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# Offences

# Homicide

## Simpson

* Facts: Accused charged with two counts of attempted murder
* Strangled first victim to point of unconsciousness and attacked another outside a bar
* Held: Trial judge incorrectly instructed the jury about (ii) with regard to intent to cause bodily harm that he knew or ought to have known was likely to cause the victim’s death
* This is incorrect; this imposes an objective standard when it is **clearly subjective**

## Cooper

* Facts: Accused charged with murder of a female acquaintance
  + Intended to strangle her but woke up after blacking out and found the victim dead
* Accused argued that there is no contemporaneity of actus reus and mens rea
* Firstly, for the purposes of (ii), the second part about recklessness is an “afterthought” (useless requirement) because a finding of the first part necessitates a finding of reckless whether death ensues
* (ii) has two mens rea requirements:
  + (1) subjective intent to cause bodily harm
  + (2) subjective knowledge that the bodily harm is of such a nature that is likely to result in death
* Series of acts may form part of the same transaction 🡪 do not need complete concurrency
* Application:
  + intent need not persist throughout the entire act of strangulation; jury open to make the determination that accused had necessary mens rea (though not required)

## Fontaine (transferred intent)

* Facts: Accused intended to commit suicide and in the course of a high-speed chase deliberately drove his car into a parked semi-trailer in the oncoming lane
  + The accused survived the collision but a passenger in his vehicle was killed
* Held: S 229(b) refers to the killing to another and not the killing of oneself
* Could not be found guilty of murder because he did not intend to kill someone other than himself

## Vasil

* Unlawful object must be clearly distinct from the immediate object of the dangerous act (**note**: *see Shand*)

## Martineau

* The reference to “ought to have known” is inconsistent with the constitutionally required mens rea for murder
* Ought to have known read out of s 229(c): unlawful object/dangerous act

## Shand

* Facts: Appellant attended home of local drug dealer in order to rob him, and produced a loaded gun to subdue persons within an occupied room, which discharged and killed one of the occupants of the home
* **Proper interpretation of s 229(c) (*elements of the offence*)**
* Two components:
* (1) perpetrator must be pursuing an unlawful object
  + Must be conduct, which if fully prosecuted, would amount to a serious crime, that is an *indicatable* offence requiring mens rea
  + Must be the perpetrator’s purpose or goal; the end that the accused seeks to achieve
    - There may be more than one object and new objects may be added during the commission of the offence
    - However, an unlawful act that the accused commits in order to achieve their object does not necessary constitute an unlawful object as required under s 229(c)
    - Must be the accused’s genuine object, ad not simply one aspect of the same “general purpose” of causing death or bodily harm that is likely to cause death
* (2) the doing of anything that the person knows is likely to cause someone’s death 🡪 the “*dangerous act*”
  + When the dangerous act was committed, the person must have known that death was likely
  + Dangerous act must be clearly identified and defined
    - a specific act that results in death
      * though series of closely related acts (continuing transaction) allowed for
    - a generally course of conduct only loosely connected to the killing could not be considered a single transaction for the purpose of defining the dangerous act
  + something done in furtherance of the unlawful object
  + does not have to be an offence in itself
* Distinctness: S 229(c) requires that the *unlawful object be something other than the harm that is foreseen as a consequence of the dangerous act*
  + If accused’s purpose (The unlawful object) was something other than to cause the death of the victim/bodily harm to the victim knowing that death is probable, then it will be sufficiently distinct from the dangerous act
  + But if the unlawful objective was the death of the victim or to cause bodily harm to the victim knowing that death was likely, s 229(c) will not apply
* *Mens rea*
  + (1) Presence of intent with respect to the unlawful object
  + (2) intent to commit the dangerous act knowing that it is likely to cause death
    - Subjective inquiry: focus on the specific moment when the act was committed and determine *the perpetrator’s subjective foresight at that point* (the accused state of mind)
      * In doing so: looking at the accused’s state of mind and all of the surrounding circumstances
      * If the dangerous act was done as a reaction and out of panic, this may tend to show that the required subjective foresight of death was not present
    - “likely” is something more than an awareness of risk or a possibility or chance of death
* Application:
  + The unlawful object in this case was robbery
    - Carrying the gun to the robbery was not the unlawful object
  + The dangerous act is drawing and using his gun in an attempt to subdue the occupants of the room who are in a confined space
    - It would be *wrong to characterize the dangerous act as entering a home with a loaded gun*
  + Regarding the likelihood of death of the dangerous act: *relevant factors include* safety was on or off, appellant acting out of fear/panic, conduct of appellant as observed by others, appellant’s knowledge of the presence and location of a person or persons who could be hurt
    - This is a very fact-specific question
    - The jury should be instructed to avoid reasoning backwards; e.g. because death occurred, it immediately means that the accused knew that death is likely

## Vaillancourt

* Facts: Appellant and acquaintance committed an armed robbery; armed with a knife and accomplice with a gun but appellant insists that accomplice leaves gun alone; appellant took bullets from accomplice; accomplice had additional bullets and someone died as a result; accomplice was not found but the appellant was charged under the now s 230
* s 230 did not even require objective foresight of death
* Objective foresight is a PFJ and this thus violates s 7

## Martineau

* PFJ that subjective foresight of death is required before a person is labelled and punished as a murderer
* Need knowledge that causing the bodily harm will likely result in death for murder
* Does not minimally impair rights; therefore unduly impairs Charter rights
  + Flexible sentencing scheme of manslaughter is in accord with the principle that punishment should be proportionate to the moral blameworthiness of the offender

