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# SEXUAL ASSAULT

**1982 reforms:** offences of rape, attempted rape, sexual intercourse w/ feeble minded + indecent assault replaced w/ 3 new offences:

1. Sexual assault (s.271)
2. Sexual assault w/ weapon, accomplices, or causing bodily harm (s.272)
3. Aggravated sexual assault (s.273)

→ reformed to recognize as form of violence by mirroring assault provisions; acknowledgement that many forms of sexual assault

**1992 reforms:** emphasis of factors specific to the context of SA and violence

Consent

* voluntary agment to engage in sexual activity in question
* can be withdrawn by words or conduct expressing non consent
* can’t be given w/o capacity, where there’s an abuse of power, or by a third party
* Mistake as to consent restricted as a defence

**M. Randall:**

* Many complainant’s experiences of SA disqualified by ideal victim archetypes
* Revision + advances in the law on books doesn't necessarily = law in action
  + Victims of report = fraction of victims
  + 42% of reports result in charges
  + Fraction of charges result in convictions

# Actus Reus of Sexual Assault



### *Ewanchuk* [1999] SCC*:* leading decision on elements of SA

AR est’d if 3 elements proven:

1. **Touching:** AR of assault under s. 265(1)
   1. Application of force, directly or indirectly, to another person w/o that person’s consent (265(1)(a)) or
   2. Attempt or threatening by acts or gestures to apply force causing other person to reasonably believe they will be assaulted (265(1)(b))
2. **Sexual Nature of the conduct:** meaning of sexual for purposes of ss. 271-3 not defined in the Code but cts have held that it can be determined on an objective basis:
   1. Would a reasonable person regard the conduct as being of a sexual nature?
   * Intent to gain sexual gratification not determinative but can be factored in:

### R v V(KB), [1993] SCC

* Court applied Chase in upholding a conviction for sexual assault in a case involving a father who had grabbed his three-year-old son’s genital area as a disciplinary response to the child’s having done this to others.
* Although the father’s purpose was clearly not sexual gratification, Iacobucci J reasoned that “it was clearly open to the trial judge to conclude from all the circumstances that the assault was one of a sexual nature and that the assault was such that the sexual integrity of the appellant’s son was violated.”

R v Chase [1987]:req’s examination of all the circs including “part of body touched, nature of conduct, words and gestures, and all other circs” (in Chase, a man grabbed 15 yo around breasts and told her “come on dear, don’t hit me, I know you want it” → words essential part of determining sexual nature

1. **Absence of consent: subjectively** determined by ref to complainant’s state of mind towards the touching at the time that it occurred (*Ewanchuk)*

* If complainant is credible, her statement that she didn’t consent must be accepted as being true…“no matter how strongly her conduct may contradict that claim, the absence of consent is est’d”
* Accused’s perception of the complainant’s state of mind is irrelevant
* According to s. 273.1(1) consent = voluntary agment of complainant to engage in the sexual activity in question; Implied consent off the table

## Factors Serving to Vitiate Consent

1. **Section 265(3)** No consent is obtained where the complainant submits or does not resist by reason of:

(a) the **application of force** to the complainant or to a person other than the complainant;

(b) **threats or fear** of the application of force to the complainant or to a person other than the complainant;

(c) **fraud**; or

(d) the **exercise of authority**.

*Cuerrier* [1998] SCC est’d new test for fraud; in order to est fraud, two things must be proven:

1. **Dishonesty** → deliberate deceit respecting HIV status or non-disclosure of that status;
2. **Deprivation** 
   1. Harm → may consist of actual harm or simply the risk of harm
   2. Non-consent w/o fraud → complainant would have refused to have unprotected sex w/ accused if they had known of the disease // deprivation of making the choice

### *R v Mabior* [2012] SCC

* Failure to disclose (the dishonest act) amounts to fraud where the complainant would not have consented had he or she known the accused was HIV-positive, and where sexual contact poses a **significant risk** of or causes actual serious bodily harm (deprivation).
* A significant risk of serious bodily harm is established by a **realistic possibility** of transmission of HIV (realistic somewhere between ‘any’ risk and ‘high’ risk)
* Realistic possibility negated if:

1. Viral load at time of sexual relations was low, *AND*
2. Condom protection was used

→ reduces risk to such that it is a **speculative possibility** not realistic

### R v Hutchinson [2014] SCC

|  |  |
| --- | --- |
| **F** | Δ poked holes in condoms; GF refused to have unprotected sex; GF got pregnant |
| **I** | 1. Had the complainant consented? 2. Was her consent vitiated by fraud according to Mabior/Cuerrier analysis? |
| **D** | Majority: consent but vitiated; Minority: Never consented |
| **R** | Fraud test:   1. Δ’s decision to use sabotaged condoms = deprivation 2. deprivation of a woman’s capacity to choose to protect herself from an increased risk of pregnancy by using effective BC; given that preg causes profound bodily changes, this posed a significant risk of serious bodily harm   Minority: Complainant consented to a diff sexual activity (consent to intercourse w/ condom) which is diff from consenting to unprotected sex |

1. **Section 273.1(2)**
2. Subject to subsection (2) and subsection 265(3), “consent” means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.
3. No consent is obtained, for the purposes of sections 271, 272 and 273, where
4. the agreement is expressed by the words or conduct of a person **other than the complainant**;
5. the complainant is **incapable of consenting** to the activity;

(c) the accused induces the complainant to engage in the activity by **abusing a position of trust, power or authority**;

(d) the complainant **expresses**, by words or conduct, a **lack of agreement** to engage in the activity; or

(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a **lack of agreement to continue** to engage in the activity

R v JA, [2011] no advanced consent:

clear that Parl intended to define consent to req’re consciousness throughout the activity in question in order to provide active consent throughout every phase of the activity. It is not possible for an unconscious person to satisfy this req’ment, even if she expresses her consent in advance. [essential to be able to revoke consent @ any time]

1. **Jobidon Principle:** Common Law principle that you can’t consent to bodily harm

### *Jobidon*, [1991]: No Consent to Bodily Harm

Courts have applied the ***Jobidon*** principle to cases of sexual assault, with the effect that **consent to sexual activity can be invalidated** – on policy grounds – where the accused intends to (and causes) **serious bodily harm**.

**Note:** It is the accused’s intention to cause bodily harm that vitiates consent – bodily harm which is recklessly caused will not be the subject of conviction.

→ non-exhaustive list of factors that may vitiate ∴ vital to look @ particular facts and circs of each case when determining whether valid consent has been given

R. v. Welch (1995) Ont CA:

**Facts:** Complainant sustained bruising from a beating with a belt and bleeding from her rectum for a number of days after sexual activity with the accused. Note that the complainant claimed she did not consent to the conduct.

**Ontario Court of Appeal:**

"[T]he **consent** of the complainant, assuming it was given, **cannot detract from the inherently degrading and dehumanizing nature** of the conduct. Although the law must recognize individual freedom and autonomy, when the activity in question involves pursuing sexual gratification by deliberately inflicting pain upon another that gives rise to bodily harm, then the personal interest of the individuals involved **must yield** to the more compelling societal interests which are challenged by such behaviour.”

### *Zhao* (2013) Ont. CA:

Did not think that the conclusion in Welch was “particularly helpful to establish a **generally applicable standard** or threshold by which consent is vitiated in sexual assault causing bodily harm cases.” The social utility of intimate sexual relationships is significantly different from that of consensual bar fights ∴ the “**underlying policy reasons for the ruling in Jobidon cannot be generally applicable** in a sexual context as suggested by the ruling in Welch.”

# Mens Rea of Sexual Assault

Not specified by the code; ct has determined there are two elements to MR for the offence:

1. **Intentional** touching of the complainant (intent to apply force as per s.265(1)(a))
2. **Knowledge that the complainant does not** consent or being **reckless or wilfully blind** as to the lack of consent (*Sansregret*)

[Absence of consent is central to both AR + MR]

* MR considers consent from accused’s perspective whereas AR considers it from complainant’s
* MR DOES NOT REQUIRE THE ACCUSED TO HAVE HAD MOTIVE OF SEXUAL GRATIFICATION

## Honest but Mistaken Belief in Consent:

* Crown will lead evidence to suggest that the accused knew that the complainant was not consenting at the time of the act (or was reckless/wilfully blind as to lack of consent)

→ will then fall to Δ to deny this, typically by arguing **honest but mistaken belief in consent**

* **Note:** This claim amounts to a **denial** of the second *mens rea* element, but is often referred to as a defence of honest but mistaken belief in consent (mistake of fact defence)

### Pappajohn v The Queen [1980]: Key case

* b/c at the time, the MR for rape was subjective intent or recklessness as to all the elements of the crime, it followed that mistake of fact was subjective in nature (given that it is a denial of the second MR element)
* However, it must be grounded in evidence which must come from some other source than the accused’s own testimony in order to give it an air of reality suff to req’re judge to instruct jury on it
* It did not have to be objectively reasonable
* However, w/ 1992 amendments, the mistaken fact defence was clarified (s.265(4)) to include that the ct, in determining honesty of the belief, must consider the presence or absence of reasonable grounds for that belief

### R v Park, [1995]:

There must be demonstration of air of reality to the defence

### Air of Reality: Osolin v The Queen, [1993] 4 SCR 595

|  |  |
| --- | --- |
| **Issue 1:** | whether s 265(4) infringed s 11(d) (presumption of innocence) or s 11(f) (right to trial by jury) of the Charter. |
| SCC unanimously held that it did not: | “Section 265(4) of the Criminal Code is applicable to all assaults, not just sexual assaults. It appears to be no more than the codification of the common law defence of mistake of fact…A defence for which there is no evidentiary foundation should not be put to the jury…” |
| **Issue 2:** | What constitutes an air of reality? |
| Cory, J: | * no req’ment of evidence independent of the accused in order to have the defence put to the jury; mere assertion by the accused that “I believed she was consenting” will not be sufficient. * req’d that defence be supported by evidence * diametric opposition of testimony precludes ‘air of reality’ in a mistaken belief |
| McLachlin (for the majority) | It is logically possible for a jury to accept parts of the testimonies of both A and C, concluding that NWS lack of actual consent, the accused honestly believed in consent. |

## Section 273.2:

It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

(a) the accused’s belief arose from the accused’s

(i) self-induced intoxication, or

(ii) recklessness or wilful blindness; or

(b) the accused did not take **reasonable steps**, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

→ puts the onus on accused to satisfy themselves that there was consent

### 273.2(a)(i) Self Induced intoxication:

* Gen’l rule of CL that self-intox isn’t a defence to crimes of **gen’l intent** (i.e. where the intent does not go beyond the commission of the prohibited act vs. intent as to consequences)
* SA is a crime of gen’l intent b/c MR is the intention to do the touching and also b/c SA is a crime of violence which doesn’t req’re sexual gratification (i.e. intent as to consequence)

∴ self-induced intox insufficient to raise reasonable doubt

#### R v Daviault, [1994]:

Raised possibility that accused might be able to raise defence of extreme intox producing involuntary conduct + led to amendments in ss. 33.1(1)-33.1(3)

1. 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, as described in (2)
2. Marked departure is found when a 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 w/ or threatens to interfere w/ bodily integrity of another
3. This will apply in respect of this Act or any other that includes as an element an assault or any other interference/threat of interference w/ bodily integrity

### 273.2(a)(ii) Wilful Blindness:

* Codifies the principles expressed in *Sansregret* and rules out defence of honest mistaken belief where the accused was **subjectively aware of the need to inquire** into consent but then deliberately failed to do so

### 273.2(b) Reasonable Steps to Ascertain Consent:

**(1)** accused takes reasonable steps is based on what he **subjectively** knows at the time [subjective]; **but**

**(2)** Section 273.2 also requires that the accused act as a **reasonable person** would in the circumstances – specifically by taking reasonable steps to ascertain whether the complainant was consenting [objective]

#### Sansregret v The Queen [1985] 1 SCR 570

|  |  |
| --- | --- |
| **P** | A/Appellant: Man in early 20s // Complainant: former partner |
| **F** | * C ended rel’nship; A later broke in and terrorized her w/ file-like instrument * In order to calm him, C held out hope of reconciliation and had sex w/ him * A broke in again and C tried to defuse situation same way * C stated that her consent was solely for purpose of protecting self from further violence |
| **I** | Should A be acquitted b/c of his honestly held belief that C was consenting? |
| **L** | *Pappajohn*: if mistake held honestly, though it is unreasonable, it should lead to acquittal. |
| **RA** | Where the accused is deliberately ignorant as a result of blinding himself to reality, the law presumes knowledge, in this case: knowledge of the nature of the consent. There was therefore no room for the operation of this defence. |
| **RE** | If he had only attacked her the once, that would’ve been okay.  Because he went back a second time, that constituted wilful blindness: A was aware of C’s likely reaction to his threats and to proceed w/ intercourse in these circumstances is self-deception to the point of wilful blindness |

**Therefore, when is the defence available?**

1. Accused believed the victim communicated consent to the sexual activity in question (claim to have not heard a ‘no’ ≠ suff); and
2. Had taken reasonable steps, given the circumstances known to him at the time, to discover whether the victim consented to the sexual activity in question

→ unless both are met, the defence is unavailable (*Ewanchuk*); to make it broadly applicable would be to undermine the principle that victims must be believed in their assertions of non consent

#### Determining Reasonableness:

“The Constitutionality of Bill C-49: Analyzing Sexual Assault as if Equality Really Mattered”

C Boyle & M MacCrimmon

* Difficult to characterize what reasonable steps are b/c mistaken belief is itself a hybrid:
  + On the one hand, it is a denial of MR
  + On the other, it is similar to a defence proper in that it will not be addressed unless it has an ‘air of reality’ on the evidence
  + Linking ‘reasonable steps’ to MR concept of mistaken belief through wording in terms of behaviour rather than belief further complicates things
* If willingness to entertain such beliefs is privileged by the law as a defence, then women belong to a group the members of which can be harmed with impunity as long as self-interested misconceptions about women’s sexual accessibility are maintained
* *Darrach*: addressed constitutionality of reasonable steps by stating that the test is a modified objective one: Accused need not take all reasonable steps & accused who has taken reasonable steps but NTL makes unreasonable mistake about consent is entitled to an acquittal
  + Startling. One would assume that reasonable steps are those which a person would take to *avoid* making an unreasonable mistake
  + “it is difficult to contemplate that a man who has sexual intercourse with a woman who has not consented is morally innocent if he has not taken reasonable steps to ascertain that she was consenting.” **Why would the man who does not take sufficient steps to avoid an unreasonable mistake be construed as morally innocent**?

##### R v Malcolm, 2000 MBCA 77

* appears that s. 273.2(b) must be considered in situations where there is an air of reality to the accused’s assertion of honest belief in consent **and the accused is neither wilfully blind nor reckless in that belief**, but circumstances exist which call into question the reasonableness of the accused’s actions.
* Section 273.2(b) requires the court to apply a quasi-objective test to the situation.
  + First, the circumstances known to the accused must be ascertained.
  + Then, the issue which arises is, if a reasonable man was aware of the same circumstances, would he take further steps before proceeding with the sexual activity?
    - If the answer is yes, and the accused has not taken further steps, then the accused is not entitled to the defence of honest belief in consent.
    - If the answer is no, or even maybe, then the accused would not be required to take further steps and the defence will apply.

# HOMICIDE

**Code contains 3 Homicide offences:**

s. 229 – Murder (1st + 2nd) **[mandatory life penalty]**

s. 234 – Manslaughter **[residual offence:** all culpable homicide that is not murder or infanticide deemed to be manslaughter]

s. 223(1) – Infanticide

# Actus Reus of Homicide

Causing the death of another human being **[for all homicide offences]**

Key provision on causation: s. 229(1): “A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being”

* Number of general and specific principles set out in CL and CC governing how causation must be understood and applied
* CC doesn’t comprehensively codify all causation issues in homicide
* Mostly dealing with legal causation b/c factual causation is relatively simple **[but for]**

## General Principles of Causation in Homicide:

### Smithers + the thin skull rule:

**Malfunctioning epiglottis-kicked in the stomach-contributing cause**

Enough to show that the action(s) of the accused was at least a contributing cause of death, outside the de minimis range.

**Moral luck** argument that one who assaults another must take his victim as he finds him

Consistent w/ Charter req’ments of fund’l justice ∴ actions of the accused can be the cause of death even if death was not a foreseeable outcome of the unlawful act

### R v Cribben, (1994) + objective foresight of bodily harm neither trivial nor transitory:

Law of manslaughter states that where a reasonable person would have foreseen the risk of bodily harm which is neither trivial nor transitory, and the unlawful act is at least a contributing cause of the victim’s death, outside the de minims range, then person is guilty of manslaughter // req’ment of objective foresight removes any risk that the de minimis test could engage the criminal responsibility of the morally innocent

### R v Nette + significant contributing cause:

* Confirmed test but changed wording to “significant contributing cause”
* Ct also stated it applied to all forms of homicide
* But test is diff in 1st degree murder where actions must form an essential, substantial, and integral part of the killing of the victim (as per ***Harbottle***)
* Dissent noted that there is meaningful distinction between ‘contributing cause not trivial or insignificant’ and ‘significant contributing cause’
* Some evidence suggests that cts have been taking a stricter approach to causation as a result
  + E.g. **R v Talbot (2007) Ont. CA:** evidence that an act was *possibly* a cause of death is not enough // ct found that a punch to head was not a significant cause of death
  + Also cts may be more willing to accept intervening causes

## Specific Principles of Causation in Homicide:

1. Responsible for death even when it might have been prevented by resorting to proper means (s. 224)

* Anticipating a situation like *Blaue* ∴ accused can be criminally liable even if victim could’ve been saved if they had accepted or rec’d proper medical treatment

1. Liability even where immediate cause of death is the proper or improper treatment provided in good faith (s. 225)

* Effectively displaces the old common law position that in certain circumstances, very bad treatment could be an intervening cause.

