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# Chapter 8: Mens Rea and the Charter

## Review Criminal Law Decision Making Tree



##  ABSOLUTE LIABILITY AND THE CHARTER

|  | AR | MR |
| --- | --- | --- |
| true crimes | Crown BRD | Crown BRD - subjective MR |
| objective MR | Crown BRD | Crown BRD - objective standard of MR - what reasonable person would have done relative to what A actually did |
| strict liability | Crown BRD | no MR requirement - defenses of due diligence & mistake of law available (A on BoP) |
| absolute liability | CrownBRD | no MR requirement - no defenses available |

Reference s.94(2) of the Motor Vehicle Act 1986 SCC

|  | Motor Vehicle Act Reference 1986 SCC |
| --- | --- |
| **Facts** | Section creates an absolute liability offence for driving without a license that can lead to imprisonment (minimum term of 7 days). |
| **Issues** | *Is this section in violation of principles of fundamental justice (s7)?* |
| **Law** | **Absolute liability and imprisonment cannot be combined because of the principle of moral blameworthiness.**  Charter requires courts to consider whether legislation accords with the broad range of values, not question policy decisions. Fundamental justice imports more than procedural fairness into Charter s. 7, it is a higher standard that forms the basis of our legal system. Some examples/elaborations are found in Charter s. 8 – 14 (overlap between natural justice [procedural fairness, judiciary independence, etc.] but not the same as principles of fundamental justice“principles of fundamental justice are to be found in the basic tenets of our legal system, not in realm of general public policy” Whether any principle is one of fundamental justice “will rest upon an analysis of the nature, sources, rationale and essential role of that principle within the judicial process”**Morally innocent should not be punished**; criminal law abhors absolute liability offences, and will not even allow imprisonment as a potential punishment. S. 1 will only save such laws in exceptional circumstances, routine administrative efficiency will not (Lamar questions whether could ever be saved) |
| **Application** | Absolute liability offends the principle that the morally innocent should not be punished because it imposes criminal liability absent a guilty mind. Combination of AL and imprisonment violates s7 and cannot be saved. |
| **Conclusion** | Struck down |

R v Raham 2010 OCA - Stunt Driving

|  | R v Raham 2010 OCA |
| --- | --- |
| **Facts** | A was convicted at trial of stunt racing for driving more than 50km/h over the speed limit. The appeal judge held that stunt racing was an absolute liability offence which raised the possibility of imprisonment, and was therefore in contravention of s.7 of the Charter |
| **Issues** | *Does this Ontario provision violate section 7 of the Charter?*  |
| **Law** | Potential for imprisonment would be enough to be unconstitutional if absolute liability; this provision found to be strict liability offense, therefore constitutionalIllustrates how SSMarie and MVA Reference should be merged:Scheme for deciding whether a public welfare offence is SL or AL (set out in SSMarie) continues to apply in Charter era - look at:1. overall regulatory pattern of the statute/regime
2. subject matter of the legislation
3. importance of the penalty (presume SL if imprisonment is possibility)
4. the precision of the language used (including possibility of a due diligence defense)

Remember: **Constitutional presumption** - if you can reasonably interpret the legislation in accordance with Charter rights, then you should.  |
| **Application** | Since imprisonment is a potential sanction, court interprets as Intended to be a strict liability offence - taking reasonable steps not to do over 50 more than speed limit |
| **Conclusion** | New trial ordered |

##  STIGMA AND THE MENS REA OF MURDER

SCC developed concept of “high stigma” crimes in Vaillencourt, Martineau andLogan.

The Court ultimately held that for “high stigma” crimes, section 7 of the Charter requires proof of subjective foresight of the prohibited consequences (i.e. death) before an accused can be convicted.

In ***Vaillancourt*,** the Supreme Court of Canada held that s. 213(d) (now s.230(a)) violated ss. 7 and 11(d) of the *Charter*, since it did not require proof of foresight of death, even on an objective standard (i.e. that the accused ought to have known that death would result).

Provision: “constructive murder” - deemed the killing of another person to be murder when that death takes place when A is committing one of a number of listed offences. Guilty of murder even where he did not intend to cause death or did not know that death is likely to result from his actions.

R v Martineau 1991 SCC - 2nd degree murder

|  | R v Martineau 1991 SCC |
| --- | --- |
| **Facts** | A was convicted of 2nd degree murder under s.213(a) of the Code, which raises culpable homicide to murder where A intends to inflict bodily harm to facilitate the commission of a crime listed in s.213. A’s friend shot two people in the course of a B&E. A (age of 15) testified that he believed they were going to do B&E of an unoccupied trailer in the woods. No motive to kill couple - “I had a mask on” |
| **Issues** | *Is proof of objective foresight of death sufficient to meet the requirements of the Charter or is a subjective MR (i.e. actual intention to cause death or knowledge that death was substantially certain) in fact required?* |
| **Law** | **Because of enormous stigma attached to murder, principle of fundamental justice requires subjective foresight of the risk of death.****Per Lamer CJC** In Vaillancourt, the SCC held that it is a principle of fundamental justice that before a person can be convicted of murder there must be proof beyond a reasonable doubt of at least objective foreseeability of death. The common law will not impose liability for murder except where subjective foreseeability of the likelihood of death is demonstrated. Murder “carries with it the most severe stigma and punishment of any crime in our society.” This stigma requires that a conviction for murder only ensue where the Crown proves moral blameworthiness. The minimum mens rea for murder is intending to cause death or inflicting bodily harm knowing that it is likely to cause death. Different than section 231(5) which raises 2nd degree murder to 1st degree murder when A has the MR for murder but lacks the planning & deliberation. |
| **Application** | A did not have subjective foresight of the risk of death when B&E |
| **Conclusion** | Provision is not saved by section 1 - fails on minimum impairment |

## APPLICATION TO OTHER OFFENCES

R v DeSouza 1992 SCC - Unlawfully causing bodily harm

|  | R v DeSouza 1992 SCC |
| --- | --- |
| **Facts** | A was charged with unlawfully causing bodily harm (s. 269). A challenged the constitutionality of this section, arguing that it breached s. 7 of the Charter. V and O at New Year’s Eve Party in Toronto - V tried to leave because of fight, O throws a bottle which breaks and injures V’s arm |
| **Issues** | *Does the constitutionally required MR of murder go beyond murder?*  |
| **Law** | **Sopinka J.** s. 269 is constitutionally valid. The process of interpretation is as follows:a. the word “unlawful” means contrary to a federal or provincial offence (predicate offence), however this offence cannot be an absolute liability offb. the Crown must prove that A has committed the predicate offence, including satisfying the MR element of the predicate offence. The predicate offence must be constitutionally valid in its own right;c. s. 269 imposes an additional MR requirement of **objective dangerousness**. This is imported through the word “unlawful”. Objective dangerous requires, as a minimum that a reasonable person would realize that A’s action **would subject another person to “the risk of some harm” that is “more than trivial or transitory in nature”**. The court should not impose liability for mere inadvertence.d. a conviction for s. 269 does not impose such a grave stigma or significant penalty that s. 7 requires subjective MR. Previous jurisprudence on s. 7 does not extend this far, and it is within parliamentary competence to impose a more grave penalty for an act that has harmful consequences without requiring additional MR for that offence.**When word “unlawfully” is used, starting presumption is objective MR and this is acceptable as long as not a high stigma offence like murder** |
| **Application** | Court rejected idea that this is exceptional type of offence with high stigma so that subjective MR is necessary, unlawful act objectively dangerous |
| **Conclusion** | S 269 is constitutionally valid. |