## Sit

* Reaffirmed Martineau; determination of this minimum constitutional mens rea requirement was the *ratio*

## Morrisey

* SCC upheld the constitutional validity of a related offence that mandates a four-year minimum sentence for criminal negligence causing death when a firearm is used in the commission of the offence

## First Degree Murder

* Second degree murder can be first degree murder if committed in certain circumstances

## More

* Accused depressed over financial affairs; plans to kill wife and himself but fails to commit suicide; charged with capital murder (first-degree)
* Accused led psychiatric evidence in attempt to raise a reasonable doubt regarding the planned and deliberate aspect (first-degree)
  + He was impulsive because of his condition rather than deliberate
* Issue: whether it was open to the jury to find him not guilty of first-degree given this evidence
* Held: it was open to the jury; depressive psychosis resulting in impairment of ability to decide inconsequential things, and the inability to make decisions in a normal way, would have direct bearing on whether the act was deliberate
* “deliberate” means “considered, not impulsive”
  + Intentional should not be used to describe deliberate (since intention is necessary to be convicted of second-degree; deliberation requires more)
  + “not hasty in decision” and “slow in deciding” left open by judge to be used to describe deliberate

## Widdifield

* Defines planned and deliberate
* Planned
  + Calculated scheme or design which has been carefully thought out, and the nature and consequence of which have been considered and weighed
  + But it does not need to be a complicated one; can be a simple plan
  + Important element is the time involved in developing the plan
  + But, the time between the development of the plan and doing of the act is irrelevant
* Deliberate
  + Natural meaning of “considered”, “not impulsive”, “slow in deciding”, “cautious”
  + Implies that the accused must take time to weigh the advantages and disadvantages of his intended action

## Nygaard

* Facts :Two accused who planned to beat victim with a baseball bat about a monetary dispute
* Issue: whether first-degree murder possible to be classified on the basis of secondary intent (s 229(a)(ii) 🡪 intentional and reckless murder provision)
* Held: Yes it applies; “there can be no doubt that a person can plan and deliberate to cause terrible bodily harm that he knows is likely to result in death”
* Planning and deliberation to cause bodily harm which is likely to be fatal must include the planning and deliberating to continue and to persist in that conduct despite the knowledge of the risk

## Collins

* Facts: Accused charged with first-degree murder after killing a police officer who was on duty and in uniform
* Argument by accused that it is unconstitutional on the basis of s 7 violation since it does not require planning and deliberation to be classified as first-degree
* There is an onus on the Crown to establish beyond reasonable doubt that the victim was a person who falls within the designation of the occupations set forth in the provision AND acting in the course of his duties *to the* ***knowledge*** *of the accused or with* ***recklessness*** on his part as to whether the victim was such a person so acting

## Pare

* this is the leading case: a death is caused “while committing” an offence enumerated under s 231(5) “where the act causing the death and the acts constituting the enumerated offence all form part one continuous sequence of events forming a single transaction” (see fall summary)

## Russel

* Facts: accused forcibly confined girlfriend and forced her to have sexual intercourse, and then went to the basement and killed another person
* The victim of the murder and victim of the enumerated offence do not need to be the same
* “while committing or attempting to commit” requires the killing to be connected, temporally and causally, with an enumerated offence

## Arkell

* Rejected claim that s 231(5) violates s 7 of the Charter because it results in punishment that is not proportionate to the seriousness of the offence
* Where a murder is committed by someone already abusing his power by illegally dominating another, the murder should be treated as an exceptionally serious crime
  + Distinction is not arbitrary or irrational; based on the organizing principle mentioned above
* Is proportional to moral blameworthiness and considers deterrence and societal condemnation of such acts

## Luxton

* Challenged ss 231(5)(e) and 745(a) for unconstitutionality on basis of s 7/9 when combined together
* S 7
  + Failed; already need to prove that the accused had subjective foresight of death; this involves illegal domination over another (treated more strictly for reasons stated above in other cases)
* S 9
  + Failed; does not demonstrate arbitrariness; offence to forcible confinement falls into organizing principle enunciated by Wilson J in Pare (illegal domination offences)

# Sexual Assault

## Brief history

* Two concerns (you can see these values in tension in *R v JA* (consent while unconscious))
* Nature of autonomy 🡪 two fundamental concerns
  + (1) One was concerned with the autonomy of the individual (complainant vis a vis the accused)
    - choose what to do with your body; how to respond to perpetrators of sexual assault
  + (2) The second concern is the autonomy of the individual vis a vis the state
    - The ways in which we want the state to regulate what we choose to do with our bodies
* In the past, gay sex was outlawed as gross indecency and buggery 🡪 anal sex
  + This was punishable by up to life imprisonment
  + 1968 🡪 Trudeau articulated the second concern; regarding the autonomy from the state
    - The state should stay out of the bedrooms of the nation
* They made some exceptions to the law: does not apply to any act committed in private between husband and wife, and any two persons each of who is twenty-one years of age or older and consenting
* In this past, there was a spousal exception to sexual offences
  + Premise behind this is that by entering into marriage, the wife had consented to indefinite sexual relations
    - Cannot be a crime to have sexual relations with spouses who do not consent
  + Specific exception in the law
* Also, there is a gendered definition of the offence 🡪 a male committed against a women
  + Not an offence that a female could commit against a male or female commit against a female
* Also exception: if they *subsequently* married that person, then it would be consensual and the charge would be released
* Historic focus is the chastity of the women 🡪 dealt with virtue and chastity
  + Crime:
    - Seduction of female persons between 16-18 of previously chaste character
    - Seduction of woman of previous chaste character under promise of marriage
    - Sexual intercourse with a female employee of previously chaste character
  + The veracity of her claims were contingent upon the chastity of her character
* **1982 Criminal Code amendments**
  + Sexual assault was merged with general assault
    - Three different offences depending on the severity of the offences
  + Old crimes of chastity, indecency, etc. were removed
  + It was moved towards an offence of bodily integrity
  + No longer a spousal exception
  + No longer a gendered definition of assault (despite the word he, it is not gendered)
  + No need to complain at the first reasonable opportunity

