# Introduction to Criminal Law

(Civil and Criminal Law) Two parallel but separate systems
Concurrent liability – same set of facts and same circumstances can generate a criminal case and tort case

Ex. Charged criminally for stealing – theft - Tort Law stealing – conversion

The Criminal Code is entirely a creature of Statute

The difference between a tort and a crime: The state prosecutes the case in criminal law – area of public law – they are the pursuer, kind of plaintiff – where Tort is civil. In Canada (crown attorneys) lawyers employed by state in criminal law

- In Criminal Law, every offence is **codified**, i.e. spelled out by the Federal government in the Criminal Code of Canada. This means that Criminal Law is entirely statute.
- Before the turn of the century and the codification of all Criminal Law, it was common law.
- Although some defences are codified, there is no exhaustive list of defence that is codified.
- Some examples of ***positive and negative defences*** that are available are:

  E.g.) **Self-Defense** (positive) **–** This is allowed with reasonable grounds, but there are restrictions. The reason that this defence is codified is because although it is severe to hurt/kill another person in any case, the law doesn't want to take away the right to defend oneself against harm.
    - Excuses, must be in a situation of imminent danger
    - Defensive duress, certain crimes the law won't recognize the offence of duress (e.g. murder)
    - If someone holds a gun to your head and says shoot that person and you do, you cannot be acquitted (even if you know you are going to die if you don't shoot the other person)
    - Morally speaking, you are in no better person than the innocent person you killed
    - Law will hold you accountable for that
    - Has to occur immediately after the occurance

  E.g.) **Mistake of fact** (negative) – i.e. honest belief, crown failed to prove mens rea
    - e.g. If I thought that it was my book, and I picked it up and left with it thinking it belonged to me, I would not be convicted
    - if the offence can be specific intent, can use self-intoxication as a defence
    - Have to have an honestly held belief based on reasonable grounds (e.g. under threat of imminent harm)
    -

- Negative defences: crown has failed to prove all elements, something is missing from the Crown's case
    - says they did they were said to have done, but they were justified for doing it

- Criminal Law has a strong moral component, i.e. it is how we collectively show our disapproval because of actions that either cause harm or are simply morally wrong.
- Criminal Law is **public law** i.e. the State is like the Π, which is 'all powerful'. This means that the public (i.e. state) is pressing charges. In a case of abuse, for example, even if the victim decided that he/she doesn't

want to press charges, it is really not up to him/her because it is not the victim pressing charges, but rather the state.

- Some acts can be both Criminal and Tort law and can have different results for each because of the different standards. In Criminal Law the Crown must find guilt based on the standard of proof which is "**beyond a reasonable doubt**", whereas in Tort Law the onus is "on a balance of probabilities".

  E.g.) In the O.J. Simpson case he was accused on killing two people. Criminally, O.J. was *not found guilty*, i.e. because the Crown failed to meet their onus beyond a reasonable doubt. However, civilly, the Π just had to prove on a balance of probabilities that O.J. likely caused the two deaths, therefore the Π succeeded.

  In criminal law, the onus of proof is on the crown to prove guilt, so the accused is innocent until proven guilty. High standard of proof in Criminal case is because of the penalty. In tort we sue for money. In criminal, penalties are much different, people could go to jail.

The Objectives of criminal law are different too:

1. Deterrence – stop people from doing things that we don't think are right

**Specific** – that particular person we charged wont do it again
**General** – everyone knows that guy got charged; people will see that and not do it

Also expresses our extreme disapproval, a way of rating and telling people what we think of that conduct. Another objective appears to be an element of vengeance, not specifically stated in criminal code, however. But it must be an element of it.

<u>Differences in procedure in private and public law:</u>

**Discovery**: both sides of a civil (tort) case have to show all their evidence long before they get to trial. Called **disclosure** in criminal law – means crown has to disclose all its evidence before you get to trial so you can set up a defense; you get to know the case you have to meet. It has "will says", the witness "will say", photographs – chance to know the case – procedural case – new evidence, you can have adjournment – you need to have an opportunity to prepare – very important right.

Defense does not need to disclose their defense to the crown. They can surprise the Crown, accept if there is an **alibi defense**, if you're saying that you were somewhere else, and have to give the crown written notice, because if it checks out then the crown can withdraw (remember trials are expense)

The defendant does not have to lead evidence nor do they have to take the stand. (Usually they shouldn't take the stand)

Crown's job is to meet its onus; every defense available to law has to be met. Lawyers are not allowed to elicit false testimony – collusion – assisting to lie as well. The defendant in a criminal case is not a compellable witness

You're under no obligation to assist the crown in convicting you, you don't have to talk to the authorities if you're not charged, unless you witness a crime, then you are a compellable witness, can be subpoenaed. About your own actives, you're not compellable.

The state not only prosecutes, they make the decision whether or not to prosecute. The private citizen usually

does not press charges; it's the crown, in criminal cases. The victim is just another witness, the process is usually always about the person charged.

*** Crown's job is not to get a conviction, but to ensure a fair trial. ***

Cases are mostly about the accused, and not the victims. Today we have the victim impact statement that gives the victim some recognition that they were hurt.

**Doctrine of Strict Construction** (i.e. **strict interpretation**)**:** The Criminal Code is interpreted very narrowly and if there is any ambiguity it is read in favour of the accused (rule of interpretation), i.e. one cannot be convicted unless actions are exactly what are spelled out. Mistakes are never taken out on the innocent. Also, the Criminal code is entirely within the jurisdiction of the federal government. In order for something to be considered a criminal offense it must be found in a statute, there is a definite, exhaustive list of criminal offenses which have to be codified in order to apply.

***Elements of a Criminal Case*** – must prove all 3 beyond a reasonable doubt

1. **Actus Reus –** the act (must be voluntary), the thing done wrong, i.e. must prove that the prohibited act occurred.
   - The most obvious Actus Reus is **particular conduct**, i.e. an act or an omission (Note: omissions are rarer).
   - Sometimes consequences are spelled out and required, and are thus part of Actus Reus.
   - Sometimes Actus Reus can be a set of circumstances, such as being where you are not supposed to be (e.g. loitering, body house, gaming house).
   - Actions must be **voluntary**, thus if lack capacity to act voluntarily then Actus Reus might not even be met.
   - Refers to conduct, voluntary act, can be an act or an omission or failure to act, although crimes of omission are rare, and you need to have a lawful duty to act
   - E.g.: parent, care of child is responsibility, fail to give it life stuff, and you fail, then that is a crime

2. **Mens Rea –** the mental aspect, i.e. must prove that there was **intention** to do the criminal act (even if didn't do it knowing that it was illegal). If you don't have mental element, then you can be acquitted
   - Note: This is usually the hardest element to prove.
   - **Subjective intention** (i.e. as opposed to objective intention) is usually what is at issue, i.e. what the accused actually thought or knew.
   - Some regulatory offences don't require Mens Rea (e.g. parking in a handicap parking spot).
   - There are four degrees of intention:
     1) **Intent**
     2) **Knowledge –** i.e. as if you intended (e.g. possession requires knowledge).
     3) **Recklessness –** If one knows that something is likely to happen as a result of an action, i.e. a reasonable person would know, but the action was done anyway.
     4) **Wilful Blindness: "**Didn't know" on purpose.

3. **Causation –** must prove that the accused was the one to actually cause the result.

**Objective or Subjective**

In criminal, we get to rely on our own stupidity, unlike tort law; if jury actually believes you then you can be

acquitted because you don't have the requisite guilty mind which is a necessary element of the offense. Subject of standard which applies. In criminal law the intentions of the accused person are of a high order and very important element of the criminal case which the crown has to prove. Intent can have some gradations. Knowledge goes hand in hand with recklessness. That's a level of intention. Willful blindness (scuba gear with drugs) is not a reliable defense; it's enough intention to convict in a crime.

**Subjective** – what the accused actually thought (you can rely on this in criminal for being stupid without having mens rea). This is important in Criminal cases, and is integral in determining mens rea or specific intent to commit an offence.
**Objective** – what the accused ought to have been thinking, more important in tort.

***Case: Regina v. Parks***

- Somnambulism = sleepwalking

- **Facts:**
  - Parks is sleepwalking, drives 23 km and stabs his mother-in-law to death. He has a history of sleepwalking in his family. The courts accept that he was sleepwalking; the issue for the SCC is whether or not the defense should be insane automatism (in which case he would be committed to a hospital) or non-insane automatism (in which case he is set free). Unclear if this exactly about capacity!

- **Charge:**
  - Parks was charged with first degree murder and attempted murder.

- **Issues:**
  - At trial the most compelling issue is whether it is possible that he did all of that while he was actually asleep. Several experts said yes and the jury believed them. There was also evidence presented that Parks usually got along with his in-laws, had prior trouble sleeping, and had had a stressful year, i.e. he recently developed a gambling problem and had stolen money from his boss, etc.

- **Arguments:**
  - The defence used a defence of **non-insane automatism**. The defence didn't want to call him 'insane' because then he would be put into an asylum for a period longer than a prison term would be.
  - On the other hand, the Crown wanted a plea of insanity i.e. saying that he had a '**disease of the mind'** and should be locked up.

- **Judgment at Trial and on Appeal:**
  - At trial, the judge only put forth the defense of non-insane automatism to the jury. Parks was acquitted based on the defence of non-insane automatism on both charges and was let free.
  - On appeal, the Court of Appeal upheld the acquittal (i.e. the appeal was dismissed). They held that insanity (or a "disease of the mind") must be caused by an abnormal condition. The automatism experienced by Parks was not caused by an abnormal condition (such as sleepwalking), but rather by the very normal condition of sleep.

- **Judicial Reasoning (from appeal):**
  - At trial, they found that there was no disease of the mind; thus insanity was not the case, rather he was in a mental state caused by the normal state of sleep, and not by sleepwalking. Since sleep is a normal condition, his sleepwalking was thus not an illness, and therefore there is no disease.
  - Regarding a 'disease of the mind' finding there are two considerations:
    1) Scope of exemption from criminal responsibility, determining the degree in which the def was responsible for his actions
    2) Protection of public by control of the accused from any further danger
  - In this case, medical evidence showed that sleepwalking is normal and has no treatment, so there is a potential problem of control.

**Disease of the Mind** (i.e. insanity)**:** "embraces any illness, disorders or abnormal condition which impairs the human mind and its functioning."