R v Creighton 1993 SCC - Manslaughter

|  | R v Creighton 1993 SCC |
| --- | --- |
| **Facts** | A was charged with manslaughter. V died after A injected cocaine into her arm. A challenged s. 222 on the basis that it was unconstitutional to confine the objective MR requirement to a risk of bodily harm rather than a risk of death. |
| **Issues** | *Is the asymmetry between the AR (death) and MR (risk of bodily harm) ok?* |
| **Law** | **McLachlin J.** s. 222(5)(a) and (b) are constitutionally valid. Both sub-sections rely on establishing a predicate offence (unlawful act as defined in DeSousa or criminal negligence as defined in s. 219). In addition, both require **“reasonable foreseeability of the risk of bodily harm.”** **Gravity of manslaughter - Stigma and Moral Blameworthiness**a. The objective MR requirement is consistent with the differential stigma associated with manslaughter cf murder – the fact that someone has died is serious, but manslaughter lacks the connotation of intentional killing. b. The consequences of A’s actions – causing death – demands a greater sanction than an action that only results in harm. Manslaughter carries a flexible penalty, and therefore the sentence can be tailored to suit the degree of moral fault. Penalty imposed generally less than for murder appropriately.**Symmetry between consequence element of AR and MR:**a. The principle that A takes his or her victim as s/he finds them requires that A take responsibility for the consequences of objectively dangerous actions, even death.b. The rule that symmetry usually exists between consequence and requisite MR is not a principle of fundamental justice but a starting proposition to which several **exceptions** exist. Parliament is within its rights to impose greater penalties for acts that have more serious consequences.**Policy considerations**a. Deterrence demands that a person who embarks on a dangerous course of action be held responsible if death ensues.b. Justice requires that the criminal law account for the concerns of the victim and for the concerns of society – in this case, the fact that someone has died as a result of A’s actions. - is also a workable test easy to apply**The objective test of MR**There is a single standard of MR for crimes of penal negligence – ***reasonable foreseeability of a risk of harm which is neither trivial nor transitory***. The only exception to this rule arises if A lacks capacity to appreciate the risk. *“The criminal law imposes a single minimum standard which must be met by all people engaging in the activity in question, provided that they enjoy the requisite capacity to appreciate the danger and judged in all the circumstances of the case, including unforeseen events and reasonably accepted misinformation.”*  |
| **Application** | Presumption of asymmetry is displaced - deterrence and concerns of the V require that A be held accountable for ensuing deaths |
| **Conclusion** | Asymmetry is acceptable and constitutional. |

**Wholesale Travel Group v R SCC 1991**: The reverse burden of proof in strict liability does not breach the Charter either because it doesn’t violate s.11(d) or because it is saved by s.1

# Chapter Seven: Departures from Subjective MR

###  ABSOLUTE AND STRICT LIABILITY (see chart above)

R v Sault Ste Marie 1978 SCC - Pollution

| *7-1* | R v Sault Ste Marie 1978 SCC |
| --- | --- |
| **Facts** | A was charged with causing or permitting pollutants to be discharged into clean water contrary to the Ontario Water Resources Act. |
| **Issues** | *Was the defence of due diligence allowed (strict liability?)* |
| **Law** | Starting presumption for public welfare offences is that they import strict liability (middle ground), with the following allocation of burden and standard of proof: (a) Crown must establish AR beyond a reasonable doubt (b) Crown need not establish MR; (c) A may prove on the balance of probabilities that s/he took all reasonable care, which involves a consideration of what the reasonable person would do in the circumstances.The task of deciding whether an offence (which is not a true crime) imports MR, or is an absolute liability offence rather than being a strict liability offence depends upon an analysis of: (a) the over-all regulatory pattern or scheme (b) the subject-matter of the legislation (c) the gravity of the penalty (d) the precise language used in the offence creating section.Provincial Statute - starting presumption = public welfare offenceCriminal Code - starting presumption = true crimeIf public welfare - starting presumption = strict liability |
| **Application** | Analysis points to strict liability. Defence of due diligence then proved on BoP and aims to give people an incentive to avoid harm and take care. |
| **Conclusion** | New trial ordered |

R. v. Chapin 1979 SCC - Hunting Near Bait

|  | R v Chapin 1979 SCC |
| --- | --- |
| **Facts** | A was convicted of hunting within one quarter mile of a place where bait was deposited, contrary to the Migratory Birds Regulations. She was unaware of the presence of grain. |
| **Issues** | *Was this strict or absolute liability crime?* |
| **Law** | Applies SSMarie:1. True crime or public welfare offence?
2. In PW Offence, start with presumption of strict liability
3. To displace presumption, look at 4 things above
 |
| **Application** | The offence is not a true crime (seemingly partly judged by severity of penalties) and does not contain words that would indicate an intention to import subjective MR. The offence is enacted to protect public & duck welfare. The fact that the penalty is significant and conviction carries serious consequences militates in favour of a strict liability standard. It is not persuasive to suggest that imposing a strict liability standard would render enforcement difficult. The regulatory pattern also supports the strict liability standard (particularly s.14(4) of the regs). A knew club well and knew they didn’t use bait, conservation officer didn’t notice bait until he stepped over it. Debatable if DD requires her to look out for grain more than she did, but having someone search a 1/4 mile radius before hunting would be ridiculous. |
| **Conclusion** | No reason to displace presumption of strict liability. Defense available. It would be unreasonable to convict A on these facts, therefore acquitted |

R v Kanda 2008 ONCA

|  | R v Kanda 2008 ONCA |
| --- | --- |
| **Facts** | A was charged with driving a motor vehicle while a child under 16 was not wearing a seatbelt. He testified that his son had unbuckled the belt at some stage, and that A had checked the belt before he began driving. |
| **Reasoning** | This case provides an example of how to apply the Sault Ste Marie factors. It adds little to the legal test, but note the discussion at around 29 about the deterrent effect of enabling a defence of due diligence vs. imposing strict liability. This is a good example of reasoning from policy, reliant on generalizations about human behaviour. At 41, you can see a good example of the appellant making a novel and persuasive argument about the underlying nature of the policy goal in the Highway Traffic Act, and how that goal might best be secured. |

###  CRIMES OF OBJECTIVE FAULT - NEGLIGENCE

**1. Introduction**Objective MR: Fault based on what the RP should have done, foreseen or known rather than on the actual state of mind of the A. Most objective MR offences are identified by clear statutory language, for example “without reasonable care”.

1. **Types of Negligence**
2. The civil standard of negligence requires any breach (mere departure) from the standard of care expected of a RP proven on BoP (**not** **criminal**);
3. **Penal negligence** has a constitutional dimension because of the possibility of criminalization and therefore requires a **marked** **departure from the standard of care expected** of the RP in the circumstances (*Beatty, J.F.*)
4. **Criminal negligence**, defined in s. 219, which requires a **marked and substantial** **departure from the expected standard of care**. (*Tutton, J.F.*) - explicit language

Penal negligence and criminal negligence are judged on a **modified objective** standard (*Hundal, J.F.*) proven BRD

Remember Creighton tells us why subjective tests are OK, degree to which personal characteristics should be used (in Creighton, Crown argued that because he was a drug user and dealer, he has a higher ability to know what would induce harm than the RP which requires more exercise of care but Court rejected this idea! Line does not shift unless incapacity to understand the risk)

**Constitutional minimum = capacity to understand the risk**

Shifting does occur where circumstances affect what is reasonable to do in the circumstances

