CRIMINAL LAW NOTES

Crime inflation

Virtually everything is a crime. These are some of the strategies by which governments criminalize behaviours:

- Great number of crimes adopted by Parliament.
- Very broad definitions of crimes (e.g., benefit from criminal activities)
- Criminalization of every day conducts (e.g., tacit consent in sexual relations).
- Ample interpretation of existing crimes.
    - Crimes interpreted even against legislative intent (e.g., luring).
- Overuse of court orders that criminalize conducts that are not in themselves crimes.
- Adoption of crimes with no strong actus reus (e.g., conspiracy, benefiting from criminal activity).
- Erosion of mens rea.
- Erosion of principles of criminal law, such as attempted crimes.
- Erosion of Charter Rights (e.g., Free Speech)
- Use of criminal offences for cases not originally foreseen by the legislator, e.g., Harvey Weinstein and sex trafficking act, or child pornography to penalize teenagers who do sexting of their own images.
- Infrequent application of the de minimis non curat lex principle
    - The law does not care for small or trivial matters
    - To place outside the scope of legal relief the sorts of injuries that are so small that they must be accepted as the price of living in society rather than made a federal case out of."
    - In Canadian jurisprudence, the defence of **de minimis** has been raised in drug cases that involve a tiny quantity of the drug, in theft cases where the value of the stolen property is very low, or in assault cases where there is extremely minor or no injury.

CRIMINAL LAW THEORY

For common law legal tradition, the main function of Criminal Law is the prevention of harm

What is harm?

For John Stuart Mill, the state can only use its coercive power, to prevent one person from harming another, but not for harming himself, nor for doing or thinking anything that does not amount to harming another, no matter how despicable the action might be.

For the Civil Law legal tradition, the main function of Criminal Law is the protection of legal goods, and nothing else. Anything that does not qualify as legal goods falls outside the scope of criminal law, and may not be criminalized.

In Binding's influential norm theory of criminal law, legal goods are protected by norms, that the legislator, in its discretion, translated into legal prescriptions and prohibitions, including, but not limited to, criminal statutes.

Legal goods are conditions or chosen ends, which are useful either to the individual and his/her free development in the context of an overall social system based on this objective, or the functioning of this system itself.

Laws that are insufficiently connected to a legal good constitutes an improper means of criminalization.

A criminal statute is illegitimate if it is not necessary to achieve its end. The legal system must employ civil, less intrusive means of protecting the legal good.

Some de minimis conducts that fit the definition of the offence are declared noncriminal because they do not really violate the legal good protected by the statute in question, e.g., tipping the mailman, calling your brother a bad name, playing penny poker.

The most important function of the concept of legal good is the facilitation of criminal analysis. The very existence of the concept stands for the proposition that there are limits within which modern criminal law must work if it is to be legitimate.

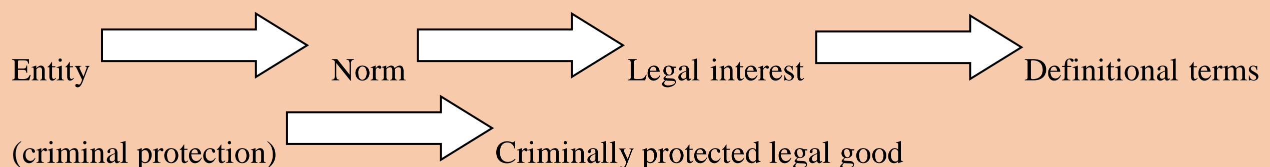
Legal Good theory

When the legislator is faced with an entity, and he/she has an **interest** to protect that entity, it is because he/she values it positively. This value of the entity is translated into a **norm**, which elevates the entity to the category of **legal good.** When the legislator wants to give that legal good

a criminal protection, based on that norm he/she elaborates a criminal definitional term, and thus the legal good becomes a **criminally protected legal good**.

Example

- Human life = **entity**
- The legislator has an **interest** in that entity because he/she values human life
- **Norm** to protect the entity (human life). The norm protects the entity by prohibiting killing human beings: "You shall not kill." This norm is expressed into **laws**, statutes. E.g., civil law statutes dealing with protection of human life.
- Criminal protection: The adoption of definitional terms.
- The legal good "human life" becomes a **criminally protected legal good**.



The concept of legal good tells the legislator what it may punish, and what it has to leave without punishing.

THEORY OF OFFENSE

The theory of offence has two purposes.

