

**TEST: Oakes – section 1**

1. Pressing and substantial goal
2. Rational connection
3. Minimal impairment
4. Proportionality (cost/benefit)

**R v. Lifchus [1997]** - What is reasonable doubt

Absolute certainty/any doubt > **PBRD** > probably guilty > imaginary/frivolous doubt

- TJ: 'normal everyday sense'
- SCC (Cory J): NOPE, basically all other adjectives are misleading

PBRD tied to presumption of innocence, logically connected to evidence

Burden is always on the Crown

- Words have special crim law meaning
- **don't** apply the same standard you apply to (even the most) important decisions in their own lives
- proof "beyond a reasonable doubt" ≠ proof "to a moral certainty"
- Proper definition of BRD **before** you say "you may convict if you are "sure" that the accused is guilty"

**R v Starr 2000 SCC**

Absolute certainty > Reasonable doubt > balance of probabilities

TJ: 'no special connotation'

- Maj (5) Iac
  - Re: a judge's task – must expressly state that more than balprob
  - Re: this charge – fairness otherwise can't cure prejudice from bad instruction
- Min (4) LHD:
  - Re: a judge's task – Lifchus more 'guideline' than rule. Maybe not a big deal
  - Re: this charge – harmless error, knew pres.inn. high standardproof below absolute certainty

Introduction to **Actus Reus**

Contemporaneity

Fagan, Miller, Cooper, Bottineau, **Williams**

**Fagan v Commissioner of Metropolitan Police (1969)** – contemporaneity. drove on foot

- ❖ MR and AR must overlap (**contemporaneity**) but can be late, can superimpose
- Driver argued accident → omission (didn't remove car)
- Still can't have assault by omission (this is continuing act of battery)

**R v Miller [1982]** – failure to rectify

- ❖ failure to rectify when possible = continuing that act

Supports **Fagan** striking down driver's argument

- unintentional act + intentional omission to rectify = **intentional act**
- Responsibility to stop it (or at least try)

**R v Cooper [1993]** continu.transac. mustcoincide Chokeblackoutbody.  
Enough:knewlikelytodie

- ❖ MR doesn't have to be continual, but **must coincide with AR**
- ❖ Series of acts forming "continuous transaction" (like **Fagan** and **Miller**)

**R v. Bottineau (2011)**

- ❖ Long period of neglect = "continuing transaction"
- 1<sup>st</sup> ° murder of grandson (death: complications of starvation), forcible confinement granddaughter
- Δ argued Crown unable to identify specific point over long period of neglect and abuse at which the accused possessed the requisite MR

**R v. Williams (2003) – TEST: bundle of components → AR**

- ❖ Failure to disclose something changing the nature/quality of an act **vitiates consent**
- Δ learned he was HIV+ (knew risks), continued unprotected sex without telling gf
- ★ **TEST: A bundle of components** that together constitute AR:
  1. physically voluntary
  2. act or omission
  3. sometimes in certain prescribed circumstances
  4. and sometimes causing certain consequences.
    - Each component equally critical

Introduction to **Actus Reus**

Voluntariness

Daviault, Larsonneur, Kilbride, **King**, Ruzic

Need conscious control of action

Will of accused → prohibited conduct

Chance to contemplate consequences

Daviault: involuntary = ~~AR~~ = s. 7

**R v Larsonneur (1933)** fails Williams test (#1)

- Deportation + unwilling return. Guilty despite involuntary.

**Kilbride v Lake (1962)** – defining MR. parkingpassgone, strictliability.

- ❖ MR ≠ "did they mean to."
- ❖ MR is intention/knowledge behind/accompanying exercise of will

**R v. King [1962]** involuntariness: imposed impairment (dentist)

- ❖ no AR unless **willpower** to do an act
  - ❖ foundation for moral/physical involuntariness
- Δ charged w/ impaired driving (after accident)
- injected w/ fast-acting anaesthetic by dentist for tooth extraction
  - When he woke, a nurse warned him not to drive, Δ said he didn't hear that warning
  - Δ remembered getting into his car and, while driving, he fell unconscious

Conviction quashed at SCC, **Ruzic** develops into broad concept “**moral**” involuntariness (ex. defence of duress)

**R v. Ruzic (2001) – moral voluntariness and duress defence.** Belgrade drug plane

- ❖ Develops **King**
- ❖ must **act in the knowledge** of what you’re doing, with **freedom to choose**
- assumption: rational, autonomous, choosing agents (involuntariness=no guilt)

s.17 defence of duress **ONLY** applicable when Δ:

"commits an offence under compulsion by threats of **immediate death or bodily harm from a person who is present** when the offence is committed".

- Q: do immediacy and presence requirements of s.17 CC infringe s.7 CCRF?
  - LeBel J (unanimous): YES
    - Needs moral voluntariness (absent here)
    - **s.17 infringes s. 7** by excluding **threats of future harm** to person or 3P
    - infringement not saved under s. 1 (hard to save violations of s. 7)

### Omissions, Status, and Circumstance

Browne, Thornton, Cuerrier, **Mabior**

Omission (e.g.):

- duty to report treason
- duty to assist a peace officer attempting an arrest
- duty to stop your vehicle, identify yourself, and render assistance after an accident.

