

**CRIMINAL LAW  
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# Burden and Quantum of Proof

## Proof of Guilt

- elements of the offence (Crown has to prove BRD)
  - **actus reus** (physical act)
  - **mens rea** (mental element)
- **absence of any lawful defence or justification** that arises from the evidence

## Golden Thread

- **presumption of innocence** (s. 11(d))
  - requirement for proof beyond a reasonable doubt
- (Source: *Woolmington v. DPP*, 1935, HL UK)

## Three Standards of Proof (see chart)

- **proof beyond a reasonable doubt**
  - presumption of innocence requires that the onus is on the Crown to prove all elements of the offence
  - breach of presumption of innocence (i.e. insanity; statutory reverse onus provisions) requires justification (**Oakes** Test)
  - BRD is short of proof to an absolute certainty but is stronger than "probably guilty" (**Lifchus**); definition summarized at p. 292:
    - inextricably intertwined with presumption of innocence
    - burden rests on the prosecution throughout trial & never shifts to the accused
    - not based upon sympathy or prejudice - based on common sense & reason
    - logically connected to the evidence/absence of evidence
    - does not involve proof to an absolute certainty - it is not proof beyond any doubt or an imaginary/frivolous doubt
    - jury must acquit if they conclude only that the accused is "probably guilty"
  - no magical incantation re: jury instructions but the trial judge should not describe "reasonable doubt" in the following ways:
    - based on an ordinary expression - this is not an "everyday" decision
    - not "to a moral certainty"
    - using adjectives like "serious doubt", "substantial doubt" or "haunting doubt"
  - *Lifchus* provided a definition of "reasonable doubt" that has "special significance unique to the legal process" (**Starr**)
    - it was not intended to be strictly adhered to but subsequent case law (*Starr*) has demanded "substantial compliance with the *Lifchus* principles"
    - BRD falls much closer to absolute certainty than BOP
- **balance of probabilities**
  - requires more than a 50% probability
- **evidentiary burden**
  - the "air of reality" test
  - raising a defence that the Crown must disprove (*Cinnous*)

# Actus Reus

## Elements

- physically voluntary
- act or omission
- sometimes in certain prescribed circumstances
- and sometimes causing certain consequences

## Symmetry

- "An act does not make the person guilty unless the mind is also guilty." (*Tolson*)
- "So long as an act rests in bare intention, it is not punishable by our laws." - Lord Mansfield, *Scofield*
- "While it is not a PFJ that fault or mens rea be proved as to each separate element of the offence, there must be a meaningful mental element demonstrated relating to a culpable aspect of the actus reus." (*De Sousa*)
- strong presumption that the same level of prescribed mens rea attaches to each element of the actus reus (*SSM*)
- some exceptions:
  - predicate offences - a crime based on a predicate offense doesn't require additional mens rea (*De Sousa*)
    - no subjective foresight of consequences is required; objective foresight of consequences will suffice
    - examples:
      - unlawful act causing manslaughter; unlawfully causing bodily harm; aggravated assault...
      - s. 269 - unlawfully causing bodily harm requires mens rea for underlying unlawful act and objective foreseeability of bodily harm (*De Sousa*)
      - s. 222(5)(a) - unlawful act causing manslaughter requires mens rea for underlying offence and objective foreseeability of bodily harm (not of death) (*Creighton*)
  - sexual assault - no corresponding mental element that the touching be "sexual"
  - stigma offences - subjective foresight is required for murder, attempted murder & war crimes

## Principle of Contemporaneity

- actus reus & mens rea must coincide at some point during the commission of the act (through not necessarily throughout) - i.e. must be contemporaneous or concurrent (*Cooper*)
- court prefers a flexible application of the principle:
  - actus reus and mens rea can start/stop at different times but need to "overlap" at some point
  - does not need to be a complete overlap - must co-exist during some portion of the crime
  - acceptance of a series of acts constituting a "continuing transaction":

- **Fagan** (deliberately leaves car on cop's foot) - defendant's actions were a "continuing act" until the wheel was removed
- **Miller** (squatter + lit cigarette = house fire) - an unintentional act followed by an intentional/reckless omission to rectify that act or its consequences can be regarded in toto as an intentional act (UK - left to the jury)
  - duty theory: where an accused causes harms and the harm is continuing, the accused has a "responsibility" to mitigate the harm
- **Cooper** (strangulation/black out) - a series of acts may form part of the same transaction; sufficient that the intent (to do bodily harm likely to cause death) and the act coincided at some point
- **Meli** (not yet dead body thrown over a cliff) - requisite mens rea coincided with the continuing series of wrongful acts that constituted the transaction
- **Williams** (HIV non-disclosure) - before testing - endangerment but no intent; after testing - intent but reasonable doubt as to any endangerment as partner possibly already infected
  - not concurrent but found guilty of attempted aggravated assault

### Voluntariness

- crime must be voluntary
  - this requirement was wrongly decided in *Larsonneur* - crimes are only by "persons who knew what they were doing and willed it" (*Ruzic*)
- voluntary = a conscious choice to commit an act either mentally or physically (*Kilbride*; *Rabey*)
- a person who commits a criminal act involuntarily (and who is not insane) must be acquitted (*Ruzic*)
- no partial voluntariness (binary) - ???
- examples:
  - involuntary intoxication (*King*)
  - acting while unconscious
  - involuntary conscious acts - spasms; reflexive acts; unexpected mechanical failures; accidental falls; being physically compelled