First, it is the lens (a strategy) through which we can analyze whether a particular conduct is a crime or not. Here the goal is to determine if a certain conduct that has taken place is a crime or not. Second, the theory of offence serves as a limit to the punitive power of the state. The state criminalizes numerous behaviours, and it does it in very broad terms. If everyone who commits the behaviours as simply written, as literally included in the Criminal Code, were to be criminally sanctioned, then we would all have to be punished by the state. The theory of offence acts as a barrier and narrows down those behaviours that may be sanctioned by the state.

We will focus mainly on the first purpose. For this, we need to have:

- A conduct (which always appears messy, mixed with lots of other actions and conducts).
- The definitional terms (definition of the offence).

Then, we apply the theory of offence to those facts and the law. It is a tripartite analysis of criminal liability in a sort of check-in-the-box system to determine whether a conduct is a crime or not.

- **Conduct**
  - Isolate the relevant conduct, i.e., the conduct that may potentially be criminal, from other conduct.
  - Describe the conduct
  - Analyze the conduct (break it down in relevant parts)
- **Definitional terms**
  - Find the definition of the offence most likely to coincide with the conduct.
  - Break down the elements of the offence.
- **Concurrence between conduct and definitional terms**
  - Check to see if all the elements (determined in the definitional terms) are present in the conduct.

Example

Definitional terms	**Conduct**
Murder: intentional causing someone else's death. Manslaughter negligently causing someone else's death.	Defendant cleaned his gun and accidentally pulled the trigger. The bullet penetrates the victim's body, who dies.

Actus reus	**Conduct**

Voluntary Act	□	Pull the trigger
Causation	□	Bullet penetrates the victim's body
Social Harm	□	Death
Mens Rea		
Intention	X	The defendant was cleaning a gun. Did not want to pull the trigger
Knowledge	X	
Recklessness	X	
Negligence		□The defendant accidentally pulled the trigger.
Defences and Justifications		
No defences	□	

Crime is an actus reus and mens rea, causation.

ACTUS REUS: DEFINITIONAL TERMS.

Important because it permits us to accommodate our conducts in advance so as to avoid punishment.

Legality principle.

- Voluntary act
- Causation
- Social harm (result)

Voluntary act

Act: it is simply a bodily movement, a muscular contraction. Examples would be to pull the trigger of a gun, to blink an eye or simply put one leg in front of the other to walk.

Sometimes there can be bodily movement but no act, e.g. someone moves my arm.
The concept of volition is tied to the notion that criminal law responsibility should only attach to those who are accountable for their actions in a very personal way.
The threshold is very low. It simply requires a willed contraction of a muscle or a movement of the body which follows our volition.
So, epileptic seizures are not voluntary.

For example, if I pick a knife and stab you, killing you, the actus reus of homicide has occurred: I have performed a voluntary act (stabbing you), that caused your death (the social harm).

Omissions: An omission or failure to act is not a basis for criminal liability, except:

- Statute that specifically requires a person to act, e.g., file tax returns.
- Status relationship: a parent’s duty to his child or husband’s duty to his wife.
- Contractual obligation: a babysitter or nurse hired to protect a child.
- Voluntary assumption:
- Defendant’s criminal or negligent act in creating the need for rescue: e.g., car accident?

Not every moral obligation to act creates a concomitant legal duty. We are not our brothers and sisters' keepers. Criminal law requires us not to do social harm but –save for some specific circumstances- it does not require us to prevent harm.
This has raised enormous criticism. The effect of this rule is to exonerate people who are guilty of moral indifference. Swimmer case.

Types of voluntary acts in the definitional terms

- Single
- Dual
  - Conjunctive
  - Alternative

Causation

Factual causation:

The criminal conduct stands in a causal connection with the harm:

- but-for test: but-for the criminal conduct, the harm would not have resulted
- criminal conduct does not have to be the sole cause

Legal causation:

- The most significant contributing cause.
  - It is a judgment call (based on common sense or moral grounds).
  - Factual causation selects the pool of possible causing conducts and legal causation identifies the one that is the most significant.

Social harm

Society values and has an interest in protecting people and things, which may be tangible (automobile) or intangible (emotional security, reputation, personal autonomy). Society is wronged when an actor invades any socially recognized interest. Specifically**, social harm is the negation, endangering or destruction of an individual, group or state interest** which was deemed socially valuable.

- Wrongful conduct

Intentionally driving under the influence of alcohol: here the social harm of the crime is a conduct because no harmful result is required, i.e., the offense is complete whether or not anyone or any property is tangibly injured because of the intoxicated driving. It is enough that socially valuable interests have been jeopardized.

- Wrongful result

An offense may be defined in terms of a prohibited result. Murder is a result crime, because the social harm is the death of another human being.