### General omission offences

- Common Nuisance (most notable)
  - unlawful act **or failure to discharge a legal duty** [omission] which (a) endangers the lives, safety, health, property or comfort of the public; or (b) obstructs the public in the exercise or enjoyment of any common right
- Criminal Negligence [**219(1)**]
  - (a) doing anything, or (b) **omitting to do anything that it is his duty to do**, shows wanton or reckless disregard for the lives or safety of other persons.
- Legal duties from statutes and common law (e.g):
  - **Parent to child**
  - Person administering surgical or **medical** treatment
  - Whoever undertakes (or has authority) **to direct how another person does work** or performs a task (re: reasonable expectations of that task)
  - Dangerous driving
    - act/omission = actus reus
    - dangerous driving (simply a departure from standard)
    - dangerous driving **causing death/harm** (requires **further proof**)

Legal cause is imputable causation. **Legal cause ≠ Factual cause**

- **Factual causation:** “how the victim came to his or her death, in a medical, mechanical, or physical sense, and with the contribution of the accused to that result” (**Nette** para. 44)
- Trier of fact: “**But for**” the accused’s action(s), would the death have occurred?
- (Factual causation is most inclusive in scope)
- Factual cause **can be legal cause** if sufficiently connected to harm (**warranting legal responsibility** “based on concepts of **moral responsibility**”).
- Legal cause informed by (e.g.):
  - wording of section creating offence
  - principles of interpretation
  - principles of fund. justice

### R v Browne (1997) OCA – Best bf ever overdoses his gf, calls her a taxi

#### ❖ 1. Undertaking? 2. DoC?

- Δ failed to render assistance when failed take her immediately to the hospital after **undertaking to render** such assistance (**breaching a legal duty**)

Undertaking incurred a duty?

- Expressing a willingness to do an act **cannot trigger** the legal duty
- TJ: undertaking from being partners in drug dealing
- OCA: trial judge’s error = started w/ Q of existence of duty of care  
↳ inquiry should begin with “whether there was an undertaking”
- Appeal allowed, acquitted

Side Note: Quebec has duty to assist person in peril

- Prov. leg. **can** provide basis for imposing criminal liability
- CANNOT base criminal liability on failure to perform **common law** duty
  - **S.9 (Criminal Code)**

### R v Thornton (1991) OCA - HIV blood donation

- Charge: common nuisance (knowingly created “catastrophic” potential harm)

**But not a written unlawful act!** Failure to discharge a legal duty?

- a “duty imposed by law” includes CL duty (**s.9 though?**)
- Broad fund. CL duty: don’t do things that could injure another
- If reasonably foreseeable that could cause serious harm → **CL “legal duty”**

Liability for omissions should be limited to Parliamentary legislation.

- Only this accords with abolition of CL crimes and principle of legality (including protection against vagueness & overbreadth)
- Breach of statutory duties or a fortiori duties enacted by prov. leg. **in no way entails criminal sanction** (and no principled basis to say that it should)
- Only argument: fair if result prohibited by criminal law?
  - ↳ ^Maybe if unified jurisdiction allowing CL crimes.
    - Today: **the case is weak.** (might allow manslaughter conviction from tort law: civil negligence causing death)

#### Status offences

- **state of being is punished** (not what you did or didn’t do)

- Status is essential ingredient of some offences (e.g.):
  - **being a parent** (who failed to provide necessities of life)
  - **being an owner** (who permitted the suffering of animals)
- “pure” status offences ~**don’t exist** in Canadian criminal law
- Acts/omissions underlie:
  - Possession
  - **201(2)**: Being in common gaming/betting house
  - **174**: public nudity

## Cuerrier

**R v Mabior (2012, SCC) TEST consent vitiated by fraud.** HIV+ non disclosure

- ❖ failure to disclose HIV+ status before intercourse AND realistic possibility of transmission → (p.f.) aggravated assault
- 8/9 complainants: I wouldn’t have consented to sex if I known Δ was HIV-positive
  - ↳ (0 contracted HIV)
- MCJ: “realistic possibility of transmission” is measure of “significant risk,” possibility **negated** if (i) low viral load at the time, and (ii) protection used. (???)

Real poss. of HIV trans. + sig. risk of serious bodily harm + **Cuerrier** deprivation element

- ★ **TEST** (distilled **Cuerrier**): Consent vitiated by fraud if
  1. **dishonest act** (falsehoods or failure to disclose)
  2. **and deprivation** (not giving opportunity to choose)

### Consequences and Causation

Winning, **Smithers**, (**Cribbin**), Harbottle, Nette, Pagett, (J.)S.R., Maybin

**R v Winning (1973) OCA – Credit @ Eatons**, (legal?) causation

1. Draw a line between accused’s conduct and prohibited consequence
2. Is this factual/causal connection sufficient for criminal liability (**legal causation**)

Δ made 2+ false statements on credit application. Eatons relies on false statements → guilty

↳ BUT **Eaton’s did not rely** upon that info (only name and address).