### Act or Omission

- act - defined in the CC or the common law
- an offence usually requires a prohibited act but could require an omission to fulfill a legal duty, an otherwise legal act occurring in prohibited circumstances, or a prohibited status (i.e. being French)
- omission - a person will not be held criminally liable for failing to act unless they were under a legal duty to act
  - specific omission offences:
    - failure to perform certain legal duties...
      - s. 215(1) - endangering life by failing to provide necessities
      - s. 216 - take reasonable care
      - s. 217 - perform undertaking
      - s. 217(1) - in a workplace

- some offences include omissions as part of the offence...
  - s. 50(b) - failure to report high treason
  - s. 79 - possessing explosives (how is this an omission?)
  - s. 127 - failure to obey a court order
  - s. 129(b) - omitting to assist a police officer
  - s. 263(3) - failure to guard a hole in the ice
- undertaking = failure to do an undertaking when it would cause a danger to help (*Browne*)
- general omission offences:
  - s. 180(2) - common nuisance - failure to discharge a legal duty thus endangering life, etc.
  - ss. 220-221 - criminal negligence causing death or bodily harm
  - note: no SCC decision whether legal duties omitted in general omission offences can be common law or only statutory
    - provincial appellate courts apply both
- criminal negligence - defined to include 1) omitting to perform; 2) a duty imposed by law and thereby having a "marked and substantial" departure from the reasonable person standard showing a wanton disregard for the lives or safety of others
  - may arise by statute or common law (i.e. *Donoghue* neighbour principle) (*Thornton*)
  - common law examples:
    - relationships of dependency (i.e. parent/child); inmates in your care (*Nixon*)
    - undertakings - must be an explicit undertaking (*Browne* - no duty between dealer boyfriend & girlfriend)
    - duty to use reasonable care in dealing with a dangerous object (i.e. rifle) (*Coyne*)
    - failure to disclose HIV+ status when donating blood (*Thornton* recognized common law duty)
    - failure to disclose HIV+ status when obtaining consent from a sexual partner (*Cuerrier* - duty found)

### Consequences and Causation

- some offences require proof that the accused "caused" a particular consequence - requires that both factual and legal causation be shown
- factual causation - must be a factual causal link between the accused's act and the prohibited consequences
  - simple preliminary issue - rare examples where this has not be established
    - **Winning** - obtaining credit by false pretense; store did not rely on the false information when granting credit
    - **Wilmot** - cyclist swerves into path of a drunk driver; acquitted of impaired driving causing death; impairment was not the cause of the death - just circumstance (*Fisher*)
      - note: **White** (NSCA, 1994) - one impairment is proven it will be assumed that impairment contributed to the accident unless there is some other innocent explanation

- **White** (UK, 1910) - tried to poison Mom who died on unrelated, independent heart attack
- legal causation - "above the *de minimus* range" or "significant contributing cause"
  - any contributing cause "above the *de minimus* range" (*Smithers*)
  - *Smithers* test has been upheld but reformulated so that it may be articulated as "significant contributing cause" (when discharging the jury) (*Nette*)
    - minority found the reformulation changed the meaning
  - UK law - must be "substantial and operating cause" (*Smith; Blaue*)
- thin skull rule - a wrongdoer takes their victim as they find them; the victim's "thin skull" is not an intervening act and does not negate liability (as in tort law) (i.e. *Blaue; Smithers*)
  - both physical and personal characteristics (i.e. religious characteristics) count
- novus actus interveniens - an intervening cause will only negate legal causation if it was independent of the original act (i.e. **White** - dying of an unrelated heart attack)
  - examples of intervening causes that are not independent (defendant is liable):
    - victim refused blood transfusions on religious grounds and dies (*Blaue*)
    - victim beaten and thrown off a cliff; dies of exposure (*Meli*)
    - victim used as human shield; killed by police shooting in self-defence (*Pagett*)
    - victim causes own death while trying to avoid threats of violence (s. 222(5)(c))
    - failure to obtain medical treatment/improper medical treatment (ss. 224-225)
- remoteness - original act might be so remote that causation is *de minimus* (*Smithers*)
- homicide - causation is codified (ss. 222-(1); (5)(c); (5)(d)); exceptions and clarifications (ss. 224-228 - i.e. hastening death; victim fails to get treatment)
  - test for causation for first degree murder (s. 231(5)) - "the actions of the accused must form an essential, substantial and integral part of the killing of the victim" (*Harbottle*)
  - this does not apply to second degree murder (and may be confined to s. 231(5)) (*Cribben*)
  - note: "substantial cause" is still less than being the primary ("51%") cause

### Circumstances

- where an act becomes an offence in a certain circumstance - i.e. driving is legal; drinking is legal; drinking & driving is illegal (nudity in public; alcohol in public)
- status offences - some offences criminalize the status of the person (i.e. nudity; being foreign)
  - subject to substantial controversy - should it be a PFJ that immutable statuses be exempt?
    - *Malmo-Levine* - a PFJ must be a manageable standard and have societal consensus
  - example - French citizen charged for being an alien in the UK when her visa was revoked (*Larsonneur*)