- ***Lamer***, the majority opinion, relied on the definition of "disease of the mind" and said that sleepwalking was not a "disease of the mind", rather that with respect to sleepwalking and condition is caused by a normal condition, i.e. sleep. Based on this, Lamer says that insanity would have been the wrong call. He holds the act was performed in a state of unawareness caused by the sleep, agreeing with the lower court. He also says it's a case about **actus reus** b/c it was an involuntary act.
- You thought it was something else, that you were doing something else and that's why you did it
- ***La Forest*** agrees with the majority decision and adds that we must distinguish between "non-insane automatism" and insanity or "disease of the mind".
- ***La Forest*** says that the trial judge cannot rely blindly on medical opinion, rather must take into consideration policy issues (i.e. vis a vis public safety). He brings up two considerations to determine whether there is a disease of the mind, both stemming from a concern for public safety and an ultimate possibility of reoccurrence:
  1) **Continuing nature –** if medical evidence says it will happen again then it should be considered a disease of the mind and the person should be treated as insane, i.e. and locked up.
  2) **Internal cause –** if medical evidence says that there is something internal making the person act this way, and it is not an external factor, then the person should be treated as insane.

  He then says that that neither theory is good in this situation. Here, the Crown says that his problem is internal and thus they want to prove disease. According to ***La Forest***, neither of the principles is clear in this case. He says that continuing nature and internal cause are just two approaches to form opinion but this case is somewhat in between. There is no evidence of likelihood of recurrent violent sleepwalking, thus there is no disease of the mind and the finding was non-insane, as opposed to insane automatism.
- ***La Forest*** also says that "only those who act voluntarily act criminally", and thus since he feels that this case was based on an involuntary act there was no actus reus and thus no criminal offence. As well, there is no intention while asleep.
- Basically, while ***Lamer*** sees it as a Mens Rea issue, ***La Forest*** says that because there is no capacity it is an issue of Actus Reus.
- ***La Forest*** also says that in this case there is no need to worry about the floodgates consequence because sleepwalking is hard to prove.

- Note: Even though Parks was completely acquitted, this was still a difficult judgment to accept, thus it was said that he must 'keep the peace and good behaviour', i.e. like parole, which still imposes some conditions on him. Reoccurrence very unlikely in this case. Reasoning in Parks Case: Lamar – mens rea

- La forest – actus Reus issue → be aware that both of those descriptions of the philosophical issue are both available

***Parks – majority goes with mens rea problem***
***Consenting – voluntary-ness part to do with actus reas requirement***
***That's the difference b/w the two***

***Case: Fagen v. C.M.P.***

- **Facts:**
  - Fagen is driving his car and a police office directs him to park by the curb. As Fagen pulls over he drives on the officer's foot and when the officer tells him to get off Fagen tells the officer to wait (rudely), and then turns off the engine. After being asked again he turns the car back on and moves.

- **Charge:**
  - Assault, i.e. intentional application of force on another person without that person's consent.

- **Defense Argument:**
  - The defense argues that there is no assault because there was no intention to put the car on his foot, and when he didn't move there was no action, rather only an omission.
  - No evidence that he drove onto the foot intentionally, car arrives on foot by accident
  - Assault: intention of force on another without their consent

- **Judgment at Trial and on Appeal:**
  - At trial Fagan is convicted of assault, but under the assumption that when Fagen originally landed on the officer's foot it was unintentional, i.e. therefore there was no mens rea at the time.

    In this case, definition of assault is a common law offense and the description is a bit creative – **any act which intentionally causes another person to apprehended unlawful personal violence** – this is what the majority defined assault to be in the court of appeal (2nd appeal) – problem with definition is the word unlawful – it already presupposes the outcome we're looking for – we're trying to decide if the act is unlawful, but here they include it in their definition! → Circular argument

    Crux of the problem, is the act complete when the car comes to rest on the officers foot – the act of stopping the car is not unlawful, only stopping it on some ones foot with knowledge of doing it constitutes the intention. He says it was an accident, didn't intentionally mean to do it, thus making it accidental, not intentional.
  - Not about mens rea, but about intentional action

  - When he knew about the car on foot he did not get out of the car, he maintained the wheel on the foot, he did not turn of the gas, he said fuck you to the man

  - On all the appeal, Fagan loses again.

  - The Court of Appeal says that there was a continuing act until the point at which the car was removed. Actus reus and mens rea are needed at the same to in order to convict, and in this situation they both did exist if it is viewed as a continuing act, because at some point there was intention (i.e. mens rea) to leave

the car there, with the actus reus of the continuing act. What Fagen said to the officer is evidence of a guilty mind, so even though there originally was no intent. The action eventually became criminal.

- Court of appeal says to look at it as if it's one long continuous act. As soon as knowledge occurs, we can convict the guy of assault. He maintained the car on the officer's foot, that's what the court said, but what act did he do to maintain the car…nothing! It was an omission, not an act. Doctrine of Strict construction makes us be picky. They say initially the act was unintentional, but became criminal when the intention was formed, when he was aware he was on the foot. The court of appeal was happy with that

- **Dissent:**
  - Need an act and not an omission in order to be charged criminally (with certain exceptions, i.e. can't not take care of your own kids), thus one cannot be charged criminally for not doing something. In this case, once he accidentally put the car on the officer's foot he didn't do anything except maintain it on the foot, which is just omitting to move it.

    **Dissenting Opinion**: says that in our law no mere omission or failure to act can be an assault, because in this case it's not an intentional application of force. The car was on the officer's foot by its own weight and inertia, he allowed it to continue, but was not part of the act. The accused just failed to move it, he did not maintain it, and he just allowed it to continue.

  - Do we have an Actus Reus (voluntary act) and knowledge at the same time sufficient to convict for assault? Cleary the majority is more consistent with our intuitive ideas of what should happen, which is very important in law and philosophy. They came out with some convoluted principles to get to their end result.
  - Dissenting says principles are important and we should stick with them, and our intuitive ideas are wrong, because there was no intentional voluntary act which put the car on the officer's foot

***Case: R. v. Miller***

Direct Intention – intend to do some particular thing and intend a result
Indirect Intention – really wanted to it, but didn't feel so bad when it happened, wasn't too worried about side consequence, e.g. you can be reckless about the outcome

Recklessness **is not** direct intention (you're driving fast, didn't mean to hit students, but you did anyway – it can attract criminal liability)

- **Facts:**
  - Miller lit a cigarette and fell asleep with it lit. His mattress caught fire and he woke up, saw smoldering mattress and just left the room to sleep elsewhere. He awoke to the fire department. He was charged on indictment with the offense of arson

- **Charge:**
  - Miller was charged with an arson statute, which is a result crime. I.e. under the Criminal Damage Act – this statute works in tandem with criminal law and imposes liability where people do things that cause harm

- **Issues:**
  - There was clearly an actus reus but when lit cigarette and fell asleep he had no intention, i.e. no mens rea. Still, he didn't do anything to stop the fire when he woke up.
  - He didn't have to intentionally light the house on fire, just have to act recklessly. It's a result crime which requires causation, actus Reus, mens rea, and causation, the wrong thing you do has to cause harm in order for them to be liable. The issue for this case is: *is the actus Reus present when you start the fire by accident, and then when you see the fire and don't do anything about it, is there an act or an omission*? There's an act, and we need to find a responsibility for the defendant.
  - Maybe learning about the fire and then not doing anything about it is actus Reus
  - Is it a continuous event? If so, then can look at the intention all the way through, i.e. he had intention (i.e. to be reckless) when he woke up.
  - Because we find the word reckless, you don't have to directly intend to cause something you can be reckless about when it happens
  - Wording gives us more flexibility for interpretation
  - Once you create the risk and you became aware of it, you should be under a positive duty to perform the steps to prevent the damage
  - Problem with this case is that there is no intention when he originally forgets about the cigarette. Is it his failure to extinguish the fire a crime? Can we find a positive duty?
  - Ordinarily omission is not a criminal offense; you need to have a lawful duty. Like taking care of a child, you have the lawful duty to provide the necessities of life. Conduct and state of mind are relevant throughout. We get another description of a continuous act. This act attracts liability on this description: Waking up and proceeding to another room, is the criminal activity, knowing that you started the fire and you don't do anything about it. He proceeded recklessly. He wouldn't be liable had he not started the fire.
  - The state of mind of the defendant is an ingredient in the offense described that way. No reason against finding liability in this situation, especially since he was reckless and since the statue uses the word reckless.

- **Judgment at Trial and on Appeal:**
  - At trial he was convicted, and they said that once he started the fire and discovered it, he had a positive duty to stop it.
  - On appeal the conviction was upheld and they found that it was a continuing act.
  - The court finds a positive obligation/duty at this particular time (when you wake) and you are aware that something you've done has started the fire and it's a potential to cause harm and you make no steps to put it out or call the fire department or something…you're under the obligation to take some steps, if you fail to do anything you will attract criminal liability under the damages act.
  - In the majority opinion, you don't need continuing act theory, just the positive duty when you're aware you caused harm.
  - The actus Reus in miller is a failure to act - Different degree of intention - Different kind of actus Reus;

it's an example or a non-act being the actus Reus.

1. House of Lords - Duty Theory - Once you create the risk, even if it's accidental, once you are aware of the risk you created, the law imposes a positive duty to do something (like call 911) – you're failure to do anything imputes criminal liability – convicted under a result oriented statute - no room for argument

2. Court of Appeal – says you just look at the whole thing as one continuous act, beginning to end.

Subjective mens rea - what the accused actually thought
Objective mens rea - what is reasonably expected that a person would have thought

***Case: R. v. City of Sault Ste. Marie***

- Note: This is not a criminal offence case; rather, it is a **result offence**, i.e. a regulatory/administrative offence.
- Absolute Liability as opposed to full Mens Rea:
- The criminal code very often will use mens rea words, but the nature of criminal law and the offense will still imply that mens rea is required.
- No mens rea is required in cases of absolute liability – E.g. speeding/parking tickets, you didn't mean to, but tough shit.
- This is a Regulatory offense, but it's all about mens rea that's why it's in the criminal section

- **Facts:**
  - The city entered into contract with Cherokee Disposal and Construction Ltd. For the disposal of all refuse originating in the city.
  - Cherokee, in discharging the refuse, was contaminating Cannon Creek and Root River, causing significant pollution. Law is you can't pollute navigable water way
  - Cherokee was convicted under the ***Ontario Water Resources Act***.
  - Now, the city is being charged with the same offence.

- **Issues:**
  - Is the city also guilty of an offence under the act?
  - Appreciate: the city was convicted at the appeal de Nuevo because the court said that this is an offense of strict liability. The court really meant to say was absolute liability. But at this trial, they mean the same thing. Strict liability in this sense is different than in the civil sense – when you do something inherently dangerous, you're liable civilly. Judge says city is liable because you have no excuse. Cherokee in this case, is an employee or an agent, by carrying out your activity. So the city disposes of the garbage, not just Cherokee. So divisional court set aside the judgment against the city, and said it was duplicitous, you can't keep charging everyone involved, and said it requires mens rea.
  - Even if the charge wasn't displicitive, you still need mens rea
  - Judges are considering whether mens rea should be applied even though the words are not there

- **Trial Decision:**
  - The charge was dismissed at trial based on the reasoning that the city had nothing to do with the actual disposal operations, since Cherokee was an independent contractor.

