Criminal Law Prof Grant/Benedet Winter 2017

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Exam Prep Error! Bookmark not defined.

# General Defences info:

**Defences**

* Some negate an element of the offence (mostly MR) ie mistake of fact.
* Others act as a justification or an excuse for an offence even though Crown proves all elements of offence ie duress.

**Other defense categorizations/classifications:**

* Whether the defense is a COMMON LAW (ie. Necessity) or STATUTORY (ie self defense, listed in CC) defense (remember: common law offences have been abolished except for contempt of court)

**Burden of proof in defences is not always the same**

* Crown can’t disprove every defense possible in advance that an accused might raise, so accused has to create the defense
* **Two different standards of burden of proof that are applied**
	+ Accused must raise some evidence on each element of the defense to give it an **“air of reality**” EVIDENTIARY BURDEN on BOP 🡪 then Crown burden to disporvoe BARD
	+ Legal burden on accused 🡪 accused must prove on a BOP

**Some defences apply to all offences, some only apply to a limited number**

* Ie. Theft wouldn’t accept self-defense (logical)
* Ie. Provocation only applies to murder (to reduce to manslaughter)

**Some defences give a full acquittal, and some defences only reduce the conviction to a lesser offence**

# Mistake

## Mistake of Fact Defense

* **Accused holds an honest belief in a set of circumstances that, if true, would otherwise entitle him to an acquittal, for example by negating an element of the mens rea (it doesn’t have to be reasonable but the reasonableness goes to the honest belief).**
* Every time that knowledge of a particular set of circumstances is part of the MR of the offence, the defence of mistake of fact may be available.

*Example* – *the offence of theft requires the Crown to prove that the accused acted with knowledge that the property was not his own and that he had no right to take it*

1. **Common law defense** – negates an element of the offence (denial of MR) rather than affirming a positive defense (Pappajohn / Ewanchuk).
2. **Statutory defense in sexual offences -** Has been modified by statute in context of sexual offences – see CC sections which define the mistake of fact in those cases (has taken all reasonable steps to confirm consent, not used in intoxication, etc.)
3. **“Air of Reality” Threshold Test - Evidentiary burden to raise a reasonable doubt on the accused to give the defence an** **air of reality** **does not have to be on balance of probabilities** – once that is proven the burden shifts back to the Crown to disprove BARD. If enough evidence to give an air of reality judge must instruct jury on mistake of fact as defense.
4. **Crown not required to disprove mistake as part of proving MR in every case** (only if defense is raised)
5. **Not all offences**
* Only applies to offences in which **part of the mens rea is knowledge of some set of circumstances**
1. **Result if successful**:
* Sexual assault 🡪 acquittal (full defense)
* Other offences 🡪 might be guilty of an attempt (usually full defense but might be partial)
1. **Applied to sexual assault**
* 1892-1982 – rape was most serious sexual offence –gendered (man 🡪 woman, not his wife), required AR sexual intercourse with vaginal penetration by penis only, without consent – need to show physical resistance corroborated – jury had to be warned about evidentiary burden
* 1983 🡪 anyone against anyone, no marital rape exemption, AR much broader, includes any physical contact of a sexual nature, without consent remains

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| R v Kundeus (1976)(SCC) \* First time Mistake of Fact as a Defence |
| Facts – Drug seller offered police constable **mescaline**. The police constable bought two “hits”, which were actually two capsules of **LSD**. Kundeus was charged with unlawfully trafficking in a restricted drug (LSD) contrary to *Food and Drugs Act*. LSD is a restricted drug; mescaline is not.**Trial** – convicted**CA** – conviction set aside, acquitted ON APPEAL he argued mistake of fact, AR of “trafficking a restricted drug” did not match with MR as he was trafficiking a controlled drug not restricted drug. **SCC** – conviction restored Who won? Crown No evidence having been tendered by the accused; it is not possible to find that he had an **honest belief** amounting to a non-existence of mens rea.Relates to *Beaver* – you should be acquitted if the thing you actually did was not what you thought you were doing (and what you thought you were doing was legal)**Laskin CJC (dissenting)** –**The actus reus and the mens rea must relate to the same crime.** Where mens rea is an element of an offence, it cannot be satisfied by proof of its existence in relation to another offence uncles the situation involves an included offence of which the accused may be found guilty on his trial of the offence charged.**Belief must be honestly held (subjective MR) does not need to be reasonable (objective MR).****The Crown should have laid a charge of attempting to traffic in mescaline**. Such a charge is supportable under s 24 of the Code that makes it immaterial whether it was possible or not to commit the intended offence.  |

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| R v Pappajohn (1980)(SCC) \* Mistake of fact in sexual assault |
| **Facts** – Pappajohn had sexual intercourse with the complainant who then ran from the house naked and denied there was any consent. Pappajohn testified that the intercourse was consensual, but then they engaged in consensual bondage, the complainant got upset and left.**Trial** – convicted **Appeal** – conviction upheld 2:1**Who won? Crown – conviction upheld** The defence did not have to be left with the jury as no evidence to support an air or reality to a mistake of fact.**Ratio** – **A defence of mistake of fact should be put to a jury when there is "some evidence which would convey a sense of reality".** **The defence of mistake of fact should avail when there is an honest belief in consent, or an absence of knowledge that consent has been withheld.** **Mistake of fact can be based on subjective or objective mistaken fact.****DISSENT**: **Need not be based on reasonable grounds -** **although “reasonable grounds” is not a precondition to the availability of a plea of honest belief in consent, those grounds determine the weight to be given the defence.** **PROBLEMS with this:*** But, the accused’s statement that he was mistaken is not likely to be believed unless the mistake is, to the jury, reasonable.
* Allows accused to be exonerated on any belief, even if rooted in stereotype or cultural standard!!
* Rape is a gendered crime, rooted in myth and stereotypes, there is a real problem then (and Laskin even restates them all as truth on 9-15!)
 |

## Contemporary Sexual Assault Law (post-Pappajohn)

**The offence of sexual assault since 1983 requires:**

1. **An assault – application of force AR**
	* *MR Intentional*
2. **In circumstances of a sexual nature**
3. **Without consent AR**
	* *MR Knowledge, reckless, willful blindness*
* Since 1992 🡪 Consent – **voluntary agreement of the complainant (as opposed to absence of resistance** 🡨 1992)
* Trier of fact must only believe victim did not consent in her subjective state of mind.
* Accused may negate MR by proving defense of honest mistaken belief of consent
* No longer linked to marital status of accused/victim, no longer gendered man/woman

Charter 1982 – Equality Rights 1985 (delayed so Parliament could amend provisions that don’t apply to the equality rights)

Section 265(1) Assault – sexual assault lies in the any definition of assault in 265(1), which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated (Ewanchuk).

Section 265(3) Absence of consent in cases of assault despite complainants seeming consent or participation – Where a complainant submits or does not resist by reason of a) application of force to the complainant or another person b) threats or fear of application of force c) fraud or d) exercise of authority.

Added 1992 - Section 265(4) Accused’s belief as to consent – Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused’s belief, **to consider the presence or absence of reasonable grounds for that belief**.

**Added 1992 CONSENT MUST BE VOLUNTARY, ACCUSED MUST HONESTLY BELIEVE CONSENT IS GIVEN, AND MUST TAKE REASONABLE STEPS TO CONFIRM CONSENT**

Section 273.1(1) Consent is voluntary argreement to engage in sexual activity in question

Section 273.1(2) No consent is obtained where agreement is by a third party, complainant is incapable of consenting to the activity, through abuse of authority, complainant says no, complainant says yes then says no.

Section 273.2 Where belief in consent is not a defence – It is not a defence to a charge under s 271, 272 or 273 that the accused believe that the complainant consented to the activity that forms the subject-matter of the charge, (a) the accused’s belief arose from the accused’s self-induced intoxication or recklessness or willful blindness OR (b) **where the accused did not take** **reasonable steps**, in the circumstances known to the accused at the time, **to ascertain that the complainant was consenting.**

Consent is not a defence to a charge of sexual assault or related offences where the complainant is under the age of 16. Section 150.1(4) also states that it is not a defence that the accused believed the complainant was 16 years of age or more, unless the accused took “all reasonable steps to ascertain the age of the complainant.”

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| R v Ewanchuck 1999 SCC \* TEST for sexual assault |
| Facts – Ewanchuck asked P (17-year-old woman) to come to his van to interview for a job after meeting her in the mall. Shut (and possibly locked) the door of the trailer after she entered. Asked for massage, then progressed to sexual nature. P said “No” several times, and Ewanchuck stopped and them resumed sexual intimacies repeatedly until the accused left. P tried to project a confident demeanor in order to avoid assault. **Trial** – acquitted – she didn’t act as if she had not consented, used “**implied consent**”**CA** – Upholds acquittal 2:1 – Crown did not prove non-consent, and would have defense of mistake re consent**SCC** – unanimous reverses acquittal, enters conviction **Who won? Crown – Consent cannot be implied in sexual assault****Holding** – – **The evidence does not disclose an air of reality to the defence of honest but mistaken belief in consent to this sexual touching**.* The trial judge accepted as credible the complainant’s evidence.
* The accused relies on the fact that he momentarily stopped his advances each time the complainant said “No” as evidence of his good intentions.

**Ratio** – **Test – Sexual assault****Actus reus – Unwanted sexual touching:**1. **Touching** Objectively proven
2. **Sexual nature of touching** Objectively proven
3. **Absence of consent**
* **Subjective (complainant’s state of mind)** – determined by reference to the complainant’s subjective internal state of mind towards the touching, at the time it
* **First time SCC determined its not about what she DID its what she WANTED**
* **Credibility** **must still be assessed in light of all the evidence –**
* **Complainant gives evidence under oath**
* **Accused can cross examine or testify to scrutizine** complainant’s words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place.
* I**f, however, the trial judge believes the complainant that she subjectively did not consent, the Crown has discharged its obligation to prove the absence of consent.**
	+ - A good judge will ask whether the CONSENT is affirmatively proven- not whether REFUSAL is proven.
		- The accused’s perception of the complainant’s state of mind is not relevant. May only come up in a defense of honest mistake in consent re MR of offence.
* **Any deemed consent can be vitiated by fear or threats of application of force** – “the complainants fear need not be reasonable nor must it be communicated to the accused in order for the consent to be vitiated”.
* **If the trier of fact accepts the complainant’s testimony that she did not consent, no matter how strongly her conduct may contradict that claim; the absence of consent is established and AR of element of offence is proven - The trier of fact cannot imply consent.**
* Problem: Complainant must still prove non-consent and can be challenged – reduces number of Asking if someone’s behavior is aligning with someone who had not consented has assumptions imbedded in it.

**Mens rea –** 1. **Intention to touch** The Crown need only prove that the accused intended to touch the complainant in order to satisfy the basic mens rea requirement.
2. **Knowing of, being reckless of, or willfully blind to a lack of consent either by words or actions from the person being touched**
* **The accused must show evidence that he believed that the complainant communicated consent to engage in the sexual activity through her words and/or actions –** MUST PROVE CONSENT not lack of consent
* **REMEMBER: Accused must take reasonable steps to confirm consent 273.2**
* Problem: What kind of conduct or words communicate consent? A belief that silence, passivity or ambigous conduct constitutes consent is a mistake of law, and provides no defense.

**Defence of mistake of fact**:* **The defence of mistake is simply a denial of mens rea.** It does not impose any burden of proof upon the accused and it is not necessary for the accused to testify in order to raise the issue. However, as a practical matter, this defence will usually arise in the evidence called by accused.

**L’Heureux Dube (concurring) – Stereotypical assumptions lie at the heart of what went wrong in this case. She tears a hole in the trial judge’s reasons!**  |

## B. Mistake of Law

* In general, a person charged with an offence cannot rely on a mistake of law as a defence.
* **POLICY REASONS** Could create imbalance of application of law (more ignorant = less applicable) and could be impossible to disprove for the Crown to constantly prove that someone knew the law in order to hold them responsible. Note – Section 19 is not a matter of justice, but a matter of policy.
* **Only can be used if unlawful purpose is built into the OFFENCE - wording requires knowledge of the law and willfully or knowingly did that offence they can then use the defense that they had no knowledge of that law.**
* Section 19 – **Ignorance of the law is no excuse** except CL defence of “officially” induced error of law.
* **Partial defense – Mitigating factor in** sentencing.
* Mistake of law can negative a malicious intent required for a crime (Campbell)

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| R v Campbell and Mlynarchuk 1973 Alta Dist Ct |
| **Facts** – Campbell performed a nude go-go dance on stage and was charged with s 163(2): Everyone commits an offence who takes part or appears as an actor, performer, or assistant in any capacity, in an immoral, indecent or obscene performance, entertainment or representation in a theatre. Campbell had relied upon a statement informed by a trial judgment in Johnson in Alberta SC (which was later reversed). Who won? Campbell (absolute discharge)Does the law that is applied need to be the law a) at time of offence or b) at time of trial? OFFENCE – but in this case that trial judgment didn’t actually change law).Ratio – **Mistake of mixed fact and law is a defence, but mistake of law is no defence**. * Mistake of law can be defence, not because a mistake of law is a defence, but because a mistake of law can negative a malicious intent required for that crime.
* For example, where the law requires that a person willfully, or maliciously, or knowingly, does something wrong, it could be a defence as negating intention, to show that, because of the mistake in the understanding of the law, there was no willful intent or malice.

Reasoning – * Campbell’s mistake was in concluding that a statement of law, expressed by a trial judge, was the law. That is a mistake of law.
* It is a mistake of law to misunderstand the significance of the decision of a judge, or of his reasons.
* It is also a mistake of law to conclude that the decision of a trial court changes the law, unless that judgment is from Court of Appeal.