# Mens Rea

## Subjective (Full) Mens Rea

- if the statute is silent on the issue of mens rea (does not specify) then any form of subjective mens rea is sufficient (*Buzzanga*)
  - the court may apply an objective test for evidentiary purposes - the greater the (objective) likelihood that the defendant had the appropriate state of mind the greater the likelihood that the subjective state of mind can be inferred
- if circumstances show that an act occurs in subjection to the power of another the jury should not infer intent unless the prosecution can prove intent was present (*Steane*)
  - in free actions it may be assumed that one intends the natural consequences of one's actions (overruled by *Chartrand??*)
- willfully = intention; generally mean intentionally (see below) and not recklessly or negligently (*Buzzanga*)
  - for some offense it is statutorily defined to also include recklessness/negligence - all offences under Part XI (ss. 429 - 447)
  - "for knowledge"?? (Duong)
- intention - there are two different forms of intent (*Buzzanga; Chartrand*)
  - direct intent - acting with the intent/purpose/desire of bringing about the prescribed harm
  - indirect intent - acting without the intent/purpose/desire of bringing about the prescribed harm but foreseeing that the harm is "certain or substantially certain to result" (*Buzzanga*)
    - i.e. the harm must be a "virtual certainty" and not merely "highly probable"
  - the words "with intent to" (s. 281 - *Chartrand*) and "for the purposes of" (s. 21(1)(b) - *Hibbert*) include both meanings
- reckless - when a person has knowledge of a danger or risk and persists in conduct that creates the risk that the prohibited result will occur (*Sansregret*)
  - "reckless+" = foresee the harm as probable and likely (s. XI)
- knowledge - subjective knowledge of some fact or state of affairs
  - note: willful blindness satisfies the requirement for knowledge (*Duong*)
- willful blindness - someone who refuses to look because doing so will fix them with knowledge (*Sansregret*); where a person becomes aware of the need to make some inquiry but does not in order to avoid learning the truth (*Sansregret; Bricoe*)
  - a dangerous rule and of limited application (*Sansregret*)
  - subjective test - defendant must have had actual suspicions and not just "ought to" have suspected (*Currie*)
  - what would have happened had inquiries been made is irrelevant - it is the state of deliberate ignorance that is culpable and not the hypothetical knowledge to be acquired (*Duong*)
    - that alternative (non-culpable) scenarios were contemplated is irrelevant

- note: the academic commentary in Roach notes that this is meant to be a limited test - the defendant must "almost know"; intended to prevent someone from "cheating" the administration of justice

### Objective Mens Rea

- no personal characteristics are included in the objective assessment of mens rea (*Creighton*)
- objective forms of mens rea cannot be applied to stigma offences (*Vaillancourt*)
  - murder, attempted murder & theft (*Vaillancourt; Martineau*)
  - war crimes & crimes against humanity (*Finta*)
  - these crimes are few in number - unlikely more will be added (*Finta*)
  - note: it is constitutional to apply objective forms of mens rea to non-stigma offences (*Creighton*)
- offences that use words such as "knowingly; willingly; with intent; without lawful excuse" are full (subjective) mens rea offences (*Pierce Fisheries*)
- criminal negligence - defined in s. 219 (invoked in ss. 220-222)
  - "marked and substantial departure" from the conduct of a reasonable person which shows a "wanton and reckless disregard for the lives or safety of other persons" (*Tutton; Waite*)
  - assessed on an objective standard (*R. v. F(J)*)
- penal negligence - a "marked departure" from the conduct of a reasonable person (*Hundal*)
  - this is a stricter requirement than civil negligence (which is "any departure")
  - common law standard that has been applied to:
    - s. 86(1) - careless use or storage of a firearm (*Findlay*)
    - s. 249 - dangerous driving (*Hundal*)
    - s. 436 - arson by negligence
  - a "momentary lapse" of attention (in the context of dangerous driving) can't establish penal negligence unless it's part of a larger pattern that deviates markedly from the norm (*Beatty*)
  - BUT... allowance for exculpatory defence - acquittal if there is reasonable doubt that a reasonable person would have appreciated the risk or could have/would have done something to avoid creating the danger (*Beatty*, ¶37)
    - BUT... personal attributes such as age, experience & education are not relevant - it is the conduct expected of the reasonably prudent person in the circumstances (*Beatty*, ¶40)
- true crimes - cannot have less than penal negligence as the mens rea requirement as true crimes require that the Crown prove a guilty mind
  - BUT... some such crimes do use the previous forms of objective mens rea (*Hundal*)
  - absent a clear intention to the contrary offences in the CC are presumptively true crimes (*Pure*)
- regulatory offences - are presumed to carry strict liability unless the offence expressively contains words of mental fault
  - such offences will carry absolute liability only if the legislature makes it expressly clear OR by the implication that guilt automatically follows upon proof of the actus reus (based on subject matter and the relative unimportance of the penalty) (*Marie*)



- if the offence effectively eliminates the defence of due diligence it has absolute liability (*Pontes*)
- strict liability - the Crown only need prove the actus reus (BRD) - no mens rea needs to be shown BUT the accused can advance a due diligence defence (*Sui St Marie*)
  - if the statute is silent strict liability is the default mens rea for a regulatory offence (*Marie*)
  - the minimum fault requirement of civil negligence satisfies the s. 7 requirements for strict liability regulatory offences (*Wholesale Travel*)
  - that due diligence must be proven by the defendant on a BOP does not violate the *Charter* (*Wholesale Travel*)
- absolute liability - no mens rea - the Crown only needs to prove actus reus (BRD); there is no defence (*Marie*)
  - not permitted when the punishment involved a potential loss of liberty - violates s. 7 (*Motor Vehicle*)
  - note: the *BC Offence Act* (ss. 6 & 82) provide that no person may go to jail for an absolute liability offence (or non-payment of fines)

# Sexual Assault

## Substantive Law

- sexual assault is an assault (per s. 265) in circumstances of a sexual nature whereby the sexual integrity of the victim is violated
- the actus reus of sexual assault involves three elements (*Ewanchuk*):
  - **touching** (assessed objectively - was there touching?)
  - **in a sexual context** (assessed objectively - what would a reasonable person conclude?) (*Chase*)
    - the sexual nature of the assault is assessed objectively (eyes of the reasonable observer) and may be inferred from: the body part touched; the nature of the contact; the situation in which it occurred; the words and gestures accompanying the act; and any other surrounding circumstance (*Chase*)
  - **without the complainant's consent** (subjective: what was the complainant's state of mind?)
    - consent is defined as voluntary agreement to engage in the sexual activity in question (s. 273.1)
    - this may be more than the complainant's testimony that she didn't consent
    - note: at the acute reus state the defendant's state of mind is irrelevant - only the complainant matters
- the mens rea of sexual assault contains two elements:
  - an **intention** to touch
  - **knowing** of - or being reckless or willfully blind to - a **lack of consent**
    - in some circumstances ostensible consent can be rendered of no legal effect (s. 265(3))
    - i.e. s. 265(3)(b) - where the complainant consents solely to avoid physical violence; the complainant's fear need not be reasonable nor must it be communicated to the defendant (*Ewanchuck*)