## Ewanchuck

* Facts:
  + Women was offered a job; taken to do an interview inside of a van
  + Man was massaging her and she said no to touching multiple times
  + Every time she said no he stopped momentarily but kept on going after
  + She was fearful that if she said no explicitly then he would become more aggressive/violent
* Held: conviction upheld.
* Actus reus
  + Touching – objectively determined (no de minimus standard 🡪 includes any touching (*JA*))
  + Sexual nature of conduct – objectively determined
    - No mens rea requirement
  + Consent – subjective
    - determined by reference to the complainant’s subjective *internal* state of mind towards the touching, at the time it occurred
      * Actual state of mind of the complainant is determinative
      * Accused’s perception of the complainant’s state of mind is irrelevant
        + This is only relevant for the mens rea component (honest but mistaken belief, negating mens rea)
    - Open for accused to claim that claim that the complainant’s words and actions raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place
    - Consent must freely be given
      * S 265(3) 🡪 consent when submission by reason of force, threats, fraud, or the exercise of authority, or common law consent given by fraud or duress is ineffective
      * If complainant fears between an application of force vs permitting the conduct, there is no consent legally speaking
      * Fear does not need to be reasonable or communicated for consent to be vitiated
    - Consent here means “the complainant in her mind wanted the sexual touching to take place”
* Mens rea
  + General intent crime
  + (1) intention to touch
  + (2) knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched
    - Defence of honest but mistaken belief in consent available here
      * Accused may challenge Crown’s evidence of mens rea by asserting an honest but mistaken belief in consent
        + This is a mistake of fact

Circumstances in the world that the accused needed to have knowledge about to be criminally responsible

* + - * Requires “air of reality” of honest but mistaken belief based on the evidence presented
      * No burden of proof by accused, but accused brings it up the defence
        + Established through evidence adduced by accused or evidence already adduced by Crown
      * Unlike actus reus consent, this is considered from the perspective of the accused
      * Consent here means “the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused”
        + Differs from actus reus
    - Limits on honest but mistaken belief in consent
      * Belief that silence, passivity, or ambiguous conduct constitutes consent is a mistake of law and provides no defence
      * Once complainant has expressed her unwillingness to engage in sexual contact, the accused should make certain that she has truly changed her mind before proceeding with further intimacies 🡪 “unequivocal yes”
        + Belief of lack of agreement constitute invitation to more persistent/aggressive touching cannot be relied upon

## Chase

* Facts: accused enters a neighbour’s house and touches a girl by her breasts
* Is the sexual nature or carnal context of the assault visible to a reasonable observer?
* Bunch of considerations in determining this:
  + Part of the body touched, nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats, which may or may not be accompanied by force, will be relevant in determining whether the conduct has the sexual nature requirement
  + Intent/purpose of the person committing the act may also be a factor

## V(B)

* Father touched son’s genital area as punishment for him touching someone else’s
* Still guilty of sexual assault even though sexual gratification was clearly not the purpose
* Held the sexual integrity of son had been violated
* Seems that the only factor considered or at least superseded all other factors is the part of the body touched

## JA

* Facts: Victim consented to erotic asphyxiation (JA choking her and having sex while she was unconscious)
* Issue: Could the victim provide prior consent?
* Complainant cannot provide “prior consent” to sexual activity
  + Consent requires the complainant to provide actual active consent throughout every phase of the sexual activity 🡪 must be ongoing and conscious
    - Consent requires a “capable” or “operative” mind
* Cannot give prior consent for when you are unconscious
* Policy arguments: necessary to ensure that individuals are not subject to sexual exploitation of others (capable of asking their partners to stop whenever)
  + Autonomy vis a vis the accused was preferred here
* Dissent: concerns the autonomy of individual persons to make decisions about their life and body without state intervention
  + Need to keep the state out of the bedrooms of the nation
* Criminal code later amended to add no consent where complainant is unconscious: (a.1) no consent is obtained where the complainant is unconscious

## Cuerrier

* We should look at how the idea of fraud should be interpreted based on how fraud was interpreted in other areas of the criminal code
* Vitiated by fraud where (1) deception, and (2) deprivation (a significant risk of serious bodily harm)
  + This does not look at the accused’s state of mind 🡪 relates to actus reus only
* This standard however was not a good and workable standard
  + Stigmatizes a certain group of people where there are higher rates of HIV (gay/drug addicts)

## Mabior

* Facts: M was charged with nine counts of aggravated sexual assault based on his failure to disclose his HIV‑positive status to nine complainants before having sex with them
* Reaffirms *Cuerrier* test: (1) a dishonest act (either falsehoods or failure to disclose HIV status); and (2) deprivation (significant risk of serious bodily harm)
* Significant risk of serious bodily harm is tested through a realistic possibility of transmission of HIV
  + No such risk where there is (1) a low viral load and (2) the accused uses a condom
    - Low viral load = 1,500 copies per millilitre of blood
      * But note, government prosecutorial guidelines: a low viral load means 200 copies of the virus per millilitre of blood
  + In this case, there will not be fraud when someone does not disclose HIV if these circumstances exist
* It is only fraud if you know you are HIV positive