- Attendant circumstances

Some attendant circumstances may be included in the definition of a particular offense and so be an element of the crime. For example, common law burglary is the breaking and entering in the dwelling house of another at nighttime.

Definitional vs. underlying social harm

- Definitional social harm: it is explicitly included in the definition
- Underlying social harm: it is implicit in the definition. There may be both a definitional social harm and a different underlying social harm.

MENS REA

A person is not guilty unless he performs a voluntary act that causes social harm with a mens rea, i.e., a guilty mind, a culpable state of mind.

Crimes are public wrongs. The implication of a guilty verdict is that the convicted party wronged the community as a whole. By convicting a criminal defendant, society denounces the actor; it condemns and stigmatizes him as a wrongdoer. Respect for human dignity suggests that such stigma should not attach, and liberty should not be denied, to one who has acted without a culpable state of mind.

Mens Rea is the particular state of mind provided for in the definition of an offense. So, for example, murder is defined as the intentional killing of another human being. The actus reus is the killing of another human being and the mens rea is intentional. So, if I kill unintentionally, there is no murder because I lack the specific state of mind required in the definition of the offense.

The law that creates the offence may provide different fault elements for different physical elements.

General vs. specific mens rea

The *mens rea* requirements have been traditionally grouped into two categories. The first category is crimes requiring general intent, whereby the defendant simply desires to commit a criminal act. The second category is crimes requiring specific intent, where the defendant, in addition to desiring to bring about the *actus reus,* wants to do something further. An example of a specific intent crime is a burglary where the intended breaking and entering of another's dwelling must be with the intention to commit a felony; or, where the defendant objectively desired a specific result to follow his act or failure to act. This classification has been considered primitive and confusing, and has marginal utility in practice.

Dual vs. single mens rea

Some crimes require only one, single mens rea. Others require a dual mens rea, i.e., two different mens rea, eg., conspiracy.

Types of mens rea

Types of mens rea
Intentional: "I want to".

Knowing: "OK, I know but I don't mind. So be it". [Also: "I don't want to know."]
Recklessness: the actor disregarded a substantial and unjustifiable risk of which he was aware (subjective test). "No, it won't happen".
Negligent: "I didn't even think of it". (objective test).

Intentional

- The *purposeful or intentional* mental state implies **a purpose or willingness to commit the act, or make the relevant omission**.
    - A person acts intentionally when it is the person's conscious objective or desire to engage in the conduct or cause the result. Further, willingness implies that the person knows what he is doing, intends to do what he is doing, and is a free agent. As a way of illustration, mischief requires intention to destroy or damage property. If, for instance, defendant wanted to damage someone else's goods, he would be acting with the required mental state, intention of mischief.
    - Intent revolves around two aspects: the foresight that certain consequences will follow from an act; and, the wish for those consequences working as a motive which induces the act.

- An exceptional application of this requirement is the *doctrine of the transferred intent*, which essentially applies to murders. It often occurs in bad aim cases when a defendant intends to kill one victim, but in fact, accidentally or unintentionally, kills another one. In this case, the defendant is culpable, and bears criminal liability for the murder of the unintended victim to the same extent as if he had killed his intended victim

Proof

Subjective mens rea focuses on the actual state of mind of the subject of the prosecution, namely, the accused. Since what someone thinks or wants or knows is personal to him unless communicated, subjective mens rea ordinarily must be gleaned circumstantially, including by using the common sense inference that persons usually intend the natural consequences of their acts. Also, it is enough to prove that the accused foresaw the consequence as a substantial certainty.

Motive vs. intention

There is a difference between motive and intention. Motive is irrelevant in substantive criminal law, i.e., the intention to cause social harm is no less intentional simply because the actor's motive was not evil in character. E.g., Dr. Kevorkian, his killings are still intentional even if the motive may be good. Motive is essential at the sentencing stage.

Knowledge

In general, a person who knowingly causes a particular result or knowingly engages in specified conduct is commonly said to have intended the harmful result or conduct.

The general rule is that knowledge applies to all elements of the actus reus.

Even when the term knowledge is absent from the definition of the offence, knowledge of relevant circumstances is usually required.

Two definitions: (i) one that applies to results, and (ii) and another that applies to conduct and attendant circumstances.

(i) With respect to result, the actor acts with knowledge that **the result is virtually certain to occur as a result of his conduct**. Airplane bomb example (he doesn't want to kill the other passengers, he even prays they will not be killed).

(ii) With attendant circumstances and conduct elements, one acts knowingly if he is aware that his conduct is of that nature that such attendant circumstances exist. For example, D fired a loaded gun in V's direction and is prosecuted for knowingly endangering the life of another. D is guilty if he was aware that his conduct endangered the life of another person. If he was not aware, perhaps because he didn't know that V was in the vicinity, even if this was obvious, then he is not guilty.