## Background

- prior to 1983 - rape was essentially a property offence (against the husband/father of the woman)
  - only men could commit it; could not rape your wife
  - girls under 14 and "previously chaste" girls under 16 were given additional protection
  - rape of makes carried additional liability
- also carried special evidentiary rules to protect the defendant:
  - corroboration requirement - complainant must be corroborated (*abolished* - s. 274)
  - recent complaint - non-immediate reports viewed as suspicious (*abolished* - s. 275)
  - past sexual history - "unchaste women" were 1) more likely to have consented; and 2) more likely to lie (less trustworthy) - the **twin myths** (*abolished* - s. 277 - but see below)
- 1983 amendments - abolished rape laws - instituted sexual assault laws (ss. 271-273)
  - revised evidentiary rules
  - instituted mistaken belief in consent (s. 265(4)) and publicity bans (s. 486)

- note: originally there was a blanket exclusion of past sexual history as evidence except under narrow conditions
  - this was struck down as too narrow in *Seaboyer*
  - ss. 276-276.5 were enacted in response - essentially codifying the majority's approach

### Procedural Issues

- rape shield - s. 276(1) prohibits adducing evidence intended to support the "twin myths" (more likely to have consented/less worthy of belief) (*Darrach*)
  - s. 276(1) prohibits evidence of a complainant's sexual history if it is being used to support either of the twin myths
  - s. 276(2) provides that - before admitting evidence of prior sexual history - the judge must determine (according to the procedures in s. 276.1-276.2) that the evidence is:
    - relevant to an issue at trial; and
    - has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice
  - s. 276(3) provides that in determining whether such evidence is admissible the judge must consider at least eight listed factors in an attempt to balance the defendant's, complainant's & society's interests
- disclosure of personal records:
  - the prosecutor must disclose all "relevant evidence" that they possess (*Stinchcombe*)
    - i.e. any personal records of the complainant that the prosecutor has copies of (*O'Connor*)
  - records held by third parties can be obtained by subpoena; this process is governed by ss. 278.1-278.9 - two-step procedure (modeled after the dissent in *O'Connor* and summarized in *Darrach*):
    - the defence must first apply in writing under s. 278.3 with grounds to establish that the record is "likely relevant" - on a *voir dire* the judge may order the holder of the record to produce it if the defense can demonstrate that the record is "likely relevant" and "is necessary in the interests of justice"
    - the judge must then determine whether to admit balancing the competing rights of the accused to make full answer/defence and the complainant's privacy rights
      - a list of factors to consider is included in the CC

# Defences

## Mistake of Fact - Non-Sexual Assault

### Steps

- determine the mens rea for the offence
  - apply this mens rea for every element of the offence (unless this is an offence to which the principle of symmetry does not apply - such as an offence based on a predicate offence)
- apply this test to the (alleged) mistaken fact:
  - **was the mistake honest?**
  - **was the accused willfully blind (or maybe reckless)?**
    - willful blindness will negate the "honesty" of the mistake; recklessness may also be sufficient to negate the mistake
  - **must the mistake be reasonable?**
    - if the mens rea is subjective the mistaken belief need not be reasonable (*Pappajohn*); although the test remains subjective, common sense inferences may be relevant in determining whether the alleged mistake is believable
    - if the mens rea is objective the mistake must be reasonable (*Hundal; Beatty*)
  - **is the accused's mistake innocent?** (*Ladue*)
    - if the accused did not have the necessary mens rea to commit this particular offence - but thought they were committing another offence (similar in nature and seriousness) - it may be a situation where the mens rea may be "transferred"

### Burden

- for this defence to be considered the accused must establish that there is an air of reality to it
- once this is established the onus is on the Crown to disprove (BRD)
- the defence negates the mens rea = acquittal

## Mistake of Fact - Sexual Assault

### Requirements for Mistaken Belief in Consent Defence

- the mens rea for sexual assault is subjective
- apply this test to the (alleged) mistaken fact:
  - **was there an "honest" but mistaken belief in consent?**
    - did the accused honestly believe the complainant communicated by words or conduct her agreement to engage in the sexual activity? (*Ewanchuck*)
    - belief that silence, passivity, or ambiguous conduct constitutes consent is a mistake of the law and provides no defence (*R. v. M*)
    - did the accused's belief arise from the accused's self-induced intoxication? if so, no defence (s. 273.2(a)(i))
    - did the accused's belief arise from the accused's willful blindness or recklessness? if so, no defence (s. 273.2(1)(ii))
  - **did the accused take reasonable steps - in the circumstances known to the accused at the time - to ascertain that the complainant was consenting? if not, no defence** (s. 273.2(b) confirmed by *Ewanchuck; R. v. M*)

### Burden

- for this defence to be considered the accused must establish that there is an air of reality to it
- once this is established the onus is on the Crown to disprove it (BRD)
- note:
  - in the context of mistaken belief in consent there is no requirement that there be a source of evidence other than the accused
  - BUT... mere assertion that "he believed she was consenting" is not sufficient - there must be something in the facts to support the assertion (*Onsolin*)
- the defence negates the mens rea = acquittal

## Mistake of Law

Section 19: "Ignorance of the law by a person who commits an offence is not an excuse for committing an offence."

