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Criminal Law Process

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The Burden of Proof

- The trier of fact is to presume that the accused is innocent until the Crown can prove, **beyond a reasonable doubt**, that they are not. This onus is always on the Crown; it never shifts. (*Oakes*)
- Proof “beyond a reasonable doubt” falls short of proof to an absolute certainty, but is stronger than proof that Δ is “probably guilty”. (*Lifchus*)
 - *Lifchus* provided a definition of “reasonable doubt” (RHT 231 [39]); it was not intended to be strictly adhered to, but subsequent caselaw has demanded “substantial compliance” (*Starr*)

Actus Reus

- The *actus reus* of an offence must be a voluntary act or omission that either causes a proscribed harm or occurs in prohibited circumstances. It must be contemporaneous with the *mens rea*.

Voluntariness

- A person who commits a criminal act **involuntarily** must be acquitted (*Ruzic*)
 - This refers to **physical** involuntariness; for moral involuntariness, see Automatism, below. (*Ruzic*)
 - Acting while unconscious is involuntary. Conscious acts that are involuntary include spasms, reflexive acts, unexpected mechanical failures, accidental falls, and being physically compelled.

Contemporaneity

- The *actus reus* and *mens rea* must **coincide** at some point during the commission of the act (although not necessary throughout). I.e. they must be **contemporaneous** or **concurrent**. (*Cooper*)
 - The accused’s separate acts/omissions may be viewed as “one continuous act or transaction” by the court, which makes finding contemporaneity easier. (*Fagan*)
- **UK law:** An unintentional act **followed by** an intentional/reckless omission to rectify it may be sufficiently contemporaneous *mens rea* (left to jury). If there was an “element of adoption” the unintentional act, that supports a finding of contemporaneity. (*Miller*)
- **Examples:**
 - Δ accidentally parks on officer’s foot, deliberately delays moving. Concurrent. (*Fagan*)
 - Δ falls asleep with cigarette, wakes up to fire, leaves. Concurrent. (*Miller*)
 - Δ attacks someone while drunk, but kills while unconscious. Concurrent. (*Cooper*)

The Prohibited Act, Omission, Status, or Circumstances

- An offence usually requires a prohibited act, but it could be an omission to fulfil a legal duty, an otherwise legal act occurring in prohibited circumstances, or a prohibited status (e.g. being French).

Omissions

- **Specific Omission Offences:**
 - It is a crime to fail to perform certain legal duties, such as those in *CC* s. 215-217 (endangering life by failing to provide necessities, perform undertakings, or take reasonable care, resp.)(**M 428**)
 - Some offences include omissions as part of the offence, such as failing to report high treason (s. 50(b)), failing to obey a court order (s. 127), or omitting to assist a police officer (s. 129(b)).
- **General Omission Offences:**
 - s. 180(2): Common Nuisance. Failure to discharge a legal duty, thus endangering life/*etc.* (**M 339**)
 - ss. 220/221: Criminal Negligence Causing Death or Bodily Harm. (**M 437**)
- **Criminal negligence** is defined in *CC* s. 219 to include omitting to perform a duty imposed by law and thereby showing wanton disregard for the lives or safety of others. (**M 434**)
 - Such a duty may arise by statute or common law (e.g. *Donoghue* neighbour principle) (*Thornton*)

- **Examples:**
 - Failure to disclose that one is HIV+ when donating blood; common law duty recognized (*Thornton*)
 - Failure to disclose that one is HIV+ when obtaining consent from sex partner. Duty found. (*Cuerrier*)

Status Offences

- Some offences criminalize the status of a person (e.g. nudity, being foreign). This is subject to substantial controversy; should it be a PFJ that immutable statuses be exempt?
 - cf. *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 is revoked. (*Larsonneur*)