∴ π did not obtain credit by false pretence

Appeal allowed, Δ wins

**Smithers v Queen [1978] SCC TEST: legal causation** (epiglottis) (see **Nette & Cribbin**)

- ❖ Governs analysis of legal causation for almost all crimes in Canada
- ❖ Assault → death = **manslaughter**
- ❖ **Provocation defence only applicable to murder charge** (not manslaughter, here)
- ★ **TEST: Standard of causation = not insignificant or trivial, beyond de minimis**
  - Cause of death: aspiration of foreign materials present from vomiting
    - ↳ all 3 med. professionals agreed the kick probably caused the vomiting but could not positively state that it did (possibility of spontaneous aspiration)
  - Assault → death = **manslaughter** (regardless of intent for death)

- malfunctioning epiglottis **does not prevent manslaughter conviction**
- Take your victim as you find them
  - ↳ **R v. Blaue [1975]** stabbed JW refuses blood transf.
    - Victim's refusal did not break chain of causation
- Legal Cause if: **contributed in some way** to the death
- **Even if** unlawful act **alone couldn't** cause death

**R v. Cribbin TEST for manslaughter** (re: **Smithers**)

1. person commits an unlawful, dangerous **act (AR)**
2. reasonable person would've **foreseen risk (MR)** of bodily harm beyond de minimis
3. unlawful act = beyond de minimis contributing **cause** of death

Note: must prove causation and fault beyond reasonable doubt

- ★ De minimis still requires objective foreseeability

**R v Harbottle [1993] SCC. TEST: Substantial causation** (forcible confinement murder)

- ❖ ↑ ° of participation required for 1<sup>st</sup>° murder
- ❖ **High threshold** of legal causation linked to words "death is **caused** by that person"
- s. 214(5): 1<sup>st</sup>° murder when the death is **caused by that person while committing...**
  - ↳ legislative history compels **extremely narrow interpretation** of the words "death is caused." Must **diagnostically occasion** the death of the victim
  - Old: "**by his own act caused or assisted** in causing the death"
  - New: "when the death is caused by that person."
    - Cory J (unan.): says **the two are not equal**
    - Cory: person who held legs is = to person who strangled (impossible to distinguish blameworthiness)
- ★ Crown has **burden of PBRD**:
  1. Δ committed or attempted to commit underlying crime (domination)
  2. Δ participated as **substantial cause of death**
  3. **no intervening act** which broke chain of causation for Δ
  4. domination and murder were part of the **same transaction**
  5. Δ guilty of that particular murder

**R v Nette (2001) SCC** explains **Smithers**. old woman robbed, suffocates from being tied up

- ❖ **Test of causation is equal for all homicide offences**
- **LHD** (concurring but not on this point): **not insignificant ≠ significant**
- Arbour J: significant = not trivial or insignificant
  - ↳ **raises Smithers threshold for legal causation**
  - **Undesirable** to place:
    - Harbottle** > ~2<sup>nd</sup>° murder causation~ > **Smithers**
    - Difficult to that formulate test in meaningful way
    - More difficult for jury to grasp subtle nuances + 3 diff. causation standards
- Only potential shortcoming in **Smithers** test is articulation not substance
- Arbour: negative phrases are harder to articulate and understand than positive phrases "significant" v. "not insignificant" (they also mean different things...)

**Pagett v The Queen (1983) Crim Appeal, Eng.** Uses pregnant 16yr. old gf as shield

- ❖ Reasonable response by authority alone won't break chain of causation
  - Reject argument that Δ “didn't (directly) kill” the girl
  - Some intervening circumstances are brought about by reasonable responses by authorities to the actions of Δ, and do not remove culpability

**R v JSR (2008) ONCA.** Δ participating in gunfight, opponent missed, killed bystander

- Each shooter induced the other to engage on crowded street
- **There is one danger.** Each bears equal responsibility for continuing (unless withdrawal or [an] intervening event)

**R v Maybin [2012] SCC - Intervening cause (2 approaches).** Pool fight bouncer punch

- ❖ 2 approaches to intervening cause: **intervenor mind** or **original perp mind**
  - ↳ **neither** determines significance of contribution
- ❖ Moral responsibility if: **general nature** of intervening act AND risk of non-trivial harm **objectively foreseeable at the time** of the illegal act.
  1. **Intervenor mind:** “**intentional, independent act**” severs legal causation
    - Intervening act is not morally innocent if:
      - a. direct response/link to appellants' actions
      - b. and does not by its nature overwhelm original actions
  2. **Original perp mind:** **reasonably foreseeable** to appellants at time of initial assault
    - ↳ (dependent on **foresight of appellants and randomness of intervention**)
    - Need to foresee the **general nature of the intervening acts** and the **accompanying risk of harm**
    - Legal causation **doesn't** require objective foresight of precise future consequences of their conduct.
- ❖ intervening acts and ensuing non-trivial harm must be reasonably foreseeable (acts and harm that actually transpired flowed reasonably from appellants conduct)
- TJ should not have focused narrowly on medical cause of death.
  - Must address the **broader issues of factual and legal causation**

### Introduction to Mens Rea and Intent

A.D.H., Buzzanga and Durocher (x2), Tennant and Naccarato, Steane, Hibbert

“guilty mind,” “mental element,” “mental state,” (most recently) “fault”

*actus non facit reum nisi mens sit rea*: an act does not become guilty unless the mind is guilty

No comprehensive CC definition of:

- intention, knowledge, wilful,
- purpose, or crim. negligence.