### Rationale for s. 19 (Jorgensen)

- defence of ignorance of law would involve insuperable evidential problems
- it would encourage ignorance when knowledge is socially desirable
- otherwise everyone would be a law upon themselves, infringing the principle of legality and defying the rule of law
- ignorance of the law is blameworthy in itself

Accused may want to circumvent s. 19 by arguing the mistake was one of mistake of fact or mixed mistake of law/fact.

### Exceptions to s. 19

- **not published in the Gazette**
  - *BC Regulations Act* (s. 7) AND *Statutory Instruments Act* (s. 11(2)) states: no person shall be convicted of an offence set out in a regulation unless the regulation was published in the *Canada Gazette*
- **Colour of Right** (i.e. *Howson*)
  - is the honest but mistaken belief that you have a right in law to the property taken
  - a colour of right based mistaken belief that can prevent the Crown from establishing the fault element for theft BRD
    - for this defence to be considered the accused must establish that there is an air of reality to it
    - once this is established the onus is on the Crown to disprove it (BRD)
    - the defence negates the mens rea = acquittal
- **mistake as to Civil Law Deemed Mistake of Fact for Criminal Offences**
  - if a person charged with a criminal offence makes a mistake about a civil law that is an essential element of the offence, the mistake will be characterized as a mistake of fact
  - you're expected to know the criminal law but you're not expected to know the intricacies/complexities of the civil law when being charged criminally
  - *Prue & Baril vs. MacDougall*:
    - both cases - accused did not know license was suspended
    - ***Prue & Baril*** - the accused was charged with a *Criminal Code* offence and the mistake was held to be a mistake of fact, not a mistake of law
      - a mistake as to civil law - i.e. whether one's license was suspended automatically under the provincial *Motor Vehicle Act* - will be considered a mistake of fact when it is an essential element on an offences under the *Criminal Code*
    - ***MacDougall*** - the accused was charged with *Motor Vehicle Act* offence - not a criminal charge - and the mistake was a mistake of law
- **negating mens rea when the Crime Requires Knowledge of Law**

- if mens rea is defined in such a way that mistake of law negates proof of mens rea (i.e. mistake of law will negate "willfully/knowingly")
- example - accused is doing something they thought was legal and is charged with willfully breaching a probation order; the mistake of law will negate the mens rea (*Doherty*)
  - this is an exception that negates mens rea
  - onus is on the Crown to prove it (BRD)
  - if the defence negates the mens rea = acquittal

## **Officially Induced Mistake of Law**

### Elements

- accused made error of law or mixed error of fact/law
- person who committed the act considered the legal consequences of their actions
- obtained advice from an appropriate official who is responsible for the administration of the law
- the advice was (objectively) reasonable
- the advice was erroneous
- there was reasonable reliance on the advice - would a reasonable person in a similar situation have relied upon the information/opinion? factors to include:
  - efforts of the accused to obtain the information
  - clarity/obscurity of the law
  - position/role of the official who gave the information
  - clarity, definitiveness & reasonableness of the information or opinion
- this is an exception - acts as an excuse
- the burden is on the accused to prove (BOP)
- judges decides; if successful = stay of proceedings



## Intoxication

### Requirements

- determine whether or not the defense is a specific intent or general intent offence
  - distinction is **ONLY** relevant to the defence of intoxication
- general intent - intent only involves the intent to move the body/apply force (simple mens rea)
  - normal intoxication is NOT a defence - except if intoxication akin to automatism (*Daviault*)
  - exception - general intent offenses involving interference with bodily integrity (s. 33.1) - no defense even if akin to automatism (*Daviault*)
- specific intent - mens rea involved more intention or foresight; must involved other purposes or foresight of certain consequences or other extra mental activity
  - normal intoxication = defence - except where part of the offence itself (i.e. drinking and driving)
- neither the normal intoxication defence nor the extreme intoxication defence can be used for an offence with an objective mens rea
  - the reasonable person is never intoxicated
  - voluntary intoxication cannot be used as a defense for status offences

<b>General Intent Offences</b> (no magic words - probably general)	<b>Specific Intent Offences</b> ("with intent to"; "for the purpose of")
Assault Assault Causing Bodily Harm <i>Assault of a Police Officer?</i> Aggravated Assault <i>Break and Enter?</i> Criminal Harassment Incest Indecent Assault Manslaughter Sexual Assault Unlawful Confinement Willful Obstruction of a Police Officer	Aiding and Abetting Arson Assault with Intent to Resist Arrest Assaulting a Police Officer Attempted Murder <i>Assaulting a Police Officer?</i> Attempted Murder Attempt of any Offence <i>Break and Enter?</i> Murder Possession of Stolen Property Robbery Theft Sexual Exploitation Willfully Causing a Fire

### Burden

- onus is on the Crown to prove specific intent (BRD)
- onus is on the defendant to prove intoxication akin to automatism (BOP)
  - for general intent offences not excluded by s. 33.1
- for specific intent offences - negates the mens rea
- for general intent offences - negates the actus reus