Similar approach applies with attendant circumstances. E.g., if D purchased stolen property and was prosecuted for knowingly receiving stolen property, D would be guilty of the offense if when he received the property he was aware that it had been stolen. Another example of knowledge of an attendant circumstance is the following. It is a crime for a person knowingly to import any controlled substance into the country. So, a person that drives a car with marijuana into the US is not guilty unless he knows of the presence of the contraband. A person has knowledge of a material fact if he is aware of the fact or he correctly believes that it exists. So in the example he knows if he himself concealed it in the car or saw someone do it or if he smells it and as a consequence believes that it is present.

Our courts have equated willful blindness with actual knowledge. The idea behind this is that an accused cannot deliberately remain ignorant and escape criminal liability as a result.

Deliberately choosing not to know something when given reason to believe further inquiry is necessary can satisfy the mental element of an offence requiring knowledge. A finding of willful blindness involves an affirmative answer to the question: did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?

Proof of knowledge

Since the state of "knowledge" is not often manifested circumstantially the way apparent intent is, the law will assume that the accused knew of the elements of the offence unless the so-called "defence of mistake of fact," discussed below, is made out.

Recklessness

The actor disregarded a substantial and unjustifiable risk of which he was aware. It implies subjective fault.

In general, where an offence does not specify the type of mens rea required, recklessness will be sufficient. (In the United States, if the offence is silent as to mens rea, then the courts will presume that intention is required).

Also, when the mens rea of the offence is knowledge of certain circumstances, courts have held that recklessness can be sufficient.

Negligence

A person's conduct is negligent if it constitutes a deviation from the standard of care that a reasonable person would have observed in the actor's situation. Conduct constitutes such as deviation if the actor takes an unjustifiable risk of causing harm to another. Thus, negligence constitutes objective fault, i.e., he is punished for his failure to live up to the standards of the fictional reasonable person.

Should negligence be punished? Mens rea means guilty mind, and yet the negligent actor is blamed and punished for what is not in his mind, i.e., attention to risk that a reasonable person would display.

DEFENSES

- Mental disorder
- Intoxication
- Duress
- Necessity
- Entrapment
- Self defense
- Defence of others
- Defence of property
- Mistake of fact
- De minimis

Types of defences

- Failure to proof defence
    - The accused did not commit the crime, e.g., wrong guy.
- General defences
    - Excuses and justifications
- Specialized defences or offence modification
    - Defences for specific crimes
- Extrinsic defences
    - E.g., diplomatic immunity, parliamentary immunity, statute of limitations.

Proof

In Canada, the general rule is that the accused does not have to prove his or her defence; it is enough merely to produce some evidence that raises a reasonable doubt about the accused's guilt in the mind of the trier of facts. Before a judge allows a jury to consider a defence, the accused must first prove to the courts that there is an air of reality for the defense to be admitted.

Exceptions: mental disorder and intoxication. The accused must prove these defences on a balance of probabilities.

Justifications: conduct is not wrong in the context. Excuse: conduct is wrong, but actor is excused from criminal liability. Defenses include both justifications and excuses.

Mental disorder (insanity)

Canada Criminal Code: No person is criminally responsible for an act or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

- **Burden of proof of insanity:** The accused on a balance of probabilities. There is a presumption of sanity, so defense must prove on a balance of probabilities that he/she is insane (the prosecutor does not have to prove beyond reasonable doubt that accused is sane).
- Mental disorder is a question of law for the judge to decide.

Disposition of insane defendants

- Before automatic indeterminate detention
- Now, hearing.
- The accused is not a significant threat to society, he is released or he is released with conditions, e.g., follow a treatment.
- If threat to safety of public, a disposition that is the least onerous and restrictive to the accused (if detained in a hospital, detention ends when he is cured or ceases to be a danger to the public).

Intoxication

Involuntary

- Almost the same as insanity.
- Valid defence.

Voluntary

- General rule: no excuse for criminal conduct.

- It cannot negate general intent crimes e.g. sexual assault is general intent, except for those crimes not involving personal violence. It can negate specific intent crimes, e.g., breaking and entering (entering with intent to commit an offense).

- So, the defense applies to general intent crimes that do not involve personal violence and to specific intent crimes with respect to the ulterior intention.

Duress

- When the defendant was coerced to commit a crime by the use of, or a threat to use, unlawful force (death or bodily harm) against his person or a third party.
  - Objective test: what would a reasonable person have done in the circumstances?
- There may not be a safe avenue to escape.
  - Objective test to determine safe avenue.
- Threat need not be immediate. The threat can be for the future.
- The person applying the duress is guilty, frequently as a first degree principal.