- **Subjective fault:** what passed through the mind of the accused at the relevant time
  - ↳ Buzzanga, Tennant
- **Objective fault:** whether the accused measured up to some normative objective standard
  - ↳ ~ADH,

**R v ADH (2013) SCC**

- ❖ Obj. fault can help establish subj. fault

MR: **positive state of mind** must be **proved by prosecution**. (Dickson J in **Pappajohn**)

- ↳ evil intention, **knowledge of wrongfulness, reckless disregard**
- Objective fault (what a **reasonable person** would have realized/ known) may be of value in determining subjective fault

### **R v Buzzanga and Durocher #1 (1979) OCA**

Determine what accused intended, **don't fix him with obj. reasonable person intention**

Devlin J, in charge to jury in **R. v. Adams (1957)**:

Best evidence of what was in Δ's mind:

- Δ testifies re: what was in his mind
- jury thinks he might be telling the truth

### **R v Tennant and Naccarato (1975) OCA**

❖ Subjective: what a reasonable man **ought** to have anticipated (obj) merely shows that **accused maybe anticipated the same consequences**

❖ Objective: basis of liability = what a reasonable man **ought to have anticipated**

**Common sense inference**: a sane and sober person can usually be taken to intend the natural and probable consequences of their actions

Model Jury Instructions endorsed by SCC:

- ↳ "You may infer, as a matter of common sense, that a person usually knows what the predictable consequences of his or her actions are, and means to bring them about."
  - **permissive inference**, not presumptive
- Before acting on it, jury must carefully consider the evidence pointing away from it

**intent ≠ motive**

### **R v Steane (1947) Court of Crim. Appeal, Eng.** (Intent confused w/ motive)

- ❖ "Guilty intent cannot be presumed and must be proved"
- Actor/Brit. subject forced to help Germans
- Charge: doing acts likely to assist the enemy, with intent to assist the enemy
  - TJ: a man is taken to intend the natural consequences of his acts.
  - Doing something → intention assumed
- Appeal (overturning):
  - Δ burden of proving **duress defence**
  - π burden of proving **intent**

### **R v Hibbert [1995] SCC** – guy forced to bring victim (his friend) downstairs to die

- TJ to jury: **threats of death or grievous bodily harm negate** joining in common plot or common intention. (must be found not guilty)
- Δ can't claim CL duress defence if safe avenue of escape existed
  - ↳ Δ acquitted (attempted murder), convicted aggravated assault (included offence)
- Lamer J:
  - AR under duress does **not necessarily prove** lack of **MR**
    - "On purpose" (dual meaning)
      1. "not by accident" (immediate intention)

2. “with desire for the ultimate ends” (see below)
  - ↳ Major problems (absurd consequences)
  - **21(1)(b)**: “for the purpose of aiding” **does not require** that aider views event as **desirable**.
  - ∴ MR under **21(1)(b)** **cannot be “negated” by duress**
- Conclusion:
  1. threats of death or bodily harm **sometimes relevant to question of MR**
  2. **Excuse-based defences** for acts committed under threats of death/bodily harm
    - a. s.17 (Statutory defence) or
    - b. CL duress defence
  3. Duress doesn’t negate MR for aiding [s. 21(1)(b)&(2)] but **may be persuasive**

### R v Buzzanga and Durocher #2 (1979) OCA - Satirical anti-bilingual pamphlet

- ❖ Wilful ≠ not accidental [TJ erred]
- Charge: **wilfully** promoting hatred against francophones
  - ↳ (in this context): wilfully = Δ must have intended to promote hatred

### Wilful Blindness and Recklessness

Briscoe, Sansregret, Duong

Good essay summary answer: The idea of wilful blindness has been said to be an aspect of recklessness. While this may well be true, it is wise to keep the two concepts separate because they result from different mental attitudes and lead to different legal results

- Culpability in wilful blindness: Δ (1) deliberately fails to inquire when he (2) knows there is reason for inquiry.
- Culpability in recklessness: (1) identifying risk and (2) proceeding in the face of it

**Wilful blindness** (controversial, sometimes confused with negligence)

- equivalent fault to knowledge
- If knowledge is component of MR, wilful blindness can substitute

### R v Briscoe [2010] SCC – “I’ll help but don’t let me know what you’re doing”

Δ charged w/ first-degree murder, kidnapping, and sexual assault.

Crown: Δ assisted in crimes by (1) driving a group to the crime scene, (2) providing a weapon, (3) holding the victim and telling her to shut up.

TJ acquits b/c accused did not know that the crimes would occur.

