of free will in doing some thing, rather than motive, the purpose which drives exercise of will.

    - Motive is always relevant and admissible; absence of a motive is exculpatory, presence of a motive is inculpatory, but in neither case is this determinative of itself.

    - Motive is not an element of the crime, and therefore is irrelevant to criminal responsibility. The prosecution need not prove motive BRD to obtain a conviction.

    - Motive is particularly irrelevant where the identity of the offender is established BRD or admitted on the facts; can commit culpable actions in absence of motive.

- *R. v. Steane* (KB 1947)

  - Facts

    - English actor unable to leave Germany during WW2, pressed into service for the Nazi regime (read the news, among other activities) under coercion. Charged with doing acts likely to assist the enemy with intent to assist the enemy.

  - Issue

    - Do the D.'s actions meet the mens rea requirement for "intent" to assist the enemy, or is this negatived through the fact that he did these acts under duress, and in order to avoid harm to himself and his family?

  - Rule

- There can be no intention of the accused where acts are subject not to own will, but the will of another enemy. Further, where innocent intention equally consistent with act as guilty intention, cannot presume intentionality. Acquitted.

- Principles

  - Generally, people presumed to intend the natural consequences of their actions - if one does act likely to assist the enemy, then likely that outcome was intended.

  - As the "intent" is explicit in the definition of the offence, it constitutes an element of the offence which must be proved by the Crown BRD.

  - In UK law, duress does not apply to treason, murder, and other felonies; however, it does apply to misdemeanors - such as the current charges.

  - It would not do to hold British POWs liable for assisting the enemy for digging trenches under threat of violence; no need for duress, as could not have intended to assist the enemy.

  - Where an act is done by a person subject to the power of other persons, esp. where that other party is a brutal enemy, cannot say that the dominated party intended consequences of actions simply because they were committed.

  - Jury free to presume intent if they thought that the act was a result of the free will of the accused, however this cannot apply where the accused is subject to the will of the enemy. Further, where there is an innocent intent which is as or more consistent with the act as a guilty intent, then cannot presume guilty intention.

- *R. v. Sit* (SCC)

  - Finding from *Martineau* that murder requires a subjective foresight of death was not mere obiter, but rather an intentional ruling of the SCC.

- *R. v. DeSousa*

  - Not a PFJ that mens rea / fault must be proved as to each separate element of the offence, there must be a meaningful mental element relating to a *culpable* aspect of *actus reus*. Restatement of the meaning of symmetry.

  - In murder, it is the death which makes murder so much more significant than, say, an assault. Therefore, the fault element must connect to the *death* for murder to be made out.

  - Contrast with impaired driving; the culpable act is the impaired driving, and not merely the drinking; therefore, mens rea must coincide with this element of the crime.

- *R. v. Finta*

    - Crimes against humanity and war crimes are special stigma crimes.

        - Mental element for crimes against humanity involve awareness of facts which make it a crime against humanity

        - Mental element for war crimes, Crown must establish that D. knew or was aware of facts which brought actions within the definition of war crime.

        - Alternately, mens rea requirement for either crime is met if the D. can be shown to have been wilfully blind; this is because wilful blindness can impute knowledge to the D.

- *R. v. Sansregret (SCC 1985)*

    - D. charged with rape in circumstances where consent was given, but had been extorted by threats / feat of bodily harm an offence. Occurred on two occasions, in which victim feared for safety, held out hope of reconciliation and consented to intercourse in order to protect herself from further violence. Consent only gained through fear. TJ acquitted on basis of *mistake of fact*, as D. held that he did not believe that consent only garnered through extortion.

    - Negligence is not recklessness; the difference is that the latter requires a higher standard. Negligence is judged through objective reasonable person standard, and a departure from the behaviour of that hypothetical person creates civil liability. Recklessness involves a subjective mental element, where one who is aware of the potential danger of actions, nevertheless persists in their pursuit.

    - Must also differentiate between recklessness and wilful blindness. Recklessness could not override the defence of mistake of fact, while willful blindness could; where wilful blindness is found, the law presumes / imputes knowledge of D.

        - eg. that the consent had been induced by threats in this case.

    - Wilful blindness occurs where a person who has become aware of the need for some inquiry declines to make it because he or she would prefer to remain ignorant.

- *R. v. Briscoe (SCC 2010)*

    - D. charged with first degree murder, kidnapping, and sexual assault. Did not directly participate, but rather assisted by driving other accused to crime scene, holding victim, etc. TJ acquitted as held that accused did not know that crimes would occur.

    - Wilful blindness does not constitute *mens rea*, but rather provides a doctrinal substitute for actual knowledge wherever this is a component of the mens rea. Occurs where one

deliberately chooses not to make inquiries where it becomes clear these are required.

- ITC, there was a strong, well founded suspicion that someone would be killed, and the D. deliberately decided not to inquire; therefore, wilful blindness found.

- *R. v. Tutton and Tutton (SCC 1989)*

  - D. charged with manslaughter via criminal negligence; failed to provide necessaries of life to child, as they believed in faith healing, did not administer insulin injections.

  - Dissent (Wilson)

    - Question is whether there is a subjective or objective standard for criminal negligence. Court decides that it is subjective; should Parliament desire an objective standard, they must enact legislation with explicit intention to that end.

    - Reckless disregard for the lives or safety of other persons, within context of Canadian jurisprudence, requires the Crown to prove advertence or awareness of the risk that the prohibited consequences will come to pass

    - Retention of a subjective standard only protects those who due to some peculiarity commit conduct which recklessly endangers others, but can be explained as inconsistent with awareness or wilful blindness.

  - Majority (McIntyre)

    - Authorities dictate an objective test for *mens rea* in criminal negligence; while it is argued that a subjective test is required for omissions (as opposed to commissions), this is not supported in the jurisprudence.

    - One is criminally negligent, who in doing anything or in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety or others. This strongly indicates that there is only one *mens rea* requirement, regardless of whether dealing with omission or commission.

    - Negligence is criminalized in this section - what is punished is not the state of mind, but rather the consequence of mindless action, which is why the provision requires that the act *show* wanton or reckless disregard for life and safety.

    - Intentional conduct is already dealt with elsewhere in the code; so, to require that criminal negligence provisions operate the same as those focusing on intentional conduct would be to rob them of their meaning.

    - Test is of reasonableness, and conduct which reveals a marked and significant departure from the standard of a reasonable person in the circumstances is

criminally liable.

- *R. v. Waite (SCC 1989)*

  - Accused drove car at high speeds while intoxicated, killed four people running on the roadside as part of a church hayride.

  - TJ instructed jury to look at subjective element, what is in the mind of the accused for the crime of criminal negligence. SCC held that this was improper, should have followed objective test set out in *Tutton*.

- *R. v. Gingrich and McLean (ONCA 1991)*

  - Charged with criminal negligence causing death after a motor vehicle accident - truck's brakes failed after driver had experienced increasing problems over several days.

  - Crime of criminal negligence is negligence; no need to import the concept of subjective intent in order to obtained a conviction. The crime is analogous to the tort of civil negligence, the crimes of omission or commission which cause harm to one's neighbour.

  - The criminality of negligence is elevated to such a serious level by the level of wanton and reckless disregard for the lives and safety of others.

- *R. v. Hundal (SCC 1993)*

  - D. charged with dangerous driving causing death. Accused drove overloaded dump truck into intersection against red light, causing accident.

  - Subjective requirement for *mens rea* in driving offences is not acceptable and inappropriate. Remains open as a defence, however - if the D. can raise a reasonable doubt that a reasonable person would have been aware of the risks of conduct.

  - Personal factors are not relevant in dangerous driving - licence requirement assures that all who drive meet reasonable standards for capability, health, capacity, and a reasonable amount of knowledge concerning driving.

  - Trier of fact must be satisfied that conduct amounted to marked departure from the standard of care that a reasonable person would observe in accused's situation.

  - If explanation offered by the accused, such as sudden illness, trier of fact must be satisfied that reasonable person in same circumstances ought to have been aware of the risk and of the danger involved for conviction to be obtained.

- *R. v. Creighton (SCC 1993)*

    - Majority (McLachlin)

        - Fault requirement for unlawful act manslaughter requires mens rea for the underlying unlawful act, which cannot be an absolute liability offence; also requires objective foreseeability that the unlawful act gives rise to risk of bodily harm that is *neither trivial nor transitory*.

        - The

        - Unlawful act manslaughter is consistent with PFJ and therefore with the *Charter*; requirements for mens rea do not need to be read up in the manner suggested by Lamer. Correct standard is that of the reasonable person.

        - Two requirements of manslaughter are conduct causing the death of another person, and fault *short* of intention to kill.

        - Most important feature of stigma in manslaughter is that it avoids the stigma of murder, intentionally causing someone's death. This is appropriate stigma; exactly what it should be for an unintentional killing. Ergo, mens rea apt for offence.

        - There is no distinction to be had in risk of bodily harm vs. death in manslaughter context; wrongdoers must take victims as they are found. Thin skull rule requires aggressors to take responsibility for all consequences of dangerous conduct.

        - There is no authority for the argument that the *mens rea* must attach to the precise consequence which is prohibited to be consistent with *Charter*.

        - There is a need to deter dangerous conduct which may injure or kill others, and this supports the view that death need not be objectively foreseeable; only injury. Lamer's test is too personalized, effectively becomes subjective.

        - Given the seriousness and finality of death, it is not amiss to apply a test which promises the greatest measure of deterrence, so long as the penal consequences are not disproportionate. This is consistent with objective test of foreseeability of bodily harm.

        - Criminal law holds people who engage in risky conduct to the reasonable person standard of care; this is a uniform standard for such offences, subject only to the exception of incapacity to appreciate nature of risk.

        - The ordinary person is not pugnacious, excitable, possessed of specialized knowledge, etc. The ordinary person is just that: ordinary.

- Where persons engage in activities outside of their area of expertise, knowledge, or ability, they may be found at fault, not because of this inability but rather because of the attempt to engage the activity without accounting for deficiencies

- Particularization in the context of the objective test is limited to the nature of the activity and circumstances surrounding the accused's failure to take care, and not by the person's characteristics.

- If a person has committed a manifestly dangerous act, it is reasonable to infer that this person failed to consider the risk; however, this may be negated by raising a reasonable doubt as to the capacity to appreciate this risk.

- Dissent (Lamer)

    - State cannot punish a person as morally blameworthy unless the blameworthiness of that person has been established BRD. To be punished for theft, elements of that crime must involve BRD evidence of dishonesty, for instance.

    - There are a small group of offences that require a subjectively determined culpable mental state in relation to the prohibited result - first degree murder, for instance.

    - There is no general constitutional principle requiring subjective foresight for criminal offences; some offences require only deviation from conduct of reasonable person.

    - There is an argument that subjective foresight could be required in unlawful act manslaughter, because it is a stigma offence. However, the stigma attached to this crime is lesser than opprobrium attached to those who intentionally take a life.

    - Mental element must relate to the consequences of an underlying act wherever the offence is structured in that fashion. This can be achieved in two ways:

        - Where consequence is the essence of an offence, where the consequence is the p&s of the offence (eg. death in the case of unlawful act manslaughter), fault element must be demonstrated BRD in relation to the consequence.

        - Where consequence forms part of actus reus, but offence is, at its essence, conduct which risks safety, fault element is objective; engaging in conduct in which a reasonable person would have perceived the risk is sufficient.

- Examples of this would be impaired driving causing bodily harm or dangerous operation causing bodily harm; the moral blameworthiness of the offence stems from the conduct of driving a car in a fashion which creates a high risk of injury.

- Mental element in relation to the consequence must be established in unlawful act manslaughter; sufficient stigma to require objective foresight of risk of death as mens rea in order to comply with s.7 of the *Charter*.

- One can only be held to a reasonable person standard if one is capable, in the circumstances of the offence, of attaining that standard; must be attentive to human frailties which could render the accused incapable of foreseeing harm, for instance.

- Further, accused is invested with enhanced foresight through experience or knowledge concerning conduct which gave rise to offence. Police officers have enhanced knowledge of firearms, and so what is reasonable given that knowledge = higher standard than laymen

- Not a subjective test - if a reasonable person with the knowledge and frailties of the accused would have foreseen the risk, then the accused will be convicted, regardless of whether the accused in fact foresaw the risk.

- Incorporation of knowledge and frailties analogous to mistake of fact; human frailties which affect capacity of accused to recognize risks must be considered - not because they result in accused believing in incorrect facts, but rather because of incapacity to perceive correct set of facts.

    - Intoxication and impairment through voluntary drug use does not vitiate liability.

    - Emergency situations which could divert one's attention from conduct at hand are not relevant to human frailties, but rather first branch of test in determining how reasonable person would have responded in same circumstance.

- Relevant frailties must be those over which the accused has no control or ability to manage under the circumstances.

    - eg. person with cataracts cannot be held responsible for limited vision, but would be expected to avoid activity in which that limitation would create risk.

- *R. v. Beatty (SCC 2008)*

- D.'s driving truck safely, momentary lapse caused him to cross centre line into oncoming traffic. Accident, caused deaths of three persons in the other vehicle. No intoxication. Question is whether this momentary act of negligence sufficient to constitute dangerous operation of a motor vehicle causing death.

- Civil negligence is concerned with apportionment of loss, but criminal negligence aimed at punishing blameworthy conduct. Where liability for criminal negligence includes imprisonment, the distinction acquires a constitutional dimension re: *mens rea*.

- *Modified objective test* is apt for weighing mens rea in criminal negligence. Modification in this case is that a *marked departure* from reasonable conduct is required in criminal law. Further, actual state of mind of the accused is not ignored in criminal law.

