**Law 5120 – Criminal Law**

Botterell

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Alternative Forms of liability



**Principal liability (21(1)(a))**

**Party liability**

1. Aiding: helping, aiding in commission of criminal act (at time act is committed) – 21(1)(b)
2. Abetting: encouraging (at time act is committed) – 21(1)(c)
3. Common Intention: intention to carry out unlawful purpose with another, and crime committed – 21(2)
4. Counselling: encouraging commission of a crime (prior to crime being committed) – 22
5. Accessory after the fact: helping (after crime has been committed) the principal to escape – 23, 240

**[Secondary Liability]**

* The criminal liability of individuals who do not actually cause by means of an unlawful act the death of another person, but those who try to do so or who help others to do so
	+ Mechanism to expand scope of criminal liability – allows state to cast a larger net of criminal liability to capture more conduct
	+ Principle offender does not have to be convicted for a party to an offence to be convicted.
	+ Subjective intent is required for party offences
* **Section 24 – Criminal Code**
	+ Attempting
* **Section 21(1)(b) – Criminal Code**
	+ Doing something for the purpose of aiding another person to commit a criminal offence makes you party to the offence
* Types:
	+ **Inchoate –** unfinished – liability
		- Does not require that the crime being aimed at actually occurs
			* Attempts (Section 24)
			* Counselling a crime not committed (Section 464)
			* Conspiracy (Section 465)
	+ **Choate –** completed – liability
		- Aiding & Abetting (Section 21(1))
		- Common Intention (Section 21(2))
		- Counselling (Section 22)
		- Accessory after the fact (Section 23)

Aiding & Abetting:

Section 21(1) – Every one is a party to an offence who

1. Actually commits it
2. Does or omits to do anything for the purpose of aiding any person to commit it or …
3. Abets any person in committing
* Aiding = Helping
	+ i.e. driving you there and giving you the weapon
* Abetting = Encouraging
	+ i.e. before the offence actually takes place

**Key Components:**

**Actus Reus:** A positive act or omission (where there is a duty) that assists, helps, encourages, instigates, promotes or procures the offence

**Mens Rea:** For the **purpose** of – the accused must intend the consequence that flow from the act

# ACTUS REUS

1. Actus Reus for aiding & abetting typically requires a **positive act** (Wilcox v Jeffery)
2. In exceptional circumstances an omission to act will provide the actus reus (Kulbacki, Russel) although it looks as if that will be the case only where there is a legal duty that the accused failed to meet
3. Mere presence **will not constitute** the actus reus for party liability (Dunlop and Sylvester, R v AA, Salajko)
* Aiding = Assist, help or facilitate offence – make commission of offence easier for principal offender
* The Crown need not prove that principle offence + aider had an express agreement in relation to the offence
	+ **The intent to assist make be exemplified in the parties conduct**

## Wilcox v Jeffery – **Abetting can be found through the mere encouragement of criminal activity**

Facts: Hawkins, a jazz musician heads to UK but only given visa on the terms that he does not perform for $$. Wilcox, a journalist planning on writing a piece on the musician’s performance picks him up and attends the concert – paying for admission. The journalist did not coordinate for the musician to come but simply picked him up at the airport, purchased a ticket + described concert in magazine (which he sold to make $$)

Issue: Did Wilcox aid and abet Hawkins?

Held: Wilcox clearly meant to encourage Hawkins, and he knew it was illegal for Hawkins to perform, he is guilty.

Reasoning: Accused knew all along what Hawkins was going to do, helped/encouraged him to perform in order to benefit himself; he also profited from the crime through his magazine article.

* But-For causation was not required to be established because for Abetting the AR is encouraging something to do a crime (i.e. purchasing a ticket) and the MR is knowing that you are encouraging someone to do a crime

**Ratio:** Abetting can be found through the mere encouragement of criminal activity – it does not have to be directly communicated to the person committing the criminal offence

## R v Kulbacki – **Inaction can be equivalent to encouragement (i.e. the A/R of abetting)**

\*Botterell doesn’t agree with court’s decision

Facts: Kulbacki owned a car which was being driven by a young female in a dangerous manner. He gave her the keys and was sitting in the passenger seat. He was charged with aiding and abetting dangerous driving; he argued that he didn’t encourage her but simply did nothing to prevent her.

Reasoning: Kulbacki had a legal obligation to intervene. It was his car; he had authority over the car; by his lack of action, he encouraged her to violate the law.

**Ratio:** A failure to protest can be equivalent to encouragement when an accused has the authority to invoke a decision or has the duty to do so – sometimes an omission can constitute aiding & abetting

## R v Dunlop and Sylvester – **Mere presence at the scene of the crime is not enough to ground culpability**

Facts: Appellants were tried and convicted of rape for their part in a gang rape of a 16-year old girl by a motorcycle gang at an abandoned dump. One of the appellants testified he had met up with the gang earlier in the night and was with the complainant at bar before the rape occurred. The appellants also testified that they arrived at the dump site, saw a woman having intercourse with a gang member, delivered four cases of beer & then left

Issue: Can a person be found guilty as a party to an offence merely by being present at the scene of the crime and doing nothing to prevent it?

Held: Appeal allowed, appellants acquitted

Reasoning: The aider/abetter must take some **active** steps by word or action with the intent to instigate the principle. Non-interference to prevent a crim is not itself a crime

* A person cannot properly be convicted of aiding or abetting in the commission of acts which he does not know may be or are intended – one must be able to infer that the accused had prior knowledge that an offence of the type committed was planned.

**Ratio:** Mere presence at the scene of a crime is not sufficient to ground culpability. Something more is needed: encouragement of the principal offender – an act facilitates the commission of the offence, such as keeping watch or enticing the victim away or an act which tends to prevent or hinder interference like preventing escape. **Presence at the scene must be accompanied by other factors – prior knowledge of offender’s intention or attendance for the purpose of encouragement.**

## R v Salajko – **Presence at the scene & conduct that seems to encourage crime should amount to liability**

Guy was found at scene of gang rape with his pants down but was not found liable for aiding & abetting. Difficult case to reconcile & has been criticized since. SHOULD NOT BE FOLLOWED.

## R v Russel – **Silence and non-interference can be construed as acquiescence and encouragement**

Facts: Russel’s wife and children all die in lake. It was found based on the evidence that the accused likely stood by and did nothing while the wife drowned the children & took her own life (following an argument between the husband & wife)

Issue: Did he encourage her or contribute to the death of the children?

Reasoning: Under the facts of the case the accused had control of his wife or did not care about her & his non-interference was indicative of encouragement (thus aiding & abetting)

* Being under a duty by reason of parenthood, and the duty that one spouse owes to another, his failure to act is construed as encouragement of or an agreement to actions of wife in murder-suicide
* Under todays law accused would likely be charged under Section 215 – failure to provide necessities of life
* Omissions case – silence can constitute acquiescence & gives consent provided there is a **legal duty to intervene**
* Botterell – should have been found guilty of party to murder – if his wife meant to kill the children, did so, and he understood that is what she was doing.

**Ratio:** Silence and non-interference in certain circumstances can be construed as acquiescence and encouragement

## R v AA – **Mere presence vs. Encouragement**

Facts: 4 boys accused with raping and forcibly confining a young girl. The boys committed their acts at different times, though one was not completely included in the actions. AA was excluded from the planning of the illegal activities; his sexual acts were found to be sufficient for independent liability but not enough to connect him as abetting a collective illegal act of the others.

Issue: Was AA guilty in party liability?

Held: He did apply an indirect force in circumstances of a sexual nature without her consent (individual sexual assault liability) but was not found to be party to the large collective charge.

Reasoning: Mere presence is insufficient for party liability – entering the bedroom does not constitute encouragement.

* Important to distinguish from Salajko because when the accused was masturbating, he was alone in the room + therefore not encouraging others.

## R v Dooley – **Link between aiding/abetting and harm does not need a standard as high as but-for causation**

Facts: Child is abused to death by his caregivers

Issue: Must the help or encouragement be a ‘but-for’ cause of the principle’s criminal behaviour?

Reasoning: Non-perpetrating parent had a duty to intervene when they knew the child was being abused + failed to do so which had the effect of facilitating or encouraging continued assaults by the perpetrator, including the fatal assault – the omission can result in aiding & abetting under the circumstances.

**Ratio:** There must be a connection or link and that connection should not be framed by using the language of causation. Will vary from case to case, very fact specific.

# MENS REA

* The mens rea for Section 21(1)(b) is doing or omitting to do anything **for the purpose of** aiding another in the commission of an offence
	+ Everything hinges on how an accused’s behaviour is characterized
1. The mens rea for section 21(1)(b) and (c) is **subjective purpose or intention** (Briscoe, Hibbert, Mariani)
2. Mens Rea is not negative if the party intended the consequence but did not desire it (Hibbert)
3. Trafficking cases are **restricted to selling,** you cannot be found liable for aiding and abetting the purchaser (Poitras, Greyeyes)
4. In trafficking cases, **the facts matter**, the key distinction between facilitating the purchase and facilitating the sale (Poitras, Greyeyes, Ahamed)
5. **Knowledge (or wilful blindness)** of the unlawful act must be present before intent can be present, intent must be present for mens read (Briscoe)
6. **Mere recklessness** cannot suffice for the fault element of aiding and abetting (Roach)
7. For homicide, the requirements include mens rea of aiding and abetting + the mens read of culpable homicide (Mariani)

## R v Poitras – **Aiding the trafficker**

Facts: Undercover cop and his friend ‘Little’ asked Poitras to get them drugs. Poitras later delivered drugs to Little, who gave them to the undercover cop. The seller was another guy named ‘Diggers’

Issue: Was Poitras only an agent of Arsenault and therefore exempt from culpability since the purchasers are not mentioned under the NCA? Or was he aiding the seller? (Whether the accused aided and abetted the sale of drugs or the purchase of drugs – if it was just the purchase, there is no aiding/abetting of trafficking).

Held: Poitras was guilty of trafficking.

Reasoning: Acting as an agent for the purchaser can still make you party liability to trafficking – purchaser of drugs is not considered trafficker, just a possessor. All three elements of sale were present – agreement or bargain, payment of price and delivery or conveyance of property.

Notes: The sale of drugs is sufficient for trafficking (CDSA s 2). Traffic means to sell, administer, give, transfer, transport, send or deliver the substance. A buyer of drugs is not automatically considered a trafficker. Did the party do something to help the seller? If yes, then aiding trafficking. Did the party do something to help the buyer? If yes, then not aiding in trafficking UNLESS the act of the party was constitutive of trafficking; if yes, they are guilty of trafficking NOT a party to trafficking.

\*\*Not still good law but helps to distinguish between purchase + seller

## R v Greyeyes – **Aiding in purchase not the same as aiding in trafficking**

Facts: An undercover police officer purchased marijuana from Greyeyes. He asked if he could get him cocaine too. Greyeyes took Morgan to a place where Greyeyes purchased cocaine on Morgan’s behalf while Morgan was right there. Morgan gave $10 to Greyeyes for purchasing it for him.

Issue: Is the person who simply assists the purchaser of drugs guilty in aiding and abetting the trafficking of drugs?

Held: Accused is guilty in this case because the appellant did far more than act as a purchaser

Reasoning:

L'Heureux-Dube J: it is not correct to say that a party assisting a purchaser is party to trafficking because purchasers are specifically excluded from the NCA. It would be overbroad to say that anyone who assists a purchase in any minimal way is a trafficker. However, in this case, Greyeyes assisted the purchase to the point where the purchase would not have happened if not for him.

1. Court says that trafficking should not be applied to cases where someone helps solely the purchaser. In that case they have aided in possession, not trafficking/distribution
	1. This is where they do less than purchaser (e.g. only drive, don’t help find a dealer, etc.)
	2. To do otherwise would be to impose a higher degree of liability on a party that did less by way of criminal wrongdoing (i.e. would be unfair)
	3. E.g. The accused had no connection to the drug dealers or suppliers. He received no fee or consideration for serving a middleman or for directing purchasers towards these dealers. He did not seek out the police officer.
2. If the actions of the accused are more than that of a mere purchaser (e.g. in this case where, without him, the officer wouldn’t have been able to acquire cocaine), they facilitate the transfer of drugs (trafficking)

## R v Hibbert – **Intent to bring about a consequence vs desire to bring about a consequence – for the purpose is not negated by coercion**

Facts: Accused was forced by the principal offender to accompany him to the victim’s apartment and lure the victim down to the lobby. The accused stood by while the principal offender shot the victim. The accused was charged with attempted murder and was acquitted but convicted on the included offence of aggravated assault.

Issue: What is the meaning of purpose used in 21(1)(b) – does it mean intention or desire?

* Does defence of duress operate by negating common intention? Can the mens rea requirements of section 21 be negated by coercion?