Consequences and Causation

- Some offences require proof that the accused “caused” a particular consequence. This requires that both factual and legal causation be shown.
- **Factual Causation:** There must be some causal link between the accused’s act and the prohibited consequences. Simple preliminary issue. Examples where this has **not** been found:
 - *Winning* (OCA 1973): Obtaining credit by false pretence; the store did not rely upon the false pretence when granting credit.
 - *Wilmot* (1940): Cyclist swerves into path of drunk driver. Acquitted of impaired driving causing death; impairment was not a cause of the death, merely a circumstance. cf. *Fisher* (BCCA 1992)
 - **Note** *White* (NSCA 1994): Once 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 of unrelated, independent heart attack.
- **Legal Causation:** Any contributory cause that is “above the *de minimis* range” (*Smithers*)
 - **UK Law:** Must be a “substantial and operating cause” (*Smith, Blaue*)
 - **Reformulation:** The *Smithers* test has been upheld, but it may now also be articulated as “significant contributing cause” (for explanation to the jury). Does this change things? (*Nette*)
- **Thin Skull Rule:** As in tort law, the victim’s thin skull is not an intervening act, and does not negate liability. A wrongdoer must take his victim as he finds her. (**e.g.** *Blaue, Smithers*)
- **Novus Actus Interveniens:** An intervening cause will only negate legal causation if it was **independent** of the original act
 - **e.g.** *White* (UK 1910): dying of an unrelated heart attack is an independent intervening cause.
 - **Examples** of intervening causes that are not independent:
 - Victim injured by Δ, refused blood transfusions on religious grounds, dies. Δ is liable. (*Blaue*)
 - Δ uses V as human shield in shootout, police shoot in self-defence. V dies, Δ is liable. (*Pagett*)
 - If V causes his own death while trying to avoid threats of violence, Δ is liable. (*CC s. 222(5)(c)*)
- **Remoteness:** An original act might be so remote that causation is *de minimis*. (*Smithers*)
- **Homicide:**
 - Causation for homicide is codified in *CC ss. 222(1), (5)(c), and (5)(d)*. Specific exceptions and clarifications are contained in *ss. 224-228* (e.g. hastening death, V fails to get treatment). (**M 439**)
 - The test for causation of **first-degree murder** (under *CC s. 231(5)*) is that “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 might be confined to *s. 231(5)*) (*Cribben*)
 - **Note:** “substantial cause” is still less than being the primary (i.e. 51%) cause.

Mens Rea

Overview

- “*Actus non facit reum, nisi mens sit rea*” (The act is not guilty unless the mind is also guilty) (*Tolson*)
- **Note on Predicate Offences:**
 - A crime based on a predicate offence doesn’t need to require additional *mens rea*. (*De Sousa*)
 - **Examples:**
 - *CC* s. 269: Unlawfully causing bodily harm. Require *mens rea* for underlying unlawful act, and objective foreseeability of bodily harm (no subjective foresight required). (*De Sousa*)
 - *CC* s. 222(5)(a): Unlawful act manslaughter. Require *mens rea* for underlying offence, and objective foreseeability of bodily harm (not foreseeability of death). (*Creighton*)

Forms of *Mens Rea*

Subjective (Full) *Mens Rea*

- If a statute is silent on the topic of *mens rea*, 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 Δ had the appropriate state of mind, the greater the likelihood that that subjective state of mind can be inferred. (*Buzzanga*)
 - 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. In free actions, it may be assumed that one intends the natural consequences of one’s acts. **Overruled by *Chartrand?*(*Steane*)**
- “**Wilfully**”: Generally means **intentionally** (below), and not recklessly or negligently (*Buzzanga*)
 - **Note:** For some offences, it is statutorily defined to also include recklessness and negligence. This includes all offences under Part XI of the *Criminal Code* (ss. 429-447). (*CC* s. 429)
- “**Intention**”:
 - Includes 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 that harm is “certain or substantially certain to result”. (*Buzzanga*)
 - i.e. the harm must be a “virtual certainty”, not merely “highly probable”. (*Buzzanga*)
 - The words “**with intent to**” (in *CC* s. 281) include both meanings, above. (*Chartrand*)
 - The words “**for the purpose of**” (in *CC* s. 21(1)(b)) include both meanings, above. (*Hibbert*)
- “**Reckless**”: Where a person has knowledge of a danger or risk, and persists in conduct that creates the risk that the prohibited result will occur. (*Sansregret*)
- “**Wilful Blindness**”: Where a person becomes aware of the need to make some inquiry, but does not, in order to avoid learning the truth. (*Sansregret*)
 - A “dangerous” rule, and of limited application. (*Sansregret*)
 - This is a **subjective** test; Δ must have had suspicions, not just “ought to” have suspected. (*Currie*)
 - What would have been found out, had inquiries been made, is irrelevant – it is the state of deliberate ignorance that is culpable, not the hypothetical knowledge to be acquired. (*Duong*)
 - The fact that alternative (non-culpable) scenarios were contemplated is irrelevant. (*Duong*)
 - **Note:** The academic commentary in **Roach** notes that this is meant to be a limited test; Δ must “almost know”. It is intended to prevent someone from “cheating” the administration of justice.
- “**Knowledge**”: Subjective knowledge of some fact or state of affairs.
 - **Note:** Wilful blindness satisfies the requirement for knowledge. (*Duong*)