- **First Appeal (New Trial) Judgment and Judicial Reasoning:**
  - The appeal was allowed and the city was convicted.
  - According to the Judge, ***Vannini***, this is a strict liability offence and thus warrants an automatic conviction.

- **Second Appeal (by city in Divisional Court) Judgment and Judicial Reasoning:**
  - The appeal by the city was allowed and so the city's conviction was overturned.
  - The ratio decedendi was first that the charge is duplicitous and second that the charge required mens rea

**Ontario Court of appeal** said it's not duplicitous, you should charge everyone who's involved, but they agree that there should be use of mens rea, it's important because the fines are potentially huge and you can go to jail for these types of offenses. So they said you require it even though there is no wording, so they send it back for a new trial because there was insufficient evidence. So sole issue in SCC is whether mens rea is required in a case of this sort. Is it a defense to say, "We didn't know"?

Note: How do we determine if there's mens rea required?

True crimes always require mens rea, you have to show intention, recklessness, willful blindness – crown does not have to prove full mens rea, you're liable if the fact occur, once crown proves actus Reus you're liable in regulatory offenses b/c of absolute liability.

For example we can accept having no mens rea in a speeding case, because that's a safety issue. It's an administrative issue; think about proving mens rea in speeding, how many tickets are given out in one day alone? (Way too much effort)

This is a practical concern. Protection of society requires a high standard of care. That's how we justify absolute liability in regulatory offenses. It does violate fundamental issues in criminal law, one of the most fundamental – we require a guilty mind.

- **Third Appeal (by Crown) Judgment and Judicial Reasoning:**
  - The Crown appealed, but the appeal was dismissed because it was decided that although a conviction cannot be lifted based on duplicity, there is a requirement of proof of mens rea and in reality the city did not have any knowledge of what Cherokee was doing.

- **Supreme Court (appeal by Crown) Judgment and Judicial Reasoning:**
  - The Crown tried to appeal the dismissal of charges again, but this appeal was also dismissed (and they allowed a new trial) because the city was not afforded the opportunity to defend **due diligence**. It was said again that a conviction requires proof of mens rea.
  - As well, a new mens rea law was developed:
    - → Traditional Approach:
      1. **Absolute/Strict Liability:** Conviction on proof merely that defendant committed the prohibited act constituting the actus reus of the offence (i.e. no mens rea required). Note: This goes against our notion of the law, as non-blameworthy people will be convicted; OR
      2. **Full Mens Rea** (i.e. criminal offences in the true sense)

    - → New Approach:

1. **Absolute Liability:** Guilty act only with no mens rea and there are no defenses available. This is only used for minor regulatory offences which have clear legislation ; OR
2. **Strict Liability:** Actus reus and causation must be established, but no mens rea is required. There is a defence of "**reasonable care**", which is allowed, and which shifts the onus to the defendant to prove due diligence. This is used for public welfare offences; OR
3. **Full Mens Rea** (i.e. criminal offences in the true sense)

Prior to this case you had only two choices: **absolute liability** (problems with it: violates fundamental principles of criminal law, no evidence that it establishes a higher standard of care, convicts people who take extra ordinary or reasonable care, and the injustice of conviction makes people cynical of law) or **full mens rea.** Court says we need something new, we'll put strict liability in between – half way house of mens rea

When penalties and consequences of law are small, absolute liability is okay, but as penalties and seriousness increase so will the requirement towards having mens rea. By reaching this halfway house we have this case: no mens rea will be required and the crown will just have to prove actus Reus, but the defendant will have an opportunity to show a lack of their guilty intention, so the burden isn't on the crown to prove mens rea, just actus rea.

Now we have three categories. Accused will only have to show they took reasonable care on a balance of probabilities. Language of the statue must be clear in excluding mens rea.

SCC ordered a new trial to hear more evidence in regard to due diligence.

### *Case: R. v. Ladue*

- **Facts:**
  - Ladue was charged was copulating or attempting to have sex with a dead woman. They were both so drunk, he thought that she passed out, didn't realize she died and that was his defense.
  - What would be the mens rea? Technically this guy has to know he's having sex with a dead woman, whom he probably didn't; therefore the charge didn't fit the crime.

- **Charge:**
  - He was criminally charged under s. 167(b) f the Criminal Code (i.e. indecent interference with human remains).

- **Issues:**
  - Ladue argues his innocence claiming that he was intoxicated and thus did not realize that the woman was dead.
  - Seems to violate our notion of the doctrine of strict construction, the mens rea must coincide with the act.

- **Decision and Trial and on Appeal:**
  - Ladue was found guilty
  - Trial judge denied the defense claim of non-guilty that he didn't know the woman was dead at the time. He says he didn't know she was dead, but admitted that he had the intention for rape for a sexual

assault, but not for what he was charged with – having sex with a dead woman.
- Judge says he didn't have consent either way.

- **Judicial Reasoning at Trial and on Appeal:**
  - **Judge says an intention to commit a crime although not the precise crime charged will provide the necessary mens rea**. He uses this argument because the accused person cannot say he was acting innocently. His ratio is that he was not acting innocently so therefore he can find him guilty. To defend this case successfully the accused person would have to show he didn't know the body was dead and was acting innocently and lawfully. This case stands for the proposition that if you have the requisite mens rea for one crime you can transfer the mens rea to the guilty act you were charged with - violation
  - An intention to commit a crime, although not the precise crime charged, will provide the necessary mens rea for conviction (though it is not considered good law to transfer mens rea) → violating the notion of strict construction
  - S.C. Means ambiguity is resolved in the favor of the accused and it means that the criminal code is to be read literally and narrowly to attract only the activity described. This seems to be a legitimate defense. This guy ought to be punished, but according to the law he shouldn't. Crown can only take one run at you. We have procedural guarantees b/c the power of the state is enormous

***Case: R. v. Logan***

- **Facts:**
  - 4 people robbed a convenient store, and one, Logan shot the store clerk. The clerk lived.
  - The three robbers other than Logan claimed that they did not know of the gun or the intent of Logan to use a gun.

- **Charge:**
  - All 4 were charged for conviction, because they were parties to the offence
  - The 2 (other than Logan) were charged as being Parties to the offence of attempted murder

Crimes – subjective/objective intention – mens rea – they have to know what they're doing and what the likely result of it will be. If you form a common intention to do something and you have reason to believe that if you know or ought to have known an offense will be committed, you will be convicted.

- **Criminal Code, s. 21:**

(1) Every one is a party to an offence who
  a. actually commits it
  b. aiding any person to commit it
  c. abets (encourages or assists) any person to commit it

(2) If 2 or more people form an intention to carry out a crime and only 1 of them actually commits the crime but the others knew (subjective) or ought to have known (objective) then both of them are liable for the consequence.

- **Issues:**
  - Johnson took the stand at trial and said he didn't know there would be guns, but you cannot say this you have to assume
  - Consider whether the other guys knew or should have known that one would probably, in the course of

the robbery, shoot someone with the intent to kill.

- According to s. 21, in order to be a "party" to an offence, one must form a common intention, i.e. one is a party if knew or ought to have known that the offence would be committed. Note: This is an ***objective*** standard, but normally in criminal law a ***subjective*** standard is needed to convict.
- Is s. 21 in accordance with the constitution?
- Ought to have known – this is an objective standard for intention or mens rea – so cannot use ignorance or stupidity as a defense

- **Judgment at Trial:**
  - At trial the judge explained s. 21 and all were convicted of attempted murder.

- **Judgment and Judicial Reasoning on Appeal:**
  - Two convictions were set aside and convictions for robbery were put into place – they said they have a problem – person who committed offense, crown has to prove subjective mens rea for attempted murder.
  - In order for crown to prove this they have to show he had foresight/intention – but other people who went along with shooter do not have to be proven – so it's easier to convict people with the shooter than the shooter himself – this is problem – the general provision to parties to an offense applies to the criminal code

    Two said they had no idea anyone was going to be shot, didn't know guns would be involved
    At the court of appeal the judge said we have concerns that it doesn't seem appropriate that you can convict the parties on a lower standard of mens rea than the killer

  - The Court of Appeal looked at the case of ***R. v. Vaillancourt*** which brought up that we must look at the minimum degree of mens rea that is required to convict for an offence and then that minimum degree must be constitutionally required to convict a party to that offence as well.

  - **In the case of Vaillencourt** – whenever you have a very serious crime and the criminal code seems to imply an objective standard of mens rea, Vailcourt, says too bad what it says you have to have a subjective standard of mens rea – sliding scale – like Sault St. Marie – the more serious a crime is the more important we have to consider the intention
  - It is way easier to convict the people that are peripherally involved than to convict the actual murderer
  - Have to prove subjective mens rea for the actual murderer, more difficult
  - The words "ought to have known" in Section 21 DOES NOT APPLY

  - As well, according to the case of ***R. v. Martineau***, no one can be convicted of murder unless the Crown proves beyond a reasonable doubt that the person had ***subjective*** foresight that death was likely to ensue, i.e. mens rea and the specific intent to kill.
  - Based on this, the Court of Appeal did not strike out s. 21 in all cases, but rather said it was to be used only for cases that require a minimum subjective mens rea. They struck it out (i.e. determined that it had no force and effect) for this specific case by saying that it violates s. 7 (life, LIBERTY, and security of the person).
  - The OCA, from now on, on an attempted murder charge, the principal offender has to have a subjective mens rea no matter what the court says – have to have an intention to kill, definite foresight that death is the likely result – for the principal offender – if that's true than you cant turn around and convict the

people that went along on a lower standard of mens rea – court overturns the conviction for attempted murder and substitute the robbery conviction – the trial judge stayed the robbery convictions – b/c said you're convicted of attempted murder and that's bad enough…technical thing

- OCA – for this case, as far as section 21 is concerned, the words *ought to have known* will have no force and effect – only for the real big ones
- The crown appealed the reversal but the appeal was dismissed, i.e. the 2 robbers were still not convicted for being parties to attempted murder.
- The Supreme Court said that it is possible to have different levels of mens rea because sometimes there is flexibility in sentencing. Note: This is rare.

- Lamar tell us – how we determine to do things from now on – under vaillencourt some offenses have minimum standard of mens rea – has to be subjective – some charges just have to – crown has to prove what the state of mind of the accused person was – proof of intent on a subjective standard

* In the end, there is a two step analysis for using s. 21, i.e. to determine parties to an offence:
  1) Is there a minimum standard of mens rea as required by s. 7?
  2) Consider the social stigma and potential sentence.