Held: Appeal allowed, accused acquitted

* Reasoning: There are two interpretations of purpose, desire + intention – parliament intended the ‘intention’ interpretation when speaking under section 21. An accused acts with the purpose of aiding another in the commission of an offence **if the accused does or omits to do anything with the intention of bringing about that consequence.** The mental states specified in ss. 21(1)(b) and 21(2) of the Code are not susceptible to being ‘negated’ by duress. Consequently, it is not open to persons charged under these sections to argue that because their acts were coerced by threats they lacked the requisite mens rea.
	+ Such persons may, however, seek to have their conduct excused through the operation of the common law defence of duress

## R v Briscoe – **Knowledge is necessary for aiding & abetting**

Facts: A group of individuals brutally raped and murdered a young girl. Briscoe drove down to the location, handed the principal a weapon and told the victim to shut up. Briscoe was nearby but not present at the murder. The TJ agreed that Briscoe aided the murder but did not have the requisite knowledge for the mental aspect so acquitted him on all charges. Court of Appeal considered the issue of wilful blindness and ordered a new trial.

Held: Briscoe had knowledge that the principal was going to kill someone. The TJ failed to consider wilful blindness. New trial ordered. Purpose has two components: intent and knowledge (substitute wilful blindness for knowledge). An accused can only act with the intention of aiding the principal if the accused knows what it is that the principal is going to do.

**Ratio:** Knowledge of the unlawful act (the murder, not just that something sketchy is happening) must be present before intent can be present. Intent is the mens rea element necessary to establish **for the purpose of** from section 21(1)(b). Purpose should be understood as synonymous with intention.

## R v Ahamed – **Trafficking cases are fact dependent**

Facts: An undercover police officer, using a wheelchair as a disguise, posed as a prospective purchaser of crack cocaine. He approached the accused and requested to purchase cocaine. The officer testified that another man nearby attempted to engage in a deal with the officer but the accused intervened, saying he knew people who would perform the sale. The accused then gave the officer his wallet as security, went into a nearby restaurant, came out and gave the officer the crack. The accused testified that he felt bad for the officer and was worried he would be “ripped off” by the other men and for this reason went into the restaurant to see if there were dealers inside.

Issue: is the accused guilty of trafficking?

Prediction: It still isn't clear whether this type of action is helping the purchaser or helping the seller. Based on the decision in Greyeyes, he is probably not party. However, there is the added element of Ahamad going back and forth and leaving his wallet as a security. That could be seen as helping the dealers make the sale, but it could also be seen as helping the purchase.

Held: his intention was to facilitate the purchase, not the sale. TJ conflated motive with intent. The seller wasn’t known to Ahamad.

## R v Mariani – **Requirements for aiding and abetting manslaughter**

Facts: a group of boys went to the park with the goal in mind of fighting another known group. When that group didn’t show, they decided to rob another unknown group of boys sitting in the park. One boy refused to give them his wallet and was pushed down and kicked to death by the boys.

Issue: Is the boy who pushed him down party to manslaughter by virtue of the fact he pushed him down & ought to have known that he was creating a risk of non-trivial bodily harm.

Reasoning: To be found guilty of aiding and abetting the crime of manslaughter there must have been the following

1. **Subjective Intent** to aid or encourage the commission of the unlawful assault (aiding)
2. **Objective foresight** that the assault would lead to the risk of bodily harm (manslaughter)
3. + the commission of the assault
4. + the causing of death

**Ratio:** Two fault elements are required to be convicted of aiding and abetting manslaughter

# ABETTING (Heldson)

1. Abetting has the **same mens rea** as section 21(1)(b)
2. The accused must **subjectively** intend that his or her words or acts encourage the principal
3. **Recklessness** is not sufficient to establish mens rea

**The mens rea is subjective purpose and intention. A necessary pre-condition for such intent is knowledge (wilful blindness), mere recklessness is insufficient for liability under 21(1)(b)(c). Involves doing something for the purpose of enabling the principal to commit a crime, where purpose has two components: intention and knowledge (Briscoe).**

Other Forms of Party Liability

# COMMON INTENTION

**Section 21(2) –** Where two or more persons form an **intention in common** to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, **commits an[other] offence**, each of them who **knew or ought to have known** that the commission of the offence would be a probable consequence of carrying out the common purpose is a **party to that [other] offence**.

* Similar to Section 229(c) – Unlawful Object Murder

## R v Jackson – **Party to the offence with common intention can be charged with lesser offence**

Facts: Two men agreed that they were going to rob a man, only one of them carried out the robbery. During the course of the robbery he shot and killed the victim being robbed. TJ did not put forth the scenario to the jury that the accused could have been convicted of manslaughter, even though arguable he did not foresee anyone dying.

Issue: If the principal is convicted of a more serious offence can the party be convicted of a lesser offence

Held: New trial ordered because of judge’s exclusion of manslaughter charge

Manslaughter under 21(1)(b)/(c): The Trial judge did not direct the jury on the point of manslaughter. The Court of Appeal ruled that he should have, but that the test was subjective foreseeability of harm. Since the court of appeal decision, Creighton was decided, therefore the Supreme Court will have to overrule because it became an objective test for foreseeability of harm.

* “I conclude that a person may be convicted of manslaughter who aids and abets another person in the offence of murder, where a reasonable person in all the circumstances would have appreciated that bodily harm was the foreseeable consequence of the dangerous act which was being undertaken.” (para. 5, emphasis added; or see again Mariani)
* The reasoning in Trinnear, coupled with Creighton, suggests that the appropriate mens rea for manslaughter under s 21(2) is objective awareness of the risk of harm. It must follow that a conviction for manslaughter under s 21(2) does not require foreseeability of death, but only foreseeability of harm, which in fact results in death.

Murder under 21(2): common intention to commit an unlawful act + death in the commission of the unlawful act + foresight that death was the probable consequence of carrying out the unlawful act = first degree murder for the actual killer, second degree murder for the party.

Manslaughter under 21(2): since there is no mens rea, it is unclear whether a party can be charged with manslaughter where the principal is convicted of murder. It wouldn't make sense for the mens rea requirement under 21(2) to be higher than regular manslaughter. Therefore objective foresight of bodily harm is the mens rea requirement.

# DEFENCE OF ABANDONMENT

* An accused is entitled to the defence of abandonment if she abandons the common intention before an offence is committed
	+ Applies to Section 21(2) and 21(1)(b)/(c) as well (R v Gauthier)
* Abandonment test outlined in R v Whitehouse
	+ One essential element ought to be established in a case of this kind: where practicable and reasonable there must be **timely communication of the intention to abandon** the common purpose from those who wish to dissociate themselves from the contemplated crime to those who desire to continue in it
	+ ‘Timely Communication’ was endorsed in R v Miller & Cockriel
		- Must be determined by the facts of each case but where practicable and reasonable it ought to be such communication, verbal or otherwise, that will serve **unequivocal notice** upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw.
1. An accused is entitled to the defence of abandonment if he or she abandons the accused before an offence is committed
2. The defence used requires the party to communicate the change of intention in an unequivocal way in a timely fashion (Whitehouse, Miller & Cockriel)
3. The defence must additionally include taking reasonable steps to neutralize or cancel out the effects of the accused’s participation thus far (Gauthier)

## R v Gauthier – **Take steps to mitigate your unlawful actions**

**Ratio:** It is not enough that you say that you are abandoning, you must take **proportional steps** to neutralize the effects of what you had done up until that point.

Steps for Defence of Abandonment (Party liability under S 21)

1. Change of intention
2. Timely communication
3. Unequivocal communication
4. Take reasonable steps in the circumstances to neutralize or cancel out the effects of the accused’s participation.

# CONSTITUTIONALITY OF SECTION 21(2)

1. When dealing with offences that have constitutionally required subjective fault element, the words ‘or ought to have known’ in section 21(2) are inoperative (Logan)
2. Murder has constitutionally required minimum fault element of subjective foresight of death (Vaillancourt)

## R v Logan – **“or ought to have known” in 21(2) is inoperative where charge is murder**

Facts: Three men rob a convenience store and shoot the clerk. Logan was boasting about his involvement in planning the robbery.

Issue: Is 21(2) Constitutional?

Judgement Below: Vaillancourt tells us that the minimum mens rea for murder is subjective foresight of death (specific intent to kill) and 21(2) allows someone to be convicted for attempted murder with an objective mens rea. In this case, the respondents were convicted because they "ought to have known" that the shooting was a probable outcome of the robbery. Therefore the "ought to have known" part of 21(2) is inoperative on the charge of attempted murder.

Held: Only with regard to offences that have a constitutionally required subjective fault element are the words "or ought to have known" inoperative

Reasoning: where the principal offender could only be convicted with a minimum fault element, the parties to the offence can only be convicted with that minimum fault element.

# COUNSELLING

**Section 22(1)** – Where a person counsels another to be a part to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.

**Section 22(2) –** Everyone who counsels another person to be a party to an offence is a part to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling

**Section 22(3)** – For the purposes of this Act, ‘counsel’ includes procure, solicit or incite

* **Actus Reus:**
	+ An accused must have counseled another person to be a party to a criminal offence
		- Offence must be criminal, however accused nee not counsel the principal offender
* **Mens Rea**
	+ Accused must have intentionally counseled an offence
1. Encouraging commission of crime prior to crime being committed
2. Doesn’t matter if counselling was effective, if you carried out the actions that would normally be considered counselling you are culpable for the same offence as the principal (O’Brien)
3. There is no distinction drawn between someone who encourages the murder and the person who commits the murder
4. You don’t need but-for causation but there must be some sort of connection between the acts of the offence and acts of the party (Dooley)

## R v O'Brien - **whether the offence would have happened anyways is irrelevant**

Facts: Richard was a drug addict who bought drugs from O'Brien. She confessed to robbing convenience stores. O'Brien told her that the robbery would be easy and told her to do it so that she would have more money to buy more drugs from him.

Held: O'Brien counselled her.

Reasoning:

* Judge identified that the woman had not made her mind up yet about robbing, and his talking convinced. – does this mean counselling needs to have a causal aspect?
* “This suggests that Ms. Richard had not made up her mind to rob Elliott’s, that she was still in the process of deciding what to do at the time Mr. O’Brien made this and his various other comments to her, contrary to Mr. O’Brien’s submission that the robbery would have occurred with or without his comments.” (para. 16)

“The appellant has not satisfied me that the judge erred in concluding that his words, considered in context, were encouragement and hence counselling… His discussion with her prior to the robbery was supportive.” (para. 17).

Even if the person had already made up their mind to commit the offence, you can still be found guilty of counselling if you encourage or counsel someone to commit that same offence – genuine encouragement is required.

**Ratio:** Motive may be taken into consideration to determine intent, while not an element.

# ACCESSORY AFTER THE FACT

1. Knowing that a person is party to an offence, receives, comforts or assists that person for the purpose of enabling that person to escape
2. Wilful blindness can be substituted for knowledge (R v Duong)

**Section 23(1)** – An accessory after the fact to an offence is one who, **knowing** that a person has been party to an offence**, receives, comforts or assists** that person for the purpose of enabling that person to escape.

**Section 23(1)(1)** – For greater certainty **section 21 to 23** apply in respect to an accused notwithstanding the fact that the person whom the accused aids or abets, counsels or procures or receives, comforts or assists cannot be convicted of the offence.

* **Actus Reus:**  (R. v. Camponi)
	+ (1) Conduct on the part of the accused which had the effect of receiving, comforting, or assisting a person
	+ (2) The circumstance that such person had been a party to the offence with respect to which the accessory-ship is alleged
* **Mens Rea:** (R v Camponi)
	+ (1) Intention with respect to the conduct alleged
	+ (2) Knowledge by the accused of the circumstance that the person was a party to the offence with respect to which the accessory-ship is alleged
		- Wilful blindness will suffice (R. v. Duong)

## R v Duong (1998) ONCA **- wilful blindness substitutes for knowledge in accessory after the fact**

Facts: Duong allowed Lam to hide out in his apartment for two weeks after Lam committed murders. Duong didn't ask any questions, but Lam had told him he was in trouble for murder.

Issue: Did Duong have actual knowledge that Lam committed the offence? Can Duong be convicted for being wilfully blind?

Held: Wilful blindness can be a substitute for actual knowledge and Duong was wilfully blind. Duong is an accessory after the fact to murder.

**Ratio:** A charge laid under section 23(1) must allege the commission of a specific offence and Crown must prove the alleged accessory knew that the person assisted or was party to that offence – the crown will meet its burden if it proves that the accused had **actual knowledge of the offence committed.**

Doctrine of Co-perpetrator liability – R v McMaster, R v Biniaris – look this up.

# Incohate offences

* An inchoate offence is a crime of preparing for or seeking to commit another crime. The most common example is an ‘attempt’. The intended criminal act remains incomplete, anticipatory or incipient.