Objective *Mens Rea*

- Objective forms of *mens rea* cannot be applied to **stigma offences**. (Vaillancourt)
 - These include murder, attempted murder, and theft. (Vaillancourt, Martineau)
 - These include war crimes and crimes against humanity. (Finta)
 - These offences are “few in number”, and it is unlikely that any more will be added. (Finta)
 - **Note:** It is constitutional to apply these forms of *mens rea* to non-stigma offences. (Creighton)
 - Offences that use words such as “knowingly”, “wilfully”, “with intent”, or “without lawful excuse” are full (i.e. subjective) *mens rea* offences. (Pierce Fisheries)
 - No personal characteristics are included in the objective assessment of *mens rea*. (Creighton)
 - **Penal Negligence:** A **marked departure** from the conduct of a reasonable person. (Hundal)
 - **Note:** This is a stricter requirement than civil negligence (which is “any departure”).
 - This is a common law standard that has been applied to CC ss. 86(1) (careless use or storage of a firearm – Findlay), 249 (dangerous driving – Hundal), and 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)
 - **Criminal Negligence:** Defined in CC s. 219 (and invoked in ss. 220-222) (M 434)
 - A “**marked and substantial**” **departure** from the conduct of a reasonable person which shows “wanton and reckless disregard for the lives or safety of other persons”. (Tutton, Waite)
 - This is assessed on the **objective standard**. (R. v. F(J))
- **True Crimes** cannot be satisfied by either of the following forms of *mens rea* (and presumptively carry full *mens rea*) 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. (Prue)
 - **Regulatory Offences** are presumed to carry **strict liability**, unless the offence expressly contains words of mental fault.
 - Such offences will carry absolute liability only if the legislature makes it clear expressly, or by implication based on the subject matter and the relative unimportance of the penalty, that guilt automatically follows upon proof of the *actus reus*. (Marie)
 - If the offence effectively eliminates the defence of due diligence it has absolute liability. (Pontes)
- **Strict Liability:** The Crown need only prove the *actus reus* (BRD), but the accused can advance a due diligence defence. No *mens rea* needs to be shown. (Marie)
 - If the statute is silent, this is the default *mens rea* for a regulatory offence. (Marie)
 - The minimum fault requirement of civil negligence satisfies the requirements of s. 7 of the Charter for strict liability regulatory offences (Wholesale Travel)
 - **Absolute Liability:** The Crown need only prove the *actus reus* (BRD); there is no defence. (Marie)
 - This is not permitted when the punishment involves a potential loss of liberty. (Motor Vehicle)
 - **Note:** The BC *Offence Act* ss. 6 and 82 provide that no person may go to jail for an absolute liability offence (or for non-payment of fines, resp.), so this isn’t an issue anymore. (Offence Act)

Sexual Assault

Overview

- **Prior to 1983:** Rape was essentially a property offence (against the husband/father of a woman); only men could commit it, their wives were exempt, girls under 14 and “previously chaste” girls under 16 were given additional protection, and rape of males carried additional liability.
 - It also carried special evidentiary rules to protect the Δ. These included:
 - Corroboration requirement: complaint must be corroborated (*abolished* – s. 274)
 - Recent Complaint: Non-immediate reports viewed with suspicion (*abolished* – s. 275)
 - Past Sexual History: “Unchaste women” were (a) more likely to have consented, and (b) more likely to lie (i.e. less trustworthy) – the **twin myths**. (*abolished* – s. 277; but see below)
- **1983 Amendments:** Abolished rape laws, instituted sexual assault laws (*CC* ss. 271-273). Revised evidentiary rules, introduced s. 265(4) (mistaken belief in consent) and s. 486 (publicity bans).
 - **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*, in response to which ss. 276-276.5 were enacted, essentially codifying the majority’s approach.

Procedural Issues

- **Rape Shield:** s. 276(1) prohibits adducing evidence intended to support the "twin myths" (*Darrach*)
 - Section 276(1) prohibits evidence of a complainant's sexual history if it is being used to support either of the twin myths (more likely to have consented, or less worthy of belief)
 - Section 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.
 - Section 276(3) provides that in determining whether such evidence is admissible the judge must consider at least eight listed factors, attempting to balance the Δ's, V's, and society's interests.
- **Disclosure of Personal Records:** (M 592)
 - The prosecutor must disclose all "relevant evidence" that the prosecutor possesses. (*Stinchcombe*)
 - i.e. Any personal records of the complainant that the prosecutor has copies of. (*O'Connor*)
 - Records held by 3rd parties can be obtained by subpoena; this process is governed by ss. 278.1-278.9, which contain a two-step procedure (modeled after *O'Connor* dissent):(summary: *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 defence can demonstrate that the record is "likely relevant" and "is necessary in the interests of justice".
 - The judge must then determine whether to admit it, balancing the competing rights of the accused to make full answer and defence and the complainant's privacy rights.
 - A list of factors to consider is included in the *Code*.