1. **Criminal Negligence**

R v Tutton 1989 SCC - Manslaughter under s 215 & 219

| *7-13* | R v Tutton 1989 SCC |
| --- | --- |
| **Facts** | A (x2) stopped giving their diabetic son insulin because they believed he had been cured by the holy spirit. They were charged with manslaughter under [ss. 215 & 219]. (now s220) |
| **Issues** | *Is section 219 a subjective or objective MR?* |
| **Law** | ***Everyone is criminally negligent who (a) in doing anything, or (b) in omitting to do anything that it is his*** *[legal]* ***duty to do, show wanton or reckless disregard for the lives or safety of others persons (s219)***Tutton’s lawyer argued the “wanton or reckless disregard” connotes subjective MR but majority says NO, is objective MR because “criminal negligence” takes interpretive precedence over the word “reckless”**McIntyre J:** “The test is that of reasonableness, and conduct which reveals a **marked and substantial departure** from the standard which could be expected of a reasonably prudent person in the circumstances will justify a conviction of criminal negligence.” “Reckless” when used in respect of objective MR, does not connote subjective foresight. A’s honest and reasonably held perception of the facts may affect the trier of fact’s assessment of the reasonableness of A’s actions, but only as an aid. **Lamer J:** In applying the “objective norm”, there must be allowance for factors particular to A, such as youth, mental development and education.  |
| **Application** | Belief was honestly held but not reasonable by society’s standards |
| **Conclusion** | Appeal dismissed. |
| **Dissent** | *Wilson J: disagreed with the objective standard, holding that criminal negligence should have a subjective aspect.*  |

R v JF 2008 SCC - Manslaughter by negligence

| *7-21* | R v JF 2008 SCC |
| --- | --- |
| **Facts** | A was convicted by a jury of manslaughter by criminal negligence and acquitted of manslaughter by failing to provide the necessities of life. Crown theory was that he failed to protect his foster child from abuse by his partner. |
| **Issues** | *Was the jury wrong in convicting of one and acquitting of the other?* |
| **Law** | **Penal negligence** has a different test than criminal negligence - “marked departure” vs “marked and substantial departure” |
| **Application** | **Fish J:** The jury’s verdict answered ‘“yes” and “no” to essentially the same question’. On failure to provide the necessities of life, Crown had to prove marked departure from the standard of conduct of a reasonable parent. On criminal negligence, Crown had to prove marked and substantial departure. Convicting JF of the higher MR (criminal negligence) while acquitting on the lower is incomprehensible and illogical |
| **Conclusion** | A must be acquitted |

**4. Penal Negligence**

R v Hundal 1993 SCC - Dangerous Driving Causing Death

| *7-27* | R v Hundal 1993 SCC |
| --- | --- |
| **Facts** | A hit another car and killed the driver after running a red light. His truck was overloaded and he stated that he had been unable to stop for the light but had honked. He was charged with dangerous driving under [s.249]. |
| **Issues** | *How is the MR determined?* |
| **Law** | **Cory J:** s. 249 imports a **modified objective standard**, based on an analysis of the licensing requirement, the nature of driving, the wording of the section, and statistics that demonstrate the excessive road toll. The test should be applied in the factual context. **The question is whether A’s conduct was a marked departure from the standard of care expected of a RP in the A’s circumstances.** If A offers an explanation, the trier of fact must consider whether a RP in A’s shoes would have appreciated the risk & danger inherent in that course of action. If something unexpected happens to A which could not have been anticipated (hart attack, detached retna), will not allow person to reach marked departure |
| **Application** | As a matter of policy, best that this is penal (obj, not subj) because:1. “automatic and reflexive nature of driving”
2. have to be licensed
3. language of the provision is consistent with this (dangerous)
4. dangerous driving imposes a significant cost to society

The language of s249 gives us the criteria to consider in determining what we expect of a RP: where they were driving, speed limit, condition of the road, busy traffic, amount of traffic reasonably expected there - *does local knowledge get imported into RP?* |
| **Conclusion** |  |
| **Dissent** | **McLachlin J:**  objects to the language “modified objective test” but agrees that regard should be had to all the circumstances, including what A knew, in determining whether A was criminally negligent. |

| section 249(4) | AR | MR |
| --- | --- | --- |
| conduct | driving | voluntary (began to drive voluntarily) |
| circumstances | motor vehicle,in a manner that is dangerous (is it objectively dangerous?) having regard to all the circumstances | objective (Hundal, Beattie)marked departure from SoC expected of RP in A’s circumstances |
| consequences | death | Creighton (do not need symmetry) |

R v Beatty 2008 SCC - Dangerous Driving Causing Death

| *7-39* | R v Beatty 2008 SCC |
| --- | --- |
| **Facts** | A was charged with dangerous operation of a motor vehicle causing death contrary to s.249. A’s truck crossed the centre line of a highway into the path of an oncoming car, killing all three occupants. A was found to have had a momentary lapse of attention |
| **Procedural History** | Acquitted by TJ because momentary lapse, CA ordered new trial because TJ erred by looking at driving itself instead of consequences (necessarily dangerous), SCC below (Charron) found TJ was correct - just because consequences injured people does not mean driving was dangerous |
| **Law** | **Charron J:** the **modified objective standard requires a marked departure from the standard expected of a RP in all the circumstances.** Personal characteristics are only relevant to the extent that they raise incapacity to appreciate or avoid creating the risk. It’s important to distinguish between the AR (driving in a dangerous manner, having regard to circumstances) and MR (a marked departure from the expected standard). If both of these elements are made out, the trier of fact should consider evidence of A’s state of mind in order to decide whether it raises an honest and reasonable mistake of fact. **McLachlin CJ:** the AR requires a marked departure. MR is the normal inference from that conduct, absent any excuse. **2 stage analysis of modified obj MR:**1. Did the conduct amount to a marked departure from the SoC expected of a RP in the circumstances as set out in s 249? (obj “photograph” of scene)
2. Given the explanation offered by A, was A’s behaviour still a marked departure? build A’s understanding of circumstances into the analysis
 |
| **Application** | AR: behaviour was dangerous having regard to all the circumstances - going into other lane highly dangerous to persons lawfully using the highway MR: cannot reach marked departure threshold because of temporary loss of awareness (a few seconds) |
| **Conclusion** | His conduct was not morally blameworthy and should not be criminalized |
| **Dissent** | **Fish J:** Agrees with Charron J on the AR. MR requires either deliberately dangerous conduct or that Crown demonstrate a reasonably prudent driver in A’s situation would have been aware of the risk and acted to avert it. This can only be inferred from a marked departure from the norm.  |

**Defences and How They Work**

Remember: Section 8(3) of CC makes provision for CL, as well as statutory defences

Where there is no inconsistency between them, CL continues to exist

In constitutional challenges, statutory provisions override CL

Defences must be brought into play

# Chapter Ten: Provocation

##  Elements of Section 232

Partial Defence - Only applies to turn murder conviction into manslaughter (variable sentence)

Excuse -based offence

A bears burden of raising an “air of reality” of each aspect of the defence, then Crown bears burden of disproving one element BRD - both obj and subj elements

No CL defense, just statutory

**ELEMENTS**

1. Wrongful act or insult (not something V had legal right to do, not something A incited V to do in order to supply an excuse)
2. Deprives ordinary person of self-control
3. Sudden (unexpected) and before passion had time to cool (reaction right away)
4. A actually lost self-control
5. That loss of self-control caused A to kill V