# ATTEMPTS

* **Section 24(1) –** Everyone who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence
* **Section 24(2) –** Question of Law: the question whether an act or omission by a person who has an intent to commit an offence is or is not **mere preparation to commit** the offence, and too remote to constitute an attempt to commit the offence is a **question of law (reviewable by an appellate court – the actus reus is in question here).**
* **Inchoate form of liability** – incomplete form – attempts - anticipatory liability – focus on mens rea.

##### MENS REA – FAULT ELEMENTS

1. Mens Rea for attempts is **intent to complete the prohibited act**, even if it wasn’t possible to commit the offence
2. In the context of attempted murder, the party to the common venture must know that it is probable that his accomplice would do something with the intent to kill in carrying out the common purpose (Ancio, Logan)

## R v Ancio – **MR for attempts = Specific Intent to Commit Offence**

Facts: Ancio’s wife left the home and went to live with Kurely. Ex-Husband broke into Kurely’s home with a shot gun + shot at Kurely but missed by three feet. Kurely wrestled gun away from Ancio.

Issue: Is Ancio guilty of attempted murder?

Held: Not guilty

Reasoning: An attempt must have intent to complete the offence – there was no clear specific intent to kill.

**Ratio:** The mens rea for attempted murder is the **specific intent to kill** and **a mental state falling short of that level** (might lead to conviction on other offences) cannot lead to a convict for an attempt. For attempts criminality lies more in the intention than in the act – the actus reus need not be a tort, crime or social mischief.

## R v Logan – **Constitutionally required minimum for attempted murder = subjective foresight**

Lamer CJ

1. Ancio described what the mens rea for attempted murder is, but did not talk about whether that was a constitutionally required minimum
2. Emphasizes the minimum below which parliament cannot fall, the constitutional minimum reflects the severity of the social stigma that will come with the label that is imposed
3. Attempted murder - minimum subjective fault element is subjective foresight of death

L'Heureux Dube J

* The mens rea for the full offence of murder and attempted murder should be different

**Mens rea** for attempt murder is nothing less than the specific intent to kill (Ancio, Logan, s 24). **Mens rea** for other offences is the specific intent to commit those offences (the Crown must establish this).

##### ACTUS REUS – the Physical Component

* The actus reus of an attempt is **attempting to complete the offence,** regardless of whether or not it is possible. There is generally no accepted test for the actus reus of an attempt. All we know is that it must be more than **mere preparation.** The question to ask is: What is the last step beyond which you move from mere preparation to fulfilling the actus reus?
1. Actus Reus of an attempt must be **more than mere preparation** (Robinson, Barker, Cline, James, Sorrell and Bondett, Deutsch).
2. The distinction between preparation and attempt is **qualitative.** Consider all the factors and make a judgement (Deutsch).

## R v Robinson – **Last Step Rule**

Facts: a policeman is passing the appellant's shop. He hears someone yelling for help from inside the store and the shopkeeper tells him he's been robbed. In fact, he has not been robbed, but he just wanted to collect insurance.

Issue: is he guilty of attempted insurance fraud?

Held: it was all mere preparation - he never made the claim to the insurance company

Reasoning: The Last Step Rule - the offender must be on the last step prior to succeeding in committing the offence. Only the act directly connected with the commission of the offence is actus reus of attempt.

## R v Barker **- 1924**

Facts: Barker definitely intended to lure a young boy away and sexually assault him. The police set up a sting and Barker met the boy and asked him to walk with him. An officer stopped them from walking before they got too far.

Issue: The walking was the initiation of what Barker planned to do, but is it enough for the actus reus of the attempt?

Stout CJ: First Step Test - if the act is the first step in the commission of a crime, it meets the actus reus requirement for the attempt

Salmond J: a criminal attempt is an act that shows criminal intent on the face of it, with the facts considered to be as the accused believed them to be. A reasonable observer could conclude that you are engaged in the attempt.

Held: His criminal intent is res ipsa loquitur (manifested by his conduct) – obvious that Barker was going to commit an assault.

## R v Cline – **Fact Specific Inquiry**

Facts: A man approached a young boy on several occasions and tried to get him to come with him to 'carry his suitcases'.

Issue: Can this be considered an attempt?

Laidlaw J: There is no good test to tell whether something is an attempt or mere preparation. Each case just needs to be judged on its facts. The criminality of conduct lies mainly in the intent of the accused.

Held: This was attempted indecent assault because the accused disguised himself, came up with a plan, his act was not preparation and it was not to remote

Reasoning: Six main principles to establish the elements of inchoate offences

1. Criminality lies in the intention of the accused: “There must be mens rea and also an actus reus to constitute a criminal attempt, but the criminality of misconduct lies mainly in the intention of the accused”
2. Evidence of acts prior and subsequent to the offence with which a person is charged will be admissible to establish a pattern of conduct from which the court may infer mens rea
3. This evidence may be advanced by prosecution without waiting for defence to raise the specific issue
4. **It is not essential that actus reus be a crime (**or a tort or even a moral wrong**.)**
5. **The actus reus must be more than mere preparation to commit a crime. BUT**
6. **When preparation to commit a crime is complete, the next step done by the accused for the purpose and with the intent of committing a crime constitutes an actus reus sufficient in law to establish an attempt.**

**Ratio:** Each case must be determined on its own facts, having due regard to the nature of the offence and particular acts in question.

## R v James – **Acts in Furtherance**

Facts: The accused was going to steal a car so he could get home, he was rummaging in the glove compartment to find the keys.

Lower Courts: They found him not guilty

OCA: overturned acquittal and ordered a new trial – was the conduct designed to further the commission of the offence?

Issue: was the rummaging for the keys mere preparation or acts designed to further the commission of the crime?

Gale CJ: "An accused can be found guilty of an attempt if he does any act in furtherance of the commission of an offence beyond mere preparation, regardless of whether it is the last act in his attempt to commit the offence."

Held: His actions were acts in furtherance of his attempt to steal the car – actus reus is satisified.

**Ratio:** Actions designed to **further the commission of the crime** are attempts, and not just mere preparation.

## R v Sorrell & Bondett – **Intent + Equivocal Acts**

Facts: Charged with attempted robbery. Two men were going to rob a store but when the manager told them the store was closed, they walked away.

Lower Courts: Trial judge thinks that if they were really intent on robbing the store, they wouldn't have walked away. So, they either didn't have the mens rea or their actions couldn't constitute the actus reus of consent. Court of appeal thought there was no proof beyond a reasonable doubt of the accused's intentions. The CoA might have ruled differently, but their disagreement was on a question of fact.

Issue: Did the trial judge err in holding that the actions of the defendants did not go beyond mere preparation?

Abandonment: The abandonment might have been too late, but you can see hints of the defence of abandonment at work.

Reasoning: Whether or not the actions went beyond mere preparation could not be determined in the abstract apart from the existence of requisite intent. Sometimes one can be in a position to determine whether the actus reus is there only if one already knows that the mens rea is there.

Held: Acquittal upheld

**Ratio:** In order to establish the commission of an attempted robber the crown must shoe the accused **intended to do that which would in law amount to robber** (question of fact) and **took steps in carrying out the intent** (question of law).

Equivocal acts – acts on their face could be ambiguous but with the requisite intent, turn into the actus reus.

## R v Deutsch – **The best case for actus reus attempts: Qualitative Test**

Facts: Deutsch charged with attempting to have illicit sex with another person. He wanted to hire a sales associate to have sex with clients to close deals.

Issue: Can his actions constitute an attempt?

Le Dain J: The offer of employment was more than mere preparation because the women knew that accepting the offer of employment was agreeing to have sex for money.

Held: New trial ordered, appeal denied

Reasoning: The accused went beyond mere preparation by holding out large financial awards in the course of interviews – the distinction between preparation and attempt is **qualitative**

Ratio: the distinction between preparation and attempt is qualitative, involving the relationship between the nature and quality of the act in question and the nature of the complete offence, although consideration must necessarily be given, in making that qualitative distinction**, to the relative proximity of the act in question to what would have been the completed offence, in terms of time, location and acts under the control of the accused yet to be accomplished.**

What is the accused attempting to do? What else was left to complete the offence? Were those things under the control of the accused? Time, location, acts to be accomplished.

* 1. What is the mens rea? Did they intend to commit the offence? SPECIFIC INTENT
	2. Are the acts preparation or furtherance? Use test stated above (time, location, acts to be accomplished).

# IMPOSSIBLE ATTEMPTS

* Factual or Legal Impossibility is **not a defence** to an attempted crime
	+ Factual Impossibility – impossibility due to inadequate means
		- i.e. X tried to kill Y by shooting from too far away or X tried to break into Y’s house but does not bring along the sort of tools that would enable her to do so.
		- The Criminal design is frustrated by the surrounding factual circumstances
			* Or
		- Impossibility due to inability to satisfy element of actus reus of the overall criminal design
			* i.e. X tried to kill Y by shooting when Y was asleep but in fact Y is already dead
	+ Legal Impossibility – impossibility due to a missing element of actus reus
		- i.e. X takes possession of property believing it to be stolen when it is not
* An attempt is factually impossible if the facts are such that you cannot do what you intended to do and legally impossible if you can do what you inend to do but even were you do that thing no crime would be committed
1. An accused can be found guilty of an attempt even if it is impossible to commit the offence (**Section 24(1)**) (Dynar)

## R v Dynar – **Factually Impossible & Legally Impossible attempts fall within the scope of 24.1**

Facts: Accused believed he was engaging in laundering money that were proceeds of crime. In reality, the money was gov’t money provided by the police in a sting operation & not drug money. Accused argues that Section 24(1) is meant to criminalize the factually impossible not the legally impossible. Dynar can only be extradited to the USA if what he committed in the USA would amount to an offence under Canadian Law.

Issue: Is Section 24(1) meant to punish both factually and legally impossible? – Could Dynar be extradited to the US?

Held: Amounts to criminal attempt & conspiracy even though legally impossible

Reasoning: We conclude that the steps that Mr. Dynar took towards the realization of his plan to launder money would have amounted to a criminal attempt and a criminal conspiracy under Canadian law if the conduct in question had taken place entirely within Canada.  We reach our conclusion on the basis of the wording in the applicable provisions of the Criminal Code interpreted in the light of the underlying theory of impossible attempts and conspiracies.” (paras. 47-48)

* In Canadian Law the impossibility to complete an offence does not limit the ability to be convicted of an attempt
* Erased all distinctions between factual and legal impossibility – the only relevant distinction is between imaginary crimes and attempts to the factually impossible

**Ratio:** Factually impossible **and** legally impossible attempts fall within the scope of Section 24(1)

Notes:

* So, although the SCC rejects the distinction between factual and legal impossibility, it concludes that an accused cannot be convicted of an attempt to commit an **imaginary crime** – see para. 65
* “one who attempts to do something that is not a crime or even one who actually does something that is not a crime, believing that what he has done or has attempted to do is a crime, has not displayed any propensity to commit crimes in the future, unless perhaps he has betrayed a vague willingness to break the law.  Probably all he has shown is that he might be inclined to do the same sort of thing in the future; and from a societal point of view, that is not a very worrisome prospect, because by hypothesis what he attempted to do is perfectly legal.” (para. 66)

Summary

1. Mens rea for attempts is intent to commit the (completed) offence
2. SLIDES

# CONSPIRACY

* **Section 465(c) –** Everyone who conspires with anyone to commit an indictable offence is guilty of an indictable offence and liable to the same punishment as that to which an accused who is guilty of that offence would on conviction be liable.
	+ **Section 465(1)(a) –** everyone who conspires with anyone to commit **murder or to cause another to be murdered** is guilty of an indictable offence and liable to a maximum term of imprisonment for life
* Inchoate liability
* **Actus Reus:** agreement/commitment itself by two or more persons, to carry out an unlawful purpose or to affect a lawful purpose by unlawful means.
* **Mens Rea:** Intention to agree + intention to carry out or fulfill the agreement (O’Brien).
1. Husbands and wives cannot form a conspiracy together because they are technically one person (Kowbel).
2. There is no offence if attempting to conspire (Dery).
* Punished more serverely than attempts.

# COUNSELLING AN OFFENCE NOT COMMITTED

* **Section 464 –** defines the offence of counselling an offence that is not committed
	+ Distinct from **Section 22 – Counseling**
* Fault Element – Intent that completed offence be committed
	+ Counselling a crime not committed and attempts are both forms of inchoate liability
1. Actus Reus: Materials or statements must actively induce or advocate **not merely describe** the commission of an offence (Hamilton)
2. Mens Rea: and accompanying intent or conscious disregard of the substantial and unjustified risk in counselling (intent or recklessness) (Hamilton)

## R v Hamilton – **Mens Rea – either intent or recklessness will suffice**

Facts: Accused offered for sale thorough the internet access to a credit card number generator in terms that extolled its use for fraudulent purposes. He also offered for sale bomb recipes and information on how to commit burglaries.