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. (*Chase*)
 - The sexual nature of the assault is assessed objectively (eyes of a 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, any other surrounding circumstance.
- **Consent** is defined as voluntary agreement to engage in the sexual activity in question. (*CC s. 273.1*)
 - **Note:** A number of factors can negate consent: (*CC s. 273.1*)
 - The consent is expressed by someone other than the complainant
 - Where the complainant is incapable of consenting to the activity
 - Where the activity is induced by an abuse of a position of trust, power or authority
 - Where the complainant expresses, by words or actions, a lack of agreement, or
 - The complainant expresses, by words or conduct, a revocation of her/his agreement.
 - There is no defence of **implied consent**. Express consent must be positively affirmed. (*Ewanchuck*)
 - A belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law and provides no defence. (*R. v. M. (M.L.)*)
 - In some circumstances, ostensible consent can be rendered of no legal effect (*CC s. 265(3)*)
 - **E.g.** *CC 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 Δ. (*Ewanchuck*)
- The **actus reus** of sexual assault involves three elements: (*Ewanchuck*)
 - Touching (assessed objectively – was there touching?)
 - In a sexual context (assessed objectively – what would the reasonable person conclude?)
 - Without the complainant's consent (subjective – what was the complainant's state of mind?)
 - **Note:** At the *actus reus* stage, Δ's state of mind is irrelevant; only the complainant matters.
- The **mens rea** of sexual assault contains two elements: (*Ewanchuck*)
 - An **intention** to touch
 - **Knowing** of, or being reckless of or wilfully blind to, a **lack of consent**.
- **Mistake of Fact:** *Mens rea* can be negated by an honest but mistaken belief in consent. (*Ewanchuck*)
 - This is **subject to CC s. 273.2**: Mistake of fact is **no defence** to sexual assault where: (*CC s. 273.2*)
 - Δ's belief arose from Δ's self-induced **intoxication**, or **recklessness** or **wilful blindness**; or
 - Where there is a history between Δ and the victim involving sexual assault, wilful blindness may be found even where the victim has ostensibly "consented" (*Sansregret*)
 - The accused did not take **reasonable steps**, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.
 - The accused must honestly believe that the complainant said "Yes" through her words or actions; a belief that touching was desired is insufficient. (*Ewanchuck*)
 - Where the complainant has expressed unwillingness to engage in sexual contact, Δ must obtain a clear and unequivocal "Yes" before he proceeds with any further sexual touching. No "testing the waters", no presuming that a lapse in time has eroded the refusal. (*Ewanchuck*)
 - **Air of Reality:** Mistake of fact in sexual assault follows the general *Cinous* rule. However, although Δ is not required to provide evidence other than his own testimony, the mere assertion that "I thought she was consenting" is insufficient evidence to ground the defence. (*Osolin*)
 - **Past Law:** Because sexual assault is a *mens rea* offence, an honest mistaken belief of consent (even if unreasonable) is a defence. (*Pappajohn*)

Defences

- **Air of Reality:** Generally, to raise a defence, Δ must show that there is sufficient evidence to constitute the defence in question, if the evidence is interpreted in the manner most favourable to Δ . Once that is shown, it falls to the Crown to disprove the defence BRD. (Cinous)