## Not Criminally Responsible due to Mental Disorder (NCRMD)

### Requirements

- to establish that an accused is NCRMD the accused must establish (per s. 16):
  - the act was committed or the omission was made while the accused was suffering from a mental disorder (= disease of the mind - per s. 2)
  - that the mental disorder rendered the person incapable of:
    - appreciating the nature or quality of the act or omission OR
    - knowing that it was wrong
- "disease of the mind":
  - legal term - to be determined by the judge (*Simpson*, affirmed by Martin J. in *Cooper*); the test is something to be determined by the courts because it is a legal test and not a medical/scientific test
    - the courts are best suited to defining this in the context of determining a legal question
  - any illness, disorder, or abnormal condition which impairs the human mind and its function (*Cooper*)
  - BUT... excludes self-induced states caused by alcohol or drugs as well as transitory mental states such as hysteria or concussion (*Cooper*)
- "appreciating the nature or quality of the act or omission":
  - **Cooper** - stated what this would occur when - because of the mental disorder - the accused could not know what they were doing and could not understand the consequences of the act
  - this excludes having to feel a certain way about the impact of the act (*Kjeldsen*) or appreciating the penal consequences (*Abbey*)
- knowing it was wrong"
  - **Chaulk & Morissette** - "wrong" did not just mean legally wrong but meant morally wrong as regarded by society - so the act/omission must be both morally and legally wrong in the mind of the accused to count
  - **Oomen** - whether the accused was able to rationally decide whether the act was wrong and therefore whether to commit the act

### Burden

- Section 16(2) - presumption of sanity unless the contrary is proven on BOP
- Section 16(3) - reverse onus; onus is on the party raising the issue of NCRMD (*Chaulk*)
- **Swain** - the SCC held that:
  - the accused may raise NCRMD during the trial
  - the Crown may raise NCRMD during the trial only if the judge has determined that the accused has made an issue of their mental capacity for criminal intent
  - either the accused or the Crown may raise NCRMD after the trier of fact finds the accused guilty but before the verdict of guilty is entered
- the defense can operate in three ways:
  - negate actus reus (insane automatism)
  - negate mens rea

- an excuse or exemption even though both actus reus and mens rea are present
- possible outcomes - review board (s. 672.54); review every year (1992):
  - release without conditions
  - release with conditions
  - detention in hospital
    - no acquittal
    - but you are considered NCRMD while within the system; may actually be held longer than if found guilty
    - twin goals: fair treatment of the mentally ill & public safety

## Provocation

### Section 232:

- (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.
- (2) A wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted on it on the sudden and before there was time for his passion to cool.

### Requirements

- re: s. 232(2) - race/ethnicity is not erased from the process; if an insult is given to someone of a particular group then it will be taken into consideration in the ordinary person "of that race and ethnicity" test
  - BUT... if your ethnic beliefs violate *Charter* values then you can't fall back on them (*Humaid*)
- **accused must be provoked by a wrongful act or insult**
  - "insult" is defined broadly as "injuriously contemptuous speech or behavior, scornful utterance, action intended to wound self-respect; an affront; indignity" (*Thibert*)
- **the wrongful act or insult must be sufficient to deprive an *ordinary* person of the power of self-control**
  - objective test
  - test is not whether an ordinary person under provocative circumstances would have done exactly what the accused did - test is whether an ordinary person would have lost control under the provocative circumstances (*Carpenter*)
  - "ordinary person" - normal temperament and level of self-control - not exceptionally excitable or in a state of drunkenness (*Hill*)
  - "ordinary person" - same age and sex, as well as share other factors with the accused that would give the act/insult in question a special significance (*Hill* affirmed in *Thibert*)
    - racial background is relevant if the insult is a racial slur (*Hill*)
    - young age is relevant to the degree of self-control expected of an ordinary person BUT... the degree of self-control the law expects does not vary with a person's gender/race/culture (*Hill*)
    - the "ordinary person" does not necessarily have all the life experience of the accused (*Friesen*)
    - cultural background can be taken into account in the "ordinary person" test (*Nahar* - questioned by *Humaid*)
  - it is proper for the jury to consider the background relationship between the deceased and the accused, including whether earlier insults which culminated in the final provocative actions/words (*Thibert*)

- while certain attributes may be attributed to the "ordinary person", this does not mean that the trial judge must in each case tell the jury what specific attributes to ascribe to the ordinary person (*Hill*)
- **the accused must be acting in response to the wrongful act or insult on the sudden and before there is time for their passion to cool**
  - suddenness applies to both the insult/wrongful act and accused's reaction to it (*Tran*)
  - sudden --> strikes upon a mind unprepared for it; must make an unexpected impact that takes the understanding by surprise and set the passions aflame (Rand J. in *Tripodi*)
    - subjective test (???)
    - if A insults B and B goes away to brood on the matter and then returns to kill A, the requirement of suddenness is not met (*Salamon*)
  - an act shall not be deemed to constitute provocation if (s. 232(3)):
    - the victim had a legal right to do something
      - such as in self-defence (*Haight*)
      - "legal right to do" means a right which is sanctioned by law (*Thibert*)
      - thus, even though insults are not prohibited, this does not mean a person has a legal right to insult others
    - the accused incited the victim to do something in order to give the accused an excuse to cause bodily harm or death

### Rationale

- defence first developed in ***R. v. Hayward*** (1833)
- belief that a person who momentarily loses their power of self-control due to a wrongful act/insult and kills another in anger is less blameworthy and therefore deserving of a lesser punishment
- the law recognizes some leniency for the human frailty of losing one's temper
- note: it is only a partial excuse and never a justification; the defence does not render the conduct lawful

### Burden (timing is a bit wonky)

- the Crown must first prove all the elements of murder (BRD)
- the defence must then show an "air of reality" of the defense
- the defence of provocation must then be put to the jury and the Crown must disprove it (BRD) (*Thibert*)
- provocation does not negate the actus reus or mens rea (*Campbell; Cameron; Parent*)
  - provocation could go towards proving intent
- provocation is a partial excuse to murder only
  - if successful it reduces murder to manslaughter
  - the defense does not render the conduct lawful (not a justification) but may provide a reason in law and policy not to punish (partial excuse)
- it is not a defense to attempted murder (*Campbell*)