Issue: What is the requisite mental element for the offence of counseling the commission of an indictable offence which is not committed?

Held: Appeal allowed, and new trial ordered.

Reasoning: Trial judge made an error of law in the distinction between motive and intent. It does not matter what an accused’s motive was, but only that he intended to – A person cannot be reckless unless they are subjectively aware of the surrounding consequences that make the risk substantial and unjustified.

**Ratio:** The Actus Reus for counseling is the deliberate encouragement or active inducement of the commission of a criminal offence. The Mens Rea consists in nothing less than an accompanying intent or conscious disregard of the substantial and unjustified risk inherent in the counseling; that is it must be shown that the accused either intended that the offence counseled be committed or knowingly counseled the commission of the offence while aware of the unjustified risk that the offence counseled was in fact likely to be committed as a result of the accused’s conduct.

DEFENCES

MISTAKE

* Three Types of Mistake
	+ Mistake of Fact (Pappajohn, Beaver, Nguyen & Hess)
		- Denying an element of the mens rea. Defence to a criminal offence if the facts as they were, were believed by the offender. If the world was as the accused believed it to be the accused would not have committed the offence, a legitimate defence of mistake of fact is established. It would render the accused’s conduct innocent – it is not a defence to the offence of which you are charged.
		- S 273.2 – circumstances where you cannot raise this defence.
	+ Mistake of Law (Campbell & Mlynarchuk, Molis, Docherty)
		- Not a defence – unless it was due to the representations of legal officials
	+ Mistake where one offence is confused for nother (Kundeus)

# MISTAKE OF FACT

1. For crimes involving possession of a narcotic, the crown must establish that the accused had physical control of the prohibited object/substance knowing that the substance was prohibited (Beaver)
2. It is not constitutional to eliminate the possibility of a mistake of fact in legislation (Nguyen, Hess)
3. Look at the subjective knowledge of the accused at the time (Beaver, Darrach)
4. As long as the accused had the mens rea to commit a less serious offence, if he actually commits a more serious offence, his mens rea is good enough (Kundeus)

## R v Beaver – **Belief must be honestly held**

Facts: Beaver is selling drugs and there was an undercover police officer who approached him as a buyer. Beaver got what he believed was sugar and sold it to the police officer. It turned out the sugar was actually drugs. He honestly believed that the contents of the package were innocent.

Issue: Is the defence of mistake of fact available to Beaver?

Held: Possession conviction quashed – as they thought the substance was sugar (knowledge is required). New Trial ordered. Trafficking conviction upheld – because they held out that they were selling heroin.

Reasoning: Whether the accused knew he was in possession of a prohibited substances **requires a finding of fact** – subjective test the court is interested in what the accused knew not what would be reasonable under the circumstances.

**Ratio:** For crimes involving possession of a narcotic, the crown must establish that the accused had physical control of the prohibited object/substance knowing that the substance was prohibited. What the court is interested in is what the accused actually knew (or wilful blindness).

## R v Ngyuen, R v Hess – **Imprisonment without Mens Rea is Unconstitutional**

Facts: Accused had sex with someone under the age of 14 and argued non-constitutionality of offence.

Issue: Section 146(1) is an absolute liability offence and could face the possibility of life in prison if there was an honest mistake of fact.

Reasoning: Oakes Analysis

* Oakes test: a violation of a Charter right will be saved under s. 1 if the government can establish (1) pressing and substantial concern; (2) rational connection; (3) proportionality/minimal impairment
* Wilson holds that while (1) and (2) are met by 146(1), (3) is not: there is insufficient proportionality between means and ends
* She considers three arguments in favour of proportionality
	+ Deterrence – uses the innocent as a means to an end
	+ Sentencing – wrong to leave questions of mental innocence to the sentencing process
	+ Comparison with CC s. 150.1(4) – what is the issue here? Variations with consent and age (of victims and accused ages).
* In the end she concludes that s. 146(1) is unconstitutional

## R v Darrach – **Subjective Standard for Sexual Assault**

Facts: Darrach was convicted of sexual assault and wanted to make the defence that she had either consent or there was an honest and reasonable believe in consent

Reasoning: although the accused must have taken reasonable steps, it is still what he subjectively knew to be true, not what he ought to have known. Procedural limits on when you can advance mistaken belief of consent defence.

\*Reminds us with respect to sexual assault even though we have the reasonable requirements element, the fault element for assault remains subjective. So long as a belief is honestly held it is good.

## R v Kundeus – **Mistaking one Offence for Another – only need mens rea in the widest sense for drug trafficking**

Facts: Accused thought we was selling mescaline but actually sold LSD to undercover police officer. It is not as serious an offence to traffic mescaline as the accused thought he was.

Issue: Is the mens rea of the offence made out if the accused was mistaken about the substance he was trafficking (he meets the actus reus for selling LSD as he did sell it).

Mens rea: intent to sell/distribute – but is the mens rea the intent to traffic in that specific drug or does a broader intent suffice? Can you simply have the mens rea to traffic in a lesser drug? Accused argued for narrower view. RULE: substance that they actually deliver – use mens rea in the widest sense rule for trafficking. Must be included in the CDSA.

Held: Guilty of the more serious offence. His intention to traffic mescaline was good enough to support a conviction for trafficking LSD. The accused understood that he was distributing a prohibited narcotic.

Botterell thinks you are charged for trafficking in the drug that you actually sold – but there is no case for this proposition.

**Ratio:** With respect to drug offences, the crown must establish that the thing that was in your possession was known to the accused to be a prohibited substance, they don’t have to prove that it was heroine in particular. Mens rea in the widest sense rule.

# MISTAKE OF LAW

1. Mistake or ignorance of the law is no excuse for breaking the law (Mlynarchuk, Molis)
2. Some laws have wording that requires particular knowledge or intention that means they must wilfully break the law in order to be found guilty (Docherty)
* Ignorance of the law is **not a defence** against the law. Knowledge of the law is not a component of any offence.
	+ But sometimes it is difficult to determine whether it is a mistake of law or of fact
		- i.e. supposed charged with offence under Section 163(1) or (2) – Distributing Pornography
			* Able admits certain elements of the offence and he admits being aware of the nature of material but he states that he did not know that the material was obscene – is this a mistake of fact or of law?
	+ Case Law suggest exception to general rule
		- Mylnarchuk – absolute discharge granted
		- Docherty – accused’s belief that he was doing nothing wrong = good defence
		- Levis – defence of official induced error of law recognized

## R v Mlynarchuk – **Pure mistake of law cannot form defence, but they should be relevant in sentencing**

Facts: She is charged with appearing nude in public. She contests that she should not be criminally prosecuted because her manager told her bottomless dancing was okay & her manager was relying on a judicial decision. The judicial decision her manager relied on was overturned by the appeal court.

Issue: Could the accused defend herself by claiming a mistake of law?

Held: The accused made no mistake of fact, only mistake of law which does not offer her defence because it did not negative her intention to do the act. Still given absolute discharge

Reasoning: A mistake of law may be relevant to **sentencing – accused may get a lower punishment.**

* **Problem with relying on common law: it is constantly changing.**
* Policy reasons for mistake of law not providing a defence: anyone could argue that they thought law allowed them to do it (efficiency and effectiveness of system of law).
* “The principle that ignorance of the law should not be a defence in criminal matters is not justified because it is fair, it is justified because it is necessary”

**Ratio:** Court holds that pure mistakes of law cannot form a defence on public policy grounds but can and should be relevant in questions of sentencing. This case suggests that this is fairly strict.

## R v Molis – **Lack of knowledge of subsections of regulations are no defence**

Facts: Molis was manufacturing MDMA. When the appellant first started manufacturing it was not on the list of restricted drugs. When it was added it was published in the Canada gazette. Molis argues that he did not know that MDMA had become a restricted drug until after their arrest.

Held: this is a mistake of law. There is nothing in the regulations that say you must know that a drug is regulated to be guilty. The regulations were made publicly available, that is all that is necessary.

**Ratio:** Due diligence defence does not apply to knowing the law

## R v Docherty – **knowledge that one’s act is contary to the law is an element for MR for wilfully failing to comply with probation order**

Facts: Accused was bound by a probation order, and while on this he was found guilty to the offence of having care and control of a MV with a BAC over .08. He did not know this was an offence. Although this was irrelevant to that charge, it was argued that it was relevant to 666(1) “willfully breaking probation order”. [Man was under probation that required him to be of good behaviour. He was charged with wilfully failing to comply with a probation order because he was found drunk in a car. He plead guilty to having control of a motor vehicle while intoxicated, but stated that he thought he was not doing anything wrong because he didn’t think the car was operational, and therefore it couldn’t move.] – Put forward mistake of law defence – didn’t know that sitting behind the wheel of a car while it was not operating but while intoxicated constituted a breach in probation

Held: Accused acquitted

Reasoning: Docherty was definitely guilty of the offence of 'drunk driving' but he was not guilty of violating his probation. He had the actus reus for the driving offence, and could be convicted even though he didn't know that he could be charged even though the car wasn't moving. He could not be charged with violating his probation because he did not drink in the car with the intent to violate his probation. He could not have wilfully violated his probation order unless he knew that he was committing a criminal offence.

**Ratio:** Knowledge that ones act is contract to the law is an element of the requisite mens rea of wilfully failing to comply with a probation order

## Levis (City) v Tetrault – **Officially induced error recognized**

Facts: In both cases, the City claimed it would give notice of licences needing renewal. In one case the City did not properly address the notice and did not resend it, in the other, the way the date was presented was too confusing. There is an extensive outline of Sault Ste Marie and the types of offences in this case.

Officially Induced Error Defence: you do something you think is legal because a gov representative told you that you were entitled to do that thing. It is not fair for the state to tell you to do something and then punish you for the thing it said you were entitled to do. The advice has to come from the state, and you must rely on it to your detriment. Think promissory estoppel.

Held: neither of the situations at bar here meet all 6 of the parts of the test. Neither are acquitted both have to pay the fines.

1 An error of mixed law and fact was made

2 The person who committed the act considered the legal consequences of his/her actions

3 The advice obtained came from an appropriate official

4 The advice was reasonable

5 The advice was erroneous

6 The person relied on the advice in committing the act (Levis)

Capacity Defences

**Intoxication:** The automatistic state is the result of voluntary intoxication. Defence to specific intent offences, and some non-violent general offences. Intoxication less than an extreme state is not a defence to anything.

**Not Criminally Responsible on account of Mental Disorder:** The automatistic state is a result of an underlying disease of the mind. Proceed directly to section 16. Do not pass go, do not collect $200.

**Automatism:** the automatistic state is the transitory result of a condition or event related neither to a disease of the mind nor to self-induced intoxication.

# INTOXICATION

* **Section 33(1) –** It is not a defence to an offence referred to subsection (3) that the accused, by reason of self-induced intoxication lacked the general intent or voluntariness required to commit the offence
	+ The intoxication must be self-induced (R v King)
* Specific Intent Offences – require the mind to focus on an objective further to the immediate one at hand.
	+ For the purpose of … in statute is indicative of a specific intent offence
	+ Every attempt is a specific intent offence
	+ Murder is a specific intent
	+ The defence of intoxication is available for specific intent offences
* General Intent Offences – require only a conscious doing of the prohibited act.
	+ Assault and sexual assault are considered general intent
	+ Manslaughter is a general intent

 Includes as an element an assault or any other interference by a person with the bodily integrity of another person.

1. Advanced self-induced intoxication is a defence to specific intent crimes (Daviault)
	1. Murder, theft, robbery, assault with intent to resist assault
2. Self-Induced intoxication, is a defence to some crimes of general intent if the intoxication is akin to insanity or automatism (Daviault) – not really capable of any sort of higher order thought
3. Self-Induced intoxication is not a defence to a violent crime of general intent (Section 33.1(3))
	1. Murder may be reduced to manslaughter because you cannot be charged with the specific intent offence, but it Is not defence to the violent general intent offence
	2. Recent cases suggest that 33.1 may be unconstitutional – Superior Court of Justice case McCaw (2018) – but it hasn’t gone up to the SCC yet.
	3. Involuntary intoxication – if someone puts something in your drink
4. Self-induced intoxication disallows the defence of mistaken belief in consent in the context of sexual assault (Section 273.2)
5. It is now generally agreed that intoxication may not increase criminal culpability
6. Involuntary intoxication is a good defence because it goes to the actus reus

2 Where the accused is charged with an **assault or sexual assault** and is found to be extremely intoxicated this will not act as a defence, whether it meant that the accused **did not have the necessary intent (MR) or that the act was involuntary (AR)**; the accused will be found to have departed markedly from the standard of reasonable care generally excepted in Canadian society.