## Hutchinson

* Facts: Girlfriend did not want to have unprotected sex. Accused poked holes into condoms and girlfriend got pregnant
* Convicted of aggravated sexual assault due to consent vitiated by fraud
* (1) dishonest
  + Sabotaging condoms
* (2) deprivation
  + Pregnancy causes profound changes to a woman’s body 🡪 counts as significant risk of serious bodily harm

## PP v DD

* Not a criminal case; a tort case (ONCA)
* Facts: DD (a woman) claiming to be on birth control but was not
  + PP consented to sex without a condom on the basis of that
  + DD became pregnant
  + PP sued her in tort for battery
* The alleged deception in this case was not with respect to the nature of the act, but only as to the likely consequences flowing therefrom
  + Clearly there are profound physical and psychological effects on a mother undergoing a pregnancy that do not apply to the father of the child
* The deprivation that Hutchinson recognizes simply does not have an equivalent for the father of a child

## Pappajohn

* Issue: reasonableness of mistaken belief (unanimous)
* Accused can raise a defence of mistaken belief in consent if he/she honestly but unreasonably believed that the complainant was consenting
  + Reasonableness not a component of honest but mistaken belief for sexual assault
* But some qualifications:
  + It is practically unimportant because the accused’s statement that he was mistaken is not likely to be believed unless the mistake is, to the jury, reasonable
  + Although reasonable grounds are not a precondition to honest but mistaken belief, those grounds determine the weight to be given to the defence
* Issue: whether the trial judge erred in not instructing the jury to consider the defence
* Majority: There was no air of reality
* To require the putting of the alternative defence of mistaken belief in consent, there may be some evidence beyond mere assertion of belief in consent by counsel for the appellant
  + E.g. R v Plummer and Brown
    - Brown did not know that Plummer raped the complainant prior to their intercourse, and she said because of continuing fear from Plummer’s threats she submitted without protest to having sex with Brown
    - There was at least an “air of reality” in that case
* Absence of damage to clothing and amount of time spent together cannot by itself advance a suggestion of a mistaken belief
  + Under *Ewanchuck* 🡪 Must be something affirmatively communicated by the complainant
* absence of serious injury suffered by the complainant and the absence of damage to clothing, as well as to the long period of time during which the parties remained in the bedroom cannot by themselves advance a suggestion of a mistaken belief

## Sansregret

* Facts: Appellant broke into complainant’s home and was threatening her
  + She had sex with him and said they could work things out of fear
  + Appellant stated that he honestly believed that she was consenting at the time
* SCC held that he was wilfully blind given the findings of the trial judge’s facts, and that that was sufficient to impute knowledge of the lack of consent
  + Defence could not be raised

# Defences

# Provocation

## Grant, The Law of Homicide

* Provocation is a concession to human frailty
* Fundamental question is when an uncontrolled impulse to kill another should be seen as frailty justifying at least some compassion
* The defence deals with rage
  + Not despair (e.g. killing another because a loved one was threatened with death if you did not go through with the act) or compassion (e.g. euthanasia is murder)

## Berger, Emotions and the Veil of Voluntariness

* Evaluative understanding of emotions
* (1) emotions involve thought on the part of the actor
  + Embedded in each emotion is a value-based commitment that is open to examination and potentially condemnation
* (2) emotions can be mistaken (we can err in our emotions)
  + Thus open to outside scrutiny and criticism
* (3) when the law turns its attention to the human actions that flow from emotions, as is the case with defences such as duress, it ought not to ignore the thoughtful element of emotions and the possibility of value-errors
  + Evaluative view would require the law to ask whether we accept the bases for the emotion
* Whatever criminal law is expressing, it must be in the service of diversity, antisubordination, and equality

## Horder, Provocation and Responsibility

* Vast majority of killers are male
* We learn that centrality to men’s conception of self-worth of possessiveness with regard to women who are partners and wives
  + Lies at the heart of many men’s conceptions of their self-worth
* From a feminist perspective, provocation ought to be abolished

## Hill

* Facts: Accused 16-year-old male who killed older male who he claimed was sexually assaulting him
* Should the ordinary person be informed by the particulars of the accused?
  + Does incorporate traits that are relevant to the “insult”
    - E.g. race for racial slur that was the insult
  + In this context, it is the same age and sex as Hill
    - We should interpret the homophobic response as natural
  + Very explicitly the premises of a homosexual assault specifically considered 🡪 this is no longer the case (but it would still be considered as an assault, but homophobic views are no longer appropriate to subscribe to the ordinary person)

## Thibert

* Facts:
  + Infidelity involving accused’s wife and another man (victim of the murder)
  + The other person was pushing Thibert back and forth, and holding the accused’s wife and preventing the accused from talking with his wife (taunting the accused)
* “ordinary person” (objective standard)
  + “ordinary person” must be of the same age, sex, and share with the accused such other factors that would give the act/insult (conduct in the new provision) in question special significance
* “legal right” portion
  + For the purposes of this section, it is a right which is sanctioned by law as distinct from something which a person may do without incurring legal liability
  + Note, this is still the same but the first part of provocation changed so this may not be an important anymore

## Huamid

* Cultural/religious beliefs only relevant if they are the target of the alleged insult