**→ If this comes up in an exam: “Is the medical treatment an intervening cause? No, because s. 225 states…”**

1. Liability even if their act can only be said to have ‘accelerated’ the death (s. 226)
2. Liability for threatening to do something that causes another to cause their own death or by willfully frightening a human being in the case of a child or sick person (s. 222(5)(c) and (d))
3. Maybin + Intervening causes:

* The point of these statutory prov’ns is to pre-empt speculation re: intervening causes (*Nette*)

*Maybin* sets out analytical tools which should be referred to when dealing w/ intervening causes

(reasonably foreseeable intervening act + independent intentional acts)

# Manslaughter

Killing of another human being in one of the culpable ways specified by s.222(5)

No minimum punishment (except w/ use of firearm); max punishment is life impris

Residual offence constructed from 222(1), (5), and 234 (i.e. it’s manslaughter if it’s not murder or infanticide)

Typically involves two broad situations:

1. killings where impossible to est MR for murder and
2. killings that are unintentional result of conduct that constitutes a marked departed from the reasonable standard

## s. 222(5)(a) Unlawful Act Manslaughter

**ACTUS REUS:**

1. The unlawful underlying act can include any fed’l or prov’l offence that is not a strict liability offence (*DeSouza*)
2. must be objectively dangerous (*DeSouza*)
3. causing the death of another human being; must est accused’s actions were a significant contributing cause of death (*Nette; Smithers*)

**MENS REA:**

1. MR for the underlying unlawful act: you look to the CC prov’n covering that offence and est the relevant fault req’ment [e.g. where an accused punches vic, relevant unlawful act will be assault under 265(1)(a) and MR will be intentional application of force]

If it is a strict liability or negligence offence, the ct will ‘read up’ the offence to req’re crown to prove that the unlawful act constituted a **marked departure from reasonable standard of care** (*Gosset*)

1. That it was objectively foreseeable that the unlawful act would give rise to a risk of bodily harm that is neither transitory nor trivial **[modified objective test]** (*Creighton*)

### R v Creighton, [1993] SCC:

|  |  |
| --- | --- |
| **F** | Creighton: an experienced drug user, was charged with manslaughter by means of the unlawful act of trafficking drugs when he injected cocaine into a friend who then died as a result of an overdose |
| **I** | Was something more than MR for underlying unlawful act required in order to establish *mens rea* for unlawful act manslaughter? |
| **D** | Affirmed the manslaughter conviction on the basis that a reasonable person in the circumstances would have been aware of the risk of non-trivial bodily harm |
| **RA** | “[T]he test for the *mens rea* of unlawful act manslaughter in Canada … is (in addition to the *mens rea* for the underlying offence) objective foreseeability of the risk of bodily harm which is neither trivial nor transitory, in the context of a dangerous act. Foreseeability of death is not required.”  However, an accused can only be held to the standard of a reasonable person if the accused was capable, in the circumstances of the offence, of attaining that standard. |
| **Maj.**  **(Bev)** | **(1) *Actus Reus***  **Unlawful act:** Crown established that the accused had been trafficking narcotics (cocaine) contrary to Section 4 of the Narcotics Control Act 1985 (now repealed)  **Death:** Yes.  **(2) *Mens Rea***  **Underlying Act:** clearly intended to administer the prohibited narcotic to the victim (as required for offence of trafficking under the *Narcotics Act*).  **Objective Foresight:** Court will **infer** objective foresight of harm where the underlying unlawful act is **manifestly dangerous** [ct had no trouble drawing inference here]  **However**: Note that the Court was stressed the need to consider questions of capacity before drawing any inference of objective foresight. **Incapacity only relevant when it relates to incapacity to appreciate the nature of the risk which the activity in question entails**   * when considering the standard of care required of the accused, the court should look to a general conception of the reasonable person (as opposed to a reasonable person with the characteristics of the accused); to do otherwise would make it difficult to hold people accountable for their dangerous actions. * One can be held criminally responsible for negligent conduct on the objective test (does not on its own violate fund’l justice) ***but* those who intentionally cause harm should be punished more severely** than those who cause harm inadvertently * Acts of ordinary negligence may not suffice to justify imprisonment; rather, must constitute a **‘marked departure’** from the standard of a reasonable person * Without a constant minimum standard, the duty imposed by the law would be eroded and the criminal sanction trivialized → leading to inexperienced people being acquitted for similar/worse conduct where experienced would be convicted |
| DIFFERENCE BETWEEN APPROACHES TURNS ON THE EXTENT TO WHICH PERSONAL CHARACTERISTICS OF THE ACCUSED MAY AFFECT LIABILITY UNDER THE OBJECTIVE TEST | |

**Suggested line of inquiry in cases of penal negligence:**

1. Actus reus established? → req’s that negligence constitute a marked departure from standards of reasonable person in all circumstances
2. Mens rea established? → mens rea for objective foresight of risking harm is normally inferred from the facts; The standard is that of the reasonable person in the circumstances of the accused.
   1. If a person has committed a manifestly dangerous act, it is reasonable, absent indications to the contrary, to infer that he or she failed to direct his or her mind to the risk and the need to take care.
   2. the normal inference may be negated by evidence raising a reasonable doubt as to lack of capacity to appreciate the risk.
3. If 1 and 2 met: did the accused possess the requisite capacity to appreciate the risk flowing from his conduct?
   1. If this further question is answered in the affirmative, the necessary moral fault is established and the accused is properly convicted.
   2. If not, the accused must be acquitted.

## Section 222(5)(b) – Manslaughter: Criminal Negligence

“A person commits culpable homicide when he causes the death of a human being (b) by criminal negligence.”

**ACTUS REUS:** provided by elements set out in **s. 219:**

1. Every one is criminally negligent who
2. in doing anything, or
3. omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons.
4. For the purposes of this section, duty means a duty imposed by law.

**MENS REA:** must establish that the accused was criminally negligent;

1. **Objective test** (*Creighton, R v JF*)
2. Behaviour of the accused represented a **marked and substantial departure** from the standard of reasonable care expected of a reasonable person in the circumstances. (*Creighton, R v JF*)
3. Objective foresight of death is not req’d (*R v H(AD)*)
4. Ct will not impute particular characteristics of the accused (e.g. age, education) to the reasonable person unless those characteristics would leave the accused incapable of appreciating the relevant risk (*Creighton, R v JF*)

### R v JF [2008] SCC:

|  |  |
| --- | --- |
| **F** | 4 yo child (M) beaten by foster mother + dies; foster father (JF) charged w/ manslaughter by criminal negligence (s.222(5)(b) and unlawful act manslaughter (s.222(5)(a) – underlying act was failing to provide necessaries of life per s. 215)  JF convicted on criminal negligence but acquitted on unlawful act |
| **I** | Whether the conviction under (b) was inconsistent with acquitting under (a) |
| **D** | Yes, inconsistent, conviction reversed. |
| **RA** | Jury should begin by considering the MR for unlawful act manslaughter – if **yes,** then the jury should consider whether the accused had MR for criminal negligence manslaughter. If yes, then guilty of criminal negligence. If no, unlawful act. |
| **Ma** | **AR** → the same for both offences: failure of accused to fulfil duty to protect his foster child from foreseeable harm from his spouse; which failure caused death.  **MR** → similar but different:   |  |  | | --- | --- | | Unlawful act (222(5)(a)) | Criminal Negligence (222(5)(b)) | | **Marked departure** from the conduct of a reasonably prudent parent in circs where it was objectively foreseeable that the omission would lead to a risk of danger to M’s life, or a risk of permanent endangerment to his health | **Marked and substantial departure** from the conduct of a reasonably prudent parent in circs where accused either recognized and ran an obvious and serious risk to M’s life or gave no thought to that risk |   ∴ more difficult to establish MR for criminal negligence |
| **Mi** | Verdicts not inconsistent b/c the two offences rely on different **actus reus:**   |  |  | | --- | --- | | Unlawful act (222(5)(a)) | Criminal Negligence (222(5)(b)) | | Failure to provide necessaries of life (s. 215 = underlying offence).  Failure of the duty must, when viewed objectively, endanger the victim’s life or permanently endanger the victim’s health | Failure of this duty must show a wanton or reckless disregard for the lives or safety of others. |   → You can logically find that (b) is met but (a) isn’t; you could find a failure to perform duty but not find that the person actually turned their mind to the endangerment of the victim’s health or life. |

# Second-Degree Murder

Distinction between 1st and 2nd degree murder contained in s. 231

2nd degree murder if it falls w/in scope of categories of 229(a), (b), or (c)

AR: Directly or indirectly causing death of another human being // MR varies w/ category

## Section 229(a): Intentional or Reckless Killing

### s. 229(a)(i): Intentional Killing:

***R v Vaillancourt,* [1987] SCC**: accused must have “actual subjective foresight of the likelihood of causing death coupled w/ the intention to cause death”

Note that in practice, where crown can establish intention, there will be little difficulty in establishing subjective foresight

### s. 229(a)(ii): Reckless Killing:

Accused “means to cause bodily harm that he knows is likely to cause death and is reckless as to whether death ensues or not”

∴ must show 2 things:

1. Accused subjectively intended to cause bodily harm
2. They had subjective knowledge that the bodily harm was of such a nature as would be likely to result in death [\*\*in order to find subjective knowledge, you can use evidence of what the reasonable person is likely to know]

***R v Nygaard,* [1989]:** reference to recklessness in 229(a)(ii) is an ‘afterthought’ b/c if the accused was intending bodily of a certain type, you can usually infer that the person was reckless as to whether death might result [i.e. beating excessively with a baseball bat]

### R v Simpson, 1981 Ont. C.A.

|  |  |
| --- | --- |
| **F** | Accused charged w/ 2 counts attempted murder |
| **I** | Whether paraphrasing MR as being intention to cause bodily harm that the accused knew or **ought to have known** was likely to cause death was correct |
| **D** | Appeal allowed; new trial. Paraphrasing a serious error. |
| **RA** | Intention to cause bodily harm that the accused ought to have known was likely to cause death is merely evidence from which, along with all other circs, jury may infer that the accused had subjective intention and knowledge but does not in itself constitute the requisite MR |
| **RE** | * MR for attempted murder found under s. 229 – a subjective standard * The requisite knowledge that the intended injury is likely to cause death must be brought home to the accused subjectively * addition of ‘ought to know’ erroneously imposes liability on an objective basis |

### R v Cooper, *1993 SCC:*

|  |  |
| --- | --- |
| **F** | Accused strangled victim but had no recollection afterwards until he woke up to find her dead; charged with murder |
| **I** | Whether the accused could be found guilty despite not having subjective intent at the precise moment of death. (what degree of temporal coincidence is req’d between the act and intent for murder under 229(1)(a)) |
| **RA** | A series of acts may be parts of same transaction. While AR + MR must coincide at some point during this transaction, it need not be at the exact moment of death. It was sufficient that the intent and the act of strangulation coincided at some point. |
| **RE** | * Once accused formed intent to cause bodily harm which he knew was likely to cause her death, he need not be aware of his actions at the moment she died * By beginning the act of strangling her at all, it can be reasonably inferred that there was necessary coincidence * Impossible to prove duration of intent ∴ if death results from a series of wrongful acts that are a part of a single transaction, it must be est’d that the requisite intent coincided at some point with the wrongful acts |

## Section 229(b): Transferred intent

**MR:** intentionally or knowingly causing death to one person is transferred to act of killing the eventual victim[if you cross the moral threshold of intending to kill one person, the fact that you kill someone else shouldn’t operate as a bar to conviction for that death]

### R v Droste (No. 2), SCC 1984:

Accused intended to kill wife by setting care on fire; fire killed 2 kids who were buckled into car. B/c attempted murder of wife was planned and deliberate, the intent and guilty knowledge could be transferred to death of children

### R v Fontaine, 2002 MB CA

|  |  |
| --- | --- |
| **F** | Δ driving w/ 2 other people in the car while involved in high speed chase; ran car into parked trailer. One of the passengers died. Charged w/ 1st degree under 229(b) b/c Δ had intended to commit suicide. |
| **I** | Is the intention to commit suicide transferrable to the accidental killing of someone else? |
| **D** | No; s. 229(b) does not apply in situations where accused intended to kill himself. |
| **RA** | A person who intends to kill himself does not have the level of moral blameworthiness required to convict someone of murder. |
| **RE** | * “cause death of a human being” could be interpreted as killing any human or specifically another human; b/c of ambiguity, interpretation must be taken that favors Δ (*contra proferentem* rule) * Suicide + murder are different conceptual entities; have hx been treated as such * One is legal and the other illegal ∴ transferred intent does not follow * Good policy reasons to differentiate between them * Murder is an offence of specific intent and as such, a transfer of general intent cannot satisfy the MR req’ment   + Transferred intent only works where the specific intent is identical from another crime |

## Section 229(c): Unlawful Object:

provides that “where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death…” which **looks** like murder conviction can rest on objective foreseeability of death

Elements:

1. For an unlawful object:
2. Person does anything that he or she knows ~~or ought to know~~ is likely to cause death

[*R v Martineau,* 1990 SCC: reference to ‘ought to know’ inconsistent w/ ss. 7 and 11(d) of Charter – subjective MR constitutionally required MR for murder]

1. And causes death

Difference between unlawful act and object: Unlawful object must be clearly distinct from the immediate dangerous (unlawful) act (*R v Vasil,* 1981 SCC)

### R v Shand, 2011 ONCA:

|  |  |
| --- | --- |
| **F** | Δ w/ others, entered victim’s home for purpose of robbery. During fight, Δ took out gun and pointed it at victim’s upper body; Gun went off and victim killed  Accused claimed shooting was accidental |
| **I** | What is the proper interpretation of s. 229(c)? |
| **D** | Must be interpreted to exclude the objective arm |
| **RE** | **s. 229(c) will be satisfied where the following elements are present:**  (a) accused must pursue unlawful object **other than to cause death/bodily harm** of the victim  (b) unlawful object must itself be indictable offence requiring MR  (c) in furtherance of unlawful object, accused must intentionally commit a dangerous act // cannot be too broad and vague, otherwise it won’t fit well into causation framework + will skew subsequent MR analysis  (d) dangerous act must be distinct from unlawful object but only in the sense that the unlawful object must be something other than the likelihood of death, which is the harm foreseen as a consequence of the dangerous act  (e) the dangerous act must be a specific act or a series of closely related acts, that in fact results in death, though **dangerous act need not itself constitute an offence**  (f) when the dangerous act is committed, the accused must have subjective knowledge that death is likely to result; vague realization that death is possible = insufficient; if dangerous act done as a reaction + out of panic, that may show that subjective foresight was not present |
| **A** | 1. Unlawful object = robbery 2. Yes, indictable offence which req’s MR 3. Dangerous act = drawing gun and using to subdue occupants of room + take marijuana ∴clearly done in furtherance of (a) 4. Yes, unlawful object clearly distinct (robbery) 5. Yes, closely related; not just talking about danger of entering house for purposes of robbery, but the confined acts that occurred in basement 6. MR is critical issue; if, when he pulled out the gun and used it in the confined space of the basement bedroom, appellant knew that it das likely to cause death but did so NTL in pursuance of the theft, this would satisfy MR |

## Constitutional Considerations

Constructive murder/felony murder provisions which made it possible for an individual who did not necessarily foresee likelihood of death to be convicted of murder

### Vaillancourt v The Queen, [1987] SCC

|  |  |
| --- | --- |
| **F** | Δ committed armed robbery w/ an accomplice; Δ armed w/ knife, acc w/ gun; accomplice shoots someone  Δ testified he was certain gun was unloaded b/c he had made accomplice empty bullets |
| **I** | Is s. 213(d) valid or should it be struck down for conflict w/ s.7 and/or 11(d) b/c it does not require MR? |
| **L** | s. 213(d): culpable homicide is murder where person causes death where committing/attempting to commit, whether or not he means to cause death and whether or not he knows death is likely if (d) he uses a weapon or has it upon his person |
| **RA** | Because of the special nature of the stigma attached to a conviction for murder, the principles of fund’l justice require subjective mens rea. |
| **RE** | Murder is distinguished from manslaughter only by the mental element w/ respect to death ∴ clear that there must be some special mental element before culpable homicide = murder; this special element gives rise to the moral blameworthiness which justifies the stigma and sentence attached to a murder conviction |

### R v Martineau, [1990] SCC:

|  |  |
| --- | --- |
| **F** | M & T set out to rob a trailer. M thought it would just be robbery but T killed the people whose home they had robbed. |
| **I** | Whether s. 213(a) offends principles of fundamental justice by allowing conviction for murder without proof of subjective foresight of death. |
| **L** | S. 213(a) classifies homicide as murder where person causes death of human being while committing or attempting to commit a range of offences, whether or not the person means to cause death or whether or not he knows that death is likely if he means to cause bodily harm for the purpose of facilitating the commission of the offence or flight after committing or attempting to commit the offence |
| **RA** | The principles of fundamental justice require that a conviction for murder be based upon proof beyond a reasonable doubt of subjective foresight of death. This maintains a proportionality between the stigma and punishment attached to a murder conviction and the moral blameworthiness of the offender. |
| **RE** | S. 213(a) removes from Crown the burden of proving BRD that accused had subjective foresight of death  → violates fund’l principle that punishment be proportionate to the moral blameworthiness of the offender |

→ note that parliament has responded to the decisions of the court in this area by enacting a number of mandatory sentencing provisions for manslaughter – s. 236: est’s minimum sentence of 4 yrs imprisonment (max: life impris) for manslaughter committed w/ firearm

### R v Morrisey, 2000 SCC 39:

Upheld const’l validity of a related provision that mandates a 4-yr minimum sentence for crim negligence causing death when firearm used in commission of offence

# First Degree Murder

**s. 231 of CC establishes the categories of 1st degree murder:**

231(1) Murder is first degree murder or second degree murder.

(2) Murder is first degree murder when it is planned and deliberate.

(3) Without limiting the generality of subsection (2), murder is planned and deliberate when it is committed pursuant to an arrangement under which money or anything of value passes or is intended to pass from one person to another, or is promised by one person to another, as consideration for that other’s causing or assisting in causing the death of anyone or counselling another person to do any act causing or assisting in causing that death. [contracted murder]

(4) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder when the victim is

(a) a police officer, police constable, constable, sheriff, deputy sheriff, sheriff’s officer or other person employed for the preservation and maintenance of the public peace, acting in the course of his duties;

(b) a warden, deputy warden, instructor, keeper, jailer, guard or other officer or a permanent employee of a prison, acting in the course of his duties; or (c) a person working in a prison with the permission of the prison authorities and acting in the course of his work therein.

(5) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder in respect of a person when the death is caused by that person while committing or attempting to commit an offence under one of the following sections:

(a) section 76 (hijacking an aircraft);

(b) section 271 (sexual assault);

(c) section 272 (sexual assault with a weapon, threats to a third party or causing bodily harm);

(d) section 273 (aggravated sexual assault);

(e) section 279 (kidnapping and forcible confinement); or

(f ) section 279.1 (hostage taking).

**Charging and Sentencing:**

1. In cases of 1st degree murder, the accused will be charged under s.229 (general provision for murder) and s.231 (specific setting out the conditions for first degree murder)
2. Both 1st and 2nd degree murder carry a mandatory sentence of life impris but w/ 2nd degree, trial judge may set parole ineligibility between 10-25 years vs. with 1st degree, it’s set at 25 (s.745(a))
3. If multiple murders, sentencing judge can order periods of parole ineligibility apply consecutively

## Actus Reus:

As with all homicide offences, AR is provided in **Section 222(1):**

A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.

## Mens Rea:

1. MR for murder set out in s. 229(a): Accused intended to kill the victim or meant to cause bodily harm that is likely to cause death and is reckless as to whether death ensues

**AND**

1. Fault consistent w/ one of the categories in s. 231(2)-(6)

## Section 231(2): Planned and Deliberate:

Requires more than intention to kill; in addition, must be proven by Crown that the murder was

1. Considered and not impulsive (R v More [1963] SCC) **AND**
2. That there was planning and deliberation beforehand

### *Banwait,* (2011) SCC:

* A planned murder is one that is committed as a result of a **scheme** or **plan** that has been **previously formulated or designed**
* A deliberate act is one that the actor has taken time to **weigh the advantages and disadvantages** of their act. The deliberation must take place before the act of murder
* ∴ A murder committed on a sudden impulse and without prior consideration, even with an intention to kill is not a deliberate murder

### *R v Widdifield,* (1961) Ont. S.C. {Authority for content of ‘planned and deliberate’}

**Planned:** Natural meaning of a calculated scheme or design which has been carefully thought out, and the nature and consequences of which have been considered and weighed (doesn’t need to be complex)

Time involved in developing plan is important, rather than the time between development of plan and the doing of the act

**Deliberate:** Natural meaning of ‘considered,’ ‘not impulsive,’ ‘slow in deciding,’ ‘cautious,’ implying that the accused must take time to weight the advantages and disadvantages of his intended action

### *R v Droste (No. 2)* [1984] – Transferred Intent for First Degree Murder

Can an accused be guilty of first degree murder if they end up killing someone different from the person who was the subject of the plan?

* Section 214(2) (now **Section 231(2)**) **does not create** a separate substantive offence of first degree murder; it classifies for sentencing purposes the substantive offence of murder as defined by ss. 212 and 213 (now **Sections 229 and 230**).
* Murder is in the first degree when “it” is planned and deliberate. // criminalizing a planned and deliberate murder not the planned and deliberate murder of a particular person.
* Planning and deliberating the murder of the intended victim and the accidental killing of someone else is therefore sufficient to make the killing of the unintended victim planned and deliberate.

### *R v Nygaard,* [1989] SCC: Possible for 1st degree murder to be found on basis of secondary intent in s. 229(a)(ii) – A reckless killing

Ruthless beating ending in death: Accused committed as grave a crime as the accused who specifically intends to kill. Society would find the drawing of any differentiation in the degree of culpability an exercise in futility. The crime defined in s. 212(a)(ii) (now 229(a)(ii) - “means to cause bodily harm that he knows is likely to cause death and is reckless as to whether death ensues or not”) can properly be described as murder and on a “culpability scale” it varies so little from s. 212(a)(i) (intentional murder) as to be indistinguishable.

## Section 231(4): Murder of Police Officer, and other officials in the course of their duties

* **Why have this section:** Deterrence; reflection of the fact that POs put themselves in line of danger for public good
* Code does not indicate whether the accused must know (or be reckless to the fact) that the victim is a police officer

### *R v Munro* (1983) Ont. CA

Held that the normal CL presumptions apply (i.e. subjective knowledge)

∴ The Crown must prove that the accused either knew (or was reckless by subjectively adverting to the possibility) that the victim was a police officer.

**Argument:** The Court stated that some degree of subjective fault (in addition to the *mens rea* requirements of Section 229(1)) were needed to justify the additional penalties / stigma attached to a conviction under Section 231(4).

* Accused doesn’t have to know for certain that the victim is PO; instead it is enough to show some subjective advertence to the risk
* Again, we can use an objective test to infer whether there was subjective knowledge

### *R v Prevost,* (1988) Ont. CA:

→ Note that these seem to reflect the idea that ‘on duty’ seems to be about PO being PO rather than the doing particular acts of policing.