Necessity

- The danger is caused by natural forces or by human conduct other than intentional threat of bodily harm.
  - The wrongful action is morally involuntary, which is measured on the basis of society's expectation of appropriate and normal response to pressure.
  - It applies to normatively involuntary behavior (e.g., natural disasters).
- The risk must be imminent, and the action is taken to avoid a direct and imminent peril.
- There may not be a legal, reasonable alternative and no legal way out or no safe way to escape. In other words, it applies only when the accused has no realistic choice but to violate the law and there is no other safe avenue.

- Objective test: to determine the existence of the legal and reasonable alternative.

Entrapment

- Government gives the accused the opportunity to commit a crime.
  - This defense is aimed strictly at governmental misconduct.
  - Policy: to prevent the government from manufacturing crime.

- Valid governmental conduct: if reasonable suspicion that:
  - The person was engaged in criminal activity; or
  - in a good faith criminal inquiry in a high criminal area.
  - In any case, government may not go beyond providing the opportunity to commit crime, i.e., it may not induce the crime.

- Invalid, i.e., the accused may raise the defence of entrapment, in all other cases, e.g., the government gave more than the opportunity to commit the crime and actually induces the commission of the crime or the accused was not under investigation or the area was not a high criminal area.
- In the USA it is necessary that the defendant have the predisposition before the government seeks to entrap him.
- If government's conduct created the predisposition, the defendant is treated as though he were not predisposed, and is entitled to the defense.

Self defense and Defence of others[1]

General basic rule for defence of the person, the three core elements are:

- A **reasonable perception of force** or a threat of force against the person or another person - (subjective perception of the accused, objectively verified);
- A **defensive purpose** associated with the accused's actions (accused's subjective state of mind); and

[1] **Defense of others**: alter ego doctrine. 3rd party is placed in the shoes of the one being defended or the 3rd party may defend another person if it reasonably appears to the intervenor (3rd party) that using force is justified in defense.

- The accused's actions must be **reasonable in the circumstances** (objective assessment)[2].

Defense of property (real and personal)

A person in a peaceable possession of property may commit a reasonable act, including the use of force, for the purpose of protecting that property from being taken, from being damaged, or trespassed upon.

Summary of elements of the defence:

- The accused reasonably believes he is in a peaceable possession of the property;
- The accused reasonably believes that another person is about to enter, take, or damage the property;
- The act of the accused is for the purpose of preventing the other person from entering, taking, or damaging the property; and
- The act of the accused is reasonable in all circumstances.

A person is not guilty of an offence if:

- they believe on reasonable grounds that another person
  - (i) is about to enter, is entering or has entered the property without being entitled by law to do so,
  - (ii) is about to take the property, is doing so or has just done so, or
  - (iii) is about to damage or destroy the property, or make it inoperative, or is doing so;
- the act that constitutes the offence is committed for the purpose of

[2]The court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors: (a) the nature of the force or threat; (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force; (c) the person's role in the incident; (d) whether any party to the incident used or threatened to use a weapon; (e) the size, age, gender and physical capabilities of the parties to the incident; (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat; (f.1) any history of interaction or communication between the parties to the incident; (g) the nature and proportionality of the person's response to the use or threat of force; and (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

- (i) preventing the other person from entering the property, or removing that person from the property, or
- (ii) preventing the other person from taking, damaging or destroying the property or from making it inoperative, or retaking the property from that person; and

- the act committed is reasonable in the circumstances.

Defence does not apply if: (i) the accused does not have a claim of right to the property and the other person is entitled by law to possess the property; (ii) the other person is doing something that he is authorized to do in the administration or enforcement of the law, unless the accused reasonably believes that the other person is acting unlawfully.

Excessive self-defence

No unsuccessful or putative self-defence in Canada. In other jurisdictions, those who engage in excessive and unreasonable self-defence have a partial defence that reduces murder to manslaughter.

Excessive use of force

Excessive use of authorized use of force is not justified and can lead to murder if the requirements of the murder offence are met.

Mistake of fact

A mistake of fact is an error as to some circumstance.

- The mistake of fact was an honest one;
- No offence would have been committed if the circumstances had been as the accused believed them to be (subjective test).

Mistake of Law

Ignorance of the law is no excuse.

De minimis defence

The Court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:

(1) was within a customary license or tolerance, neither expressly negated by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense; or

(2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or

(3) presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.