## Reniger v Fogossa – **There is moral fault in getting drunk in the first place, therefore no excuse from mens rea**

* This is taken to be the first-time courts have ever mentioned drunkenness
* They substitute knowledge and memory with the blameworthiness of getting that drunk in the first place
* “[I]f a person that is drunk kills another, this shall be felony, and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding nor memory; but inasmuch as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be privileged thereby.”

## DPP v Beard – **Beginning of modern intoxication defence**

Three Principles:

1. Intoxication could be ground for an insanity defence if it produced a disease of the mind
2. Evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with other facts proved in order to determine whether or not he had this intent.
3. The evidence falling short of proved incapacity in the accused to form the intent necessary to constitute the crime + merely establishing that his mind was affect by drink does not rebut the presumption that a man intends the natural consequences of his acts.
* Emphasis on capacity and intent + the specific intent to commit the crime in question is the only circumstance where intoxication can be a defence

##### SPECIFIC VS GENERAL INTENT

* “The categories of "specific" intent on the one hand and "basic" or "general" intent on the other have evolved as an artificial device whereby evidence, otherwise relevant, is excluded from the jury’s consideration.” (Dickson CJC in R v Bernard)
* The distinction between general and specific intent offences is not a precise science. Logic, intuition, and policy all play a part. The task has proved formidable to those who have been schooled in criminal law, and daunting to those who have not.” (Moldaver J. in **R v Tatton)**
* Specific intent offences require the mind to focus on an objective further to the immediate one at hand, while general intent offences require only a conscious doing of the prohibited act.” (R v Daley, at para. 35)
	+ Murder = Specific Intent (also robbery, fraud, attempts, for a particular purpose or with a particular intent in mind)
		- There is further complexity to the consideration to commit murder (objective isn’t merely to shoot at victim, the intent/objective is to take their life)
	+ Assault = General Intent (also sexual assault, manslaughter, arson)
		- There isn’t a specific objective required, only apply force (intentionally with no other objective)
* Specific Intent require fairly complex mens rea or fault elements (Tatton)
	+ Ulterior Motives (Lewis – the tea kettle)
	+ Intent to bring about particular consequence (murder)
	+ Knowledge of Circumstances (possession of stolen property)
* If examination of mental element does not provide clear answer, then **policy considerations** must be included
* Lastly, ask – is there a lesser included offence?
	+ If so, the first offence is probably specific intent
		- i.e. assault with intent to resist arrest vs. simple assault

## R v Leary – **Specific/General Intent Distinction – Intoxication only good for Specific Intent**

* Recklessness in getting to that level of drunk is enough to satisfy the mens rea.
* However, not all cases of recklessness are enough to satisfy mens rea.
* Endorses R v Majewski (1976) HL
* It therefore follows from Beard, Majewski, and Leary that an accused could be convicted of assault, say, even though, due to intoxication, he did not in fact intend to apply force directly to his victim

**Rule Emerging**: Intoxication was not an defence to an offence of general intent, although it was in principle a defence to an offence of specific intent – must be advanced intoxication (simply being drunk is not a defence).

## R v Bernard – **Mild/Extreme Intoxication Distinction**

* Found guilty of sexual assault causing bodily harm
	+ Appeals were denied
* Key component was Justice Wilson’s concurring opinion
	+ Believed there should be a modification or relaxation of the Leary rule to allow drunkenness to be a defence to general intent offences, but only where the intoxication was so extreme as to similar to insanity or automatism
	+ “I believe that the Leary rule is perfectly consistent with an onus resting on the Crown to prove the minimal intent which should accompany the doing of the prohibited act in general intent offences. I view it as preferable to preserve the Leary rule…so as to allow evidence of intoxication to go to the trier of fact in general intent offences **only if it is evidence of extreme intoxication involving an absence of awareness akin to a state of insanity or automatism**. Only in such a case is the evidence capable of raising a reasonable doubt as to the existence of the minimal intent required for the offence.”

**Rule Emerging:** A slight shift to relax the rule that intoxication could not under any circumstances be placed in front of a jury in the context of general intent offences.

## R v Daviault – **Only matters if extreme intoxication – burden is accused to establish they have reached such a level**

Facts: Daviault arrived at his wife's friend's house with a 40 oz. bottle of brandy. He had already allegedly drunk 7 or 8 beers earlier that day. He fell asleep on the couch; at some point he awoke, picked up the wife's friend, wheeled her to the bed in her wheelchair and sexually assaulted her. He doesn't recall finishing the bottle of brandy, but it was empty when the complainant saw it later that night/morning.

Issue: Can self-induce intoxication, if it is so extreme that it resembles automatism or a disease of the mind, act as a defence for a general intent offence?

Reasoning:

* Cory proposes that the court should accept Wilson’s approach in Leary
	+ “In my view, the Charter could be complied with, in crimes requiring only a general intent, if the accused were permitted to establish that, at the time of the offence, he was in a state of extreme intoxication akin to automatism or insanity. Just as in a situation where it is sought to establish a state of insanity, the accused must bear the burden of establishing, on the balance of probabilities, that he was in that extreme state of intoxication.” (para. 59)

Questions:

1. When is the Daviault defence available
	1. Extreme intoxicated either self-induced or involuntary – unconscious or involuntary behaviour
	2. **Burden is on the accused** to establish that he was in an extreme state of intoxication
2. Why did the SCC focus on extreme intoxication akin to insanity or automatism.
	1. Because we have the distinction between specific and general intent offences
3. Should the defence ever succeed?
	1. Hard to determine if someone can ever be so drunk that they do not intend to assault.

**Rule Emerging:** Intoxication can be a defence to crimes of specific intent, extreme intoxication akin to insanity can be a defence to a general intent offence but accused bears burden of establishing it on the balance of probabilities, in such cases extreme intoxication could go to mens rea or actus reus (as tending to show involuntariness)

## Parliamentary Response – **Enacting Section 33.1**

* Enacted s. 33.1
	+ Not a defence to an offence referred to in subsection 3
* For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.
* This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.

**Rule Emerging:** Advanced intoxication remains a defence to specific intent, self-induced intoxication is no longer a defence to violent general intent offences, this is true even if the accused’s intoxication is so extreme as to render the accused’s assaultive actions involuntary; involuntary intoxication on the other hand may constitute a good defence.

## R v Daley – **Cite for Distinction between levels of intoxication**

Facts: Daley is accused of stabbing his wife after a night of drinking when he couldn't get back into the house. Daley claimed he was so drunk he didn't remember anything after he arrived home. At trial and at the court of appeal, Daley was found guilty of second-degree murder.

Issue: how should trial judges be instructing juries in terms of an advanced intoxication defence?

The MacKinlay & Canute Models: MacKinlay first instructs on capacity to form the requisite intent, and then goes on to say that if the jury finds beyond a reasonable doubt that the accused possessed the capacity to form the requisite intent, they must still go on to determine whether the accused possessed the actual intent. The Canute model focusses only on whether the accused possessed actual intent.

 Ratio: “I would therefore recommend that a one-step Canute-type charge be used in all future charges on intoxication.” Juries are to be instructed to ignore issues of capacity and ask whether the intoxicated accused in fact formed the requisite intent.

Held: TJ’s instructions on intoxication were appropriate, and confirmed the accused’s conviction for 2nd degree murder

* Three levels of Intoxication
	+ **“Mild” intoxication** = alcohol-induced relaxation of inhibitions and socially acceptable behaviour
	+ **“Advanced” intoxication** = intoxication to the point that the accused lacks specific intent/foresight of consequences – defence to specific intent
	+ **Extreme intoxication** akin to insanity or automatism “which negates voluntariness and thus is a complete defence to criminal responsibility” subject to s. 33.1 – defence to general intent, but not violent general intent

**On Exam**

* Identify the level of intoxication that is involved
* Identify whether it is specific or violent general intent, or general intent.
	+ Is it one of the general attempt offences that is exempted from the defence?
* Use Daviault, Daley, and S 33.1.
* Put all the pieces together to create an argument whether or not they can apply the defence

# NOT CRIMINALLY RESPONSIBLE FOR REASONS OF MENTAL DISORDER (NCRMD)

* Two ways this can come into play:
	+ A) Not fit to stand trial – accused is presumed fit to stand trial unless the court is satisfied on a balance of probabilities that the accused is unfit to stand trial.
	+ B) Not guilty of crime for reason of mental disorder – a disease of the mind
* Not defined in the criminal code – must look at common law to find definitions – “disease of the mind”
	+ i.e. arteriosclerosis (Rabey), brain damage (revelle), Chronic alcoholism (Beard), Delusion (Abbey), Epilepsy (Sullivan), Erotomania (Fraser), Bipolar Disorder (Warsing), Psychopathic Personality Disorder (Craig)
	+ A question of law – must be determined by a judge if that disease of the mind rises to the level. They must then determine if the particular accused suffered from that disease and is that the thing that caused them to be unable to appreciate the nature and quality of their acts.
* **Section 16 –**
	+ **(1)** Defence of Mental Disorder – 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
	+ **(2)** Presumption – Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on a balance of probabilities
	+ **(3)** Burden of Proof – the burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue
* Where an accused is found not criminally responsible by virtue of mental disorder, a court or Review Board may, pursuant to CC s. 672.54 – review board must choose the option least onerous and least intrusive to the accused
	+ a) Where the accused is not a significant threat to the safety of the public, order that the accused be discharged absolutely;
	+ b) Direct that the accused be discharged subject to such conditions as the court or RB considers appropriate;
	+ c) Direct that the accused be detained in custody in a hospital, subject to such conditions as the court or RB considers appropriate.
1. Used when the accused did not know what they were doing or didn’t know it was wrong due to a disease of the mind
2. Everyone is presumed sane unless proved otherwise on a balance of probabilities **(Section 16(2))**
3. Whether an illness counts as a disease of the mind is a question of law, whether the accused suffered from that disease is a question of fact (Cooper, Bouchard)
4. Temporary psychosis does not constitute a disease of the mind (Cooper, Bouchard)
	1. Ask if the situation would have the same impact on any normal person. If it would have the same effect, then the cause of the psychosis is external and the court should find that there is no mental disorder (Bouchard) – also look for psychological blow
5. Appreciating the nature and quality is higher than simple knowledge (Cooper, Bouchard, Abbey)
6. An accused’s failure to appreciate the penal consequences of his actions due to a disease of the mind does not entitle him to the defence under **Section 16** (Abbey)
7. Accused must know that it was a legally or morally wrong (Chaulk)

## M’Naghten’s Case

Facts: M'Naghten shot a guy and thought he was shooting the prime minister. He thought he was being harassed and persecuted by the government.

Issue: Did the accused have an understanding that what he was doing was a wrongful act? What is the actual test or rule to find someone insane?

Held: Not guilty on ground of insanity

Reasoning:

* it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a [1] defect of reason, [2] from disease of the mind, as [3] not to know the nature and quality of the act he was doing; or, [4] if he did know it, that he did not know he was doing what was wrong.
	+ 1.Accused bears the burden of establishing that he is insane
	+ 2.It must be proved that the accused was suffering from ‘a disease of the mind’
	+ 3.The disease of the mind must have been operative at the time of the offence
	+ 4.The disease of the mind must have rendered the accused unable to know the nature and quality of the act he was doing
	+ 5.Alternatively, the disease of the mind must have rendered the accused incapable of knowing that what he was doing was (legally) wrong

Prof Note: this is the most important case for laying out the foundation for the modern NCRBRMD. Section 16 is taken almost directly from what the judge said. – key difference is ‘appreciate’ vs. ‘knows’

## R v Cooper (1980) SCC – **Related to s.16(1) – Definition of Mental Disorder/Disease of the Mind**

Facts: Accused and victim were both parties at the Hamilton Psychiatric Hospital; both attended a church dance, and “after an unsuccessful attempt at sexual intercourse” the appellant strangled the victim.

Issue: Did the accused have a disease of the mind which rendered him incapable of appreciating the nature and quality of the act of which he was charged or of knowing that it was (legally) wrong?

“’Appreciates’ imports an additional requirement to mere knowledge of the physical quality of the act. The requirement, unique to Canada, is that of perception, an ability to perceive the consequences, impact, and results of a physical act. An accused may be aware of the physical character of his action (i.e., in choking) without necessarily having the capacity to appreciate that, in nature and quality, that act will result in the death of a human being” Higher level degree of knowledge, understanding what the consequences of your conduct are likely to be.

Ratio: Definition of disease of the mind: “To date, the phrase ‘disease of the mind’ has proven intractable, and has eluded satisfactory definition by both medical and legal disciplines. It is not a term of art in either law or psychiatry” but: “one might say that in a legal sense ‘disease of the mind’ embraces any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion.”