Look at ***Tran*** first! 2-step test in Thibert changed to 4 elements in Tran

R v Hill 1985 SCC - “Big Brother” Case

|  | R v Hill 1985 SCC |
| --- | --- |
| **Facts** | A was convicted of 2nd degree murder. Crown theory was that A & V were lovers, had an argument, as a result of which A first hit V over the head then stabbed him. A testified that V had made unwelcome advances (as Big Brother) and A accidentally hit V twice in trying to fend him off, then stabbed V when V threatened to kill A. TJ charged jury on provocation, but did not specifically address nature of “ordinary person” test. |
| **Issues** | *Should the jury have been charged on provocation? Was there air of reality?* |
| **Law** | **Dickson C.J. per majority.** Judge must ask:  *if all of A’s evidence was believed, would there be an “air of reality” to provocation?*Test for provocation is: First Identify the act or insult1. Would an ordinary person be deprived of self-control by the act or insult?2. Did A in fact act in response to these provocative acts? (causal relp)3. Was A’s response sudden and before there was time for passion to cool?OP is person of: normal temperament and level of self-control, not excitable, drunk or short tempered, not quick to violence Objective person standard permits jury to have regard to characteristics that are relevant to the insulting nature of V’s behaviour (ex. racial slur) but Charter’s equality rights provide limits on OP (cannot be homophobic, etc). This relevance flows from the context of the case. However, it is not necessary for TJ to charge jury specifically on this test (since Dickson thinks jury will do this naturally) |
| **Application** | Wrongful act = homosexual advances1. Ordinary Person - age of A is relevant - 16 year old male

2 and 3. Decide based on what A has done and why - (jury charge must tell them they are not looking subjectively - causal rel’p) |
| **Conclusion** | TJ’s charge was acceptable. Conviction stands. |

R v Thibert 1996 SCC - Wife’s Lover “Daring Him to Shoot” Case

|  | R v Thibert 1996 SCC |
| --- | --- |
| **Facts** | A was convicted of murder after shooting his (separated) wife’s lover. A testified that he had gone to wife’s work to talk things over and scare wife with rifle, but V insulted and demeaned A by holding wife in front of him and daring him to shoot. TJ did not tell jury that Crown bears burden of disproving provocation, where raised, BRD. |
| **Issues** | *Is there enough evidence to allow jury to believe there is air of reality?* |
| **Law** | Ending a relationship and starting a new one is not an insult, but the taunting may have been for the objective side of test. Past relationship evidence is relevant to both parts of test |
| **Application** | **Cory J. per majority.**  On these facts, it was appropriate to put the defence of provocation to the jury although it is not certain that they would accept the defence. The test (at 10-36) is whether there is some evidence to establish that an ordinary person would lose self control, and whether there is some evidence to establish that A was actually deprived of self-control. Leaving one’s partner can’t constitute provocation without more (at 10-39). Relationship evidence is relevant to the objective standard and the subjective test. Put some limits on what the OP has a legal right to do |
| **Conclusion** | New trial ordered |
| **Dissent** | **Major J. in dissent**. On these facts, there was no wrongful act or insult that could found a provocation defence. The defence should not have been left to the jury so no miscarriage arose. |

R v Daniels 1983 NWTCA - Battered Wife Kills Husband’s Lover Case

|  | R v Daniels 1983 NWTCA |
| --- | --- |
| **Facts** | A stabbed and killed V, who had been having an affair with A’s husband. V & husband had been openly having an affair, and A’s husband would beat A regularly. On the night of the killing, A was drunk and went looking for husband and V. A killed V after V told A to “f\_\_\_ off”. TJ directed jury to consider provocation, and limited the events that might constitute provocation to those that occurred in the immediate context of the killing.  |
| **Issues** | *Should events have been limited to immediate context of killing or not?* |
| **Law** | **Laycraft J.A. per curiam** “The requirement for suddenness of insult and reaction does not preclude a consideration of past events. The incident which finally triggers the reaction must be sudden and the reaction must be sudden, but the incident itself may well be coloured and given meaning only by a consideration of the events which proceeded it.”  |
| **Application** | It was inappropriate to limit jury’s consideration to events at the house, and the proper test is the response of an ordinary person to the insult after a long series of assaults and indignities. Similar to Tran but provocation is not just about walking into bedroom and being sworn at - also context of past physical abuse - not necessarily a sudden act - can brew over period of time with string of events |
| **Conclusion** | Appeal accepted.  |

R v Tran 2010 SCC - Husband with Keys Kills Estranged Wife’s Lover

|  | R v Tran 2010 SCC |
| --- | --- |
| **Facts** | A killed his estranged wife’s new partner after breaking into his old apartment. He also harmed his estranged wife. A had told wife that he no longer had keys to the apartment. A was angry and upset at the breakdown of his marriage and because of rumours that his ex-wife had a new partner. TJ acquitted on 2nd degree murder and convicted on manslaughter. Crown appealed on basis that there was no air of reality to the defence. |
| **Issues** | *Should provocation been charged to the jury?* |
| **Law** | **Charron J (per curiam)** The focal point for an analysis of provocation must be the wording of s. 232. The subjective & objective elements identified in a variety of cases (including Hill and Thibert) do not vary in substance, but are ways of understanding s. 232 in particular cases. While the language of s. 232 has not changed since 1892, the context in which it is applied has changed. In particular, the court must have regard to contemporary social norms and Charter values when applying the objective element of whether a wrongful act or insult would cause an ordinary person to lose self-control.A ‘legal right’ referred to in s. 232 must be an action expressly authorised in law. The proper place for considering factors such as whether a woman is entitled to leave a relationship & start an intimate relationship with someone else is under the ‘ordinary person’ test. The OP will share some relevant generic characteristics with the A (confirming Hill) but this cannot subvert the logic of the objective test. The limits of an OP’s characteristics are partly informed by the Charter – for instance, homophobia would not be ascribed to an OP. The circumstances of the A may be generically relevant but do not shift the standard to the individual A.The subjective element is twofold – did A act in response to the provocation? And did s/he act on the sudden and before passion had time to cool. This focuses on A’s subjective perception, including what s/he believed, intended or knew. The provocation must cause A to commit the homicidal act. The question of whether there is an air of reality to provocation is a legal one, subject to appellate review. If there is an air of reality, the burden of proof lies on the Crown to disprove one or more element(s) of provocation BRD. |
| **Application** | Not an insult (sleeping with another behind closed doors)No air of reality re: sudden - went to the house looking for them, went back to kitchen to get more knives, planned assault |
| **Conclusion** | No air of reality of provocation, 2nd degree murder conviction |

R v Nealy 1986 OCA - Drunk Guy kills Rude Guy Outside Pub

|  | R v Nealy 1986 OCA |
| --- | --- |
| **Facts** | A killed V in a fight outside a pub after V had repeatedly made crude sexual remarks to A’s girlfriend. A had been drinking and also testified that he was scared and angry during the fight. TJ did not direct jury on cumulative effect of drunkenness, fear and anger.  |
| **Issues** | *Should jury have been directed on cumulative effect?* |
| **Law** | Cory J.A. It would have been better to instruct jury to take cumulative effect into account when considering whether A formed the intent required of murder. Not every case will require this direction but in most cases where these factors accumulate such a direction should be made. If you are angry enough and drunk enough, you might have trouble forming/recognizing the likelihood that someone will die (MR) as a result of an act |
| **Application** | Would have been better to instruct on accumulation here. Possible that A did not have the MR to commit murder due to combination of factors |
| **Conclusion** | New trial ordered. |

# Chapter Eleven: Mental Disorder & Automatism

##  The Defence of Mental Disorder

This raises a special plea of not criminally responsible by reason of mental disorder (NCRMD) - previously known as plea of “insanity”

**Section 16 of the Criminal Code**

Section 16(1) provides a defence if A commits an act or omission while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or of knowing that it was wrong.