↳ **erred by not considering wilful blindness**

**TEST Wilful Blindness** imputes knowledge to accused if:

1. suspicion aroused
2. he or she sees the need for further inquiries
3. **deliberately chooses not to make those inquiries**

Failure to inquire **may be** evidence of recklessness or criminal negligence but **wilful blindness needs deliberate ignorance**

**Recklessness:** often read into offences that contain no explicit fault requirement

### R v Sansregret [1985] SCC **Recklessness TEST**

- Negligence uses objective standard of reasonable man.
  - less than reasonable care is insufficient for criminal penalty
- ★ **Recklessness must have subjective element** in order to form MR
  - the conduct of one (1) who sees the risk and (2) who takes the chance

### Accessory after the Fact

An accessory can be convicted even if a party to the offence is not (R v Shalaan, [1998])

### R v Duong (1998) Ontario Court of Appeal

❖ Wilful blindness fixes accused with knowledge

Δ knew Lam was wanted for murder, knew he would be in trouble for harbouring Lam, deliberately elected not to ask Lam about his involvement in a news story

### Criminal Negligence and Penal Negligence

Hundal, **Creighton**, Beatty, Roy

### R v Hundal [1993] redlight crash: overloaded dump truck

- ❖ No subjective MR test for dangerous driving (“simply inappropriate”)
- Cory J: insisting on a subjective mental element for driving offences is to deny reality  
It cannot be forgotten that the operation of a motor vehicle is, as I have said so very often, automatic and with little conscious thought.
- MR (adopted by Charon J in Beatty)
  - Must PBRD that Δ’s objectively dangerous conduct had MR (marked departure from standard of care of reasonable person in accused’s circumstances (or ought to have been aware)

Hundal and **Creighton** basically adopt the same test

If ambiguity after **Hundal**, resolve with **Creighton**

### R v **Creighton** [1993] SCC **Penal Negligence TEST**

- ❖ Single “reasonable person” (unless incapacity)
- ❖ Manslaughter constitutional even without subjective fault

experienced drug user charged w/ manslaughter via trafficking (injected cocaine into a friend who died from OD) (see **Browne**)

The Court split 5:4 on a number of issues.

- Nature of obj. reasonable person standard
- Does obj. standard violate s7 CCRF?
- Does s7 require MR for **all aspects** of AR including the causing of death?

Judges must consider **human frailties** which make Δ **incapable** of perceiving /foreseeing the same things as the “reasonable person”

- ↳ Reasonable person expected to compensate for his or her frailties, to the extent he/she is conscious of them and able to do so
- Voluntary intoxication/impairment CANNOT vitiate liability for negligence

**This is not a subjective test:** if reasonable person with  $\Delta$ 's frailties would have appreciated the risk, it doesn't matter if the accused did not in fact appreciate the risk

- **McL (maj)**
  - **Objective MR is not concerned with what  $\Delta$  intended or knew.**
  - MR: **failure to identify** a risk that the reasonable person would have appreciated
  - Not what was actually in  $\Delta$ 's mind, but **what should have been there**
    - Principle and policy: **single, uniform legal standard of care**, subject to one exception: **incapacity to appreciate the nature of the risk** which the activity in question entails.
  - McL J foresees **only rare issue of convicting innocents**
  - Q of MR **only** relevant if AR constitutes dangerous and unlawful act or marked departure from standard of care of reasonably prudent person
    - Unregulated activities: Ordinary common sense usually sufficient
    - Many licensed activities (ex. driving): basic amount of knowledge and experience is **required before license issued** (see *R v Hundal*)
    - If you do something without sufficient knowledge, experience, or physical ability, your fault may be the **decision to attempt the activity without having accounted for their deficiencies.**
      - ↳ **ask questions, seek help before you venture beyond your depth**
      - ↳ lack of education, psychological predispositions are no excuse for criminal conduct (but may affect sentencing)
  - If you have **requisite capacity to appreciate danger** (re: all circumstances of the case, including unforeseen events and reasonably accepted misinformation), criminal law imposes a **single minimum standard** for everyone engaging in the activity in question
    - ↳ Without constant minimum standard, legal duty would erode and criminal sanction would be trivialized
  - Issue of reasonable care must consider **all circumstances of the case per McIntyre J in R. v. Tutton**, [1989]

### **McLachlin's TEST for penal negligence**

1. Establish AR
  - a. Marked departure from reasonable person in circumstances?
2. Established MR
  - a. normally inferred from the facts
  - b. Standard: reasonable person in the circumstances of the accused
3. **Capacity**
  - Affects the court's ability to assume negligence for a dangerous act

Is objective foresight of likelihood of death required? (*Brown, Creighton, Smithers*)

- McL (maj): no, only MR of underlying unlawful act and reasonable foreseeability of the risk of bodily harm beyond de minimis
- The entire Court agreed that the manslaughter charge was constitutional even though subjective fault is not required.

- Lamer J (min):
  - Need MR because of stigma
  - Reasonable person should have same relevant special experience or knowledge (maj rejects)

Objective standards re: **Hundal** and **Creighton** relatively **short-lived**.