**There is no special intention required for this offence**. The only mens rea required here is that Campbell **intended** to do that which she did. There is no suggestion that she lacked that mens rea. |

##

## Officially induced Mistake of Law

**Common law defense –** completely judge created

**Burden of proof** - requires accused to prove on BALANCE OF PROBABILITIES more likely than not that **all 6 factors** are present

**Full defense** – mitigating factor in sentencing, would generally get acquitted

**Applies to all offences –** criminal and regulatory (strict and absolute) – state is estopped from convicting you

“In such a case, regardless of whether it involves strict liability or absolute liability offences, the fundamental fairness of the criminal process would appear to be compromised” Levis

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| Levis (City) v 2629-4470 (Quebec Inc) 2000 SCC \* Officially induced error of law |
| Facts – 2629-4470 Quebec Inc (the “company”) was told by an SAAQ employee that a renewal notice would be sent to it 60 days before the expiry date of its registration fees for its vehicle. The notice never arrived, and the company did not pay the fees. The police stopped the vehicle and observed that its registration had expired contrary to s 31.1 of the *Safety Code*.Who won? Levis (City) – Company made an administrative error but knew they had to pay fees by due date.Issue – What is the nature and availability of the defence of officially induced error of law?SCC rules it exists but it was not found in this case.Holding – The company and Tetreault must each pay the minimum fine of $300.Ratio – **Officially induced error of law exists as an exception to the rule that ignorance of the law does not excuse.** The wrongfulness of the act is established. However, because of the circumstances leading up to the act, the person who committed it is not held liable for the act in criminal law. The accused is thus entitled to a stay of proceedings rather than an acquittal. **Test** – The accused must prove (on a BOP) six elements of the defence of official induced error of law:1. That an error of law (or of mixed law and facts) was made
2. That the person who committed the act considered the legal consequences of his/her actions
3. That the advice obtained came from an appropriate official
4. That the advice was reasonable
5. That the advice was erroneous
6. That the person relied on the advice in committing the act

**POLICY*** In such a case, regardless of whether it involves strict liability or absolute liability offences, the fundamental fairness of the criminal process would appear to be compromised.
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### Note: R v Khanna

* Khanna’s applied for citizenship, reported no criminal offences
* Subsequently charged with criminal negligence causing death
* Called Citizenship Canada, told by two people it didn’t need to be reported as wasn’t a serious crime
* After receiving citizenship was told she had failed to disclose a material circumstance
* Was found to be an **officially induced error of law** based on the advice she received from the immigration officials

# Chapter 10 – Defences – Intoxication and Provocation

## A. Intoxication

* Drugs and alcohol both count, legal or illegal
* Being drunk is not a defense, must have a very high level of intoxication (Drader)

**Specific intent crimes:**

* Act done for an ulterior purpose, with knowledge of specific circumstances or consequences
* Allow accused to raise **defence of intoxication** (air of reality test)

**General intent crimes:**

* Only requires MR for doing the act, not knowledge of certain circumstances of consequence
* Allow accused to raise **defence of extreme intoxication** (legal burden on accused)
* Allow accused to raise defense of intoxication **IF AIDING OR ABETTING**
* **Cant use intoxication if OBJ MR as reasonable person is not drunk! (ie 21(2) – subsequent A/A offence)**

**The distinction of general intent vs specific intent crimes lies in the complexity of the thought and reasoning processes that make up the MR of the offence, and the social policy underlying the offence. (Tatton)**

**Categorizing offence as general or specific intent:**

1. **Examine jurisprudence – how has this offence been classified in the past?**
2. **Examine mental element to determine whether general intent or specific intent offence as above**.
* How important is the mental element of the offence?
* How complex is the thought and reasoning process?
	+ **If offence is done for an ulterior purpose 🡪 specific intent**
	+ **If offence requires actual knowledge of circumstances or consequences 🡪 specific intent**
	1. Intoxication should be considered for specific intent crimes
	2. Intoxication should NOT be considered for general intent crimes
1. **If still unsure how to categorize the offence, consider policy considerations:**
	1. If self-induced intoxication **is habitually connected to the crime** (ie sexual assault, damage to property) then allowing intoxication defense is **counterintuitive** 🡪 **general intent**
	2. If there is a lesser offence included then intoxication can be considered as defense to the higher offence but not the lower offence 🡪 **specific intent ok**
	3. Presence of judicial sentencing discretion may be a factor to consider: if harsh minimum sentence may be unduly harsh not to allow intoxication defense. If judge has discretion however, then making it specific intent to allow intoxication as a defense (that could result in acquittal, vs. guilty with a lower sentence mitigated by intoxication) is reasonable

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| R v Tatton (2015)(SCC)  |
| **Facts** – After drinking heavily, Tatton put oil on stove and then left house for coffee. Came back 20 minutes later to girlfriends house on fire, destroyed contents of home. Charged with arson under s 434. Claimed defense of intoxication. **Trial and CA:** accepted defense of intoxication as was found to be specific intent offence, acquitted.**Who won? Crown -** Acquittal set aside, new trial ordered.Issues – Is the offence of arson a specific or general intent offence? **GENERAL** Ratio – **Intoxication is not a defense (short of automatism) in a general intent offence such as arson – confirms Leary rule after Daviault****The distinction of general intent vs specific intent crimes lies in the complexity of the thought and reasoning processes that make up the MR of the offence, and the social policy underlying offence.****Specific intent offence –*** **Intoxication available as a defense (Leary rule)**
* **Require a more sophisticated reasoning process and heightened MR**
* **Most have included offences – so they aren’t likely to be acquitted, just found guilty of a lesser offence**
* Crimes involve an ulterior purpose
* Accused must indent to do the act itself, and must also have an ulterior purpose in mind
* Doesn’t matter whether he meets the ulterior purpose, just that he had it in mind
* Could also take form of intending to bring about certain consequences if that intent required more complex thought and reasoning processes (ie murder)
* Could take form of requiring that the accused has actual knowledge of certain circumstances or consequences due to more complex thought and reasoning processes
* **More specific policy concerns arise suggesting should allow intoxication as defence**

**General intent offence – intoxication not available - upholds Leary rule*** **Thought and reasoning processes are relatively straightforward**
* **Minimal intent -** MR simply relates to the performance of an illegal act – does not require intent to bring about certain consequences that are external to the AR (ie assault intends to apply force, regardless of whether injury results)
* **Minimal degree of consciousness -** Do not require actual knowledge of certain circumstances or consequences, to the extent that such knowledge is the product of complex thought and reasoning processes.
* **Cannot use intoxication as defense**
* **No major policy concerns arise suggesting NOT allowing intoxication as defense**
1. **Examine mental element to determine whether general intent or specific intent offence as above**.
	1. Intoxication should be considered for specific intent crimes
	2. Intoxication should NOT be considered for general intent crimes
2. **If unsure how to categorize the offence, consider policy considerations:**
	1. If self-induced intoxication is habitually connected to the crime (ie sexual assault, damage to property) then allowing intoxication defense is counterintuitive
	2. If there is a lesser offence included then intoxication can be considered as defense to the higher offence but not the lower offence
	3. Presence of judicial sentencing discretion may be a factor to consider: if harsh minimum sentence, may be unduly harsh not to allow intoxication defense. If judge has discretion however, then allowing it as a defense (that could result in acquittal, vs. guilty with a lower sentence mitigated by intoxication) is a policy issue

**Reasons**:* AR of arson is damaging PROPERTY by fire.
* Starting a fire isn’t the AR – it’s the resulting damage to fire.
* So MR must apply to the DAMAGE (**intentionally** or **recklessly** damaging property) instead of to starting a fire intentionally
* No additional mental element required therefore general intent, intoxication doesn’t apply
 |

**History of the defense of intoxication**

**Beard – HL 1920**

* YOU MUST BE REALLY DRUNK: Evidence of drunkenness which *renders the accused incapable of forming the specific intent essential to constitute the crime* should be taken into consideration with the other facts proved in order to determine whether or not he had this intent
* A LITTLE DRUNK ISNT DRUNK ENOUGH: Evidence of drunkenness *falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime* and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion does not rebut the presumption that a man intends the natural consequences of his acts.

**R v Leary [1978] 1 SCR 20**

**Majority**:

* Rape is a crime of general intent and thus no defense of intoxication allowed

**Dissent:**

* Evidence of intoxication should always be relevant to whether the accused formed the MR
* Distinction between specific and general should be rejected

**R v Robinson [1996] 1 SCR 683**

* The focus on capacity is not consistent with s 7 and 11(d) of the Charter
* Must focus on whether the accused actually had the specific intent not whether he/she had the capacity (or not due to intoxication) to form the MR

**Leary**

**What’s left of Leary**

1. **Mild intoxication** – no defense not relevant to liability, sometimes relevant to sentencing
2. **Advanced intoxication** 0 defense to specific intent crimes only – almost always reduces to an included offence. Once the accused puts it into issue, the crown must disprove beyond a reasonable doubt (Daley 2007 SCC 57)
3. **Extreme intoxication** 0 very rare -0 so intoxicated as to be a state of automatism.

**Daviault**

* Introduces defense of “extreme intoxication” on basis of Charter – allows extreme intoxication in general intent crimes where the level of intoxication is akin to automatism. Constitutional right to the defense as it violated s 7 and s 11(d) to disallow the defense that was not justified in s 1.

**Where we are after 33.1**

We still have LEARY RULE **CL defense of advanced intoxication for specific intent crimes**

* if the intoxication negated the MR of the offence, that person will be acquitted or convicted of a lesser included offence if there is one.
* Crown must prove BARD that you were not intoxicated to that state

DAVIAULT RULE allowed the defense of extreme intoxication for general intent crimes. However limited by s 33.1

We have the defense of extreme intoxication you will have a defense to crimes of general intent that did not include any violence

* defense proves on a BOP with expert evidence that accused was extremely intoxicated
* requires marked departure (standard of penal negligence), deemed by the level of intoxication – if you get yourself that drunk, we assume you have made a marked departure from the standard of reasonable person.

### Note: Criminal Code s 33.1 Self-Induced Intoxication – Statutory Limitation on Defense

33.1 Does not affect specific intent offences - Leary rule would take murder to manslaughter

33.1 only changes Daviault rule for general intent offences

**33.1(1) GENERAL INTENT OFFENCE (DOESN’T LIMIT LEARY DEFENSE)**

* It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused **departed markedly** from the standard of care described in subsection (2).

**33.1(2)** **LIMITS TO ANY CASE OF VIOLENCE IN ANY CASE WITH GENERAL OR SPECIFIC INTENT**

* A person **departs markedly** from the standard of reasonable care… 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 behavior, **voluntarily or involuntarily interferes with or threatens to interfere with the bodily integrity of another person.**
* *What is trier of fact had a situation where they didn’t think it was a marked departure? This law tells them they have to find it a marked departure*

**33.1(3)** **WHAT OFFENCES ARE EXCLUDED?**

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.

Most cases since 33.1 find that it violates s 7 and 11(D) but so far has been upheld under s 1 (Vickberg) – No BCCA binding decisions otherwise so it still applies.

**Two ways you can uphold 33.1: either by saying no violation of rights or that there is a violation of rights but upheld by s 1:**

Vickberg:

* “The section effectively eliminates the minimal required mens rea for the general intent offences to which it applies.  It substitutes proof of voluntary intoxication for proof of the intent to commit an offence of general intent, most commonly, assault.  It is also obvious that the section, on its face, imposes criminal liability in the potential absence of any voluntariness in the actions of the accused. ”

**However it is upheld under s 1**

* Violence in society and accountability for criminal behaviour are pressing and substantial concerns;
* Women and children are disproportionately affected by these offences and thus promoting equality is also a compelling objective.
* Rationally connected and minimally impairing because limited to crimes of violence

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| R v Bernard (1988)(SCC) \* general vs specific intent |
| Facts – After drinking, Bernard forced the complainant to have sexual intercourse, punched her twice, and hid a bloodstained towel and pillowcase in the toilet tank. Before the incident, Bernard was walking straight and talking and was able to put a record on. He was awoken by the police and said he didn’t know why he had forced the sexual intercourse but got off when he realized what he was doing. He was charged with sexual assault causing bodily harm contrary to s 246.2(c). **Trial:** convicted sexual assault**CA:** appeal dismissedWho won? Crown – appeal dismissed 4/7 uphold distinction btwn specific and general intent 5/7 would have allowed defense if intoxication was so severe that it was a state of automatismIssues – * Is sexual assault causing bodily harm an offence requiring proof of **specific**, or of **general**, intent?
* Is evidence of self-induced drunkenness relevant to the issue of guilty or innocence in an offence of general intent?

**Ratio** – **The distinction between general and specific intent offences ought to be maintained. (4 of 7 judges)****Drunkenness is not a true defence to a criminal act.** Where, however, in a case that involves a crime of specific intent, the accused is so affected by intoxication that he lacks the capacity to form the specific intent required to commit the crime charged, it may apply. **The defence of intoxication has no application in offences of general intent.** **McIntyre, J (Beetz concurring): In rare case where intoxication negates MR of a general intent offence we can substitute the moral blameworthiness of getting so drunk with the blameworthiness of the offence (therefore negates Charter argument S 7 protecting punishing morally innocent by saying you’re not morally innocent for drinking so much!).****Wilson J (L’Heureux-Dube concurring)**: If you’re so drunk you are in a state that is akin to automatism or insanity, we should allow the offence of intoxication.**The mental element of sexual assault causing bodily harm is only the intention to commit the assault therefore sexual assault is an offence of general intent.*** Specific intent would be a **heavier burden** on Crown to prove, which would “go a long way toward defeating the obvious purpose of the enactment.”
* Strong reasons in **social policy** which would support this view. To import an added element of specific intent in such offences, would be to hamper unreasonably the enforcement process. It would open the question of the defence of drunkenness, one which has always been related to the capacity to form a specific intent and which has generally been excluded by law and policy from offences requiring only the minimal intent to apply force.

**Using drunkenness for defense in general intent offences is no good b/c:*** The more drunk a person becomes by his own voluntary consumption of alcohol or drugs, the more extended will be his opportunity for a successful defence against conviction for the offences caused by such drinking, regardless of the nature of the intent required for those offences.
* The effect of excluding the drunkenness defence from such offences is merely to prevent the accused from relying on his self-imposed drunkenness as a factor showing an absence of any necessary intent.
* They cannot be heard to say: “I was so drunk that I did not know what I was doing.” If they managed to get themselves so drunk that they did not know what they were doing, the reckless behaviour in attaining that level of intoxication affords the necessary evidence of culpable mental condition.

**Dickson CJC (dissenting) (L** – Evidence of intoxication should be admissible for all offences to raise a reasonable doubt as to the mens rea of the accused, regardless of general or specific intent. Not allowing the defense in general intent violates S7 and S11(D) and cannot be upheld in S 1 as other countries have removed distinction between general and specific intent.  |

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| R v Daviault **Leading case on distinction between general and specific intent crimes** |
| Facts – Daviault consumed seven or eight beers during the day and drinking a bottle of brandy during the evening and early morning. In the night, he grabbed the complainant’s (a friend of his wife) wheelchair, wheeled her into the bedroom, threw her on the bed and sexually assaulted her after. Daviault was charged with sexual assault.**Trial**: acquitted – no MR for sexual assault due to drunkenness.**CA**: overturned acquittal - convictedWho won? Crown – appeal dismissed??? Allowed??? New trial??? Issue – **Can a state of extreme drunkenness that resembles automatism or a disease of the mind (as defined in s 16) constitute a defence for a crime of general intent? YES**Holding – A new trial is directed. Ratio – **A state of extreme drunkenness can be a defence for a crime of general intent.*** **Legal persuasive burden:** The accused should be called upon to establish it on the **balance of probabilities**.
* Expert evidence would be required to confirm that the accused was probably in a state akin to automatism or insanity as a result of his drinking.