- Generally speaking if we're trying to figure out if there's a minimum standard of subjective mens rea, we look at the stigma associated with crime and then the look at the potential penalty as a secondary way of looking at it – this is the majority opinion

- **Concurring opinion, but dissents in her reasoning** – L'Heureux asks why we need a subjective standard for an attempt – reason being: we need actus reas, mens rea, and causation for crime – but we don't have a the actus reus – b/c the attempt failed – but there is no actus reus b/c no one died – generally speaking – for attempts by definition the crime does not occur as far the actus reus is concerned and no causation – if you don't succeed, then you have to have the guilty mind – subjective foresight that you wanted that to happen – you can only convict for attempted murder if you can prove the mens rea – an attempt by nature will not have an actus reus for the successful crime – and attempt is kind of like a lesser included offense. Her observation is for attempts. By definition they're dealing with an unsuccessful try at the main offense
- The stigma (talked about in the majority) is the same for the murdere as the attempted murderer
- Since there is no actus rea, it is all about mens rea
- A lot more focus on the mens rea

- (Repetition) ***L'Heureux-Dubé*** agrees with the final result but not with the reason. According to this Justice, we must look at intents generally.
- In an attempt (i.e. attempted murder), the connection between actus reus and mens rea is important. Since there is no actus reus there is only intention so we must prove that the intention was really there.
- The motivation for requiring subjective foresight is not fair because of the social stigma (since murder and attempted murder are so similar); rather, it is because of the primacy/dominance of the mens rea (as the actus reus component is not fulfilled in an attempt).
- Based on this, he says that you should have a minimum subjective mens rea.
- The focus according to the dissent – if you don't have a successful actus reus in the death of a person for murder and you want to prove an attempt it's all about finding the intent, the subjective intention, and you can convince them of an attempted murder – very difficult to prove, however. The criminal element solely lies in the intention. It would be unconstitutional for the parties involved to have a lower standard

of mens rea than the person convicted of the attempt

**Essay**

Moral responsibility v. causal responsibility
There are things we make happen when we do something and they may have absolutely no moral implications or moral accounts (can find an indirect or direct causation, but might not be morally relevant)
Morally relevant is when you cause something bad and that was the intention - to cause something bad

Oblique Intention – doctrine of double affect
This means you intend one thing and something else occurs at the same time
My main thing I want to do is this, but I know something else will occur as result

1. Directly intend # 1
2. Know result #2 will occur
3. Reason not to make #2 happen
4. Do #1 anyways

Ex: doctrine of double effect used to be used as a philosophical device that would sort of justify an abortion as something else – we are saving this woman's life with a surgical procedure, but it will kill the fetus in the process –

Only thing which makes oblique intention philosophical in criminal law is that the thing we obliquely intended has to be bad

- Issue, can you have an OI in regards to a sexual assault? If you had an honestly mistaken belief you should be convicted, so can you intend intercourse and the person in fact had no consent, you have an honest mistaken belief in consent, well does this honest make in belief allows an acquittal? Professor Brannough says you can be reckless in finding out about consent, so if you're intention is to have sex and be reckless about finding out their consent; you can then have an honest mistaken belief in consent and still have an OI, so you're proceeding in the face of risk or reason against. PHILOSOPHICAL!! You can have an OI if you're reckless in finding consent out – ingenious way of looking at it

***Case: D.D.P. v. Smith***

- **Facts:**
  - Smith, who had a bad rep, was driving through town and a police officer happened to look into his car and see stuff (construction wedges) that he thought looked stolen, so he asked Smith to pull over. Instead of pulling over, Smith accelerated, drive away. The officer hung onto his car and Smith continued to accelerate and zig-zag through traffic until the officer flew off, was run over, and died.
  - Smith was a rounder → people who are in and out of jail all the time

- **Charge:**
  - Smith was charged with murder in the first degree (killing a police officer)

- **Issues:**
  - Is this a case of murder or manslaughter?

- **Defense Arguments:**
  - Mr. Smith argues initially – I wasn't trying to hurt that officer – that was not my intention – his direct intention was to escape/avoid arrest – he just wanted to get away – it becomes a matter, is there an oblique intention to kill the officer? We ask this b/c he's charged with murder in the first degree – does he obliquely intended to kill the officer – in order to say yes we have to say he knows for sure that that is the result that goes along with his direct intention – we have to know that's the result and you have to know there's a reason against it for oblique intention. Based on this, Smith was saying that he had no intention to harm or kill, in order to lower his charge to manslaughter because of his lack of intent.

  - Smith's second defence was that he didn't intend to hurt the officer, but rather just go get the officer off his car and to get away from him. Note: The problem with this defence is that obviously the second result (i.e. harming/killing the officer) would follow from his actions (though in this case they do not mention the actual term of "oblique intention").
    - Didn't think the was going to killed
    - Direct intention was to get away
    - Oblique intention was to flick the officer off his car into traffic
    - Can then have a debate about how much moral certainty there is when you flick someone off a car into traffic if they will die

- **Judgment at Trial and on Appeal:**
  - At trial, Smith was convicted however it was determined that there were some tactical mistakes in the trial: There is a presumption at law that people intend the natural and probable consequences of their actions. If this is true, we can infer intention, i.e. a reasonable person would know that Smith's actions would cause harm or death. The problem with this is that it is an ***objective*** standard. Note: This is different than oblique intention, which is a subjective standard. Based on this, Smith appealed. At trial he was convicted, and he appealed on a misdirection on a charge to the jury – in the trial the judge said if any reasonable person would recognize harm would be the result of flipping an officer over you can assume that he meant to do it, you don't have to ask the accused – you've adopted on the charge to the jury an objective standard
  - Says reasonable man would know that shaking an officer off a car would cause harm and likely death

  - The Court of Appeal said that we need a purely ***subjective*** test, thus we cannot rely on whether one should know something is reasonable.
  - If the jury was convinced that Mr. Smith subjectively believed he didn't realize some would be harmed he should be acquitted – on the judge's charge he said that you can presume he intended the consequences of what he did – objective standard – takes out the mens rea. Appeal says that subjective charge should be used, and if he's really that stupid, he should be let off
  - If they believe that this guy made an honest mistake, he should be acquitted

- House of Lords agrees with Trial judge. Once a guy is acting voluntarily, then unless he is insane, he must intend whatever comes as a result → must impute intention whether it is actually there or not
- Can infer there is an intention if the result is reasonably expected
- The House of Lords disagrees with the court of the appeal. They said we're slavishly adhering to this norm. They say the only way you can defend on a mens rea in a case like this is to proof you're incapacity. If the crown proves an act the natural consequences of which are almost certain the jury can infer the intentions to cause that harm. The only competing theory they would allow is the one about capacity. So the HOL goes back and agrees with the trial judge.
- house of lords is highest court – they said you can have an objective standard of mens rea if death is a likely result, the only way to argue with them if they said that then you can pass a statute – changes the common law (because there is no higher court)
- Note: This is rebuttable only by a lack of capacity, therefore the final finding is that we can infer intention to consequences and thus Smith was convicted of murder.
- This case adopts the objective (reasonable) standard of mens rea in a murder case. You cannot infer but you'll have to make a finding of fact about his intentions. You can say that we just can't believe that you honestly weren't aware, that's different than saying that we can infer that you're aware – subtle difference – but an important one, b/c once you presume, you can't get up there and say how stupid you are.
- Hildebrand says HOL made a terrible mistake here, so Parliament came in to change the law because usually you cannot go against HOL
- Held: Conviction of Capital murder restored

  - NOTE: 7 years later the **Criminal Justice Act** (pg. 46) was passed: Not required to infer that someone intends consequences so jury must use all evidence to decide per case, not based on a reasonable person, but rather based on that specific person's intent.
    - Says not entitled as a jury to presume or assume, but when you look at all the evidence you can find fact
  - Probably in this case the outcome would not have made a difference (he probably still would have been convicted) but in later cases this change in law is very important

Oblique intention – this includes this – not what a reasonable person ought to have known – by flipping an officer off – the thing you obliquely intended has to be a known side effect – it has to be a result that's so apparent that you can't deny it.

Purely normative means the side effect is the violation of some principal/rule/law – breaks a rule – when the crown has to prove you intend, they don't necessarily have to prove that you know it's a crime – a purely normative side effect means its only about societal norms, where as a normatively important side effect, means it's wrong for some big reason, and harm is generally a reason, and we all recognize that it's wrong
Normative – norms in society, rules we abide by or we agree to, normal way to behave

**Objective** – doesn't matter what they knew, it's what the accused ought to have known
**Subjective** – what the person actually thought – crown can never fully prove this – the trier of fact will make a decision on what the person actually thought, and the crown has to proof what they thought beyond a reasonable doubt

Oblique intention stuff would require a subjective foresight of the result – you'd have to know that thing is going to happen
Ex: two conjoined twins – only way to save one was to kill the other, otherwise they both die – direct intention was to save life, oblique intention was to take a life in so doing – we require subjective or we cant say you obliquely intended.

Misdirection of jury in smith – that's what it's all about – the misdirection was: you can assume a man intends the natural and probable consequences of his actions – this cant be right – this makes your subjective intention irrelevant – they didn't mean to say that – but they did

***Case: D.D.P. v. Morgan***

- **Facts:**
  - Mr. Morgan was drinking with his Army buddies. He invited them to come back to his house to have sex with his wife. He told them that she likes it but will still put up a fuss. When they got to his house the wife did exactly this. It turns out that the couple lives in separate bedrooms and hasn't had sex in a very long time. The men drag her she screams to her son to call the police. They hold her down and all four have sex with her (Morgan last). When they are all done she goes to the hospital and tells on them.

- **Issues:**
  - At trial, the issue is whether the Def. can be convicted if they have an "honest but mistaken belief" that is clearly based on unreasonable grounds. Basically the question is whether with respect to consent the honest belief must be reasonable.