The phrase “on duty” has been interpreted in a “purposive manner” to apply to a whole tour of duty including breaks.

### R v Boucher, (2006) QCCA

Officer is still on duty even though they may have been using excessive force at the time they were killed

### *R v Collins,* (1989) Ont. CA

Accused argued that section infringed s. 7 by allowing conviction w/o proof of planning and deliberation, seen as the only way the higher degree of moral blameworthiness could be found

**Upheld:** Rationale is to provide add’l protection due to the danger of their occupations and in order to act as an add’l deterrent; could also be argued that the murder of a person whose obligation it is to maintain law and order carries with it an added moral culpability and requires a heavier deterrent to protect the public interest.

Crown must prove that the murderer had knowledge of the identity of the victim as one of the persons designated in the subsection and that such person was acting in the course of his duties or was reckless as to such identity and acts of the victim. Otherwise, there would be no difference in moral culpability ∴ no reason to impose a higher penalty.

## 3. Section 231(5): While Committing

(5) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder in respect of a person when the death is caused by that person while committing or attempting to commit an offence under one of the following sections:

(a) section 76 (hijacking an aircraft);

(b) section 271 (sexual assault);

(c) section 272 (sexual assault with a weapon, threats to a third party or causing bodily harm);

(d) section 273 (aggravated sexual assault);

(e) section 279 (kidnapping and forcible confinement); or

(f ) section 279.1 (hostage taking).

Renders a homicide first degree when the death is caused by that person while committing or attempting to commit an offence (under one of the referenced sections only – if it falls o/s those enumerated offences, it’s 2nd degree)

**Remember:** On the question of causation, the SCC in *Harbottle* held that in order to secure a conviction under Section 231(5), the Crown must prove that the actions of the accused formed “an essential, substantial and integral part of the killing of the victim.”

**For mens rea, key question:** What is meant by the phrase ‘while committing?’

* leading decision on the requirements of s 231(5) **is R v Paré: “while committing”]**

### R v Russell, 2001 SCC

|  |  |
| --- | --- |
| **F** | * accused (appellant) tied and gagged GF in her bed, forced her to have sex and left her there * Then went to the basement and beat and stabbed victim to death * Charged with first degree murder |
| **I** | Whether s.231(5) reqs the victim of the murder and the enumerated offence to be the same person |
| **D** | S, 231(5) does not require the victims to be the same. It only requires that the accused have killed while committing or attempting to commit one of the enumerated offences. Appeal dismissed |
| **R** | “While committing or attempting to commit” already req’s that the killing be closely connected temporally and causally w/ an enumerated offence. It’s immaterial that the victims might be different among the two offences. |
| **R** | * Language is clear, prov’n doesn’t state the victims need to be the same person * In other places, CC limits “while committing or attempting to commit” in express language and no limiting language used here ∴ reasonable to assume that if Parl had intended to limit the scope of s.231(5), it would have done so explicitly * Other places within 231 invoke examples where someone other than the intended victim of an underlying offence could be killed * Plus, 231(5) reaches both successfully executed offences and attempts; where attempts thwarted by an intervener, if the intervener is killed the accused should still be held liable. * Question of whether it’s actually a single continuous transaction given that there are 2 victims; none of the cases cited (e.g. Pare) dealt w/ multiple victim scenarios so it’s not that those cases foreclose application to multiple victim scenarios * Organizing principle is still that unlawful domination is particularly blameworthy and deserving of more severe punishment * fact that the prov’n must be strictly construed doesn’t in itself justify restricting the ordinary meaning of the prov’ns words → the words are restrictive enough |

### *R v Arkell,* 1990 SCC [Addressed constitutionality of 231(5)]:

Parliament’s decision to treat more seriously murders that have been committed while the offender is exploiting a position of power through illegal domination of the victim accords with the principle that there must be a proportionality between a sentence and the moral blameworthiness of the offender and other considerations such as deterrence and societal condemnation of the acts of the offender. Therefore, I conclude that, in so far as s. 214(5) is neither arbitrary nor irrational, it does not infringe upon s. 7 of the Charter.

### *R v Luxton,* 1990 SCC: Constitutional challenge at ss. 214(5)(e) [231(5)(e)] and 669[745(a)]:

Arguing that ss. 7, 9 + 12 were infringed by the combined effect of the sections which appellant claimed failed to meet const’l req’ment that a just sentencing system contain a gradation of punishments differentiated according to the malignancy of offences and that sentencing be individualized

**S. 7:** it is proportional, given that forcible confinement involves illegal domination which markedly enhances the moral blameworthiness of an offender ∴ decision to elevate murders done while committing forcible confinement to 1st degree murder is consonant w/ proportionality. Also consistent w/ Individualized sentencing esp. b/c it’s only applicable to those who’ve killed w/ subj foresight of death

**S. 9:** Not arbitrary. It’s a narrowly defined class of murderer under an organizing principle of illegal domination w/ specifically defined conditions. Definition of forcible confinement may allow for differing circumstances in different cases but this isn’t a sign of arbitrariness

**S. 12:** (cruel and unusual punishment); this is punishment for most serious crime which has the most serious level of moral blameworthiness. Punishment is deservedly severe. It reflects societal condemnation; it is not excessive and does not outrage standards of decency. It is rational to treat serious crimes w/ appropriate degree of certainty and severity.

# Infanticide

**s. 233:** “A female person commits infanticide when by a wilful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of her child her mind is then disturbed.”

**s. 237:** Every female person who commits infanticide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

### *R v LB,* 2011 ONCA

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| --- | --- |
| **F** | LB acquitted of murder charges and convicted of included offence of infanticide for killing her 2 children. Dr. of opinion that her mental state was likely impacted/assoc’d w/ mood and behavioural changes as consequence of childbirth |
| **I** | 1. Is infanticide both a substantive offence and a partial defence to a murder charge, or is it exclusively a substantive offence that may, in appropriate cases, be an included offence in a murder charge to be considered iff crown fails to prove murder?    1. What is MR for infanticide?    2. If an accused can raise a defence of infanticide to a murder charge, does the crown have the onus of negating the defence or is the accused req’d to establish on BoP that the homicide constitutes infanticide |
| **D** | 1. Infanticide was initially, and still is, both a stand alone indictable offence and a partial defence to a charge of murder    1. MR for infanticide is the same as that for manslaughter    2. Crown has onus of negating the defence BRD |
| **RA** | Assuming a sufficient evidentiary basis to give the infanticide claim an air of reality, the respondent was entitled to be acquitted of the murder charge and convicted of the included offence of infanticide unless the crown could negate the defence of infanticide BRD |
| **RE** | AR:  Req’s mother-child rel’nship where child <1 yo  At time of homicide, mother’s mind must be ‘disturbed’, in connection w/ childbirth or lactation effects [unlike other mental states that mitigate crim responsibility, no causal connection necessary between disturbance and the decision to cause death ∴ more appropriately in AR vs MR]   * s. 222(4) declares that “culpable homicide is murder or manslaughter or infanticide” → suggests that these are alternatives to one another ∴ one homicide cannot be both murder and infanticide * Treating infanticide as partial defence is consistent w/ Parliamentary intent to keep the offences distinct; removing it would allow crown to have too much discretion in charging * it is the AR which distinguishes infanticide from murder and manslaughter   MR:   * MR for murder and infanticide are different, see differing language between intent to kill in s. 229 vs ‘wilful’ in s. 233 * Given obvious hierarchy among homicide offences, MR for manslaughter more appropriate (i.e. must establish the MR assoc’d w/ the unlawful act that caused the child’s death and objective foreseeability for the risk of bodily harm to the child from that assault) * reaches not only an intention to kill but also objective foresight of bodily harm; providing a coherent and comprehensive reading of the homicide provisions * Presence of MR for murder, while not negating the partial defence of infanticide, is not a condition precedent to the existence of the defence * Presumption of innocence, const’lly protected by s.11(d) of the Charter, req’s Crown to prove essential elements of the crime BRD   + also req’s Crown to negate potential defences to same standard of proof → any deviation from that burden of proof is a prima facie violation and is const’l only if justified under s. 1 * Infanticide is sui generis, not a variation on the mental disorder req’ment of the insanity defence ∴ the reversal of burden in insanity doesn’t imply anything about appropriate burden w/ infanticide * No statutory limit to presumption of innocence in the statute to suggest that Δ would bear burden of proving the defence, and there’s no justification for reading one in |

## Steps for application of Section 233

**(i)** The jury should first decide whether the Crown has proved beyond a reasonable doubt that the accused caused the child's death. If Crown hasn’t, accused must be acquitted.

**(ii)** If the Crown proves causation, the jury next decides whether the Crown has proved beyond a reasonable doubt that, in causing the child’s death the accused committed culpable homicide as defined in s. 229. Most often involve proving that the accused committed an unlawful act (usually an assault). If the Crown fails to prove a culpable homicide, the accused must be acquitted.

**(iii)** If the Crown proves that the accused committed a culpable homicide, the jury must then decide the nature of the culpable homicide. The jury should be told to consider infanticide first. If the Crown fails to negate any element of infanticide beyond a reasonable doubt, the jury should be instructed to return a verdict of not guilty of murder, but guilty of infanticide.

**(iv)** If the Crown does negate infanticide, the jury should be told to go on and consider whether the Crown has proved murder. If the Crown proves murder, then the jury should be instructed to determine whether the murder is first or second degree murder.

**(v)** If the Crown fails to prove murder, the jury should be instructed to return a verdict of not guilty of murder, but guilty of manslaughter.

# PARTICIPATION

# Theoretical Underpinnings of Accomplice Liability

General principle of criminal law that individuals are not responsible for the actions of others, and should not be held liable for acts/outcomes they did not intend; so what is the justification for taking a different approach when it comes to accomplices?

## Derivative Theory

Liability of an accomplice derives from the offence committed by the principal. An accomplice has linked themselves to the actions of the principal by assisting in their unlawful efforts

**OR**

The accomplice has authorized the principal to commit the offence on behalf of both of them, so the accomplice has generated their own liability

|  |  |
| --- | --- |
| **Advantages** | **Disadvantages** |
| Intuitive justification because both accomplice and principal are being treated as having caused the same harm, even if their methods differ | Doesn’t explain why a person ought to be held responsible for the actions of another here as opposed to other situations  **Dennis Baker:**  “Criminalization for another's conduct is morally objectionable, because it ignores the separateness of each person as a responsible autonomous agent. Generally, it is unjust to criminalize people for the remote consequences of their actions, as criminal liability usually requires some proof of harmful conduct that is imputable to some culpable action of those who are to be criminalized. The harm principle is designed to uphold this ethical principle. Being able to fairly impute blame for the actual harmful conduct is a fundamental requirement of justice and fairness both in attributing fault and blame from an ex post (trial) perspective and from an ex ante (criminalization) perspective.” |
| Explicitly recognizes that when people act together to commit a crime, it’s sometimes a matter of chance as to who ‘does the deed’ | Doesn’t explain how much association/participation is required; the theory lumps all accessories together, regardless of their level of assistance to the crime actually committed |
| There is no liability where the principal doesn’t commit the offence | Doesn’t explain how to determine liability when the principal acts o/s of expectations of the accomplice |
| Can produce harsh results:  Foreseeability alone is not sufficient to convict for murder but for accomplice liability, it would be |

## Causation Theory

Accomplice liability derives from the fact that they can be said to have causally contributed to the harm to the victim ∴ not b/c of association w/ principal but b/c they are themselves a cause of the harm

Derivative theory

vs. causation theory

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| **Support** | **Criticism** |
| Can defend the theory on the grounds that it properly recognizes that both the principal and the accomplice have contributed to the harm, but provides a basis for treating their actions as different types of wrongs. | Removes the distinction between principals and accomplices altogether, which ignores the fact that the accomplice and principal may be responsible for *different types* of harm |
| John Gardner: “Both principals and accomplices make a difference, change the world, have an influence. The essential difference between them is that accomplices make their difference through principals, in other words by making a difference to the difference that principals make.” | Hornle: while individuals who collect (or distribute) child pornography are clearly acting wrongfully (in helping to fuel the market for the pornography), the wrong is not the same as that committed by those who create the pornography (and abuse children in the process) |
| Herring: on this view of the theory, although the collector and creator of child pornography do different wrongs, we can also acknowledge that they have caused harm to the children concerned. | Clarkson and Keating: Even though the accessory does not cause the ultimate harm, it is clear that he does cause a “harm”, namely the harm of assisting or encouraging the principal offender. The harm involved in assisting or encouraging other criminals, like the ‘harm’ in endangerment offences, is quite different from the ultimate harm actually inflicted and does not necessarily deserve the same level of criminal liability and punishment.” |

# Modes of participation:

|  |  |
| --- | --- |
| 1. **Actual Commission** | **Section 21(1)** Everyone is a party to an offence who  (a) **actually commits** it; |
| 1. **Aiding** | **S. 21(2)(b)** does or omits to do anything for the purpose of **aiding** any person to commit it; or |
| 1. **Abetting** | **S. 21(2)(c) abets** any person in committing it. |
| 1. **Common intention** | **Section 21(2)** Where two or more persons form an **intention in common** to carry out an unlawful purpose and to assist each other therein and any one of them, in **carrying out the common purpose, commits an offence**, each of them who knew or ought to have known that the commission of the offence would be a **probable consequence of carrying out the common purpose** is a party to that offence. |
| 1. **Counselling** | **Section 22 (1)** Where a person **counsels another person to be a party to an offence** and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.  **Section 22(2)** Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled **knew or ought to have known was likely to be committed in consequence of the counselling.**  **Section 22(3)** For the purposes of this Act, **counsel includes procure, solicit or incite.** |

## R v Thatcher, [1987]

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| **F** | T charged w/ causing unlawful killing of ex-wife; at trial, some evidence supported theory that he was principal perp while other evidence supported he had arranged the killing and had been in another city at the time → T appealed on the basis that TJ erred in failing to instruct jury that the verdict must be unanimous re: mode of participation |
| **I** | Whether a jury needs to be unanimous in determining the mode of participation in order to properly convict an accused |
| **RA** | Because s. 21(1) places the aider/abettor on the same ‘legal footing’ as the principal, unanimity as to the type of participation is not required for conviction. If the jury has a reasonable doubt that an accused was innocent, there must be an acquittal. But if each juror is satisfied that there was *some* type of participation, then conviction is justified. |
| **RE** | Adopting an alternative rule risks an acquittal despite the fact that each juror is satisfied BRD that accused is guilty under a mode of participation in Section 21(1) |
| **ETC** | * The way that it was charged, the form of commission was combined so that a piece of evidence that supports only one scenario being added to evidence that supports the other scenario can be added such that the evidence can be compiled against the accused * jury not req’d BRD standard for either sort of commission b/c using a confluence of evidence where each substantive charge would independently not have enough evidentiary support * Why might this be problematic? → ct is working backwards – by saying that if either is true, you’re assuming guilt – outcome-focused |

## *R v Pickton,* 2010 SCC 32:

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| **F** | Pickton tried for 6 counts of 1st degree murder  Crown theory throughout trial was that Pickton personally shot the women & defence theory dependant on proposition that others involved, to the exclusion of Pickton  TJ’s instructions: jury should convict if they were satisfied *either* that Pickton shot the victims or that he actively participated in their killing  Pickton appealed on the basis that TJ took defence by surprise by instructing jury that they could convict for active participation and/or actual commission |
| **I** | Whether TJ needed to instruct the jury on the law of aiding or abetting |
| **D** | SCC confirmed that jury instructions didn’t negatively impact fairness of trial/constitute miscarriage of justice |
| **RE** | 1. The theory that others may have possibly been involved could not have come as a surprise to the jury or the defence b/c throughout the trial Pickton’s counsel consistently argued the potential implication of others 2. Even though there was no explicit instruction on aiding and abetting, the relevant law had been explained to the jury sufficiently, considering the facts and evidence |

## Section 21(1)(b) and (c): Aiding and Abetting

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

(a) actually commits it;

(b) does or omits to do anything for the purpose of aiding any person to commit it; or

(c) abets any person in committing it.

***Thatcher*** and ***Pickton***: Not necessary for the Crown to establish / specify which person was the principal or the aider / abettor when both are known – as both the principal and the aider / abettor will be guilty of the same offence.

Reiterated in ***Briscoe* [2010]:** “Section 21(1) of the Criminal Code makes perpetrators, aiders, and abettors equally liable ... The person who provides the gun, therefore, may be found guilty of the same offence as the one who pulls the trigger. **The *actus reus* and *mens rea* for aiding or abetting, however, are distinct from those of the principal offence**.”

These are distinct forms of *actus reus*, and either one can give rise to liability under Section 21.

***R. v. Briscoe* [2010]**: "To aid under s. 21(1)(b) means to assist or help the actor… To abet within the meaning of s. 21(1)(c) includes encouraging, instigating, promoting or procuring the crime to be committed."

[These are the definitions you would be expected to use for a fact pattern]

→ e.g. A distracts security guard so B can shoplift: A is an aider // C is a salesclerk who encourages or allows B to shoplift: C is an abettor.

### Actus Reus

Crown must prove that the accused did (or, in some circumstances, omitted to do) something that **assisted** (aiding) or **encouraged** (abetting) the perpetrator to commit the offence;

\*\*\*note that mere presence/passive acquiescence will not be usually sufficient for s.21(1)

#### Greyeyes, [1997] SCC:

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| **F** | An undercover police officer asked G if he knew where he could get some cocaine. G directed the officer to an apartment building, facilitated entry + negotiated purchase of drugs |
| **I** | Can someone who facilitates the purchase of a narcotic be found guilty of trafficking as an aider or abetter under s. 21(1)? |
| **RA** | Where an accused knows they are assisting in the illegal sale of narcotics and intends to so assist, encourage, and facilitate, they can be held liable for trafficking pursuant to s. 21(1)(b) and (c) |
| **RE** | Did more than act as a purchaser (no trafficking offence for mere purchasers); Actions reveal concerted effort to effect transfer of narcotics  **Aid:** Intention req’d is not desire, but intending the consequences that flow from the aid to the principal (accused need not approve of/want the consequences)  **Abet:** Must be proven that accused encouraged principal w/ words or acts and that they intended to do so |

#### Dunlop & Sylvester v The Queen, [1979] SCC:

[passive observation ≠ participation]

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| --- | --- |
| **F** | D&S charged w/ being parties to offence of rape.  V, 16 yo, subjected to gang rape by 18 members of motorcycle club  D&S brought beer to site of the rape and saw that two members were having intercourse w/ V but claimed they didn’t take part |
| **I** | Can presence at the commission of an offence ground liability through s. 21? |
| **RA** | Mere presence, without evidence of any positive act or omission to facilitate the unlawful purpose, cannot be convicted as being parties to the offence. |
| **RE** | Presence at the commission of an offence can be evidence of aiding and abetting if accompanied by other factors, such as prior knowledge of the principal offender's intention to commit the offence or attendance for the purpose of encouragement.  no evidence that while the crime was being committed either of the accused rendered aid, assistance, or encouragement to the rape of the complainant.  A person cannot properly be convicted of aiding and abetting in the commission of acts which he does not know may be or are intended.  One must be able to infer that the accused had prior knowledge that an offence of the type committed was planned, *i.e.* that their presence was with knowledge of the intended rape |

#### R. v. Williams (1998)

Accused was a passenger in a car that was driven by S. Car was searched at the Canada-US border by Canada Customs officers; found 7 bags of cocaine. Accused convicted of importing a narcotic. Overturned by **ONCA:** even if the Crown could prove that the accused knew of the presence of the drugs, "mere passive acquiescence" to their transportation could not be sufficient to justify a conviction of importing a narcotic.

### Omissions?

In some cases, a failure to act be sufficient to constitute aiding and/or abetting for the purposes of Section 21.

**→** If the accused is under a legal duty to act and fails to do so, if the failure to act is accompanied by the intent to provide assistance or encouragement to the person(s) actually committing an offence, the accused will become a party to that offence as an aider and/or abettor.