    - For instance, cannot avoid conviction by saying that risk of dangerous driving was not in mind, but can avoid by saying that a reasonable person in that circumstance would not have had risk of dangerous driving in mind.

- Short of incapacity to appreciate the risks involved, personal characteristics are not relevant. However, particularized such that reasonable person placed in circumstances of the accused at the time of the act.

- Actus reus is defined by the *words of the enactment*, rather than by a *marked departure from the normal manner of driving*. Conduct markedly departed from the norm is necessary to make out the *mens rea*, not the actus reus.

    - ITC, actus is driving in a manner that was dangerous to the public...etc.

    - ITC, act does not contemplate a specific consequence (eg. death), but rather only that the vehicle was operated dangerously. For instance, if driving and drinking was not a marked departure from the reasonable person standard, it did not become so merely because a collision occurred.

- Mens rea requires satisfaction on all evidence, including the actual state of mind of the accused, that the conduct amounted to a marked departure from the reasonable person standard of care.

    - Not necessary that the Crown prove a positive state of mind. Proof of a subjective mens rea is sufficient, but not necessary in order to make out criminal negligence.

- Lack of care must be serious to merit punishment. For instance, conduct in a brief timeframe which is otherwise proper in all respects is more indicative of civil rather than criminal negligence.

    - ITC, only reasonable inference is that the D. experienced a loss of awareness that caused crossing over the line; momentary lapse of attention insufficient to

ground criminal liability.

- Dissent (McLachlin)

    - Equates the marked departure standard of the reasonable person with the words of the offence - held that this was just a non-exhaustive list of circumstances to be taken into attention.

    - Considering dangerous operation in a manner other than with an actus of a marked departure makes it redundant with provincial offences.

    - Momentary lapse of attention is not consistent with the idea of a *marked departure* in view of the actus reus for dangerous operation. Would require something more.

    - Additional inquiry into accused's state of mind is unnecessary; if driving in manner which constitutes a marked departure from the norm, can drawn inference that *mens rea* has been made out, absent an excuse.

    - Fault element is not the marked departure from the norm, but rather that a reasonable person in the circumstances would have been aware of and acted to avert risks. There could be circumstances where transitory inattention is sufficient, although not ITC.

- R. v. Duong (ONCA 1998)

- D. accused of accessory after the fact to murder; reports on TV and news that Lam committed murder. Lam contacts D., says that he was "in trouble for murder"; D. allowed Lam to hide out in his apartment for two weeks.

- Where the Crown chooses to charge with accessory after the fact, must show more than generalized knowledge that the principle has committed *some crime*.

- Knowledge of the offence committed by the person aided was an essential element to being convicted of being an accessory after the fact. Accused must have known, for instance, that the principle had committed murder, and with that knowledge, assisted.

- Parliament has not chosen to enact legislation which allows for generalized knowledge to be sufficient to ground a charge of accessory after the fact.

    - While the Crown argues that this allows for acquittal where D. believes that principal committed crime X rather than crime Y, the latter being the actual criminal act. If this is the case, however, it must be remedied via legislation, not jurisprudence.

- However, wilful blindness imputes knowledge to the D.; so if the Crown can show that the D. had knowledge that inquiries should be made, and those inquiries were not made, this is sufficient to satisfy the mens rea for the offence; this is true regardless of whether the inquiries would have actually led to obtainment of required knowledge.

    - In other words, with wilful blindness sufficient to show that accused deliberately failed to inquire when the accused knows there is reason for inquiry. Deliberately choosing someone when one knows one ought to satisfies the *mens rea*, replacing actual knowledge

    - Remaining deliberately ignorant is no defence; inquiry into what would be the likely result of accused's attempts to learn more is irrelevant when no such attempts were actually made.

- *Vaillancourt v. the Queen (SCC 1987)*

    - D. convicted of second degree murder; armed robbery in pool hall; D.'s accomplice killed a patron. Plan was to only use knives in robbery, but accomplice brought gun. D. asked accomplice for bullets so as to carry out robbery with unloaded firearm. Accomplice apparently complied, but did not give all bullets. Constitutional challenge to s.213(d) - first degree murder, regardless of foreseeability of death if one commits a crime with a weapon upon one's person.

    - Through stigma and penalty, conviction for this offence will result in deprivation of life, liberty and security of the person; ergo, must respect principles of fundamental justice.

    - Something less than subjective foresight of the result may, in certain circumstances, suffice for the imposition of criminal liability for causing that result through intentional criminal conduct.

    - There are only a very few crimes in which the special nature of the stigma or the available penalties require a *mens rea* which reflects the nature of the crime itself.

        - Consider theft; conviction for that crime carries stigma, and so *mens rea* must require some proof of dishonesty.

        - Murder is another such crime; most severe penalty, and extreme stigma; separable from manslaughter only by level of intentionality, ergo requires special mental element.

    - Conviction for murder cannot rest on anything less than proof BRD of subjective foresight. Further, s.213(d) does not even require the lower standard of objective foresight, and so is entirely inconsistent with PFJ mens rea requirements.

- This particular offence has replaced objective foreseeability mens rea with inference from BRD proof of engaging in certain forms of dangerous conduct.

- Is it possible for murder conviction to occur, in spite of reasonable doubt as to whether accused foresaw death? If so, there is a violation of PFJ.

- s.213(d) cannot be saved by s.1; while there is a sufficiently important objective, deterring the use of weapons in dangerous crimes, this measure unduly limits the rights of Canadians. It is not necessary to convict people of murder to deter weapons use.

- *R. v. Martineau (SCC 1990)*

- D. thought that the crime would be a B&E, however accomplice shot and killed the residents of the dwelling broken into. s.213(a) holds that felony murder is where a person causes the death of a person while committing certain offences, regardless of whether they possess subjective foresight of likelihood of death ensuing.

- Those causing harm intentionally must be punished more severely than those who cause harm unintentionally; this is the reason for the differentiation between murder and manslaughter / criminal negligence, for instance.

- The stigma relating to the most serious of crimes must be reserved for those who intentionally cause death or choose to inflict harm likely to cause death; they are the most morally blameworthy.

- While the indiscriminate punishing for murder of all those who cause death, regardless of intention, might deter engaging in risky conduct; however, such measures are not *necessary* in order to achieve this objective. *Charter* rights are thus unduly impaired.

- Criminal liability for a particular result is not justified except where the actor possesses a culpable mental state in respect of the result.

- Dissent (L'Heureux-Dube)

    - Objective foreseeability is sufficient, and therefore no *Charter* violation has taken place.

    - Correlation between consequences of criminal act and its retributive repercussions would become obscured by involving accused's asserted intentions; could equate assault causing bodily harm and manslaughter equated at law.

    - Stigma concentration is not necessary; misplaced compassion to save offenders from the mark of Cain. Murderers face the same stigma if labeled manslaughterers.

- Acts in s.213 are not accidental, but rather conduct so abominable that it is objectively foreseeable that those who engage in such predicate crimes intentionally could cause death.

- To strike down the scheme because other means were available (eg. in the third branch of the *Oakes* test) undermines Parliamentary prerogative.

- *R. v. Finlay (SCC 1993)*

  - There is insufficient stigma attached to the careless storage of firearms as an offence so as to require a subjective mens rea.

- *R. v. Peters (BCCA 1991)*

  - SCC holds as special re: stigma: murder/attempted murder (intent to cause death), theft (dishonesty), as offences which require a subjective mens rea.

  - Can conclude however, that subjective mens rea not constitutionally required with respect to consequences from a wilful act other than murder or theft, where this is caused by a lack of care on the part of the accused.

- *R. v. Bernard (SCC 1988)*

  - *Charter* does not require intention with regard to all consequences requited by the offence; minimal element of application of force is sufficient for conviction of sexual assault causing bodily harm, for instance.

- *R. v. DeSousa (SCC 1992)*

  - Requirement of fault with regard to meaningful aspect of actus reus is required, however; this is necessary to avoid punishing the mentally and morally innocent.

  - Assault and assault causing bodily harm both have identical mens rea requirements; element of causing bodily harm is merely used to classify the offence. There is nothing to stop Parliament from treating crimes with certain consequences as more serious than others which lack those consequences.

  - Conduct may have more or less serious consequences, depending on circumstances of case; same assault might kill one, injure another, and have no effect on a third.

  - Distinguishing criminal responsibility on the basis of the amount of harm actually caused is acceptable, if done through higher maximum / minimum penalties based on consequences.

  - One is not morally innocent merely because consequence was not subjectively foreseen; punishing for unforeseen consequences does not mean that the morally innocent are

punished, but rather those who caused injury through avoidable, unlawful actions.

- *R. v. Finta (SCC 1994)*

  - D. charged with confinement, kidnapping, manslaughter constituting a war crime / crime against humanity. TJ held that D. must have been aware that actions were war crimes / crimes against humanity; D. was acquitted as a result.

  - Following *Vaillancourt*, stigma attached is such that the mens rea of the crime must match the particular nature of the crime. Opprobrium attached to war crimes is extreme.

  - Due to high level of stigma with war crimes, accused must be aware of conditions which make actions more blameworthy than underlying offences.

  - The mens rea does not have to be proved in each element of the offence; however, must be meaningful mental element in a *culpable* aspect of the actus reus.

  - There must be an element of subjective knowledge on the part of the accused of the factual conditions which render given actions a crime against humanity; however, not required that the actor know that the actions were *inhumane*.

  - Same goes for war crimes; must know circumstances which render actions a war crime. However, actual knowledge in either case can be substituted by knowledge imputed through wilful blindness.

- *Beaver v. the Queen (SCC 1957)*

  - D. charged with possession and sale of morphine; holds that did not have sufficient mens rea, on account of the fact that he thought it was an innocent substance.

  - As a necessary feature of the trade, a butcher holds himself out as selling meet fit for consumption; statutes concerning meat quality simply convert that civil duty into a public duty.

  - It is within the power of Parliament, pre-*Charter*, to enact legislation which attaches penal consequences to strict liability offences. However, Court cannot *presume* this, must have explicit representations to this effect in the statute.

- *R. v. Pierce Fisheries, Ltd. (SCC 1971)*

  - D. charged with possession of undersized lobsters.

  - There is no similarity between offences which prohibit true crimes, versus those which prohibit certain activities in a regulatory manner. There is no language requiring mens

rea explicitly. Therefore, will be read as a strict liability offence.

- There are a wide category of offences for regulation of conduct in the interests of the public which are not subject to the common law presumption of mens rea.

- Dissent (Cartwright)

    - There is an express finding of fact that the D. had no knowledge of presence of undersized lobsters; therefore, necessarily not guilty.

- *R. v. Wholesale Travel Group Inc. (SCC 1991)*

    - Corporations have standing to challenge the constitutionality of legislation, and may benefit from finding that these are unconstitutional (eg. if they violate s.7 for a person, then they are of no force or effect for persons or corporation) - so long as the legislation in question was not enacted to apply *solely* to corporations.

    - Mens rea applies to true crimes due to the fault and moral culpability which they imply; stigma and consequences. This does not apply to offences which are not criminal, but relate to the public interest in a regulatory manner.

    - Criminal actions are those which are so abhorrent to the basic values of human society that they must be prohibited completely. Other conduct is prohibited not because it is inherently wrongful, but because lack of regulation would lead to dangerous conditions.

    - Criminal offences punish previous bad conduct, while regulatory offences are aimed at the future, at avoiding future harm by promoting best practices in the present.

    - By requiring a "timely retraction" in addition to due diligence as defence to strict liability defence, the false advertising legislation went beyond a mere strict liability offence, entered the realm of absolute liability. Given presence of penal consequences, this is a prima facie violation of s.1.

    - There are means available to achieve legislative objectives without punishing the morally innocent, ergo this legislation fails under the third branch of the *Oakes* test.

    - The stigma associated with false advertising is not the same as that associated with dishonesty stemming from a theft conviction, as it implies carelessness, not dishonesty.

    - s.11(d) is offended when an accused may be convicted despite the existence of a reasonable doubt on an essential element of the offence. Issue is not that the D. must disprove or provide an excuse, but of conviction in the face of a reasonable doubt.

- Restriction of liberty interest through regulatory versus criminal offence is the same; there is no lesser or greater liberty, therefore, s.11(d) must apply to both circumstances.

    - So, to require the accused to "establish that" there was a timely retraction on BOP means that the accused could be convicted in spite of a reasonable doubt.

- However, very difficult for the Crown to prove the absence of due diligence; therefore, without evidentiary burden on accused, would potentially be impossible to obtain conviction.

    - ITC, shifting burden is not limited as much as possible, however, and therefore cannot pass the third branch of the *Oakes* test.

- Dissent (Cory)

    - Those who engage in regulated activities should be deemed to have accepted certain terms and conditions relevant to that sphere.

    - Regulatory schemes require imprisonment and other penal consequences in order to have efficacy; potential for serious harm is too great to preclude prison.

    - Strict liability represents an appropriate compromise between competing interests (truth seeking versus fairness versus administrative efficiency versus Parliamentary objectives).

- *R. v. Sault Ste. Marie (SCC 1978)*

    - Protection of social interests requires a high standard of care and attention on the part of those who follow certain pursuits; such persons are more likely to be stimulated to maintain that standard if they know that ignorance or mistake is no excuse.

    - Administrative efficiency is also important; concerning the difficulty of proving mental culpability, proof of fault is too great a burden in time and money on the courts, given that regulations are the primary means of enforcing government policy.

    - Public welfare offences are a distinct class; enforced through criminal law mechanisms are nonetheless of a civil nature, regarded as a branch of administrative law. Principles of criminal law have limited application to such offences.