Ignorance of the Law

- *CC* s. 19: “Ignorance of the law is not an excuse for committing an offence” (M 62)
- **Mistake of Fact** is a defence, even for questions of mixed law and fact.
- **Mistake of Civil Law** is considered a mistake of fact when it is an element of a *CC* offence. (Prue)
 - This does not apply to offences under provincial law (MacDougall)
 - **E.g.** The *Prue* exception was applied to the *CC* offence of taking a child contrary to a custody order where the parent mistakenly believed the custody order was of no legal effect. (Hammerbeck)
 - **Note:** The SCC has noted, in *obiter*, that *Prue* and *MacDougall* are irreconcilable, and that *Prue* may be incorrect (at least in the context of the offence of driving with a suspended license) (Pontes)
- **Colour of Right:** An honest, mistaken belief that one has a right to the property in question. (Howson)
 - Some offences (e.g. *CC* s. 322 (theft)) are defined to apply only if Δ had no colour of right. (Howson)
 - **Comment:** Although a mistake as to property rights is technically a mistake of law, the “colour of right” exception appears to treat it as a mistake of fact (as with the civil law exception above)
- **Negating Mens Rea:** Courts sometimes treat a mistake of law as negating *mens rea* (Docherty)
 - **E.g.** Δ acquitted of “willfully” breaching probation order; couldn’t be wilful if Δ didn’t know that his actions were illegal. (Docherty)
 - **Note:** This view is likely incorrect, and similar-fact cases have decided oppositely. (Gunn)
- **Officially Induced Error:** Originally proposed in Lamer CJ’s minority opinion in *Jorgensen*.
 - The modern approach to this defence has 6 requirements: (Lévis)
 - An error of law or of mixed law and fact was made;
 - The person who committed the act considered the legal consequences of his or her actions;
 - The advice obtained came from an appropriate official;
 - The advice was reasonable;
 - The advice was erroneous; and
 - The person relied on the advice in committing the act.
 - *Lévis* does not comment on Lamer CJ’s other views (but they’re likely affirmed): (Jorgensen)
 - The defence is an **excuse**, not a justification,
 - It applies not only to regulatory offences but also to true crimes
 - **Note:** Previously, it applied only to regulatory offences (Cancoil)
 - The defence must be established by the accused on a balance of probabilities
 - The appropriate remedy if the defence is proven is a stay of proceedings, not an acquittal.

Voluntary Intoxication

- **Current Law:** Primarily a common law defence (s. 8(3)), but it is restricted by *CC* s. 33.1. (M 92)
 - Voluntary intoxication is a defence if it negates the specific intent required for a crime. (Leary)
 - Voluntary intoxication is not a defence to a general intent crime unless
 - The intoxication is so extreme that it is akin to insanity or automatism (Daviault)
 - The general intent crime does not involve assault as an element of the crime. (CC s. 33.1)
 - Voluntary intoxication is no defence to objective *mens rea* crimes (e.g. negligence) because the reasonable person is never an intoxicated person.
- **Onus of Proof:** Differs between specific and general intent [“not very logical” – Prof. Tollefson]
 - For **specific intent** offences, the Crown must prove the existence of specific intent BRD (Bernard)

- For **general intent** offences, the onus is on Δ to prove the defence on the BoP. (Daviault)
- **Consequences:** If the defence of intoxication is made out, there are two options to the court:
 - Full acquittal (due to lack of *mens rea*).
 - If Δ has been charged with a specific intent offence that is subsumed by a general intent offence (e.g. murder & manslaughter), the court may opt to convict on the general intent offence.
- **General vs. Specific Intent:** (George)
 - **Specific Intent:** “acts done with the... intention of furthering or achieving an illegal object”
 - **General Intent:** “acts done to achieve an immediate end”
 - **Note:** There is a **table of specific vs. general intent offences** in the course outlines.
- **Note:** Self-induced intoxication is never a defence to offences that include intoxication in the *actus reus* (e.g. drunk driving). (Penno)

Insanity (NCRMD)

Substantive Law

- CC s. 16(1): No person is criminally responsible for an act committed 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**. (M 53)
 - **Note:** This is actually two defences (the “appreciating” branch and the “knowing” branch).
- “**Mental disorder**” means “disease of the mind” (CC s. 2)
 - “Disease of the mind” is a term that: (Cooper)
 - Includes any illness/disorder/abnormal condition which impairs the mind and its functioning
 - Excludes self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion. [NB – intoxication and automatism should be used instead]
 - This is a **legal** term; whether the medical profession considers it a “disease” is irrelevant. (Simpson)
- “**Appreciating**” means appreciating only those physical consequences which are an essential element of the definition of the offence; appreciation of penal consequences is not included (Abbey)
 - This is a more narrow definition of “appreciate” than was adopted previously (which also included an emotional appreciation, and broad ability to perceive consequences) (Cooper)
 - **Lower Courts:** Merely knowing what physical event might follow (e.g. cutting someone leads to bleeding) does not imply an appreciation of the nature and quality of the act (Swain, Kirkby)
- “**Wrong**” means “wrong by the standards of the ordinary person” (Oommen)
 - This includes being “morally wrong in the circumstances according to the moral standards of society” (in addition to being merely legally wrong) (Chaulk)
 - This branch is satisfied if Δ was “unable to rationally consider whether his act was right or wrong in the way a normal person would”
 - **E.g.** Believing your friend is Satan may prevent you from knowing that killing him is wrong. (Landry)