## Tran

* Facts:
  + Tran knew that his wife was likely cheating on him
  + Tran entered the locked apartment of his wife, unexpected and uninvited
  + He caught her with her boyfriend
  + He attacked them, then left, got two knives, and started stabbing the man and his wife
  + He ended up killing that man
* This defence should continue to evolve to reflect contemporary social norms and in particular, *Charter* values
* Broadly speaking, the defence of provocation occurs when law recognizes that, as a result of human frailties, the accused reacted inappropriately and disproportionately, but understandably to a sufficiently serious wrongful act of insult
* Application:
  + The evidence must be reasonably capable of supporting the inferences necessary to make out the defence before there is an air of reality to the defence
  + No air of reality in this case with response to both aspects
* Test for provocation
  + Objective element – ordinary person
    - As stated in *Thibert*, “legal right” does not mean conduct specifically prohibited by law; rather only sanctioned by law
    - Conduct must be of sufficient gravity to cause a loss of self-control, as objectively determined
    - Age and sex do not detract from person’s characterization as ordinary
    - Particular characteristics that are not peculiar or idiosyncratic can be ascribed to an ordinary person without subverting the logic of the objective test of provocation
    - Ordinary person standard must be informed by contemporary norms of behaviour, including fundamental values such as the commitment to equality provided for in the Charter
      * E.g. appropriate to ascribe to the ordinary person racial characteristics if the accused were to be a recipient of a racial slur, but inappropriate to ascribe the characteristic of being homophobic if the accused were the recipient of a homosexual advance
      * No place for antiquated beliefs such as adultery is the highest invasion of property, and any form of killing based on inappropriate conceptualizations of “honour”
    - Particular circumstances in which the accused finds himself will also be relevant in determining the appropriate standard against which to measure the accused’s conduct
      * But care must be taken not to subvert the logic of the objective inquire and assimilate circumstances that are peculiar to the individual into the objective standard
      * E.g. deceased wrongfully firing the accused from his long-term employment may be taken into account, but not the accused’s peculiar relationship or feelings about his employer
    - Personal characteristics are relevant in the subject inquiry
  + Subjective element
    - Inquiry into whether the accused was in fact acting response to the provocation
      * Accused must have killed because he was provoked and not being the provocation existed
    - Inquiry also into the suddenness of the response to the provocation
      * Applies to both the provocation and the reaction
      * Must make an unexpected impact that takes the understanding by surprise and sets the passions aflame
      * Must have been committed by the accused before there was time for his passion to cool

# Self-defence

## Cinous

* Facts:
  + Due to a series of suspicious events, accused thought his fellow criminal accomplices were about to kill him
    - His revolver was stolen days earlier, gestures that indicate that one is about to kill another; latex gloves put on, etc.
  + Accused killed Mike
* Court applied the test: (for air of reality; not making final conclusions; only whether to put it forward to the jury)
  + (1) Reasonable belief that A was being assaulted
    - Yes, there is a belief and it is reasonable
  + (2) Reasonable apprehension of death or grievous bodily harm
    - Yes, there is, since the attack
      * Cannot simultaneously believe accused in the last aspect and disbelieve accused in this aspect
  + (3) Reasonable belief in lack of legal alternatives
    - Requires not that the accused rule out a few courses of action, but that accused believed on reasonable grounds that there were no alternatives available
    - On the subjective branch there was evidence that he though he did not have any legal alternatives
    - He has reasonable belief that he did not have *some* alternatives (e.g. could not call the police because they would not come in time, returning to his apartment)
    - But no evidence to support that he could not run away from the car
    - This requirement is important because self-defence is a defence of final resort

## Lavallee

* Facts:
  + Accused living with her batterer, Rust, for 3-4 years
  + Rust gave her a gun and said that either you kill me or I’ll kill you
  + When he walked out, she shot him in the back of the head
* Expert evidence responded to myths regarding the conduct of battered partners
* Inform The second and third branch of the test
  + First: heightened knowledge of partners’ violence
    - Battered women have heightened knowledge of their partners’ violence that she is able to anticipate the nature and extent of the violence by this conduct beforehand
    - Special knowledge of timing/degree of harm derived from long relationship of violence
    - They were “tuned” to the sorts of force that might be coming
    - *Petel*: error not to instruct jury about the history of violence between the partners and the ways in which this might inform the knowledge of the accused as to the potential harm that she might be facing
  + Second: imminence of the harm
    - No need to wait for imminence of harm in this context
      * Otherwise “murder by installments” 🡪 wait through violence until risk of death manifest itself
* Necessity and the lack of reasonable belief in legal alternatives
  + Not for the jury to pass judgment on the fact that an accused battered woman stayed in the relationship
  + She did not forfeit her right to self-defence by having done so
  + Also, traditional self-defence doctrine does not require a person to retreat from her home instead of defending herself
* Still remains to the jury to assess the expert evidence (open to the jury to inform that)

## Petel

* Facts:
  + Petel was in an abusive relationship with Edsell
  + Edsell went into Petel’s house and threatened to kill her and her daughter
  + The accused shot Edsell and then killed Raymond, Edsell’s friend, because she perceived that her was lunging at her
  + It is important to relate the earlier threats to the elements of self-defence
* Held: It is important to relate the earlier threats to the elements of self-defence
  + Judge’s answer may have led the jury to disregard the entire atmosphere or terror which the respondent said pervaded her house