    - Three classes of offence:

        - True crime - subjective mens rea required; positive state of mind, including intent, knowledge, recklessness. Public welfare offences end up in this category only given explicit intention by Parliament (eg. regulation includes "knowingly")

- Strict liability - once actus reus proved, there is a defence of due diligence which can be shown on balance of probabilities. Sensible halfway house. Jury is entitled to presume that accused acted with knowledge / foresight unless there is evidence to the contrary. Public welfare offences presumptively fall into this category.

- Absolute liability - once actus reus proved, no defence available, although due diligence may be a mitigating factor in sentencing. This category applies only where the public welfare offence states that defence of due diligence is not applicable. Effectively an exception to the categories above.

- To require proof of fault in regulatory offences would be to allow D. to escape by merely denying evil intent; would not have any legislative effect, as this is a level of proof which is very difficult to meet.

- Only accused has knowledge of what has been done in order to avoid the breach, and therefore the burden is properly placed on the D. to show due diligence on BOP.

– *Reference re: s.94(2) of the BC Motor Vehicle Act (SCC 1985)*

- s.94(2) creates an absolute liability offence in which guilt is established through actus reus, namely that person drives motor vehicle while licence is suspended, regardless of whether they knew that the licence had been suspended.

- Laws which have potential to punish penally those who have done nothing wrong offend PFJ - cannot combine absolute liability and imprisonment.

- s.7 is a broad category, nearly absolute; ss.8-14 are merely illustrative of deprivations envisioned by s.7; parameters of what life, liberty and security of the person are. PFJ isn't a right itself, but a category of rights to which Canadians are entitled by the *Charter*.

- There is a revulsion towards punishment of the morally innocent; absolute liability w/ penal consequences violates PFJ in this way.

    - Should be mentioned that imprisonment could occur for non-payment of fines, and so there may be consideration of this issue in view of absolute liability offences punishable by fines; but not ITC.

- Absolute liability does not violate s.7 of the *Charter* per se; rather, it only does so where it is attached to penal consequences. However, in the latter case, it *always* violates PFJ.

- The consideration of public interest is irrelevant except for considering whether this violation is justified under s.1.

- s.1 can only rescue violations of s.7 for the purposes of administrative efficiency in exceptional situations - for instance, natural disasters, war, epidemics, etc. ITC, no such

justification in the least.

- *R. v. Pontes (SCC 1995)*

    - If the only defence available to a strict liability defence is negatived by legislation or common law principle (eg. ignorance of the law), then it is effectively an absolute liability offence.

- *R. v. Chase (SCC 1987)*

    - D. enters house of victim, teenage girl, without invitation. Proceeds to grope her before she calls neighbour.

    - Objective test for whether assault is *sexual*: in light of all circumstances, is the sexual or carnal context of the assault visible to a reasonable observer?

        - Factors include the nature of the contact, situation, words, gestures, threats, etc. Can also be *informed* by the intent of the person committing the act.

            - If the motive of the accused is sexual gratification, then this helps evidence that the nature of the assault was in fact sexual.

            - ITC, clear that conduct of respondent in grabbing the victim's breasts was in fact sexual.

- *R. v. V. (K.B.) (SCC 1993)*

    - Father convicted for sexual assault; grabs son's genital area as disciplinary response to child having done this to others.

    - While the purpose was *not* sexual gratification, the assault was one of a sexual nature, and violated the sexual integrity of the victim.

- *R. v. Seaboyer (SCC 1991)*

    - Case concerns rape shield provisions in s.276, holds that they are unconstitutional under s.11(d) / s.7, not saved by s.1.

        - s.277, which prohibits admission of sexual history to impeach credibility of complainant is constitutional, however.

    - Defence of honest belief rests on the concept that the accused may honestly but mistakenly believed that the complainant consented to the act; this could be established by adducing evidence relating to other sexual acts. Such evidence would be precluded under s.276, therefore violating s.7 re: fair trial.

- Dissent (L'Heureux-Dube)

    - Sexual assault is a gendered phenomenon - women victimized at higher rate.

    - Relevance of sexual history evidence rests on acceptance of stereotypes about women and rape; should therefore be excluded.

    - No relevant evidence regarding the defence of honest belief in consent is excluded by the provision under attack ITC.

    - Following *Pappajohn,* defence of honest belief in Canada is subjective, not objective; in other jurisdictions, it is a defence of reasonable belief.

- *R. v. Ewanchuck* (SCC 1999)

    - At trial, D. acquitted on basis of implied consent; SCC held that no defence of implied consent to sexual assault exists in Canadian law.

    - Irrational as the complainant's motive may be, if she subjectively felt fear at time that consent was given, this leads to a legal finding of absence of consent.

- *R. v. Darrach* (SCC 2000)

    - Accused charged with sexual assault, seeks to introduce evidence concerning complainant's sexual history. Challenges constitutionality of s.276.

    - Current s.276 prohibits sexual history evidence in only two circumstances, depending on inference being supported. Can be adduced to support *other* inferences, however.

    - Prohibited inferences are that a person is more likely to have consented to the alleged assault (ie. due to her prior sexual experience) and, that she is less credible as a witness by virtue of her prior sexual experience.

    - s.7 / s.11(d) can be respected without the accused being entitled to the most favourable procedures that could possibly be imagined. Accused not entitled to procedures which take only his/her interests into account.

    - Three purposes of s.276 are in fact PFJ themselves; protecting the integrity of the trial by excluding evidence that is misleading, protecting the rights of the accused, as well as encouraging the reporting of sexual violence and protecting "the security and privacy of the witnesses.

    - Therapeutic and personal records can be adduced, however it is important that these are not used to circumvent s.276; cannot do indirectly what is prohibited directly.

- The scope of the right to make full answer and defence must be determined in light of privacy and equality rights of complainants and witnesses.

- s.276 is not a blanket exclusion; in fact, it only prohibits the admission of evidence where this is adduced to support one or both of the two prohibited inferences.

- Evidence of non-consensual sexual acts can equally defeat the purposes of s. 276 by distorting the trial process when it is used to evoke stereotypes such as that women who have been assaulted must have deserved it and that they are unreliable witnesses, as well as by deterring people from reporting assault by humiliating them in court.

- The phrase "by reason of the sexual nature of that activity" in s. 276 is a clarification by Parliament that it is inferences from the sexual nature of the activity, as opposed to inferences from other potentially relevant features of the activity, that are prohibited.

    - If evidence of sexual activity is proffered for its non-sexual features, such as to show a pattern of conduct or a prior inconsistent statement, it may be permitted; because this does not support either of the two prohibited inferences.

- If evidence is not barred by s. 276(1) because it is tendered to support a permitted inference, the judge must still weigh its probative value against its prejudicial effect to determine its admissibility.

    - Test is that judge can admit evidence of "significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice" (emphasis added).

    - The adverb "substantially" serves to protect the accused by raising the standard for the judge to exclude evidence once the accused has shown it to have significant probative value

    - Requirement of "significant probative value" serves to exclude evidence of trifling relevance that, even though not used to support the two forbidden inferences, would still endanger the "proper administration of justice".

    - By excluding misleading evidence while allowing the accused to adduce evidence that meets the criteria of s. 276(2), s. 276 enhances the fairness of trials of sexual offences.

- There has been a lot of change in sexual assault law in a very short period of time. Many of the significant developments have been in the last thirty years. Changes were implemented not only in substantive law, but also in evidentiary laws used in the course of sexual assault procedures.

- There is a strong societal interest in deterring sexual assault, which involves investigating, prosecuting, and punishing offenders; this must be balanced against the

strong societal interest in ensuring that the innocent are not punished, and this requires that we ensure that accused persons are capable of raising a vigorous defence in the interest of a fair trial.

    - Previously, the law had been stacked in the favour of the accused, and the rights of the complainant were not fully represented at trial. Changes in the last twenty years have attempted to alter this balance;

- There is a large body of law dealing with sexual assault involving children (age of consent is now 16) - complicated sections relating to age of complainant, age of assaulter, and applicable evidence. ITC, we limit ourselves to sexual assaults of adults, by adults.

- There is a difference at law between prior sexual history, and general sexual reputation; s. 277 excludes evidence concerning the latter as it pertains to the *credibility* of a victim of a sexual assault - for instance, one cannot say that a sex trade worker is inherently less likely to be telling the truth.

- s.276 does not pertain merely to sexual reputation, but rather to any evidence concerning the prior activity of the complainant. This is a commonly used section, unlike s.277. The first attempt by the Fed to limit cross examination on prior sexual conduct was struck down in *Seaboyer*.

    - See the case re: defence of honest belief.

    - Legislation almost always survives its second challenge; that is, when a law is struck down by the SCC and reframed subsequently by the legislature, it will nearly always be upheld if challenged again.

    - Separate application to the TJ, ideally before trial, must be made in order to attempt to adduce evidence of complainant's sexual activity at trial.

    - The second attempt at s.276 included (in sub 2) a balancing clause, which held that the D. cannot lead this evidence unless the judge, after hearing the application, finds that:

        - Contains detailed particulars of the evidence sought to be adduced (s.276 (2)(a))

        - Relevant to an issue at trial; (s.276(2)(b))

        - Must have significant probative value that is not substantially outweighed by the danger of prejudice. (s.276(2)(c))

        - Further, must be considered in accordance with factors in s.276(3):

- (a) the interests of justice, including the right of the accused to make a full answer and defence;

- (b) society's interest in encouraging the reporting of sexual assault offences;

- (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

- (d) the need to remove from the fact-finding process any discriminatory belief or bias;

- (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

- (f) the potential prejudice to the complainant's personal dignity and right of privacy;

- (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

- (h) any other factor that the judge, provincial court judge or justice considers relevant.

- Technically only prevents the accused, and not the Crown from adducing evidence of prior sexual history. Therefore, the prosecution may introduce information concerning the sexual history of the complainant where this is relevant or necessary.

- Anecdotally, s.276 has reduced drastically the extent to which defence counsel has engaged on fishing expeditions concerning sexual history evidence, and further has reduced generally the admissibility of s.276 evidence in BC; exactly what it was designed to do.

- *Pappajohn v. the Queen*

- Facts

- D. meets with victim, real estate agent; alleged sexual assault occurs. Victim alleges that she never consented, resisted throughout.

- Issue

- Is the D.'s perception of consent relevant in sexual assault?

- Rule

    - Yes; this is the basis of mistake of fact defence, which is still relevant in Canadian criminal law. Subjective standard, did the D. believe honestly, (thought mistakenly and even unreasonably) that the victim consented? If yes, then the defence applies, acquittal entered.

- Principles (McIntyre)

    - Agrees with Dickson re: operation of defence, but holds no AOR sufficient to put the defence to the jury ITC.

- Dissent (Dickson)

    - *Operation of mistake defence* - prevents accused from having mens rea which the law requires for the crime charged; more of a negation of guilty intention than affirmation of a positive defence, although follows AOR / BRD defence reqs. If knowledge, intention, or recklessness required for certain offence, and D. mistaken re that mens rea, then culpability is negatived.

        - Defence operates where there is an honest belief in consent, or absence of knowledge that consent has been upheld, for instance.

        - Intent in sexual assault would be to have relations with a nonconsenting person.

    - *No third party required in mistake* - defence not limited to situation in which mistake induced by information received from third party.

    - *Mistake does not have to be reasonable* - subjective, not objective standard, applies concerning the D.'s state of mind. If person withholds consent in own mind, but does not communicate this to accused, could be unjust to convict. Unjust to ignore the actual belief of the accused in favour of an attributed belief.

- *Sansregret v. the Queen (SCC 1985)*

    - Facts

        - D. has history of violence concerning complainant; after ceasing relations with him, he twice appeared at her house, and each time acted threateningly. In order to calm D., victim had intercourse, held out hope of reconciliation. D. charged with sexual assault as a result.

    - Issue

- Can the defence of mistake of fact apply in a circumstance where D. has acted threateningly towards the person he claims he believed to have consented to his sexual advances - eg. the consent was obtained by coercion?

- Rule

- No; equal to wilful blindness, which imputes actual knowledge and negatives defence of mistake of fact.

- Principles

- TJ held that no rational person could have been under honest mistake of fact in these circumstances; but D. believed in reconciliation between self and victim; supported by victim's testimony. D. believed what he wanted to believe.

- *Wilful blindness precludes this defence* - there can be no honest belief where there has been self-deception to the point of wilful blindness. Law does not reward deliberate ignorance concerning the true state of facts. This is not incompatible with Pappajohn re: reasonableness of belief, because in case of wilful blindness, we impute knowledge to D. - in this case, we impute knowledge that the victim had not consented, so honest belief to contrary is irrelevant.

- R. v. Seaboyer (SCC 1991)

- Facts

- Deals with operation of rape shield provisions re: constitutionality.

- Issue

- Are s.276 and s.277 unconstitutional, in particular because they will cause the exclusion of evidence which could support the defence of mistake of fact?

- Rule

- s.276 unconstitutional; s.277 constitutional, as prohibits sexual reputation evidence, which is not relevant to defence, only goes to credibility of victim.

- Principles

- s.277 - prohibition of use of sexual reputation to challenge credibility of victim is constitutional. No logical or practical link between sexual reputation and credibility.

- s.276 - sexual history of victim with persons other than the D. could be admitted only if it rebutted evidence adduced by prosecution, established identity of

person who had sexual contact with complainant, or was evidence of activity that took place on same occasion as activity in the current charge and relates to consent that D. alleges was given by victim.

- The basis of the D.'s honest belief in consent may be acts performed by the complainant at some other time or place. This evidence would be precluded by s. 276. Therefore, overshoots the mark by precluding evidence relevant to live, recognized defences.

