Framework 3.3 – The Criminal Trial

One essential aspect of the protection of the rights and freedoms of individuals is the **presumption of innocence**. **Section 11(d)** of the Canadian Charter of Rights and Freedoms guarantees that an accused person is "innocent until proven guilty. . ." This individual protection, however, must be balanced with society's interests. The state must have the opportunity to determine whether the accused person is in fact guilty. Section 11(d) states that this shall be done "according to law before an impartial and independent tribunal." This is the function of the criminal trial. Due to the importance of the rights, freedoms, safety, and security at stake, the criminal trial is a very complex and expensive process. Due to the time and money involved, the system has developed mechanisms to encourage the speedy disposition of most criminal charges; over 80% of them are resolved with guilty pleas, which avoids the need for a trial altogether.

Criminal Trial Principles

The criminal trial is a manifestation of the underlying principles that society holds with respect to fairness, justice, safety, security, and individual rights and freedoms. Strict adherence to these principles ensures the appearance of a fair balance between the rights of society and the rights of the individual accused.

Rule of Law

In the criminal context, the rule of law implies that citizens in our society have been made to understand our agreement to live according to the law, and that the specific provisions of the criminal law are either well-known or readily discovered. All citizens are then entitled to equal treatment under the law before any individual rights or freedoms are taken away by the state.

Specific Allegations

Individuals who have been charged with a criminal offence are entitled to know exactly which offences and the related circumstances that were alleged to have occurred. This is considered essential in allowing the mounting of a defence at trial. The provision of this information to the accused is called **Crown disclosure**.

Case to Meet

The Crown bears the burden of proof in a criminal trial; it must present evidence to convince the court that the accused should be convicted. In other words, the Crown must present a **case to be met** by the accused. Until it does so, the accused has no responsibility whatsoever to convince the court that he or she should be **acquitted**. The accused, in fact, has the **right to remain silent** throughout the trial; they cannot be compelled to testify by the Crown.

Presumption of Innocence

This premise reflects an acknowledgement of the power imbalance that exists between the individual and the state. At the beginning of a criminal trial, the accused is considered innocent by the court, until or unless the Crown is able to prove them guilty **beyond a reasonable doubt**. This is a much stricter burden of proof than those used in other types of judicial proceedings.

Open and Public Trial

In most cases, criminal trials are open to the public and the media. It is very important to assure the public that justice is being done in a fair and unbiased manner.

Independent and Impartial Adjudication

Judges and jury members, if applicable, must be **impartial** with no personal interest or bias regarding the outcome of the trial. It is important that decisions be determined by the law and the facts as opposed to the identity of the participants in the trial.

The Criminal Trial Process

The Triers of Fact and Law

In a **jury trial**, the jury is the trier of fact and the judge is the trier of law. In a **bench trial**, with no jury, the judge is both trier of fact and trier of law. Criminal trials are typically decided by **findings of fact**, which include determinations of what happened and how it applies to well-settled law. **Legal findings** are made by judges on rare occasions when it is unclear how the **law** should operate in that particular case.

The Crown's Case

In a criminal trial, the state presents its evidence first. It is the responsibility of the Crown to **prove each and every element** of the offence beyond a reasonable doubt.

The Defence's Response

If the defence believes that the Crown may not have presented sufficient evidence for a conviction, it can bring a motion for a **directed verdict** of acquittal. If the court agrees that a reasonable person, properly instructed in the law, would not find the accused guilty, then it will grant the acquittal without requiring the defence to present any evidence. Directed verdicts are actually quite rare since it is the responsibility of the Crown to ensure that sufficient evidence exists before taking a criminal matter to trial. If the Crown does present a case to meet, it is then up to the defence to present evidence that raises a reasonable doubt as to the guilt of the accused. If, at the end of the trial, there is a reasonable doubt in the mind of the trier of fact with respect to any of the elements of the offence charged, then the accused is entitled to an acquittal.

The Jury

The Role of the Jury

Individuals charged with serious indictable offences have the option to choose a trial before a judge and jury. The jury in a criminal trial consists of 12 members who represent society as a whole as they collectively apply the law to the facts as they find them. The jury may also be seen as a safeguard against unfair or oppressive laws and as an instrument to improve the public's knowledge and trust in the criminal justice system.