Reasoning – **Majority**:* **Maintaining the Leary rule (that the defence of drunkenness can have no application to crimes of general intention) would violate the Charter.**
	+ This would permit evidence of extreme intoxication akin to automatism or insanity to be considered in determining whether the accused possessed the minimal mental element requires for crimes of general intent.
	+ **The substituted mens rea of an intention to become drunk cannot establish the mens rea to commit the assault.** The principles embodied in our Charter, and more specifically in **ss 7 and 11(d),** mandate a limited exception to, or some flexibility in, the application of the ***Leary* rule.**
* **This defense is now available to all general intent crimes where the level of intoxication is so high that it is a state of automatism.** However, to use it accused must prove on a BOP the level of intoxication. This could violate S11(D) because it puts an evidentiary burden on the accused. However S1 is upheld in the violation because the accused is the only one who would know what state they were in.
* In other jurisdictions where the Leary rule was abandoned, the defense would be available on in in the rarest cases, demonstrating there is no urgent policy or pressing objective which needs to be addressed.
* **Should it be though that the mental element involved relates to the actus reus rather than the mens then the result must be the same.**

**Lamer CJ** (concurring)/La Forest J (concurring) – The mental element involved should relate more to the actus reus than the mens rea, so that the defence is clearly available in strict liability offences. **Public outcry** – DOJ acted very quickly to bring in draft legislation. Enacted legislation to limit the defense to exclude crimes of violence. Preamble focuses on equality – also a constitutionally protected right. In order to protect equality of victims of violence (often women and children). Law – s 33.1  |

**Note re R v Vickberg 1998 BCSC**

* Accused using heroin and prescription drugs for back pain
* Attempted murder charge – specific intent – included offence of aggravated assault

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| R v Drader (2009)(Alta Prov Ct) \* B&E, Indictable offence Theft,  |
| Facts – Drader had been drinking at a party and then entered a car, took mail from it, and entered a home for the purpose of committing an offence. He was confronted and then fled, but was captured and charged with break and enter and commit theft (s 348(1)(b)); break and enter with intent to commit an indictable offence (s 348(1)(a)); and possession of property, to wit: mail, knowing that it was obtained by an offence (s 354(1)). He submits that his level of self-induced intoxication should lead to an acquittal. All of the witnesses called by counsel for Drader had been drinking themselves. * **Break and enter and commit theft** – generally considered an offence of **general intent**, **unless a** **specific intent indictable offence is alleged**
	+ The indictable offence was **theft** (a specific intent offence)
* **Breach and enter with intent to commit an indictable offence** – **specific intent**
* **Possession of property, to wit, mail knowing it was obtained by an offence** – **specific intent b/c knowledge you have to have is distinct from just possessing the property – you had to know it was obtained illegally**

Who won? CrownIssue – Does Drader’s self-induced level of intoxication lead to an acquittal of any of the charges?Holding – **Drader’s self-induced level of intoxication does not lead to an acquittal. (Wasn’t drunk enough to negate the MR of the offences).**Ratio – The law recognizes three degrees of intoxication:1. **Mild intoxication** – does not provide a defence and will not absolve an accused of any criminal liability
2. **Medium intoxication** (accused’s ability to foresee the consequences of his/her acts is impaired) – an accused can be acquitted of an offence of specific intent if, due to intoxication, there is a reasonable doubt that he/she lacked the actual intent to commit the offence; this defence is not available for a crime of general intent
3. **Extreme intoxication** (state akin to automatism) – absolves an accused of all common law criminal liability (defence is rare and requires expert evidence)
* Does not apply to offences which involve an element of assault, interference, or threat of interference with the bodily integrity of another person (s 33.1)

Reasoning – Drader was able to physically move around, he was able to dance and he was able to play the guitar and sing. He was able to close the door at the second house and responded exactly how one would expect someone to act who had broken and entered a dwelling with an intent to commit an indictable offence, that is, he immediately ran and existed the premises when confronted by the homeowner. |

## B. Provocation

1. Statutory defence – found in s 232 of the Code – Revised in 2015,
2. Old version – what qualifies as a wrongful act or insult has been narrowed dramatically in 2015, used to be judges could define it, no cases on new version yet

**(2)** **Conduct of the victim that would constitute an indictable offence under this Act that is punishable by five or more years of imprisonment (assaults and threats, not insults or worldviews)** and that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section, if the accused acted on it on the sudden and before there was time for their passion to cool.

**(3)** For the purposes of this section, the questions

**(a)** **whether the conduct of the victim amounted to provocation under subsection (2), and**

**(b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,**

are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.

1. Burden on **accused** – evidentiary (**air of reality** in order for it to be left to the jury, Crown has to disprove BARD)
2. Limited application – applies only to murder charge
3. Does not result in a full acquittal – can reduce to manslaughter

Applies whenever the accused subjected to a “wrongful act or insult” that would cause the “ordinary person” to lose “the power of self control” (objective), and where the accused “acted on the sudden” and before there was time for “his passion to cool” (subjective) (Thibert)

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| R v Hill (1985)(SCC) \* modified objective test |
| Facts – Hill (a 16-year-old male) was charged with first-degree murder after causing the death of Pegg. The position of the Crown was that Pegg and Hill were homosexual lovers and Hill murdered Pegg after a falling out. Hill stated he was subject to unexpected and unwelcome homosexual advances while asleep, and acted in self defence in killing Pegg or was provoked.Who won? CrownIssue – Should the trial judge have instructed the jury to consider whether the wrongful act or insult was sufficient to deprive an “ordinary person” of the age and sex of the accused of his power of self-control? YESHolding – The trial judge did not err in failing to specify that the ordinary person, for the purposes of the objective test of provocation, is to be deemed to be of the same age and sex as the accused. Ratio – It is not necessary for a trial judge to direct a jury that the ordinary person means an ordinary person of the same age and sex as the accused?Test – **Provocation**1. **Objective:** Was the provocation in question sufficient to deprive an ordinary person of the power of self-control?
2. **Subjective:** Was the accused so deprived? What actually occurred in the mind of the accused? Did the accused react to the provocation on the sudden and before there was time for his passion to cool?

Reasoning – Although the instruction that the ordinary person, **for the purposes of the objective test of provocation, is to be deemed to be of the same age and sex of the accused may be helpful in clarifying the application of the ordinary person standard.** However, it is not wise or necessary this a mandatory component of all jury charges on provocation. \*\* Juries are perfectly capable of sizing the matter up. |

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| R v Thibert 1996 SCC \* Air of reality test |
| Facts – Mrs. Thibert told Mr. Thibert she was going to leave him, was in relationship with Sherren. Agreed to meet him, and then did meet with him but refused to return home with him. Mr. Thibert thought about killing himself and loaded a rifle, which he eventually put in his car. Later he followed Mrs. Thibert to a bank parking lot where she worked, and asked her to go some place to talk to him. When Sherren came out of the building, Mr. Thibert got the rifle from his car. Sherren swung Mrs. Thibert back and forth in front of him and moves towards Mr. Thibert, telling him **“Go ahead and shoot me, come on big fella, go ahead**.” Mr. Thibert closed his eyes and shot Sherren, was charged with 1st murder**Trial:** instructed jury on defense of provocation but gets elements wrong**SCC:** Should the judge have instructed the jury on provocation as defense? YES Who won? Thibert – reduced to manslaughterIssue – Was the trial judge correct in leaving the defence of provocation with the jury (and therefore incorrect in failing to instruct the jury that no onus rested upon the accused to establish the defence)?Holding – **There was evidence upon which a reasonable jury acting judicially and properly instructed could have concluded that the defence of provocation was applicable** and that Thibert acted on suddenRatio – **Before the defence of provocation is left to the jury, the trial judge must be satisfied that:**1. **There is some evidence to suggest that the particular wrongful act or insult alleged by the accused would have caused an ordinary person to be deprived of self-control**

The wrongful act or insult must be one which could, in light of the past history of the relationship between the accused and the deceased, deprive an ordinary person of the same age, and sex, and sharing with the accused such other factors as would give the act or insult in question a special significance, of the power of self-control.1. **That there is some evidence showing that the accused was actually deprived of his/her self-control by that act or insult**

The background and history of the relationship between the accused and the deceased should be taken into consideration. This is particularly appropriate if it reveals a long history of insults, leveled at the accused by the deceased. This is so even if the insults might induce a desire for revenge so long as immediately before the last insult, the accused did not intend to kill.Reasoning – T**here was evidence that the accused was actually provoked**. **Were the acts of the deceased ones which he had a legal right to do but which were nevertheless insulting?*** While the actions of the deceased in the parking lot were clearly not prohibited by law, they could none the less be found by a jury to constitute insulting behavior. These actions did not constitute self-defence.

**Major J (dissenting)** – There is **no evidence of a wrongful act or insult sufficient to deprive an ordinary person of the power of self-control.** It would be a dangerous precedent to characterize involvement in an extramarital affair as conduct capable of grounding provocation, even when coupled with the deceased’s reactions to the dangerous situation he faced. * The accused had no right or entitlement to speak with his wife in private.
* I am of the opinion that neither the objective branch nor the subjective branch of the threshold test for leaving the defence of provocation with the jury has been met.
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| R v Gill 2009 ONCA \* Air of reality 🡪 jury decides whether reasonable |
| Facts – Garavellos called Gill and his friends “fucking geeks” as he drove by them. Gill ran after the car and hit it. Medeiros and Garavellos (both significantly larger than Gill) got out of the car and a confrontation ensued. Gill retrieved a knife. Gill was frightened. Garavellos eventually raised a bottle to Hill’s head and swung at him, and Gill reacted instantly by stabbing Garavellos. Gill denied that he was angry when he did so. Gill was convicted of 2nd murder at trial, after judge declined to leave defence of provocation with jury.Who won? Gill **Trial judge erred by failing to leave the defence of provocation with the jury**Reasoning – If the jury rejected Gill’s evidence that he was afraid, there was evidence capable of supporting an inference that he was angry. Similarly, there was evidence capable of supporting an inference that Gill acted in the heat of passion or as a result of a loss of self-control. It was also open to the jury to conclude that Gill was both frightened and angry**. The fact that Gill previously retreated from the confrontation, retrieved a knife, and then returned does not undermine the availability of the inference that his conduct was prompted by sudden rage.** |

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| R v Tran 2010 SCC \* ordinary person test informed by Charter values |
| Facts – Tran entered the locked apartment of his estranged wife and attacked his wife and her boyfriend. He stabbed both parties repeatedly and then phones his godparent and said, “I got him.” He was charged with murder (of the boyfriend) and attempted murder (of his wife). **Trial:** successfully argued provocation at trial **CA**: manslaughter conviction overturned – 2nd degree murder held**SCC:** **agreed with CA, defense of provocation not available where the wrongful act or insult was based on the notion that a wife leaving a marriage was dishonourable, or that women are property. The ordinary person test shows beliefs must be in accordance with the charter**.**The ordinary person standard must be informed by contemporary norms of behavior, including fundamental values such as the commitment to equality provided for in the Charter.** For example, it would be appropriate to ascribe to the ordinary person relevant racial characteristics if the accused were the recipient of a racial slur, but it would not be appropriate to ascribe to the ordinary person the characteristic of being homophobic if the accused were the recipient of a homosexual advance. There can be no place in this objective standard for antiquated beliefs such as “adultery is the highest invasion of property”, nor indeed for any form of killing based on such inappropriate conceptualizations of “honour”. Reasoning – **The conduct in question does not amount to an “insult”; nor does it meet the requirement of suddenness.** The behavior of the victims was not only lawful, it was discrete and private and entirely passive vis-à-vis Tran. There was nothing sudden about the discovery. It cannot be said that Tran’s discovery struck upon a mind unprepared for it. |

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| R v Cairney (2013)(SCC) self induced provocation |
| Facts – Cairney lived with long time friend Ferguson, who had a hx of drinking and physically assaulting his common law spouse, Cairney’s cousin. Witnessed Ferguson assaulting spouse, decided to scare him with a shotgun. Walked up to Ferguson, yelled at him for his conduct to spouse. They argued. Ferguson left, Cairney followed and shot him.**Trial**: 2nd degree murder, defense of provocation, judge charged jury on defense, convicted of manslaughter**CA**: Crown appealed acquittal of 2nd degree murder, arguing no air of reality to defense of provocation, agreed, new trial ordered.Who won? Cairney – appeal dismissed, no air of reality to defense of provocation in that circumstance, new trial ordered An objective person would not have been provoked. Trial judge erred by leaving the defense with the jury.Issue – Was there an air of reality to the defence of provocation when the provocative conduct came as a result of the accused initiating aggressive confrontation? YESRatio – ***A. When Must the Defence Be Submitted to the Jury — The "Air of Reality" Question***The question is whether a properly instructed jury acting reasonably could have a reasonable doubt as to whether the elements of the defence of provocation are made out: Tran**The test is "whether there is (1) evidence (2) upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true"****The judge is only to weigh the sufficiency of the evidence – not the credibility of it. The jury assesses that.**If this air of reality test is met, the judge should leave the defence to the jury. While judges must ensure that there is an evidential foundation for the defence, they should resolve any doubts as to whether the air of reality threshold is met in favour of leaving the defence to the jury.***B. The Elements of the Defence of Provocation*****41        By appropriately contextualizing the ordinary person standard, the law on provocation strikes a balance between recognizing human frailties that lead to outbursts of violence, on the one hand, and the need to protect society by discouraging acts of homicidal violence, on the other:** [***Thibert***](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=6407&FindType=Y&SerialNum=1996450215)**,****Only factors which contribute to the significance of an act or insult should be taken into account when contextualizing the standard****C. *Self-Induced Provocation*****Self-induced provocation refers to the situation where the accused initiates or invites the act or insult he says provoked him. It is not a special category of the defence of provocation. The fact that the accused initiated or invited the provocation is simply a contextual factor in determining whether the subjective and objective elements of the defence are met.**Taken as a whole, the cases support the view that the fact that provocation is "self-induced" by the accused may be relevant to both the objective and subjective components of the defence**There is no absolute rule that a person who instigates a confrontation cannot rely on the defence of provocation**. As in all cases where the defence of provocation is raised, whether the defence goes to the jury depends on whether the evidence provides an air of reality to it. However, the fact that an accused sought out an aggressive confrontation and received a predictable response is a factor which may deprive the defence of an air of reality.**Dissent**: **Trial judge was correct to leave the defense with the jury. Must consider the context of the whole relationship between Ferguson and his spouse and Cairney. . The assaults were frequent — often weekly. They were also severe. Dissent would have allowed the appeal and restored conviction for manslaughter.** |

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| R v Nealy 1986 ONCA \* cumulative effects of alcohol considered  |
| Facts – Nealy injected “stovetop” into his arm in the afternoon and then drank at taverns in the evening with his girlfriend. Casimiri repeatedly said that Nealy’s girlfriend “had nice tits and that he was going to fuck her.” The two men began pushing and punching each other and went outside. Nealy took a knife before going outside. Nealy eventually stabbed Casimiri several times. The trial judge charged the jury to consider drunkenness, self-defence, and provocation, but did not instruct the jury as to the cumulative effect that the consumption of alcohol and the fear and anger that were experience might have had upon Nealy’s ability to form the requisite intent to commit murder.Who won? Nealy new trial orderedIssue – **Should a jury be instructed that they should take into account the cumulative effects of the evidence of drinking and the evidence with regard of provocation? YES**Ratio – I**t will be preferable in most cases (and essential in some cases) where the consumption of alcohol and some form of provocation is involved that a specific direction as to the cumulative effect of these factors be given.** **Rolled-up charge** – accused argues at least two defences of intoxication, provocation, and self-defence – BC has not been receptive 0+0+0=0 – but SCC has used it Reasoning – The jury should have been told that even if the words spoken by Casimiri coupled with his actions did not raise in their minds a reasonable doubt as to whether or not Nealy had been provoked, or that Nealy was incapable of forming the required intent by reason of the consumption of alcohol, the jury was still to consider all these surrounding circumstances in coming to a conclusion as to whether Nealy possessed the requisite intent needed to commit murder. |

# Chapter 11 – Defences – Mental Disorder

**16(1):**

**No person is responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person**

* + - 1. **incapable of appreciating the nature and quality of the act or omission**

**OR**

* + - 1. **incapable of knowing that it was wrong**

**16(2):**

**Every person is presumed not to suffer from a mental disorder until proven on a balance of probabilities**

**16(3): The person raising the issue has the burden of proof**

**S. 2: “Mental disorder” means a disease of the mind**

## A. The Defence of Mental Disorder

1. Statutory defence – found in s 16 of the Code amended after Swain
2. Burden of proof on whichever party is trying to prove mental disorder – the presumption of sanity is disproved by proof on a BOP subs 16(2) and (3)
3. Applies to all offences
4. Results in special disposition – not criminally responsible by responsible by reason of mental disorder (NCRMD)

The Mental Disorder provisions are found in s 16 and Part XX.1 of the Code

* Where an accused claims that he had a mental disorder at the time of committing the offence, he can ask for a special verdict of not criminally responsible by reason of mental disorder (NCRMD)

The defence of “mental disorder” is found in s 16

The accused must be found to:

1. **Have a mental disorder (defined in s 2 to mean a “disease of the mind,” that**
2. **Renders him unable to appreciate the nature and quality of the act he committed, OR incapable of knowing that it was wrong.**
	* **An accused may be aware of the physical character of his action** (e.g., 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.
	* The alternate definition, of incapacity to know that the act was “wrong,” has generated disagreement among the members of the court.
* The source of the incapacity may be congenital or acquired, permanent or temporary, but it has typically been held to exclude states of self-induced intoxication and transitory mental states, such as a concussion.
* Cooper – 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.
* Cooper - The requirement, unique to Canada, is that of perception, an ability to perceive the consequences, impact and results of 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.