- **Charge:**
  - The three men are charged with rape. Note: Morgan is not because at that time a person could not be charged of raping their spouse.
  - Morgan was charged with aiding and abetting
    - Helping the other 3 rape his wife, not convicted of rape because it was a common law principle that a husband could not be charged of the sexual assault of his partner

- **Defense Arguments:**
  - The primary defense isn't a defense per se, but rather they claim that there was a negative mens rea because they didn't know, therefore what they did was not wrong.
  - The men said that she consented

- **Judgment at Trial and on Appeal:**
  - At the House of Lords her evidence and their evidence is mostly the same except that they claimed she was a willing and enthusiastic participant.
  - The trial judge told the jury that if there is an honest belief with reasonable grounds then they must acquit, which is based on an ***objective*** standard. (reasonable = objective)
    - Problem is when the judge made his direction to the jury he made the mistake saying you can find that she didn't consent or that she did OR that if they had an honest belief of mistaken consent based on reasonable grounds, the mistake is that it does not have to be based on reasonable grounds

    - You can actually prove that they did not believe they were doing something wrong
- No one would believe that she was consenting but that isn't really the question → you cannot show us that → based on subjective?
- Outcome of case probably won't be effected, but it means it has to go to appeal because of what the judge said

- This is where the def. found grounds for appeal. This is an important, but subtle problem. Morgan did not tell them they'd be raping his wife, he said that she'll only act like she's being raped. Morgan convinced them that she wanted to do this, and this was ordinary sexual activity in their house. You should be acquitted if you honestly believe in consent regardless if you had any reasonable grounds to believe in that consent
- At the House of Lords they said that only an honest belief in consent matters, but there is nothing to do with reasonable grounds.
- In the end the judges just didn't believe that the men had a belief of consent based on the evidence. Therefore, the men were convicted because of their fantastic story.
- Note: They still got their foot in the door with the defence of an honest belief because of what Morgan said to get them there.
- Assault: intentional application of force on the person of another without their consent
- Morgan was convicted of aiding and abetting.
- three guys were convicted of assault and rape
- Law allows that you cannot be reckless to that persons consent

***Case: Pappajohn v. R.***

(in Morgan – they were told she would consent and that she liked it)

- **Facts:**
    - The accused, a business man, and a real estate agent had lunch and drinks as they discussed her listing his house for sale. They drank a lot and then he drove her car to his house, where they drank more while discussing the listing and then had sex.
    - He claimed that the sex was consensual but evidence shows that she ran to her neighbour's house (a Priest) naked, with her hands tied up behind her back.
    - Charged with sexual assault
- **Trial:**
    - At trial both had conflicting evidence about the sequence of events
    - At trial on ***voir dire*** (i.e. a hearing within the hearing where the jury is excused and a technical point of law is argued to the judge) the two sides discussed how the judge should charge (i.e. direct) the jury as to what to consider. The defence wanted the judge to charge the jury to consider that he had an ***honest mistake of fact (belief in consent)***. If this was the direction and they found that he indeed did have a mistake of fact then he should be acquitted, i.e. based on no means rea, i.e. he didn't know that she was not consenting.
    - Judge says they have heard all of the evidence, but this has never been raised as a defense → the accused gave a different account of events (he tried to prove that he consented and was having fun), this is a contradictory account of the events
    - The judge decided not to put forth the defense of mistaken fact for the jury to consider because the

judge felt that there was insufficient evidence because there were two totally different stories – he refused this because he said it was not supported by the evidence (accused took the stand and never explained this evidence)

- Note: This is different than in the Morgan case!
  → 3 of the 4 accused persons gave some notion that they had believed she had consented. But in this case that never came up
- Trial Judge - In the end, the jury did not believe the accused's story and he was convicted at trial.

- **Appeal:**
  - On appeal the defence argued that the judge should have put forth the defence of mistaken fact. The appeal was dismissed by the B.C. Court of Appeal. – agreed with Trial Judge
  - Lost appeal as well, on her evidence there wasn't any consent
  - On his evidence, they did not believe his account and didn't support his position

- **Supreme Court *(McIntyre)*:**
  - The judge agrees that that there were two diametrically different stories but acknowledges some discrepancies, such as the fact that the two were in the house a long time before she left, her clothes were neatly folded, there were no bruises, and there were no torn clothes. Despite these acknowledgments, he still finds the evidence to be insufficient and therefore the appeal is dismissed. (these bits of evidence go to the fact of whether there was consent or not, nothing to do with mens rea)
  - When looking at sex assault case, you have to prove intercourse, no consent on part of victim, and have to prove (mens rea), knowledge of no consent. No requirement to put defense of mistaken belief in fact up to jury, b/c arguments are so diametrically different.
  - Don't disturb findings of the jury

- **Dissent (*Dickson)*:**
  - Mens rea must be based on honest belief.
  - Dickson says that the mens rea for rape (know they're not consenting), he says intention or recklessness to have intercourse without the plaintiff's consent will have to be proven. It should apply where belief of consent is even said. He said, if they want to put that in front of the jury, they should do it. Dickson is in the view that it really doesn't matter if there's any evidence out there to raise is as an issue, mens rea is always an issue, so they should raise it. Doesn't matter if there is any evidentiary foundation, if he raised it, the jury must consider it and decide whether or not they believe the defendent
  - Based on this, we don't need objective evidence to raise the defence of mistaken fact because it is always a ***subjective*** determination, i.e. what did the accused think, without considering any reasonable grounds for that belief.
  - Three theories: didn't consent, consent, didn't consent but he thought she did
  - Dissent opinion would allow the appeal and order a new trial

Normatively important v. Purely normative

- Normatively important result is something we would all agree not to have
  - e.g. someone dying is a bad result we would all agree on
- Purely normative - the only thing you are doing wrong is breaking a rule, may not have moral component, just a rule
  - Adopt it as a rule
  - Less significant as things that are normatively important

***Case: Regina v. Tutton***

So much about reasonable and what's wrapped up in our conceptions and how we enforce them on other people. This is case about interpretation of statute, entirely about objective and subjective standard of mens rea. How we interpret what appears to be mens rea words, but really criminal negligence (reckless or careless behavior) – we're careless enough to know someone's going to be really hurt by what we do.

- **Facts:**
  - Religious parents have a diabetic son. He was diagnosed in 1979 at which time they were informed about the disease, treatment, how to give insulin, etc. They were also told that he would always have the disease. Still, they wanted him to be cured so they prayed. At one point in time the parents believed that he had been cured by Divine intervention so they stopped the insulin. The boy got very ill, was rushed to the hospital and stabilized and the parents promised never to discontinue the insulin again. One year later the mother had a dream that God came to her and cured the boy so the parents decided again to stop the insulin. Again, the boy got very sick and was rushed to the hospital, where he was dead on arrival.

- **Charge:**
  - The parents were charged with manslaughter, i.e. death by **criminal negligence**.
  - This is a form of **culpable homicide**, i.e. which is blameworthy under the criminal code.
  - **Criminal negligence:** Act or omission that shows reckless disregard for the safety of others.
    - Ought to have known

- **Issues:**
  - **Criminal negligence:** Act or omission that shows wanton or reckless disregard for the safety of others.
  - One important part of this case is how to interpret 'criminal negligence'.
  - Based on the word 'negligence' the definition implies that it is an objective standard, requiring no mens rea. However, the word 'reckless' implies a subjective standard, requiring mens rea.
  - Reckless disregard (criminal negligence) does this imply an objective or subjective standard? Their obsession was all about making their boy healthy. Do they have a criminal intent? If it's an objective standard, then it doesn't matter what they believed.
- **Trial:**
  - At trial the parents were convicted of manslaughter

- **Appeal:**
  - On appeal the conviction was set aside and a new trial was ordered because it was determined that the judge didn't properly direct the jury, i.e. because he said that negligence implies an objective standard, i.e. no mens rea, regardless of what the parents believed.
  - Court of appeal said although the word negligence would lead someone to objective, this is a crime of omission rather than commission.
  - Basically they don't give an answer to our main issue of objective v. subjective; rather they add that the issue is greater when it relates to an omission.
  - Court of appeal says since it's a crime of omission, the law if very reluctant to find criminal liability for people that don't act. So in order to find them guilty, they have to prove a subjective standard, their state of mind, they knew kid would die if they didn't get their medication. The woman really believed he was

better – nature of religious fate is about believing things that may seem contradictory. Hard to put finger on what she may or may not have known. Not an easy obvious answer. Did she have motif? Issue is how reasonable is your religious conviction
- Ontario Court of Appeal rejects objective standard because this is a court of omission not comission

- **Supreme Court *(Wilson)*:**
  - SCC says that appeals court distinction on commission and omission is not important
  - Defence is an honest but mistaken belief
  - Majority says: wanton (willful blindness) or reckless disregard means there must be some kind of mens rea, must have some advertence to risk. You have to have some kn owledge of risk. At this point, this is the same result as the court of appeal. However, Wilson adds that once the Crown shows the wanton or reckless disregard we can infer mens rea but the accused must then be given an opportunity to show why the inference is wrong.
  - Basically, he says that we need to stick with a subjective standard; therefore there is no need for beliefs to be reasonably held, i.e. when defense gives evidence as to why the Crown is wrong.
  - Appeal dismissed (and new trial ordered) based on subjective standard, no evidence and no decision regarding mens rea
  - Trial judge sent the wrong evidence
  - Always need a subjective standard

- **Dissent *(McIntyre )*:**
  - In this case we can see an honestly held but mistaken belief (i.e. in the Divine), which can serve as their proof that they didn't know that the kid needed assistance.
  - We need to use an objective mens rea. This case is purely an interpretation of statute, thus what is at issue is the conduct, not the intent or mental state.
  - For criminal negligence we need to consider reasonableness, meaning here the specific knowledge of the disease and if beliefs are held on reasonable grounds (i.e. that God spoke in a dream), then you can have an acquittal.
  - If not reasonable, then we must convict!
  - Note: He also disagrees with the omission/comission distinction.
  - Actual intentions here are not relevant, politically charged opinion
  - Dissent – endorses notion of objective standard to convict someone of manslaughter b/c of criminal negligence – CN – known or ought to have known, DO says for manslaughter by CN, that's good enough – Negligence by definition, is action w/out thought – no mens rea – whereas maj. Says wanton/reckless are mens rea terms!

***Case: Regina v. Paré***

**Constructive Crime**

This is when the criminal code describes something that's done indirectly as the same as doing something directly. If you're doing something that you shouldn't be doing, and someone dies as a result, then we'll call it the same as murder. Murder is intentionally killing someone, or constructively, it's robbing a bank with a weapon and someone dies, just as good. It's like oblique intention.

Constructive – you indirectly do cause the result, your direct intention is something else that you're charged

with. For example, Pare, is charged with murder in the first degree, b/c he killed someone while committing a sexual assault – good example of an oblique intention (but better in smith than Pare). The first act has to be unlawful, there is a list too.

- Might not be directly charged, but charge is created by a set of circumstances

Constructive trust – built on a set of facts of circumstance, in direct result. Husband wife, divorced, nothing written, wife may be entitled to thing even if it's not in her name…When you have a set of circumstances, it's the set that add up to murder. Pare is all about if the murder is 1st or 2nd degree.

- 1st degree: murder is planned and deliberate, or kill someone while committing another offence
- Constructed murder charge in this case → killed someone while doing something else

o **Constructive Crimes:** Set of facts or circumstances that once proven make an indirect act into a crime.
  - E.g.) murder is direct v. constructive murder refers to killing while doing something else.

Constructive crime by virtue of circumstances

- **Facts:**
  - The accused, Paré convinced a seven year old boy to go swimming with him and then to go look at cars, i.e. to get him alone. Once alone, Paré sexually assaulted the boy and the boy said he was going to tell his mother. Paré and the boy talked and Paré convinced the boy not to tell. Still, Paré was nervous that the boy would tell, so he killed him.
  - All the facts were admitted at trial

- **Charge:**
  - First degree murder

- **Issues:**
  - Is this a case of first or second degree murder?
  - The Criminal Code says that if you kill while committing one of the following offences (i.e. including sexual assault) then the murder becomes first degree murder (i.e. normally must be planned and deliberate) based on the principle of a Constructive Crime. Basically, although some cases of sexual assault and then murder are not planned and deliberate, rather it may be possible to argue panic lead to the murder, it is still automatically a first degree murder charge.
  - If there is any ambiguity in the Criminal Code it must be resolved in favour of the accused person
  - The real issue on appeal is the words "while committing", i.e. did Paré kill while he was committing the sexual assault?
  - Ambiguity between "while committing" instead of "after" committing

- **Defence Argument:**
  - Paré argued that he did not kill the boy "while" committing the sexual assault, as after the assault the two talked before the murder took place, thus he argues that according to the **Doctrine of Strict Construction**, which states that ambiguity is read in favour of the accused, he should not be convicted of first degree murder (rather second degree murder).