Section 16(2) establishes a presumption that A is not suffering from a mental disorder until the contrary is proved to BoP. (Contravenes *Charter* s. 11(d) but justified under s. 1 per majority in **Chaulk 1980 SCC** considering s. 16 in its previous form). - saved for practical reasons: there is no universal, unassailable test to prove BRD that someone was mentally ill at time of offence and because A has the knowledge so makes sense to put burden of proof on A (Wilson dissents pointing to US cases saying fails on minimal impairment)

Section 16(3) places burden of proof on party that raises the issue.

***“While suffering from a mental disorder”***

Source of incapacity may be congenital or acquired, permanent or temporary but excludes states of self-induced intoxication and transitory mental states, such as a concussion or hysteria.

**Cooper 1980 SCC** “any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding, however self-induced states … as well as transitory mental states …”.

Need expert psychiatric evidence - must be diagnosable but may not have been diagnosed in A

***“Incapable” generally***

**Chaulk 1990 SCC** per Dickson C.J. citing Fortin and Viau with approval this word connotes “a purely subjective and personal dimension of the individual”. The incapacity must be causally linked to the disease of the mind.

***“Incapable of appreciating the nature and quality of the act”***

**Cooper 1980 SCC** this word requires perception “an ability to perceive the consequences, impact and results of physical act”, not just knowledge of act - where A charged with murder after attempting to rape a young woman and then strangling her to death outside a dance organized for mental health patients, must understand consequences of strangling

***“Incapable of knowing that it was wrong”***

**Chaulk 1990 SCC** The requisite incapacity for the second limb of the defence is incapacity to appreciate that the act is wrong according to the **ordinary moral standards of reasonable members of society**. That is, even if the A knew that the act was legally wrong, he may be acquitted if he was incapable of understanding that it was morally wrong. Full normative comprehension of a rule violation includes comprehension of what the violation will mean to others, and how they will respond.

n.b. Chaulk overruled previous holding in **Schwartz (1977)** – if A had capacity to understand that the act was legally wrong, s/he could not access the defence.

Both incapacity to understand that breaking the law is wrong and that your specific action is wrong will give you access to the defence

**How mental disorder operatesChaulk 1990 SCC** The defence may operate to: - negate AR on premise that A did not act consciously; - negate MR on premise that A was incapable of forming the requisite MR (such as lack of intent); - provide an excuse on the basis that the A’s mental condition prevented him or her from knowing that the act was wrong.

Each is predicated on **capacity**. Jury faced with NCR defence should consider questions in the following order:

a. has the A established NCR under one of the two limbs of s. 16 BRD?

b. does the evidence of mental disorder negate MR in whole or part (e.g. prevent A from forming specific intent for murder)?

Section 16(3) places BoP standard on the party that raises the defence (usually the A). The Crown may, in some circumstances, introduce evidence of mental disorder against the wishes of the A. Procedure for introducing evidence of mental disorder is set out by SCC in **R v Swain** (1991) with 4 possibilities:

1. A may plead NCR at the outset of the trial with evidence heard during trial and A must prove on BoP that he had a mental disorder at time of the offence
2. A pleads “not guilty”. If other defences fail and Crown proves guilt BRD, A may change his plea to NCR and a hearing on the matter will be held before conviction is entered. Same BoP
3. Crown may raise evidence of A’s mental disorder during the trial if the A otherwise puts his mental state in issue (for example, by introducing evidence that he was seeing a psychiatrist at time of the offence). Crown must prove on BoP
4. Crown may raise evidence of mental disorder after the finding of guilt is made but before conviction is entered, as in option 2 above. Crown must prove on BoP

R v Chaulk 1980 SCC - Robbers Think They are Gods and Kill “Loser”

| 11-54 | R v Chaulk 1980 SCC |
| --- | --- |
| ***Facts*** | As killed V during a robbery - claimed they suffered from a paranoid psychosis that made they think they were gods who were above the law and had to kill V because he was a loser |
| ***Issues*** | *Does MD apply?* |
| ***Law*** | Burden of proof rests of the party that raises this defence and this is constitutional (saved by s1 for practical reasons - no unassailable test to prove BRD that someone was mentally ill at time of offense and A has the knowledge)MD covers any illness, disease or abnormal condition which affects the human mind and its functioning, excluding transitory and self-induced states. MD may negate AR (no conscious action), MR (incapable of forming intent) or provide an excuse if A didn’t know he was wrong. Jury must consider if the accused satisfied either test on a BoP and if the resulting MR negates one of the above options. |
| ***Application*** | Even if A knew that a law prohibited his conduct, he is still NCRMD if he didn’t know his act was morally wrong or that most people would condemn his actions. |
| ***Conclusion*** | New trial ordered. |

##  Relationship between Mental Disorder and Automatism

|  |  |
| --- | --- |
| **Mental disorder (section 16)** | **Automatism (CL defence)** |
| Requires disease of the mind | No disease of the mind required |
| Mental disorder automatism (where *actus reus* is denied) | Non-mental disorder automatism |
| Verdict is not criminally responsible by reason of mental disorder | Verdict is acquittal |
| May be detained in hospital if board concludes that A is a significant threat. | No continuing supervision but the possibility of a peace bond or civil commitment arises. |

If you have insane automatism, it is subsumed in section 16 mental disorder, leaving a limited area of pure automatism dealt with under the CL (Parks)

##  Automatism (Mental disorder and non-mental disorder)

**Insane automatism is subsumed into section 16 mental disorder, leaving a limited area of pure automatism dealt with under the CL (i.e. Parks)** - as a matter of policy, where there is a potential of continuing danger or where appropriate for A to be under supervision, find a way to get them under section 16 (**Stone**)

**Only MD automatism OR non-insane automatism will be left to jury, not both!**

**Burden of Proof:** BoP placed on the party who raises it (**Stone**) - saved by s1: Crown benefits from presumption of voluntariness (not practical to prove person was disassociating) and could easily be feigned. A raises evidence to rebut presumption of voluntariness

If judge is asked to lead automatism to jury, what should TJ do?

1. **Could a properly instructed jury decide on BoP that A dissociated at the time of committing the AR?**  sufficiency of evidence? - look at expert evidence, documented history of dissoc., corroborating evidence of bystander, connection between action and trigger is important = motive)

If NO, jury does not consider automatism, TJ should consider what other defences could be led, including section 16 (don’t worry about section 16 if no evidence of a disease of the mind)

If YES, then ask: **2. *Does dissociation arise from a disease of the mind? -* internal cause** (Rabey) (stress of ordinary life, psy/emotional makeup, organic factors) (think about process: is finding a letter like the one Rabey found something that would cause on OP to dissociate?) - contextualized objective enquiry (Stone) - OP in circumstances of A (including history) -**continuing danger** (history of dissociation, violence, context) -**policy concerns** - easily feigned (“last refuge of a scoundrel”), credibility of system**Stone** holds that the presumption is MD automatism (if tie, go with section 16 MDA)

If NO, go down to CL non-insane automatism - jury would be instructed to consider on a BoP whether A, in fact, dissociated having regard to same things as TJ -if jury decides, YES did dissociate, then absolute acquittal -if jury decides, NO to dissociation, then can still raise other defences (not s16)

If YES to dissociation arising from a disease of the mind, then jury asks: ***Does A have a disease of the mind?*** If no, other defences (not auto), if YES, ask: ***Was A unable to understand the nature and quality of act OR unable of knowing it was wrong*** (because of the disease of the mind)? if no, other defences (not auto), if YES, then NCRMD (discharged with referral to hospital)