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| R v Chaulk (1990)(SCC) \* presumption of sanity, definition of wrong = moral |
| Facts – Chaulk and Morrissette (two youths) plundered a home for valuables and then stabbed and bludgeoned its sole occupant to death. A week later they turned themselves in and made full confessions and argued that they were in the grips of a mental disorder (a paranoid psychosis that made them believe they had the power to rule the world and had the right to kill the victim because he was a “loser”). Who won? Chaulk and Morrissette Issue – What is the interpretation of the word “wrong” which is found in s 16(2)? Is its meaning restricted to “legally wrong” or may it also be interpreted more broadly to include “legally or morally wrong”?Holding – The insanity defence was available to the appellants.Ratio – **The presumption of sanity embodied in s 16(4) of the Code limits the presumption of innocence guaranteed by s 11(d) of the Charter. However, s 16(4) is a reasonable limit on the presumption of innocence that can be upheld under s 1 of the Charter, given the importance of the objective that the Crown not be encumbered with an unworkable burden and given that s 16(4) limits s 11(d) as little as is reasonably possible.****The term “wrong” as used in s 16(2) must mean more than simply “legally wrong”.** A person may well be aware that an act is contrary to law but, by reason of “natural imbecility” or disease of the mind, is at the same time incapable of knowing that the act is morally wrong in the circumstances according to the moral standards of society.Reasoning – **This interpretation of s 16(2) will not open the floodgates to amoral offenders or to offenders who relieve themselves of all moral considerations because:** 1. The incapacity to make moral judgments must be causally linked to a diseased of the mind.
2. “Moral wrong” is not to be judged by the personal standards of the offender but by his awareness that society regards the act as wrong.
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### Note: R v Swain

* **The Crown may in some circumstances introduce evidence of mental disorder against the wishes of the accused.**

The procedure for introducing evidence of mental disorder is set out in *Swain*. There are four possibilities:

1. **The accused may plead NCR at the outset of the trial.** The evidence of mental disorder will be heard during the trial and the accused prove on a BOP that he had a mental disorder at the time of the offence.
2. **The accused may choose to plead “not guilty” and may advance any defences or other arguments against conviction during the trial.** If those arguments are unsuccessful, and the Crown proves the guilt of the accused BARD, the accused may change his plea to NCR and a hearing on the matter will be held. This occurs **after a finding of guilt** is made, but **before a conviction is entered**. The accused has the same burden of proof as in option 1.
3. **The Crown may raise evidence of the accused’s mental disorder during the trial if the accused otherwise puts his mental state in issue**, for example by introducing evidence that he was seeing a psychiatrist at the time of the offence. The Crown has the burden of proving on a BOP that the accused had a mental disorder at the time of the offence.
4. **The Crown may raise evidence of mental disorder after the finding of guilt is made but before the conviction is entered**, as in option 2. The Crown has the burden of proving on a BOP that the accused had a mental disorder at the time of the offence.

## Disposition for those found NCRMD

**Where a court or Review Board makes a disposition for those found NCRMD, it shall**, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, **make one of the following dispositions that is the least onerous and least restrictive to the accused**:

1. Where a verdict of NCRMD has been rendered in resect of the accused and the accused is not a significant threat to the safety of the public, by order, direct that the accused be **discharged absolutely**;
2. By order, direct that the accused be **discharged subject to such conditions as the court or Review Board considers appropriate**; or
3. By order, direct that the accused be **detained in custody in a hospital**, subject to such conditions, as the court of Review Board considers appropriate.
* **If found to be NCRMD, accused does not have the burden of proof at the disposition stage to prove that he/she does not present a significant threat.**

## Automatism

* The situation in which an **accused person does not have mental control of their physical actions is referred to as a state of automatism**.
* How the criminal law treats the claim of automatism depends on the alleged source of the accused’s dissociative state.
	+ **Where the alleged automatism is the result of voluntary consumption of intoxicants** 🡪 the claim is analyzed according to the parameters of the defence of intoxication
	+ **Where the source of the alleged automatism is a mental disorder** 🡪 the claim is treated like any other mental disorder claim
	+ **Where the claim is that the automatism is neither the result of voluntary intoxication, nor the product of mental disorder** 🡪 the accused is arguing the defence of non-mental disorder automatism
		- If successful, this entitled the accused to a **full acquittal**

**Overlap of intoxication and automatism – “Toxic Psychosis”**

**However in Bouchard-Lebrun, the Court finds it is just purely Intoxication, and can’t negate MR in a violent episode – excludes mental conditions brought on by intoxication.**

**Overlap of automatism and mental disorder – “Mental Disorder automatism”**

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| R v Rabey 1977 ONCA \* Disease of the mind must be malfunction |
| Facts – Rabey was emotionally attached to Miss X. He found a letter in Miss X’s notebook that expressed her sexual interest in another student, and that called him and his friend “nothings”. The next day he took a rock from a geology laboratory, which he said he intended to study at home. He later saw Miss X by chance and asked her what she though of him and a mutual friend. Miss X replied “just a friend” to both. Rabey grabbed her around the arms and struck her head with the rock twice, calling her a bitch. Rabey also threatened another student. After being restrained by a professor, Rabey ran to get a nurse and told the nurse he thought he had killed someone. He later said he didn’t know why he started or why he stopped hitting Miss X.Who won? Crown If Rabey was in a dissociative state at the time he struck Miss X he suffered from “disease of the mind”. A new trial must be had.Issue – Is a “dissociative state” due to a “psychological blow” a “disease of the mind” within s 16?Ratio – * **The malfunctioning of the mind, although temporary, is a “disease of the mind”, unless it can be considered as a transient state produced by an external cause within the meaning of the authorities.** **The ordinary stresses and disappointments of life that are common lot of mankind do not constitute an external cause constituting an explanation for a malfunctioning of the mind which takes it out of the category of a “disease of the mind”.**
* Malfunctioning of the mind arising from some cause that is primarily internal to the accused, having its source in his psychological or emotional make-up or in some organic pathology 🡪 disease of the mind

Reasoning – The emotional stress suffered by Rabey as a result of his disappointment with respect to Miss X **cannot** be said to be an external factor of any real meaning. The dissociative state must be considered as having its source primarily in Rabey’s psychological or emotional make-up. |

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| R v Parks (1992)(SCC) \* Driving while asleep - killed MIL / injured FIL |
| Facts – Parks killed his mother-in-law and seriously injured his father-in-law while they were sleeping after Parks drove to their home. He then drove to the police station and confessed. He presented the defence of automatism, stating that he was sleepwalking at the time of the incidents. He had had excellent relations with his parents-in-law, but was having problems and was particularly stressed. He always slept very soundly and members of his family suffered from sleep problems.Who won? Parks The trial judge did not err in leaving the defence of automatism rather than that of insanity with the jury. **There are no compelling policy factors that preclude a finding that the accused’s condition was one of non-insane automatism**.Issue – Should the condition of sleepwalking be classified as non-insane automatism resulting in an acquittal or as a “disease of the mind” (insane automatism), giving rise to a verdict of not guilty by reason of insanity?Ratio – **Recurrence is but one of a number of factors to be considered in the policy phase of the disease of the mind inquiry. The absence of a danger of recurrence will not automatically exclude the possibility of a finding of insanity.** **“Continuing danger” theory** – any condition likely to present a recurring danger to the public should be treated as insanity **“Internal cause” theory** – a condition stemming from the psychological or emotional make-up of the accused, rather than some external factor, should lead to a finding of insanity (*Rabey*)The two theories share a common concern for recurrence, the latter holding that an internal weakness is more likely to lead to recurrent violence than automatism brought on by some intervening external cause.Reasoning – **Unlikely that the recognition of somnambulism as non-insane automatism will open the floodgates to a cascade of sleepwalking defence claims.** |

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| R v Stone (1999)(SCC) |
| Facts – Stone was charged with the murder of his wife after stabbing her 47 times. The stabbing occurred in his truck after his wife threatened him and berated him because he said they should divorce if she was not going to let him see his sons. **Stone remembered a “whoosh” sensation washing over him, and when his eye focused again he was holding a knife and his wife was dead**. He claimed insane automatism, non-insane automatism, lack of intent, and alternatively, provocation.Who won? Crown **The internal cause factor and the continuing danger factor, as well as the other policy factors set out in *Rabey* and *Parks* all support the trial judge’s finding that the condition Stone alleges to have suffered from is a disease of the mind in the legal sense.**Issue – Should the defence of non-insane automatism have been left to the jury?**Test – Determining whether automatism should be left with the trier of fact:**1. **INITIAL EVIDENTIARY BURDEN ON A BOP (HIGHER THAN AIR OF REALITY)- Assess whether there is evidence that a defence of automatism has been established**
* D must make an assertion of involuntariness and call expert psychiatric or psychological evidence confirming that assertion.
* However, this defence has not been satisfied simply because the defence has met these two requirements. The burden will only be met where the trial judge concludes that there is evidence upon which a properly instructed jury could find that the accused acted involuntarily on a BOP.
* **Relevant factors include:**
	+ Psychiatric or psychological evidence
	+ Nature and severity of the triggering stimulus 🡪 more trigger = mental disorder
	+ Likelihood of the trigger recurring (not behaviour to recur)
	+ Is the cause internal or external?
	+ Corroborating evidence of bystanders
	+ Corroborating medical history of automatistic-like dissociative states
	+ Whether there is evidence of accused having motive for the crime
	+ Whether the alleged trigger of the automatism is also the victim of the automatistic violence
* **If the trial judge concludes that a proper foundation has not been established, the presumption of voluntariness will be effective and neither automatism defence will be available to the trier of fact.**
1. **Determine whether the condition alleged by the accused is mental disorder or non-mental disorder**
* The evidence of medical witnesses with respect to the cause, nature and symptoms of the abnormal mental condition from which the accused is alleged to suffer, and how that condition is viewed and characterized from the medical point of view, is highly relevant, but not determinative, since **what is a disease of the mind is a legal question.**
* Trial judges start from the proposition that the condition the accused claims to have suffered from is a disease of the mind. They must then determine whether the evidence in the particular case takes the condition out of the disease of the mind category.
* A holistic approach must be available to trial judges dealing with the disease of the mind question.
* This approach must be informed by the internal cause theory, the continuing danger theory and the policy concerns raised in *Rabey* and *Parks*.
* If the trial judge concludes that the condition the accused claims to have suffered from is not a disease of the mind, only the defence of non-insane automatism will be left with the trier of fact. The question for the trier of fact will be whether the defence has proven that the accused acted involuntarily on a BOP. A positive answer will result in an absolute acquittal.
* If the trial judge concludes that the alleged condition is a disease of the mind, only mental disorder automatism will be left with the trier of fact. The case will proceed like any other s 16 case.
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| R v SH (2014) ONCA |
| Facts – SH 60 year old neighbour of two widows on the street, one much older one slightly younger. SH helped the widows out. SH sexually assaulted both widows one night, claimed no memory. Had been drinking, complainants did not think he was impaired. Found shirtless on 2nd victims basement floor.Argued “transient global amnesia” and several small strokes, had medical expert testify**Trial**: **non-mental disorder automatism – involuntary AR elements – acquitted on all counts****CA: New trial ordered to determine whether MD or non-MD**Who won? Crown – needs new trial to determine mental disorder automatism or non-mental disorder automatismIssue – Was automatism mental disorder or non-mental disorder?**Holding – Confirms definition of MD Rabey/Cooper/Stone, Factors to consider Stone, BOP on accused** |

## D. The Relationship Between Mental Disorder and Intoxication

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| R v Bouchard-Lebrun 2011 SCC |
| Facts – Bouchard-Lebrun assaulted two individuals (possibly based on his belief that one was wearing an “upside-down cross”) while in a psychotic condition caused by chemical drugs (ecstasy) taken a few hours earlier. He had never experienced a psychotic episode before, had no underlying disease of the mind, and was not addicted to a particular substance. Who won? Crown I**f everyone who committed a violent offence while suffering from toxic psychosis were found NCRMD regardless of the origin or cause of the psychosis, the scope of the defence provided for in s 16 would become much broader than Parliament intended.**Issue – Can a **toxic psychosis** that results from a state of self-induced intoxication caused by an accused’s use of chemical drugs constitute a “mental disorder” within the meaning of s 16? **NO**Holding – Bouchard-Lebrun was not suffering from a “mental disorder” at the time he committed the assault. Section 33.1 applies (intoxication not a defense in violent offence of general intent). Appeal dismissed.Ratio – ***Malfunctioning of the mind that results exclusively from self-induced intoxication cannot be considered a disease of the mind and must be considered under the intoxication defense**** **Where intoxication is the cause of automatism, we just deal with it as a defense of intoxication specifically (affirms Cooper which was before s 33.1).**
* A 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.
* **Section 33.1 applies to any mental condition that is a direct extension of a state of intoxication**. There is no threshold of intoxication beyond which s 33.1 does not apply to an accused, which means that toxic psychosis can be one of the states of intox covered.
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### Note: Fitness to Stand Trial

* In cases where the ability of the accused to understand the proceedings and to instruct counsel is in doubt, there may be a hearing on the accused’s fitness to stand trial, a term defined in s 2.
* Where the accused is found to be unfit, he must go before the review board for a disposition hearing similar to the procedure used after an NCRMD finding. The accused may be detained or released on conditions. If the accused later becomes fit, he may be tried at that time.