## Self-Defence - No Provocation

Section 34(1) - "Everyone 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." [emphasis added]

### Requirements

- accused reasonably believes (or has a reasonable but mistaken belief) that they are subject to an unlawful assault (but not an assault posing threat of death or grievous bodily harm - *Pawliuk*)
  - if accused reasonably apprehended death or GBH then s. 34(2) will apply
- accused did not provoke the assault
  - provocation includes blows, gestures, words (s. 36)
  - engaging in consensual fight disentitled combatant to rely upon this section (*Paice*)
- accused did not intend to kill or cause GBH in his response, though death or GBH may have resulted
- the force used was no more than necessary to defend against the unlawful assault
  - objective assessment
- no duty to retreat, though failure to retreat where reasonably available...???
- note: reasonable person is not intoxicated - defence is still available but must be despite intoxication and meet reasonableness standard

### Burden

- objective burden - defence must raise an air of reality for each element of the offense before the judge will put the defense to the jury (*Cinous*)
- the Crown bears the burden for disproving the defence (BRD)
- statutory defence that provides a justification for the offence
- no partial justification - excessive force will render the defence inapplicable
  - jury will then address whether the intention to cause death/GBH was present

### Difference Between the Self-Defence Sections

- s. 34(1) - cannot provoke; cannot intend to cause physical harm; any unlawful assault is sufficient; only allowed to use reasonable force to deter
- s. 34(2) - can provoke; can intend to cause physical harm; must fear death or GBH; can cause death or GBH if perceived to be the only option available
- s. 37 - if did not fear death or GBH, then need to use this section...
  - if the accused has been provoked and therefore doesn't fit in s. 34(1)
  - for defence of third parties

### Policy Concerns re: Self-Defence Sections

- difficult to prove that the response was reasonable
- difficult to ascertain exactly what level of threat was perceived by the accused
- should self-defence be available to those who provoked an attack (s. 34(2))?

- issue of the immediacy of the threat
- no need to retreat - could this provoke violence or make the defence too broad?
- should s. 37 be available to fill in gaps? does this make the defense too broad?

## Self-Defence - Possible Provocation (*McIntosh*)

### Requirements

- accused reasonably believed they were subject to an unlawful assault, which requires:
  - a subjective test - the accused actually believed they were in danger of death or GBH
  - an objective test - a reasonable person - in the position of the accused - would have considered themselves in danger of death or GBH
- accused reasonable apprehended death or GBH from the assault
  - subjective part - diminished intelligence of an accused should be taken into account in deciding whether the accused's apprehensions and beliefs were reasonable (*Nelson*)
  - objective part - what would the reasonable person think?
    - reasonable standard does not take into account intoxication - reasonable person is sober (*Reilly*)
- accused must believe - on reasonable grounds - that they cannot otherwise preserve themselves from death or GBH
  - subjective part - the degree of necessary force
    - the force used may be more than is actually necessary provided that the accused reasonably believed that the force was necessary (*Baxter*)
    - there is no express requirement to retreat - but failure to retreat may be considered a significant factor in deciding whether the accused belief was on reasonable grounds (*Cinous*)
  - objective part - whether the accused's belief was on reasonable grounds - should not take into account the accused's participation in a criminal sub-culture (*Cinous*; *Pilon*)
    - accused cannot rely on intoxication as a factor in arguing that their beliefs were reasonable (*Reilly*)
    - diminished intelligence of an accused should be taken into account in deciding whether the accused's beliefs were based on reasonable grounds (*Nelson*)
- note: s. 34(2) expressly states that it only applies when death or GBH is actually caused - appears to be a fourth requirement
  - if death/GBH is not caused, then can argue there is a gap and rely on s. 37
  - can also argue that "even" should be read in to the provision

### Burden

- the defense must convince the judge that an air of reality for each component of the defence is present
- it is then for the trier of fact to determine if the defence stands - jury applies test
- defense provides a justification = acquittal



## **Self-Defence - Section 37**

### Section 37

- (1) Everyone is justified in using force to defend himself or any one under his protection from assault, if he uses no more force that is necessary to prevent the assault or the repetition of it.
- (2) Nothing in this section shall be deemed to justify the willful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

### Requirements

- s. 34 is unavailable (only put to the jury in these cases)
- the accused reasonably believed the person (self or third party) was subject to an unlawful assault
  - "anyone under his protection" = "anyone who requires protection which the accused may be able to provide" (*Webers*)
- the force used was no more than necessary to prevent the assault or its repetition
  - objective test - the reasonable person'd opinion of the degree of force necessary (proportionality test)
  - no other defences available
  - the willful infliction of any hurt or mischief was not excessive, having regard to the nature of the assault that the force used was intended to prevent

### Burden

- if there is an air of reality on all three of the requirements then the Crown must prove that at least one of the requirements is rebutted (BRD)
- the defence is a justification = acquittal

## Automatism - Common Law Defence

Automatism is a state of impaired consciousness, rather than unconsciousness, in which an individual, though capable of action, has no control over that action (*Stone*)

### Requirements

- Mental Disorder (Insane) Automatism - caused by disease of the mind = NCRMD
- Non-Mental Disorder (Non-Insane) Automatism - no DOTM = acquittal
  - caused by...
    - physical blow
    - physical conditions (i.e. diabetes, strokes)
    - psychological blows
      - **Rabey** - "A majority of the Supreme Court held that unconscious (dissociative) conduct caused by a psychological blow arising out of the ordinary stresses and disappointments of life will normally be attributable to an internal, psychological weakness in the accused's make-up. Thus, it will be classified as a disease of the mind and therefore the proper defense in mental disorder (insanity), but not automatism."
        - things that are extraordinary may be said to cause non-insane automatism - i.e. seeing your child killed