R v Stone 1999 SCC - Husband Stabs Wife after Hours of Insults

| 11-54 | R v Stone 1999 SCC |
| --- | --- |
| ***Facts*** | A stabbed his wife after she had insulted and yelled at him over a period of several hours. He testified that when he committed the violent act, he was unaware of what he was doing and only returned to full consciousness with the knife in his hand and his wife dead. Two psychiatrists testified – one said that A’s account was consistent with dissociation and the other testified that it was extremely unlikely that A was dissociated at the time. Fled to Mexico, not medically examined for a year after the act |
| ***Issues*** | *Should the defence of automatism have been left to jury?* |
| ***Law*** | **Per Bastarache J. (+ 4 judges)** On current medical understanding, better to describe automatism as a state of impaired consciousness in which A has no voluntary control over his or her actions. Insane automatism is subsumed by the s. 16 defence, while non-insane automatism is treated separately. The test for establishing automatism of either variety is the same:1. **Establish a proper foundation for the defence** - The law presumes that A acted voluntarily. Burden on A to raise evidence sufficient to permit a properly instructed jury to conclude on BoP that s/he was automatistic – requires psychiatric evidence and additional evidence such as history of dissociation, corroborating evidence, and absence of motive. [See 180 re Charter considerations.] Defence will only be put to jury if judge concludes that sufficient evidence exists.
2. **Consider whether automatism has its genesis in a mental disorder -** TJ only considers this aspect once a proper evidentiary foundation is established. The question whether alleged dissociation originated in a disease of the mind is a legal question, and the starting presumption should be that the dissociation did originate from a mental disorder. TJ should consider whether automatism had an internal cause “psychological blow” – if so, more likely to be a disease of the mind. If A presents a continuing danger, more likely to be a disease of the mind. Other policy factors such as the need to protect society may also be identified on a case by case basis.
3. **Jury determines questions of fact depending on which defence is left to jury** - If non-insane automatism, question whether A acted involuntarily on a BoP. If a disease of the mind, jury considers defence according to s. 16 framework – did A suffer from a disease of the mind which rendered him or her incapable of appreciating the nature and quality of the act.
 |
| ***Application*** | Note testimony by A, witnesses describing A at or soon after the time of accident, expert testimony |
| ***Conclusion*** |  |
| ***Dissent*** | **Binnie J. (+3 judges)** dissented on burden of proof and on question of whether non-insane automatism should have been left to the jury. |

R v Parks 1992 SCC - Sleepwalking Killing

| 11-37 | R v Parks 1992 SCC |
| --- | --- |
| ***Facts*** | A killed his parents-in-law. Medical evidence suggested that A was sleepwalking at that time and that sleepwalking is not a mental illness. A had a family history of sleepwalking and other sleep disorders, and experts suggested that it was highly improbable that he would be violent again. Sleepwalking had no treatment, but recommended practices to minimize recurrence. |
| ***Issues*** | *Does the defence of automatism apply?* |
| ***Law*** | **Sleepwalking** is not a disease of the mind but transient state - see below |
| ***Application*** | **Lamer C.J.** (per curiam on automatism) On these facts, automatism was not a disease of the mind but a transient state. It was open to the TJ to leave non-insane automatism to the jury and for jury to acquit. **La Forest J (+ 3 judges)** Recurrence is a non-determinitive factor in the insanity inquiry. The internal cause approach is not directly applicable to these facts but is relevant to the defence. Additional policy considerations that may assist with distinguishing between forms of automatism are listed at 53. No compelling policy factors preclude a conclusion that this A’s condition is non-insane automatism. This is also supported by the medical evidence. |
| ***Conclusion*** | Acquittal. No compelling factors here preclude non-insane automatism |

R v Rabey 1977 OCA - Student Kills Student with Rock after Letter

| 11-21 | R v Rabey 1977 OCA |
| --- | --- |
| ***Facts*** | A hit V on head with a rock and choked her after reading a letter in which V expressed sexual interest in another man. Conflicting psychiatric opinions regarded whether dissociation is a mental illness or not.  |
| ***Law*** | **Martin J.A. (per curiam)** “Disease of the mind” is a legal term and the TJ must determine whether a particular condition fits within that phrase – question whether A suffered from condition is for jury. The phrase includes functional disorders with no known cause, but excludes intoxicant-induced disorders. A distinction should be drawn between automatism with an “internal” cause i.e. having its source in psychological or emotional makeup and transient automatism which arises from specific external factors. “ordinary stresses and disappointments of life which are the common lot of mankind do not constitute an external cause constituting an explanation … [which amounts to non-insane automatism]”.  |
| ***Application*** | Can’t succeed based on the ordinary lows of life, but something is wrong |
| ***Conclusion*** | Sent back to trial to see if A had a mental disorder as he had an abnormal mind - new trial. |

# Chapter Twelve: Self Defence

###  Criminal Code Provisions - Elements of ss 34, 35 and 37

**TJ must find air of reality for all elements, then charge to the jury (BoP)**

**Self-Defence is a justification not an excuse**

New Bill C-26 will turn self-defence into one section rather than 3

**Section 34(1):** *Everyone who is unlawfully assaulted without having provoked the assault (no provocation!) is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself*

* no provocation
* no intent to cause death or grievous bodily harm
* no more force than necessary

**Section 34(2):**  *Everyone who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if*

1. *he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and*
2. *he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.*

-A must subjectively on reasonable grounds believe they are at risk of death or GBH and reasonably believe they have no alternative

**Section 34(2) Elements:**

1. Was A being assaulted?

 -imminence no longer necessary (**Lavallee**)

1. Did the A perceive a threat of death or grievous bodily harm? (scale of threat)
2. Did A have a reasonable alternative?

**Cinou** says each of these has a subjective and (modified) objective aspect to it

**Section 35:** basically obsolete since majority in McIntosh found that s.34(2) is available where A provoked initial attack by victim

**Section 37(1):** *Everyone is justified in using force to defend himself or anyone under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it*

-courts use this where you are protecting another person at risk of harm

R v Lavallee 1990 SCC - Battered Woman Shot Abuser

| 12-1 | R v Lavallee 1990 SCC |
| --- | --- |
| ***Facts*** | A killed her partner after he had threatened to kill her “later”. At the time A shot V, V had his back to A and was walking out of A’s bedroom. Evidence established a pattern of violent physical abuse by V towards A. Expert evidence suggested that A suffered from the psychological effects of battered woman syndrome, explained that she was likely well attuned to the nature and severity V’s impending violence, and suggested why she would have disbelieved that she could leave the premises as a way of escaping the violence. |
| ***Issues*** | *Was this a case of self-defence under s34(2)? Is it permissible to look at entire history of relationship?* |
| ***Law*** | **Per Wilson J.** (+ 4 judges, other judges concurring). Two questions arise re. s.34(2) C.C.: the temporal connection between apprehension of death and A’s use of force; and the requirement that A’s belief in the need for self-defence be based on reasonable and probable grounds. The common link is the standard of “reasonableness” and how it should be judged. Re the requirement of a temporal connection between apprehension of death or GBH and A’s use of force, courts had previously required imminence (the raised knife standard) in **Whynot**. This is based on a masculine norm that excludes the cumulative effect of V’s brutality on A. The cycle of violence begets a predictability to the violence. The test is what A reasonably perceived, given her situation and experience. There is no absolute requirement for A to wait until the knife is raised.Re the requirement that A’s belief that she could not otherwise defend herself be based on reasonable and probable grounds, the expert evidence re. her lack of alternatives (“learned helplessness” – later qualified in **Malott**) is helpful. Relevant question is “whether, given the history, circumstances, and perceptions of the appellant, her belief that she could not preserve herself from being killed by Rust that night except by killing him first was reasonable”.  |
| ***Application*** | 1. **Was A being assaulted?** air of reality to idea that it was reasonable for Lavallee to believe she was going to be assaulted given the circumstances (and history of abuse)
2. **Did A perceive threat of death or GBH?** subjectively, yes! (based on doctor testimony, comments in police car), objectively question should be asked in light of context of battered woman (need expert testimony! Walker Cycle Theory of Violence - could predict level of violence)
3. **Did A have a reasonable alternative?** subjectively thought had no RA, objectively, look at “learned helplessness” (escape might have precipitated her death, Stockholm syndr, financial barriers) - criticized for suggesting domestic violence is medical condition of woman