Procedural Issues

- The first question is whether Δ is fit to stand trial (see below). If so, continue to following points.
- The insanity defence may be raised at the following times (by the listed parties only!): (Swain)
 - During trial by the accused.
 - During trial by the Crown if Δ has put his mental capacity for criminal intent in issue.
 - By either party after the trier of fact has made a finding of guilt, but before a verdict of guilty is formally entered (“bifurcated trial”).
- There is a **presumption** of sanity, and the **onus** is on Δ to rebut it on the BoP. (CC ss. 16(2), 16(3))
- There is a **special verdict:** Not criminally responsible on account of mental disorder (CC s. 672.34)
- Upon a finding of NCRMD, the Court will select the least onerous/restrictive order (Winko) from the following list that balances the needs of society and Δ. Δ will be: (CC ss. 672.45, 672.54)

- Released unconditionally
- Released upon conditions of supervision (subsequent reviews by Review Board – s. 672.47), or
- Detained in custody in a hospital (subsequent reviews by Review Board – s. 672.47).

Unfit to Stand Trial:

- Statutorily defined (CC s. 2), with many rules around determination of fitness (CC s. 672.1-672.81)
 - **Note:** See item #7 on the Insanity lecture outline for a **summary of relevant provisions**.
- An accused is unfit to stand trial if he/she is unable, on account of mental disorder, to: (CC s. 2)
 - Understand the nature of the proceedings,
 - Understand the possible consequences of the proceedings, or
 - Communicate with counsel.
- It is not necessary that Δ "be capable of making rational decisions beneficial to [Δ]" (Whittle)
- It is not necessary that Δ "be capable of exercising analytical reasoning in making a choice to accept the advice of counsel or in coming to a decision that best serves his/her interests" (Whittle)

Automatism

- Automatism is “a state of impaired consciousness in which an individual, though capable of action, has no voluntary control over that action” (Stone)
 - This defence “amounts to a denial of the **voluntariness** component of the *actus reus*” (Stone)
- This is a **common law defence**, preserved by s. 8(3).
- Δ is **presumed** to act voluntarily, and Δ has the **onus** to rebut that presumption on the BoP (Stone)
 - Δ must make an assertion of involuntariness (i.e. Δ must testify) and must call expert psychiatric or psychological evidence confirming that claim. (Stone)
 - Expert opinion based only on an assumption of the truthfulness and accuracy of Δ's account of the event, without other supporting evidence of automatism, is generally insufficient. (Stone)
 - **Factors** to consider in assessing a claim of automatism include, *inter alia*, the severity of the triggering stimulus, bystanders’ corroborating evidence, corroborating medical history of similar dissociative states, the presence or absence of motive, the relationship between the alleged trigger of the automatism and the victim of the automatistic violence. (Stone)
 - It is a question of law as to whether the automatism was caused by a **mental disorder**. (Stone)
 - If so, Δ cannot rely on the defence of automatism, and must apply for NCRMD. (Rabey)
 - If the cause was **intoxication**, Δ must rely on the intoxication defence instead. (Hartridge)
- **Verdict:** If non-insane automatism is found, Δ is acquitted.
- **Disease of the Mind:** The judge must take a holistic approach to determining what conditions are diseases of the mind. This must be informed by: (Stone)
 - The internal cause factor (was the cause internal? If so, disease of the mind)
 - This is particularly relevant in **psychological blow** automatism. Was this a transient state with an “extremely shocking” external cause? If not, it is a disease of the mind. (Stone)
 - The ordinary stresses and disappointments of life do not constitute an external cause; need an event that may cause an "average, normal person" to go into dissociation. (Rabey)
 - The continuing danger factor (does Δ present a recurring danger to the public, considering history of violent automatistic episodes and likelihood of the recurrence of the trigger?)
 - Policy concerns, including:
 - Fear of fabrication
 - Public disillusionment by a full acquittal, (e.g. of a sleepwalker who has killed someone)
 - A verdict of acquittal on the basis of automatism does not allow for subsequent monitoring and control of the accused as a NCRMD verdict does.
- There is a (rarely rebutted) **presumption** that automatism is caused by a disease of the mind (Stone)
- **Sleepwalking** is not, in itself, a disease of the mind, but it can arise from one (Parks)