## Marlott

* Facts:
  + Malott was abused by Mr Malott sexually, physically, psychologically, and emotionally
  + They separated and Mr Malott went on to live with his girlfriend Ms Sherwood
  + Malott was set to go to a medical centre with the deceased for their illegal drug trade
  + She took a loaded gun from Mr Malott’s gun cabinet and killed him as they were driving to the medical centre
  + She then shot and stabbed Sherwood, who luckily survived
  + Found guilty of second-degree murder and attempted murder
* In considering the defence of self-defence as it applies to an accused who has killed her violent partner, the jury should be instructed on the violence that existed in the relationship and its impact on the accused
  + The latter will usually but not necessarily be provided by an expert

# Duress

## Carker (no longer good law)

* Facts:
  + Accused was a prisoner in a jail
  + One day a prison riot took place
  + Individuals around him were destroying the infrastructure but Carker was just sitting there
  + Individuals threatened him telling him that if he does not destroy things in his cell
  + Mischief 🡪 wilful destruction of public property
* SCC said his claim fell short on the requirements of immediacy and presence
  + Other prisons said they would get revenge when they were out of their cells
* SCC said they would take a narrow reading of the provision
* The accused argued that he should benefit from a broader common law approach to duress that has been recognized around the world
* SCC: the common law rules have been codified and defined exhaustively in s 17
* Your case needed to fit in s 17
* Narrow reading of the provision

## Paquette

* Innocent bystander killed during robbery
* Appellant was threatened to drive the two robbers to the robbery (aid/abetting a robbery)
* *Statutory defence of duress applies for principal offenders* (those who actually committed the offence)
* Those who are sought to be made a party to an offence (e.g. aiding/abetting) *are entitled to rely on the common law defence of duress*
  + Able to use the common law by virtue of s 8(3) of the *Criminal Code*
* Significant because the statutory defence excludes a bunch of offences

## Mena

* Error not to instruct the jury that they need to make a decision to find that the accused was a principal offender or an aider or abettor
* In conflict Thatcher: Judge does not need to instruct the jury that the accused is a principal offender or aider/abettor; only that they are one of them

## Hibbert

* Common law: No safe avenue of escape
* See facts on the next page

## Ruzic

* Facts:
  + Accused charged with offences including possession and use of a false passport, and unlawful importation of narcotics
  + The accused was approached by a “warrior” in Belgrade, allegedly paid to kill people during the war, and was told to import the drugs or her mother would be harmed
  + She went through with it out of fear for her mother’s well-being and did not think there was any safe alterative available because she believed the authorities were corrupt due to the nature of the climate in which she resided
* Moral involuntariness adopted as a PFJ
  + *Only voluntary conduct, behaviour that is the product is a free and controlled body, unhindered by external contracts, should attract the penalty and stigma of criminal liability* (applies to physical involuntary conduct, as seen in past cases, but now applies to morally involuntary conduct (*Hibbert*, *Ruzic*)
  + Moral involuntariness does not negate the actus reus or mens rea
* Threats do not necessarily need to be made to the accused; can be made to third parties (only require that the threat is made to the accused)
* Immediacy and presence requirements in s 17 statutory defence are struck down as unconstitutional under s 7 of the Charter
  + Court substitutes elements of the common law into the statutory defence: Close temporal link and no safe avenue of escape for the immediacy and presence
    - Consistent with PFJ regarding not punishing the morally innocent

## Ryan

* Facts: Case of a battered woman whose husband repeatedly threatened to harm her and her daughter, and who approached an undercover RCMP officer for the purpose of hiring him to kill her husband (charged under counselling the commission of an offence)
* Defence of duress is available when a person commits an offence while under compulsion of a *threats made for the purpose of compelling* him or her to commit it
* Differences between self-defence and duress
  + (1)
    - Self-defence: lawful in defined circumstances to meet force (or threats of force) with force (the victim is the person threatening)
      * Force against an attacker
    - Duress/necessity: Victim is generally an innocent third party (or a crime not against the attacker)
  + (2)
    - Self-defence: motive for attack or threat is irrelevant
    - Duress: the purpose of the threat is to compel the accused to commit an offence
  + (3) self-defence is completely codified while duress is partially codified and partially governed by judge-made law
  + (4) the rationale
    - Duress and necessity are excuses
      * Defences built upon the principle of moral involuntariness are excuses
    - Self-defence is a justification; challenges the wrongfulness of an action which technically constitutes a crime
    - Therefore, self-defence ought to be more readily available than the excuse of duress
  + (5) No motive necessary for the force used against the person invoking self-defence
    - Defence of duress is available when a person commits an offence while under compulsion of a *threats made for the purpose of compelling* him or her to commit it
* **Elements of the defence of duress**
  + (a) an explicit or implicit threat of death or bodily harm proffered against the accused or a third person. The threat may be of future harm. Although, traditionally, the degree of bodily harm was characterized as “grievous”, the issue of severity is better dealt with at the proportionality stage, which acts as the threshold for the appropriate degree of bodily harm;
  + (b) the accused reasonably believed that the threat would be carried out;
    - Modified objective standard of the reasonable person similarly situated (reasonable person in the same situation as the accused and with the same personal characteristics and experience)
  + (c) the non-existence of a safe avenue of escape, evaluated on a modified objective standard;
    - Defence does not apply to persons who could have legally and safely extricated themselves from the situation of duress
    - Modified objective standard of the reasonable person similarly situated
  + (d) a close temporal connection between the threat and the harm threatened;
    - Sufficient temporal link between the threat and the offence committed
    - If the threat is too far removed from the accused’s illegal acts, it will be difficult to conclude that a reasonable person similarly situated had no option but to commit the offence
    - Does not preclude availability of the defence in cases where the threat is of future harm
    - Temporal link is necessary to demonstrate the degree of pressure placed on the accused
      * Ensures that the threat put so much pressure on the accused that between the threat and commission of the offence, the accused lost the ability of act freely (truly acted in an involuntary manner)
  + (e) proportionality between the harm threatened and the harm inflicted by the accused. This is also evaluated on a modified objective standard;
    - Two elements:
    - (i) the harm threatened is equal or greater than the harm caused
    - (ii) general moral judgment regarding the accused’s behaviour in the circumstances
      * Whether the acts of the accused accord with what society expects from a reasonable person similarly situated in a particular circumstance
      * Examine if the accused demonstrated “normal” resistance to the threat”
  + (f) the accused is not a party to a conspiracy or association whereby the accused is subject to compulsion and actually knew that threats and coercion to commit an offence were a possible result of this criminal activity, conspiracy or association.
    - Cannot rely on defence if they knew that their participation in a conspiracy or criminal organization came with a risk of coercion of threats to compel them to omit an offence
    - Subjective standard
    - Voluntary assumption of risk argument
* LEFT OPEN: the constitutional status of the statutory exclusions, and what, if any, exclusions apply at common law
  + SCC noted though that “some courts have found some of these exclusions to be constitutionally infirm”
  + E.g. *Fraser*: Nova Scotia court finding that exclusion of robbery violates s 7 of *Charter*