**Beatty**: SCC sharply divided, reconsidered MR for dangerous driving causing death (**Hundal**)

### **R v Beatty [2008] SCC**

Charge: three counts of dangerous driving causing death (249(4))

- Δ's pickup crossed centre line (no apparent reason, Δ drove properly just before, no mechanical failure, no intoxicants)
- Δ not sure what happened (says he must have lost consciousness or fallen asleep)

Does momentary act of negligence trigger 249(4) (marked departure)?

- **Charon J**: MR = **modified objective** (standard expected of reasonably prudent driver)
  - ↳ TJ was right: MR = **marked departure from norm** (on **objective basis**)
  - **Issue of dangerous driving is how you're driving not the consequence**
  - (for vehicle offences) Crown doesn't need to prove Δ had positive state of mind (intent, recklessness or wilful blindness)
    - **absence of appropriate** mental state (omission) **can = fault (negligence)**
      - (obviously doesn't mean that the actual state of mind of the accused is irrelevant)
      - Δ **cannot avoid** conviction by simply stating he wasn't thinking about the manner of driving.
  - ❖ Cites Doherty J.A. in **Willock** "conduct that occurs in such a brief timeframe in the course of driving, which is otherwise proper in all respects, is **more suggestive of the civil rather than the criminal end of the negligence continuum**"
- **McL**
  - ❖ **Momentary lapse of attention insufficient for MR/AR of dangerous driving**
    1. AR (**marked departure** from norm)
    2. MR generally **inferred from marked departure** → Δ lacked req. mental state of care of a reasonable person.
    3. ↑ evidence (e.g. onset of illness) may negate/cast reasonable doubt on inference
  - Inquiry into Δ's **actual state of mind** is unnecessary (**marked departure → MR**)
- **Fish J**
  - operating vehicle in dangerous manner ≠ marked departure (insufficient 4 inference)

### **R v Roy [2012] SCC**

back road stop sign, unpaved, snow-covered, slippery, low visibility, crash (~~right-of-way~~)

- **Cromwell J** supports **Charon**, **Fish**, and **McL** in **Beatty**
  - Δ made simple misjudgment of speed/distance in difficult conditions w/ poor visibility. Focus on manner of driving, not consequences.

**Charter Considerations and Review**  
Vaillancourt, Martineau, Finta, Creighton

- **Vaillancourt & Martineau**: s.213 AND s.21(2) AND stigma → objective fault element
  - ↳ **party provision (s. 21.2)**: If 2 people form a common intention to carry out the purpose, and either knew *or ought to have known* that the offence was a probable consequence, is party to the offence.
  - ↳ murder conviction needs **subjective foresight of death at the minimum**

### **Vaillancourt v The Queen** [1987] – 3 bullets in a glove, gun to knife robbery (poolhall)

- ss. 213/21 allowed conviction of murder w/o subj MR (murder during offence & accused's knife imputed intent)
- Lamer J (obiter): stigma offence (theft/murder) needs subj MR "~~ought to have known~~"
- Parl intended harshness – doesn't breach the Charter

### **R v Martineau** [1990] – "but we have masks"

- s. 213(a) struck down, unconstitutional
  - Anomalous – all other murder provisions require subj. MR
  - Proportionality to moral blameworthiness needed to justify imposing stigma
  - Intention to cause death → murder (bodily harm they know will likely cause death)
  - Manslaughter or offences causing bodily harm can deter this behaviour, not a murder provision

Objective foresight sufficient: if specifically intended to commit underlying offence, and specifically intended to inflict bodily harm (per s. 213) → death objectively foreseeable  
 "Felony-murder" rule is acceptable. Exists in the US. Can't overemphasize the mens rea and underemphasize the actus reus.

s. 213 isn't accidental killing – they already have subj. intent for 2 serious underlying crimes (deterrence very important here)

Confirms Vaillancourt: murder requires is subj. foresight of death as minimum  
 213 struck down, and analysis also applies to party provisions in s. 21(2).

### **Finta** [1994] SCC - WWII concentration camp officer

- Special stigma for war crimes/crimes against humanity [needs subj. MR]

Absolute and Strict Liability  
 Beaver, Pierce Fisheries Ltd., Sault Ste. Marie (city),  
 Re: s94(2) B.C. Motor Vehicle Act, Wholesale Travel Group Inc.

### **Beaver v The Queen** [1957] SCC

- Δ, accomplice sell drugs to cop, Δ thought it was sugar
- Statute doesn't require MR (suggests absolute liability)
- Sentence ≤6 mos, Court: Parl. can do this, but needs absolutely clear wording). today it's unconstitutional.
- Dissent: Must respect legislative intent even if severe punishment

### **R v Pierce Fisheries** [1971] SCC undersized lobsters (absolute liability, no MR)

- Held: important objective justifies
- Dissent: essentially possession (so needs knowledge)

### **R v Wholesale Travel** [1991]

enforcement of reg. offences would be ~impossible if Crown required to prove negligence BRD. Δ in the best position to bring forward evidence relevant to the question of due diligence (proof of reasonable care)