Attempted crimes

The offence of attempted crime takes place when a person who has the intent to commit an offence, does or omits to do anything for the purpose of carrying out the intention.

This offence requires three main elements:

(i) the intent to commit the offence (and the intent to go beyond mere preparation);

(ii) some act or omission toward the commission of the offence; and

(iii) Non-completion of the offence.

Actus reus

The actus reus of attempted crimes consists of an act or omission proximate to the commission of the offence, which requires that the act or omission be beyond preparation.

If the accused's acts are mere preparatory for the commission of the offence, there is no attempt. In other words, the *actus reus* must be more than mere preparation to commit a crime. When the preparation to commit a crime is in fact fully complete and ended, the next step done by the accused for the purpose and with the intention of committing a specific crime constitutes an *actus reus* sufficient in law to establish a criminal attempt to commit that crime.

Whether an act is an attempt or mere preparation is a question of law.

Stages of criminality

- Idea of committing a crime
- Decision to act
- Plan
- Preparation of the commission of a crime
- Next step: attempted crime
- Commencement of the commission
- Completion of commission (achievement of goal)

______________________X__________________

idea decision plan preparation commission start result

Generally speaking, the consummation of a crime usually comprises a series of acts which have their genesis in an idea to do a criminal act; the idea develops to a decision to do that act; a plan may be made for putting that decision into effect; the next step may be preparation only for carrying out the intention and plan; but when that preparation is in fact fully completed, the next step in the series of acts done by the accused for the purpose and with the intention of committing the crime constitutes the attempted crime.

Preparation

The determination of what constitutes preparation is crucial for the determination of the existence of attempt. It involves the relationship between the nature and quality of the act in question and the nature of the complete offence. It further requires consideration to the relative proximity of the act in question to what would have been the completed offence, in terms of time, location, and acts under the control of the accused remaining to be accomplished.

No satisfactory general criterion has been established by the courts to draw the line between preparation and attempt, so the distinction depends on the common sense judgment of the courts on a case by case basis.

However, the Supreme Court of Canada gave some general guidelines to help courts with this task. According to the highest tribunal, relative proximity may give an act, which might otherwise appear to be mere preparation, the quality of attempt. But an act which on its face is an act of commission does not lose its quality as the *actus reus* of attempt because further acts were required or because a significant period of time may have elapsed before the completion of the offence.

Mens rea

The mens rea is dual. It consists of the intention to commit the act or omission beyond mere preparation and the specific intent to commit the full offence.

The Supreme Court has concentrated on the specific intent only and has ignored the analysis of the mens rea of the act or omission beyond preparation. The specific intent to commit the full offence is required even in those cases, such as sexual assault, where the full offence may be committed with a lesser mens rea than intent.

In *Ancio*, the Supreme Court held that "the intent to commit the desired offence is a basic element of the offence of attempt, and indeed, may be the sole criminal element in the offence given that an attempt may be complete without completion of the offence intended."

No attempted crime for less than intent

Most jurisdictions hold that there is no such thing as attempt to commit crimes that require a mens rea less than intent (ex. crimes committed through recklessness) for the simple reason that, by definition, you cannot attempt to be reckless.

Merger doctrine

The crime allegedly intended is called the target offense. Inchoate offenses merge into the target crime. This means that if the defendant is prosecuted for the target crime, attempt cannot be charged as well. However, both conspiracy to commit a crime and the crime itself may be charged.

Abandonment

Abandonment is only allowed when it is **voluntary** and occurs before commission of the intended crime.

A voluntary abandonment is one that is motivated by a change of heart, timidity, or lack of perseverance.

Renunciation is not voluntary if motivated by circumstances that increase the probability of apprehension or that make the performance of the attempted crime more difficult.

The abandonment defence is very limited in Canada.

Impossibility

If it is impossible to commit the target offence, but the accused went beyond preparation and had the intention to commit the target offence, the accused has committed an attempted crime. For example, if a pickpocket put his hand inside someone else's coat pocket in order to steal money, but the victim had no money at all, then the accused committed attempted theft.

Sanctions

- Indictable offence life imprisonment: max 14 years;
- Indictable offence max imprisonment for 14 or less: half of the longest term to which a person who is guilty of that offence is liable;
- Summary conviction: guilty of an offence punishable on summary conviction; and
- Hybrid offence:
  - (i) guilty of an indictable offence and liable to imprisonment for a term not exceeding a term that is one-half of the longest term to which a person who is guilty of that offence is liable, or
  - (ii) is guilty of an offence punishable on summary conviction.
- Murder:

- (*a*) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for

the benefit of, at the direction of, or in association with, a criminal organization, to imprisonment for life and to a minimum punishment of imprisonment for a term of

- (i) in the case of a first offence, five years, and
- (ii) in the case of a second or subsequent offence, seven years;

- (*a.1*) in any other case where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and
- (*b*) in any other case, to imprisonment for life.