Jury Selection Process

In the interest of fairness, both the Crown and the defence participate in selecting citizens to become members of the jury. Pursuant to Ontario's **Juries Act,** potential jurors must be Canadian citizens residing in Ontario and 18 years of age or over, but they cannot be a member of certain professional groups such as doctors, lawyers, and law enforcement officers. The initial step for these citizens occurs when they are served notice by the sheriff that they have been chosen as part of the **jury array**, also known as the **jury panel** or **jury roll**. This only means that they will potentially become a member of a jury for a criminal trial. The composition of the array may be challenged by the Crown or the defence on the grounds of partiality, fraud, or willful misconduct by the sheriff. When a jury is required for a criminal trial, a group is taken from the array and convened for the selection process which is known as **empanelling** the jury. During empanelling, both the Crown and the defence have the statutory right to challenge potential jurors in two ways. Section 634 of the Criminal Code allows for **peremptory challenges** and sets out the maximum number that can be made by either side depending upon the seriousness of the offence. When either the Crown or defence rejects a potential juror by peremptory challenge, they are not required to give reasons. They are therefore often made for superficial reasons, such as the juror's name, occupation, address, or physical appearance. **Challenges for cause**, on the other hand, are made when either the Crown or the defence believe that the potential juror would not be able to fulfill their responsibilities properly. Section 638 of the Code lists the grounds which can be relied upon when challenging for cause. The most common ground is the claim that the potential juror is not **impartial** as between the Crown and the accused. The other party may then dispute the challenge in which case the judge will appoint two jurors to hear arguments and decide whether the challenge for cause should succeed.

Determining Impartiality

Clause 638(1)(b) identifies the ground that, "a juror is not indifferent between the Queen and the accused." This implies bias or prejudice or a lack of impartiality which might arise from the potential juror having **prior knowledge of** or **association with** the accused or having been exposed to **media coverage** of the case that is going to trial. In *R. v. Williams* [1998], the Supreme Court of Canada held that **racial bias** could also support a challenge for cause under clause 638(1)(b). In that case, the issue was whether the defence could raise a challenge for cause based on the potential juror's bias against an Aboriginal accused charged with robbing a white person. This decision implies that the mechanism of challenge for cause is in place not only to protect the Charter right of the accused to a fair trial and impartial jury under s.11(d), but their equality rights under s.15 as well.

Evidence

The Crown and the defence are both entitled to introduce evidence at trial in order to reconstruct the circumstances of a criminal act. It is then up to the trier of fact to determine which reconstruction or combination of reconstructions is the most believable. Testimony given by a witness is usually a verbal description of their knowledge elicited by a lawyer. The lawyer that **summonsed** the witness questions them first in the **examination in chief**. The lawyer on the opposite side then poses questions designed to challenge the previous testimony in a process called **cross-examination**. Since the introduction of evidence is so influential on the final judgment in a trial, it is important that there be rules in place to ensure the process is fair and reliable.

Rules of Evidence

The general rule is that only **relevant** evidence is admissible. This requirement is in place to streamline the fact-finding process, making it more efficient and rational. Determining relevance can be a very complex problem. For example, to what extent should the behaviour of the accused or the victim either long before or after the occurrence of the crime be considered relevant? Beyond the relevance requirement, there are specific rules that can render evidence **inadmissible** for two separate purposes; to ensure that only reliable evidence is admitted and to promote fair trials and the proper administration of justice. The rule against **hearsay** is one that is aimed at ensuring reliability. It states that, in general, a witness cannot testify about indirect knowledge, such as an event that was described to them by someone else. Only the original witness to the event can testify as to its occurrence. Another class of rules designed to promote fair trials and the proper administration of justice are those that render inadmissible any evidence obtained through the violation of **Charter** rights. When the admissibility of evidence is disputed in court, a hearing called a **voir dire** is held. In a jury trial, the jury is excused for the voir dire, and if the evidence is ruled inadmissible, they will not be told of it. In a bench trial, the judge remains in the courtroom during the voir dire, but if the evidence is ruled inadmissible the judge will instruct himself or herself to disregard it.

Defences

Upon the Crown presenting a *case to meet*, the accused is entitled to raise a defence. A **negativing defence** is one that raises a reasonable doubt as to whether the accused committed one of the essential elements of the offence, whether it be part of the *actus reus* or the *mens rea*. Examples of negativing defences include mistake of fact, mental disorder, automatism, and intoxication. An **affirmative defence** is raised on the premise that the Crown has proven all of the essential elements of the offence. It asserts, however, that the accused should be excused from criminal liability because his or her actions were the only reasonable ones in the circumstances. Examples of affirmative defences include self-defence and compulsion or duress.

Mistake of Fact

If the defence can prove that the accused was mistaken about an important fact related to the commission of the offence, then it may argue that he or she did not possess the *mens rea* required for conviction. For example, one element of possession of property obtained by crime is that the accused **knew** that the property was obtained by crime. An accused who mistakenly believed that the property had been lawfully obtained did not have the required *mens rea*. The mistake of fact defence is raised most often in cases of sexual assault where part of the required *actus reus* is a lack of consent by the victim. The courts have ruled that a subjective test is to be used when determining a mistaken belief; it must simply be **honestly held** to negate mens rea. An objective standard that would require the mistaken belief to also be **reasonable** was rejected by the Supreme Court of Canada in ***R. v. Pappajohn***, 1980. Pappajohn was a sexual assault case, and the subjective standard created by the decision outraged women's groups across the country. One very influential lobby group is the Women's Legal Education and Action Fund (**LEAF**). Thanks largely to their efforts, amendments were made to the Criminal Code in 1992; sections 273.1 and 273.2 were added to narrow the definition of "consent" and to require that the accused took "reasonable steps . . . to ascertain that the complainant was consenting" before being able to rely on mistake of fact. Although the subjective standard still exists for the mistake

of fact defence, it is now much more difficult to raise it successfully in the case of sexual assault.