Must be clear causal relationship between elements and battering context |
| ***Conclusion*** | Court found air of reality of all 3 elements subj and obj - acquitten |

R v Petel 1994 SCC - Grandma kills Abusive Drug-trafficker

| 12-16 | R v Petel 1994 SCC |
| --- | --- |
| ***Facts*** | A killed R, who was an acquaintance of her daughter (business partner of daughter’s drug trafficking boyfriend) - both men were violent to all the women in the house. On night of crime, A heard a threat they would all be killed and shoots both men. |
| ***Issues*** | *Did she have a reasonable perception that she was being assaulted given that at the moment of killing they were not actively threatening her?* |
| ***Law*** | Under s. 34(2), A may make a reasonable mistake about whether she is being assaulted and have access to the defence. Imminence is only one factor to consider when assessing reasonableness. |
| ***Application*** |  |
| ***Conclusion*** |  |

R v Malott 1998 SCC - Warns about Syndromization

| 12-16 | R v Malott 1998 SCC |
| --- | --- |
| ***Facts*** | A was convicted of 2nd degree murder of her ex-spouse and attempted murder of his girlfriend |
| ***Law*** | **L’Heureux-Dubé J.** (+1, concurring in result) *Lavalleé* did not establish a defence of being a battered woman – but directed court to consider situation and experience of battered woman in applying legal tests of reasonableness. May equally apply to duress, provocation, necessity. Court should resist “syndromization” by focusing on reasonableness of A’s actions in light of her personal experiences and experiences as a woman. Other material factors, such as a lack of financial resources, may equally apply. This judgment warns against extending the ambit of “battered woman syndrome” without careful research and additional expert evidence. |
| ***Application*** |  |
| ***Conclusion*** | Conviction stands. |

##  Provocation by A and Air of Reality

R v McIntosh 1995 SCC - Dispute over DJ Equipment Leads to Stabbing

| 12-21 | R v McIntosh 1995 SCC |
| --- | --- |
| ***Facts*** | V had agreed to repair sound equipment for A. For eight months, A tried to reclaim the equipment. Eventually, A went to V’s house with a knife and demanded the equipment. A testified that V pushed A then picked up a dolly, raised it and advanced on A. A stabbed V, dropped the knife, and fled. It was open to jury to find that A provoked the assault. |
| ***Issues*** | *Can section 34(2) apply in this circumstance?* |
| ***Law*** | **Lamer CJC (+4 judges).** Sections 34, 35 and 37 are not reconcilable in any coherent manner and each needs to be interpreted according to principles of SI. Section 34(2) is not ambiguous re. question of whether it requires an absence of provocation (it is silent on this matter, and finding this requirement would demand that words be read into the section). S.34(2) applies on its face to initial aggressors, this interp. is more favourable to A and is consistent with clear wording, thereby promoting certainty. No requirement of absence of provocation. S. 37 adds to the confusion and should not be used if another section applies.  |
| ***Application*** | Section 34(2) is available to the A even if provoked initial attack |
| ***Dissent*** | **McLachlin J (+3 judges)** leaving out the words “without having provoked the assault” was clearly a drafting error. These words should be read into s. 34(2). This interpretation is also supported by policy. |

R v Cinous 2002 SCC - Paranoid A kills Fellow Thieves in Van

| 12-29 | R v Cinous 2002 SCC |
| --- | --- |
| ***Facts*** | A shot V as they were on their way to steal computers. At the time, their van was in a gas station, V was sitting in the van and A was outside it. A testified that he believed that V and a friend were planning to kill him, and that he could not report his fears to police because they wouldn’t arrive in time and it would make him an informant. |
| ***Issues*** | *Is there an air of reality to self-defence?* |
| ***Law*** | **McLachlin CJC and Bastarache J (+2 judges)** Narrow question is whether there is an air of reality to the defence of self-defence. Broader question is the legal test for whether an air of reality exists. Re. legal test, the question is **whether there is (1) evidence on the record (2) upon which a properly instructed jury acting reasonably could acquit**. Second part of test requires TJ to decide if there is direct evidence on each element of the defence, or circumstantial evidence which is reasonably capable of supporting inferences required to acquit A. TJ does not decide whether inference should be drawn, but considers whether it is available. Relevant elements requiring evidence include reasonableness of A’s belief. Evidentiary burden is on A.  |
| ***Application*** | Re narrow question – legal test is (1) Did A reasonably believe, in circumstance, that s/he was being unlawfully assaulted (Petel); (2) Did A reasonably apprehend death or GBH? (3) Did A reasonably believe in the absence of alternatives to killing? In this case, A presented evidence to requisite standard on all fronts except reasonableness of A’s belief that he had no alternatives. Evidence does not explain why A didn’t run away or hide in gas station. Self-defence is intended to be a last resort where A’s safety and survival depend on killing V at that moment.**Binnie J (+1 judge)** concurring with leading judgment. Assessing reasonableness of A’s belief in lack of alternatives from perspective of criminal subculture would be antithetical to public order. A’s bare assertion on this regard is inadequate - would have to crawl into skin of A and accept as reasonable a sociopathic view of appropriate DR |
| ***Conclusion*** | No air of reality to self-defence |

# Chapter Thirteen: Necessity & Duress

##  NECESSITY

Available as an **excuse** (response to human frailty, person facing grave personal harm will commit an offence - don’t condone their action but excuse it in this situation) or as a **justification** (given the nature of the peril they face, it is a lesser harm to commit offence that to face the harm so they are justified in their action)

**1. Burdens of Proof**

The defence must raise an air of reality about each element of the defence, and if properly raised, Crown must disprove beyond a reasonable doubt

**2. Elements and Their MR**

|  |  |
| --- | --- |
| **Element (*Perka*)** | ***Mens rea* (*Latimer*)** |
| A is in a pressing emergency of great peril | Subjective (A’s honest belief) and modified objective (taking A’s situation and characteristics into account, relying on *Hibbert*) |
| Compliance with the law is demonstrably impossible | Subjective and modified objective |
| A’s response is proportionate to the threatened harm | Purely objective – **no modification.** Homicide might never be proportionate. |

**3. Cases**

R v Perka 1984 SCC - Drug Smugglers Meet Storm

|  | R v Perka 1984 SCC |
| --- | --- |
| ***Facts*** | A (x 4) were on a boat conveying cannabis from one destination in international waters to another. The boat started to have difficulties, so they made an emergency landing in a bay on Vancouver Island. Their evidence was that they intended to repair the boat, reload the drugs, and proceed. They were charged with importing cannabis.  |
| ***Issues*** | *Does the defence of necessity apply?* |
| ***Law*** | **Per Dickson J (+3, Wilson J concurring)** recognizes/establishes a CL defence of necessity. This operates as an excuse rather than a justification, and is confined to circumstances in which A’s actions were normatively involuntary. There are three elements:1. A was in a situation of pressing emergency of great peril;2. Compliance with the law was “demonstrably impossible” – there was no legal way out;3. There was proportionality between the harm threatened by the situation and the one inflicted by A’s response. It is not directly relevant that A’s preceding conduct was illegal, but A cannot cause a situation where the clear consequences are what actually ensued, and then seek recourse to necessity. Defence must raise an air of reality about elements, then Crown must disproved BRD. |
| ***Application*** | in these facts, best seen as an excuse (illegality should be dealt with separately) |
| ***Conclusion*** | New trial to consider this new defence |