Provocation

- Statutorily defined in *CC* s. 232, and has two significant limitations: (M 454)
 - It is only a defence to murder, and nothing else (not even attempted murder) (*Campbell*)
 - If proven, the murder charge is reduced to manslaughter; no acquittal is granted. (*CC* s. 232(1))
- The **requirements** of the defence are laid out in *CC* s. 232(2): (M 454)
 - Δ must be provoked by a **wrongful act or insult**,
 - **Insult**: "injuriously contemptuous speech or behaviour, scornful utterance, or action intended to wound self- respect; an affront; indignity" (*Thibert*)
 - **Wrongful Act**: Does not include acts that the victim had a legal right to do (*CC* s. 232(3))
 - "Legal right to do" means a right that's sanctioned by law, not just not prohibited. (*Thibert*)
 - **E.g.** One has a legal right to act in self-defence (*Haight*), but not to insult others (*Thibert*)
 - The wrongful act/insult must be sufficient to **deprive an ordinary person of self-control**, and
 - The ordinary or reasonable person is Δ 's age and sex, has a normal temperament and level of self-control, and is not exceptionally excitable or pugnacious, and is not drunk; (*Hill*)
 - Other general characteristics relevant to the gravity of the wrongful act or insult may be considered (e.g. if the insult was racial, the reasonable person should be of Δ 's race) (*Hill*)
 - The level of self control expected varies with age, but not with any other characteristics. (*Hill*)
 - The background relationship between Δ and the victim may also be considered. (*Hill*)
 - **Cultural Background**: The authority here is divergent:
 - Cultural background may be a relevant consideration for provocation, even if that culture has views antithetical to contemporary Canadian society. (*Nahar*, BCCA 2004)
 - The "ordinary person" may not be given beliefs that are antithetical to fundamental Canadian values (including views of female inferiority). (*Humaid*, OCA 2006 [*obiter*])
 - The cultural background of Δ is not a relevant consideration generally. (*Ly*, BCCA 1987)
 - Δ must himself be acting in response to the wrongful act or insult "**on the sudden**" and before there is time for his passion to cool. [**NB**: subjective test]
 - This is not met if A insults B, B goes away to "brood" on the matter, and later kills A (*Tripodi*)
 - Even a few minutes may be enough time to "cool" (*Friesen*)
 - The question is whether Δ formed the **intent to kill** while in the state of rage resulting from the insult, not before or after. Premeditation can be relevant here. (*Thibert, Cameron*)

Self Defence

- Defined in *CC* s. 34 as two distinct defences. *CC* ss. 35 and 37 define related defences. (M 94)
- **CC s. 34(1)**: Self-defence, less than death or grievous bodily harm ("D/GBH")
 - Its statutory **requirements** are:
 - An **unlawful assault** on Δ (or reasonable/mistaken belief of impending assault – *Petel*)
 - The assault must not have been **provoked** by Δ (including words/blows/gestures – *CC* s. 36)
 - The force used by Δ must **not be intended** to cause **death or grievous bodily harm**.
 - The force used by Δ must be **not more than necessary** to defend himself.
 - If Δ **apprehended** D/GBH to himself from the victim, he must rely on s. 34(2) instead. (*Pawliuk*)
- **CC s. 34(2)**: Self-defence where there is an apprehension of D/GBH.
 - Its statutory **requirements** are:
 - An **unlawful assault** on Δ (or reasonable/mistaken belief of impending assault – *Petel*)
 - Δ must be under a **reasonable apprehension** of D/GBH from the attacker;
 - Δ must believe, on **reasonable grounds**, that he can't otherwise avoid D/GBH.
 - Thus failure to retreat is a *consideration* here, but is not imperative. (*Cinous, Deegan*)
 - Δ must have actually caused D/GBH to the attacker. (Not always explicitly mentioned – *Cinous*)
 - Δ may have intended to cause D/GBH (but intent is not necessary). (*Pawliuk*)