## Hibbert: defence of duress and mens rea

* Facts: Accused forced by principal offender to lure the victim down to the lobby; then stood by while the principal offender shot the victim
* Because of how intention/purpose is defined in the mens rea component (i.e. meaning to do rather than by accident, knowing, etc.) duress will almost never negate the mens rea of an offence, except where coercion is specified by Parliament as a component of mens rea
* They may however have their conduct *excused* through operation of the common law defence

# NCRMD

## Cooper

* Facts:
  + Accused voluntarily placed himself in a health institution
  + Victim was another patient in the institution
  + Both out in a dance that was put out by the hospital
  + The two of them walked away from the dance
* Held:
* FIRST- Disease of the mind is legal term; not a medical term (not a precise medical meaning)
  + Because the judge has to consider policy implications too
  + Disease of the mind – embraces any illness, disorder or abnormal condition which impairs the human mind and its functioning,
    - excluding however, self-induced intoxication and transitory mental states such as hysteria or concussion
    - In order to support a defence of insanity the disease must, of course, be of such intensity as to render the accused incapable of appreciating the nature and quality of the violent act or of knowing that it is wrong (Second branch of the test – discussed later)
* SECOND- up to the trier of fact to decide if the accused actually suffered within the particular mental disorder

## Bouchard

* Facts:
  + Accused took drugs and as a result suffered from toxic psychosis
    - This was an extreme form of the effects of the drug (not the normal effects)
  + This resulted in complete disassociation between the appellant’s subjective perceptions and the objective reality
    - “on another planet”
    - He said the apocalypse was coming
  + He brutally assaulted two people while under this state
* TEST for NCRMD
  + (1) Characterizing the mental state of the accused
    - Whether the accused suffered from a mental disorder in then *legal sense* at the time of the alleged events
    - Concept of mental disorder is very broad
    - Concept continues to evolve as medical science evolves; no exhaustive list of medical conditions that will constitute a disease of the mind
    - This is a **legal exercise with a medical and scientific substratum**
      * Legal concept with a medical dimension
      * Medical expertise plays an essential part on the legal characterization exercise
        + But judge is not bound by medical evidence; medical experts generally take no account of policy component of the analysis required by s 16
      * It is a question of law
      * If the judge find as a matter of law that the mental condition of the accused is a mental disorder, it will ultimately be up to the jury to decide whether on the facts the accused was suffering from such a mental disorder at the time of the offence
        + (therefore question of fact if the accused actually suffered from the mental disorder)
    - Issue: whether toxic psychosis caused exclusively by a single episode of intoxication constitutes a mental disorder
      * Circumstances can vary a great deal; so not invariably
      * A *contextual approach should be used*
      * Courts should start with the presumption that temporary psychosis is covered by the exclusion under Cooper; but the accused may rebut the presumption
        + There must be something else other than purely the effects from state of self-inducement
      * **Malfunctioning of the mind that results exclusively from self-induced intoxication cannot be considered a disease of the mind in the legal sense, since it is not a product of the individual’s inherent psychological makeup**
        + **This is nothing more than a symptom of the drugs, albeit an extreme one**
  + (2) effects of the mental disorder
    - Whether owing to his or her mental condition, the accused was incapable of appreciating the nature and quality of the violent act or of knowing that it is wrong (*discussed in later cases*)

## Abbey

* Concerns first branch of the second part of the test: appreciating the nature and quality of the act
* Facts:
  + Accused charged with importing cocaine and possession of cocaine
  + Disease of the mind called hypomania
  + Appreciated that bringing in drugs was wrong but believed that if caught he would not be punished for it
  + Held: conviction upheld
* A delusion which renders an accused incapable of appreciating that the ***penal*** sanctions attaching to the commission of the crime are applicable to him does not go to the mens rea of the offence, *does not render him incapable of appreciating the nature and quality of the act*
* **Consequences concerned about are the *physical* consequences of the wrongful act, not the *legal* consequences**

## Chaulk

* Concerns second branch of the second part of the test: “wrong”
* Facts:
  + Two kids thought they had the power to rule the world and killed a guy because they thought he was a loser and they would not be punished
  + They knew that the laws of Canada existed and prohibited what they did but believed that it did not apply to them because they believed they were above the law
* “wrong” means contrary to the ordinary moral standards of reasonable men and women, not legally wrong
  + Not judged by personal standards of the offender but by his awareness that society regards the act as wrong