- **Trial:**
  - At trial, all the facts were admitted so Paré was convicted of sexually assaulting and killing the boy. He was convicted of first degree murder.
  - The judge said that the two acts (i.e. sexual assault and murder) do not have to be simultaneous, just one continuing act.

- **Appeal:**
  - On appeal it is said that "while" is not the same as "after" thus because of Strict Construction it should be second degree murder (i.e. appeal allowed, i.e. agrees with defense).
  - Still, the Crown argues that s. 214 is not an offence, rather just helps us to categorize, thus the Doctrine of Strict Construction does not apply.
  - Here they interpreted the law strictly – appeal allowed
  - Said should be 2nd degree murder

- **Supreme Court:**
  - Here, they agree with the Crown and says that we cannot look at the words alone and literally, rather we need to look at them in context and thus we just need a link temporally and causally between the sexual assault and the murder.
  - Based on this, they determine that the conviction should in fact be one of first degree murder because we can't really show a beginning or end to the sexual assault thus it is a continuous act.
  - As well, the literal reading is arbitrary therefore if we reason with it will "***bring the administration of justice into disrepute***."
  - Court says we can't really tell when's the beginning and when's the end of the sexual assault, when do we say that's when it ends?
  - It trivializes the law if there's a difference of 2 min from when sex assault ends, and then the murder takes place, says the SCC.
  - All constructive murder crimes in the criminal code have one thing in common – the exploitation or illegal domination of one person by another. The Trial judge's charge to the jury was exactly right on this point – the murder that took place was causally directed, and part of one continuous sequence of events, and SSC restored conviction to first degree murder.
  - Is there a close causal link between sexual assault and the killing
  - Pretty obvious → the only reason he killed this child is because he thought he was going to tell on him because of the sexual assault
  - Should look at underlying principles
  - Murder was causally connected to underlying offence, part of one continuous sequence of events
  - Allow the appeal, and restore the conviction for 1st degree murder
  - Agreed with trial judge

***Case: Leary v. The Queen***

- **Facts:**
  - The complainant said that Leary forcefully raped her by threatening her with a knife.
  - Leary admitted to sex but also claimed that there was full consent and that no knife was used.
  - At trial, Leary was convicted of rape and his appeal was dismissed and the conviction upheld.
  - This new appeal by Leary is based on the fact that the judge instructed the jury that drunkenness can't

be a defence here because this is a crime of general intent. Note: a case of specific intent can lead evidence of drunkenness (though won't necessarily get off with it).
- Leary claims that sexual assault is a specific intent offence because need further knowledge that the victim is not consenting.
- She said she was raped at knife point

- **Issues:**
  - Distinguish between **specific** and **general intent**.
  - Was the accused so drunk that he could not form a criminal intent?
  - To meet the whole charge you must have the further intention: specific intent (further purpose)
  - Can say I was that drunk I did not mean to commit that offence
  - Assault is general intent
  - Can use an intoxication as an excuse for manslaughter → can raise this point

- **General v. Specific Intent:**
  - A Specific intent offense is described as something you do for the purpose of doing something else. Ex, break and enter for the purpose of committing an offense.
  - **Specific intent** wording requires some further intent (e.g. "break and enter with the intent to [steal]...").
  - The explanation as to why we are allowed to use drunkenness as a defence for specific, but not general intent is that maybe drinking diminishes the ability to have that mens rea, i.e. that specific intent (e.g. maybe I broke in just because I was drunk, but not with the intention of stealing).
  - In this case, the example for specific intent is murder (even though it is not worded as a specific intent offence), saying that one can use drunkenness to reduce murder to manslaughter.

- **New Appeal Decision and Judicial Reasoning:**
  - The Court cites an earlier case of ***Vandervoort***, which says that assault with specific intent to rape is different than normal rape, which is indeed general intent.
  - Not only do you need to have intent to have sex, but you must also have intent to have it with this person
  - In terms of rape being a general or specific intent case we must consider the case in relation to the rapist's purpose.
  - Rape is a crime of general intent, drunkeness is not a crime of general intent
  - No miscarriage of facts
  - Judge says something wrong, let's appeal for this reason, but in this case it doesn't really matter because the action never gave any evidence of the level of intoxication
  - Jury did not believe his defence, also, he did not plead in his defence that he was too drunk and didn't know what he was doing
  - It was his lawyers decision at trial, you cannot plead those 2 things: she fully consented AND I was too drunk I have no idea what I was doing
  - The judges say that this is not a case of specific intent, but even if they did find it was a case dealing with specific intent, there is no evidence that Leary was so drunk as not to be able to form the necessary intent. As well, how could he be so sure that she consented if he was at the same time so drunk that he didn't know what he was doing?!
  - Rape is the intent to have sexual intercourse with the intention of not having consent, so you can look at it as specific intent, that's why Leary appeals, he says it's a specific intent, and therefore he can appeal b/c he was drunk – did not have criminal mind – court says your wrong, cant rely on it, it's general – it's

stupid it went to so far, but really b/c judge made mistake by making bad charge to jury
- We have an intuitive inversion to calling rape a crime of specific intent – doesn't seem right! Distinction should be abandoned b/w specific/general according to Hilda. Result: we'll stick with distinction, and rape is general, cannot defend by arguing you were drunk. In the end the appeal was dismissed, and conviction upheld.

***Case: R. v. Daviault***
**READ HILDEBRAND'S COMMENTS AT END OF BOOK**

- **Facts:**
  - The facts in this case are not being disputed. A 60 year old partially paralysed woman in a wheelchair was at the home of the accused (i.e. because she knew his wife). The accused brought her brandy, which she drank and then fell asleep. He took her into his bed, dragged her out of the wheelchair and raped her. When she woke up all the brandy was gone, i.e. he had drank it. The accused didn't remember anything.
  - Expert evidence established that the accused remembered nothing, thus implying that there was no mens rea, and i.e. he lacked capacity (like in the *Parks* case).

- **Issues:**
  - The problem here is that an intention to get drunk is a voluntary consumption of alcohol, thus in this respect it can be said that he created his own problem. On the other hand, if one is so drunk that you can't foresee what you will do…
  - Can extreme drunkenness be used as a defense for general intent? In the ***Leary case*** the decision was no, but in the Australian ***O'Conner case*** it was yes.
  - problem with Daviault –if we think about it, we compare it to parks – he's not just drunk, he's so drunk he's like comatose, blacked out. He's in a disassociate state – and if you are, are you criminally blameworthy? Do you have the mens rea? He's like an automaton, can he be published criminally? But it's self induced intoxication, so we want to convict him.

Australian Case - O'Connor Case
- He ended up stealing a map and a knife
- When he is arrested he stabs the arresting officer
- Was charged with wounding, with intent to commit bodily harm, and charged with theft
- Drunkeness can be an offence, specific intent to commit bodily harm
- In the rare case that a person is so intoxicated, give them the opportunity to prove that

- **Trial Decision:**
  - At trial, Daviault was acquitted because there was a doubt as to if he really had mens rea. So, even though the act is reprehensible if need mens rea with actus reus then can't convict (i.e. because the charge is not the intention to get drunk).

- **Arguments according to the *Leary case* reasoning** (i.e. can't use defence)**:**

→ Drunkenness is self-induced, so why should we care?
→ Society cannot afford to let us use drunkenness as a defence here, because then drunkenness can always be tried as a defence for general intent.
→ Using this defence here will open the floodgates, i.e. people will always try to use a drunkenness defence.
→ Despite the fact that the accused drank with full knowledge of alcohol, would open the floodgates, society should not have to bear the burden of your bad behavour
→ Also, gives him even more reason to drink

- **Arguments according to the *O'Conner case* reasoning** (i.e. can use defence)**:**
  → Using the original intention to get drunk to convict for intention of the subsequent actions is illogical, i.e. this is **imputing intention**.
  → Accused would be unable to put forth a defence that he/she didn't know what he/she was doing.
    → Floodgates are not a concern because it is very rare that the accused can actually prove a blackout (i.e. like in the *Parks* case).
    → They're very concerned with Leary here in the majority, b/c it says, if we follow Leary the way it is, a person can be that drunk without proper intent, we're punishing them for getting that drunk – have mens rea for getting that drunk, but not sexual assault – we're not supposed to use one mens rea for another crime
  → Illogically imputes, puts intention where there is none, no rational basis for this

- In the O'Conner case the accused got drunk and took pills while driving. He stole a knife and then when the police stopped him he stabbed. The Judge found that can use a drunkenness defence for the specific intent offence of stealing and wounding with the intent to commit bodily harm, but not for the lesser included defence of unlawful wounding. The accused was acquitted of the specific intent offence and convicted of the lesser.
- On appeal he defended that drunkenness should always be allowed as a defence and that it should just be a matter of degree of the drunkenness. In the end it was decided that if sufficiently drunk that the person becomes like an automaton with no capacity to intend, then drunkenness could always be used as a defence.

* Basically, in our case here it seems that we can either go by the decision in *Leary* (i.e. drunkenness for specific intent offences only) or by the one in *O'Conner* (i.e. drunkenness if sufficiently drunk, for both general and specific intent offences). However, Judge ***Cory***, here, says that there should be a third alternative: Normally, the accused does not need to prove anything; however, here once the Crown proves actus reus then the onus of proof shifts to the accused who now must prove that he drank enough to make him an automaton.
- Accused would be convicted if they stuck with Leary
- *Leary* got its principles from the *Beard* case, but judge ***Cory*** is now saying that the 3 main principles are misunderstood:
  1. Insanity would result in an acquittal – but don't inquire into the cause, insanity is always a difference
  2. Evidence for intent specific to offence should be taken into account (note: does not say specific intent) – so drunkenness for general intent should also be considered
     - If a person is so drunk that they cannot perform a specific intent they ought to be allowed to leave it as defence
  3. Drunkenness less than sufficient cannot be used.