- Crimes = punishing blameworthy past behaviour
- Reg. offences = deterring behaviour in public interest (about consequences not morally blameworthy conduct)
- Reg. offences (reas.care standard) ≠ moral/criminal fault. (less blameworthy, MR requirement would mean impossible to enforce)
- Govt must be allowed to pursue important social ends thru public welfare legislation
- Ratio: Upholds strict liability distinction/reverse onus in Sault Marie

R v Sault Ste Marie [1978] SCC City dumped materials into water

- Main diff b/w criminal & regulatory offences is MR
- Arguments for AL: Protecting society requires high SOC, admin efficiency, usually small penalty/stigma, nec. for important social ends
- Arguments against AL: Violates fund. principles of penal liability, injustice of conviction → disrespect for law, imprisonment isn't small penalty.
- If Crown proves AR, Δ can rebut w/ due diligence

Creates three categories:

1. True Crimes: Full MR
2. Strict liability: No MR (e.g. public welfare offences)
3. Absolute liability: AR is full guilt, no defence.
  - ↳ Only if Parl. shows CLEAR intent (**Beaver**)
  - ↳ Determined from (1) overall leg. reg. pattern, (2) subject-matter of leg. (3) importance of penalty (4) precision in wording

**Reference re BC MVA [1985] s. 94(2) = AL offence w/ imprisonment**

- ❖ Held: CANNOT HAVE AL and imprisonment
  - ↳ PFJ that morally innocent not punished
  - ↳ AL offences always violate s.7, but public interest saves under s. 1
  - ↳ Main argument for AL offences: administrative expediency

·  
Lévis v. Tetreault [2006] 1<sup>st</sup> recog: officially-induced error: exception to s.19 (mistake of law) renewal notice was supposed to be mailed and never was  
Must establish: (1) mistake of law/mixed law and fact (2) π considered legal consequences (3) appropriate official (4) advice reasonable in circumstances (mod.obj.) (5) advice erroneous (6) reasonable reliance [Lamer: “trapped doing something wrong”] Extras: π made efforts to obtain info, clarity/obscurity of law, position/role of official, info clarity, definitiveness, and reasonableness. (6. Added in *Levis*, 1-5 from *Jorgenson*).

La Sourveraine ☹

No due diligence defence to mistake of law unless officially induced.

Reasonable effort to learn law is insuff. (would be highly subjective and unfair)

DISSENT: omission/silence from regulator could be reasonably relied on as approval/inducement.

Pontes [1995] prov. offence, MVA “automatic” suspension.

- McDougall: mistake of law ≠ defence for abs. liability offence [post-*Charter* affirmation]
  - Casts doubt on *Prue and Baril*. Affirms ref: BC MVA (1985) no prison for AL
- **Diss** just as unfair as drug dealers in *Molis*. Should be SL: can show reasonable mistake of fact re: due diligence toward learning existence of conviction

Sexual Assault

Randall, “Sexual Assault Law, Credibility, and the ‘Ideal Victims’”

Chase

J.A.

Mabior [previously assigned]

Hutchinson

Bill C-49

Darrach

### Mistake of Fact, Consent and Mistaken Belief of Consent

Pappajohn, Sansregret, Bill C-49 refresh and Constitutionality, Malcolm, Ewanchuk

- **Pappajohn**: [1980] SCC
  - V seen running from house after SA. Δ: she consented. At the time, MR for SA was fully subj.
  - **Maj**: no air of reality means no MoF defence (belief of consent)
  - **Diss**: since belief of consent is part of MR, must be fully subjective.
- **Sansregret** [1985] SCC. See above re: **MoF/Willful Blindness**
- **Boyle/MacCrimmon**, “**Constitutionality of C-49**”: troubling that unreasonable MoF (belief of consent) + reasonable steps to obtain consent may = acquittal
- **Malcolm**: 2000 MBCA SCC appeal refused. Reasonable steps test under 273.2(b) is quasi-objective, since it requires ‘reasonable steps’ (obj), but on the basis of D’s knowledge at the time (subj). Test is: 1) ascertain circumstances known to D 2) would reasonable person take further steps before proceeding with touching? 3) If no or maybe, accused need not have taken steps, and can rely on defence of MoF (belief of consent).
- **Ewanchuk**: see above re: **SA and MoF**

### Intoxication

Beard, George, Daviault, s33.1 (1995), Bouchard-Lebrun, Intoxication Defence

- **Beard** 1920 HOL: Murder or manslaughter? Δ drunk, killed 13yo.
  - Intoxication can lead to NCRMD if incapable of forming spec. intent (for spec. intent crimes)
- **George** [1960] SCC
  - Drunk Δ assaults, steals from elderly man. Robbery needs spec. intent. Assault doesn’t.
  - Specific intent: with intent to, for the purpose of... (**clear language in CCC**). Often furthers illegal object or ulterior motive (unclear morality). General intent = everything else.
- **Daviault** [1994] SCC. Δ assaulted elderly woman while very intoxicated. Intoxication can defend gen. intent crimes if automatism (no MR if intent doesn’t follow actions). Δ burden to prove on BoP.
- D acquitted (Crown couldn’t prove he wasn’t automated).
- **Diss**: though gen/spec distinction can be unwieldy, it makes sense here. Voluntariness not a PFJ, so removing this defence doesn’t offend *Charter*.
- **Section 33.1 (1995)**: abolishes Daviault defence if crime involves bodily integrity. Unclear whether it will

withstand const. review, (likely come down to s.1 analysis, likely fails #3 min. impairment) **Ferguson**, “Intoxication Defence”