- **Note:** s. 34(2) applies even when an assault is provoked. (McIntosh)
- Each of the first three components have both **subjective** (Δ 's belief) and **objective** (reasonable belief) elements; each must have an **air of reality** before the defence will be put to the jury. (Cinous)
- **CC s. 35:** "Virtually useless" [- Prof. Tollefson]. Stricter than s. 34(2), applies to initial aggressors.
 - When in one's home, there is no obligation to retreat or flee to apply this defence. (Lavallee)
- **CC s. 37:** Defence of self or others
 - Its statutory **requirements** are:
 - Δ must **reasonably believe** that the person is subject to an **unlawful assault**
 - The force used must be no more than is necessary to prevent the assault (or its repetition)
 - The wilful infliction of any hurt or mischief must not be excessive, having regard to the nature of the assault that the force used was intended to prevent.
 - **Note:** Δ could have provoked the attack, or intended D/GBH.
 - Although the statute only refers to "any one under his protection", this has been interpreted as "anyone who requires protection which the accused may be able to provide" (i.e. any 3P) (Webers)
 - This should only be applied where ss. 34 and 35 don't apply ("gap-filling role") (McIntosh)
- **Reasonable Belief:** The reasonable person is not intoxicated, so that is not a relevant consideration when determining whether Δ 's beliefs were reasonable (i.e. Δ isn't precluded, but isn't helped) (Reilly)
 - The diminished intelligence of an accused should be taken into account [for s. 34(2)] (Nelson)
- **Excessive Force:** If the force used is more than justified under these provisions, Δ is liable under CC s. 26. If it was accompanied by intent to kill (and death occurs), Δ is liable for murder. (Faid)

Duress

- There are two defences of duress; statutory (CC s. 17) and common law. (Paquette, Hibbert, Ruzic)
- Elements of the **statutory defence** (**Note:** ~~struck-out~~ elements were struck down in **Ruzic**):
 - Δ commits an offence under **threats of immediate death or bodily harm**
 - ~~The threats were from a person present when the offence was committed~~
 - Δ **believes** threats will be carried;
 - Δ is **not a co-conspirator** or criminal associate
 - The offence is not one of the 22 listed in s. 17 (i.e. s. 469 offences, robbery, sexual assault)
 - **Controversy:** Do these exclusions offend the PFJ of voluntariness? (cf. Ruzic)
- Elements of the **common law defence**: (Paquette, Hibbert, Ruzic)
 - Δ is subject to **threats** of death or serious injury (with a "**close temporal connection**")
 - Δ must **believe** that the threat will be carried out.
 - Threat must be of a **gravity** to cause a **reasonable person** to act as Δ did.
 - Δ must not have a **safe avenue of escape**
 - This is "an objective standard that...takes into account the particular circumstances and human frailties of the accused" (Hibbert)
 - Δ must **not be a criminal associate** or accomplice.
- **Principal offenders** may use **both** the statutory and common law defences if the offence is not listed in s. 17. If it is listed, they may use **neither** defence. (Ruzic)
- **Secondary offenders** (e.g. aider/abettor; see CC ss. 21, 22) may always apply the **common law** defence, but never the statutory defence. (Paquette)
 - The question is whether Δ **intended** to act in concert with the principal actor. If so, Δ is a co-perpetrator (i.e. a principal offender). If not, Δ is a secondary offender. Question of fact. (Mena)
- **Note:** Although Paquette allows this defence to be applied to a charge of **murder**, this was based on the English case *Lynch*, which has since been overruled (Howe). The Canadian law is murky.

Necessity

- A **common law** excusatory defence (although Wilson J argues that it can also be justificatory) (*Perka*)
- Like duress, the defence is
- **Elements** of the defence of necessity:
 - Urgent situation of clear and **imminent peril** (*Perka*)
 - Assessed on the **modified objective test**: (*Latimer*)
 - Does Δ, on **reasonable grounds**, honestly believe that there is imminent peril?
 - Must take into account circumstances that affect Δ's **ability to perceive** the situation.
 - **Contributory Fault**: Although illegality or negligence do not disentitle, if it was within Δ's contemplation (or should have been) that his act might bring about the imminent peril, and yet Δ still does it, then his response is not involuntary and the defence fails. (*Perka*)
 - There must be no reasonable legal way out
 - Assessed on the **modified objective test**: Is Δ's belief reasonable given his circumstances and attributes? (*Latimer*)
 - The harm avoided must be proportionate (i.e. at least comparable) to the harm inflicted.
 - Assessed on the **objective test**: Refer to community standards, infused with constitutional considerations (e.g. equality rights of the disabled). (*Latimer*)
- **Necessity as a Justification**:
 - Wilson J. argues that, if Δ is caught between two conflicting legal duties and "rightfully" chooses the lesser of the two evils, the defence should act as a **justification**. (*Perka*)
 - If it is viewed as a justification, the requirements may be less stringent; e.g. immediacy may be relaxed, and it may even be a foreseeable harm that Δ acted to bring about (so long as Δ was acting to avoid breaching the greater duty).
 - This is also significant for **civil actions**; although **excused** conduct may still carry civil liability against Δ, justified conduct does not.

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