- Intoxication should not be a defence

- Drunkeness was always seen to be an offence for every charge
- Cory says do not need to think of all these arguments in terms of Leary
- Says leave that alone, do not need to remake the law → but from NOW ON, if you are that intoxicated that you are automaton than that will prove mens rea
- So, the law after this case is that for general intent we can use drunkenness as a defence if the drunkenness is sufficient to make a person into an automaton, however it is still very rare. Leary got beard wrong!
- Justice Cory with majority – people who are in support of Leary like it b/c they say self induced intoxication should not be used to avoid liability
- Implications of Leary, what really bothers Cory, is that self induced intoxication mens rea is substituted for the mens rea of the actual crime if you stand on Leary – Cory does not want to see this happen – he would be convicted where he lacks intent – fundamental criminal principle of the law – you need a guilty mind – very unlikely drinking and sexual assault would be one continuous act
- Cory says rape is a crime of general intent so you cannot use self-induced as a defence
- Intuitive sense says something should happen to this guy, and something should happen to restore the victim
- Intention to drink is substituted for intention to know the prohibited act

Are intuitive reaction to Daviault is something bad should happen, but if we stay true to our common law, strict construction, like Cory says, he should go home – but nothing happens to him – and that bothers us. Purpose of criminal law is to protect the public

Sopinka recognizes criticism of Leary case – if we want to allow drunkenness as a defense, we'll call it specific – he puts the cart in front the horse here….interchanges them – takes away something from it , it may be illogical, Sopinka doesn't care about that. Sopinka says if you have the mens rea to get that drunk, then that's good enough for whatever is after – they are not blameless. Daviault acquitted, and parliament didn't like that so they passed a new law – but it goes against majority decision in Daviault.

1. Intend thing 1
2. Thing 2 will happen
3. Reason against 2
4. Do it anyway

**Arguments**

- Can extreme drunkeness even be used when you are looking at a crime such as sexual assault

- **Dissent (*Sopinka*):**
  - This is a case of general intent, so drunkenness is not a possible defence.
  - This judge wants to stick with the old reasoning for a number of reasons. Basically, criminal law is supposed to protect society, so it is not right that the drunker you get the less responsibility you have.
  - He also gives several criticisms of Leary: First, the distinction between general and specific intent offences is irrational. General intent has intent inferred from the act so since this is what drunks usually do they shouldn't be able to use this as a defence. Specific intent carries an importance of mens rea and often has a lesser included offence so even if we allow drunkenness as a defence the offender won't get off and thus it is justified in these cases. Note: He says this even though this is not at issue here, seeing that he's just an exception.

- He says that automatism by drunkenness should only apply to specific intent offences.
- People are not allowed to rely on their own fault or negligence, they deserve to be held legally responsible for their actions - just like Ledou
- If you want to change something, Parliament can change it
- Substituting the intent to do one thing as if it were another
- ***Sopinka*** accords with our gut feelings (i.e. he rationalizes to our gut decision), but not with how we normally reason in criminal law.
- Cannot really be supported on principle
- Those who voluntarily get drunk and then commit offences → circular reasoning, assuming they are drunk enough to be an automaton

Hildebrand favours Cory's opinion, but says he would try to draft an offence that had to do with drinking deaths, says if you really did employ the disease, that this person is disabled, could be that alcohol is a disease of the mind
Deals with the offender and with society, but doesn't do much in terms of vengence

- Murder is not written like a specific intent but we treat it like it is because it has a lesser offence
- We call things specific intent when the mens rea is really important, general intent when mens rea is less important

* Note: Very soon after this case the government passed a law saying that people cannot rely on the defence that Daviault relied on (even though he was acquitted). They adopted the dissenting opinion.

***Case: Perka v. R.***

- **Facts:**
  - The appellants are drug smugglers. They were supposed to deliver marijuana via boat from a point in international waters off the coast of Columbia t another point in international waters off the coast of Alaska. They were supposed to drop their drugs via a shrimp net and another boat was to retrieve it from the water.
  - The drop off boat began to malfunction en route to the drop point. This, combined with the bad weather made them decide to stop the boat for the sake of safety, i.e. in order to unload it so it wouldn't capsize, at Vancouver.
  - Police soon arrived and charged them with importing and trafficking Cannabis into Canada.
  - Charged with importing cannabis into Canada

- **Issues:**
  - What constitutes necessity?
  - How is a choice related to a decision?

- **Judgment at Trial and on Appeal:**
  - At trial, and on appeal they argued the **defence of necessity**, i.e. that they had to stop in Canada for safety, but that they were not bringing the drugs into Canada with the intention of selling them. They were acquitted at trial, and on appeal a new trial was ordered.

- Note: In order to succeed with such a defense, peril must be so pressing that human instincts cry out. The important thing that is required is that there be no reasonable alternative. Necessity can only be used if the circumstances are bad enough, i.e. if the peril is direct and immediate.
- The basis for appeal in this case had been that there probably had been another reasonable (and legal) response to the peril, but the judge made an error in not charging the jury to consider this.

- **Judicial Reasoning:**
  - Inappropriate to punish those who commit involuntary crimes.
  - The Supreme Court stated regarding necessity that we must recognize the difference between ***excuse*** and ***justification***:
    → Actions can be excused in an emergency situation because it is deemed too onerous to comply with the law. Still, when something is excused it is still wrong. Basically, **excuse** concedes the wrongfulness of an action but asserts that under the circumstances it should be attributed to the actor.
    → On the other hand, **justification** challenges the wrongfulness of an action which technically constitutes a crime on the basis of a utilitarian type argument, i.e. greater good formulation. Examples of justified conduct are self-defence or speeding in a car in order to rush someone to the hospital.

- Necessity is an excuse (so still wrong), not justification, because that way we don't really defend it. The criterion is moral involuntariness, i.e. the law doesn't require you to die in order to obey the law. Must be severe threat and circumstances, and fairly immediate, in order to rely on this defense. There can be no reasonable legal alternative.
- Not saying we did the right thing, just that we had no choice

- There are 2 rationales for excuse at law (#1 which is rejected):
  1) Disobey law for greater benefit or good (utilitarian) – this rational is rejected because it makes each person the arbitrar of the law.
  2) Complying with the law would impose too great a benefit. To avoid trafficking I would have to die – too heavy a burden. Basically involuntary in a moral sense because in an emergency where eminent danger is threatening there is no alternative. This can excuse some wrong conduct.

Supreme Court rejects that decision if it is for the benefit of the greater good, only justification can use is that to comply with the law would cause too great a burden
If I had not brought the drugs to the shores, I would have died. Law does not expect the guy to perish

Not a justification, must be an act described as morally involuntary

**Held**: Dickson accepts that the trial judge was correct in offering the defense of necessity to the jury since there was enough evidence to suggest that the peril was imminent and the situation was urgent. However, he holds that the trial judge was incorrect in failing to instruct the jury that there needed to be no reasonably available legal alternative to the act. He failed to tell the jury that, if there was a "legal way out", the defense of necessity would not be available. Because of this, Dickson dismisses the appeal, and orders a new trial.

Duress: someone else under threat made you do something – just like necessity – didn't have a moral choice – made me do this under no choice – Paqeutte case.

Section 17 – you wont be convicted if you're acting under duress, but not under every crime – sets out you can argue duress as a defense, not for murder, robbery, or treason – so if criminal code is the last word – then you don't get duress

***Case: R. v. Paquette***

- **Facts:**
  - Robbery takes place at the Pop Shoppe. An innocent bystander was killed by a rifle that was shit by Simard.
  - The appellant, Paquette was not present during the robbery. He had been threatened by the two robbers to drive him to the Pop Shoppe and remain there to bring them home afterwards. He did not want to do it and tried not to be involved, but in the end he did it.
  - He was charged with being a party to the offence because of his part in the events that took place.
  - There was evidence that he was reluctant (i.e. a third party said so), for example he resisted letting them back in the car.
  - Was forced into driving

- **Charge and Defense:**
  - Paquette was charged under s. 21, 2 (for parties to an offense) which outlined conviction for committing an offence by forming intent with a common purpose.
  - Paquette put forth the defence of **duress**.

- **Issues:**
  - When can duress (i.e. distress) be used as a defence?
  - Is the defence of duress available for an accomplice to a crime, or only to one who unwillingly commits a crime?

- **Trial Judgment:**
  - At trial, Paquette was acquitted based on his defence of duress.
  - He's not a principal offender, so section 17 refers to principal offenders, which he's not; he's made a party to offense by virtue of s. 21, 2.
  - But he's not a party b/c mens rea is not there b/c of duress
  - Crown appealed

- **Appeal Judgment and Judicial Reasoning:**
  - On appeal, Paquette was convicted based on the earlier case of ***Dunbar***. In that case, Dunbar lived with bank robbers, drove them to and from the robbery and then shared in the profits. He tried the defence of duress but the defence was not allowed because it had been spelled out (i.e. codified) in s. 20 (now s. 17) that duress could not be used certain cases, i.e. where a killing, robbery, etc. took place.
  - Said they made me do it, relied on statgetory defence of duress
  - There are exceptions
  - Criminal code says you can use duress as defence but not for following kinds → express limitations

- Armed robbery is one of the things you cannot use, you cannot take the life of someone innocent and defend on the basis of duress

* can't kill an innocent to save your own life → duress

- **Second Appeal Judgment and Judicial Reasoning:**
  - Regarding our case, the current s. 17's codified duress doesn't apply because Paquette was a party, not the principle offender, so since it says "anyone who commits an offence" the codified exemption of duress doesn't apply. Based on this, the common law defence of duress can be used to see if intention to form a common purpose existed.
  - It is quite clear that in this case it didn't (e.g. they held him at gun point and he still resisted), thus this negated the mens rea and he was acquitted (like originally).
  - Section 17 does not apply to Pacquette, because it only applies to a principle offender and he is merely a party (not a principle offender)
  - Cannot really say that the crime happened but for his activities, there is no certainty that compliance meant the death of a victim → no causation

Heresay evidence: someone told them about something, do not directly know, not good evidence at a trial, cannot assess someone else's credibility

***Case: R. v. Lavallee***

**Inadmissable hearsay: heard from someone else, cannot cross examine this person because they are no where to found**
**Out of court declarant:**

Expert witness: entitled to give an opinion at court

- Not supposed to say "this guy did this"
- Just supposed to give straight facts, evidence in the hypothetical
- Evidence about things that we otherwise would not understand
- That knowledge will let us look at the particular and tell us if the expert evidence matches up with the hearsay

Social Science evidence

- Don't normally use it in a trial to tell us what happened
- Dangerous road
- e.g. our generation is less empathetic than past generations

Lawyers cannot give opinions, they can only give submissions at court

- **Self-Defence –** This defence can only be used based on reasonable apprehension of harm/reasonable grounds that will be harmed/killed. Note: This is an ***Objective standard***.
  - → Positive defence
  - → Codified in the criminal code
  - → Requirements:
    1) Imminent danger (serious danger)

- Law imposes on us, we need a legitimate reason to fear for our safety

- **Facts:**
  - There was a party taking place at the house of the appellant and the now deceased (i.e. a couple who lived together).
  - The couple got into an argument in their bedroom, where the appellant (Lavallee) had been hiding in her closet. The man (now deceased) said he was going to kill the appellant, unless she kills him first. He gave her his gun. As he was leaving the bedroom she shot him in the back of the head. She said that she thought she had shot above his head.
  - Lavallee had been a victim of constant violence in the relationship. Although she did not take the stand at the trial, expert evidence (i.e. from Dr. Shane, an expert on battered women's syndrome) said that the shot was her final desperate act. He testified that with battered women there are typically feelings of entrapment with the abuser as the victim start to somehow empathize with the hostage taker.
  - Not imminent danger because he is coming back later → she should probably be calling the cops, leave the house, run away etc
  - Dr. Shane gave evidence about feelings of entrapment and circle of violence
  - Dr. Shane gave a lot of evidence in this case that was beyond the hypothetical
  - One statement that she gave the police "I didn't mean to kill him, I love him so much, etc"
  - Only statements made afterwards were made to the psychiatrist
  - Dr. Shane said a lot about what she "said", she felt ___ and felt ____
  - Ended up taking the stand and being her mouthpiece, given all of the evidence that she would have given if she was a witness
  - She had the right to not incriminate themselves (if she had taken the stand she may have)
  - Jury said you are not allowed to draw adverse evidence from the witness
  - Dr. Shane gave hearsay as the evidence

- **Judgment at Trial:**
  - At trial she was acquitted based on the testimony from the expert.