- Dissent (L'Heureux-Dube)

- Focus on the gendered nature of the crime, sexual assault has a reduced conviction rate compared to other violent crimes. Relevance of sexual history evidence always relates to myths concerning sexuality of women. No evidence relevant to mistake of fact defence is precluded by s.276.

- *R. v. Ewanchuck (SCC 1999)*

- Facts
  - Victim was lured into trailer by D. Frightened following discussion with D. D. repeatedly attempts to initiate sexual contact, repelled by non-consenting victim, but persists. Victim acted in such a way so as to prevent communicating discomfort, actively attempted to project picture that she was happy to be with D., so as not to provoke him into harming her.

- Issue

  - Can consent be given in circumstances where the victim fears that the only other option is force? Can the D. claim mistake of fact in such circumstances?

- Rule

  - No; and yes, but no AOR (and unlikely that there could be a circumstance where D. obtains consent under coercion, takes reasonable steps to ascertain validity of consent, and is not wilfully blind re: consent, thus allowing the defence to prevail).

- Principles

  - Accused can claim that the words an actions of a complainant raise a reasonable doubt concerning assertion of subjective non-consent (eg. that she did not in fact consent). Perception of state of mind not relevant; what is being argued is whether or not the complainant actually felt what she purports to have felt concerning consent.

- *Consent must be freely given* - vitiated if given under fear, threat of coercion, etc. See s.265(3). There is no consent where complainant subjectively believed that she was choosing between sexual contact with D. or being subject to application of force. Not whether she preferred not to have sexual activity, but whether there were only two choices - force, or compliance.

- *Sex assault* - crime of general intent; end of itself, not committed to achieve some other end.

- *Must be active consent* - for mistake of fact to succeed as a defence to sex assault, evidence must show that the D. believed that the victim communicated consent to engage in sexual activity. Not sufficient that the D. believed that the victim consented in her mind but did not communicate this. Must communicate "yes" through either words or actions.

- *Change of heart must also be explicit* - Once the complainant has expressed unwillingness, the accused must ascertain that the mind of the victim has truly changed before proceeding with further intimacies. Silence, time, etc. do not indicate change of heart. This would be reckless or wilfully blind conduct which is unacceptable.

- *Defendant does not have to testify to plead mistake of fact.*

- Dissent (L'Heureux-Dube)

- See prev. argument re: myths concerning sexuality of women, gendered nature of offence of sexual assault.

- *Requirement of positive vitiation of consent troubling* - s.265(3) applies in circumstances where the complainant does not resist / submits by reason of the application of force; should also apply to silence / passivity. Otherwise, would require physical resistance of some sort by the victim for the offence to be established.

- R. v. Howson (ONCA 1966)

- Facts

- Towing service employee charged with theft of car when refusing to return vehicle to owner until expenses paid. Provision for this offence requires that the person must have acted fraudulently and without colour of right.

- Issue

- Can D.'s ignorance of the law constitute a colour of right, thereby negativing the offence?

- Rule

- Yes.

- Principles

- *Ignorance no offence* - s.19 holds that ignorance of the law is not a defence - however, this provision only applies if there is an offence. Therefore, if genuine misconception concerning law or fact arises which negatives the offence definitionally (eg. due to colour of right), then s.19 has no applicability. Ignorance of the law is therefore a "defence" in such circumstances.

- *Colour of right* - can be no offence of *theft* where there is a genuine misconception of fact or law which gives rise to colour of right.

- Can be said that D. acting with colour of right where he believed, genuinely though wrongly, that the law gave him power to hold vehicle until expenses paid. Negatives actus, since required circumstance (absence of colour of right) not present.

- *R. v. Docherty* (SCC 1989)

- Facts

- D. charged with wilfully failing to comply with probation order, broke peace when he drove with greater than .80; accused pled to DUI, but contests the probation charge, contending that he could not have *wilfully* failed to comply, since he was unaware that he was breaking the law when he blew .80.

- Issue

- Can an accused have wilfully breached probation in a circumstance where D. was not aware that he was doing so?

- Rule

- Wilfully is the same as intentionally; while D. intended to drive with greater than 0.80 BAC, he did not intend to break the law or comply with probation in so doing. This negates the mens rea of the failure to comply offence. Parliament redrafted s.733 as a result of this decision.

- *Jones and Pamajewon v. the Queen* (SCC 1991)

- Operating unlawful bingo; believed that CC didn't apply to activities on reserve. Mistake of fact is not the same as mistake of law / ignorance of law. Mistake of law only applies in limited circumstances, where knowledge of the law is required in order to make out the offence on a definitional level.

- Consider R. v. Prue, the case with the automatic licence suspension, where the D. claimed that he did not know his licence was suspended; this is a question of fact, not a question of law.

- *Forster v. the Queen* (SCC 1992)

- Ignorance of the law - only a defence where knowledge that one's actions are contrary to the law is a component of the *mens rea* for an offence. {Forster}

- *Molis. v. the Queen* (SCC 1980)

- D. charged with trafficking MDMA. Began manufacturing before restriction, became illegal thereafter (Fed. followed proper channels re: Gazette). D. contends that he did not know it was illegal, had performed due diligence. Defence of officially induced error not left to defence, no AOR.

- *R. v. MacDougall* (SCC 1981)

- *Defence of officially induced error* - operates as an exception to the principle that ignorance of the law is not an excuse. Available as a defence to violation of (1) regulatory statute where the accused has (2) reasonably relied on erroneous legal opinion or advice (3) of an official responsible for admin/enforcement of the particular law.

- *R. v. Jorgensen* (SCC 1995)

- Issue

- Did D. knowingly sell obscene material, do so without excuse? Approval of a film by the OFRB cannot negative mens rea of this offence; can it provide excuse, however, through officially induced error?

- Rule

- Yes!

- Principles

- *Policy rationale re: presumption against ignorance of law as defence* - evidentiary problems are difficult re: mistake of law, defence encourages ignorance of the law, would create a subjective law for each citizen tailored to their knowledge,

and ignorance of the law is blameworthy itself.

- *Officially induced error allowable exception* - does not offend the four policy considerations which concern the ignorance of the law as a general defence. Further, existence of other exceptions concerning ignorance of law as a defence (colour of right as mens rea, or lack of publishing in Gazette) implies that ignorance principle should not apply where manifestly unjust.

- *Operation of officially induced error* - not a full defence, as it does not negative culpability. Instead, excuses behaviour of accused. Not the same as due diligence either; diligence may be required in obtaining advice however, in that it is not reasonable to rely on official advice unless inquiries have been made to this end. Applies to true crimes and to strict/absolute liability offences.

- *Process for determination* - on BOP, accused must (1) determine whether error was of law, or of mixed law and fact. If purely of fact, then defence fails. If error was one of law, then (2) demonstrate that accused considered legal consequences of actions, (3) demonstrate that the advice came from appropriate individual - objective standard re: whether reasonable person would believe that the official is responsible for advice concerning law in question, (4) advice was reasonable in the circumstances (low threshold, due to knowledge disadvantage of D.), (5) advice was erroneous, (6) advice was relied upon (shown by receipt of advice previous to action, for instance).

    - OFRB understood as body which approves films for play, no other body logical re: advice for whether film is illegally obscene for sale in Ontario.

- *Levis (City) v. Tetrault* (SCC 2006)

    - Operating vehicle for which registration fees had not been paid. Claim of officially induced error, holding that it had been advised by an employer that a renewal notice would be mailed 30 days before expiry; never arrived.

    - Defence of officially induced error cannot stand absent due diligence. When not receiving notice, should have been concerned and acted on this information. Further, administrative practices are not advice.

- *DPP v. Beard* (HL 1920)

    - Facts

    - Issue

        - Can drunkenness constitute a defence?

- Rule

    - In certain circumstances.

- Principles

    - Voluntary drunkenness thought of as an aggravating factor, rather than a defence; no reason to give a debaucher a better legal situation than a sober man. However, rigidity of this rule relaxed in the 19th century.

    - *Specific intent* - where specific intent is essential element of an offence, evidence of a state of drunkenness which makes D. incapable of forming that intent can be considered, and if compelling, leads to acquittal. Holds that drunkenness does not excuse, but can be incompatible with the crime charged.

    - *Alcohol consumption akin to insanity* - distinction between insanity due to drunkenness, and drunkenness which negates capability to form specific intention. If insanity occurs, then furnishes D. with same answere to criminal charge as insanity induced by other cause.

    - *Mere increased readiness to violent passion* - merely drinking to the point that one's mind is not robbed of specific intent, but rather one is merely more readily able to give way to voluntary passion does not rebut mens rea, that man intends natural consequences of actions.

- *R. v. George* (SCC 1960)

    - Facts

        - D. stole amount from victim; theft is a specific intent offence (unlike assault), as it is a means to an end; one steals in order to deprive another of property.

    - Issue

        - Is drunkenness a recognized defence to a specific intent offence?

    - Rule

        - Yep.

    - Principles

        - *Can still be culpable for component offences* - specific intent offences may contain components which are general intent offences. A state of voluntary drunkenness might excuse the former, but never the latter. Judge must consider all included offences of which there is evidence regardless of whether the Crown makes

reference to such offences.

- D. assaulted victim for purposes of robbery; while this theft is specific intent, the common assault component is general intent, for which D. has no excuse.

- *Difference between general and specific intent offences* - acts done to achieve an immediate end are general intent, and acts done to achieve a specific, ulterior motive are specific intent offences - deliberate steps taken towards illegal goal. Consider intention as applied to acts in relation to their purposes, and intention as applied to acts apart from their purposes.

    - D. violently manhandled a person and knew that he was carrying out an assault; this is an offence which cannot be excused by voluntary drunkenness which is not akin to insanity.

- *R. v. Daviault* (SCC 1994)

    - Facts

        - D. charged with assault of elderly woman; had BAC which would kill or render comatose an ordinary person; could cause blackout, loss of contact w/ reality - no awareness or memory of actions.

    - Issue

        - Can extreme drunkenness, akin to insanity or automatism, constitute defence for general intent offences (would obviously do this for specific intent offences)?

    - Principles

        - *Extreme intoxication* - negatives the mental element of offences. Voluntary intoxication is not a crime, not itself morally blameworthy; ergo to be compatible w/ *Charter* re: punishing only the morally blameworthy, must recognize circumstances where extreme intoxication, though voluntary, has robbed D. of capacity to form intent. Person who intends to drink does not intend to commit sexual assault necessarily, and consequences of extreme intoxication are not predictable.

        - *General intent offences* - mens rea in certain offences which amounts to an intention to have committed the actions which constitute the offence. Ordinary inferred by proof that the assault was committed by the accused.

        - *Level of extremity required* - must be such that it is akin to automatism or insanity, this is required to raise a reasonable doubt re: ability to form mens rea to commit a crime. One who is so drunk that he/she is an automaton; can move

arms legs, but cannot form simple intent.

- *Standard of proof* - accused must establish this level of drunkenness BOP. Unlike other defences, does not follow defence AOR, Crown BRD model of proof. This would also likely require testimony from accused re: amount and effect of consumption, in accordance with expert evidence.

- *Having care or control of motor vehicle while one's ability to drive is impaired is a general intent offence*.

- Dissent (Sopinka)

- *Sexual assault is a crime of general intent*.

- To not recognize this defence would be to convict those for whom a reasonable doubt exists concerning mens rea; however, intent to perform the actus reus is not required in general intent offences; substitute this for the fact that the accused intended to become intoxicated.

- Requirements of PFJ - must be symmetry between some aspect of the actus reus and mens rea; must be punishment proportionate to moral blameworthiness of offender.

- *R. v. Whittle* (SCC 1994)

- *Fitness to stand trial* - test based on limited cognitive capacity, strikes balance between fitness rules and the right of accused to choose own defence, have trial within a reasonable time. Unfit if unable to understand process, communicate with counsel. Persons suffering from disease of the mind under s.16 of the *CC* are exempt from criminal liability and punishment. They are sick, not blameworthy. However, they can still be tried.

- *R. v. Demers* (SCC 2004)

- *Permanent stay if not likely to ever become fit* - proceedings against an accused found unfit to stand trial could be permanently stayed if the person is not likely to ever become fit to stand trial, and does not pose a significant threat to the safety of the public.

- *R. v. Swain* (SCC 1991)

- Issue

- Who can raise the mental disorder issue?

- Rule

    - Accused at any time; Crown after verdict of guilty found by trier of face, but before conviction entered.

- Principles

    - *Accused can adduce evidence of inanity at any time during trial.*

    - *Accused must introduce evidence of insanity first* - Ability of the Crown to raise evidence of insanity over wishes of D. interferes with control of D. over own defence. However, where D. adduces evidence which puts mental capacity of D. at issue but falls short of raising NCRMD defence (re: s.16), Crown can raise own evidence of insanity.

    - *If no insanity evidence adduced by accused, Crown must wait for guilty verdict* - this is the so called *bifurcated* trial - Crown can raise the issue after a guilty verdict has been reached, but before a conviction has been entered. If the trier of fact found that the accused was insane at the time of the offence (BOP), then the NCRMD (not guilty by reason of insanity) verdict would be entered. Otherwise, a conviction would be entered.

    - *Rationale for allowing Crown interference* - may be circumstances where there is an accused who is NCRMD, but refuses to adduce cogent evidence to this end; in such circumstances, Crown should be able to adduce evidence reflecting the fact that society has an interest in ensuring that the outcome of the trial is valid. Further, public must be protected from dangerous persons requiring hospitalization. This does not interfere with the accused's ability to conduct defence, as evidence not adduced until defence concluded, or where the accused's own evidence has put capacity at time of offence into issue.