Mental Disorder

One important premise underlying our criminal justice system is that an accused person should only be punished for criminal actions that they have voluntarily chosen to commit. Some accused may be afflicted with mental disorders that limit their ability to understand the nature or consequences of their wrongdoings. In these cases, the court may be called upon to determine whether they should be held blameless. However, even if a determination of "**not criminally responsible on account of mental disorder**" is made, the court or a special review board must still consider the question of whether the accused poses a continuing danger and possibly resort to measures, other than criminal conviction, to both treat them and protect society. The Criminal Code contains detailed provisions to deal with "Mental Disorder", starting at s.672.1. They were designed to ensure that the accused is treated fairly and is not incarcerated unless there is concern of an ongoing threat to the community. The court or review board must try to choose the appropriate disposition that is least onerous for the accused.

In addition to difficulties understanding between right and wrong, an accused with a mental disorder may also be unable to stand trial due to their lack of understanding of the legal process. In order to be able to benefit from a fair trial, an accused must be able to instruct counsel, understand the proceedings and their consequences, and communicate with their counsel and the court. If it is determined that an accused is unable to do so, they will be placed under the jurisdiction of a review board which will then explore the potential of the accused to stand trial.

Automatism

The mental disorder defence is one recognition of the **voluntariness principle** of criminal law, which states that the actus reus of an offence must be committed voluntarily before there is a finding of criminal liability. Whereas a "mental disorder" is generally a long-term affliction that can cause a loss of control over one's actions, automatism is generally a temporary loss of control that can cause the commission of criminal acts. It may be brought on by either psychological or physical trauma, such as a chemical imbalance or a blow to the head. Upon a finding of automatism, the court must classify it as having been caused by mental disease or to be of the "non-insane" variety. A finding of automatism from mental disease will result in the accused falling under the procedures for the mental disorder defence. A finding of "non-insane" automatism, on the other hand, results in outright acquittal. One controversial example of a court's acceptance of the defence of non-insane automatism was the Supreme Court of Canada's decision in **R. v. Parks**, 1992, where the accused was acquitted of murder and attempted murder committed while he was sleepwalking.

Intoxication

Although intoxication can affect behaviour in ways similar to mental disorder or automatism, society generally deems it less forgivable since accused people are usually responsible for their intoxicated state. In order to deal with the issue of intoxication, the courts developed a distinction between **general intent offences** and **specific intent offences**. The wrongful intent in a general intent offence, such as assault, only includes the prohibited act itself. Even in cases when the accused had been intoxicated, the court

can infer that they were capable of understanding what was happening at the time the offence was committed and intoxication is **not a defence**. The intent in specific intent offences includes more than the wrongful act that had been committed to include an element of criminal planning or premeditation. One example is *breaking and entering with intent to commit an indictable offence*. For these offences, the defence can argue that the accused was too intoxicated to form the specific intent required. This distinction was blurred somewhat by **R. v. Daviault**, where the Supreme Court decided that evidence of **extreme intoxication** equivalent to automatism was admissible in defence of a general intent offence. Daviault was a sexual assault case, and the ensuing public backlash caused the government to amend the Criminal Code to disallow the extreme intoxication defence for any type of physical assault.

Self-Defence

Section 34 of the Criminal Code establishes the framework for the defence of self-defence in the case of an **unprovoked assault**:

> **34.** (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.
> (2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if
> (*a*) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and
> (*b*) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

The use of force in self-defence may be excused even if it causes *grievous bodily harm or death* as long as it is deemed reasonable by an objective standard; it must be seen to have taken place "under reasonable apprehension of death or grievous bodily harm" with no alternative way of seeking protection. The Supreme Court of Canada reconsidered the requirements of imminent danger and no alternative with their decision in **R. v. Lavallee,** 1990, wherein the Court recognized "battered woman syndrome" and the need to examine the entire context of the offence.

Compulsion, Duress, and Necessity

The defences of compulsion and duress exist to excuse a person whose actions were compelled by threat and who had no realistic choice but to commit the criminal offence. The defence of **compulsion** is codified in s.17 of the Criminal Code which requires "threats of immediate death or bodily harm from a person who is present . . ." These statutory requirements of *immediacy* and *presence* have been loosened somewhat by the Supreme Court of Canada in their consideration of what should be considered a serious threat. Section 17 also lists a number of offences for which the defence is unavailable due to their serious nature. The common law defence of **duress or necessity** is similar to compulsion, but with no restrictions as to which offences it can be raised against.