#### R v Dooley, (2009)

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| **F** | 7 yo boy being abused by dad and step mom; died of severe head injury. Both parties blamed each other. Both charged & convicted of 2nd degree murder. |
| **I** | Can a failure to act ground party liability for murder? |
| **D** | Father convicted of abetting under 21(1) for failing to protect |
| **RA** | A parent who does nothing to protect a vulnerable child from physical abuse can be a party to murder if he or she foresaw the likelihood of the child’s death as a consequence of the abuse. |
| **RE** | Aiding includes an omission to do something where the accused had a legal duty to act in the particular circumstances. A parent owes their child a legal duty to prevent the infliction of harm by the other parent where harm is reasonably foreseeable  → Failure to take reasonable protective steps can be a form of aid to the other parent and as a positive encouragement to the other parent to harm the child |

#### Nixon, (1990)

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| --- | --- |
| **F** | N = PO in charge of lockup. Convicted as a party to aggravated assault of a prisoner |
| **RA** | In some circumstances the presence of an accused will be held to have encouraged the commission of the offence. Here, the failure to act in accordance with a duty to protect prisoners under his care rendered him a party because his purpose was to facilitate the commission of an offence. |

### Mens Rea:

#### R v Briscoe, [2010] – Mens Rea Requirements for accomplices:

**“purpose” = 2 components**

1. intent to assist in commission of the crime (desire for successfully commission of offence not req’d)
2. Knowledge → flows from the requirement of intent //matter of common sense

* Must have **knowledge** of the type (though not nec. exact nature) of offence committed
* **BUT** for 1st degree murder, b/c of extra blameworthiness, knowledge must include fact that the murder is planned and deliberate
* Wilful blindness may substitute for actual knowledge

### Can you aid or abet in the commission of an impossible crime?

R. v. Chan (2003):Accused took part in the purchase of what he believed to be a large quantity of heroin. Drugs had already been intercepted (and substantially “diluted”) by the police, meaning they contained only a small amount of heroin @ time of purchase. Convicted of drug possession.

**→CA:** sufficient for the Crown to prove that the accused **believed** he was dealing with heroin.

**→Roach:** suggests that the accused might have had the *mens rea* even if there were no drugs in the package that was received

## Common Intention – Section 21(2)

Accused must form common intention w/ another person(s) to carry out an unlawful purpose and to assist them with that purpose

when CI is found, accused will be held responsible for crim acts that are a probable consequence of the CI, if the accused knew or ought to have known that the crim acts were a probable consequence

**Roach:** A person who forms a **common unlawful intent** (for example, to commit a robbery) will be a party to other offences that he or she knew or ought to know would probably occur (such as forcible confinement or manslaughter).

**→** goes on to suggest that 21(2) usually only applies where the principal has committed crimes that go beyond what the accomplice intended to aid / abet. ***R. v. Simpson* (1988)**

### Actus Reus:

Crown must prove:

1. Accomplice formed a **common intention** with the principal to assist in carrying out an **unlawful purpose** (contrary to crim code), **and**
2. The subsequent offence committed was one that the **accused either knew or ought to have known** would be a probable consequence of carrying out common purpose

#### R v Jackson, [1993]

One possible scenario: Jackson and Davy had formed a common intention to rob Rae and that, in the course of the robbery, Jackson murdered Rae.

Even if he did not participate in the murder, D could be liable under s. 21(2) in this scenario.

If D foresaw that murder was a probable consequence of carrying out the common purpose of robbery, he would be guilty of second degree murder.

If D did not foresee the probability of murder **but a reasonable person in all the circumstances would have foreseen at least a risk of harm to another as a result of carrying out the common intention**, D could be found guilty of manslaughter under s. 21(2).”

**→** Accused doesn’t have to foresee the actual offence for which the principal is ultimately convicted (murder).

**Why?** Because murder and manslaughter are included offences – both are forms of **homicide**.

### The Defence of Abandonment

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| **Principle** | The accomplice will not be held liable for the actions of the principal if they have abandoned the common intention prior to the commission of the offence |
| **Why it exists** | ***R. v. Gauthier* [2013]:**  Two policy reasons in criminal law for making this defence available to parties to offences. First, there is a need to ensure that only morally culpable persons are punished; second, there is benefit to society in encouraging individuals involved in criminal activities to withdraw form those activities and report them. |
| **Application** | For the defence of abandonment, the accused must prove:  **(i)** **communicated** the intent to abandon the common intention to the person or person involved; and  **(ii)** communicated in a **timely and unequivocal** manner.  **(iii)** Took reasonable steps in the circumstances either to **neutralize** or otherwise cancel out the effects of his or her participation or to prevent the commission of the offence. |
| **Key Cases** | *R v Kirkness* [1990] & *R v Gauthier* [2013] |

#### R v Kirkness, [1990] SCC: Robbery turned SA and murder // what constitutes abandonment of CI

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| --- | --- |
| **F** | K & S (Principal) broke into E’s house. S sexually assaulted E while K robbed house. K also propped a chair in front of the front door as a barricade. After SA, S dragged E to hallway, she lay limp and S began choking her. K told S to stop. S then put a plastic bag over E’s head, put her in bathtub and turned on hot water. K denied ever touching E.  → K & S both charged w/ 1st degree murder; S convicted, K acquitted. |
| **I** | Whether there was sufficient evidence to support that K had abandoned CI or was not in support of the SA and murder. |
| **RA** | The fact that K told S to stop strangling E indicates that if he had ever been a party to the offences, he had removed himself from any joint enterprise w/ S that involved the killing of E. |
| **RE** | * K could not be said to have known that S would either commit SA or kill E * Did not know that death or bodily harm short of death might result from SA * Did not enter the bedroom * Bodily harm resulted from suffocation which occurred after SA * Not aiding and abetting b/c he told S to stop * Placing the chair in front of the door could have been a preventive measure against getting caught robbing house as facilitating SA |

#### R v Gauthier, 2013 SCC 32: Must show proof of neutralization before considering abandonment

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| --- | --- |
| **F** | G entered into pact w/ husband to murder children and commit suicide  After supplying husband w/ pills to kill children, G told him they shouldn’t do it  G convicted of aiding and abetting in the murder of her 3 children |
| **I** | Was there sufficient evidence of abandonment such that the jury should have been instructed on it? |
| **D** | The defence did not have an air of reality ∴ did not need to be put to the jury. |
| **RA** | Adds a new requirement for the defence of abandonment: the accused now has to demonstrate that they took reasonable steps in the circumstances either to **neutralize** or otherwise cancel out the effects of his or her participation or to prevent the commission of the offence. |
| **RE** | Criteria to establish an air of reality to the defence:   1. Intention to abandon or withdraw from unlawful purpose 2. Timely communication of the abandonment to the person in question to those who wished to continue 3. Communication served unequivocal notice upon those who wished to continue 4. Accused took, in a manner proportional to his or her participation in the commission of the planned offence, reasonable steps in the circumstances either to neutralize or otherwise cancel out the effects of his or her participation or to prevent the commission of the offence.  * Certain circs where notice is sufficient to neutralize effects of participation and others where more is needed – esp where person has aided in the commission of the offence * You can raise this defence in aiding or abetting **but** “Aiders and abettors generally do much more than promise their support in carrying out an unlawful purpose in the future.” |
| **A** | No air of reality to the defence. Even if it were assumed that evidence showed communication of withdrawal, more was needed b/c she didn’t just promise to take part, she supplied her spouse w/ intoxicants used to kill the children ∴ had to do more to neutralize the effects of her participation |

#### R v Logan, [1990] SCC: Constitutionality of MR in s 21(2) in relation to attempted murder

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| --- | --- |
| **F** | Accused were charged w/ a number of offences relating to a robbery of a store and wounding of a cashier. 2 were convicted of attempted murder |
| **I** | Whether s. 21(2)’s objective component is constitutional (b/c of the possibility of convicting a party based on objective intent but convicting principal would have to show subjective intent) |
| **RA** | When the principles of fundamental justice require subj. foresight in order to convict a principal of attempted murder, that same minimum is req’d to convict a party to the offence |
| **RE** | * if the offence is one for which s. 7 req’d a minimum degree of MR, Vaillancourt does preclude Parl from providing for conviction of a party to that offence on the basis of MR below const’lly req’d minimum   ∴ Prima facie infringement of s. 7  → Infringement meant to deter joint criminal enterprises and to encourage criminal parties to ensure that their accomplices do not commit offences beyond the planned unlawful purpose = sufficient importance to justify overriding the rights of an accused  → BUT it unduly impairs s. 7 rights when it operates for an offence that carries such a severe stigma and for which there is a const’lly req’d minimum degree of MR |

#### R v Jackson, [1993] – s. 21(2) and manslaughter:

## Counselling as a Form of Participation

### R v O’Brien, NSCA 2007

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| **F** | O’Brien (Δ/A) convicted of counselling Ms. Richard to rob a convenience store  R was a drug addict; Δ was her supplier  R confessed to robbing the convenience store twice in order to get money to buy drugs |
| **I** | Whether Δ could be seen as a party to the offences for counselling |
| **D** | The words of Δ, taken in context, were encouragement and therefore counselling. |
| **R** | Evidence suggests that Δ was @ R’s home offering encouragement and reassurance to further his own undertaking  For the 2nd robbery, R stated she was worried about it but Δ talked her into it (contrary to the submission that she would’ve done it regardless) |

## Accessory After the Fact

Defined in ss. 23, 23.1, and 463:

* Accessory is not a party to the offence but a **principal in a distinct offence** that consists of **facilitating the escape** of another person who was a party to the offence
* Conviction of an accessory is **not contingent upon conviction of a party to the offence** (*R v Shalaan*)

### *R v Duong,* 1998 ONCA: degree of knowledge req’d to be an accessory

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| --- | --- |
| **P** | L: committed murder // D: alleged accessory |
| **F** | * L called D and asked if he could stay at D’s apt; L stated he was “in trouble for murder” and had no place to go. D allowed L to hide in his apt for 2 wks * When asked what he knew about the homicides, D said he had seen media reports of the homicides but didn’t want to know anything b/c if he knew, he would get in trouble for helping him hide * TJ held that Crown would have to prove that D knew L was a party to a murder when D agreed to hide him from the authorities and that wilful blindness would suffice |
| **I** | 1. Whether accused must have knowledge of the specific offence of murder or whether knowledge of a criminal offence was sufficient 2. Whether wilful blindness amounts to knowledge |
| **L** | S. 23(1): “An accessory after the fact to an offence is one who, knowing that a person has been a party to the offence, receives, comforts or assists that person for the purpose of enabling that person to escape”  s.240 provides **more severe penalties for accessories to murder** vs. accessories to other crimes under s. 463 |
| **RA** | 1. Language of 23(1), charging language, and sentencing provisions indicate that where the Crown chooses to charge someone with being an accessory after the fact to murder, it **cannot gain a conviction based on a more generalized knowledge that the principal had committed *some* crime** 2. Actual suspicion, combined with a conscious decision not to make inquiries which could confirm that suspicion, is **equated in the eyes of the criminal law with actual knowledge (i.e. wilful blindness)**. Both are subjective and both are sufficiently blameworthy to justify the imposition of criminal liability. |
| **RE** | * Liability turns on the decision not to inquire once real suspicions arise and not on the hypothetical result of inquiries which were never made. * Where an accused chooses to make no inquiries, preferring to remain “deliberately ignorant,” speculation as to what the accused would have learned had he chosen to make inquiries is irrelevant to the determination of the blameworthiness of that accused’s state of mind |

# INCHOATE OFFENCES

**Basic Rule:** a person can be held criminally liable for a crime even if the crime is not completed, provided that there is proof of some prohibited act and accompanying MR

**Three types:** attempt, incitement (also called counselling) and conspiracy

2 overarching questions about the nature and limits of inchoate liability:

1. At what point does the desire to commit a crime – and actual efforts to undertake a criminal act – constitute an attempt that warrants sanction and punishment?
2. When and how should the crim law distinguish between unsuccessful and successful efforts to engage in criminal activity?

Other key questions:

* If one of the central aims of the criminal law is to acknowledge harms and punish wrongs, how do we justify criminalizing inchoate offences? (**i.e. punishing w/o harm)**
  + prohibited act gives rise to a culpable risk of criminal behaviour and is coupled w/ an intention on the part of the wrongdoer to engage in the criminal act → the fact that they haven’t succeeded doesn’t make them any less blameworthy
  + sometimes difficult to distinguish successful versus unsuccessful attempts; there might actually **be** harm
  + Deterrence
  + The harm is the creation of the risk – the fact that certain consequences didn’t come about does not negate that there was a risk (similar to dangerous driving offence where there is no consequence piece of AR)
    - Risk management vs. harm management

# Attempt

A person who tries to commit a criminal offence but does not succeed can nevertheless be found guilty of attempting the offence if his or her conduct falls within the terms of s. 24:

**Attempts**

**24(1)** Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.

**Question of law**

**24(2)** The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.

## Actus Reus: acts beyond mere preparation

* The precise req’ments of AR for attempts will vary according to the nature of the crime attempted and the circumstances of the individual case.
* Calling it a question of law means that CA can revisit more easily and that judges (rather than juries) will determine the appropriate threshold of AR

### R v Cline, ONCA 1956

**F:** Accused approached C (a young boy) and asked him to help carry his suitcases, saying that he would give the boy “a couple of dollars.” Accused did not actually have any suitcases with him. C refused. Accused was charged with indecent assault. Accused had approached other boys in very similar circumstances, and in at least one instance performed an indecent act without the victim’s consent → provided admissible evidence in order to establish motive in order to establish intent. Convicted at trial. On appeal, set aside the conviction and substituted one of attempted indecent assault.

**Conclusion/Ratio:**

1. Must be AR and MR to constitute a criminal attempt, but the criminality of misconduct lies mainly in the intention of the accused
2. Evidence of similar acts done by the accused before the offence with which he is charged, and also afterwards, if such acts are not too remote in time, is admissible to establish a pattern of conduct from which the court may properly find MR
3. Such evidence may be advanced in the case for the prosecution without waiting for the defence to raise a specific issue
4. It is not essential that the AR be a crime or a tort or even a moral wrong or social mischief
5. **The AR must be more than mere preparation to commit a crime** BUT
6. When the preparation to commit a crime is in fact fully complete and ended, **the next step done by the accused for the purpose and with the intention of committing a specific crime constitutes an AR** sufficient in law to establish a criminal attempt to commit that crime // This is the point at which the accused must have MR

### Deutsch v The Queen, *SCC 1986*

|  |  |
| --- | --- |
| **F** | The accused sold franchises and had placed an ad in a number of newspapers for a secretary/sales assistant. He conducted interviews with 4 women – 3 applicants and 1 policewoman, posing as an applicant. He told the applicants that one of the tasks expected of this secretary/sales assistant would be to have sexual intercourse with clients or prospective clients when it was deemed “necessary to conclude a contract.” He also told them that the successful applicant could earn up to $100,000 a year in the position.  None of the actual applicants were interested in the job after learning of this part of the role. When the policewoman said she would still be interested, she was told to “think it over” and let the accused know. In sum, no formal employment offers were made to any of the women.  The accused was charged with attempting to procure female persons to have illicit intercourse with another person and CA ordered a new trial, which the accused appealed. |
| **I** | The issue on appeal was what constitutes mere preparation as opposed to an attempt, for the purposes of section 24. |
| **D** | The appeal was dismissed. |
| **RA** | In order to determine whether something is an attempt or mere preparation, the court must find that the accused has, in essence, begun to commit the complete offence. The court holds here that there are still no hard and fast rules about discerning the two. |
| **RE** | * No definitive line that can be drawn between preparation and attempt. Rather, the distinction has to be made with reference to the relationship between the nature and quality of the act in question and the nature of the completed offence. * Consideration must necessarily be given, in making that qualitative distinction, to the relative proximity of the act in question to what would have been the completed offence, in terms of time, location and acts under the control of the accused remaining to be accomplished. * In terms of what proximity means here, as between the attempted offence and the completed offence: “there must be an act done which displays not only a preparation for an attempt, but a commencement of execution, a step in the commission of the actual crime itself.” * MR: intent to induce or persuade the women to seek employment that would require them to have sexual intercourse with prospective clients * AR: the actual inducing or persuasion. * It follows that the holding out of the large financial rewards in the course of the interviews could constitute the actus reus of an attempt to procure. * this would be a crucial step in the commission of the offence. There was not much that the accused would have to do to otherwise have committed the complete offence. * it didn’t matter that there had yet been no formal job offer, nor that the illicit sexual intercourse might not be an immediate consequence. |

## Mens Rea:

### R v Ancio, [1984] SCC

|  |  |
| --- | --- |
| **F** | A broke into estranged wife’s house, with a gun. Gun went off, narrowly missing wife’s new BF.  Accused convicted of attempted murder using combo of ss. 24 and 213(d) (now 230(d))  TJ found that A had broken into apt building intending to use weapon to force wife to leave  CA overturned conviction and ordered a new trial; crown appealed to SCC |
| **I** | What is the mens rea requirement for conviction of an attempt?  What is the mens rea requirement for conviction of attempted murder? |
| **D** | The intent to commit the desired offence is a basic element of the offence of attempt. Indeed, because the crime of attempt may be complete without the actual commission of any other offence and even without the performance of any act unlawful in itself, it is abundantly clear that the criminal element of the offence of attempt may lie solely in the intent.  The mens rea for an attempted murder cannot be less than the specific intent to kill. |
| **RA** | The completed offence of murder involves a killing; the intention to commit the complete offence of murder must ∴ include an intention to kill; you cannot intend to commit unintentional killings |
| **RE** | The intent to kill is the highest intent in murder and there is no reason in logic why an attempt to murder, aimed at the completion of the full crime of murder, should have any lesser intent. If there is any illogic in this matter, it is in the statutory characterization of unintentional killing as murder. |

### R v Logan, [1990] SCC

|  |  |
| --- | --- |
| **F** | Robbery of the convenience store – charge for attempted murder |
| **I** | whether the principles of fundamental justice require a minimum degree of mens rea in order to convict an accused of attempted murder |
| **RA** | The constitutional minimum MR of attempted murder is subjective foresight of death. |
| **RE** | All that differs from first degree murder and attempted murder is the ‘consequences’ component of actus reus; an attempted murderer, if caught and convicted, is a ‘lucky murderer’  Criteria by which offences req’ing a minimum degree of MR, due to principles of fund’l justice are, the stigma assoc’d with a conviction and the penalties available |
| **A** | Stigma assoc’d w/ conviction of attempted murder is the same as it is for murder (same ‘killer’ instinct; just got lucky)  Penalty very severe, though no auto life sentence |
| **LHD** | In dissent: held that an intent to murder (as in Ancio) should be the constitutionally required intent for attempted murder  The motivation for requiring subjective foresight for attempt crimes radiates from the primacy of the MR component, not from any potential penalties or social stigma that might attend conviction for the completed offence |

\*\*\*note that one reason for making MR harder to make out is that for completed offences, the limiting of liability occurs at the actus reus stage. The narrowing occurs there whereas for attempts, the mens rea must necessarily do more of the work.

### R v Sorrell and Bondett (1978) ONCA:

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| **F** | Accused charged w. attempted robbery of a takeout food store. Knocked on closed door, manager told them to leave and they left. Arrested with a loaded revolver. |
| **I** | When do the acts of the accused constitute AR and MR for attempted robbery? |
| **RA** | Attempt has only been reached when the acts show **unequivocal criminal intent.** |
| **RE** | Where an accused’s criminal intent is otherwise proved, acts which may appear equivocal could still be sufficiently proximate to constitute an attempt  Where there is no extrinsic evidence of the intent with which the acts were done, acts that appear equivocal may be insufficient to show that the acts were done w/ criminal intent ∴ insufficient to establish the offence. |

## Abandonment:

S. 24(2) does not create a free-standing defence of abandonment

However, as Roach notes, CDN cts have recognized that evidence of abandonment may lead to a ‘reasonable doubt about whether the accused had the intent to commit the crime in the first place.’

**Point:** Cts treat abandonment as a repudiation of the MR for attempt (not a separate defence) – *R v Sorell,* (1978)

## Impossibility:

There is no impossibility defence for attempted crimes in Canada. An accused can be convicted of an attempt even if it was a factual or legal impossibility.