# Chapter 12 – Defences – Self-Defense

* Self-defence is generally available as a **defence to any charge that contains an element of assault or other violence against the person**, such as assault, manslaughter or murder.
* If raised successfully, self-defence entitles the accused to a **complete acquittal**.
* **Statutory defence:** The provisions in the Code are found in ss 34-35. They can apply to both self-defence and to defence of a third person or of property.
* Evidentiary burden on the accused to give the defence an **air of reality**, once that is proven the burden shifts back to the Crown to disprove BARD

**OLD SELF DEFENSE PROVISIONS:**

* **S 34(2)** – applied in Lavallee – causes death or grievous bodily harm is justified:
	+ **PROPORTIONALITY** - Caused under reasonable apprehension of death or grievous bodily harm
	+ **NECESSITY** - Belief on reasonable and probably grounds there is no other way to get out of it

**NEW SELF DEFENSE PROVISIONS March 2013:** Ss 34-35

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| R v Lavallee 1990 SCC \*\* Key case OLD PROVISIONS |
| Facts – Lavallee, a 22-year-old woman, lived with Rust. The relationship between them was volatile and Lavallee was frequently a victim of physical abuse at the hands of Rust. At a party at their residence, Lavallee and Rust had an argument and Rust gave Lavallee a gun and said “wait till everybody leaves, you’ll get it then” and “either you kill me or I’ll get you”. Lavallee shot Rust in the back of the head, killing him.**Trial**: Acquitted**CA**: overturned, sent back to retrial – excluded doctor’s evidenceWho won? Lavallee Acquittal restored 🡪 defense of self defense allowed.Issue – Can the defence of self-defence apply to a situation in which a woman who has been abused by her spouse reacts to that abuse with deadly force? (Does she meet the PROPRORTIONALITY and NECESSITY requirements of old version of S 34(2)? YESRatio –*When considering whether a belief is “reasonable” the court must look at the circumstances and perceptions of the accused and the history of the relationship between D and the attacker.* ***Test under old self-defence provisions.**** Self-defence has to be interpreted and applied in a way that makes sense in the context of the accused’s history of abuse at the hands of the deceased.
* Where evidence exists that an accused is in a battering relationship, expert testimony can assist the jury in determining whether the accused had a “reasonable” apprehension of death when she acted by explaining the heightened sensitivity of a battered woman to her partner’s acts.
* **Objective standard of reasonable man does not apply – should be what the accused reasonably perceived given her situation and her experience**

Reasoning – * **It may be possible for a battered spouse to accurately predict the onset of violence before the first blow is struck, even if an outside to the relationship cannot**.
* **Learned helplessness** and **traumatic bonding, fear of retaliation, lack of money or skills, children in home** – key features of battered women syndrome – why women stay
* Where evidence exists that an accused is in a battering relationship, expert testimony can assist the jury in determining whether the accused had a “reasonable” apprehension of death when she acted by explaining the heightened sensitivity of a battered woman to her partner’s acts.
* The common law has never required people retreat from their homes in order to claim self-defense.
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### Note: R v Petel

* **Facts** – The accused was charged with the second degree murder of R. R was involved in drug trafficking with the accused’s daughter’s boyfriend E. E was violent and allegedly beat his girlfriend and threatened the accused. The accused fired at E when she saw he was lunging at her after she fired at E.
* The Court applied *Lavallee* and held that, **under the self-defence provisions of s 34(2) an accused could make a reasonable mistake about whether she was actually being assaulted.** The jury should consider “whether the accused reasonably believed in all the circumstances that she was being unlawfully assaulted.”
* **The assault need not be imminent:** **Imminence is only one factor the jury** should consider in determining whether the accused had a reasonable apprehension of danger and a reasonable belief that she could not extricate herself from the threat without killing her attacker.

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| R v Malott \* Battered women |
| Facts – The accused was convicted of the second-degree murder of her former spouse and the attempted murder of his girlfriend. She appealed the murder charge.Who won? CrownRatio – *Expert evidence of the reasonableness of a battered woman’s belief is relevant to self-defence, provocation, duress, and other defences in which reasonableness is a component.** **The legal inquiry into the moral culpability of a woman who is claiming self-defence must focus on the reasonableness of her actions in the context of her personal experiences, and her experiences as a woman, not on her status as a battered woman.**
* Where the reasonableness of a battered woman’s belief is at issue, a judge and jury should be made to appreciate that a **battered woman’s experiences are both individualized**, based on her own history and relationships**, as well as shared with other women**, within the context of a society and a legal system which has historically undervalued women’s experiences.
* A judge and jury should be told that a battered woman’s experiences are generally outside the common understanding of the average judge or juror, and that they should seek to understand the evidence being presented to them in order to overcome myths and stereotypes. All of this should be presented in such a way as to focus on the reasonableness of the woman’s actions, without relying on old or new stereotypes about battered women.

Reasoning – **L’Heureux Dube J and McLachlin J (concurring):**1. **The significance of Lavallee reaches beyond its particular impact on the law of self-defense. Must not limit the application of battered womens syndrome to only specifc women in specific circumstances, or those diagnosed with a syndrome specifically.**
2. **Women’s experiences and perspectives may be different from the experiences and perspectives of men. A women’s perception of what is reasonable is influenced by her gender, as well as by her individual experiences, and both are relevant to the legal inquiry.**
* The perspectives of women, which have historically been ignored, must now equally inform the “objective” standard of the reasonable person in relation to self-defense.
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| R v Caswell (2013)(SKPC) \* Defense of Property |
| Facts – Caswell and Thomas had been in an on again, off again relationship. The couple got into a verbal argument at Caswell’s house. Thomas demanded that Caswell leave the house and when he refused, she threatened to break his TV, picking up a microwave tray to do so. A struggle ensued and Caswell struck Thomas on the shoulder. He later pulled the phone cord out of the wall. Thomas had destroyed property in Caswell’s home in the past. Who won? Caswell – reasonable belief his property would be damages, force was proportionateIssue – Is Caswell guilty of assault or **acquitted** because of self defense (of property)?Holding – Caswell is not guilty under s 35 of the new law. Ratio – The applicable overall rule is that Parliament was presumed to have intended that legislation affecting substantive (as opposed to procedural) rights would not be applied retroactively, although that presumption is rebuttable. ***Allowing old self-defence provisions to linger would promote uncertainty and delay remedial effects of legislation. New law applied***Section 35(1) A person is not guilty of an offence if1. they either believe on reasonable grounds that they are in peaceable possession of property…;
2. they believe on reasonable grounds that another person is about to damage or destroy property,
3. the act that constitutes the offence is committed for the purpose of preventing the other person
4. the act committed is reasonable in the circumstances.

Reasoning – **The new s 34 should be applied immediately because to do otherwise would leave the evils that the legislation was intended to cure.**1. Caswell was in peaceable possession of his personal property.
2. Caswell had reasonable ground to believe Thomas was about to smash his TV.
3. Caswell did what he did for the specific purpose of preventing Thomas from carrying out her intended purpose of destroying his personal property.
4. The blow Caswell directed at Thomas was reasonable in the circumstances.
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| R v Urquhart 2013 BCPC \* Applies both old and new provisions |
| **Facts** – At a meeting, Urquhart did not allow McBride to speak and McBride left. Before leaving, Urquhart told him to “go have another drink” and McBride responded “go fuck yourself”. Urquhart followed McBride into the parking lot and what followed thereafter is in significant dispute. McBride was left with injuries. McBride admits that he pushed Urquhart away just before Urquhart struck him.Who won? Crown Self-defence under the former s 34(1) and s 37 is not available to Urquhart and self-defence under the new s 34 is not available to Urquhart.Ratio – **Self-defence under the new s 34 no longer requires the proportionality of the force to be fixed (while it’s still a factor). Also, it is no longer a complete bar if the accused provoked the assault.***Application of both old and new self defence provisions. Considers proportionality of force.***Under the former s 34(1), in order for the Crown to defeat self-defence it must prove at least one of the following four facts BARD:**1. That the victim did not assault the accused
2. That the accused did provoke the assault *Urquhart provoked the assault.*
3. That the accused did intend to kill the victim or cause him grievous bodily harm
4. That the force used by the accused was more than necessary to enable the accused to defend himself *Urquhart was excessive in all the circumstances.*

**The new s 34 self-defence (in force March 11, 2013) provisions contain three essential elements:**1. A reasonable perception of force or a threat of force against the accused or another person: s 34(1)(a) *Urquhart may have believed on reasonable grounds that he was being assaulted.*
2. A defensive purpose for the accused’s act: s 34(1)(b) *The blows were not for a defence or protective purpose.*
3. An objective determination of the reasonableness of the accused’s act: s 34(1)(c) applying the factors under s 34(2) *The blows were not objectively reasonable.*
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| R v Levy 2016 NSCA \* Applies new provisions |
| Facts – Appellant 60 yo, lived with 90 yo mother in wheelchair, and 16 yo grandson Jordan. Daughter Nicole had bad relationship with Appellant. CL spouse Terry Green was also employee. Green got mad at Jordan not coming to work, went to appellant’s house, confronted Jordan while in bed. Green got in fight with appellant, chased him to bathroom, left and took Jordan to work. Appellant got gun, went to worksite, stopped and went home. Called his daughter and asked why Green had attacked him. Green went to Appellants house, and Appellant shot him and he died.Who won? Levy – appeal allowed, new trial on charge of 2nd degree murder orderedIssue – The real issue was whether the Crown had satisfied the jury beyond a reasonable doubt that any one of the elements of self-defence did not apply; if not, were they satisfied beyond a reasonable doubt that he had the requisite intent for murder.Ratio – **If there is an air of reality to self-defence, no offence is committed unless the Crown disproves at least one of the following: 1) that the accused believed on reasonable grounds that force or a threat of force was being used or made against them or another person; 2) the accused's acts were done for the purpose of defending or protecting themselves or another; 3) the act was reasonable in the circumstances.** For the latter element, the trier of fact is directed to take into account the non-exclusive list of nine factors found in s. 34(2).  |

# Chapter 13 – Defences – Necessity and Duress

* Moral Involuntariness
* The defences of necessity and duress excuse criminal conduct where the accused was acting under compulsion of threats from another person (duress) or in response to emergency circumstances (necessity), in order to prevent a greater evil from occurring

## A. Necessity

1. Common law defence recognized by the SCC in *Perka*
2. Evidentiary burden on the accused to give the defence an **air of reality**, once that is proven the burden shifts back to the Crown to disprove BARD
3. All offences
4. Full acquittal

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| R v Perka SCC \* Test for necessity |
| Facts – Appellants delivering cannabis shipment, vessel began to encounter problems while 180 miles from the Canadian coastline, sought refuge on the shoreline to make temporary repairs. Eventually the Captain, fearing the vessel was going to capsize, ordered the men to off-load the cargo. The appellants were charged with importing cannabis into Canada and with possession for the purpose of trafficking. They claimed they did not plan to import into Canada or leave their cargo in Canada. Expert witnesses testified that the decision to come ashore was expedient and prudent and essential.**Trial**: Acquitted for necessity**CA**: Acquittal reversedWho won? Appellants Holding – The trial judge did not bring the question of a reasonable alternative to the jury’s attention.Ratio – **Negligence or involvement in criminal or immoral activity does not disentitle the actor to the excuse of necessity.*** However, if the accused’s “fault” consists of actions whose clear consequences were in the situation that actually ensued, then he was not “really” confronted with an emergency that compelled him to commit the unlawful act he now seeks to have excused. In such situations the defence is unavailable.

**Test** – Three elements must be present for the defence of necessity (where the accused places before the Court sufficient evidence to raise the issues, the onus is on the Crown to meet it BARD)1. The requirement of **imminent peril** or danger
2. The accused must have had **no reasonable legal alternative** to the course of action he/she undertook
3. There must be **proportionality** between the harm inflicted and the harm avoided

Reasoning – Necessity is an “excuse”, which concedes the wrongfulness of the action but asserts that the circumstances under which it was done are such that it ought not to be attributed to the actor. It rests on a realistic assessment of human weakness, recognizing that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience. |

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| R v Latimer \* Necessity unsuccessful |
| Facts – Latimer took his daughter’s life by poisoning her with carbon monoxide and was charged with murder. Tracy suffered from cerebral palsy, and was in a great deal of pain. She could have been fed with a tube, an option that might have allowed for more effective pain medication to be administered, but the Latimers rejected the option. Tracy was scheduled to undergo further surgery, which would cause pain and require future surgery. **Trial**: no air of reality, so no instruction on necessity to jury**CA:** Who won? Crown – no lowering minimum penalties for 2nd degree murderIssue – Was the jury entitled to consider necessity? YES Is the minimum penalty of life with no parole until 10 years for 2nd degree murder cruel and unusual punishment in this case? NOHolding – There was **no air of reality to any of the elements of the defence**, and the trial judge was correct to conclude that the jury should not consider necessity.Ratio – **Modified Objective Test for elements 1 and 2 (can consider personal factors, age, experience, relationships, etc but still has to be a reasonable objective person standard)****#1 Imminent peril and #2 no reasonable legal alternative** * Modified objective standard (an objective evaluation, but one that takes into account the situation and characteristics of the particular accused person)
* Latimer did not have peril to himself, but perceived peril to his daughter. Her upcoming surgery was not immediate peril. She had an “obstinate and long standing state of affairs”.
* **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 alternative open.** There must be a reasonable basis for the accused’s beliefs and actions, but it would be proper to take into account circumstances that legitimately affect the accused person’s ability to evaluate his situation.

**#3 Proportionality** * **Objective standard** (since evaluating the gravity of the act is a matter of community standards infused with constitutional considerations)
* The two harms must, at a minimum, be of a comparable gravity. The harm avoided must be either comparable to, or clearly greater than, the harm inflicted.
* **It is difficult to imagine a circumstance in which the proportionality requirement could be met for a homicide**.