Criminal Participation

Perpetrator

- The principal actor or perpetrator commits the offence by himself/herself or
- The principal actor or perpetrator uses an innocent instrumentality.
  - The doctrine of innocent agency is predicated on the notion that a person who committed an offence by means of an innocent agent has to be deemed to be the actual perpetrator.
- Co-principal (joint perpetrator)
  - Two or more perpetrators carry out the actus reus, e.g., they all hit the victim until she/he dies. No need to prove who stuck the fatal blow
  - The actus reus is divided between each party, who act in concert to commit a criminal offence as a joint enterprise. A contribution to the *actus reus* with the requisite mens rea will be sufficient.

Aiding and abetting

- AR: the assistance provided, such as the aiding, abetting, encouraging or advising during the commission of the crime.
  - The assistance may either be physical or psychological conduct.
  - Any aid, no matter how trivial, suffices to consider the person providing the help as an aider or abettor.
    - No but-for-test

    - This would include, for example, applauding, adding numerical strength, or cheering.
    - The assistance has to be given in the presence of the perpetrator. This presence may be actual or constructed.
        - Constructive presence takes place if the aider or abettor is situated in a position to assist the principal during the commission of the crime even if not physically present together with the principal at the scene of the crime.
- If the commission of an offense continues: those who aid are aiders and abettors until all of the acts constituting the crime have ceased, e.g. getaway car in theft: aider and abettor, but getaway car in murder is accessory after the fact.
- Dual mens rea:
- The intention to assist the perpetrator to engage in the conduct that constitutes a crime and the knowledge that an offence is planned or is taking place; and
- Specific mens rea of intention that the perpetrator actually commit the offence.
    - For murder cases, the Supreme Court of Canada held that: 'if the intent of the aiding party is insufficient to support a murder conviction, then that party might still be convicted of manslaughter if the unlawful act which was aided or abetted is one he or she knows is likely to cause some harm short of death.
- Mere presence at the commission of an offence does not constitute aiding and abetting or an offence in itself. However, it can be evidence of aiding and abetting if accompanied by other factors, such as prior knowledge of the principal offender's intention to commit the offence or attendance for the purpose of encouragement.
- Doctrine of natural and probable consequences:
    - Under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the target offence, i.e., the intended crime, but also of any other offense that objectively was a natural and probable consequence of the crime aided and abetted [i.e., the non-target offense].
    - A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes.

        - Because the non-target offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant and culpability is imposed simply because a reasonable person could have foreseen the commission of the non-target crime.
- Accessory during the fact does not require the conviction of the perpetrator (SCC).
- Punishment: same as principal.

Accessory before the fact

- AR: The solicitation, procuring, or instigation to another person to commit a crime.
    - to advise, recommend, hire, procure, instigate, persuade, solicit, or incite the principal to commit an offence.
- Dual MR:
    - the intention to solicit the offence
    - plus the specific intent that the other person actually commit the crime; OR
    - Recklessness about whether the offence would be committed (it is enough if the accused is aware of a substantial and unjustifiable risk that the offence was likely to be committed).
- Doctrine of natural and probable consequences for counsellors.
    - So, 'every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed as a result of the counselling.'
    - Counselling is always an attempted conspiracy, and if and when agreed, it becomes a conspiracy.
- A counsellor is a party to the offence even if the crime is committed in a way different from what was suggested, because counselling constitutes an offence in itself.
- A counsellor is a party to the offence even if the counselled crime is not committed.
- Accessory before the fact does not require the conviction of the perpetrator (SCC).
- Punishment: same as principal.

Accessory after the fact

- AR: receiving or assisting the person to escape.
    - An accessory after the fact to an offence is one who, knowing that a person has been a party to the offence, receives, comforts or assists that person for the purpose of enabling that person to escape.
    - The notion of escape is to be interpreted in a broad manner and includes avoidance of arrest, trial, and conviction.
- MR: the knowledge or willful blindness that the perpetrator has committed a crime, and the intention to assist the principal to escape.
- Sanction: An accessory after the fact is not a party to the offence but is punished with the penalty for the attempt of the offence he helped with.
- Accessory after the offence is an independent offence, so it does not require the conviction of the perpetrator.
- Punishment: same as attempted crime.