**Factual:** Trying to shoot someone who is already dead

**Legal:** Trying to import heroin but it was actually flour

However, if it is an imaginary crime, no conviction

**Imaginary:** Trying to import flour, believing it’s a crime to import flour.

### United States of America v Dynar, [1997] 2 SCR 462

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| --- | --- |
| **F** | Dynar was set up in a money laundering sting operation. Clearly his acts went beyond mere preparation. But because he thought that the money was from illicit drug trade and they were in fact property of US FBI, question was whether that was enough to convict him for an attempt. |
| **I** | Can a person be guilty of an attempt when completion of the offence is for some reason impossible? |
| **D** | Yes. No defence of impossibility in Canada. |
| **RA** | Section appears indifferent as to whether or not the attempt could have succeeded. Sufficient evidence shows that Dynar intended to commit the money-laundering offences, and that he took steps more than merely preparatory in order to realize his intention ∴ that is enough to establish that he attempted to launder money contrary to 24(1). |
| **RE** | * Δ attempted to do the impossible but did not attempt to commit an imaginary crime * Major purpose of the law of attempt is to discourage the commission of subsequent offences, therefore, if someone intends to commit an imaginary crime, they do not have the intent to commit an offence. And that’s not worrisome because the person hasn’t shown a propensity for criminality but rather a propensity to do the thing that is perfectly legal. * Motivation is not intention – a person intends his act in the circumstances that he knows or believes to exist. B/c this is the rule for consummated offences, there is no good reason why it should differ for attempts * ∴ it doesn’t matter that Δ’s motivation wasn’t to launder drug money, but rather to assist one of his new associates and receive a commission for doing so – what is important is not what moved Δ but what he believed he was doing and it was clear that he believed he was embarked upon a scheme to convert drug money |

# Incitement

|  |  |
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| 1. Counselling a crime that is completed   = Participation via counselling (s. 22) | 1. Counselling a crime that is not completed = Incitement, an independent form of inchoate liability (s. 464) |
| * Treated as a form of participation * Req’s objective knowledge in AR * Punished as if had committed the complete offence | * Treated as a form of inchoate liability (incitement) * Req’s subjective fault * Punished as an attempt * Criminalized on the theory that, by inciting another, the inciter has already taken affirmative steps towards the completion of the offence |
| **AR:**   1. Accused encouraged or actively induced the commission of a criminal offence 2. Accused knew – **or ought to have known** – that the offence was likely to be [\*\*note that one would think that knowledge would sit w/ MR but here it sits with AR] committed as a result of the counselling 3. The crime must be committed by the person counselled | **AR:**  The accused encouraged or actively induced the commission of a criminal offence   * not enough for the person to describe the offence. **Instead:** They must actively induce or advocate for the commission of the offence. * **Section 464** imports the meaning of counselling from **Section 22(3)** – includes “procure, solicit or incite.” * Doesn’t matter if the person counselled never has any intention of carrying out the crime – see ***R. v. Glubisz* (No. 2) (1979)** |
| **MR:**   1. The accused **intended** for the offences to actually be committed by the person counselled; or 2. **Extreme recklessness** with respect to the possibility that the offences might actually be committed by the person counselled (i.e. more serious form of recklessness // not likely) | **MR:**   1. The accused **intended** for the offences to actually be committed by the person counselled; or 2. **Extreme recklessness** with respect to the possibility that the offences might actually be committed by the person counselled |

## R v Hamilton, 2005 SCC 47

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| **F** | Hamilton advertised a ‘credit card number generator’, bomb recipes, and info on how to commit burglaries online; charged under s. 464 |
| **I** | Whether the mens rea of incitement requires intent or can be satisfied by recklessness |
| **D** | Recklessness is sufficient |
| **RA** | AR: is the deliberate encouragement or active inducement of a criminal offence  MR: intent or conscious disregard of the substantial and unjustified risk inherent in the counselling that the offence will be committed. |
| **RE** | The AR for counseling will be established where the materials or statement made or transmitted by the accused actively induced or advocated, and do not merely describe, the commission of the offence (R v Sharpe).  Distinction between motive and intent held to be a substantial error of law but \*\*where intent is to make someone else do the thing, it doesn’t seem clear that motive and intent are so distinct – doesn’t he have to intend the acts to be committed? i.e. is counselling crimes for the purpose that they be committed? |

# Conspiracy

**Section 465(1)(c)** Establishes the **general offence of conspiracy** by providing that:

“[E]very one who conspires with any one to commit an indictable offence is guilty of an indictable offence and liable to the same punishment as that to which an accused who is guilty of that offence would, on conviction, be liable."

**Note:** The section does not provide a definition of conspiracy, or set out its elements.

**In effect:** The offence is established because Section 465 provides for the **punishment** of conspiracy to commit various substantive offences.

* S. 465 contains a number of specific provisions establishing various forms of conspiracy, but most often charges are brought in cases involving organized crime and drug trafficking.
* In the absence of a statutory definition of conspiracy, the cts have relied on CL for the elements of the offence

### *R v O’Brien,* (1954) SCC: adopted definition of conspiracy from *R v Mulcahy,* (1868) (UK):

“A conspiracy consists not merely in the intention of two or more, but in the **agreement of two or more to do an unlawful act**, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an action itself, and the act of each of the parties ... punishable if for a criminal object.”

→The essence of conspiracy is an **agreement** between two or more persons to commit a crime.

Supreme Court in ***Dynar* (1997):** “[C]onspiracy is in fact a more 'preliminary' crime than attempt, since the offence is considered to be complete before any acts are taken that go beyond mere preparation to put the common design into effect. The Crown is simply required to prove a meeting of the minds with regard to a common design to do something unlawful, specifically the commission of an indictable offence.”

→Basic justification for offence of conspiracy is the **prevention of crime:**

**Dynar:** “[T]he rationale for punishing conspirators coincides with the rationale for punishing persons for attempted crimes. Not only is the offence itself seen to be harmful to society, but it is clearly in society's best interests to make it possible for law enforcement officials to **intervene before the harm occurs** that would be occasioned by a successful conspiracy or, if the conspiracy is incapable of completion, by a subsequent and more successful conspiracy to commit a similar offence.”

* viewed w/ suspicion by civil libertarians, owing to its vague parameters and the power to charge an accused person w/ conspiracy places an unfair advantage in the hands of the Crown → don’t have to show acts…just intentions. Esp if you have an accused who is unsympathetic, a jury might be likely to find someone guilty.
* Point echoed by Justice Dickson in ***Cotroni and Papalia* (1979):** “…the indictment for conspiracy is a formidable weapon in the armory of the prosecutor. According to the cases, it permits a vague definition of the offence, broader standards of admissibility of evidence apply; it may provide the solution to prosecutorial problems as to situs and jurisdiction… **There is, I have no doubt, a subconscious tendency upon the part of jurors in a conspiracy case to regard all co-conspirators alike and ignore the fact that guilt is something individual and personal.**”

## Actus Reus

**Basic rule:** the fact of the agreement to carry out the completed offence.

**Key points:**

* Don’t need to show that steps were taken to implement the agreement; nothing else req’d from accused; AR is **complete** as soon as agreement is concluded (*F.(J.)* 2013)
* Although the essence is agreement, a single person can be convicted of conspiracy even if the other co-conspirators are not (*R v Murphy,* 1981)
* An implied or tacit agreement to commit an offence is sufficient for conspiracy (*Atlantic Sugar Refineries Co. v. Canada (AG),* 1980)
* Does not have to be direct communication between the co-conspirators (*Cotroni and Papalia,* 1979)
  + Chain conspiracies: ΔA in contact w/ ΔB who is in contact w/ ΔC (agreement to commit crime is between A and C)
* Where the accused joins a pre-existing conspiracy, they can only be convicted of conspiracy if the Crown can prove that they adopted the criminal plan as their own and consented to participate in carrying it out.
  + **Key:** Knowledge of a conspiracy does not give rise to criminal liability – ***Lamontagne* (1999)**.
* Cannot conspire with a spouse, as they are treated as one person for the purpose of conspiracy – ***Barbeau* (1996)**

### USA v Dynar, 1997 SCC

Δ involved in sting operation; ct considering of what a criminal conspiracy consists

|  |  |
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| **RE** | **What must be proven?**  AR: must be an intention to agree, the completion of an agreement, and a common design   * **AR is the fact of agreement** // more preliminary than attempt b/c offence is complete before any acts are taken to put common design into effect * As long as there is a continuing overall, dominant plan there may be changes in methods of operation, personnel, or victims, w/o bringing conspiracy to an end   MR: Intention **cannot be anything but the will to attain the object of the agreement**   * Why criminalize? b/c the scale of injury that might be caused is so great ∴ the very fact of agreement constitutes a menace to society   **What about impossibility?**   * By virtue of the preliminary nature of the offence, criminal liability will still attach as long as the agreement and the common intention can be proved * B/c this has never been a defence to inchoate liability in Canada, and the position in the code is clear w/ regards to attempt, there is no good reason to treat other forms of inchoate liability differently * As always, if it’s an imaginary crime, then impossibility is a defence * There is **no separate mental element for the offence of conspiracy – for offences that require knowledge, the mental element is belief** ∴ the subjective state of mind of a money launderer is the belief that the money is derived from an illicit source and the subjective state of mind of the person who conspires with others to launder money is also that belief |

## Mens Rea

Intention in both instances is **subjective** (but note ***R. v. Nova Scotia Pharmaceutical Society* (1992) SCC**)

**Two key elements:**

1. Intention to agree **and**
2. Intention to put the common design into effect

***R. v. O’Brien* (1954)**:

“Although it is not necessary that there should be an overt act in furtherance of the conspiracy to complete the crime, I have no doubt that there must exist an intention to put the common design into effect The intention cannot be anything else but the will to attain the object of the agreement.”

# Combining Inchoate Offences:

### *R v Déry,* 2006 SCC 53 [outdoor booze storage // criminalizing risk that risk will arise]

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| **F** | Bunch of guys remarking that they could steal a bunch of booze that was being kept outside due to overstocking practices in holiday months. Unrelated investigation resulted in the interception of these discussions. Charged with conspiracy to commit theft and to possess stolen goods. B/c there was no evidence that either had taken any steps to begin theft, nor that there was any agreement to commit theft, TJ acquitted. But thought that attempt to conspire was an included offence. |
| **I** | Whether attempting to conspire to commit a substantive offence is a crime |
| **D** | No. Convictions set aside and acquittals entered. |
| **RA** | It has never been the goal of the criminal law to catch all crime ‘in the egg’; conspiracies are criminalized when hatched and they can only be hatched by agreement.  Criminalizing attempt is warranted because it aims to prevent harm by punishing behaviour that demonstrates a substantial risk of harm. That is lost when applied to conspiracy because an attempt to conspire amounts, at best, to a risk that a risk will materialize. |
| **RE** | AR for counselling is the deliberate encouragement or active inducement of the commission of a criminal offence  Given that conspiracy is essentially a crime of intention and crim law shouldn’t police people’s thoughts (*Dynar*) it is difficult to reach further than the law of conspiracy already allows  Unilateral conspiracies (situations where there was an attempt to conspire but no agreement was reached) aren’t a conspiracy but rather counselling under s. 464 |

**Note also:**

* Unsuccessfully attempt to enter a conspiracy may be offence of **counselling** **a crime that is not committed**.
* Person who **abets** (or **encourages**) conspirators to pursue the object of the conspiracy can be a party to the conspiracy even though they did not actually agree to the conspiracy.
* A person who pursues a unilateral conspiracy beyond mere preparation could be guilty of an **attempt** to commit the actual crime.

### R. v. Nova Scotia Pharmaceutical Society (1992)

* A number of pharmacies were charged with conspiracy "to prevent or lessen competition" under Section 32(1)(c) of the Combines Investigation Act for the sale of prescription drugs and dispensing services prior to June 1986.
* Pharmacies challenged the decision on the basis that Section 32(1)(c) violated Section 7 of the Charter on account of its vagueness.

→ Supreme Court reaffirmed the rule that the subjective intent is needed for the *mens rea* of conspiracy.

**However:** In this case, the Court also held that an **objective** fault element was sufficient in relation to the aims of the agreement. Accused would be guilty if Crown could prove that **reasonable business people** in the same position would have known that the agreement would unduly lessen competition.

**Hence:** A could be guilty even if he not actually intend or know the agreement would unduly lessen competition.

# DEFENCES

# INTOXICATION

IN CANADA:

# Common Law Defence of Intoxication: The *Beard* Rules

### DPP v Beard, HL [1920] AC

**3 CONCLUSIONS:**

1. Insanity, whether produced by drunkenness or otherwise is a defence to the crime charged. (i.e. if drunkenness causes ‘madness’ (that would have qualified as insanity had it not been the result of drunkenness), it’s a defence)
2. Evidence that the accused was so drunk as to make him incapable of forming the specific intention, should be taken into account in determining whether accused had MR.
3. Evidence of drunkenness falling short of a proved incapacity to form intent, and merely establishing that his mind was affected by alcohol 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. (i.e. drunkenness is not an answer to assault if you got drunk and beat someone up)

**Meaning:** If intoxication gives rise to a mental disorder and makes the accused “not criminally responsible” as per Section 16 of the *Code*, then the accused will be acquitted – “not criminally responsible on account of mental disorder” (NCRMD)

### R v Bouchard-Lebrun, 2011 SCC 58

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| **F** | Accused (B-L) and friend purchased and consumed ecstasy pills. The went to house of the victim (L) with the intention of assaulting him. In the course of attacking L, B-L and his friend were interrupted by D (L’s neighbour). B-L grabbed D and threw him down a flight of stairs, and then while he was helpless stomped on his head. L suffered serious and permanent injuries.  B-L was charged with two counts of aggravated assault.  **Defence:** Argued that at the time of the assault, B-L was in a psychotic state brought on by ecstasy pills. Argued that he had completely lost touch with reality, and was acting under the influence of a delusion. |
| **I** | Did the psychotic state constitute a disease of the mind for the purposes of the Code? |
| **D** | Concluded that B-L’s condition was caused by external factors that were transitory, and as a result rejected the defence. |
| **RA** | If the mental disorder is the result of external factors (e.g. by taking an intoxicating substance), presumably that could be avoided by not taking the intoxicant. Therefore, it is the prior fault of the defendant.  Recklessness shown by an accused in becoming voluntarily intoxicated can constitute the fault element needed to find that a general intent offence has been committed. |

### The steps the ct must follow:

1. Is the mental condition of the accused covered by **s. 16** (i.e. disease of the mind)?
2. If **s. 16 does not apply**, is **s. 33.1** appropriate and applicable on the facts?

\*\*\*constitutionality of s. 33.1 is in question

**Focus must be on the actual intent of the accused, not just whether he or she had the *capacity* to form the intent**

# Intoxication and Specific Intent

*Beard Rule #2:* If intoxication prevents the accused from forming the **specific intent** required for the charged offence, then he or she must be acquitted **of that offence**

**∴ Two additional points:**

1. Intoxication can never be a defence to a crime of general intent.
2. Where the accused succeeds in raising the defence of intoxication in the context of a specific intent crime, the effect will be to reduce the charge.

**That is:** The accused will still be convicted of a **less serious** offence based on the same facts but only requiring general intent (for example, manslaughter rather than murder). In this regard, intoxication is a **partial defence**.

**General intent:** Intent to do the prohibited act.

**Specific intent:** Intent to bring about prohibited consequences

### R v George, [1960] SCC

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| --- | --- |
| **F** | 84 yo man violently manhandled by Δ and had $22 stolen from him  No doubt that Δ committed crime, but Δ was extremely drunk and doesn’t remember anything but being in the house and admitted that he had hit the victim;  Acquitted b/c of drunkenness on charge of robbery and common assault. |
| **I** | Only question is whether drunkenness is a defence to assault |
| **D** | No. Appeal allowed, guilty verdict of common assault entered |
| **RA** | The word intentionally appearing in the code section prohibiting assault is **exclusively related to the application of force or the manner in which force is applied**. The finding that the accused did not have the capacity to form specific intent to commit robbery did not justify the conclusion reached that he could not have committed the offence of common assault. |
| **RE** | In considering MR, a distinction has to be drawn between intent as it applies to   * Acts done to achieve an immediate end [intentional in that they aren’t done by accident or mistake] * Acts done with the specific and ulterior motive/intention of furthering or achieving an illegal object [intentional in that they are the product of preconception and deliberate steps]   TJ found that Δ violently manhandled a man and knew that he was hitting him ∴ evidence that the accused was in a voluntary state of drunkenness cannot be treated as a defence because there was no suggestion that the drink had produced permanent or temporary insanity |

### *R v Bernard,* [1988] SCC [justification for the distinction]

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| **F** | Accused beat the complainant in the face and forced intercourse. Accused’s police statement: he forced her to have sex b/c he was drunk and when he realized what he was doing, he got off the complainant. TJ instructed jury that drunkenness no defence. |
| **I** | Whether the former offence of rape was an offence of general intent for which intoxication was no defence (as per *Leary*) |
| **RA** | Drunkenness in a general sense is not a true defence to a criminal act. Where, however, in a case which 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, however, has no application in offences of general intent.  The distinction between general and specific intent offences is justified based on the fact that there is a qualitative difference between intention to commit a crime and the intention to move your body in a specific way that may result in criminal behaviour. |
| **RE** | **McIntyre + Beetz**  Leary rule doesn’t relieve Crown from obligation to prove MR in a general intent offence; the fact that an accused may not rely on voluntary intox is not based on the nature of offence and MR that must be shown  MR may be proved in 2 ways:   1. MR can be inferred from AR (person presumed to have intended the natural and probable consequences of his actions) 2. Where accused is so intox as to raise doubts about voluntary nature of his conduct, Crown can meet MR burden by proving the fact of voluntary self-induced intox (i.e. prior fault) – evidence of intox is evidence of the guilty mind   → voluntary drunkenness cannot be a defence b/c this is enough to rebut the claim that the accused is morally innocent |
| **RE** | **Wilson + LHD**   * Agrees that you can make inference for MR b/c sexual assault is an offence of general intent and req’s only that the accused intended to apply force; **not necessary to resort to substituting self induced intoxication** as a substitute MR. * Substituting elements for criminal offences can only occur where, upon proving the substituted element BRD, it would be unreasonable not to be satisfied BRD of the existence of the essential element (*Vaillancourt*); to do otherwise would be to infringe presumption of innocence and 11(d) * Intox should go to trier of fact in general intent offences only when there is evidence of extreme intox involving an absence of awareness akin to insanity or automatism; only then would there be a reasonable doubt re: MR |
| **DIS** | **Dickson**   * Evidence of self-induced intox should always be considered along with all other relevant evidence in determining whether MR has been proven * Imposing absolute liability on intoxicated offenders is inconsistent w/ basic req’ment of a blameworthy state of mind sufficient to deprive someone of their liberty (contra s. 7) * contra s. 11(d) b/c guilty intent is in effect presumed upon proof of the fact of intox * **Leary rule treats deliberate act of becoming intox as culpable in itself but inflicts punishment measured by the unintended consequences of becoming intox; punishment for deterrence only works where conduct is intended or foreseen** |

R. v. Lemky (1996):

“If the real question is whether the accused was prevented by drunkenness from actually foreseeing the consequences of his or her act, it follows that **the threshold for putting evidence to the jury must be evidence sufficient to permit a reasonable inference that the accused did not in fact foresee those consequences**. While capacity and intent may be related, it is possible to envisage cases where evidence which falls short of establishing that the accused lacked the capacity to form intent, may still leave the jury with a reasonable doubt that, when the offence was committed, the accused in fact foresaw the likelihood of death.”

### R v Robinson (1996)

The key question when considering the second rule under *Beard* is whether the Crown has satisfied [the jury] beyond a reasonable doubt that the accused had the requisite intent.”

### R v Daley (2007)

Whether a literal interpretation of rule#2 amounted to a violation of ss. 7 and 11(d):

Yes, on the grounds that the jury **could convict** an accused where they had the capacity to form the specific intent (despite the intoxication), **even though there was evidence that they didn’t in fact have the intent.**

# Extreme Intoxication and General Intent

If the accused cannot prove that the intoxication prevented him or her from forming the specific intent required, then there will be no defence (even if the intoxication prevented him or her from controlling their actions).

**Put another way:** Lack of control due to intoxication is **not a defence** if specific intent was present.

## R v Daviault, 1994 SCC

Prior to this decision, the courts routinely applied *Beard* rule #2, with the result that the defence of intoxication would be **automatically** rejected where the accused was charged with a general intent crime.