- Dissent (LaForest)
    - Permitting the Crown to raise insanity during the course of trial is an infringement on D.'s ability to control own defences. Does not satisfy minimal impairment of *Oakes*, ergo unconstitutional. Also infringes on the rights of the mentally ill on the basis of s.15 of the *Charter*; denies equality with other persons under the guise of paternalism.

- *R. v. Chaulk*

    - Facts

        - D. entered home in Winnipeg, bludgeoned occupant to death. Claimed paranoid psychosis; thought law was irrelevant to them.

- Issue

    - *CC* holds, s.16, everyone shall be presumed to have been sane; violates s.11(d), but this is justified under s.1. As sanity is a factor which is essential to guilt, unconstitutional to presume, as not compatible with presumption of innocence.

- Rule

    - Impossible to know which of the means available to Parliament for dealing with establishing sanity in criminal trials impairs s.11(d) the least.

- Principles

    - *Meaning of wrong* - morally vs. legally wrong so narrow in serious offences that there is no ready means of differentiation. Means more than merely contrary to law, read in context of the *Criminal Code* (could have used unlawful instead, contrary to law rather than mauvais in French). Therefore, NCRMD excuses on the basis of the inability of the D. to make meaningful moral distinctions.

        - *Legally wrong is not justifiable or tenable* - what is illegal and what is morally wrong rarely differs. In any case, not judged by the standards of the offender, but by the awareness that society considers the act as wrong. To do otherwise would be to hold some NCRMD offenders culpable where they knew that an act was formally a crime, but did not know that it was morally wrong - untenable position.

        - *Accused must merely be incapable of understanding that the act was in <u>some sense</u> wrong* - this position recognizes that both morality and awareness of the formal law guide decisions of rational actors. Those without ability to make such decisions are not criminally responsible for their deviations.

- Dissent (McLachlin)

    - *Presumption of sanity does not affect the burden of the prosecution* - Crown must still prove all elements of the offence BRD. This provision merely relieves from establishing, beyond this, that the accused has the capacity for rational choice rendering the attribution of criminal responsibility morally justifiable.

- Dissent (Wilson)

    - To justify under s.1, government would have to adduce evidence which showed that perfectly sane persons who had committed crimes, had this proven BRD in a court of law, were going free on tenuous insanity pleas; does not accord with facts, which show that the defence is invoked successfully in less than 1% of cases in the US.

- *Winko v. British Columbia (Forensic Psychiatric Institute)* (SCC 1999)

    - Issue

        - What are the consequences of an NCRMD finding?

    - Principles

        - *Denial of treatment ill serves* - neither mentally ill offenders nor society itself are well served by being punished for offences which they should not be held morally responsible for. To serve fair treatment and public safety, new approach is required. Therefore, legislative response protects society by treating the root cause of behaviour (eg. the mental illness), and offender by ensuring that punishment is not levied where not morally deserving.

        - *Process concerning disposition* - Court or a review board conducts hearing to determine whether person should be held in institution, released with conditions, or released absolutely. Dispositions must be made in accordance with s.672(54) of the *CC*. Findings must be reviewed within twelve months (unless absolute discharge) and every twelve months thereafter - s.672(81)(1). Hearings required to make restrictions more stringent. Attempts to serve both assessment and treatment requirements.

        - NCR verdict is neither guilt nor acquittal, nor finding of significant threat to society. This must be a further decision made at discretion of court or review board.

- *R. v. Simpson* (ONCA 1977)

    - Issue

        - Whether personality disorders can be considered diseases of the mind within the contemplation of s.16 of the *CC*.

    - Rule

        - Personality disorders or psychopathic personality disorders are capable of constituting a disease of the mind.

    - Principles

        - *Disease of the mind* - a legal concept, although it requires a medical component, ultimately whether an ailment meets this definition is a question of law for the judge. For example, Personality disorders or psychopathic personality disorders are capable of constituting a disease of the mind. Definition will evolve with medical knowledge. Further, presence of disease not sufficient for NCRMD, as

must meet the rest of the definition in s.16(1).

- *Cooper v. the Queen* (SCC 1980)

    - Disease of the mind

        - *Disease of the mind not meaningful of itself* - not a term of art in law or psychiatry; it is a working concept. There is no differentiation to be made between physical or mental illnesses at law. While psychoses are clearly diseases of the mind, really can include any mental disorder which can manifest in violence and is prone to recur.

        - *Evidence of experts not conclusive* - this is a question of law, not a question of fact. Therefore, the opinion of experts as to whether a disorder is a "disease of the mind" is not binding on the trier of law (this is separate from *whether* the D. suffered from a disease of the mind, a matter for the trier of fact).

        - *Broad interpretation of disease of mind* - any illness, disorder, abnormal condition which impairs the human mind and its functioning, save for self induced states (re: alcohol and drugs, which must fall under intoxication defences) is included; NCRMD on this basis will succeed where other components of defence under s. 16 are met.

    - Nature and quality of the act

        - *Emotional and intellectual awareness required* - must be aware of the act itself, and be able to understand the consequences of the act. More than mere knowledge that it is taking place. Not merely lacking remorse, guilt, or other emotional content, even where this stems from disease of the mind.

            - Difference between being aware that one is choking someone, versus that this action will lead to death.

        - *Timing is critical* - must not be awareness and understanding before or after commission, but rather at the very time that the offence is committed.

- *R. v. Abbey* (SCC 1982)

    - Facts

        - D. accused of importing cocaine; relies on insanity defence. Appeared normal during commission and arrest. Held that he suffered hypomania. Expert testifies that while understanding of nature / quality not entirely impaired, there was some impairment, as D. did not feel that consequences would apply to him.

- Issue

    - For purposes of s.16, are the consequences at issue the penal sanctions attached to the offence, or rather the physical consequences of the offence?

- Principles

    - *Consequences at issue* - it is the physical consequences of the act, and not the penal sanctions as a result of being arrested for the act which are at issue in s.16. Not knowing of the penal sanctions does not undermine the mens rea of the offence, does not bring into operation NCRMD defence.

    - *No defence of irresistible impulse* - while an irresistible impulse may be evidence of an NCRMD condition, it is not a defence itself.

    - *No defence of diminished responsibility* - requires that the impairment meet the full definition required in s.16 re: capability of understanding. No relief is provided to D.'s who were partially impaired.

- *R. v. Oommen* (SCC 1994)

    - Facts

        - D. under paranoid delusion, shot woman he believed was part of conspiracy to kill him. TJ held that NCRMD not applicable, as D. knew society would regard acts as wrong (ergo morally wrong) even though D. did not subjectively believe acts to be wrong.

    - Issue

        - Is the awareness / understanding of right and wrong stipulated in s.16 of the *CC* to be judged on objective (eg. society *would* view as right / wrong) or subjective standard (eg. accused views as right / wrong)?

    - Rule

        - Subjective. What is in the mind of the accused, not society, determines the course of this inquiry.

    - Principles

        - *Centre of inquiry* - whether the accused lacks capacity to discern whether act is right or wrong, therefore make rational choice concerning whether to persist in course of action.

- D. had general capacity to distinguish right from wrong. However, on night of killing, did not know that killing victim was wrong; visions led him to believe that the killing was justified and necessary.

- *General capacity does not preclude NCRMD* - there are situations where accused has capacity generally to differentiate b/w right and wrong, but at time of commission is so obsessed with delusions or so subject to impulses that D. is unable to bring mind to bear on actions, discern right or wrong. In such situations, s.16 is satisfied. This is different from the case of a psychopath, who knows that acts are wrong in the eyes of society, and chooses to commit them anyways.

- *Rabey v. the Queen* (SCC 1980)

- Facts

- D. assaulted student with rock after discovering that she considered him just a "friend".

- Issue

- Can blows, such as romantic rejection, deemed to be part of the ordinary stresses and disappointments of life, ground a defence of non-mental disorder automatism?

- Rule

- No.

- Principles

- Central question in automatism defence - was the accused suffering from a disease of the mind? Question of law re: what constitutes a disease of the mind (see mental disorders), but question of fact in determining whether this is actually present in a given circumstance. Differentiation between a malfunction of the mind caused by transient external factors (concussion) versus internal factors (schizophrenia).

- *Ordinary stresses and disappointments* - the common lot of mankind does not constitute an external cause / psychological blow which provides an explanation for malfunctioning of the mind absent internal cause. Therefore, if no cause for a dissociative state can be found in internal makeup of D., then there is no disease of the mind within meaning required by s.16 for NCRMD.

- *Emotional shock absent physical injury* - such circumstances may be able to ground automatism defence via external cause - including perhaps murderous attack w/

knife, other extraordinary events. This question does not need to be answered in present circumstances.

- Dissent (Dickson)

- No pathological symptoms indicative of previously existing or ongoing disorder, so NCRMD finding not appropriate in this case. If there was automatism, then it was not caused by mental disorder, but rather by a psychological blow.
- Automatism is easily feigned, therefore must be limited due to policy concerns. However, as a defence,n should be available whenever there is evidence of unconsciousness throughout commission of crime which cannot be attributed to fault or negligence.

- Emotional blow can constitute an external factor, regardless of whether other persons subjected to that shock would react in that same way. Objective standard is not relevant to psychological blow, physical blow, or drug reaction automatism. That other persons may mot have reacted the same way should not obscure reality that it did cause a reaction in the subject at hand.

- *R. v. Parks* (SCC 1992)

- Facts

- D. kills mother in law, wounds father in law. Claims that this was done while sleepwalking.

- Issue

- Is sleepwalking a disease of the mind for consideration within s.16?

- Rule

- No; Crown failed to prove this.

- Principles

- *Non-mental disorder automatism can apply if not disease of mind* - Must be a disease of the mind for mental disorder automatism to apply. Otherwise, non-mental disorder automatism is the applicable defence if there is an AOR to the possibility of unconsciousness on the part of the D. Further, Crown holds burden to prove that a disorder constitutes a disease of mind where they raise claim.

- Expert testimony reveals that D. was in fact sleepwalking; this is not a neurological or psychiatric condition; no medical treatment is possible.

- *R. v. Stone* (SCC 1999)

    - Facts

        - D. stabbed wife 47 times after she made insulting comments concerning his sexual prowess, her infidelity, paternity of their children, etc.

    - Issue

        - TJ left only mental disorder automatism to jury; convicted. D. appeals, contending that non-mental disorder automatism should have been left.

    - Rule

        - Right not to leave only mental disorder automatism.

    - Principles

        - *Unconsciousness not correct terminology* - automatism describes unconscious, involuntary behaviour, person is capable of action but not conscious of what is being done. However, does not accord with medical definition (unconscious means comatose). Impaired consciousness better term.

        - *Insane / mental disorder automatism not correct terminology* - true automatism only includes involuntary behaviour which does not stem from a disease of the mind; where involuntary behaviour stems from a disease of the mind, this amounts to s.16 mental disorder, not automatism.

        - *Burden of proof* - lies with the defendant on BOP. Similar to presumption of innocence in s.16, Crown enjoys presumption that persons act voluntarily in order to avoid onerous BRD burden on Crown.

        - *Policy analysis* - according with Dickson's approach in Rabey, must consider policy in order to ensure that feigning is accounted for. Applies in second stage of the automatism analysis; this is why the BOP lies with the accused, for instance.

        - *Standard / burden of proof in psychological blow automatism* - D. must show, BOP, evidence of an extremely shocking trigger (beyond ordinary disappointments of life), and must establish that a normal person *might* have reacted by entering into an automatic state as a result. Contextual (modified) objective test - not subjective; this is acceptable because there has already been inquiry as to whether there is evidence suggesting to AOR that D. *subjectively* acted involuntarily (as part of the actus reus).

- *Two approaches to disease of the mind analysis* - can consult either or both in making determination. Further, must make reference to policy factors if there is no conclusive determination as to whether there is a disease of the mind:

    - *Internal cause theory* - applied in Rabey, where differentiation between insanity and automatism was determined based on the source of the alleged loss of control; internal source is insanity, external source is automatism. However, this line is often blurred, holistic approach is required.

    - *Continuing danger theory* - any condition which is likely to present a recurring danger to the public should be treated as a disease of the mind. However, finding of no continuing danger does not necessarily preclude a finding of disease of the mind.

- Dissent (Binnie)

    - *Imposition of persuasive burden not justified* - policy is fulfilled by requiring evidentiary burden / AOR on part of claimants of automatism. No need to take this further by also requiring that they prove automatism BOP, does not accord with s.11(d). Could lead to conviction of those concerning whom the jury has a reasonable doubt.

    - *Presence of external cause can negative disease of mind* - the fact that there is a psychological blow, drug reaction, or physical blow sufficient to cause automatism can negate the inference that there is also an underlying mental disease.

    - *Cause of condition not necessary component of automatism* - regardless of whether the D. can identify the specific component or facet of circumstance which led to automatic state, the defence should still be able to be relied upon.

- *R. v. Luedecke* (ONCA 2008)

    - *Strong preference for NCRMD post-Stone* - TJ must begin from premise that automatism is caused by disease of the mind, and then look to evidence to determine whether it is convincing that the condition is or is not a disease of the mind.

    - *Shifting values pre-and-post verdict* - pre-verdict, social defence concerns dominate, particularly whether there is a continuing danger posed by the D. Where this occurs, there will be further inquiry into dangerousness in order to protect the public. Post verdict, emphasis shifts to personalized assessment of dangers posed by the D. who has been found NCRMD.

- *R. v. Hill* (SCC 1986)

- Facts

    - D. accused of killing big brother, who D. claims made unwanted sexual advances on his person.

- Issue

    - Was the jury properly instructed on s.232(2)? In objective standard re: ordinary person deprived of self control, are factors such as age and sex of appellant relevant?