- **First Appeal Judgment and Judicial Reasoning:**
  - The decision was appealed based on the inadequacy of the way that the judge informed the jury regarding how to treat the expert evidence. In this case the expert evidence was social science evidence (which is usually inadmissible or the weight greatly reduced) and thus it was especially important that the judge qualified the evidence so that it is not too compelling and thus basically making the decision for the jurors.
  - The appeal was allowed based on the reasoning that the expert evidence was not even needed seeing that the case was clearly not one of self defence seeing that she had the gun and he was leaving the bedroom. As well, he gave evidence beyond the hypothetical, which is all expert testimony is generally supposed to do.

- **Second Appeal Judgment and Judicial Reasoning:**
  - On further appeal the original acquittal was returned with the reasoning that expert evidence was in fact essential in this case because without it the jury would not have been able to "understand" the circumstances of the woman.
  - Expert witnesses are needed when there is a subject matter that a lay person could not form a correct opinion about without the assistance of the expert opinion. So, although social science expert evidence

is often inadmissible, in this case it was found to be essential in order for the jury to understand how she felt like a prisoner in her own home, i.e. the psychological dynamics that made her think she could not escape and thus was in danger even as he was leaving the room.

- There are two important characteristics of self-defence (both of which are met in this case), which require the ***objective standard*** of both the apprehe

nsion of death and the need to repel the assault with deadly force:

1) **Temporal time connection –** Did she believe that she was about to be the subject of more abuse at that moment? Based on phases of abusers, etc. we can reasonably say that she knew with some certainty that she would be severely beaten that night, and thus she was in eminent danger. Although self-defence is usually only used when there is clear eminent danger, in this case her defence comes from an accumulation of many episodes, which allows for an element of predictability regarding the severity of the upcoming violence.
2) **Force required for protection –** Was the magnitude of force used by Lavallee the only way to get herself out of the troublesome situation?

- In the end, it was decided that the role of the expert does not usurp the role of the jury; rather, it just makes their decision a more "correct" one. The court says that the decision is still up to the jury, i.e. the triers of fact to decide.
- Still, we must note that it probably was inappropriate that the expert was allowed to give heresy evidence that she stated.

Admissible evidence

- Courts say we need it
- Judges and jury are not experts on evidence
- Two elements:
    - Time: did she on reasonable grounds feel that time was imminent
    - How much force did she need to protect herself: she was asking the court to believe she needed to kill him
    - What would the ordinary battered woman think or do in these circumstances
    - Why didn't she leave?
        - Cycle of degradation, learned helplessness behaviour, economic factors (she didn't have any money), she thought she loved him

CONCLUSION: expert evidence is crucial for trial knowledge, expert can explain myths of battered syndrome, help jury in dispelling some of those myths (why she would stick around etc), explain extent of abuse
- Hildebrand disagrees in this case
-Jury can disbelieve the expert and make up their own minds → but this is a concern
-Expert is important in this case
-SCC said trial went fine, needed this evidence and there was nothing wrong with the way the evidence came out

### *Case: The Queen v. Tolson (Capacity?)*

- **Facts:**
    - A couple was married in 1881 and the husband went to sea. The wife believed that her husband was lost

at sea, i.e. dead (and her belief was even validated by his family).
- She married again in 1887 but soon after the original husband came back and she was charged with **criminal bigamy**.
- Statutory offence to marry more than one person
- According to statute one can remarry only after 7 years, but she slightly missed this cutoff.
- Idea of mistake of fact
- She had an honest mistake in belief that her husband was dead - was this reasonable
- Very common when England and other countries went to sea to make their fortune

- **Judgment at Trial:**
  - She was convicted at trial, still on a finding of fact the jury was instructed to determine if she honestly thought that he was dead. They said that she had really believed that he was dead and thus she was allowed to form an appeal of her conviction.

- **Judgment and Judicial Reasoning of Majority on Appeal:**
  - On appeal, the issue is whether she should be convicted even though there was no mens rea component to her crime.
  - According to Judge ***Wills*** her actions are exactly within the statute so according to positivism she would be guilty since there is no mention of any mens rea words in the statute. However, ***Wills (and Stephen)*** he takes a ***natural law*** approach, which says that we should obey laws but that they shouldn't be arbitrary, so although her actions are in fact prohibited by statute, what she did was not morally wrong and thus the conviction should be quashed. He feels that we should be able to look at all the circumstances because at times the same wording sometimes requires mens rea and at other times doesn't. He feels that in this case where the punishment is so severe we should be able to imply that mens rea is needed.
  - Is nothing more than a technical offence
  - Can intend to do something prohibited by statue, that is morally wrong etc, start with proposition to obey the law as duty of all citizens, but there are many municipal or regulatory offences that require mens rea
    - We often imply mens rea ought to be part of the offence
    - Since the language of the statue jus leaves out mens rea, doesn't expressly state that you need it
  - In addition, ***Wills*** notes that regarding property in probate court they only had to wait one year (as well as with insurance issues) and then when it was found that he was alive there was no criminal sanctions, thus it is inconsistent to use 7 years regarding this issue.
    - This evidence is good and let's you do something
    - Wills says she ought to be acquitted, no mens rea, no intention to commit a crime, no guilty man
  - According to Judge ***Stephen***, she had an honest mistaken belief and so the decision should be reversed and her conviction lifted.
  - Natural law – cannot be guilty unless you have a guilty mind – ***Stephen***
  - You can intend a wrong in two senses: you can intend to something morally wrong, or something prohibited by statute only.
  - Is this a regulatory offense? If we have a statute and not impose or imply mens rea, then it seems so, and we're okay with that – but once we look at serious results from a conviction, then we invoke principles of natural law – maybe a mistake of fact ought to go to assist her defense.

- Every crime requires mens rea – ***Stephen***
- These guys are natural lobbyists

- **Dissent:**
  - Judge ***Manisty***, a ***positivist***, says that since there is no reference to mens rea in the statute, it is thus unimportant. Also, since the statute clearly says 7 years she is guilty and thus he recommended that the conviction should be reaffirmed.
  - He says that our job is to apply the law – black letter law - as written so we must convict. If the legislature wants to change it the result might be different, but as it stands she should be convicted.
  - He says there no ambiguity of language, clear does not include mens rea
  - b/c there's a specific proviso, you have to wait 7 years, that's obviously what legislature intended
  - affirmed conviction
  - Language is clear, no ambiguity
  - Legislature obviously thought about this, provided a limited offence, provides a clear statue of the actus reus alone
  - Legislature can change the law if they want to but it's up to the judge to apply the law as it is written
  - He is a POSIVIST

***Case: Regina v. Campbell and Mlynarchuk***

- **Facts:**
  - Case about ignorance of the law – Mistake of Law
  - Go-Go dancer is charged with immoral/indecent performance.
  - The accused danced on stage in front of an audience and by the end of her dance she was not wearing any clothes. Although the original law was that this was illegal, her boss had told her that there had been a recent case in Calgary where dancing naked had been okayed. She thought that she was allowed to do what she did based on that case and thus she danced naked.
  - At the time you were allowed to dance topless but not completely naked
  - Someone else had been charged with dancing naked, but had been acquitted because Court said it was okay
  - Charged with an immoral performance: being nude in a public place is immoral, therefore nude dancing must be immoral

- **Issues:**
  - S. 19 of the Criminal Code says that ignorance of the law is not a defence. The reason behind this rule is basically pertaining to efficiency. If this could be used as a defence then it would be beneficial not to know the law.
  - Can't really on ignorance, only mistake of fact.
  - She argues mistake of fact as defence (I didn't know)
  - Issue: An ordinary person is supposed to be better informed about the law than a judge? Anomaly → a judge said it was okay in another case
  - Places a premium on ignorance, people would have an incentive not to learn the law
  - Because then the issue at all of the cases would be "did they learn the proper law"

- **Trial Judgment:**

- Because of s. 19 she was convicted, but on sentencing she was granted absolute discharge and thus she has no criminal record based on the recognition that she truly tried not to commit any offence.
- Convicted her because ignorance of law is no excuse and mistake of law cannot make you acquitted
- Didn't have a criminal record because Judge granted absolute discharge
- Judge had no authority to grant a pardon
- Judge thought no need for deterrence because she won't do it again
- Not worried about general deterrence because no evidence that is going on in the community

- There is an anomaly here – the other judge that made the decision and convinced her that what she was doing was legal – she's expected to have a greater understanding of the law than a judge - in the end the conviction was reversed for that reason.

Pardons: for criminals, allow criminal to get a job

- Something like 3 years after sentence you can apply to get a pardon in order to be able to apply for a job later
- Not uncommon to be turned down
- If they do not get a pardon they will never be employed which means they will always be a criminal

Tuckier

- Convicted
- Met a real lawyer because he appealed and judge said on appeal he did not have a fair trial
- LOOK AT TORT NOTES
- Lawyer had told the court what he did
- Due process: what is usually used to protect the accused person
- Also, everyone in Australia now knew he killed the constable so he could never have a fair trial
- The entire country knows he did it but because of the fundamental flaw he can NEVER be convicted

Constructed offence/crime: Doesn't normally meet the criteria of first degree murder

- Pare: can argue that the murder was not planned and delivered
- If you kill someone while you are committing other offences it will be murder in the first degree
- The circumstance will create trust
- When it is created by circumstance it is called "constructed"

Constructed trust: you are in a relationship and do not get married, live with someone for 20 years, partner is entitled to assets: can say, because you contributed to the relationship there should be some constructed trust, circumstances create a constructed trust in your benefit

Necessity: common law defense, broad and expansive, may have been in peril but didn't have to hurt anyone

- Considered a negative defence
- e.g. Didn't intend to bring drugs to shore, but if they didn't they would die

Positive defence: I intended to do that thing but I was excused/justified (e.g. Self Defence)
Negative defence: I didn't really intend to do the thing that I did (e.g. Necessity)