**However:** With the enactment of the ***Charter***, the question arose as to whether this automatic denial of the defence violated the **principles of fundamental justice guaranteed by ss 7+11(d).**

|  |  |
| --- | --- |
| **F** | Accused charged w. SA of an elderly woman; chronic alcoholic. Suspected blood alcohol ratio (based on contents of brandy bottle being empty) were enough to cause death or coma; to induce blackout and cause a person to lose contact w. reality. Accused would have no awareness and would dissociate from normal functioning. |
| **I** | Can a state of drunkenness so extreme as to resemble automatism or disease of the mind (as defined in s. 16) constitute a basis for defending a crime which requires only general intent? |
| **D** | Flexibility mandated w. the Leary rule; Majority agreed that a strict application of the second rule in Beard amounted to a violation of Sections 7 and 11(d). |
| **RA** | **2 step process:**   1. On BOP: in a state of intox akin to automatism 2. Does this raise a reasonable doubt as to the MR? |
| **RE** | * MR is an integral part of the crime and is fund’l to each crime, though it may be minimal in general intent offences. * Here, MR is simply intention to commit SA or recklessness; can ordinarily be inferred from the proof that the assault was committed by the accused **but** the substituted MR of an intention to become drunk cannot establish MR to commit the assault   → to substitute would eliminate the MR req’ment for the actual offence and denies the principles of fund’l justice   * B/c Leary rule applies to all crimes of general intent, it’s not well tailored to address a particular objective and it would not meet either proportionality or minimum impairment req’ments * B/c only avail in rarest of cases, it shows that there’s no urgent policy or pressing objective that needs to be addressed to allow 11(d) to be repudiated |
| **DIS**  **(Sop)** | * None of the principles of fund’l freedom req’re that the intent to perform AR of an offence of general intent be an element of the offence itself * Proof that the accused became voluntarily intox is enough * To the degree that it bears upon his or her level of moral blameworthiness, an offender’s degree of intox @ time of offence may be considered during sentencing |

### 

### R v Penno, 1990 SCC:

Intox is **not a defence to a crime in which it is an element** (care and control of a motor vehicle while impaired); there, even though accused may be too drunk to know they are assuming care and control of the motor vehicle, that doesn’t matter b/c mental element of the offence is voluntarily becoming intox.

## Section 33.1 and its Effect on Intoxication Rules

→ may have made things more confusing than ever b/c there are now 3 variations of the defence:

1. CL rule in cases like *Bernard* that restricts defence to offences of specific intent (still applies ∴ still need to classify between general and specific intent offences)
2. Expanded defence from ***Daviault*** which applies to general intent offences where automatism/insanity (req’s expert evidence concerning nature and effect of intoxicant; must be proven by Δ on BOP)
3. **S. 33.1** which **denies the defence of extreme intox to any offence of general intent that involved interference or threatened interference w/ bodily integrity of another person** provided that, at the relevant time, the act was performed in a **state of intox that shows a marked departure from the standard of reasonable care**

Section 33.1 Summarised by the Supreme Court in *Bouchard-Lebrun* (2011):

“This provision applies where three conditions are met: (1) the accused was intoxicated at the material time; (2) the intoxication was self-induced; and (3) the accused departed from the standard of reasonable care generally recognized in Canadian society by interfering or threatening to interfere with the bodily integrity of another… Where these three things are proved, it is not a defence that the accused lacked the general intent or the voluntariness required to commit the offence.”

### Constitutionality of The Intoxication Defence – G. Ferguson

No appeal ct has considered considered the question but first instance cts have considered it and arrived at diff answers

Though virtual unanimity that it violates principles of fund’l justice, in ss. 7 and 11(d) – they have virtually **ignored one strong feminist argument** which is that the **removal of a defence of extreme intox in cases of general intent offences involving assault** (by reliance on the device of substituted fault) should not be seen as a violation b/c **it supports the equality rights of women and children** and is applied to a group of extremely intox persons who are **not morally blameless** for the ultimate consequences of their conduct

**May ∴ survive a s. 7 challenge**

### *R v SN,* 2012 NUCJ [Nunavut perspective on s. 33.1 protecting against gendered violence]

Statistical data showing extent to which women (and esp. Aboriginal women) suffer from intox violence is stunning. In Nunavut, where violent crime is several-x national average, cts rarely see a case of violence against a woman where offender is *not* intoxicated.

### Summary of the Current Law on Intoxication:

**(1)** For crimes of **specific intent**, the second and third ***Beard*** Rules apply and intoxication may be used as a defence where it prevents the accused from forming the required specific intent.

**(2)** For crimes of **general intent**, where the offence involves an element of assault or any other interference or threat of interference with the bodily integrity of a person, self-induced intoxication is not a valid defence no matter how severe it may have been at the time (Section 33.1).

**But:** In all other cases - where the offence does not involve an element of assault or any other interference with the bodily integrity of a person – if the intoxication is so extreme as to produce a state akin to **automatism or insanity**, the accused will have the benefit of an absolute defence (as per the decision in ***Daviault***). OTHERWISE IT IS NOT A DEFENCE.

# Involuntary Intoxication

## R v Chaulk, NSCA 2007

|  |  |
| --- | --- |
| **F** | Δ went to a party, unclear how much he smoked and drank or if he took any other drugs prior to being offered a ‘wake-up’ pill. Δ stated he thought it was just caffeine. Δ ended up terrorizing several neighbours and was in apt of one, naked, sweating profusely and babbling, while the neighbour tried to subdue him. |
| **I** | Whether ‘self-induced intoxication’ must be established subjectively |
| **D** | Self-induced intoxication can be established on an objective basis |
| **RA** | The test for self-induced intoxication:   * 1. Accused voluntarily consumed a substance which   2. S/he knew or ought to have known was and intoxicant and;   3. The risk of becoming intoxicated was or should have been w/in his/her contemplation |
| **RE** | Conflicting evidence about Δ’s consumption of intoxicants that evening; common ground that the pill was some form of intoxicating substance  Crown: should’ve thought it might have been intoxicated  Δ: honestly beliefed it was just caffeine  Ct: voluntary intox = person knew or had reasonable grounds for believing; no need to contemplate or intend a certain level of intox  Voluntary ingestion + knowledge it might be dangerous + reckless indifference about what might occur |

# MENTAL DISORDER AND AUTOMATISM

**Two main defences** associated with **mental disorder** in Canadian criminal law:

**(1)** **Not criminally responsible on account of mental disorder** (NCRMD); and

**(2)** **Automatism**

→ These defences apply where there is evidence that the accused suffered from some form of severe mental impairment or incapacity.

# Introduction:

**Basic distinction between the defences:**

|  |  |
| --- | --- |
| *NCRMD* | *Automatism* |
| Applies in situations where the accused does not have the capacity to appreciate the nature and quality of the act or omission (or to know that it is morally wrong)  → est’d by s. 16  **If defence succeeds:** not guilty but not an acquittal  Accused held to be NCRMD and may be held in custody in psych facility, placed under community supervision, etc. | Applies in situations where the accused acts involuntarily as a result of some temporary mental impairment (such as a blow to the head)  → common law defence  **If defence succeeds:** acquittal |

## Section 16

**(1)** No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

**Presumption**

**(2)** Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.

**Burden of proof**

**(3)** The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue.

**→** This constitutes a violation of Section 11(d) b/c accused might be able to raise a reasonable doubt about capacity but haven’t proven it in BofP

**However:** Supreme Court has consistently held that this limit on the presumption of innocence is reasonable (see decision in ***R. v. Chaulk* [1990]**)

## “Mental Disorder and the Instability of Blame in Criminal Law” – BL Berger

* An accused declared NCRMD is now moved through a disposition hearing before a review board who decide on the appropriate treatment and control options, driven largely by assessments of dangerousness
* “mental disorder” – given an expansive construction
  + **Not a delegation to psychiatric authority**
  + Rather, a legal term to be defined and applied by judges

M’Naghten Paradigm:

* Places emphasis on **capacity for practical reasoning and cognition** (∴ excludes volitional impairments and issues of emotional appreciation)
  + Extremely high threshold
* **Removes defence from those suffering personality disorders** 
  + Argument that under-inclusiveness **effectively removes collective, social, and political responsibility** that arise at the meeting of mental health, social disadvantage and crime
* Criminal law chronically detached from or comfortably ignorant of situations that raise serious concerns → what is the function of a doctrine that is so unconcerned w/ facts that bear on its own theoretical preoccupation?

# Fitness to stand trial:

*→ arises when accused who was sane when they committed offence, subsequently suffers from a mental disorder that would make it impossible for him or her to have a fair trial*

s. 2 of the code says **“unfit to stand trial”** = “unable on account of mental disorder to:

(a) understand the nature or object of the proceedings

(b) understand the possible consequences of the proceedings, or

(c) communicate with counsel”

**APPLICATION:**

* An accused is assumed fit to stand trial unless ct satisfied otherwise on BofP (s. 672.22)
* Fitness of accused can be brought as an issue on the ct’s own motion or on application of accused or prosecutor (s. 672.23(1))
  + person who brings it as an issue has burden (s. 672.23(2))
* If accused is unfit to stand trial, may still be subsequently tried if found fit (672.32(1))
* **legal standard:** focuses on the fairness of the trial process and the ability of the accused to take part
* Accused may still be fit even if they are **unable to give testimony and do not remember the crime**
* If the accused is found unfit to stand trial, under s. 672.33 the Crown is required to establish a prima facie case against the accused every two years until the accused is either found fit to stand trial or is acquitted
* Under Section 672.851, the court is able to stay proceedings in cases where the accused is not likely to **ever** be fit to stand trial, and does not pose a significant threat to public safety.

## *R v Whittle,* 1994 SCC [fitness to stand trial ≠ mental disorder w/in meaning of s.16]

* NCRMD exempts an accused from liability and punishment but does not mean they are exempt from trial → exemption from trial process must be made on test of ‘fitness’
* If the accused possesses a limited **cognitive capacity to understand the process and communicate with counsel**, she does not have to be capable of exercising analytical reasoning in making a choice to accept advice of counsel or in coming to a decision that best serves her interests

## R v Demers, 2004 SCC

Possible that proceedings against an accused found unfit to stand trial could be permanently stayed if person unlikely to ever become fit and doesn’t pose a significant threat to public safety

# Who Can Raise the Defence?

## *R v Swain,* 1991 SCC [Crown can raise mental disorder after proving MR+AR]

|  |  |
| --- | --- |
| **I** | Whether or not the prosecution can raise mental disorder as an issue against the wishes of an accused b/c it interferes w/ the accused controlling his or her own defence; also may have a negative impact on the outcome of the verdict (if brought before a jury, fact of mental disorder might prejudice them to believing guilt) |
| **RA** | → in circumstances where the accused’s own evidence tends to put his or her mental capacity for crim intent into question, the Crown can put forward its own evidence and the trial judge will be entitled to instruct jury on s. 16. But the crown limited to raising this evidence only after the trier of fact has been satisfied that the full burden of proof on AR and MR has been discharged (i.e. accused found guilty) or after defence had put mental capacity forth as an issue. |
| **RE** | 2 objectives for allowing prosecution to raise the defence:   1. To avoid unfair treatment of the accused (I.e. convicting an accused who may not be responsible but refuses to introduce evidence about insanity) 2. Public protection  * Accused can no longer be detained indefinitely after being found NCRMD * There is a **legitimate public interest** in ensuring that dangerous persons who require hospitalization do not simply have their cases discontinued. The Crown may raise the issue of mental disorder independently of the accused only after the trier of fact has found the **offence proven and before a conviction being entered.** |
| **DIS** | * Permitting Crown to raise insanity, even on conditions, infringes equality of mentally disabled under s. 15 * Reinforces stereotype that they are incapable of rational thought and the ability to look after their own interests * The conditional right proposed would only pass constitutional muster if it could be shown that there exists no alternative that achieves the same objective w/o limiting the accused’s s. 7 or 15 rights (e.g. limiting the prosecution’s ability to after any defences have been put forward and rejected by Δ and essential elements proven by Crown)   → would respect the accused’s right to waive the defence and ensures that any prejudice in the finding of guilt flows from his own decision not to avail himself of the defence and not as a consequence of the prosecution’s having raised the issue mid-trial |

### Counter-arguments:

**(1)** Crown could strengthen a **weak case** by presenting evidence of mental disorder (may be prejudicial to the accused if the defence is rejected);

**(2)** Accused could be subject to **indefinite detention** if the defence succeeds (and they are found not guilty on grounds of mental disorder); and

**(3)** Deprives the accused of the decision to argue that they are innocent of the crime.

# 4. Burden of Proof

## R v Chaulk, 1990 SCC

|  |  |
| --- | --- |
| **D** | Presumption that everyone is and has been sane (under s. 16(4)) violates s. 11(d) but saved under s.1 |
| **RA**  **(MAJ)** | In order to be guilty, you have to be sane (i.e. proving MR requires that the person be sane)  Presuming that one piece of MR is already proven vs making crown prove it as an element is an infringement of presumption of innocence. If Δ wants to *disprove* sanity they have to do so on BofP  *Oakes:*   1. Objective: avoid placing an impossible burden of proof on the Crown and to thereby secure the conviction of the guilty = suff’ly important 2. Chosen from the range of means which impair s. 11(d) as little as possible ∴ proportional   → reasonable limit. |
| **McL, LHD, Gont**  **(Concur in result)** | **s. 16(4) doesn’t violate 11(d)**  Sanity is a precondition for criminal responsibility not an actual state of mind  It’s a theoretical precept that crim responsibility and punishment only morally and legally justifiable for those who have capacity to reason and ∴ to choose right from wrong  s. 16(4) merely relieves crown from est’ing that the accused has capacity to reason – crown must still prove guilt of the accused (AR, MR, absence of exculpatory defences) BRD |
| **DIS**  **(Wilson)** | **Unjustified violation of s.11(d)**  If the starting premise is: it is necessary to impose a persuasive burden on accused to prove insanity on BofP in order to prevent sane persons from escaping liability on specious claims (introducing evidence that raised a reasonable doubt not enough) then gov’t would have to give evidence under s. 1 that this was a real social problem – that enough people were doing this that something had to be done  B/c this has virtually always been in place, there is no hx experience in our jurisdiction w/ a purely evidentiary burden in order to show that such a burden was inadequate to achieving the gov’ts purpose  ∴ has not been proven that there was such a pressing and subst’l concern  Although leg doesn’t need to wait until there’s a crisis, it hasn’t even been est’d that there’s a likelihood of this arising |

# Consequences of NCRMD

## Winko v BC (Forensic Psychiatric Institute) 1999 SCC

|  |  |
| --- | --- |
| **F** | Winko (A) alleges that Part XX.1 violates rights to liberty, security of the person, and equality |
| **RA** | Part XX.1 protects liberty, security, and equality rights of NCRMD accused b/c the defence req’s an absolute discharge be granted unless ct or review board concludes they pose a significant risk to public safety. |
| **RE** | * NCRMD Accused no longer held at pleasure of LGIC * Part XX.1 gives third option (other than acquittal or conviction) for mentally ill people the individual is diverted into a special stream where ct or review bd conducts a hearing to determine whether person should be kept in secure institution, conditionally released, unconditionally released * Emphasis is on achieving twin goals of protecting public and treating mentally ill offender fairly and appropriately * Can only order treatment if the accused consents and the ct/bd considers it to be reasonable and necessary * XX.1 doesn’t presume NCR accused to be threatening * Public safety will only be ensured by stabilizing the mental condition of dangerous NCR accused   Interesting that this is only seen as necessary for NCRMD…shouldn’t this be a prerequisite of criminal punishment more generally? Only here is it recognized that society shouldn’t “content itself with locking the ill offender up for a term of imprisonment and then releasing him or her into society, without having provided any opportunities for psychiatric or other treatment” |

**NB:** s. 672.54 amended in 2014 to state that the ct’s “paramount consideration” is public safety

**Step 1: Disposition Hearing:**

If the accused is found NCRMD, then a disposition hearing – composed of a judge and 2 mental health professionals – is req’d to be held ‘as soon as is practicable but not later than 40 days after the verdict was rendered (s. 672.47(1))

**Step 2: Assessment and Discharge:**

If the review board concludes that the accused is not a significant threat to the safety of the public, then they will be discharged.

**Step 3 – Continued Detention / Conditions**

If the review board decides against an absolute discharge, then according to Section 672.54 they are required to make a disposition that – 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” – is “the least onerous and least restrictive to the accused.”

**In practice:** This can mean placing the accused in continued detention at a mental health institution / hospital, or releasing them subject to a series of conditions and restrictions.

**Points to note:**

* Continued detention (or imposed conditions) must be reviewed on a yearly basis by the review board – Section 672.81(1)
* Detention and treatment of the accused is the responsibility of provincial authorities.
* Although the review board cannot order treatment for the accused, it does have the power to order provincial authorities to provide an assessment and treatment plan

# USING MENTAL DISORDER AS A DEFENCE

# From *M’Naghten* to Section 16:

Current approach in Canada has its origins in the rules developed by the UK House of Lords in the *M’Naghten Case* (these rules are commonly referred to as the *M’Naghten rules*).

**→** The accused will have a defence of insanity where it can be proved that “at the time of the committing of the act, **the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act** he was doing, or, if he did know it, that **he did not know what he was doing was wrong**.”

**Three key differences** between the original *M’Naghten rules* and the version contained in Section 16:

|  |  |
| --- | --- |
| *M’Naghten* | *Section 16* |
| “…as not to **know** the nature and quality of the act he was doing...” | “…incapable of **appreciating** the nature and quality of the act or omission...”  → substitutes the word “appreciate” for “know” in the framing of the rule |
| “…as not to **know** the nature and quality of the act” | “… **incapable** of appreciating the nature and quality”  → refers to the *capacity* of the accused to appreciate the nature and quality of their actions, rather than knowledge |
| Under the original *M’Naghten rules* (which still apply in countries like United Kingdom), the defence is referred to as the **insanity defence.** | the **not criminally responsible on account of mental disorder (NCRMD) defence.** Parliament was of the view that the label of “insanity” was stigmatic. |

# Structure of the Defence

This basic structure is confirmed in *R v Bouchard-Lebrun*

IN THE EVENT THAT THE COURT IS WILLING TO ACCEPT THAT THERE IS A MENTAL DISORDER WITHIN THE MEANING OF S. 16, THE DEFENCE WOULD PROCEED TO THE SECOND **OR** THIRD BRANCHES…EXAM HINT.

“A person who is unable to appreciate the nature and quality of an act or is incapable of knowing that the act is wrong, **but does not suffer from a mental disorder**, will not qualify for the defence.”

**However:** As Roach notes, they may still be able to use the common law defence of **automatism**. AGAIN, IF THIS COMES UP IN AN EXAM, IF YOU CAN’T MAKE OUT NCRMD, THEN RUN AUTOMATISM FOR THOROUGHNESS.

## what qualifies as DofM under code is a question of law

### Cooper v The Queen, 1980 SCC

* Judge will determine what mental conditions are w/in the meaning of the phrase and whether there is any evidence that an accused suffers from an abnormal mental condition comprehended by that term.
* If there is any evidence that the accused did suffer such a disease in legal terms, question of fact must be left w. jury
* Disease of the mind:Phrase should be given a **broad and liberal legal construction:** “embraces any illness, disorder or abnormal condition which **impairs the human mind and its functioning**, **excluding** however, **self-induced states** caused by **alcohol or drugs**, as well as **transitory** mental **states** such as hysteria or concussion.”
* must be of such intensity as to render the accused **incapable of appreciating the nature and quality of the violent act or of knowing that it is wrong**
* Although DofM includes a medical component, deciding whether a given condition fits w/in this phrase is ultimately a question of law.