- Rule

    - Yes.

- Principles

    - *Concession to human infirmity* - provocation defence recognizes that all human beings are subject to uncontrollable outbursts of passion and anger which may lead them to do violent acts.

    - *Would an ordinary person be deprived of self-control by act or insult* - determined on objective standard; reasonable person *under the circumstances*. This standard necessary to avoid relieving the excitable while punishing the even-tempered. CJS sets standards for behaviour, desirable to encourage rational response.

        - *Modification* - narrow objective test, which would have precluded consideration of circumstances of the accused (mental deficiency, impotency) set aside. Must include attributes of person, including age, sex, race, physical infirmity, shameful incident, or any attribute of the accused which would make the insult *more offensive*. Not necessary that this be made explicit in charge, as reasonable jury will assume.

            - Drunkenness is not a factor which is to be taken into consideration, nor idiosyncrasies; ordinary person has normal temperament, is not excitable or drunk.

            - Race of person not relevant consideration if provoking insult concerns physical characteristic.

    - *Did the accused in fact act in response to provocative acts* - based on the facts, whether or not the accused was in fact provoked into the ultimate response; subjective approach. An assessment of what actually occurred in the mind of the accused.

- *Was the accused's response sudden, before time for passion to cool* - based on the facts, subjective approach.

- *R. v. Thibert* (SCC 1996)

  - Facts

    - Accused kill wife's lover.

  - Issue

    - Was there AOR to provocation?

  - Rule

    - Yep.

  - Principles

    - *Requirements for AOR* - must be some evidence to suggest that the provocation would have caused the ordinary person to be deprived of self control, and some evidence to show that the accused was actually deprived of self control.

    - Certain characteristics must be assigned to the ordinary person, such as the age, sex, and other factors which would give the act or insult a special significance.

    - *Unpreparedness* - the provocation must hit a mind unprepared for it at the subjective branch of the test. The background / history between the victim and the D. are relevant to this consideration. However, even where there is a long history of affronts over long period of time, inducing desire for revenge, this does not preclude provocation, so long as there was no intent to kill until immediately before the last insult.

      - Can hardly claim that you are unprepared to receive insult when you have provoked, for instance by pointing a gun at someone, however.

      - Taunted by man who has broken up marriage could provoke one so as to lose the power of self control.

      - Rejection in romantic relationship does not constitute basis for provocation defence, however (could be dangerous to hold otherwise).

    - *Legal right* - refers to a right sanctioned by law, not merely something which one may do without incurring legal liability.

- One does not have the right to taunt a cuckolded husband in a parking lot. It's not illegal, but nor is it sanctioned.

- Dissent (Major)

- Actions of the D. were not contemptuous or scornful, but rather legitimate reactions to a dangerous situation.

- Breakup of a marriage is not a wrongful act or insult itself.

- Cannot be said that the D. was unprepared for the sight of his wife such that he was taken by surprise; was expected in the circumstances, no element of suddenness.

- *R. v. Cameron* (ONCA 1992)

- Facts

- Convicted of 2nd degree murder, appeals holding that s.232 violates s.7 / s.11(d) of the *Charter*.

- Issue

- D. contends that provocation negatives mens rea, therefore objective standard required in the defence incompatible with subjective standard of offence. Valid?

- Rule

- Nope.

- Principles

- s.232 / provocation does not negative the fault requirement for murder, but acts as a partial defence. In other words, does not impose liability where subjective fault does not exist, but rather reduces that liability even though fault exists.

- Provocation does not require that the D. disprove anything essential to establishing culpability, as the onus is on the Crown to negate provocation BRD once AOR raised.

- *R. v. Parent* (SCC 2001)

- Facts

- D. killed estranged wife; litigation over division of assets; claims she said "I told you that I would wipe you out completely." D. further claims that he felt hot

flush rising, shot her as a result. Contends provocation.

- Issue

    - Is provocation a defence of anger?

- Rule

    - TJ left "defence of anger" with jury, so that they were open to reduce verdict from murder to manslaughter on this invalid basis. Incorrect!

- Principles

    - Anger cannot negate the intention to kill, nor is this a valid basis for reducing the offence of murder to manslaughter. Even high degree of anger, short of provocation, cannot reduce murder to manslaughter. Anger can form component of provocation defence, but only where other elements are met. Anger could also cause someone to enter automatic state (psychological blow automatism).

- *R. v. Nahar* (BCCA 2004)

    - Facts

        - D. stabs wife to death, claims provoked by her violation of cultural norms. Claims brain went numb.

    - Issue

        - Cultural norms to be taken into account in considering whether reasonable person would be provoked in defence of provocation?

    - Rule

        - Cultural background important - ordinary person must be one from the background in which the behaviour and insult would be relevant; this constitutes a factor which would give the wrongful act or insult special significance.

    - Principles

        - Cultural background important - ordinary person must be one from the background in which the behaviour and insult would be relevant; this constitutes a factor which would give the wrongful act or insult special significance.

            - Actions could be seen as reflecting badly on both husband and wife in Sikh community - include smoking, socializing with men other than

husband/family, etc.

- Reaction of an average Vietnamese male to infidelity on part of his wife was not considered in defence of provocation, cultural factors only relevant if slur is racial in nature: *R. v. Ly* (BCCA 1987)

- *R. v. Humaid* (ONCA 2006)

  - Facts

    - D. no longer considered wife attractive, and she controlled much of family wealth. Crown alleges that he planned to murder her, attempt to frame associate. Regardless, does kill her, claims provocation as she mentioned "little pill", which D. argued referred to birth control, therefore infidelity not consistent with Arab-Islamic cultural background. Psychological blow causing non-mental disorder automatism, or alternately, provocation.

  - Issue

    - Cultural background of D. relevant to modified objective test concerning provocation?

  - Rule

    - No.

  - Principles

    - Provocation does not negate fault or actus, but rather becomes germane only once the offence has been proven, in entirety, BRD.

    - *Absent evidence that D. shares cultural beliefs, not applicable to provocation* - not sufficient to lead evidence that a group has certain beliefs, that these could affect the gravity or seriousness of conduct for members of the group, and that the accused is a member of that group. Any member could hold belief to varying degrees depending on myriad factors. To assume otherwise would be to stereotype. As the taunt did not focus on D.'s cultural beliefs, it's irrelevant.

      - D. did not provide evidence that he subscribed to the notions of infidelity and honour attributed to Islamic culture by expert evidence.

      - Expert testifies that Islamic culture is male dominated, great significance played by family honour. Therefore, infidelity treated serious violation of honour, worthy of harsh punishment by males.

- *Not a culturally driven sense of appropriate response* - provocation does not deal with appropriate responses, but rather as a concession to human frailty, definitionally with inappropriate response. Will not therefore avail an accused who acts in of accordance with belief system which entitles husband to punish wife's infidelity. Difference between a loss of control (provocation) and believing that cultural beliefs advocate or endorse homicide (murder).

    - Evidence is not that Islamic men react in a rage when faced with infidelity, but rather that there are serious cultural consequences for Islamic women who are unfaithful.

- *Ordinary person does not have values irreconcilable with Canadian values* - will not be affixed with values which are antithetical to fundamental Canadian values, including those concerning gender equality, accepting violence against women, etc.

- R. v. Pawliuk (BCCA 2001)

    - Facts

        - D. thought that victim was going to shoot him, as victim was running towards him with a gun. He pulled out a gun of his own and accidentally shot the victim.

    - Issue

        - Which self defence provision should be left with the jury?

    - Rule

        -

    - Principles

        - Both s.34(1) and s.34(2) can apply where the accused did *not* intend to cause death or GBH.

        - s.34(1) is not always excluded where death or GBH occurs; only excluded where the defender *intends* to cause death or GBH in defending against the assault.

        - s.34(2) applies where defender *causes* or *intends* death or GBH. Requires that the accused was under *apprehension* of death or GBH from the attacker's assault.

        - *Duty to retreat* - there is no requirement to retreat in s.34; however, this can be relevant to considerations, as this could raise doubt concerning whether the

accused reasonably apprehended a risk of death or GBH, or believed that killing the assailant was the only means available to avoid harm. *Druken* (NFCA 2002)

- *Apprehension of fear must be reasonable* - apprehension of fear re: death or GBH under s.34(2) must be reasonable, based on reasonable and probable grounds. Therefore, can still invoke this provision, even if mistaken re: fear, if the apprehension was reasonable. *Reilly* (SCC 1984)

- *Intoxication not relevant to apprehension* - a reasonable person is in full possession of faculties. A drunken man is one who's ability to reason have been impaired. While drunken persons can hold reasonable beliefs, and thus the defence is not precluded under s.34(2), cannot use alcohol as an excuse for holding unreasonable beliefs for the purposes of this section. *Reilly* (SCC 1984)

- *Accused in fistfight cannot claim self defence* - not available to either combatant under s.34(1), as would violate requirement that the assault was not provoked. Cannot say that assault not provoked when engaging mutual combat. *Jobidon*

- *Doctrine of excessive force inapplicable in Canada* - incompatible with self defence statutes. Would deal with s.34(2), in that it requires intention to cause death (otherwise would be s.34(1) with no intention to cause death, therefore not necessary to reduce from murder to manslaughter). *Brisson* (SCC 1982) Where killing has resulted from excessive force, there is no s.34 justification, partial or otherwise. Could still be manslaughter if without intent proven BRD, of course. *Faid* (SCC 1983).

    - Reduces murder charge to manslaughter in certain circumstances; applies where D. uses force to defend against real or apprehended attack, honestly believed that use of force justified, but force was excessive in that it exceeded what accused could *reasonably* have considered necessary. *Reilly* (SCC 1984)

- *R. v. Cinous* (SCC 2002)

    - Facts

        - D. charged with murder; part of criminal organization. Believed that associates Ice and Mike intended to kill him; drawn from fact that revolver stolen, wore latex gloves, other indications relevant to culture of crime.

    - Issue

        - Was there an AOR to self defence?

    - Rule

- No.

- Principles

- *Three requirements for self-defence under s.34(2)* - unlawful assault (either occurring or imminent), reasonable apprehension of death or GBH, reasonable belief that it is not possible to preserve oneself except by causing death or GBH.

- *Each component of s.34(2) test is both objective and subjective* - D.'s perception is the subjective part of the test; must show not only that it was reasonable to believe matter under the circumstances, but that D. in fact did so believe.

- *AOR required on all components of s.34(2)* - for defence to be put to jury, must be all components must be satisfied considering both objective and subjective standards. Reasonableness cannot be established via direct evidence; therefore, must determine whether could be reasonably inferred by jury.

- *Mere assertion insufficient for AOR* - while the credibility of the D. is not at issue in AOR, it is not sufficient for the D. to merely claim the elements of the defence on the stand for it to be put to the jury. Question is whether inference favourable to D. *could* (not should) reasonably be drawn by the jury.

- *Reasonable belief that no alternatives to causing death / GBH* - not merely that D. articulates reason for holding belief (eg. enmity with police), but must be objectively reasonable. Not reasonable to hold that one could not resort to police help due to criminality, not that one standing outside of vehicle had no choice but to shoot one sitting inside a vehicle parked at a populated gas station.

- *Four requirements for self-defence under s.34(1)* - unlawful assault, not provoked, lack of intent to kill or cause GBH, force used no more than necessary for self defence. Each component is both subjective and objective. *Kong* (ABCA 2005)

- *R. v. Lavallee* (SCC 1990)

- Facts

- D. was repeatedly physically abused by victim over numerous years. After one such occasion, shot him in the head as he was walking away from her. Claimed battered woman's defence.

- Issue

- How does BWD integrate with the notion of self defence as defined in the *CC?*

- Principles

- *Battering relationship subject to stereotypes* - requires expert evidence, as this issue is beyond the knowledge of the average juror. This is particularly true considering that what the ordinary man would do in the position of a battered spouse is irrelevant, because men do not find themselves in that situation. Expert testimony required in cases of BWD.

- *Walker Cycle of Violence* - three distinct phases of violence; (1) tension building, where there is increasing friction and abuse, causing woman to withdraw, which causes more aggressive action by abuser, (2) acute battering caused by explosive release of tension, (3) loving contrition, where abuser showers woman with affection, gifts.

- *Definition of a battered woman* - Battered woman is one who has gone through the cycle twice. Any woman can go through the cycle once. Merely being a battered woman does not entitle one to an acquittal; question of fact as to whether perceptions and actions were reasonable.

- *Temporal issue* - under s.34(2)(a), there is a temporal requirement re: the apprehension of death or GBH. However, this section does not require *imminent* danger, although caselaw has read this into the defence; for instance, that it is unreasonable to apprehend death or GBH until a physical assault is in progress. However, this does not apply within the context of BWD.

    - *Cycle begets predictability* - in an isolated incident between strangers, no predictability possible. However, battered spouses can accurately predict the onset of violence before the first blow is struck, even if outsiders cannot. In some circumstances, battered women can recognize circumstances which make a final episode of violence different than others (eg. can foresee coming of exceptionally brutal violence).

    - *Onerous to wait for assault to commence* - requiring battered woman to wait until the gun is uplifted, until the assault is in progress before it is deemed reasonable would be onerous. Firstly, while this would probably increase the "correctness" of apprehension, correctness is not required - only *reasonableness* is required. Secondly, this would amount to sentencing woman to murder by instalment, particularly given advantage of men in combat.

- *Alternative avenue issue* - under s.34(2)(b), there is a magnitude requirement, re: inability to otherwise preserve oneself.