### Test from *Stone*

- air of reality? proper foundation for automatism? evidence on which a jury could acquit if believed to be true? (*Fontaine*)
- was the act involuntary? (an impaired act not the product of conscious control)
  - presumption of voluntariness
  - accused must assert involuntariness - experts must confirm in all cases of automatism - assertion + expert evidence = likely to go to the jury (*Fontaine*)
- mental disorder or non-MD automatism?
  - DOTM - mental disorder claim (not automatism)
  - DOTM conditions - question of mixed law and fact
    - whether the accused actually suffered from conditions is a question of fact for the jury (*Simpson; Cooper*)
  - DOTM? - presumed DOTM to start and then a holistic approach informed by:
    - internal cause factor (*Rabey*)
      - psychological blow automatism requires evidence of "an extremely shocking trigger" in order to be considered an external factor and not a result of a DOTM
      - not just stress (contextual objective test)
      - if malfunctioning of the mind is caused by some external factor (i.e. blow) it is not a DOTM and non-MD automatism is the proper defence
      - dissociative conduct from a psychological blow from ordinary stress = internal weakness and should be DOTM (insanity)
- continuing danger test (*Parks*)
  - look at the accused's history - what's the likelihood that a trigger will cause a repeat

- how do you know you're not going to re-offend (*Stone*)
- if there's a likely recurring danger then treat as insanity (and vice versa)
- policy concerns
  - fear of fabrication
  - public disillusionment with an acquittal
  - can't monitor the accused afterwards like with NCRMD
  - consider: the trigger; corroborating evidence from bystanders/experts; medical history

### Burden

- MD automatism - see NCRMD; accused dealt with under s. 16
- non-MD automatism - the accused must prove the act was involuntary (BOP)
  - the defence negates the actus reus - concerns the voluntariness of the act (*Stone*)
  - full acquittal

## **Duress - Section 17 & Common Law Defence**

Section 17 - A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused from committing the offence if the person believes that the threats will be carried out and if the person is not party to a conspiracy or association whereby the person is subject to compulsion, but this section does not apply where this offence that is committed is... [see list of excluded offences]

### Common Law Requirements

- common law defence was preserved under s. 8(3)
- accused subject to threat of death or serious injury to self or other person; close temporal connection between threat and its execution required (but does not need to be immediate) (*Ruzic*)
- accused committed offence exclusively as a result of the threat; must believe threat will be carried out if offence not committed
- threat of such gravity that it may well cause a reasonable person in the same situation to respond to the threat by committing the offence
  - objective-subjective test applied - proportionality between threat & offence
- accused has reasonable belief in no reasonable avenue of escape
  - objective-subjective test applied
- accused must not be a voluntary member of a criminal association whereby they knew they may be subject to compulsion by threats

### Principal & Secondary Parties

- ss. 21-22 - lay out who are considered parties to an offence
- s. 21(1)(a) - principal = the individual who actually commits the offence
- all other parties are secondary parties - ss. 21(1)(b); 21(1)(c); 22
- whether someone is the principal or a secondary offender is to be decided as a matter of fact by the jury (*Mena*)

### Burden

- the defence needs to provide an air of reality and then the Crown must prove the absence of the defence (BRD)
- the defence is an excuse - it does not negate mens rea
- raised after the elements of the offence are established BRD (*Hibbert*)

### Excluded Offences - Section 17

- high treason/treason
- murder
- piracy
- assault with a weapon
- threats to a third party or causing bodily harm
- aggravated sexual assault
- forcible abduction

- hostage taking
- robbery
- assault with a weapon or causing bodily harm
- aggravated assault
- unlawfully causing bodily harm
- arson
- abduction and detention of young persons (ss. 280-283)

	<b>Section 17 Pre-Ruzic</b>	<b>Common Law (Paquette; Mena; Ruzic)</b>	<b>Section 17 Post-Ruzic subjective</b>
Applies to Principle Offenders (the person who does the act)?	Section 17 applied to principles but not secondary parties for all offences	Applies to principles for all offences except those listed in s. 17	Section 17 applies
Applies to "secondary" parties (aiders/abettors)?	No ( <i>Paquette</i> )	Yes ( <i>Paquette</i> ) - and can be used for excluded offences in s. 17	No
Nature of threat required?	Bodily harm	Serious bodily harm	n/a
Basis for assessing safe avenue of escape?	Subjective test ( <i>Mena</i> )	Modified objective test	n/a
Presence requirement?	Yes	No - common law never required	No - struck down as s. 7 violation
Immediacy requirement?	Yes	No - common law never required (though close temporal connection between threat & offence required)	No - struck down as s. 7 violation

## Excuse vs. Justification

A justification renders the conduct unlawful - "challenges the wrongfulness of an action which technically constitutes a crime"

- asserts that - while the action was technically criminal - it was not wrong and therefore should not be punished (Dickson J. in *Perka*)
- examples - an innocent victim of an assault uses force to defend themselves; a police officer shoots a hostage-taker in order to save the hostages

An excuse does not render the conduct unlawful but may provide some reason in law and policy not to punish - "concedes the wrongfulness of the action, but asserts that the circumstances under which it was done are such that it ought not to be attributed to the actor" (Dickson J. in *Perka*)

- **Ruzic** - "An excuse acknowledges the wrongfulness of the accused's conduct, but nevertheless, the law refuses to attach penal consequences to it because an 'excuse' has been made out." (¶139)
- examples - an actor who was unable to appreciate the nature/consequences of their actions due to mental illness; a lost hiker who breaks into a cabin to avoid freezing to death - defence of necessity (LeBel J. in *Ruzic*)
- the defences of mistake of fact, intoxication, automatism, and mental disorder are all excuses (not justifications)