Conspiracy

- Conspiracy is a crime that involves the participation of more than one perpetrator.
    - The essence of the offence of conspiracy is the agreement to perform an illegal act or to achieve a result by illegal means.
    - The overt acts taken to carry out that agreement are simply elements going to prove the agreement, which is the essential ingredient of the offence.
- Conspiracy involves an agreement by two or more persons to do a criminal act, a series of criminal acts, or to accomplish a legal act by unlawful means.
- AR: the agreement to commit an offence
- Dual MR:
    - Intention to enter into the agreement
    - Intention that the agreement be carried out.
- No conspiracy between spouses, but if there is a third party, all three are co-conspirators.

- Conspiracy is a very controversial crime because it is predominantly mental in nature.
- Criminal policy: to nip crime at its stem.
- Punishment:
- Murder: maximum life in prison;
- Prosecution of a person for an alleged offence, knowing that he did not commit:
    - (i) Max 10 years: if the alleged offence is sanctioned with imprisonment for life or for a term not up to 14 years, or
    - (ii) Max 5 years if the alleged offence is sanctioned with less than 14 years;
- All other offences, same as principal.

Regulatory offences

Regulatory offences (R v. Sault Ste. Marie):

The purpose is to regulate some aspect of human activity, not to attach blameworthiness. The activity is not illegal, but it is regulated to ensure public safety.

Created by provincial or federal statutes and municipal bylaws.

- Strict liability: Crown must prove the actus reus beyond a reasonable doubt; and the defendant may use the defence of due diligence (and prove that he or she was not negligent on a balance of probabilities):
    - Two requirements:
        - The accused acted as a reasonable person in the circumstances; or
        - Had an honest but mistaken belief in facts that if they had been true, would have rendered the act innocent.
    - Prevails in Canada.
    - There is a presumption that a regulatory offence will be a strict liability offence unless there is clear legislative intention to create one of absolute liability or one requiring mens rea by using words such as knowledge, intention, or recklessness.

- Absolute liability: the Crown must prove the actus reus, and there is no possibility for the defendant to use the due diligence defence. Offences that have very minor fines as punishment.

Corporate Criminal Responsibility

Canada follows **the identification doctrine** for corporate criminal responsibility. Under this doctrine, corporations and other organizations have criminal responsibility when a crime is committed by senior executives or employees that are **the directing mind** of the corporation. According to the Supreme Court, the identification theory: "produces the element of *mens rea* in the corporate entity, otherwise absent from the legal entity but present in the natural person, the directing mind. This establishes the identity between the directing mind and the corporation which results in the corporation being found guilty for the act of the natural person, the employee. In order to trigger its operation and through it corporate **criminal liability** for the actions of the employee (who must generally be liable himself), the actor-employee who physically committed the offence must be the *ego*, the centre of the corporate personality, the vital organ of the body corporate, the *alter ego* of the employer corporation or its directing mind."

The Supreme Court elaborated three requirements for corporate criminal liability to arise. The Prosecution must prove that the action taken by the directing mind: (a) was within the field of operation assigned to him; (b) was not totally in fraud of the corporation; and (c) was by design or result partly for the benefit of the company. In a later decision, the Supreme Court conceptualized the notion of the directing mind by holding that 'the key factor which distinguishes directing minds from normal employees is **the capacity to exercise decision-making authority on matters of corporate policy**, rather than merely to give effect to such policy on an operational basis.'

Elements:

- Senior employee who is the directing mind of the corporation (alter ego)
  - The key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy on an operational basis

- Senior employee must generally be liable, too.
- Link between the actions of the employee and the corporate.
- The identification theory attributes **primary** liability to the corporation.
    - This effective merging of legal (the corporation) and natural (the directing mind) persons was a necessary legal fiction created to facilitate the attribution of criminal responsibility to the corporation.

Three conditions:

- the action taken by the directing mind was within the field of operation assigned to him;
- the action was not totally in fraud of the corporation; and
- the action was by design or result partly for the benefit of the company.

The US follows the vicarious liability approach whereby a corporation potentially faces liability for offences committed by any of its employees. The Supreme Court of Canada's approach encourages a pragmatic, case-by-case inquiry to determine whether or not a particular senior employee should be considered the directing mind of the company.

Defences

Pursuant to *Canadian Dredge and Dock*, a corporation will not take on primary responsibility for a criminal offence in the following situations:

- The individual who committed the act was not a directing mind, i.e. did not have the authority to devise or develop corporate policy, or make corporate decisions. Thus, the identification doctrine is confined to the company's executive ranks.
- The directing mind acted wholly in fraud of the company, without the company benefiting from the action. This is a high standard for the defendant to meet, since it is not a sufficient defence to prove merely that the manager acted in disobedience to explicit instructions not to disregard the law.