    - *Obvious question concerns intolerability of violence* - if so terrible, why not leave abuser; left unchecked, this leads to inferences that violence not as bad as claimed, etc. Not for jury to judge fact that battered woman stayed in relationship. Self defence doctrine does not require person to retreat. Further, position of battered woman akin to hostage: may not be other

reasonable places to go, may be children / childcare implications, may be no means of income, etc.

- If held hostage, and captor says that you will be killed in three days, are you not justified in seizing opportunity to kill captor on first day?

- *R. v. Petel* (SCC 1994)

  - Facts

    - D. killed associate of abusive spouse; she shot and wounded spouse, then associate lunged at her, so she shot him as well.

  - Issue

    - Was the jury charged correctly on s.34(2) considering previous threats made to the D. by the victim and her spouse?

  - Rule

    - No. New trial required.

  - Principles

    - *Previous threats applicable beyond existence of assault, ability to carry out* - threats were relevant in determining whether victims threatened the accused and had present ability to effect their purpose, but also, in determining the D.'s state of mind regarding the imminence of the assault, and the fact that she could not otherwise preserve herself. Threats made throughout relationship are relevant to the D.'s state of mind.

- *Grant on syndromization*

  - Transforms reality of gender oppression into a disorder; victim becomes the abnormal actor. Focus is on the irrationality of woman's response, and this is made reasonable by medical terminology; woman reasonable like a man, or reasonable like a battered woman.

  - Involves learned helplessness; perceived inability of woman to extricate herself from battered environment. It is not necessarily helplessness which makes killing under BWD reasonable; it is repetition and regularity of abuse, perception of threat to life and safety.

  - Portrays women as helpless; unable to escape dominance of men - but same evidence used to explain one instance where woman acts to preserve own safety. The act of killing

is not the act of a helpless woman. Woman who kills batterer should not be seen as acting abnormally or pathologically - may well be quite reasonable under circumstances.

- *R. v. Malott* (SCC 1998)

    - Facts

        - D. separates from abusive common law spouse (had previously been in abusive marriage). Shoots him to death during drug deal, then takes taxi to his girlfriend's home, who she shot and stabbed (she survived, however).

    - Issue

        - Should BWD defence apply in the murder of her spouse?

    - Rule

        - AOR, should be put to jury.

    - Principles (Major)

        - *Four principles of BWD defence* - jury should be informed how expert evidence may be of use in elucidating these. (1) Why an abused woman might stay in abusive relationship, (2) nature and extent of violence in battered women relationships, (3) accused's ability to perceive danger re: reasonable apprehension, (does not need to be imminent), and (4) whether the accused reasonably believed that there was no other option.

    - Principles (L'Heureux-Dube)

        - Historically, women and battered women have been treated unfairly. Myths and stereotypes which are the tools of this unfair treatment interfere with the ability of triers of fact and law to determine BW claim of defence. Not merely modification of subjective test to allow for subjective perceptions of battered women, but rather modification of objective test to account for both male and female perspectives.

        - *Utility of expert evidence not limited to self defence - also* applicable to other circumstances where the reasonableness of actions or perceptions is at issue - for instance in provocation, duress, or necessity. Battered women may kill their partners other than in self-defence.

        - *Issues with stereotyping in battered women defence* - possible that women who are not able to fit within stereotype of victimized, passive, helpless, dependent battered woman who will not have claims to defence fairly decided. Could put at

disadvantage women of strength, initiative, professionals, etc.

- *Must avoid learned helplessness analysis* - shifts legal debate from objective rationality of actions to preserve own life to personal inadequacies which apparently explain failure to flee from abusers. Comports with stereotypes, and should be avoided.

- *Environmental factors which impair ability to leave* - lack of job skills, presence of children to care for, need to protect children from abuse, etc.

- *Prison environment syndrome* - inmate charged with murder; claimed that other inmates planning to kill him, so took preemptive action. Accepted expert evidence concerning belief that person could apprehend assault without immediacy. *McConnell* (ABCA 1995)

- *Perception affected by psychiatric disorder* - Asperger's syndrome sufferer assaults roommate, claims self defence; expert evidence concerning syndrome's effect on perceptions adduced. *Kagan* (NSCA 2004)

- *Diminished intellectual capacity* - accepted evidence re: intellectual capacity concerning reasonable apprehension in s.34(2), could not have had same perception as ordinary man. Applicable where capacity out of broad band of normal adult capacity. *Nelson* (ONCA 1992).

- *R. v. Carker* (SCC 1967)

- D. claims duress, but cannot meet immediacy and presence in s.17; contended that as common law defences were protected by the *CC*, therefore should have relief from common law defence. Court held that duress was exhausted by s.17, no more common law defence to be had.

- *Paquette v. the Queen* (SCC 1977)

- Facts

- D. forced at gunpoint to be getaway driver for Pop Shoppe robbery; charged under s.21(2), because he was not present when the robbery occurred.

- Issue

- As D. was not a primary offender, as required by s.17, is there any defence of duress available?

- Rule

- Yes - common law duress available for secondary offenders.

- Principles

- *Statutory defence limited to primary offenders* - s.17 is limited to circumstances where the person relying on the provision has himself committed an offence. Uses explicit words "person who commits an offence" not "person who is party to an offence." s.17 does not apply where criminal liability as a party is determined through s.21(2), s.21(1)(b) or s.21(1)(c).

- *Common law defence revived for secondary offenders* - as s.17 did not apply, and s.8 (3) kept alive common law defences, the common law defence of duress can apply for secondary offenders.

- *R. v. Mena* (ONCA 1987)

- Facts

- Main culprit enlists two aides to robbery at gunpoint; gives one task of disabling alarm, the other the task of carrying out the money; former had defence of duress, latter did not.

- Principles

- *s.21 to be decided by trier of fact* - The extent of one's participation in a crime within the meaning of s.21 is a matter of fact to be left to the jury where there is an AOR to multiple such classifications.

- *Hebert v. the Queen* (SCC 1989)

- Notary convicted of perjury, held that several bikers were present in court, harassed him with threats.

- D. admits to having lied, did so deliberately - but had no intent to mislead in so doing; he *intended* that the manner of his testimony would result in his *not* being believed, so as to arouse the attention of the judge to deal with the matter.

- Perjury requires more than a mere false statement - must have been made with intent to mislead. Person can lie deliberately, yet not intend to mislead in having done so.

- *R. v. Hibbert* (SCC 1995)

- Facts

- D. was friend of victim; forced by principal offender to lure victim to lobby so that D. could shoot him.

- Issue

    - Can the intent to join a common criminal plot within meaning of s.21(2) be negatived by duress? This would be an example of negativing mens rea via duress.

- Rule

    - No.

- Principles

    - *Duress can provide a defence in two ways* - either as an excuse which negates criminal liability, or rather as a means of negating criminal fault. For duress to negative criminal fault, would require special type of mens rea which is not often found in definitions of criminal offences.

    - *Knowing the consequences of actions is not the same as desiring them* - person forced to be getaway driver knows that the result of actions will be that a bank (or Pop Shoppe) is robbed; but may be indifferent to result. However, if the driver's family will be harmed if the crime is not successful, then may *desire* the result.

    - *Duress can be relevant to mens rea, albeit rarely* - depends on the structure of the offence, whether the mental state specified by the Fed in defining the offence is such that the presence of coercion can have a bearing on the existence of mens rea. However, s.21 is not susceptible to this; w/ s.21 duress would apply as an excuse, not as a means of raising BRD re: elements of offence.

    - *Safe avenue requirement* - duress presents a choice between two alternatives; one of which is so disagreeable that a serious infraction of the law seems preferable. The safe avenue requirement is a specific example of this requirement; only when all other licit choices have been ruled out does duress excuse illicit behaviour.

        - *Standard of proof* - whether there is a safe avenue is to be judged on a modified objective basis, one which takes into account particular circumstances and human frailties of accused. D.'s own perception of surrounding facts can be highly relevant to determining whether actions were reasonable Not being used to determine fault, but rather used in weighing excuse after fault has been established, and so does not conflict with *Creighton*.

    - *Duress similar to necessity* - arises under circumstances where external danger (circumstantial with necessity, human with duress) causes person to commit a

criminal act as a way of avoiding that harm.

- *R. v. Ruzic* (SCC 2001)

    - Facts

        - D. told to smuggle heroin into Canada by member of criminal gang in Serbia; consequences of noncompliance would be her mother's death. D. had opportunity to approach authorities in Turkey, Greece, and Canada, but did not do so.

    - Issue

        - D.'s defence under s.17 is a no-go due to immediacy and presence requirements. Are these requirements constitutional? If so, then what is the state of the statutory defence of duress?

    - Rule
        - SCC strikes down immediacy and presence requirements of s.17; holds that application of the common law defence of duress is correct, even for principle offenders, in such circumstances.

    - Principles

        - *Withdrawal of a criminal defence will not necessarily a breach* - this can be allowable, for instance where defence is inconsistent with the very evil prescribed. Moral involuntariness therefore nevertheless deserves protection under the *Charter*.

        - *Moral involuntariness* - person acts in a morally involuntary fashion when deprived of reasonable choice concerning whether to break the law. This is used as a synonym for where one had no real choice but to commit the offence. This does not negate the mens rea for the offence, but rather acts as an ex post facto excuse; conflicts with physical voluntariness, which provides an acquittal.

        - Threatened party for the meaning of s.17 does not have to be the accused. Could be other persons (eg. family members).

        - Gravity of threats in common law defence also judged on modified objective standard.

        - *Immediacy and presence requirements of s.17 unconstitutional* - because they could lead to convictions for persons who had voluntariness undermined through the coercion of a third party, for instance through threats to third parties.

- Temporal connection required between threat and harm threatened for common law defence.

12.Miscellaneous

- *Peter Cross re: Heather Thomas homicide*

- Went missing at 5:20pm, October 1, 2000 - Sunday, during Cloverdale Flea Market in Surrey. Market brings approximately 3,000 of people into the area. Search begins, two officers, followed by K-9 unit, and ultimately more uniformed officers. Complex has many children, lower socio-economic housing, with drug dealers and sex offenders in the completx.

- Scheduled to be returned to mother's house, 10km away. Brother last saw sister at 5pm, riding a borrowed red bike around father's apartment building. Father begins looking for Heather, joined by parents. Discover bike at front of complex, wheels still turning.

- Uniform investigators feel that the search for Heather has been futile up to this point; there is "something up with Dad"; bring in Surrey Serious Crime Unit. Uniforms felt that the father was not reacting as would have been expected.

- After SSCU interviews the father, they believe his story; however, feel that the father is hiding something. Feel that his response does not exactly match what would be expected either. Logistics all but eliminate the father's involvement, however.

- Search house and father's vehicle with father's permission, nothing of significance found. Search for Heather takes place over a three day period, and is then resumed a day later without notification to the press.

- By third day of search, there were 1,200 civilian volunteers assisting the search. As expected, this many searchers will find things; problem is the difficulty of sifting through the evidence to determine what is and is not valid. There were 1,500 exhibits retained, under the control of one detective.

- Theory is that often the suspect will become involved in the search effort - this requires documentation of who is actually searching. Eventual search led to detection probability of 80% over 4 square km.

- Stranger abduction crimes, generally

    - Sexually driven; probability of survival after first three hours drops below 20%, and after 8 hours, below 10%. Investigation has to assume that she is deceased after she has been missing for nearly a week.

    - Usually, there is a second movement of the body (eg. abduction to second place, then assault / murder, and then disposal in a third place). Body will usually be

recovered within a 1.5km range.

- Usually committed by caucasian males.

- Reason for the cessation and secret resumption of the search was to give the offender the opportunity to move the body, so as to potentially make it discoverable.

- Neighbourhood inquiries, had to speak with every person living in or visiting the complex at the time of the abduction (and people from flea market). Checked the sex offender registry as well.

    - Drug dealer coming and going from complex in white van, male driving around, tearing down missing posters, male in complex who paid kids to dance for him, sex offenders with prepared statements concerning alibi, etc.

- Media coverage became increasingly intense, and the police had to develop a strategy to ensure that this did not become a disruptive issue concerning the investigation.

- October 21st, hiker sees a body floating in a manmade lake in Golden Ears (near Maple Ridge), 35km away from the abduction site (Golden Ears). Media were scanning police radio frequency. News chopper got so close in helicopter that the rotor blades moved the body.

- Heather's body found naked from the waist down, in the water. She has been in the water for a considerable period of time, and this has destroyed much of the evidence. Fortunately, it was not in the ocean, in which there are other elements (eg. shrimp - can skeletonize a body in 48 hrs) which enhance decomposition, and make destruction of evidence worse.

- Where her body was found could have been 100ft from the waterline, based on the fact that the water in the manmade lake had been lowered (thus allowing for her discovery).

- Winwell brand bag was discovered near the location of the body. Contains girl's jeans (turn out to be Heather's), Bay Co. (Governor's House) towel, girl's underwear, plant-like material, a rock. No shoes, bag zipper broken. Ultimately determine that she was placed inside the bag.

    - Most important discovery was the Governor's House brand towel and the plant material.

- Media interest returns with fullest ferocity on discovery of Heather's body. Must look for connection between areas based on current information.

- Maple Ridge dispatcher remembers that, on the day that Heather disappeared, that she had a GOA (gone on arrival) from the following day. Nothing came of it, but she brought this ticket to police attention. Complaint had been called in by park wardens

concerning suspicious vehicle in the park.

    - Large vehicle (boat of a vehicle, distinctive) driven slowly into park, driver wearing hoodie. Saw vehicle again, parked southbound, hood up and nobody around. Another employee saw same vehicle on boat ramp, nobody around.

- One witness may have written down licence number; search of office reveals old logbook with plate tag DRE 666 written. Points to Shane Ertmoed of Vernon, BC. Renewed licence on Oct 2nd, with new address - the housing complex in Cloverdale where Heather went missing.