## R v. Bouchard-Lebrun **–Related to (2) - A disease of the mind will always have an internal trigger; if it’s externally triggered it is not a disease of the mind and will not qualify for use under s.16**

Facts: Accused brutally assaults two people leaving one disabled and confined to a hospital for the rest of his life. This happens after he goes into a state of toxic psychosis, a result of voluntary intoxication from ecstasy. At trial accused convicted on basis that meeting s 33.1 requirements will not constitute defence for violent crimes. Accused appealed citing Insanity (s. 16) should have been the defence rather than intoxication.

Issue: Can toxic psychosis caused by voluntary intoxication count as disease of the mind under CC S. 16?

Held: (appeal dismissed)

* The internal cause factor involves comparing the accused with a normal person.  The comparison between the accused and a normal person will be objective and may be based on the psychiatric evidence.  The more the psychiatric evidence suggests that a person suffering from no disease of the mind is susceptible to such a state, the more justified the courts will be in finding that the trigger is external.  Such a finding would exclude the condition of the accused from the scope of CC s. 16. The reverse also holds true.

Reasons: In this case drug taking was found to be the cause of the accused state of toxic psychosis. Based on comparison to a normal person (a person not suffering from a disease of the mind), evidence suggested that drug taking was an external trigger of the psychosis. Therefore, the defence of “insanity” under s. 16 is unavailable to the accused.

* There must be some underlying disease of the mind that triggers the psychotic break to qualify for a disease of the mind – so how do we determine if there is a disease of the mind?
	+ Compare the accused with a normal person and ask whether a normal person would, upon becoming intoxicated in the manner in which the accused did, have manifested the same sort of psychosis
		- If yes, the trigger is external and no disease of the mind.
		- If no, then the trigger is internal and arguably due to a disease of the mind.
			* Applied to the facts of the case: Bouchard-Lebrun is not suffering from a disease of the mind – so excluded from s.16 and s.33.1 applies to rule out a defence based on intoxication

Ratio: Toxic psychosis caused by mental disorder (internal trigger) can qualify as a disease of the mind and can be used as basis for defence under CC s. 16. However, Toxic psychosis caused by a Self-induced intoxication (external trigger) will not be available for this defence and accused should proceed under CC S. 33.1.

## R v Abbey – **Related to (3) – Nature and Quality of the Act/Omission: an accused’s failure to appreciate, as a result of a disease of the mind, the penal consequences of his or her actions does not in law render the accused “insane” within the meaning of s16(1)**

Respondent was found not guilty at trial on account of insanity, of importing cocaine into Canada and of unlawful possession of cocaine for the purpose of trafficking. A hypomaniac, respondent knew he was doing wrong but believed that, if caught, he would not be punished. The trial judge found that respondent's incapacity to appreciate the nature and quality of his acts met the test of s. 16(2), and more particularly, that he did not "appreciate" the consequences of punishment associated with the commission of the offence; had a "delusional belief" that he was committed to a course of action, that no harm would come to him and he would not be punished.

Rule Emerging:

1. An accused’s failure to appreciate, as a result of a disease of the mind, the penal consequences of his or her actions does not in law render the accused insane within the meaning of s. 16(1)
	1. The ability to appreciate the nature and quality of one's act includes (i) the ability to perceive the physical consequences and (ii) impact of the act
	2. It refers to the physical character of the act, and requires sufficient mental capacity to measure and foresee the consequences of conduct
	3. A delusion which renders an accused incapable of appreciating the nature and quality of his act goes to the mens rea of the offence, and results in a verdict of not guilty by reason of insanity
	4. Punishment is not an element of the offence itself, and an inability to appreciate the penal consequences of an act does not go to mens rea and does not bring into operation the "first arm" of the insanity defence [i.e. nature and quality]
	5. The "second arm" of s. 16(2) [knowing it was wrong] requires an ability to know that an act is "wrong", which means "wrong according to law". The provision is concerned with knowledge of wrongness, not appreciation of consequences, whether physical or penal.

## R v. Chaulk – **“wrong” within s.16 means legally OR morally wrong.**

TAKEAWAY: Wrong, within the meaning of s. 16(1) means a legal or a moral wrong.

Facts: A 15 (Chaulk) and 16-year-old boy, under the belief that they could rule the world in a state of paranoid psychosis killed the victim because they thought it was a necessary means to an end. They appreciated that the act was illegal but that they were above the ordinary law; they thought the law was irrelevant to them and that they had a right to kill the victim because he was “a loser”.

Issue: Is the meaning of the word “wrong” in s. 16(1) of the Criminal Code restricted to “legally wrong” or should it be interpreted more broadly to mean “legally or morally wrong”?

Held: New trial ordered (appeal allowed)

 “The insanity defence should not be made unavailable simply on the basis that an accused knows that a particular act is contrary to law and that he knows, generally, that he should not commit an act that is a crime. It is possible that a person may be aware that it is ordinarily wrong to commit a crime but, by reason of a disease of the mind, believes that it would be “right” according to the ordinary morals of this society to commit the crime a particular context. In this situation, the accused would be entitled to be acquitted by reason of insanity.”

* Previously all that was cared about was whether the accused appreciated that it was legally wrong
* But there can also be situations where an accused appreciates the legal wrong of the act but does not appreciate the moral wrong of it (or under the circumstance they found themselves in, it was necessary to complete the act for whatever reason)
* The burden is on the accused to establish they were unable to fully appreciate either the moral wrong or the legal wrong

 “The problem with [then] s. 16(4) is twofold. First, the provision allows sanity… to be presumed. This violates the basic principle (set out in Oakes) that the state bears the burden of proving guilt beyond a reasonable doubt. Secondly, the provision requires an accused to prove his or her insanity, on a balance of probabilities, in order to rebut the presumption of sanity. This gives rise to a reversal of the burden of proof such that an accused could be found guilty of a criminal offence despite a reasonable doubt in the in of the trier of fact about the accused’s insanity”

Dissent (McLachlin + LHD): “In Lamer’s view, an accused who is capable of knowing an act or omission is legally wrong is not subject to the criminal process, if mental illness rendered him or her incapable of knowing the act or omission was morally wrong. I on the other hand, take the view that it does not matter whether the capacity relates to legal wrongness or moral wrongness – all that is required is that the accused be capable of knowing that the act was in some sense “wrong”. If the accused has this capacity, then it is neither unfair nor unjust to submit the accused to criminal responsibility and penal sanction.”

Upshot – ‘Or Knowing it was wrong’ – refers to morally wrong as well

Ratio (Lamer + Dickson CJ, La Forest, Cory): “It is plain to me that the term ‘wrong’ as used in s. 16(1) must mean more than simply legally wrong. In considering the capacity of a person to know whether an act is one that he ought or ought not to do, the inquiry cannot terminate with the discovery that the accused knew that the act was contrary to the formal law”

**Summary & Exam:**

* What constitutes Disease of the mind is a matter of law (for a judge to decide)
* Whether accused is suffering from it is a matter of fact (deference to trial judge and jury).
* Disease of mind renders accused incapable of appreciating the nature and quality of acts. Accused needs to appreciate this to ground culpability. **(Cooper**)
* Accused does not need to appreciate the penal consequences of his actions to ground culpability (**Abbey**) – knowing it is wrong is enough.
	+ Disease of the mind must render person incapable of appreciating nature and quality of act or omission (**Cooper)** 🡪 but not legal consequences (**Abbey**).
* Toxic psychosis caused by self induced intoxication is almost always never a disease of the mind
	+ External trigger means not disease of the mind (**Bouchard-LeBrun**)
	+ Internal trigger indicates more likely to be disease of the mind (**Bouchard-LeBrun**)

First Question: Is the accused party to a disease of the mind?

Second Question: Did it have particular consequences or effect?

* Did it stop them from appreciating what they were doing?
* Did it stop them from understanding that what they were doing was legally or morally wrong?
	+ If incapable of understanding the moral wrong, and incapable of understanding the legal wrong, then defence is available.
	+ If incapable of understanding the moral wrong, but capable of understanding legal wrong, the defence may be possible as stated by Lamer in Chaulk; but McLachlin disagrees.
	+ If capable of understanding legal wrong, and capable of understanding moral wrong, no defence.
	+ If capable of understanding moral wrong, and incapable of understanding legal wrong, no defence – see Chaulk, para 21 for more detail.

# AUTOMATISM

* Definition: Unconscious, involuntary behaviour, the state of a person who, though capable of action, is not conscious of what he is doing – it means an unconscious, involuntary act where the mind does not go with what is being done
	+ Goes to negating the Actus Reus of the crime
	+ Focusses on the voluntariness + the variety of impairment rather than complete, lack of consciousness
		- Prove involuntariness on balance of probabilities
		- Presumed mental
* Goes to the voluntariness of the crime – the actus reus of the crime
* Three ways to classify:
	+ 1. A result of disease of the mind – goes under s 16 of the code (mental disorder defence)
	+ 2. A result of self-induced intoxication – goes under s 33.1 of the code (intoxication defence)
	+ 3. A transitory result of a condition or event related neither to a disease of the mind nor to self-induced intoxication.
		- Acquitted on actus reus basis

Test for Automatism (Stone)

* 1. Satisfy evidentiary burden for the defence: the burden is on the accused to rebut the presumption of voluntariness. The accused must prove that it is more likely than not that he acted involuntary
		+ The accused must assert involuntariness
		+ The accused must have psychiatric or psychological evidence confirming involuntariness
		+ The accused must give additional evidence to show their involuntariness (at least one of the things listed)
			- That there was a trigger that started the automatistic state
			- That there was a documented medical history of recurring automatistic states
			- Corroborating evidence of a by-stander
			- The act was motiveless
	2. Decide whether to leave mental disorder or non-mental disorder automatism with the jury
		+ Start by assuming there is a disease of the mind, search for things that prove otherwise
			- Use internal cause theory
			- Using continuing danger theory
			- Other policy questions – does society require protection from the accused
1. Sane automatism is unconscious, involuntary behaviour that is not rooted in a disease of the mind (R v K, Rabey)
	1. State of impaired consciousness, rather than unconsciousness, in which an individual, though capable of action, has no voluntary control of that action (Stone)
2. Internal Cause Theory: if the accused behaved in a way that a normal person would not have, that is an indication that the trigger is internal, but the automatism defence relies on the trigger being external (Rabey)
3. Continuing Danger Theory: if the accused constitutes continuing danger to society, non-insane automatism is not open to them as a defence (Parks)
	1. Consider the likelihood of the accused encountering triggers for the state again (Leudecke)
4. The history of the state matters – how it arises.
5. If the automatism state arises neither as a result of intoxication or disease of the mind, then the accused is entitled to an acquittal (Parks)
6. The burden is on the accused to prove on a balance of probabilities that he was in an automatist state (Stone)
7. The judge may use a combination of internal cause theory, continuing danger theory and other policy considerations to determine whether the accused should be charged with insane or non-insane automatism (Stone)

## R v Rabey (1980) SCC - **internal/external factor test, "psychological blow" automatism**

Facts: A guy finds a note in his girlfriend's journal that she likes other guys better than him. He sees her the next day and hits her on the head with a rock and chokes her. He had previously had many appointments with psychiatrists.

QoL/QoF: Whether a mental state counts as a disease of the mind is a question of law, whether an accused had a particular mental state is a question of fact.

Issue: Can the defendant successfully argue non-insane automatism?

Held: No – it was a disease of the mind.

Reasoning: External cause vs internal cause. We have to ask what was the trigger for the psychotic break. Would an ordinary person have acted the way the accused did? If an ordinary person would not have acted that way, it suggests that the trigger is internal. In this case, the cause was clearly internal, so it has to be treated as a case of insane automatism and a new trial must be struck.

Dickson Dissent: we should only be concerned with the accused's subjective state of mind. If someone suffers a severe mental blow and there is no disease of the mind, he should be able to argue automatism.

**Ratio:** In order to decide whether section 16 applies or non-insane automatism look at whether it rises from an **internal source** (disease of mind) **or external force** (non-insane).

\*Following *Rabey* we have an internal/external distinction.

## R v Parks (1992) SCC - **sleepwalking = non-insane automatism, introduction of continuing danger theory**

Facts: The respondent attacked his in-laws, killing his mother in law and seriously injuring his father in law. The respondent drove his car from his home to their home and then from their home to the police station where he confessed. Respondent claimed he was sleepwalking. He was having problems with stress earlier.

Issue: Is he entitled to the defence of automatism? Further can he get non-insane automatism?

Previous Decisions: The trial court and appeal court both acquitted on the defence of automatism.

Held: It is appropriate on the facts to give him non-insane automatism. This is good for him, doesn't have to go to an asylum. No AR so he walks free.