Reasoning –1. Tracy’s surgery did not pose an imminent threat to her life, nor did her medical condition. It was not reasonable for Latimer to form the belief that further surgery amounted to imminent peril.
2. Latimer had at least one reasonable legal alternative: he could have struggled on, by helping Tracy to live and by minimizing her pain as much as possible.
3. The “harm avoided” was, compared to death, completely disproportionate.
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| R v Ungar 2002 Ont CJ \* Necessity successful |
| Facts – Ungar, a member of Hatzoloh, picked up his son and then received a call that a woman had been hit by a motor vehicle and was not moving. He put his flashing light on his roof and went through several red lights, drove northbound in the southbound land, exceeded the speed limit in heavy traffic, crossed two lanes of traffic quickly, and drove onto the meridian. Constable Wright followed Ungar. Ungar was charged with operating a motor vehicle in a manner that was dangerous to the public contrary to s 249(1)(a).Who won? Ungar - entitled to the defence of necessity. Reasoning – The driving of Ungar was dangerous in the circumstances, but Constable Wright also drove dangerously. There was no reasonable legal alternative to Ungar’s driving.Note – This case begs the question: Is proportionality based on what actually happened or what could have happened? |

## B. Duress

* The defence of duress applies where accused commits a criminal act in response to a threat from 3rd party.
* The specific criminal conduct need not be directed by the threatener.
* Statutory and common law defense – is CL valid when there is a statutory provision?
* Based on moral involuntariness, force of involuntariness is an external threat.
* There is both a common law defence of duress and a statutory defence. Section 8 of the Code preserves common law defences only to the extent that they are not inconsistent with statutory provisions.
* Under **section 17**, a person must be under a threat of immediate death or bodily harm from a person who is present when the offence is committed. There is also a list of excluded offences. If s. 17 is successfully raised a full acquittal will be entered. None of these limitations were present at common law.
1. Evidentiary burden on the accused to give the defence an **air of reality**, once that is proven the burden shifts back to the Crown to disprove BARD
2. Section 17 excludes a number of offences from the defence entirely
3. Full acquittal

**The statutory defence/common law defence of duress post-*Ruzic***

1. There must be a threat of death or bodily harm directed against the accused or a third party
* There must be an explicit or implicit, present or future threat of death or bodily harm, directed at the accused or a third person
1. The accused must (reasonably) believe that the threat will be carried out
* Analyzed on a **modified objective basis**
1. The offence must not be on the list of excluded offences (statutory only)
2. The accused cannot be a party to a conspiracy or criminal association such that the person is subject to compulsion (statutory only)
3. No safe avenue of escape
* The defence does not apply to persons who could have legally and safely extricated themselves from the situation of duress.
* Measured on the **modified objective standard** of the reasonable person similarly situated
1. A close temporal connection between the threat and the harm threatened
* The close connection between the threat and its execution must be such that the accused loses the ability to act voluntarily.
* Once the immediacy and presence requirements were struck from s 17, these requirements became critical
* The accused’s belief that the threat would be carried out must evaluated on a **modified objective standard**
1. Proportionality between the threat and the criminal act to be executed
* The harm caused must not be greater than the harm avoided
* Measured on the **modified objective standard**

**Changes to S 17 post-Ruzic**

* **Requires that the person making the threat be present when the criminal act is committed**
	+ *Ruzic* – the requirement of presence must be struck down as unconstitutional
* **Requires that the threat be of immediate, rather than future, death or bodily harm**
	+ *Ruzic* – the requirement of immediacy must be struck down as unconstitutional
* **Interpreted as requiring that the threats be to the accused and not to some third person, like the spouse or child of the accused**
	+ *Ruzic* – Section 17 may include threats against third parties
* **Excludes a number of offences from the defence entirely.**
	+ What is the status of excluded offences after Ruzic?
* *Ruzic* – need for the application of an objective-subjective assessment of the save avenue of escape test

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| Hibbert v The Queen 1995 SCC \* Duress – Does not negate MR, gives excuse for AR |
| Facts – Hibbert was charged with attempted murder and convicted of the lesser included offence of aggravated assault after taking Bailey to the apartment of Cohen and acting as a lure (Bailey shot Cohen). Hibbert said he did so because Bailey threatened him and he feared Bailey would kill him if he did not cooperate. He testified that he had no opportunity to run away or to warn Cohen.Who won? HibbertRatio – **Duress is not based on the idea that coercion negates mens rea. It operates by justifying or excusing what would otherwise be criminal conduct**.Duress and mens rea:* The fact that a person commits a criminal act does so as a result of threats of death or bodily harm can in some instances be relevant to the question of whether he/she possessed the mens rea necessary to commit the offence.
* Depends on the structure of the offence in question (whether or not the mental state specified is such that the presence of coercion can have a bearing on the existence of mens rea).
	+ *The mental states specified ss 21(1)(b) and 21(2) (“parties to offences”) are not susceptible to being “negated” by duress.*
* Duress includes a requirement that **it can only be invoked if there is “no legal way out” of the situation of duress the accused faces.** The rule that duress is unavailable if a “safe avenue of escape” is open to the accused is specific instance of this general requirement.
	+ **Modified objective standard:** The question of whether or not a safe avenue of escape existed is to be determined according to an **objective standard**. When considering the perceptions of a “reasonable person”, however, the personal circumstances of the accused should be taken into account.
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| R v Ruzic 2001 SCC \* Duress – S 17 revised unconstitutional |
| Facts – Ruzic, a 21-year-old Yugoslav citizen, landed in Toronto carrying heroin strapped to her body and a false Austrian passport. She admitted to having committed possession and use of a false passport and unlawful importation of narcotics, but claimed that she was acting under duress. Two months earlier, a man had approached her and continued to threaten her and physically assault her and sexually harass her. He strapped heroin to her body, gave her a false passport, a bus ticket, and money. He warned to her that, if she failed to comply, he would harm her mother. Ruzic did not seek police protection because she believed the police in Belgrade were corrupt and would not help her.Who won? Ruzic Section 17 is unconstitutional in part, and the acquittal should be upheldIssue – Is s 17 of the Code (requiring threat to be immediate, and that the threat occurs when the crime occurs / person making threat present) constitutionally valid under s 7 of the Charter?Ratio – * Section 17 breaches s 7 of the Charter because it allows individuals who acted involuntarily to be declared criminally liable.
* The immediacy and presence requirements exclude threats of future harm to the accused or to third parties.
* The immediacy and presence requirements cannot be saved by s 1 (they would not meet the proportionality branch of the s 1 analysis) – must be struck down as unconstitutional.

Reasoning – **It is a principle of fundamental justice that only voluntary conduct – behavior that is the product of a free will and controlled body, unhindered by external constraints – should attract the penalty and stigma of criminal liability. Depriving a person of liberty and branding her with the stigma of criminal liability would infringe the principles of fundamental justice if the accused did not have any realistic choice.**Note – Presumably there are constitutional arguments to be made about the list of excluded offences in s 17 as well. |

## C. Relating Duress, Necessity and Self-Defence

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| R v Ryan 2013 SCC \* Duress – hitman to kill husband |
| **Facts** – Ryan was a victim of a violent, abusive and controlling husband. He told her that he would kill her and her daughter if she ever tried to leave him. She repeatedly contacted the police for help, but they did not help her. Over the course of seven months, she spoke to at least three men whom she hoped would kill her husband. She was contracted by an undercover officer, posing as a “hit man”, and was arrested and charged with **counseling the commission of an offence not committed contrary to s 464(a).****Trial: Duress succeeded, acquitted****CA: Crown argues duress does not apply, acquittal upheld** The court saw no principled basis to justify a distinction between the aggressor as opposed to a third party being the targeted victim. MacDonald C.J.N.S. also highlighted the need for the defence to be sufficiently flexible, when appropriate, to accommodate the dark reality of spousal abuse.Who won? Ryan – stay of proceedings enteredIssue – Is duress available as a defence where the threats made against the accused were not made for the purpose of compelling the commission of an offence? NOHolding – **Duress is not available to Ryan, but the uncertainty surrounding the law of duress coupled with the Crown’s change of position between trial and appeal created unfairness to Ryan’s defence in this case.**Ratio – Duress cannot be extended so as to apply when the accused meets force with force, or the threat of force with force in situations where self-defence is unavailable**. Duress is an applicable defence only in situations where the accused has been compelled to commit a specific offence under threats of death or bodily harm.****CA**: Defence of duress is to absolve an accused of criminal liability when his or her conduct is morally involuntary – broadened duress . In short, the Court of Appeal thought it appropriate to develop the common law of duress in order to fill a gap in the law of self-defence.**Reasoning** – There are significant differences among the defences of self-defence, necessity and duress. * Self-defence is statutory defense, based on the principle that a person is justified in the use of force, in defined circumstances to meet force (or threats of force) with force; in duress and necessity, the victim is generally an innocent third party 🡪 in this case she hasn’t used any force, so doesn’t apply, and there is no imminent threat that she is defending herself from.
* **Self-defence is an attempt to stop the victim’s threats or assaults – motive irrelevant; duress is succumbing to the threats by committing an offence – purpose of the threat is to compel to commit an offence**
* Self-defence is completely codified; duress is partly codified.
* **The rationale underlying duress of moral involuntariness (Ruzic); self-defence is a justification for an action taken willingly.**

**You cannot twist necessity to try and make it fit duress.** |

After Ryan, her former husband had moved and remarried and had a new child.

Released video on YouTube, denied allegations, sat outside of court room, waited to be called

# Chapter 14 – Participatory Limits: Parties and Attempts

* The criminal law permits individuals to be prosecuted in some situations where they did not personally commit the full offence
	+ **Inchoate offence** – something other than the completed offence
	+ Balance of attempt vs committing offence difficult – if the bar is too high then police cannot stop attempts in time, and if its too low then people are considered guilty of an offence they haven’t yet committed – we need to preserve their ability to back out and not actually commit it.
* Individuals can be prosecuted in some situations where they did not personally commit the full offence (i.e. all the elements of the AR and MR): attempts and ‘aiding and abetting’ the commission of an offence (aka party to offence).
* An attempt may be charged separately or be found as an included offence. Attempts are always included offences when a full offence is charged.
* Penalties are often reduced for attempts (s. 463)
* The AR and MR of an attempt are set out in **section 24** of the code:
	+ 1) Intent to commit an offence
	+ 2) Act or omission for the purpose of carrying out that intent (beyond mere preparation)

\*Satisfied whether or not it was possible under the circumstances to commit the offence.

* Attempts are essentially crimes of intention. The focus is on whether the MR is present.

## A. Attempts

* Individuals may be convicted of attempting to commit an offence where the offence was not completed
* **MENS REA for attempts is HIGH – full subjective intent to commit the crime you are accused of attempting to commit (Ancio) Recklessness will not suffice Ancio**
* **Summary: Majority in Dynar – s 24(1) does not draw a distinction between factually and legally impossible crimes – if you intend to launder money or steal you committed an attempt regardless of whether or not it was impossible.**
* Attempts are included within included offences

**Section 463** – general sentencing rules for attempts

* Punishment is typically less than punishment for the offence
* If an indictable offences’ maximum penalty is life imprisonment, the maximum penalty for the attempt is 14 years
* If an indictable offences’ maximum penalty is 14 years or less, the maximum penalty for the attempt is ½ of the maximum penalty
* Summary conviction – maximum penalty doesn’t change, but the expectation is that the actual penalty will be lower

**Section 24** – general provision that defines attempts

* + 1. Every one who, having an intent commit an offence (*mens rea*), does or omits to do anything for the purposes of carrying out the intention (*actus reus*) is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.
* **Intent to commit the offence, whether or not it was possible**
	+ 1. The question whether an act or omission by a person who has an interest 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.
* **Some act more than merely preparatory taken as attempt**
	+ *Actus reus – some act beyond mere preparation*
	+ *Mens rea – intention to commit the offence*

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| R v Ancio 1984 SCC \* MR for attempt |
| Facts – Ancio’s wife left him and was living with Kurely. Ancio broke into a friend’s home and took three shotguns. He sawed off the barrel of one, loaded it, and taking some extra ammunition with him went to Kurley’s apartment and gained entry by breaking the glass door. Kurely came from his bedroom carrying a chair with a jacket hanging on it. The gun went off and the blast put a hole in the jacket. A struggle followed. Ancio was charged with attempted murder (constructed)Who won? Ancio – did not have intent to commit murderIssue – What is the intent required for an attempt to commit murder? SPECIFIC INTENT TO KILL. Ratio – **The mens rea for an attempted murder cannot be less than the specific intent to kill. Recklessness is not sufficient.** * It is not illogical to insist upon a higher degree of mens rea for attempted murder, while accepting a lower degree amounting to recklessness for murder.
* Mens rea for murder includes recklessness but not for attempted murder.

Note – The mens rea of attempts in general is probably full intention to commit the completed offence.  |

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| R v Sorrell and Bondett 1978 ONCA\* intent – beyond mere preparation |
| Facts – Sorrell and Bondett, wearing balaclavas and sunglasses, came to the entrance of Aunt Lucy’s Fried Chicken at 10:50 pm. One of them rapped on the door and the manager said they were closed. One of them had a gun in his hand. Two officers saw them and saw one throw an article of material towards a snow bank. The men were arrested by the police, with a loaded revolver and shells.**Trial**: acquitted for attempt to rob, unclear on reasonsWho won? Sorrell and BondettIssue – Did the trial judge err in acquitting the men of attempted robbery?Holding – Because of the doubt the trial judge entertained that the RESPs had the necessary intent to commit robbery, his error in law in holding that the RESPs’ acts did not go beyond mere preparation could not have affected the verdict of acquittal.Ratio – **Evidence of acts constituting the AR of an alleged attempt do not prove the existence of intent. Lack of extrinsic evidence speaking to intent may be fatal to the Crown’s case.****In order to establish the commission of the offence of attempted robbery, it is necessary for the Crown to prove that the accused: s 24(2)**1. **Intended to do that which would in law amount to the robbery specified in the indictment (mens rea), and Question of fact**
2. **Took steps in carrying out that intent which amounted to more than mere preparation (actus reus) Question of law**

Reasoning – If the trial judge had found that the RESPs intended to rob the store, the acts done by them clearly had advanced beyond mere preparation, and were sufficiently proximate to constitute an attempt; there was no evidence of the intent to rob other than that furnished by the acts relied on as constituting the actus reus. |

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| United States of America v Dynar 1997 SCC \* Factual or legal impossibility still crime |
| Facts – Dynar, a Canadian citizen, entered into negotiations with a FBI informant, in which he offered to launder drug money for a commission. The FBI aborted the sting operation and no money was ever transferred to Dynar. Dynar was indicted in the US, and the Government of the US requested his extradition. The conversion of monies that are believed to be the proceeds of crime but are not in fact the proceeds of crime was, at the relevant time, not an offence in Canada.Who won? United States of AmericaIssue – May an accused who attempts to do the “impossible” be guilty of attempt? YES – We are punishing the belief that you are doing something, where possible or not. As long as you have that intention it doesn’t matter whether or not you complete it.**Does 24(1) apply to FACTUAL impossibility or LEGAL impossibility? NO DIFFERENCE – it says “whether or not it was possible under the circumstances to commit the offence” – so as long as you have intent to carry out an actual crime, it doesn’t matter what made it impossible, it is still an attempt**Holding – The steps that Dynar took towards the realization of his plan to launder money would have amounted to a criminal attempt under Canadian law if the conduct in question had taken place entirely within Canada.Ratio – *Neither factual nor legal impossibility will bar a finding of criminal attempt. All that is required is intent + act beyond mere preparation.** The conventional distinction between factual and legal impossibility is not tenable.
* The only relevant distinction for the purposes of s 24(1) is between **imaginary** crimes and attempts to do the **factually impossible** (one whose completion is thwarted by mere happenstance).
* The law recognizes no middle category called “legal impossibility” (an attempt which, even if it were completed, still would not be a crime).