    - Concerned with tunnel vision.

- So, now that there is a real suspect, what is to be done? Should the suspect be arrested? Should he be brought in for questioning?

    - Cross does not want to arrest, or interview at this stage. Need more evidence, so that the police are not relying on merely relying on an attempt to get a confession.

    - Only advantage is the element of surprise; Shane does not know that the police suspect him at this stage.

        - Disadvantage is time, particularly in view of the possibility of reoffending. Issue with waiting to gather more evidence is that Shane could strike again. Further, focus on Shane could reflect tunnel vision, hijack focus away from valid portions of investigation (eg. if Shane is innocent).

        - Reoffending is avoided through 24/7 surveillance. Difficult to do however (took 3hrs to install tracking device - nowadays, 1.5mins). Can maintain the manpower required for a maximum of 14 days, therefore this is the guideline for the remainder of the investigation on Shane.

    - Decide to covertly enter his house. Set up teams, each w. 4-6 people:

        - Obtain search warrant for house / car

        - Covert house entry team (dress as construction workers)

        - Vehicle seizure and entry team (by stealing vehicle)

        - Vehicle examination team

- Background evidence gathering (in Vernon and Surrey, attempt to be inconspicuous)

- DNA analysis team

- Arrest team

- Interview team

- Undercover team - plant into holding cell following arrest

- Report to Crown - convince Crown that there is enough to charge

- Car magazines, junk food, works as a general labourer, a loner, hangs around the house a lot. Problems in high school, inappropriate sexual message English teacher, trouble for putting hands up girls' skirts on bus. Caught spooning child by girlfriend, who was babysitting children.

    - Had been investigated for sexual assault as a result of the incident w/ the babysitter; child was a young girl, and she was partially undressed.

    - Police dropped the ball, as the investigator did not give much though to the matter until 8 months in, never spoke with Shane. Crown calls the family - are you willing to go to Court? The answer was no, and charges were not laid.

    - As a result of this failure by the Crown / police, Shane's name does not come up on any criminal record checks. Does show up on local police indices.

- Shane had called in a B&E to his residence; police attended to investigate. Shane was also spoken with six times during the course of the investigation - had gone to the movies.

    - Vacuum cleaner in the living room; apartment otherwise dishevelled, but living room clean; pile of clothes in bedroom (middle of the floor). Indicates that someone has emptied a bag, perhaps to move property. Shane said that he was not missing a bag.

- *General warrant* granted; authorizes any technique or means in order to obtain search; eg. sneek and peek, can search without having to give notice (although notice would have to be given eventually). Need to prove *why* it is necessary as an investigative tool.

    - Shane's backyard has a gate in the fence, which cannot be seen from the other side; opens to 50ft away from where Heather's bike was found. One of the issues with the investigation was how she could have been grabbed without anyone seeing - the gate solves this problem.

- Find Governor's Home towel in Shane's house, same type as found in the bag.

- Find receipt from Happy Face Gas Station (Langley), 4:30pm in the afternoon on Oct. 1st. Issue for timeline, as the police believed Heather was still riding her back as of 5pm.

- Ticket stub for "The Exorcist" - Colossus Theatre in Langley. Dates to 7:06pm. Go through 42 cameras worth of surveillance footage from that night; Shane did show up and buy the ticket (clothing match) - however, he never went into the theatre.

- Shane's car is stolen by the police (although media truck attempts to follow). Interior is white, and so likely to reveal stains. Eager to check trunk - however, hydraulic set up in trunk precludes possibility of hiding body.

    - However, there is sufficient space to fit a body under the *hood* of the vehicle; placed into bag, bag placed under hood. This fits with the witnesses seeing the vehicle pulled over with the hood of the vehicle up.

- No DNA located in bag; no evidence of sexual assault; female DNA recovered on rock inside the bag, but it was not Heather's. DNA tested against all female investigators to preclude contamination, no match

    - Botanical evidence revealed as cultivated salmonberries. Matched some near residence in Cloverdale, and some found in headlight of vehicle.

- Shane packs up to move out of the complex; surveilled granting interview to reporter. Moves to address in Langley across from elementary school. Couple upstairs have two young children.

    - At this stage, arrest is critical; must prevent reoffending - question is whether the landlord should be informed of the fact that he has rented his basement suite to a child killer.

    - TV network calls, says that they know who the suspect is; will run story saying that the police have identified and intend to arrest suspect. This is a problem, as it pushes the arrest forward by 24 hours.

    - However, if police allow that network to film the arrest exclusively, will not run the story. Police do not deign to make deal (Cross knew that the police needed a second source, and likely only have one source).

        - Two police leaks - one high ranking RCMP officer, the other an inadvertent leak by a psychologist (interviewer).

- Shane arrested on day 14, by officers wired for sound. Scripted and orchestrated for the purposes of bonding. Surveillance had lost site of Shane approximately 15 minutes before the arrest was to take place. Story running immediately afterwards on VTV.

- Interview

    - Interviewer chosen for skills and physical appearance. Interview begins after orchestrating face to face meeting with counsel (later appeal was based partially on "incompetent counsel" - Sheldon Goldberg)

    - Shane confesses after three hours and twenty minutes; enticed her into apartment, admits to spooning her. Did not admit to sexual assault, putting rocks into bag.

        - Went back to park after initial disposal (put hood up), with yellow life raft. Could not complete movement at that point; went back to work. Then returned to park, dumped body and bag into the lake.

        - Body separates from bag due to broken zipper and floats to the surface. Never recovered yellow raft.

- Trial

    - Three month trial ended up taking nine months. Defence theory was that it was a conspiracy to find a scapegoat. Team was so professional, could have framed anyone.

    - Shane claims that he was tricked into confession.

- Every homicide, murderer will make 5-7 mistakes; police only need one.

- *Roach on Symmetry*

    - Common law presumed subjective fault for all offences, and symmetry (eg. fault in each element of prohibited act); this has since been eclipsed by the *Charter*. Negligence liability now applies to all crimes but few with sufficient stigma to require subjectivity.

    - Courts are cautious and minimalistic when constitutionalizing fault principles as part of a supreme law which cannot be limited, overridden, or amended. This approach has left room for development of negligence as form of criminal fault, experiment with blends of subjective and objective fault.

    - However, also reveals faint-hearted commitment to subjective fault from common law, which were previously held as a critical component of criminal justice, eg. that each is culpable only in context of own perceptions and abilities.

- Unlike other *Charter* rights, s.7 rights are close to absolute, and will only be subject to s. 1 limitation in extraordinary (eg. emergency) situations. This treatment explains why the court is reluctant to constitutionalize criminal law fault standards (eg. as subjective); could have invalidated hundreds or thousands of laws in one fell swoop.

– *Policy concerns in sexual assault / defence of mistake of fact / access to records*

- *Martin*

- Sexual assault is a form of sex discrimination, even if not all women are assaulted, because women are disproportionately victimized.

- Purpose of rape is a conscious process of intimidation, through which all men keep all women in a state of fear.

- Rape is sexual terrorism, both systematic and random - systematic because women as a group are its targets and they live knowing it; random because there is no way of knowing which individual woman is next on the list to be victimized.

- *Shilton*

- Historically at common law, women were not legal persons. Rape was treated by the law more like a property offence than like an offence against the person: a property offence committed by one man against the property of another.

- Husbands could not be prosecuted for raping their wives. Furthermore women had no right to vote or participate in any meaningful way in the political process.

- Therefore laws relating to sexual assault were developed, promulgated and administered by men, without regard to the experience and perspective of women, and without regard to sex equality values.

- Pronouncements concerning the nature of rape took on the quality of legal rules, eg. that rape is an accusation easily made, difficult to defend regardless of the innocence of the offender; ergo, handled with care by the courts.

- Mythical propositions became guiding principles of the law of evidence: women who have sex outside of marriage tell lies; women who have sex outside of marriage are promiscuous and completely undiscriminating about their partners. So does myth
become truth: these truths once and still inform the law.

- Change in terminology following 1983 amendment involved gender neutral language; recategorized as offences against the person; held as a crime of sex, not

of violence, although the latter position is preferred by some academics. However, explicitly recognizes rape by spouses.

- Conflict between legislature, responding to public demand for change, and the judiciary, which has continued to employ, albeit less overtly, traditional stereotypes about women, sexuality, and sexual assault. Mistake of fact, in particular, was identified as a key area of resistance.

- Because the required mens rea for rape is subjective only, the accused's honest belief that the complainant consented to intercourse is enough to exculpate. This is the case regardless of whether the belief is reasonable. Affront to sexual autonomy of women.

- *Boyle*

  - Supreme Court of Canada decided that, in accordance with general principles of criminal law, a person accused of sexual assault may claim as a defence that even if the complainant did not consent, so long as the offender honestly (though unreasonably) thought she did.

    - Allows those who are capable of taking care to escape conviction / prosecution, and further, allows those incapable of taking care to pose a grave danger to others.

  - Why would we construe as morally innocent, a person who has not taken sufficient steps to avoid an unreasonable mistake?

  - s.273(b) - imposes a positive duty on those who undertake sexual relations to be reasonable in the circumstances; to take reasonable steps to ensure that their partners consent. However, if the result of this inquiry is an honestly held though mistaken and (un)reasonable belief, then the defence will still protect.

- *Pickard*

  - No man can find himself unwittingly in the act of intercourse - penetration is an act which cannot be done accidentally or by mistake. That is sufficient reason to require him, as an initial matter, to inquire into consent before proceeding.

  - No accused should be able, therefore, to defend himself successfully against a rape charge by claiming that he had no belief whatsoever about consent because he simply did not advert.

  - Major harm for a woman to be subjected to non- consensual intercourse notwithstanding that the man may believe he has her consent. There can be little doubt that the cost of taking reasonable care is insignificant compared with the

harm which can be avoided through its exercise.

- In Seaboyer, the majority felt that s. 276 excluded evidence which could be relevant to an accused's claims of innocence - the defence of mistake of fact. Sexual history evidence was held to be relevant to basis for accused's honest belief in consent; problematic reasoning.

- *Majury*

- McLachlin's judgment in Seaboyer can be described as operating from a presumption of gender equality; Dube's dissenting analysis flows from her recognition of gender inequality.

- In specific response to the Seaboyer decision, section 276 was replaced by new provisions guiding admission of evidence dealing with the sexual history of the victim.

    - Now, specifically negatives use of sexual history evidence to support inference that woman consented *or* that she is less credible.

    - Judges are instructed to rule on whether sexual history evidence can be introduced in a voir dire, and in doing so, are required to consider a list of factors - society's interest in sex assault reporting, prejudice to dignity, rights or privacy.

- s.273(2) now qualifies that the defence of honest but mistaken belief in consent is only available if the accused took reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

- *Busby*

- *O'Connor's* lawyer held that if complainants did not have anything to hide, they would not object to releasing personal records. However, this shows misunderstanding of privacy rights.

    - Complainants revictimized by criminal justice system, and play on mistaken belief that women and children fabricate charges in sexual violence cases.

    - Individuals have right to maintain control over a biographical core of personal information; well grounded in the need for physical and moral autonomy and is essential for the well-being and dignity of individuals.

- Problematic aspects of analysis include:

- Absence of any examples of when privacy rights could lead a trial judge to decide against production;

- That privacy rights should not figure into the decision of whether records should be disclosed to the judge;

- Ignorance of fact that most sexual violence is committed by someone the complainant knows and that release of the records to the accused may place the complainant in danger;

- failure to acknowledge that records release to the defence involves disclosure to the person accused of the assault, and, quite possibly in open court, records containing intensely private aspects of their lives.

- Likely that applications regarding records will become routine in sexual violence cases, and many records will be ordered disclosed. Some criminal lawyers are of the view that it would be negligent not to subpoena any potentially relevant records in every sexual violence case.

- Mistake of fact is about much more than the relationship between human mistakes and criminal culpability. Indeed, mistake of fact is an area of criminal law in which distinct attitudes about women, sexuality, and violence are both promoted and contested.

- In the context of sexual assault cases mistake of fact is inextricably linked to other areas of the criminal law such as admissibility of sexual history evidence and disclosure of personal records.

- Like mistake of fact, these areas are also imbued with deeply gendered messages about men, women, sex, and violence.

- *Policy concerns in provocation*

- *Boyle on Provocation*

- Defence functions as concession to human frailty; uncontrolled impulse to kill driven by rage is excusatory, while need to kill out of compassion is not - not a partial defence. Battered women kill in despair, not rage, so they receive no consideration either. An interesting defence to recognize in modern Canadian jurisprudence.

- *Berger on Provocation*

- Emotional response of rage one that we want to recognize as tolerable or legitimate?Emotions are intelligent, require critical engagement with environment. Emotions are thus the result of reflection on what is good / bad /

high / low in the world.

- As a result of critical if less than conscious reflection about the world, then they are susceptible to error. They can be critiqued because the value judgments which underly them can be incorrect.

- When faced with circumstance where person reacts to strong emotion, cannot say that the choice was constrained and that therefore action was not emotionally voluntary; this is reductionist concerning human emotion and agency.

- Norms which are inconsistent with diversity, antisubordination, and equality cannot be given force by the criminal law.

- *Horder on Provocation*

- While provocation purports to make concession to human frailty, in fact it reinforces conditions in which men are perceived as natural aggressors, particularly against women.

- Most killers are male. Most violent episodes against women involve possessiveness and sexual jealousy. This is because possessiveness is related to male self worth; possession of sexual fidelity / labour / love / affection of woman, exclusively, is critical. Therefore, use of violence to secure this is seen as acceptable, as encapsulated in provocation defence.