La Forest: QoL/QoF distinction. Is sleepwalking counted as disease of the mind? Only voluntary conduct can attract criminal liability and sleepwalking is non-voluntary. Sleepwalking does not fit well into the internal/external test. See policy arguments in para 42. This case will not open the floodgates to sleepwalking offences. The accused did not constitute a continuing danger under the continuing danger theory. Whether or not the accused constitutes a continuing danger matters to whether or not the particular accused can have non-insane automatism. Insane or non-insane has become a policy question

Lamer dissent: Precedent shows us that sleepwalking is not a disease of the mind.

**Ratio:** Two policy approaches to disease of the mind inquiry – (1) Continuing danger: any condition likely to represent a recurring danger to the public should be treated as insanity (2) Internal Cause: stemming from the psychological or emotional makeup of the accused rather than some external factor should lead to a finding of insanity

## R v Stone (1999) SCC - **current law for automatism, essentially impossible to get non-insane automatism now; Botterell does not like this case**

Facts: Stone is charged with killing his third wife by stabbing her 47 times. He killed her after she had been berating him. He hid her body and flew to Mexico. He eventually came back to Canada and turned himself in.

Issue: Should the jury have been offered non-mental disorder automatism?

Held: the trial judge was correct to not offer the defence of non-insane automatism, he is guilty of manslaughter.

Stone plead many defences; including insane automatism, non-insane automatism, provocation, no intent. Accused bears burden of establishing involuntariness.

New Definition of Automatism: a state of impaired consciousness, rather than unconsciousness, in which an individual, though capable of action, has no voluntary control over that action.

Step 1: Establishing the proper evidential foundation – evidence upon which a properly instructed jury could find that the accused acted involuntarily on a balance of probabilities (this is much higher than the “air of reality” test, and puts the evidential burden on the accused).

Step 2: Classifying the automatism as sane or insane – begin from the proposition that the defence to be left with the jury is the mental disorder defence. To establish automatism, the accused will typically point to prior instances of automatism, but that means that there is a danger of recurrence, and that means that the automatism is likely to be characterized as insane.

**Ratio:** Step One – Accused must first meet evidentiary burden for automatism, prove involuntariness, Step Two – Judge presumed that automatism is disease of mind unless otherwise proved. \*Significant for increasing the difficulty for raising defence of non-insane automatism

## R v Luedecke (2008) ONCA - **application of test in *Stone***

Facts: The accused was charged with sexual assault and did not dispute that he had non-consensual sex with the victim. He claimed that he was asleep when he committed the offence and therefore should have the defence of non-insane automatism.

Issues: Were the accused’s' actions involuntary? If so, is he NCR-MD?

Held: Automatism brought on by parasomnia renders his actions non-culpable in terms of voluntariness, however, there are policy/public safety concerns that lead to a finding of NCR-MD.

Ratio: "La Forest J. and Martin J.A. both acknowledged that public safety considerations may dictate that any abnormal mental state rendering a person incapable of controlling his or her conduct should be characterized as a disease of the mind regardless of the medical characterization or diagnosis. The legal characterization of the condition as a “disease of the mind” places the accused within the s. 16 exemption to criminal liability and forecloses an outright acquittal. Those who are exempted from criminal liability under s. 16 are subject to a post-verdict inquiry into their dangerousness."

Reasoning: Accused had had previous history of this kind of behaviour, accused had medical evidence of a sleep disorder specialist, trial judge found that the accused had established involuntariness on a balance of probabilities and ONCA accepts that too. Because the triggers that cause the accused to enter into a state of sexsomnia will always be around, he does constitute a continuing danger. The court is responsible for assessing potential risk, the specific risk/treatment of the individual accused is done later. The triggers for the condition are important: stress, fatigue and alcohol are the triggers; these are certain to occur, making it likely that the accused will be triggered again.

EXCUSES AND JUSTIFICATIONS

**Necessity:** Excuse. Codified through section 8(3). Used as a complete defence when the accused had “no other choice”

**Duress:** Excuse. Section 17 for principals, common law for parties. Used as a complete defence when the accused only did the criminal act because another person forced them to.

**Self-Defence: Justification**. Section 34. Used as a complete defence when the accused attacks as a precursor to being attacked themselves.

**Provocation:** A partial defence to murder. Used when the criminal act was committed by the accused in response to something offensive that the victim did.

**Justification or Excuse?** If someone was justified in their actions, it means that what they did was not wrong. With an excuse, everyone agrees that what they did was wrong, but they are excused. With justification, you do not take responsibility for the harm you have caused, with excuses you do.

# NECESSITY – natural threat

* The defence of necessity is about normative or moral involuntariness. **It is considered a residual offence that fills in the gaps left by other defences.** To have no choice means that the accused was acting voluntarily, but we think a rational person in the same situation would not have acted differently
1. As a defence, necessity is an **excuse not a justification** (Perka)
2. The first two steps of the test are judged by a modified objective test and the last step is purely objective test (Latimer)
3. Step 2: There may be an option available but it is not appropriate for us to expect them to take that option

**Necessity Test (Latimer)**

1 The accused must be in imminent peril or danger: the peril or danger must be more than just foreseeable or likely. It must be near and unavoidable. A a minimum, the situation must be so emergent and the peril must be so pressing that normal human instincts cry out for action and make a counsel of patience unreasonable. **[modified objective test]**

2 The accused must have had no reasonable legal alternative to the course of action he or she undertook **[modified objective test]**

3 The harm inflicted by the accused must be proportional to the harm avoided by the accused. **[objective test]**

## Dudley and Stevens – **Necessity is no defence to murder in the UK**

Facts: Three men were shipwrecked at sea, one of them fell into a coma and the other two ate him to survive.

Ratio: "the private necessity which justified, and alone justified, the taking the life of another for the safeguard of one’s own to be what is commonly called “self-defence."

Reasoning: there is no way of determining whose life is more worthy than anyone else's

Held: sentenced to death

## Perka v The Queen – **Three elements for necessity – imminent peril, compliance impossible, proportional**

Facts: Ship smuggling approx.. $7,000,000 of marijuana in atlantic ocean up to Alaska for trafficking. Waters get rough and problems with ship cause ship to seek refuge in a bay in BC. Police happens upon the ship and arrests people for possession with intent to trafficking etc. into Canada. When police find them the majority of the weed and equipment from ship had been unloaded onto land. Accused, plead defence of necessity – captain was fearful of the boat capsizing

Reasoning:

Dickson J – Rationale for the defence is that it is inappropriate to punish actions that are “normatively involuntary” where this form of involuntariness is measured on the basis of society’s expectation of appropriate and normal resistance to pressure

Elements of the defence of necessity

1. The accused must be in a situation of imminent peril
2. Compliance with the law must be demonstrably impossible – the accused must have no reasonable legal alternative to disobeying the law if the peril is to be avoided
3. There must be proportionality – the harm inflicted must be less than the harm sought to be avoided

Consider again the first two requirements:

1.The accused must be in a situation of imminent peril

2.Compliance with the law must be demonstrably impossible – the accused must have no reasonable legal alternative to disobeying the law if the peril is to be avoided

* Both of these requirements are to be analyzed according to a **modified objective test** (see Latimer at para. 33): “The accused person must, at the time of the act, honestly believe, on reasonable grounds, that he faces a situation of imminent peril that leaves no reasonable legal alternative open.”

3.There must be proportionality – the harm inflicted must be less than the harm sought to be avoided

* This requirement is to be determined according to a **purely objective standard**: “The proper perspective…is an objective one, since evaluating the gravity of the act is a matter of community standards infused with constitutional considerations (such as, in this case, the s. 15(1) equality rights of the disabled).” (Latimer at para. 34)

## R v Latimer – **Modified Objective tests & objective test**

Facts: A man killed his daughter who had cerebral palsy because she was in severe pain and would have to undergo surgeries for the rest of her life. Rather than placing her in a care home, he asphyxiated her with carbon monoxide and then tried to pass it off as death in her sleep.

Issue: Should the trial judge have directed the jury on the defence of necessity?

Held: No, a reasonable jury could not have found the defence of necessity. The conviction should be upheld.

Reasoning: The defence of necessity is narrow and of limited application in criminal law. The accused must establish the existence of the three elements of the defence. **1) That there is imminent peril or danger (to the accused, or it could be a third party). 2) That the accused had no reasonable legal alternative to the course of action undertaken (The test for both steps 1 and 2 is modified objective – a reasonable person in the same circumstances). 3) There must be proportionality between the harm inflicted and the harm avoided. (objective test)** The trial judge was correct to remove the defence from the jury since there was no air of reality to any of the three requirements for necessity.

Obiter: "Assuming for the sake of analysis only that necessity could provide a defence to homicide, there would have to be a harm that was seriously comparable in gravity to death (the harm inflicted)." This means that it isn't clear whether you can kill someone to save yourself.

Ratio: The first two steps of the necessity test will be judged on a modified objective test. The accused person must, at the time of the act, honestly believe, on reasonable grounds, that he faces a situation of imminent peril that leaves no reasonable legal alternative open. The proportionality step will be purely objective. A subjective evaluation of the competing harms would, by definition, look at the matter from the perspective of the accused person who seeks to avoid harm, usually to himself.

# DURESS – from another person

* **Section 17 –** A person who commits an offence under
	+ **(1)** Compulsion by threats of
	+ **(2)** immediate death or bodily harm
	+ **(3)** From a person who is present when the offence is committed is excused for committing the offence if
	+ **(4)** the person believes that the threats will be carried out and
	+ **(5)** the person is not a party to conspiracy or association whereby the person is subject to compulsion.
* Exceptions under **Section 17**
	+ 1) high treason or treason, 2) murder, 3) piracy, 4) attempted murder, 5) sexual assault, 6) sexual assault with a weapon, 7) threats to a third party or causing bodily harm, 8) aggravated sexual assault, 9) forcible abduction, 10) hostage taking, 11) robbery, 12) assault with a weapon or causing bodily harm, 13) aggravated assault, 14) unlawfully causing bodily harm, 15) arson or 16) an offence under sections 280 to 283 (abduction and detention of young persons).
1. Section 17 applies to principles and is much more restrictive, common law duress applies to parties and is concerned with moral involuntariness
2. Immediacy & presence is not required (Ruzic, Ryan)
3. A person acting under threats of death or bodily harm can in some cases negate the mens rea component of an offence. Whether or not it does so will depend on the particular offence in question. The relevant question in each case will be whether the definition of the offence as written by Parliament is capable of supporting the inference that the presence of coercion can have a bearing on the existence of mens rea (Hibbert)
4. The defence of duress will be available as an excuse if the accused acted under threat (Hibbert)
5. An accused cannot rely on common law defence of duress if he or she had an opportunity to escape from the circumstances causing duress (Hibbert)
6. Section 21(1)(b) and 21(2) mental elements cannot be negated by duress (Hibbert)
7. The common law defence requires ‘no safe avenue of escape’ judged on a modified objective standard (Hibbert)
8. Duress only available when person commits an offence while under compulsion of a threat made for the purpose of compelling them to commit the offence (Ryan)

**Common Law Duress Test**

1 An implicit or explicit threat of immediate death or bodily harm proffered against the accused or a third person. The threat may be of future harm.

2 The accused reasonable believed that the threat would be carried out.

3 No safe avenue of escape, evaluated on a modified objective standard

4 A close temporal connection between the threat and the harm threatened.

5 Proportionality between the harm threatened and the harm inflicted by the accused, on a modified objective standard

6 The accused is not a party to a conspiracy or association

## The Queen v Carker – **Immediacy & Presence requirements for duress are intense**

Facts: Carker was in prison when he broke the fixtures in his cell. He claimed that the other prisoners were being rowdy, and he was not, so the other prisoners told him that they would harm/stab him if he did not join in by breaking the fixtures.

Issue: Did Carker act under duress?

Held: No defence of duress

Wilfully: In statute it said that the mischief must be caused wilfully. This does not go to the motives behind why Carker damaged his fixtures, only to the intent to damage the fixtures, which he did have.

Reasoning**:** The threat was not immediate as none of the prisoners who threatened him were **in the cell** at the time. The prisoners were locked in other cells. No reasonable apprehension of immediate death.

**SIGNIFICANCE:** Very limited view of duress.

* Interestingly, in Carker the SCC seemed to hold that s. 17 ousted the common law defence of duress altogether: “The common law rules and principles respecting ‘duress’ as an excuse or defence have been codified and **exhaustively defined** in s. 17[.]” (para. 4)
* However, this position was later weakened in Paquette with respect to parties – see Hibbert at para. 51
* Thus, following Paquette, s. 17 was held to be available to principals, and principals alone, and the common law defence of duress was held to be available to parties, and parties alone

Ratio: immediacy requires that the threat be carried out immediately and not at some future time. The person making the threat must be present at the time the threat was made.

R v Paquette – The principal/party distinction in the context of the law of duress.