- **Bouchard-Lebrun** [2011] SCC. Δ took ecstasy, assaulted V. Pleads NCRMD, doesn't apply for temp. voluntary intoxication (though underlying condition present). Applied s.33.1 (for assault) found guilty. To claim s.16, Δ must prove (1) suffering from MD and (2) can't tell act was morally wrong.
- legal Q: What constitutes MD?
- factual Q: Did Δ suffered from MD? (Intoxication has presumption against MD)
- **Penno**: Extreme intoxication not a defence if offence includes intoxication component (drunk driving)

## Mental Disorder I

Berger “Mental Disorder and the Instability of Blame in Criminal Law,”

Whittle

Swain

Chaulk and Morrisette

Winko v. British Columbia (Forensic Psychiatric Institute)

Brief discussion of 2014 amendments to s. 672.43

## Mental Disorder II

Simpson

Cooper

Abbey

Chaulk and Morrisette

Oommen

Landry

Temporary Psychosis Caused by Voluntary Intoxication

- **Berger “MD & Instability of Blame in Crim Law”**: NCRMD is way for society to avoid addressing complex issues of how MD people are failed by society.
- **Whittle** [1994] TEST fitness for trial. Δ needs to understand proceedings and communicate, doesn't have to understand what's going on (low bar). *Taylor*: Δ doesn't need to make rational decisions.
- **Swain**: [1991] SCC. Δ in psych.episode assaults wife, no priors, NCRMD. ∴ harsher than usual punishment. NCRMD can be raised During trial by D, or by crown if D has out mental capacity in issue. By either after trier of fact has found guilty, before verdict is entered.
- **Chaulk**: [1990] SCC. Boys murder/steal. ‘Paranoid psychosis’ made them think they were above the law. Presumption of sanity (crim. Capacity; s. 16(4)) violates s.11 of the charter but is saved by s.1 (**diss** that it doesn't violate **conc.** that it isn't saved). Kids have presumption against crim capacity, rebuttable for kids over 14. Trial judge must instruct jury that “appreciate that the act was wrong” means that because of the mental disorder, D couldn't comprehend society's moral condemnation of the conduct. **Diss** says that difference between moral and legal wrongness is irrelevant. All that matters is that D knew act was wrong in some sense. Main issue is whether trial judge erred with instruction – held that he did.
- **Winko**: 1999 SCC. NCRMD doesn't result in automatic indefinite detention – balances fair treatment of D with public safety. Can release with conditions, or place in custody in care, conditions do not include compulsory treatment, are subject to appeal
- **2014 amendments to s. 672.54**: similar to above, but more emphasis on ensuring public safety (paramount consideration).
- **Simpson**: 1977 ONCA. disease of the mind is a legal term, defined by courts. Judicial precedent, medical evidence not determinative, decision left to the trier of fact whether D is NCRMD.
- **Cooper**: 1980 SCC. Confirms *Simpson*. NCRMD includes any disorder that impairs the mind and its functioning, **excludes intoxication** and transitory states like hysteria/concussion (**automatism**). Requires permanence. Broad inclusion since it's really about second step of test (whether D know conduct

wrong). Question is about whether D knew character of conduct.

- See **Bouchard-Lebrun** above in **Intoxication**
- **Abbey**: D thought god was protecting him from capture, still knew he was smuggling drugs, sufficient to be convicted (understands essential elements of offence)
- **Oommen**: 1994 SCC. D thought V trying to kill him. NCRMD because he lacked ability to determine **specific act** was wrong, even though he knew killing generally was wrong.
- **Landry**: 1991 SCC. D killed wife, thinking her Satan. Jury rejected NCRMD, CA overturned, SCC agrees with CA, Confirming *Chaulk*. D must be able to determine act is morally wrong to be found guilty. **Conc** reiterates disagreement in *Chaulk* re: moral/legal difference.
- **Temporary Psychosis Caused by Voluntary Intoxication**: can't use NCRMD – see **intoxication**

Automatism

Parks

Stone

Luedecke

Further Notes on Automatism (Fontaine, Graveline and Jiang))

Grant, Chunn, and Boyle, "The Law of Homicide,""

Berger, "Emotions and the Veil of Voluntarism,"

Horder, "Provocation and Responsibility"

Provocation

Hill

Thibert

Tran

Mayuran

Self-Defence I

Cinous

Self-Defence II

Lavallee

Pétel

Malott

Grant, "The Syndromization of Women's Experience"

Duress

Paquette

Mena

Hibbert

Ruzic

Ryan

Aravena

Necessity

Morgentaler (1976)

Morgentaler (1985)

Perka

Latimer