**Note:**

* b/c it is for the court to decide, defining ‘mental disorder’ may be influenced by policy considerations as well as medical definitions or understandings of mental illness
* in Canada, the internal/external distinction is *not* a determinative factor

R. v. Parks (1992): Danger of recurrence (typically assoc’d w/ internal causes) is only one of many factors that can be considered when deciding whether a disturbance of the mind is a mental disorder. The fact that the disturbance is unlikely to recur does not preclude a finding of mental disorder

R. v. Stone [1999]:Factors that can be considered in determining whether a disturbance of the mind is a mental disorder include:

* Evidence of continuing danger
* Recurring likelihood of violence
* Internal cause
* Psychiatric history of accused

Examples of conditions that have been recognized as mental disorders:

* Psychopathic personalities – ***R. v. Simpson* (1977)**
* Personality disorders – ***R. v. Rabey* (1977)**
* Brain damage, including fetal alcohol spectrum disorder – ***R. v. C.P.F.* (2006)**
* Severe mental disabilities – ***R. v. Revelle* (1979)**
* Delirium tremens produced by chronic alcoholism (where the condition is permanent and not simply the product of transitory intoxication) – ***R. v. Malcolm* (1989)**

## When voluntary intoxication is the *sole* cause of mental disorder ≠ DofM **BUT** defence left open by *Cooper* in certain exceptional circumstances

### R v Bouchard-Lebrun, 2011 SCC 58

|  |  |
| --- | --- |
| **F** | Δ had assaulted 2 people while in a state of psychosis caused by drugs he had taken  In addition to the regular effects of the drug, he suffered an unanticipated psychosis which caused a complete dissociation between Δ’s subjective perceptions and objective reality  Never had psychotic episode before; no underlying disease of the mind; no addiction  But arguing indirectly that the toxic psychosis resulted from an underlying disease of the mind that was triggered by the drugs b/c toxic psychosis can’t be result of just drugs |
| **I** | Whether toxic psychosis resulting from the voluntary consumption of drugs is a ‘mental disorder’ w/in the meaning of s. 16 |
| **D** | No. DofM must be something inherent, rather than the result of external factors. |
| **RA** | A malfunctioning of the mind that results *exclusively* from self-induced intox cannot be considered DofM in the legal sense, because it is not a product of the individual’s **inherent psychological makeup.** |
| **RE** | **Requirements of the Defence [Δ must prove on 2-stage test]:**   1. Suffering from disease of mind at the time [on BofP] 2. Disease of mind resulted in inability to know right from wrong   --------------------------------------------------   * Note that disease of mind is a broad category that includes any disorder that impairs the mind or functioning, the recognition of which is **compatible w/ the policy considerations that underlie the defence** * DofM is a legal concept w/ a medical and scientific substratum   + Psychiatrist describes the accused’s mental condition and how it is considered from medical point of view   + Then the judge determines whether the condition described is comprehended by DofM * Δ’s position depends on the characterization of DofM is dependent on medical expertise but this is untenable b/c it would shift responsibility for deciding whether an accused is guilty from the judge or jury to the expert   **Problem of Psychosis Caused by Drugs/Alcohol**  Toxic psychosis can be caused by a # of diff things ∴ must take a contextual approach to characterisation vs. always calling something DofM  If Δ is intoxicated and suffering from psychosis, then in order to determine whether psychosis was *solely caused* by intoxication or was unrelated, must take a flexible ‘holistic’ approach |
| **ETC** | * Determination of DofM crucial in cases of automatism or involuntary conduct b/c an accused who acts involuntarily will satisfy one or both arms of mental disorder defence * Confirms the rule in *Cooper* but seems to leave open the possibility of the defence where the ingestion of drugs exacerbates a pre-existing condition and results in a form of psychosis that continues for a significant period (usually months rather than days)   ∴ certain types of self-induced psychosis may provide the basis for a defence of NCRMD:   * Psychosis caused by ingestion of a drug that lasts for a significant period * Ingestion of a drug exacerbates a pre-existing psychotic condition * Psychosis caused by withdrawal from a drug (e.g. alcohol)   IF THIS COMES UP IN AN EXAM, YOU SHOULD USE THE COOPER RULE BUT STATE THAT THERE MAY BE AN EXCEPTION BUT IT HAS NOT BEEN USED IN THE CASE LAW TO DATE. |

## BRANCH 1: Appreciating the Nature and Quality of the Act:

**Roach:** The ability to appreciate the nature and quality of an act involves **more than mere knowledge** or cognition that the act is being committed. [remember, s. 16 uses language of ‘appreciation’ rather than ‘knowledge’]

**→ Instead:** It includes the capacity to measure and foresee the consequences of the conduct.

**→ As a Result:** If the accused cannot appreciate the physical consequences of their actions due to a mental disorder, then they may have a defence under Section 16. Does *not* extend to situations where the accused does not understand the emotional impact of their actions on the victim (i.e. absence of empathy)

### Cooper v The Queen, 1980 SCC

**The true test is:** was the accused, at the very time of the offence, by reason of disease of the mind, unable to **appreciate** not only the nature of the act but the natural consequences that would flow from it?

* To know the nature and quality of an act may mean merely to be aware of the physical act, while to ‘appreciate’ may involve estimation and understanding of the consequences
* The test requires a level of understanding of the act which is more than mere knowledge that it is taking place – req’s a capacity to appreciate the nature of the act and its consequences
* More than knowledge of the physical quality of the act; also an ability to perceive the consequences, impact and result of a physical act
* e.g. an accused may be aware of the physical character of his action (i.e. in choking) w/o necessarily having the capacity to appreciate that, in nature and quality, that act will result in the death of a human being.
* Doesn’t exempt someone who has the capacity for appreciating the nature but merely lacks appropriate feelings for the victim or lacks feelings of remorse or guilt for what he has done, even though such lack of feeling stems from a disease of the mind [*Regina v Simpson,* 1977 ONCA]

### R v Abbey, [1982] SCC

|  |  |
| --- | --- |
| **F** | Accused charged w/ importing cocaine and possession of cocaine for the purpose of trafficking  When going through customs and afterward, accused appeared normal  Crown and defence agreed that Δ suffered from hypomania but differed re: incapacity  Agreed as well, that he knew that what he was doing was wrong  Δ had a delusion that he was in receipt of external power and was protected from punishment by the mysterious external force |
| **I** | Whether believing that oneself will be shielded from punishment for committing a crime, despite knowing that it is wrong to commit, amounts to an incapacity to appreciate the consequences of one’s act. |
| **RA** | Consequences only refers to the physical consequences of one’s act. A delusion about legal consequences does not render the accused incapable of knowing the nature and quality of his or her act. |
| **RE** | A delusion which renders an accused incapable of appreciating the nature and quality of his act → goes to MR and brings into operation the 1st arm of 16(2)  Delusion which renders accused incapable of appreciating that penal sanctions attaching to the commission of the crime are applicable to him does not go to the MR ∴ does not render him incapable of appreciating the nature and quality of the act. |

## BRANCH 2: Knowing the Act is Wrong

**Basic Rule:** To satisfy the second limb of the test in s. 16, the accused must establish that **as a result of the mental disorder,** they were incapable of knowing that the act or omission was wrong.

**Key question:** What sort of wrongfulness? **Legal or moral** wrong?

### R v Chaulk

### wrong for s. 16(1) means wrong according to the ordinary moral standards of reasonable members of society

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| --- | --- |
| **F** | Accused C+M entered a home, plundered it for valuables, then stabbed and bludgeoned its sole occupant to death. A week later they turned themselves in.  Evidence at trial given that they suffered from paranoid psychosis which made them believe that they had the power to rule the world and that **the killing was a necessary means to that end**; **thought they had the right to kill the victim** |
| **I** | What is the meaning of the word ‘wrong’ found in s. 16(2)? (i.e. morally wrong or legally wrong or either?) |
| **RA** | It is not enough to show that A understood that the act was contrary to law. The question is “whether an accused was rendered incapable, by the fact of his mental disorder, of knowing that the act committed was one that he ought not have done.” |
| **RE** | The question is whether an accused was rendered incapable, by the fact of his mental disorder, of knowing that the act committed was one that he ought not have done [*M’Naghten’s Case*] therefore, the inquiry cannot terminate with the discovery that the accused knew that the act was contrary to the formal law.  **Won’t open floodgates b/c:**   * Incapacity to make moral judgments must be causally linked to disease of the mind * Won’t favour amoral offenders b/c moral wrong won’t be judged by personal standards of offender but by his awareness that society regards the act as wrong |
| **DIS** | * Thinks that a deficiency of moral appreciation shouldn’t shield an offender. * Basically, all that capacity requires is that the accused be capable of knowing the act was **in some sense wrong**. * If the person knows the act is against the law, why should they be exempt just b/c they thought it was morally okay? We don’t treat sane offenders that way, so why should a ‘breakdown of the moral mechanism’ work this way? * What should the result be if the accused claims incapacity to know that his or her unlawful act was morally wrong and, objectively, the act was one for which the moral wrongfulness can be disputed? It’s not fair to expect judges or juries to pronounce on morality ∴ for the sake of greater certainty and the avoidance of metaphysical arguments, shouldn’t put this in. → isn’t this what cts do all the time through the application of the ‘reasonable person’ standard? |

### R v Oommen, 1994 SCC

|  |  |
| --- | --- |
| **F** | Accused suffered from a paranoid delusion and **believed that the woman staying in his house was part of a conspiracy to kill him** so he shot her. |
| **I** | What is meant by the phrase “knowing that the act was wrong” in s. 16(1)? Does it refer only to abstract knowledge that the act would be viewed as wrong by society or does it extend to the inability to rationally apply knowledge of right and wrong and hence to conclude that the act in question is one which he ought not to do? |
| **D** | New trial ordered where accused could raise insanity defence |
| **RA** | The accused possessed general capacity to distinguish right from wrong, but **delusions deprived him of the capacity to know that killing the victim in particular was wrong – in fact believed action was necessary and justified.** |
| **RE** | * The person would know killing was wrong but his delusion would cause him to believe that killing was justified under the circumstances as he perceived them * Possessed the general capacity to distinguish right from wrong but on the night of the killing, delusions deprived him from the capacity to know that killing the victim was wrong * The crux of the inquiry is whether the accused lacks the capacity to rationally decide whether the act is right or wrong and ∴ to make a rational choice about whether to do it or not * This includes delusions which make the accused perceive an act which is wrong as right or justifiable, and a disordered condition of the mind which deprives the accused of the ability to rationally evaluate what he is doing.   → didn’t McL object to this line of reasoning in *Chaulk?* No, because ‘saving the world’ is not a protected exception to murder whereas self-defence is. In other words, if the facts of the world were as he believed them to be, the Δ would have been right that the killing was justified.   * While accused was generally capable of knowing that the act of killing was wrong, he could not apply that capacity for distinguishing right from wrong at the time of the killing b/c of mental disorder |

**STICK TO THE COMMON SENSE APPLICATION OF THE FACTS**

* Insanity defence not available if – even though the accused was labouring under a delusion – they were still capable of knowing that the act in the given circumstances “would have been morally condemned by reasonable members of society.” *R. v. Ratti* (1991)
* Insanity defence not available to a psychopath or other person following a deviant moral code if that person is “capable of knowing that his or her acts are wrong in the eyes of society, and despite such knowledge, chooses to commit them.” *R v Oommen* [1994]
* Insanity defence not available where accused knows that killing the victim is wrong, but does so in the deluded belief that killing them would save the world. *R. v. Baker* [2010]

**Basic Point:**

NCRMD defence will not be available under the second limb of Section 16(1) if the accused – who understands society’s general views about the difference between right and wrong – chooses to do the wrong thing due to a delusion. Criminal law punishes criminal choices.

## Operation of Both Branches, Together:

### R c Landry, 1988 QUECA

* Difference between a person who killed believing he was killing Satan on the orders of God and the person who was prevented from having sympathy for his victim or remorse for his act, or the accused who killed b/c mental disorder made him believe that he would not be arrested or charged.
* In the first case, the accused’s mental state directly affects the mens rea, in the other two, it does not.
* Even if Landry knew the nature and consequences of his act and even if he knew that it was unlawful, he was incapable of appreciating the nature and quality of his act if, at that moment, he thought that he was God and that Fortin was Satan.

### Landry, SCC:

* CA interpreted s. 16(2) in a manner that is inconsistent with *Cooper, Abbey, and Kjeldsen.*
* The first branch of s.16(2): protects an accused who, because of DofM, was incapable of appreciating the *physical* consequences of his act
* The second branch of S. 16(2): protects an accused who, because of DofM, was incapable of knowing that the act was wrong in the circumstances

# MENTAL DISORDER AND NON-MENTAL DISORDER AUTOMATISM

* Unconscious and involuntary behaviour
* Successful Non-MDA: acquittal + freedom vs. Successful MDA = subsumed by NCRMD
* In R. v. Rabey (1977), the Supreme Court in defined automatism as:

“[U]nconscious, involuntary behaviour, the state of a person who, though capable of action, is not conscious of what he is doing. It means an unconscious involuntary act, where the mind does not go with what is being done.”

* Note also that in R. v. Stone [1999], the court held that the **accused does not actually need to be unconscious** to have the defence of automatism.

**Instead:** Key is that the actions were **not voluntary**

* Consequences of the automatism defence are complete acquittal.
  + **However:** As Roach notes, if the accused presents evidence of automatism, it is **then open to the Crown** to counter with evidence that the cause of the **automatism was a mental disorder.**

**→ Point:** In such cases, the question then becomes whether the cause of the automatism is a mental disorder or some other factor.

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**If cause of automatism is DOM →** Then accused goes through NCRMD route and is subject to a disposition hearing.

**If cause of automatism is not DOM →** then accused must receive a simple acquittal as per *R v Bleta*

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***Prior to 1992:***

*If the accused raised a defence of non- insane automatism, then the accused would be entitled to an acquittal if the evidence raised a reasonable doubt as to whether they acted in a voluntary or conscious manner (as per the decision in R. v. Parks (1992))*

*As Roach notes (304):*

*Rationale for this approach was based on the idea that such evidence would raise a reasonable doubt as to whether the accused acted with the requisite fault element (including capacity to form any objective mens rea) or alternatively whether they actus reus was voluntary / committed consciously.*

**→ Stone changes this position so now, the accused must establish on a balance of probabilities that their conduct was involuntary.**

*Rationale for the Change?*

(1) Court was concerned that automatism defence could be faked under the traditional approach – that is, jury could consider the question of automatism provided that the accused presented some evidence that raised a reasonable doubt as to voluntariness.

(2) Court wanted to bring burden of proof for automatism in line with extreme intoxication (Daviault) and NCRMD (Section 16(1)) – that is, onus is on the accused to establish the defence on a balance of probabilities.)

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*R. v. Stone* also held that the new persuasive burden on the accused – to prove automatism on a balance of probabilities – also raised the threshold for judges with respect to whether to instruct the jury about the defence.

**Put another way:**

After R. v. Stone, in order to establish the air of reality threshold test, the **accused must do more than simply assert involuntariness.** Instead they must also have collaborating psychiatric evidence.

## *R v Parks,* [1992] SCC [sleepwalker kills inlaws – NMDA]

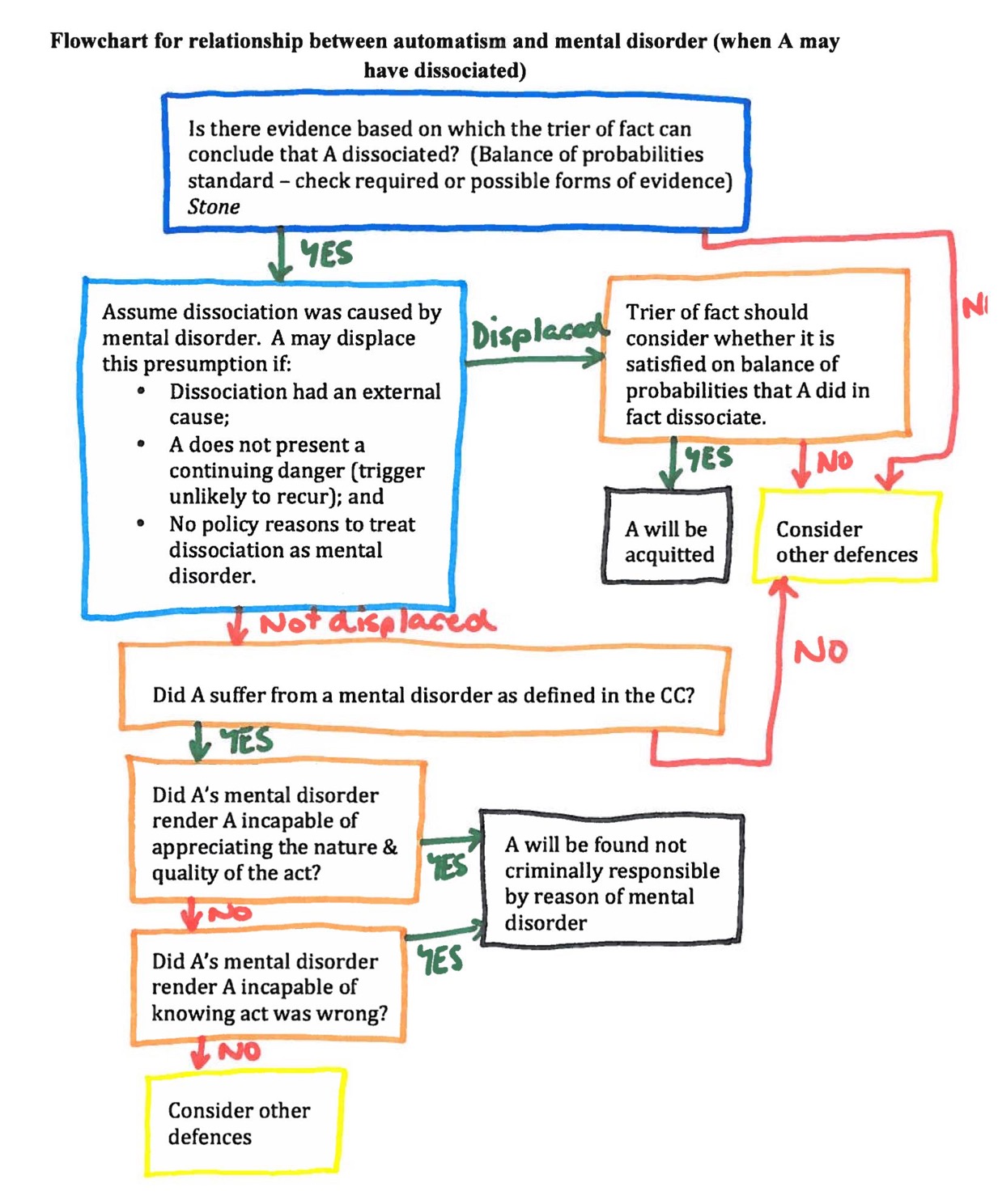
* Sleepwalking is not a disease of the mind in the legal sense of the term
* Automatism: mental unconsciousness/dissociation w/o full awareness (e.g. somnambulism, fugues) – applies to actions or conduct of an individual apparently occurring w/o will, purpose, or reasoned intention on his part; can be observed in persons who are not actually insane but NTL suffer from an obscuration of the mental faculties, loss of volition, memory, kindred affections
* No compelling policy factors that preclude a finding that the accused’s condition was automatism.
* Note: that the successful automatism defence *amounts* to a repudiation of AR; “Although spoken of as a defence, it is **conceptually** a subset of the voluntariness req’ment which is in turn part of the AR component of criminal liability.”