## **R v Hibbert** (1995) SCC - distinguish between intent to bring about a consequence and desire to bring about a consequence, the role of moral involuntariness

Facts: Bailey wanted to kill Cohen as a result of a past conflict. Bailey threatened Cohen's friend, Hibbert, in order to force him to lure Cohen into a trap. Hibbert and Bailey called at Cohen's apartment. Bailey shot Cohen, but Cohen lived. Hibbert stood by and watched without intervening. Hibbert turned himself into the police.

Issue: did the defence of duress operate by negativing common intention? Or did the defence of duress operate as an excuse for criminal behaviour? Can the mens rea requirements of section 21 be negated by coercion?

**Duress per minas** = duress by threat. Duress is outlined for principals in section 17 and maintained for parties by section 8(3).

Reasoning: Lamer J distinguishes between two meanings of "purpose" as mentioned in the mens rea part of section 21. There is purpose equated with intention and purpose equated with desire. He interpreted that parliament intended the 'intention' version. Duress does not negative mens rea, it is an excuse despite the mens rea being present. "Intention in common" means simply that "the two persons had in mind some unlawful purpose".

Held: appeal allowed, accused acquitted

Three Conclusions:

1. Depending on the offence, duress can negate the mens rea of the particular offence of a party to an offence
2. Duress can be used to excuse the conduct of a party to an offence
3. Section 21(1)(b) and 21(2) mental elements cannot be negated by duress

The court found that a person acting under threats of death or bodily harm can in some cases negate the mens rea component of an offence. Whether or not it does so will depend on the particular offence in question. The relevant question in each case will be whether the definition of the offence as written by Parliament is capable of supporting the inference that the presence of coercion can have a bearing on the existence of mens rea.

In any case, the defence of duress (both the common law defence and the more narrow statutory defence set out in s. 17 of the Criminal Code) will be available as an excuse if the accused acted under threat. This acts similarly to the defence of necessity.

However, an accused cannot rely on the common law defence of duress if he or she had an opportunity to escape from the circumstances causing duress.

## R v Ruzic – The importance of moral involuntariness

Facts: Ruzic had drugs strapped to her body by a guy who threatened to hurt her mother. She smuggled the drugs into Canada.

Issues:

1. Do the immediacy and presence requirements of CC s 17 violate s 7 of the Charter?

1. Is it a principle of fundamental justice that morally involuntary conduct should not be punished?
2. What is the relationship between s 17 and the common law defence of duress?

Held:

Reasons: It is a principle of fundamental justice that only voluntary conduct should attract the penalty and stigma of criminal responsibility.

CC s 17 should be read as follows:

A person who commits an offence under compulsion by threats of death or bodily harm to herself or to others is excused for committing the offence if the person believes that the threats will be carried out.

Elements of common law defence:

1. Must be a threat of death or serious bodily harm to accused or to another person.
2. The accused must have honestly, ie. subjectively, believes that the threats would be carried out
3. It must be the case that the reasonable person in the position of the accused would have reacted in the same manner as the accused.
4. The accused must have had no reasonable avenue of escape.

## R v Ryan – the statutory and common law defence of duress is largely the same.

Facts: An abused wife believed that her husband would kill her and her daughter, so she hired someone to kill him.

Ratio: Duress only available when person commits an offence while under compulsion of a threat made for the purpose of compelling them to commit the offence.

Held: stay of proceedings, so no conviction but not because she successfully used a defence

Reasoning: Everybody recognizes the vulnerable position she was in. Mr Ryan was not threatening her for the purpose of getting her to commit an offence so duress does not fit these facts.

CoA: Why can't she hire someone to do something that she was justified in doing herself? She would have been entitled to self-defence.

SCC: Self-defence is an attempt to stop threats, by using potentially lethal force; duress involves succumbing to threats by committing an offence. Duress is available only in situations in which the accused is threatened for the purpose of compelling the commission of an offence. Even if Ms Ryan was subject to threats from her partner, she was not threatened in order to commit an offence.

6 steps for the defence of duress.

# SELF-DEFENCE (JUSTIFICATION)

* **Section 34** – Justification not an excuse
	+ (1) A person is not guilty of an offence if:
		- A) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person
		- B) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
		- C) the act committed is reasonable in the circumstances
* Old provision - 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
* Old provision - Everyone who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified **if**
	+ - **(a)** he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes and
		- **(b)** he believes, on reasonable grounds that he cannot otherwise preserve himself from death or grievous bodily harm
* Reasonableness – built into the structure of the defence under 34(2)
	+ Individuals who act in self-defence must act reasonably in the circumstances
		- Their belief that force is being used against them or another person, their belief that they or another person are being threatened with force must be reasonable
		- Their response to the threatening situation must be reasonable in the circumstances
1. Completely codified in Criminal code – just relate section to fact pattern
2. Proportionality is encoded into the reasonableness section of self-defence
3. Reasonableness is judged on a modified objective standard
4. The long-term special relationship that battered women have with their abusers is a factor in determining whether their response was reasonable in the circumstances (Lavalee)
5. In order for Battered Women’s Syndrome to count as evidence towards self-defence, the victim must be the abused (Eyapaise)

## R v Lavallee (1990) SCC – **relationship between self-defender and deceased relevant to reasonableness standard**

Facts: In some ways this is really a case about expert evidence. There was expert evidence given about whether the actions of a battered wife were reasonable in terms of self-defence. This was argued under the old provisions, but the case is still relevant. Woman is in an abusive relationship and holding a party. Man gives her a gun and says that she'll have to kill him or he'll get her after the party. She believed that she had no alternative other than to kill him. She shot him in the back of the head.

Issue: The issue before the SCC was whether the expert evidence on battered women was admissible or not and that the threat was for later in the evening.

Reasoning: SCC says that expert evidence is important to understanding whether the reasonable person standard is satisfied. There is no defence of battered spouse syndrome, but it is important to satisfying the modified objective test. Battered women, due to their special relationship with the victim, are entitled to certain perceptions, and so entitled to do things that others are not entitled to do – this is a justification – defence of self defence, coupled with the idea that it was reasonable in these circumstances, because of this perception.

Held: Self-Defence defence success: Lavallee is acquitted

Expert testimony – contextualizes the experience of the excused – considerations about imminence should factor into the question of self-defence – was accepted in this case – relevant of the trier of fact for the jury to hear this information.

Is imminence a requirement? Generally yes; but it is not seen on the facts of this case. Also, he was leaving the room when she shot him.

## R v Malott

Facts: Accused shot and killer her common law spouse and attempted to kill her spouse’s girlfriend.

Issue: Is the defence of self-defence available to the accused because she was in a violent relationship with the deceased? Also pleads provocation and self-induced intoxication.

Reasoning: Battered women syndrome is not a legal defence in itself, such that an accused woman need only establish she is suffering from the syndrome in order to gain an acquittal. It is a psychiatric explanation of the mental state of women who have been subjected to continuous battering by their male intimate partners, which can be relevant to the legal inquiry into a battered woman’s state of mind.

Held: Convicted of second-degree murder at trial, appeal to OCA dismissed, SCC also dismissed

## Eyapaise (1993) ABQB

Facts: Accused was drinking at a bar with the cousin and victim ended up back at the cousins house with them. Victim had made advances by groping her, accused stabbed the victim killing him. She had endured a life of victimhood herself through repeated abusive relationships and sexual assault against her.

Issue: Can she use self defence?

Held: She cannot use the defence of self-defence

Ratio: In order to use BWS, the abusive relationship must be with the victim.

Reasoning: Although she had endured a life of abuse, it was not reasonable for her to think that this guy that she had just met was going to be a perpetrator of violence against her.

## **People v Goetz** (NYCA) – not useful

Facts: Canty approached Goetz and told him to give them 5 dollars. Goetz shot all of them. That was not an objectively reasonable response.

Ratio: 1) The defense of justification which permits the use of deadly physical force is not a purely subjective standard; the actor must not only have the subjective belief that deadly physical force is necessary, but those beliefs must also be objectively reasonable. 2) The mere appearance of perjured testimony given before the Grand Jury is not sufficient to sustain a dismissal of an indictment.

Held: He was acquitted of attempted murder and assault in the first degree, but convicted of possession of a firearm in the third degree

## R v Pandurevic

There is a natural aversion to allowing the retroactive application of legislative amendments that would render certain actions illegal that were legal at the time they were performed.  Likewise, there is a natural aversion to limiting or eradicating a defence upon which an accused person could have expected to rely at the time the offence occurred.

* Accused murdered someone, wanted to use defence of self-defence from the old law because that was what was in place when he committed the offence
* He was allowed to use the older defence

## R v Dadson 1850

* Guy is guarding wood, sees other guy stealing wood, shouts at him to stop, thief starts running, guard shoots thief in leg.
* Guard is convicted despite the fact that he might have had justification in that the thief was committing a felony
* The guard may have been justified if he knew the thief was committing a felony but he didn't
* Can't justify killing someone for a reason other than the reason you would have been justified in killing him, even if the events occurred simultaneously

# PROVOCATION – Section 232

**Provocation Test**

**1.** Was there a wrongful act or insult sufficient to deprive an ordinary person of self-control (**objective test)**

**2.** Was the accused in fact deprived of self-control by the act or insult (**subjective test)**

**3.** Was the accused’s response ‘all of a sudden’ or did it occur before there was time his passion to cool? (**Subjective Test)**

* Where the accused murdered another person “in hot blood” after a wrongful act or insult towards them, the defence of provocation is available and, if successful, the murder will be reduced to manslaughter.
1. Partial defence that applies only to murder & reduces it to manslaughter if successful
2. Sex and age are relevant, but other factors may also be relevant in so far as they affect the nature and force of the provocative act or insult (Camplin)
	1. Juries do not explicitly need to be instructed to take age and sex amongst other things into account because they are commonsensical and will do it on their own (Hill)
	2. Past relationships may be relevant to the nature of the relationship (Thibert)
	3. The culture/religion of the accused is relevant to the nature of the relationship (Humaid)
3. A belief system that is contrary to fundamental Canadian values cannot be used as a partial defence to murder (Humaid)

## Camplin (1978) HL – **some personal characteristics are relevant for provocation defence**

Facts: a 15 year old boy was charged with murder after killing an older man who had allegedly homosexually assaulted and humiliated the boy.

Issue: Can the boy's age be taken into account in determining what an ordinary person would have done?

Ratio: (1) sex and age are relevant, and juries should be explicitly told this (2) other factors are relevant insofar as they affect the nature and force of the provocative act or insult ex: race

## R v Hill (1986) SCC – **juries do not need to be explicitly told to take age and sex into account**

Facts: There are two different versions of the events. The Crown claims that they had been homosexual lovers and Hill killed him after a falling out. Hill's version is that he was subject to unwelcome homosexual assault while staying over at the victim's house.

Issue: Did the TJ err in law in instructing the jury that they ought to take age and sex into account?

Ratio: Juries do not explicitly need to be instructed to take age and sex and other things into account, because they are commonsensical and will do it on their own

Wilson Dissent: The jury should be explicitly told that age and sex should be taken into account

## R v Thibert (1996) SCC - **can take past relationship into account**

Facts: Mrs. Thibert leaves her husband and goes to a hotel. He keeps phoning her at work. He puts a gun in his trunk. On the way there he abandons the intention to kill (this seems to show that he had time to cool down). He confronts Mrs. Thibert and insists that they go somewhere private. He tells her he has a rifle. Victim comes out of building to get Mrs. Thibert. Victim taunts Mr. Thibert to shoot him. Gun discharged accidentally and killed the victim.

Issue: Was the TJ correct in leaving the defence of provocation with the jury? Was there an air of reality to the defence of provocation?

Ratio: Past relationship is relevant to the nature of the relationship

Held: A jury could find the actions of the deceased to be taunting and insulting, the defence should have been left with the jury.

Reasoning: An ordinary person would not have

\*Major thought he was writing the majority decision, but then someone jumped ship. He says there was no wrongful act or insult that would result in such a reaction.

## R v Humaid (2006) ONCA – **provocation will not defend what is counter to Canadian values**

Facts: A serious blow to the honour of the family.

Charter considerations: Recall *Blaue*, the Jehovah's Witness that wouldn't accept a blood transfusion after being stabbed. That was a reasonable belief so the accused was responsible for the death.

Issue: The question in this case is whether we can imbue the ordinary person with these beliefs about honour?

Ratio: The culture of the accused is relevant to the nature of the relationship

Reasoning: religious and cultural beliefs are not the target of the assault. We should not be encouraging the notion that women are lesser than men. On policy reasoning, the ordinary person cannot be fixed with beliefs that are contrary to fundamental Canadian beliefs. A belief system that is contrary to fundamental Canadian values cannot be used as a partial defence to murder.

answer outline + process

**Introduction:**