**Knowledge has two components: truth and belief*** **Truth** – objective; a state of affairs in the external world that does not vary with the intention of the accused (not part of the mens rea; can be one of the attendant circumstances that is required if the actus reus is to be completed) (e.g. the actual vitality of the victim at that moment)
* **Belief** – subjective; mens rea (e.g. belief that the victim is alive just before the deadly act occurs)

Reasoning – The absence of an attendant circumstance is irrelevant from the point of view of the law of attempts. **It will always be the case the actus reus of the contemplated offence will be deficient, and sometimes this will be because an attendant circumstance is lacking**.Major J (dissenting) – It should not be a criminal attempts to do acts that, if contemplated, would not amount to an offence in Canada. |

**Examples**:

* What if someone stole something that turned out to be a free sample?
	+ Majority in *Dynar* says that should be an attempt
* What if someone attempts to do something that he believes is a criminal offence, but in fact is not?
	+ Both majority and dissent agree that that’s not an offence (it’s an imaginary offence)

## B. Aiding and Abetting

* An individual may be convicted of an offence for aiding or abetting the principal offender
* We often refer to such individuals das “parties” to the offence, although s 21 states that the principal offender is a “party” as well
* **Aiding actus reus** – stands guard, drives getaway car, provides weapon.
* **Doesn’t matter if it ACTUALLY aided the criminal** – Crown doesn’t have to prove that, just have to have done something to assist with the MR of the crime.
* **Aiding Mens rea** - You must know what the principal is going to do – you do not have to know that it is a crime or HOW they are going to do it. You have do the act or omission to aid or abet for the purpose of helping the principal
* **Abettting actus reus** – encouraging the perpetrator to commit the offence
* **Has to be before or during the offence** – after the fact doesn’t matter (that is being an accessory after the fact)
* The maximum penalty is reduced for someone that’s just assisting the principal
	+ Exception – murder (penalty is mandatory life sentence)

*Aiding and Abetting*

* “Parties” to the offence—e.g. lookouts or getaway car drivers—can be convicted of the same offence as the principal offender.
* **Section 21** says that all parties to an offence are equally culpable. “Parties” to an offence include: a) person who actually commits the offence b) does or omits to do anything for the purpose of aiding any person to commit it c) abets any person in committing it.
	+ “Aid” means to assist or help (*Briscoe* )
	+ “Abet” means to encourage, instigate, promote or procur (Briscoe)
* **Section 21** – the principal offender and the aider/abettor are parties and are equally culpable
* **21 intoxication is a defense**! As aiding/abetting is specific intent

*Elements of the offence S 21 (2)*

1. The accused and principal have to form a **common intention** to commit an offence and assist each other
2. In the process of committing the offence, the principal commits a further offence
3. Party **ought to have known** that further offence was a probably consequence of the underlying offence.

**Willful blindness is sufficient**

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| R v Briscoe (2010) SCC \*\* AR AIDING ABETTING |
| Facts – D transported girl to golf course where she was killed by another party (Leboucan). Claimed not to know what was happening.**AR** of Aider/Abettor is doing/omitting to do something that aids or abets principal offender. **MR**: s 21 - they must intend to assist in the commission of the offence and they must know that the perpetrator intends to commit the crime. **Wilful blindness satisfies the knowledge requirement**. With murder, the Crown must prove that the **aider knew** the murder was planned and deliberate (intentional), but the **aider does not need the intention to kill**. **The AR and MR must overlap.** If you aid someone without knowledge that they intend to commit a crime then you are not guilty. The aider does not need to know precisely how a crime will be committed, however, in order to have the requisite MR.Who won? Briscoe – New Trial orderedRatio – **Aiding/abetting requires knowledge that the perpetrator intends to commit the crime and intent to assist the perpetrator in the carrying out of that crime. AR is satisfied by act or omission that aids or abets***.* |

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| R v Fraser (1984) BCCA \*\* MR AIDING ABETTING |
| **Facts** – D charged with assault with intent to steal, drunk at the time of offence. **Issue** – Is intox defence available for aider/abettor when crime you are aiding is general intent? **YES****S 21 (1)** Aiding and abetting – done with the *intention* of helping the principal. “For the purpose of” = specific intent crimes!**Aiding and abetting is always a specific intent crime – regardless of the intent of crime you are assisting. How does this relate to 33.1, which bans the application of extreme intoxication to crimes of assault or bodily harm? Can be available if AIDING violent offence.**Ratio – 21(1) **Aiding and abetting are “specific intent” offences for which the defence of intoxication is available. Defence of intoxication only available for “abetting” if accused is so intoxicated as to be incapable of understanding the actions and purpose of principal.** |

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| R v Dunlop and Sylvester (1979) SCC \*\* AR AIDING ABETTING |
| Facts – D part of gang that raped girl. Ds testified they left to get beer and returned to see a woman having sex with a man they could not identify.  JB: Is there a way to consider the presence of Ds as aiding and abetting? They are part of an audience, they brought beer, they could be keeping watch, etc. Perhaps the court is concerned that a finding of guilt in a case like this could result of a finding of guilt in other scenarios (e.g. riots) in which we do not want non-participating bystanders to be guilty.Who won? Defendant - AcquittedIssue – Were Ds party to offence? NO Holding – Mere presence at the scene of a crime does not make one guilty of aiding/abetting. Encouragement of the offender, participation, or an act or omission that facilitates the offence is required. Ratio **– Mere presence at the scene of a crime does not give rise to culpability.** Reasoning – Encouragement of the offender or an act or omission that facilitates the offence is required. Failing to prevent or stop a crime is not sufficient. |

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| R v JSR (2008) ONCA |
| Facts – Gunfight in downtown Toronto, a bullet fired by someone aimed at JSR killed a 15 year old bystander. JSR charged with murder - innocent bystander killed.Who won? JSR - **convicted 229(c) unlawful object murder – frenzied gunfight, knew likely to cause death, in fact he did cause death… isn’t that more 229B not C? Has MR and AR for 229c, life in prison. Parole ineligible 7 years.** Issue – Could JSR be convicted as a principal or a party?Holding **–** JSR cannot be said to have aided/abetted the other shooter in killing JSR. However, JSR could potentially be convicted under 229(c) for unlawful object murder. Ratio – **Individuals who act for an unlawful object with subjective foresight of death can be found guilty under 229(c) even if they do not intend to harm the victim. Liability under 21(b) and (c) must attach to a specific crime committed by someone other than aider/abettor***.* Reasoning – **S 229 (B) – if you mean to kill X and you kill Y instead, you are still guilty of murder**Northbound shooter has the MR of killing JSR, not the MR for killing bystander**To prove aided in crime 21(1)(b):*** Did something to assist northbound shooter in committing the offence.
* MR had knowledge that he did something to assist in the crime.
* SO he would have had to aid in the killing of himself, and do something that assists in killing himself – so **AIDING DOESN’T WORK**

**To prove abetting 21(2):*** Common intention would have had to be to kill JSR.
* They weren’t acting together, **so abetting doesn’t work**

**Convicted under 229(c):*** For an unlawful object does a dangerous act and know that death is likely to result.
* Unlawful object: engage in shootout
* Should have known that death is likely to result (subjective standard only, no objective standard as they took out “ought to have known” in Martineau)
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| R v Thatcher (1987) SCC |
| Facts – Crown argued that D had killed his wife or, alternatively, had caused someone else to do so. Judge did not instruct jury that it had to be unanimous as to one or the other alternatives.Issue – Can a conviction stand even if members of the jury are not unanimous as to the theory of the crime?Ratio –**The court is indifferent as to whether a defendant was a principal or aider/abettor, in terms of guilt. If a jury is convinced beyond a reasonable doubt that D was either, then this is sufficient to found a conviction.**Reasoning – Strong evidence in relation to the murder weapon and D’s desire to kill his ex-wife; some evidence that suggests D may have done it himself. 21(1) makes no distinction between aider/abettor and principal. **A person is not guilty merely because he is present at the scene of a crime and does nothing to prevent it:  Smith & Hogan, Criminal Law (4th ed., 1978), p. 117**. If there is no evidence of encouragement by him, a man's presence at the scene of the crime will not suffice to render him liable as aider and abettor. A person who, aware of a rape taking place in his presence, looks on and does nothing is not, as a matter of law, an accomplice. The classic case is the hardened urbanite who stands around in a subway station when an individual is murdered. |

### Note: R v Logan (1990) SCC

* **Where a minimum level of MR is required for the commission of a substantive offence, the same level of MR is required for aiding/abetting that offence**
* **Attempted murder requires, at a minimum, subjective foresight of death. Aiding/abetting this offence requires subjective MR**, 21(2) “ought to have know” unconstitutional as it applies to murder.

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| R v Gauthier (2013) SCC |
| Facts – D charged as party to murder-suicide pact that resulted in death of D’s husband and children. D says she abandoned her intent to kill the children, or alternatively that she acted involuntarily.  JB: Does the fourth element apply to offences other than A/A? Policy reasons for making the defence available include not punishing morally innocent and giving every avenue of withdraw. Who won?Issue – Requirements for the defence of abandonment?Holding – *Three elements of the defence of abandonment. Fourth element if abandonment is raised as a defence to a charge under s. 21.* Ratio – Any defence with an air of reality on the evidence must be put to the jury. Theoretically incompatible defences can both be put to the jury if they meet the air of reality test. Three elements of the defence of abandonment: 1) intention to abandon or withdraw from unlawful purpose 2) timely communication of abandonment to those who wish to continue 3) notice communicated must be unequivocal. Where a person is a party to an offence under 21(1) or forms a common intention under 21(2), a fourth element of the test must be met: 4) the accused took, in a manner proportional to his participation in the commission of the planned offence, reasonable steps to neutralize or cancel out the effects of their participation or to prevent the offence. Reasoning – No air of reality. D did not do enough to neutralize the effects of her participation (e.g hide medication, called police). |

### Note: R v Vu (2012) SCC

* Kidnapping is a continuing offence that includes both initial taking and ensuing confinement.
* Individuals not involved in initial kidnapping, but who become involved later, are still guilty as parties under 21(1).

# Chapter 15 – Sentencing Principles and Parameters

* 1st offence refers to THIS offence
* CSO Not available if there is a max imprisonment of 14years or life
* What PURPOSE of sentencing should predominate in this case?
* **Crown** – specific and general deterrence, denouncing the crime, isolation from society
* **Defense** - rehabilitation

## A. Principles of Sentencing

* The judge is guided by the **Purpose and Principles of Sentencing** in **718** and in the case law:
	1. **denounce** unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
	2. **deter** the offender and other persons from committing offences;
	3. **separate** offenders from society, where necessary;
	4. assist in **rehabilitating** offenders;
	5. provide **reparations** for harm done to victims or to the community; and
	6. promote a sense of **responsibility** in offenders, and acknowledgment of the harm done to victims or to the community.

**The Fundamental Principle of Sentencing** is explained in **718.1**: **A sentence must be proportionate to the gravity of the offence and degree of responsibility of the offender.**

**Aggravating and Mitigating Factors**

**718.2** A sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing

**AGGRAVATING**

* motivated by bias, prejudice or hate
* abused their spouse or common-law partner,
* abused a person under the age of 18 years,
* abused a position of trust or authority in relation to the victim,
* offence had a **significant impact on the victim**, considering their age and other personal circumstances, including their health and financial situation,
* offence was committed **for the benefit of, at the direction of or in association with a criminal organization,**
* offence was a **terrorism offence**, or
* offence was committed while the offender was subject to a **conditional sentence order made under section 742.1 or released on parole**, statutory release or unescorted temporary absence under the [Corrections and Conditional Release Act](http://laws-lois.justice.gc.ca/eng/acts/C-44.6)

**Maximum Sentences:**

* Are either: 1 2 5 10 14 or LIFE. If you are sentenced for multiple offences it could be more than 14 years, but not life.
* The Code will set out a maximum sentence for the offence in question (this is the “liable to” part) and will sometimes set out a minimum penalty as well.

**Sentencing Hearing:**

* Both the Crown and the accused can introduce evidence at the sentencing hearing.

**Time served:**

* Prior to the *Truth in Sentencing Act*, a trail judge had broad discretion to give credit (often 2-to-1) for day spent in custody pre-trial.

**Fundamental Tension in Sentencing - Individualization vs. Consistency/certainty**

* Individualization – leads to judicial discretion and more disparity in sentences imposed;
* Consistency/certainty – – leads to more legislative and appellate constraints on discretion ie mandatory minimums

### When considering a sentence:

### Mandatory minimum or maximum? CHECK s 2 for DEFINITIONS

### Sentences can be combined (e.g. imprisonment and probation or fine and suspended sentence), but no more than two kinds can be combined.

### 718.1 Proportionality: gravity of offence and degree of responsibility of offender – does it have to be consecutive or concurrent?

### 718.2 Statutory aggravating or mitigating factors?

### 1st offence of this kind?

### Criminal Record?

### TOTALITY – Consider the added up and reduce by pre-trial custody time served 1.5 credit for each day? Or just 1?

### Aggravating factors: Are there any orders currently in effect? Ancillary orders – weapons prohibition? Probation at time of offence?

### Mitigating Factors: Pleading guilty (taking responsibility) 🡪 If you plead not guilty, you can’t be forced to feel remorse 🡪 If you plead guilty, the absence of remorse is aggravating

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| R v Nasogaluak (2010) SCC |
| Facts –**Sentences must be proportionate to the gravity of the offence and the moral blameworthiness of the offender. No one sentencing objective trumps others; judges have broad discretion that is fettered somewhat by case law.**  |

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| R v Sweeney (1992) BCCA |
| Facts – D, 20 year-old male, fled police while drunk, crashed into motorcycle and killed driver. D comes from dysfunctional home and has learning disabilities; evidence put forth that he regrets his mistake and is working to change circumstances.Issue – Was trial judge’s 4.5 yr sentence appropriate? Ratio – **Moral culpability of drunk driver is the same, whether a death ensues or not. Wood J. takes issue with the idea that greater sentences will necessarily result in greater deterrence.**Reasoning –* Mitigating factor: young, life ahead of him, still time to rehabilitate
* **Purpose of sentencing is the protection of society as well as the discouragement of re-offending and the deterrence of other offenders.**
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| R v Smith (2013) BCCA |
| Facts – D, 37 yo, non-status Indian, led a tragic life, plagued by abuse, addiction, and mental health problems. Drove her vehicle into another car while drunk and killed the driver. Impaired driving causing death s 255(3) 🡪 minimum $1000 fine, max life.**Trial**: Range generally 2-5 years. BUT felt not appropriate on these facts. Judge wanted to impose CSO (option removed in 2007), but sentenced to one day in prison, 3 years probation. Prevailing goal is rehabilitation 🡪 and she had been doing work on that already, and deterrence which is not an issue when she was too impaired to think well, no more moral blameworthiness than just that of the blameworthiness of impaired driving period.Who won? Crown. Sentence increased to 2 years less one day (for time served). Principle of sentencing most important is deterrence which trial judge erred by insufficiently considering. Moral culpability insufficiently weighted by trial judge. Range identified as 18 mos – 8 yearsIssue – Sentence?Ratio – **Trial judge cannot hand down a sentence that is unreasonable in the circumstances. Trial judge tried to craft a sentence that was equal to a CSO, which goes against legislative intent. Parliament purposely eliminated conditional sentence, the intent behind this must be respected.**Para 71 By eliminating conditional sentences for the offence in this case, Parliament did not open the door to reducing sentences below the usual range to avoid its clear intention that offenders should be incarceratedReasoning –* Gladue report 718(e) MAY have impacted sentence if it had been provided.
* First offence
* Policy consideration: Should the court grant time served for time in rehab facility?
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## B. Maximum Sentences

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| R v M(L) 2008 SCC |
| Facts – D convicted of sexual assault of his daughter and making and distributing child pornography. **Trial:** Judge imposed maximum sentence for sex assault (10 years) and consecutive sentences for pornography charges (5 years) Total 15 years and Long Term Offender designation.**CA**: Sentence not similar enough to similar cases – this one is too high at the max. They could imagine a worse scenario that would need a higher punishment.Who won? **Crown** D’s actions were highly reprehensible. The sentence was proportionate and reasonable.Issue – Did CA err in reducing sentence? **YES Trial sentence restored on basis of PROPORTIONALITY of crime to punishment**Ratio –* **Maximum sentences are not only for the worst crimes committed by the worst offender 🡪 max sentences can be imposed when PROPORTIONATE 🡪 the blameworthiness and actions of the accused warrant it.**
* **All relevant sentencing factors must be considered, and if they warrant imposing the max sentence the judge must impose it.**
* **Sentenced for the same types of offences will not always be identical.**
* **Appellate courts must show deference to sentencing judges unless there is:**
	+ an error in principle,
	+ failure to consider a relevant factor
	+ or an overemphasis of the appropriate factors
	+ or if **sentence is manifestly unfit**
	+ then they can intervene to reduce a sentence (usually) or increase (rare).