## *R v Stone,* [1999] SCC [insulted husb kills wife; NMDA v MDA = decision for judge]

**BEFORE THE COURT MOVES TO CONSIDER A CLAIM OF NMDA, Δ MUST ESTABLISH ON BOP THAT THEIR CONDUCT WAS INVOLUNTARY.**

|  |  |
| --- | --- |
| **F** | Δ charged w/ murder and convicted of manslaughter for killing wife after she made various insulting comments  Δ raised NMDA and MDA – judge only put MDA to the jury and Δ appealed on that |
| **I** | How can an accused demonstrate that mere words caused him to enter an automatistic state such that his actions were involuntary and do not attract criminal sanction? |
| **RA** | In order to determine whether automatism should be put as a defence to the jury:  Δ must show involuntariness on BoP  Then, Judge decides whether it should be MDA or NMDA based on: Internal or external cause; continuing dangers; other policy factors |
| **RE** | * Shouldn’t be ‘unconsciousness’ but rather ‘impaired consciousness’ meaning that a person has no voluntary control over that action   **Step 1: proving involuntariness on BoP**   * Legal burden applicable to all cases involving automatism must reflect policy concerns (i.e. that it’s easily faked) ∴ legal burden for any claim of automatism must be that Δ proves involuntariness on BoP   + Saddling crown w/ proving voluntariness defeats purpose of presumption of voluntariness   + Reverse burden justified under s. 1 * Factors that can be considered by TJ when deciding whether the air of reality is met:   (1) Severity of any triggering stimulus  (2) Corroborating evidence of bystanders  (3) Evidence that the accused has entered into a state of automatism in the past  (4) Whether the victim was also an alleged trigger for the automatism   * Also held that the judge should consider whether the crime can be explained without reference to automatism.   **Step 2: NMDA or MDA?**   * Comes down to question of whether the condition alleged by Δ is a mental disorder // two dominant theories  1. *Internal Cause Theory:*  * Compare, objectively w/in context, whether the ‘trigger’ would be such as would have caused a normal person to enter an automatistic state * Subjective test would frustrate this inquiry  1. *The Continuing Danger Theory:*  * Any condition which is likely to present a recurring danger to the public should be treated as a disease of the mind  1. *Other Policy Factors:*  * Could be that neither of the above is useful, so should consider a ‘holistic approach’: TJs should consider other policy concerns which underlie the inquiry; * Judges are speaking to the law in other jurisdictions by stating that internal cause is not the definitive answer * Both should be considered   Key points from the majority decision:  (1) The defence bears the legal burden of proving involuntariness on a balance of probabilities to the trier of fact. This is justified under Section 1 as automatism is easily feigned and the relevant knowledge rests with the accused.  Question for the trial judge is whether the defence has raised evidence on which a properly instructed jury could find that the appellant acted involuntarily on a balance of probabilities. The trial judge should consider factors such as motive and corroborating evidence in deciding whether this standard has been met  (2) The trial judge must decide which form of automatism to leave with the trier of fact. The trial judge must decide which mental conditions are included within the term and whether there is any evidence that the accused suffers from an abnormal mental condition.  (3) In deciding whether the accused suffered from a disease of  the mind, the judge may have regard to:  (i) Whether the normal person might have reacted to the alleged trigger by entering an automatistic state. In the case of psychological blow automatism (such as this one), an extremely shocking trigger must be needed to prompt automatism in an ordinary person. The conclusion that a normal person would not have entered an automatistic state supports a preference for Section 16.  (ii) Policy considerations also dictate attention to the question of whether A presents a continuing danger to the public or to particular people. If the danger is likely to be a continuing one, this supports a preference for Section 16. Note that Bastarache J also directed that the question should be whether the trigger would recur, not whether the automatism was likely to recur.  (iii) The trial judge may also consider other policy concerns which arise in a given case. |
| **A** | Trigger was not extraordinary external events that would amount to an extreme shock or psychological blow that would cause a normal person in the circs of the accused to suffer dissociation w/o any disease of the mind ∴ no subst’l miscarriage of justice |
| **DIS** | * Can’t make classifications re: NMDA or MDA, thereby relieving crown of onus of proving voluntariness; no attempt to justify this infringement of s. 7 and 11 w/ s. 1 * Imposition of a persuasive BoP to establish involuntariness also contrary to Charter and w/o justification * Internal cause theory cannot be used to deprive Δ of the benefit of jury’s opinion on voluntariness * Internal cause theory does not impose a presumption that a lack of voluntariness of a mental disorder any time there is no identification of a convincing external cause * Wrong for cts to req’re Δ to substitute for his chosen defence of involuntariness the conceptually different plea of insanity * There are states of automatism where perfectly sane people lose conscious control over their actions – matter should be left to jurors * There is no reason why both should not be left with the jury   Structural Implication:  Consider a situation where the defence produces evidence that shows that the accused was – on a balance of probabilities – suffering from dissociation.  Trial judge is obliged to presume that the dissociation was the result of a mental disorder (unless there are facts that displace the presumption).  **Now:** What if the court concludes that the dissociation was not the result of a mental disorder?  **Result:** Court is not able to “return to the start” and consider “non-insane” automatism. |

# POST-STONE FLOW CHART



If the presumption is not displaced, and the **accused fails on s. 16**, you can’t get back to the beginning and argue automatism

**The air of reality test** occurs here – the threshold before TJ can even consider the defence

## *R v Luedecke,* 2008 ONCA [SA while Δ asleep; hx of this behaviour]

*Stone* alters approach to the characterization of automatism as NMDA or MDA in significant ways:

* 1. TJ must now begin from the premise that automatism is caused by a DOM and look to evidence to determine whether it convinces him/her that the condition was not DOM
  2. In evaluating risks to public, TJ must not limit inquiry only to risk of further violence while in automatistic state
  3. Strong preference for NCRMD in cases where accused est’s a dissociative state
  4. In conjunction w/ the [OLD] rules about NCRMD, after a verdict of NCRMD, accused must be individually assessed and if the accused does not demonstrate a significant risk, they must receive an absolute discharge

## Main Categories Of Automatism:

1. Automatism **caused by “normal” conditions** (such as sleepwalking and hypnosis);

* Parks: sleepwalking is the paradigmatic case of this; rejected the idea that this is a form of mental disorder.
* **Note**: Reason to think that as a result of **Stone**, the Supreme Court might now take a different view of sleepwalking (as per the decision in **R. v. Luedecke**, where the court held that sleepwalking in this case was a mental disorder).
* Also noted that the focus on likely recurrence of triggers (rather than likely recurrence of automatism) tend to keep sleepwalking cases in MDA

1. Automatism caused by **external trauma** (such as blows to the head) can be physical or psych;

* **Rabey:** Supreme Court held that an automatic state brought on by an emotional or physical blow could provide the basis for a defence of non-insane automatism.
* **However:** Event in question must be “extraordinary” – such as being in a serious accident or seeing a loved one killed: “Event must be one that “might reasonably be presumed to effect the average normal person **without reference to the subjective make-up of the person** exposed to such an experience.” // ct is loath to recognize this
* Being exposed to “the ordinary stresses and disappointments of life which are the common lot of mankind” will not be enough.
* Likelihood of recurrence of dissociation must be remote.
* Noted that in the case of a physical blow, the question is whether the accused went into a dissociative state (not whether a reasonable person exposed to the same blow would have done so)

1. Automatism involuntarily induced by alcohol or other drugs;

* **Rule:** If the accused falls into a state of automatism as a result of involuntary intoxication – or from being drugged – then they are entitled to the defence of automatism.
* **However:** Note that the defence will not be available where there is evidence that the accused had **foresight of impairment** or had **taken the alcohol / drug voluntarily.**

1. Automatism voluntarily self-induced by alcohol or other drugs:

* **Rule:** If the accused falls into a state of automatism as a result of voluntary intoxication – or from taking drugs – then they will not be entitled to the defence of automatism.
* **R. v. Revelle (1979):** “It is well-established that if automatism is produced solely by drunkeness only the defence of drunkenness, which is limited to crimes of specific intent, need be left to the jury.”
* Note **Bouchard-Lebrun** where there was no mental disorder where the accused took drugs resulting in a toxic psychosis (and committed assault in part because of religious delusions).
* **Roach: “**The Court's restrictive reading of mental disorder in this case is at odds with its broad reading of mental disorder in Stone which as discussed earlier has been applied to cover even cases of sleepwalking. **Self-induced intoxication thus seems to be a special case to which Canadian courts are reluctant to apply the mental disorder defence.”**

1. Automatism caused by a mental disorder (s. 16)

**Rule:** Where the automatism caused by a mental disorder, the accused will not be entitled to the defence of automatism, but instead Section 16 will apply.

Note: Only categories (1) – (3) can constitute the defence

# Self-Defence

**General rule:** One may act reasonably in response to a threat to oneself or another; overall reasonableness of the accused’s response in the circumstances is where ‘heavy lifting’ of the assessment happens

**34(1)** A person is not guilty of an offence if

(a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person; [subj/obj]

(b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force [subj]; and

(c) the act committed is reasonable in the circumstances. [obj *but* considerations under (2) are a mix of subj and obj factors]

(2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:

(a) the nature of the force or threat;

(b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;

(c) the person’s role in the incident;

(d) whether any party to the incident used or threatened to use a weapon;

(e) the size, age, gender and physical capabilities of the parties to the incident;

(f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;

(f.1) any history of interaction or communication between the parties to the incident;

(g) the nature and proportionality of the person’s response to the use or threat of force; and

(h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

(3) Subsection (1) does not apply if the force is used or threatened by another person for the purpose of doing something that they are required or authorized by law to do in the administration or enforcement of the law, unless the person who commits the act that constitutes the offence believes on reasonable grounds that the other person is acting unlawfully.

# 3 Key requirements under section 34:

For a claim of self-defence to be successful, the accused must raise a reasonable doubt that they:

(1) Subjectively believed on reasonable grounds that force (or the threat of force) was being used under Section 34(1)(a);

(2) That they had the subjective purpose of defending themselves (or others) under Section 34(1)(b); and

(3) That their actions taken in self-defence were reasonable in all the circumstances under Section 34(1)(c).

## Drilling down on the elements

### REQUIREMENT 1:

Accused subjectively believed on reasonable grounds that force (or the threat of force) was being used under Section 34(1)(a)

**BASIC RULE:** the accused must believe on reasonable grounds that force (or the threat of force) was being used against them. Important to note that this step incorporate a subjective and an objective component. Begin by asking whether the accused subjectively believed they were being assaulted or threatened with an assault. **Then:** ask whether there was an **objective (reasonable)** basis for the subjective belief. Funnelling effect b/c subjective bar is not particularly difficult to get over. Don’t want to make it available to someone who is using SD as a reason to do something else (e.g. vengeance)

***KEY CASE R. v. Reilly*** (1984) as per Richie J.:

The jury can be guided by the subjective beliefs of the accused “so long as there exists an objectively verifiable basis for his perception.”

→ See also McLachlin CJ and Bastarache J. in ***R. v. Cinous*** (2002):

“The accused’s perception of the situation is the “subjective” part of the test. However, the accused’s belief must also be reasonable on the basis of the situation he perceives. This is the objective part of the test ... [T]he approach is to first inquire about the subjective perceptions of the accused, and then to ask whether those perceptions were objectively reasonable in the circumstances.”

As Roach (329) notes, this subjective / objective approach means that **a mistake** by the accused **as to existence of force (or threat** of force) will **not automatically preclude** a self-defence claim.

However**, the (subjective) mistake** **must be reasonable**.

Consider the case of ***R. v. Berrigan*** (1998):

Accused stabbed the victim. Claimed that he did so because he thought that the victim was reaching for a gun (in fact, he was taking a cell phone out of his pocket).

Court concluded that the **mistake was based on reasonable grounds**, having heard that the victim had told Berrigan on three previous occasions that he carried a gun.

Other points to note [these mirror the factors in 34(2); they’re all factors to take into acc’t in determining whether the grounds for SD are reasonable…THESE ARE A CHECKLIST FOR YOUR CANS]

1. s. 34(1)(a): includes the threat of force ∴ it is possible to claim SD even if the accused has not in fact been assaulted

Stressed in **R v Petel (1994):**

“An honest but reasonable mistake as to the existence of an assault is ... permitted ... The existence of an assault must not be made a kind of prerequisite for the exercise of self defence to be assessed without regard to the perception of the accused. This would amount in a sense to trying the victim before the accused.”

1. The accused is not req’d to wait until faced with an imminent attack before acting in self defence

***R. v. Lavallee* (1990):**

Accused shot her abusive husband in the back of the head after he threatened to hurt her once their guests had left their house.

**Court:** Held that accused was acting in self–defence, even though they were not being assaulted at the time of the act.

→ When you get to the objective step of the defence, you need to take an even broader view of what is reasonable. Rejected the view that it was unreasonable for the accused to apprehend death or grievous bodily harm – and act accordingly in self-defence – unless the assault was in progress.

**Instead:** Noted that it “may in fact be possible for a battered spouse to accurately predict the onset of violence before the first blow is struck, even if an outsider to the relationship cannot.” Can’t be dismissive to the circumstances of an abused woman. This is pretty broad and it’s starting to look pretty subjective. However, it’s different from other defences because SD is a *right.* You are born with a right to protect yourself; you’ve given up your right to resolve conflict with violence. But, in circumstances where the state is not able to provide adequate protection, that right **re-emerges.**

1. **History of the relationship between the parties** is relevant to the question of whether the accused had reasonable grounds to believe that he or she faced force or a threat of force (**Lavallee)**
2. **Imminence of the force** is also relevant to the question of whether the accused had reasonable grounds to believe that he or she faced force or a threat of force (**Cinous**)
3. S. 34(1)(a) also extends to the **protection of another person** from force or threats of force

### REQUIREMENT 2:

That they had the **subjective purpose of defending themselves** (or others) under Section 34(1)(b).

As Roach notes (333), this requirement is usually easy to make out at trial. However, Main point to note is that the subjective intent behind the accused’s use of must go to self-defence, and not things such as a desire for vengeance.

### REQUIREMENT 3:

* That their actions taken in self-defence were reasonable in all the circumstances under Section 34(1)(c)
* Note that this provision marks a departure from the previous approach to the use of force – where the accused was only permitted to use such force as was necessary in the circumstances.
* **Now:** Key question is whether the **amount of force** used in self-defence was **reasonable** under all the circumstances. The ct is not constricted in what factors they consider; Although there are the 9 specified factors set out in 34(2), the judge should end the list to the jury with the fact that the jury is **not confined** to the list.
* The presence/absence of one of the factors is not **determinative**. The factors are only meant to provide **guidance.** You still need to form an argument around the factors.

## Section 34(2): Factors Drill Down

**(a) Nature of the force or threat:**

* > violence > force can be used reasonably in response
* use of force can be preemptive in response to threatening words or gestures:
  + **R v Young 2008 BCCA:** “[I]n cases of self-defence ... the words of threat must be considered in the context of the history of abuse and the reasonable perceptions of the accused.”

**(b) The extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force.**

* < imminent the likelihood of violence, the more the accused will be expected to find a means of avoiding the threat/resorting to SD
* No formal req’ment of imminence – and so an absence of imminence will not be fatal (**Petel)**
* Note that in **Lavallee:** role of imminence is diminished where the accused is a woman who has been subjected to a pattern of physical abuse.
* Also from **Lavallee:** “The rationale for the imminence rule seems obvious. The law of self-defence is designed to ensure that the use of defensive force is really necessary. It justifies the act because the defender reasonably believed that he or she had no alternative but to take the attacker's life. If there is a significant time interval between the original unlawful assault and the accused's response, one tends to suspect that the accused was motivated by revenge rather than self-defence.”

**(c) The person’s role in the incident**

* Defence may not be available in cases where the accused has initiated the violent encounter that led to them using SD
* ***R v McIntosh* (1995):** The accused, who had confronted the victim w/ a knife following a disagreement over loaned property, could not rely on SD b/c he had provoked the attack

**(d) Whether any party used or threatened to use a weapon**

* The use of a weapon will be a key factor in determining whether the force used was reasonable in all the circs; however note **Lavallee** qualifies that it might be reasonable for a woman to use a weapon against a more powerful male partner (in the context of a hx of abuse)
* Very difficult to rely on SD where accused uses deadly force in response to a non-lethal weapon (**R v Cain (2011)**)

**(e) The size, age, gender and physical capabilities of the parties**

* Where the accused is at a significant physical disadvantage, then the use of a weapon / extreme force is more likely to be regarded as reasonable – **R. v. Lavallee** (1990)
* Note also comments from Wilson J. on the role of gender in **R. v. Lavallee** (1990): “I do not think it is an unwarranted generalization to say that due to their size, strength, socialization, and lack of training, women are typically no match for men in hand-to-hand combat.”

**(f) The nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat**

* The existence of a pre-existing relationship between the parties – particularly if it is an abusive one – may be taken into account when considering whether the pre-emptive use of force in self-defence was reasonable – **R. v. Lavallee** (1990)

**(f.1) Any history of interaction or communication between the parties to the incident**

* The court can look to previous interactions / past communication when determining whether the accused’s conduct was reasonable.
* For example, if you borrow money from a loan shark with a reputation for violence, it may be reasonable to be in fear for your safety when they come to collect the debt – see decision in **R. v. Docherty (2012)**

**(g) The nature and proportionality of the person’s response to the use or threat of force**

* The use of force must be proportional to the circumstances / situation
  + The greater the amount of force above the amt necessary to extricate yourself from the situation, the more likely it’ll be found to be disproportional
* But note that the courts have recognised that decisions made in relation to self-defence are often made quickly and in the heat of the moment – when it is difficult to decide what might be an appropriate or proportionate response.
  + **R. v. Baxter** (1975): “[A] person defending himself against attack, reasonably appreciated, cannot be expected to weigh to a nicety, the exact measure of necessary defensive action.”

**(h) Whether the act committed was in response to a use or threat of force that the person knew was lawful**

* Good example of this is where a trespasser knows that a homeowner has a legal right to use force to remove them (if they have refused to leave). In this case, if the trespasser resorts to the use of force in self-defence, the court may not agree that the use of force was justified.
* **Note also the operation of Section 34(3):** Cannot rely on self-defence where the force used / threatened is from an individual who is legally entitled to use such force / make such threats (such as a police officer).

# Key points to note about the operation of Self-Defence:

* + 1. SD is **not a repudiation of AR or MR**. Instead, it operates as a JUSTIFICATION that provides a complete defence (and leads to acquittal) //different from an excuse
    2. Accused does not have to establish the defence on BoP (unlike for MD, Autom, intox). Instead, once the defence is raised, it is for the Crown to **disprove** the defence as part of its burden to prove guilt BRD. If jury has reasonable doubt the accused acted in SD, then it **MUST ACQUIT.**
    3. **TJ** does not have to instruct the jury in all cases where SD is raised. Must still have AoR.
* R. v. Cinous (2002): Supreme Court held that the standard air of reality test applies with respect to defences such as self-defence.
* TJ must be satisfied that a properly instructed jury acting reasonably could acquit on the basis of the evidence.
* In Cinous, there was no evidence that Δ acted in SD (when he shot the victim in the back of the head), and so the trial judge should not have instructed the jury to consider the defence.

## Interpreting and Applying the Self-Defence Provisions:

**Conditions necessary to give the defence an air of reality:**

1. Accused must believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made
2. Accused must have acted w/ subjective purpose of protecting himself or herself (or others) from the use or threat of force
3. The act committed by the accused to defend against that force must be ‘reasonable in the circumstances’

* Note that assault is taken out as a req’ment ∴ conceivably could steal a car in order to flee an attack, claiming self-defence; in the past, this would have been covered under duress
* Also note that the accused is not deemed to have been ‘justified’ in their actions but merely not guilty

## Subjectivity and Objectivity in Self-Defence:

### R v Cinous, 2002 SCC 29

|  |  |
| --- | --- |
| **F** | Δ a computer thief, thought he was subject of a murder plot by a fellow thief so killed the fellow thief. Convicted at trial. |
| **I** | Whether there was an air of reality that meant the defence of self-defence ought to have been put to a jury |
| **D** | No air of reality to elements of the defence |
| **RA** | The defence must have an air of reality before it is put to the jury. To give an air of reality, it must be reasonable that the accused was acting in self-defence. |
| **RE** | **Reasonable belief in imminent attack**  A jury acting reasonably could draw an inference from the circumstances described by the accused, including particularly the many threatening indicators to which he testified, to the reasonableness of his perception that he was going to be attacked. [subj/obj]  **Reasonable apprehension of death or grievous bodily harm**  If there is an air of reality to the accused’s belief in imminent attack, also reasonable that it would be deadly. A jury acting reasonably could draw an inference from the circumstances described by the accused, including particularly the indications that Mike and Ice were armed, the rumors of a plan to assassinate him, the suspicious behaviour, and the wearing of the gloves, to the reasonableness of his perception that he was in mortal danger.  **Reasonable belief in absence of alternatives**  No air of reality; fails on objective portion b/c there were plenty of other options. Killing must be very last resort |

#### Reilly v The Queen, 1984 SCC

Although intox can be a factor in inducing an honest mistake, it cannot induce a mistake which must be based upon reasonable and probable grounds. The standard is objective; the reasonable man is in full possession of his faculties. If the intox man holds a belief that the obj reasonable sober man would have held, then there are reasonable and probable grounds for the belief *in spite* of his intox.

#### R v Nelson, 1992 ONCA

Intellectual impairment should be taken into consideration when assessing his or her reasonable beliefs and responses. → under new leg’n, this would come under ‘relevant circumstances of the person’ under s. 34(2)

## Proportionality and Other Aspects of ‘Reasonableness’

* Not req’d to measure nicety of blows; all that is req’d is whether the force was reasonable and in doing so, jury should look at what a reasonable person in the accused’s situation might do given the threatening attack and the force necessary to defend himself against that apprehended attack
* S. 34 does not impose a req’ment to retreat but nor does it provide a right to ‘stand one’s ground’
* May be a more absolute rule re: whether one is ever req’d to retreat in one’s own home

## Excessive Force and Self-Defence

All or nothing defence ∴ if accused concedes that they committed an offence and claims self-defence, if their actions are found to have been unreasonable, they are guilty of the offence.

* S. 34 + s. 26: “every one who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess.”
* However, if there is a charge of murder where self-defence is claimed and the principal issue is whether the accused used excessive force, the outcome will either be an outright acquittal or conviction of murder
  + This puts significant pressure on an accused to plead guilty to a lesser charge rather than take the risk that a judge or jury will find that their acts were excessive or unreasonable. This is of particular concern in cases of gendered and domestic violence.