R v Latimer 2001 SCC - Father Kills Daughter with Cerebral Palsy

| 6-6 | R v Latimer 2001 SCC |
| --- | --- |
| ***Facts*** | A killed his daughter, who suffered from severe cerebral palsy and experienced continual pain. He pleaded necessity in defence to 2nd degree murder, but TJ refused to leave this defence to the jury. |
| ***Issues*** | *Was TJ right in refusing to leave the defence of necessity to jury?* |
| ***Law*** | **Adds MR of elements of defence**Per curiam Necessity is narrow and of limited application. There was no air of reality to the defence in this case. First two elements set out by Dickson J. in Perka are assessed on a modified objective standard plus A must have an honest belief in both factors. Proportionality is assessed on a purely objective standard. Court expressed doubt about whether homicide could ever be a proportionate response, but left this question for another day. |
| ***Application*** | No air of reality - father himself was not in pressing emergency, neither was daughter; there was a legal alternative (medical options, care home), homicide might never be proportionate |
| ***Conclusion*** | Defence of necessity not available. Conviction stands. |

R v Ungar 2002 OCA - Rare Case of Necessity Succeeding

|  | R v Ungar 2002 OCA |
| --- | --- |
| **Facts** | A was charged with dangerous operation of a motor vehicle. He drove on the wrong side of the street and broke the speed limit with lights flashing while driving to deliver emergency medical assistance to an injured woman. |
| **Rule** | ***Lampkin J.*** It was not a reasonable legal alternative to fail to respond to the call for assistance. The defence of necessity succeeds and the Crown should never have pressed these charges. - TJ ignored test from Perka and Latimer, but still likely the defense would’ve succeeded anyway. Likely possible to use necessity when the emergency threatens a 3rd party. |
| **Application** | Necessity here is a justification because of peril to another person, harm caused was proportionate |
| **Conclusion** | Acquitted |

##  DURESS

**1. Burdens of proof**

Rests on A to raise an air of reality about each element and shifts to the Crown to disprove one of the elements BRD. Court should apply “reasonable, but strict standards” for the purpose of deciding whether an air of reality has been raised (Ruzic)

1. **Theoretical Basis of this Defence**

Ruzic 2001 SCC suggests that duress is largely an **excuse** based on the same principles as necessity. Like necessity, duress arises because A responds to some external pressure. Hibbert 1995 SCC acknowledges that occasionally duress may negate MR, but cautions that this only works where A’s desire or motive is an element of the offence and that desire or motive is not present because of the duress.

1. **Status of Section 17 and Common Law**

A person who is charged as a **party to an offence** (i.e. who did not perform the AR) can raise the common law defence of duress (Hibbert, Paquette)

It is unclear whether **the list of excluded offences** at the end of s. 17 is constitutional (Ruzic did not answer this question). ***Possible resolutions if this arose:***

* the list violates s. 7 because it renders a person who acted in a morally involuntary fashion liable to conviction, so must be read out & s. 17 would apply to these As (relying on Ruzic);
* the words *“this section does not apply”*, coupled with the presumption that parliament does not intend to pass unconstitutional legislation (Ruzic, Lavallee) lead to the conclusion that a person charged with an offence listed in s. 17 should rely on the CL defence (relying on Paquette, Hibbert)
* the list violates s. 7 but is saved by s. 1 (note that s. 7 violations are almost never saved under s. 1 and given the strong language in Ruzic, this is an unlikely resolution.)

**The relationship between s. 17 and the common law is unclear after Ruzic.** *Do these defences have the same elements?* In Ruzic, Le Bel J. confirmed the TJ’s use of the CL defence in a case in which s. 17 applied, suggesting that the two defences have converged. However, the SCC did not explicitly make that ruling.

1. **The Elements of Section 17 Compared with CL (post *Ruzic*)**

|  |  |
| --- | --- |
| **Section 17 (after Ruzic)** | **Common law** |
| A commits a non-excluded offence | A commits an offence as a party (*Hibbert.*) |
| A is acting under compulsion by threats of death or bodily harm (query *to which a person of reasonable firmness would respond*) | A is acting under compulsion by threats of death or serious bodily harm to which a person of reasonable firmness would respond. (*Ruzic*) |
| To A or another person (*Ruzic*). | To A or another person. |
| Which A believes will be carried out | Which A believes will be carried out. |
| From a person | From a person. |
| While A has no safe avenue of escape, using a modified objective test. (*Ruzic*) | While A has no safe avenue of escape, using a subjective and modified objective test (*Hibbert*) |
| Query whether proportionality will be read in (likely yes per *Ruzic*).  | And A’s criminal act is proportionate to the threat made against A (*Ruzic*) **measured on subjective-modified objective standard** (compare *Latimer*).  |
| Immediacy and presence requirements are read out – query whether imminence requirement is read in (*Ruzic*). | And there is a sufficiently close connection in time between the threat and its execution to overbear A’s will. (*Ruzic*) |
| And A is not a party to a conspiracy or association | A acted without voluntarily assuming the risk (obiter from *Ruzic)*. |

**5. Cases**

R v Hibbert 1995 SCC - Charged as Party to the Offence

|  | R v Hibbert 1995 SCC |
| --- | --- |
| **Facts** | A was charged with attempted murder and convicted of a lesser included offence. A was charged as a party to an offence where the AR was actually committed by B. A testified that he had taken B to V’s apartment because B had threatened to kill A if he did not co-operate. A also testified that he had no opportunity to run away or warn V. |
| **Rule** | **Lamer CJ**  Common law defence of duress is available to parties who are charged under s.21 C.C. (per **Paquette**) A cannot rely on the defence if s/he had an opportunity to safely extricate him or herself. The opportunity to retreat is assessed on a subjective and modified objective standard (using the **Lavallee** standard, not the **Creighton** standard – discussion at 13-27 ff). The **Lavallee** modification applies to self-defence and duress (and by analogy as an excuse-based defence, necessity). Duress does not vitiate MR but takes away moral voluntariness like necessity |
| **Application** |  |
| **Conclusion** | New trial. |

R v Ruzic 2001 SCC - Heroin Mule Caught

|  | R v Ruzic 2001 SCC |
| --- | --- |
| **Facts** | A was charged with importing heroin and using a fake passport. She testified that she and her mother had been threatened by M, who had also been physically violent to A. expert evidence supported A’s assertion that she did not trust the Yugoslavian police to protect her from M. A claimed duress under s. 17 C.C. |
| **Issues** | *Does duress under section 17 apply on the circumstances?* |
| **Rule** | **Le Bel J**  Statutory defences receive no special deference from the court under the Charter – they are subject to review on the same principles as other statutory provisions. It is a principle of fundamental justice under s. 7 Charter that only voluntary conduct “behaviour that is the product of a free will and controlled body, unhindered by external constraints” attracts the penalty and stigma of criminal liability. The requirements in s. 17 that a threat be one of “immediate” harm and that the crime occur in the physical presence of A violate this principle of fundamental justice and cannot be saved under s. 1. Unsure if list of excluded offences is constitutional or not - likely not |
| **Application** | TJ in this case was correct to leave the CL defence of duress to the jury. Not reasonable for her to call police because of political situation in her country |
| **Conclusion** | Acquittal stands. |