Reasoning **– So long as the sentence is reasonably and not demonstrably unfit, appellate courts must not interfere. Human nature is such that people will always be able to think of a worse offence.****Aggravating factors:** * 718.2 mandatory aggravating factors: age < 18, breach of trust (parent)
* long history of sexual assaults
* very young child unquestionably subjected to psychological violence
* parental role
* repeated nature of offence, quantity of materials seized
* his central role in the creation and dissemination online

**Mitigating factor:*** acknowledgement of his sexual deviance
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# Chapter 16 – Secondary Principles of Sentencing (s 718.2)

## Aboriginal Peoples and the Principles of Sentencing (s 718.2(e))

**718.2** Provides a non-exhaustive list of factors that a sentencing judge may consider when handing down a sentence.

**718.2(e):** “All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.”

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| R v Gladue  |
| 718.2(e) applies to all and emphasizes that imprisonment should be the last resort. It is not an auto-discount for aboriginals, the purpose is to allow circumstances and factors unique to aboriginals to be considered. **Facts**: D (Cree woman) charged with stabbing and killing her boyfriend. When sentencing for manslaughter, trial judge didn’t take aboriginal background into acct.**Issue**: How should 718.2(e) be interpreted?**Analaysis**: Purpose of section is to respond to overincarceration, particularly that of aboriginals. Traditional sentencing goals of deterrence, separation and denunciation are not necessarily part of Aboriginal perspective. 718.2(e) is not an auto-discount for aboriginals: the point is to allow unique circumstances to be considered, including systemic or background factors that contributed to their circumstance and aboriginal sentencing practices.**Decision**: Three year sentence reasonable. JB: **explanations for over-incarceration:** higher rates of poverty, addiction, younger population, historical disadvantage, stereotyping and systematic disadvantage, racial profiling, less likely to secure bail. After ***Gladue***, statistics on aboriginal incarceration became worse. |

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| R v Ipeelee; R v Ladue |
| Gladue principles apply to serious offenders equally to less serious offenders. Offenders are not required to establish a causal link between background factors and the commission of the offence. **Facts**: D breached Long Term Supervision Order, sentenced to three years’ imprisonmentI**ssue**: Aboriginal heritage properly considered?**Analysis**: **Two objectives of LTSO**: 1) protect public from risk of re-offence 2) rehabilitate offender and reintegrate into community. Former is not more important than latter. **When dealing with aboriginal sentencing, counsel have a duty to bring individualized information pertaining to the background of the offender.** JB: purpose of LTSO was to fill the gap between fixed sentence and dangerous offender status; the former allows dangerous people back on the street while the latter suspends release indefinitely. LTSO allows for supervision for up to 10 years, with conditions that are strictly enforced. |

## B. Parity and Totality

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| R v Akapew |
| Sentences on co-accused do not have to be the same. Parity is a consideration, but there is no rule that party to offence cannot receive higher sentence than principal.**Facts**: D has criminal record spanning 25 years with 75 convictions, 22 of which are driving convictions including impaired driving and flight from police. D party to flight from police that resulted in death. **Issue**: 4.5 year sentence fit?**Analysis**: No principle that sentences imposed on co-offenders be similar. Sentencing is an individual process. Trial judge erred in believing that she was bound to give D a shorter sentence than co-accused.**Decision**: Sentence increased to 12.5 years, given aggravating factors. JB: is this an appropriate case for a life sentence? When is it appropriate to hand down a life sentence for repeat offences? Does this case suggest that a maximum sentence is never a fit sentence for an aboriginal offender? |

## C. Mitigating Factors

### Note: R v Nasogaluak

Sentencing judge may take into account police violence or other state misconduct while crafting a fit and proportionate sentence.

**Facts**: D punched repeatedly by police officers, who did not report use of force.

**Issue**: Can sentencing take consideration of excessive use of force?

**Analysis**: sentencing judge may take into account police violence or other state misconduct while crafting a fit and proportionate sentence, without requiring the offender to prove that the incidents complained of amount to a *Charter* breach.

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| R v Draper |
| Denunciation and deterrence must be weighed against rehabilitation. Mitigating factors and personal circumstance must be taken into account when assessing proportionality. **Facts**: D has fetal alcohol syndrome and several addictions; convicted of four robberies and one theft, sentenced to 6 years. **Issue**: Sentence fit?**Analysis**: Denunciation and deterrence must be weighed against rehabilitation. Accused was a first offender with a unique set of mitigating circumstances, as well as community and personal support.**Decision**: Sentence reduced to three yearsJB: Mitigating factors must be established BOP by the defence. Can we say that his life challenges—including FASD, ADHD, and a difficulty saying no to others—reduces his moral blameworthiness? Should there be a partial defence of diminished capacity?  |

# Question Approach

**True crime or public welfare offence? Summary indictable or hybrid?**

**Classify the MR of an offence**

1. Check previous case law for definition
2. Read offence to see if it specific MR – presume subj / rebuttable for all true crime Beaver
	1. If KNOWLEDGE prove KNOW or WB as it is sufficient for knowledge –
	Accused deliberately choose not to inquire Briscoe/Sonregret
	2. Is the element silent or does it state the mens rea necessary?
		1. Subjective or Objective?
		2. Any mens rea required?
		3. Intentional?
		4. Knowledge or WB?
		5. Recklessness?
		6. Special stigma case?
		7. Strict or Absolute Liability?
3. Apply s 7 of Charter
	1. Cant combine absolute liability and imprisonment
	2. Murder requires subjective fault – all special stigma crimes do

**List the AR elements**

**Can the Crown prove each element of the offence BARD?**

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| **As the Crown I must prove the following BARD:** |
|  | **Actus Reus** | **Mens Rea**Willful or with intent = subjSpecial stigma = subjStrict/Absolute Liab = obj |
| **Conduct –** What acts or omissions must the Crown prove for this offence? Must be voluntary |  |  |
| **Circumstances** - What circumstances must the criminal offence be committed in to count as the offence? |  |  |
| **Consequence -** Is there a particular consequence that needs to be proven? |  |  |
| **CAUSATION** (conduct🡪 consequences) **Not its own mental element** |  |  |

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| **Provision** | **Offence** | **Subj/Obj** | **MR** | **AR** | **Case** |
| -- | True Crimes | Subj | Presume Full MR |  | *Beaver* |
| 380 | Fraud | Subj | intent to commit prohibited actsubjective knowledge or recklessness that prohibited act could deprive*Honest belief things would work out = no excuse* | 1) Dishonest act - needs proof of deceit falsehood or other fraudulent means 2) Deprivation caused by dishonest act – proof of detriment, prejudice, or risk of prejudice  | *Theroux* |
| 265 | Assault | Subj  | Intend to apply force; Know victim doesn't consent | Direct/indirect application of force (contact no matter how slight - def. from caselaw) without consent | *Fagan* |
| 267(b) | Assault causing bodily harm | Subjhybrid | Intention to apply force / same as assault | Commits assaultCauses bodily harm (more than trivial in nature) OR Carries uses or threatens weapon |  |
| 86 | Careless storage of firearms  | Obj | Not what a RP would do | Carry handle ship or store a firearm in a careless manner without reasonable precautions | *ADH ref Finlay* |
| 218 | Child abandonment | SubjDissent: OBJ | Based on what accused actually knew | Abandoning a child | *ADH –*baby in toilet - acquitted |
| 253(1)(a)(b)258(1)(a) | Operation of MV whl impairedCare/control presump |  | Voluntary inebriationVoluntary occupancy of driver seatPLUSA realistic risk of danger to persons or property | Presumption 258\*1(a) – anyone in the drivers seat of a MV is deemed to be in care and control  | *Boudreault* |
| s. 249 (old was 233) | Dangerous driving causing death | MOT | **Marked departure from** RP in the circumstances(in context – consider A’s state of mind, but not personal characteristics)Note: anywhere you see “in regard to all the circumstances” = OBJ | Operating a motor vehicle in a manner objectively dangerous to the public having regard to the circumstances - nature/condition of place, amt of traffic reasonably expected | *Hundal –* loaded truck ran light - guilty*Roy –* motorhome at intersection -acquitted*Beatty* – sudden cross ctr line - acquitted |
| s. 215(2)  | Failing to provide the necessities of life | Obj | **Marked departure** from RP | Failed to provide necessaries without a lawful excuse for whom it is legal dutyIn failing, caused or was likely to cause the health of that person to be endangered permanently (JF) | *Tutton, JF, ADH* |
| s. 32(1) of *ON Water Resources Act* | Discharging pollution into water source  | SL | Strict liability: Crown proves AR; BoP on D to show DD(provincial statutory offence) |  | *SS Marie* |
| s. 14(1) of *Migratory Birds Regulations* | Hunting on private property | SL | Strict liability: Crown proves AR; BoP on D to show DD(Regulatory offence ) |  | *Chapin* |
| 212(3) | Living on the avails of prostitution |  | Reverse onus burdenMinor charter infringement of 11(d), upheld under s 1 | Lives with or is habitually in the company of prostitutes | *Downey* |
| 271272consent273.1 | Sexual assaultSex asst/weapon | SubjGeneral | intention to touch; knowing of, or being reckless or willfully blind to, a lack of consent, either by words or actions, from the person being touched. | application of force (touching/contact), of a sexual nature, without consent | *Ewanchuk* |
| 172(1) of *HTA* | Stunt driving/racing | SL | Strict liability: Crown proves AR; BoP on D to show DD (new trial for D to raise due diligence) |  | *Raham* |
| 322 | Theft | Subj Specific intent | Intent to deprive owner of goods even temporarily  | Take the property of anotherFraudulently and without colour of right |  |
| 5(1) CDSA | Trafficking controlled substance |  | Knowledge of the presence of illicit drugs being provided to anotherRecklessness counts! |  | *Scheppanek* |
| 281.2(2) now 319 | Wilfully promoting hatred against a group | Subj | Willfully = intention and recklessnessIntended to bring about hatred to a group or been reckless to it as a foreseeable consequence | (CT) communicating statements, (CI) not in a private conversation, (CO) promoting hatred against an identifiable group. | *Buzzanga* |
| 239 S 24 attempts | Attempted murderCannot transfer intent (*Gordon*) | SubjSpecific | actual intent to kill, Recklessness will not suffice  | some act, “beyond mere preparation” towards the goal of killing the victim | *Ancio**Gordon* |
| 221 | Criminal negligence NOT related to death | Obj | Look at conduct not mental state**Marked and significant departure** from the RP in the circumstances | Doing anything or omitting to do anything that is his duty to do **shows wanton or reckless disregard for the lives or safety of other person** | *Tutton* |
| 220 | Crim Neg CAUSING death | Obj | **Marked and significant departure** from reasonable person within the circumstances | Under a legal duty to do something, objectively failed to perform the duty, and in failing to perform **showed a wanton or reckless disregard** for the lives or safety o another person (JF) | *Tutton**Insulin child* |
| 222(5)(a) (b) | Manslaughter222(4) culp homicide = murder or manslaughter or infanticide | ObjNot special stigma | A) MR of unlawful act **+ foreseeability of bodily harm** (not death) (Creighton per De Sousa) | Causes death by1. unlawful act
2. criminal negligence
 | *a) Creighton/De Sousa**JF* |
| 222(5)(c) (d)rarely used | Culpable homicide |  |  | Causes death by causing the other to take their life or willfully frightening a sick person or child |  |
| 229(a) | Culpable homicide – murder | Subj | CT: i) intent to kill or ii) recklessness as to whether death ensues or not Subjective foresight of death | CT: Unlawful act or criminal negligence CO: causing death  |  |
| 229(b) | SubjIntent can be transferred | As above + Causes death to another human being, notwithstanding that he **does not mean to cause death or bodily harm** to that human being;  | CT: Unlawful act or criminal negligence CO: causing death Significant contributing cause (beyond the de minimis range)  | *Nette* *Gordon (transferred intent)* |
| 229(c) -note“ought to know” removed | Unlawful object murderCant be absolute liability | Subj | An intention to carry out unlawful actKnowing it was likely to cause death. (foresee danger of death not enough) Shand | do an act (V - must be objectively dangerous) for an unlawful object (V - serious indictable offence w/ subj MR does anything he knows or ought to know **is likely to cause deat**h, guilty even if didn't intend death. | *Vasil – set fire to apt, killed 2 kids**Martineau**Shand – shot V while stealing pot* |
| 231(2)231(5) | 1st degree Murder | Subj | 231(2)**Subjective Foresight of Death** (=Minimum MR for M)231(5)Death was caused by A while committing offence in 231 (5) highjacking sexual assault, aggrav sexual assault, kidnapping, hostage | **Substantial and integral cause of death**Higher standard than 2nd degree and manslaughter | *Martineau**Nette – hog tie 96 yo* |
| 231(7) | Second degree murder | Subj | All murder that is not first degree murder | **Significant contributing cause of death***“a contributing cause of death that is not trivial or insignificant, outside of the de minimis range”* | *Smithers/Nette* |
| 232(1) | **Manslaughter PROVOCATION** | Subj | Sudden passion | Causes deathProvokedVictim conduct would be indictable offence 5+ yrs imprisonment |  |
| 222(5)(a) | Manslaughter - Unlawful act | Predicate MR +Obj | MR of unlawful act + **Obj foresight of bodily harm** Obj MR is consistent w/ the stigma associated w/ manslaughter and murder – the fact that someone has died is serious, but MS lacks stigma of intentional killing | AR of unlawful object + Causing death | *Creighton – trafficking drugs, injected V with heroin, V died* |
| 222(5)(b) | Manslaughter – criminal negligence | Predicate MR +Obj | MR of unlawful act + Obj foresight of bodily harm **MARKED DEARTURE (De Sousa)** | AR of unlawful object + Causing death | *Creighton – trafficking drugs, injected V with heroin, V died* |
| s. 269 | Unlawfully causing bodily harm  | Predicate MR +Obj | Unalwful MR + Objective foresight of b harmHarm must have significant causal connection to the underlying offence (De Sousa) (the risk of some harm that is more than trivial/transitory in nature)  | AR of unlawful act (NOT abs liability)+ Causes BH | *DeSousa – broke glass, piece flew off and injured**Creighton**ADH* |