## Oommen

* From Chaulk: Embraced the idea of considering morally wrong rather than legal wrong in determining what is “wrong” for the second branch of the defence
* Facts:
  + Paranoid delusion and believed that the woman he repeatedly shot was part of a conspiracy that was coming into his house to kill him
  + In his condition, he could distinguish right from wrong in some abstract sense
  + But ultimately, whether he understood what he was doing as wrongful in the particular case
* *the inquiry focuses not on general capacity to know right from wrong, but rather on the ability to know that a particular act was wrong in the circumstances*. The accused must possess the intellectual ability to know right from wrong in an abstract sense. But he or she *must also possess the ability to apply that knowledge in a rational way to the alleged criminal act.*
  + embraces not only the intellectual ability to know right from wrong, but the capacity to apply that knowledge to the situation at hand

# Possible Essay Questions

## Provocation

* **Should provocation be a defence?**
  + The current provocation defence strikes the right balance between punishing individuals in relation to their level of moral blameworthiness and attempting to fix the underlying issues historically associated with the defence
  + It addresses problematic situations when provocation was historically used, such as the discovery by a man of his wife committing adultery or “honour” killings
    - The law addresses this through the provoking act being an offence under the *Criminal Code* with a minimum five-year maximum sentence associated with it
    - Furthermore, as stated in *Tran*, the ordinary person must be informed by contemporary norms of behaviour, and in particular, *Charter* values, which filters out many of the problematic cases it applies to as identified in the scholarship, such as “honour killings”
    - Likewise, I believe this effectively addresses Horder’s criticism of provocation in “Provocation and Responsibility” in terms of provocation endorsing possessiveness of men toward women as natural and justifiable. It does so by excluding the defence in these instances through the two mechanisms I have addressed earlier.
  + It is in line with the PFJ, which are foundational principles of justice
  + *Creighton*: PFJ: “No person can be sent to prison without mens rea and the seriousness of the offence must not be disproportionate to the degree of moral fault”
    - “Provided an element of mental fault or moral culpability is present, and provided that it is proportionate to the seriousness and consequences of the offence charged, the principles of fundamental justice are satisfied”
  + I believe that when a person is seriously provoked and acts on the basis of that anger they are less morally culpability
    - E.g. someone is sexually assaulted. During the midst of the attack, they manage to knock the attacker unconscious, freeing themselves from danger. But, in the moment, due to their anger, they decide to repeatedly strike the person in the head with a mental object they find in an attempt to kill the initial attacker, going far beyond what would constitute self-defence
      * This is especially relevant because there is no half-way house or partial justification with self-defence (*Faid*)
    - E.g. 2: someone learns their child is heinously killed by a cold-blooded murder, and acting on that anger, finds and murders the killer of his or her child
  + I do not find Grant, Chunn, and Boyle’s criticism in “The Law of Homicide” compelling
    - My response to their criticism is: yes, the government has fallen short in legislating similar defences for other human frailties (in situations where a person does not have the same level of moral blameworthiness as someone commits the crime but does not act on that frailty) such as compassion (*Latimer*), but that does not mean that they are wrong in establishing defences for some human frailties
      * To provide an analogy, homelessness is a problem nationwide. If the government successfully manages to eliminate homelessness in one province, that does not mean that they are wrong in doing so merely because they have not addressed the problem in other provinces.
      * While I understand it is a deliberate by the government move not to legislate these other defences, it is my opinion, normatively speaking, that there should be some defences, or some type of reduced punishment, for certain offences committed on the basis of human frailties (e.g. compassion, *Latimer*)
  + I find Berger’s criticism in “Emotions and the Veil of Voluntariness” compelling to an extent. I believe that emotions are part of us to an extent and that we should subject our emotional responses to critical evaluation. However, there is still overwhelming scientific evidence supporting that very serious emotions can result in responses that are far removed from our normal behaviour and cause us to do completely illogical and irrational things which we would otherwise not do. Ultimately, humans are not completely rational and logical beings. We still have biological attributes that affect us and push us to act in ways that are, in my opinion, apart from our character.

## Moral involuntariness

* Is moral involuntariness a good standard, particularly requiring normal fortitude? (in terms of duress)
* Relevant cases: *Ruzic*, *Ryan*
  + Normal resistance to the threat required in the proportionality stage (*Ryan*)

## Duress distinction between principals and parties

* **Is the distinction between principals and parties for the purposes of duress a good distinction?**
  + I do not think it is a good distinction
  + I think the court recognized the rigidity of the statutory defence and wanted to find a way to circumvent it (*Carker* = statutory applies to all; *Paquette* = statutory for principal offenders
    - The way they could do so at the time (pre-*Charter*) is by statutory interpretation (they could not displace the statue)
    - Since the statute did not expressly state it applies to both principal offenders and parties to the offence that are not principal offenders, they could interpret it in such a way as to make the statutory defence only apply to principle offenders
    - As a result, they did justice in the case at hand (*Paquette*)
    - However, this distinction is arbitrary when considering the reasoning behind it
  + Ultimately it comes down to the judges recognizing that the statutory defence can result in significant injustice and attempting to rehaul the defence in order to do justice
    - This is further reinforced by the fact that the statutory defence went through a serious change due to many unconstitutional components
  + Also, consider the fact that principal offenders and parties are not considered differently for the purposes of sentencing (s 22 CC) 🡪 why the distinction here?