**LAW120: Criminal**

**Spring CAN (2014)**

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*Mens Rea* and the *Charter*

|  |  |  |
| --- | --- | --- |
|  | **AR** | **MR** |
| **True Crimes** | BRD | BRD - Subjective |
| **Objective MR** | BRD | BRD – objective |
| **Strict liability** | BRD | Nil. But defense available – due diligence, mistake of law/fact (BOP) |
| **Absolute liability** | BRD | Nil – no defense available |

**Steps to Establish MR:**

1. Read offence in CC to see if MR is specified
2. If no clear answer go to case law
3. If nothing in case law then attempt to classify as true crime or public welfare
4. Then check to see if classification is Charter compliant

***Beaver***: starting presumption for **true crime** is **subjective MR** that could be changed by clear statutory language to the contrary → accused should respond to all critical aspects of the offence

***Sault Ste. Marie***: Starting presumption for **public welfare** offence is **strict liability,** but Parliament could choose to impose subjective MR by clear statutory language – could also make it absolute liability

* CL doesn’t like absolute liability

***Pappajohn***: cannot be convicted of **true** **crime** unless **voluntarily directed by “willing mind”**

* MR = positive state of mind (ex. evil intention, knowledge of wrongfulness of act, reckless disregard of consequences (*not including negligence*)

Before the Charter, Legislature could do whatever they liked for creation of offences – no constitutional check

The Charter is given a wide and purposive interpretation (***Hunter v Southam***) → should be interpreted liberally & not narrowly

* **Charter, s. 7** – provides right to “life, liberty, and the security of the person” – what that means is not defined

PRINCIPLES OF FUNDAMENTAL JUSTICE

Imprisonment & Absolute Liability

***Reference re: S. 94(2) of the Motor Vehicle Act, 1986*** [SCC]

S. 94(2) of MVA created absolute liability offence for driving while unlicensed or suspended. It was punishable by a min term of 7 days imprisonment. Gov’t could suspend your license w/o driver being aware.

**Analysis:**

* Absolute liability + Charter:
  + Imprisonment & AL shouldn’t be combined – offends **s. 7 Charter** (only in exceptional circumstances)
  + AL offends principle that morally innocent shouldn’t be punished – imposes criminal liability w/o guilty minds & judges don’t like that
  + Where **life, liberty, security** at issue, **fundamental justice** is triggered
* Approach to Charter:
  + Task of Court isn’t to choose between substantive or procedural content of “principles of fundamental justice” – it is too secure for persons “the full benefit of the *Charter*’s protection” (***Big M***)
  + Meaning of a right meant to be understood in light of the interests it’s meant to protect (***Hunter***)
  + S. 7 = interests being protected are the **life, liberty & security of the person** – principles of fundamental justice is a qualifier of the right, not a protected interest in itself
    - **Function:** to set the parameters of s. 7 right
    - Principles of fundamental justice found in **basic tenets & principles** not only of our judicial process, but of entire legal system
  + Says “fundamental justice” is NOT the same as “**natural justice”** (BC had put forward this argument, SCC rejected it)
    - **2 purposes of natural justice:**
      * Can’t have adjudicator as interested party – must be unbiased
      * Adequate notice & opportunity to be heard
  + Ss. 8-14 address specific deprivations of the “right” to life, liberty & security – can’t interpret s. 7 more narrowly than these → court says these sections provide “invaluable key” to the meaning of “principles of fundamental justice”
* Fundamental Justice:
  + Unless statute clearly or by necessary implication rules out MR as constituent part of a crime, court shouldn’t find a man guilty of an offence against criminal law unless he has a **guilty mind** (***Beaver***)
  + AL doesn’t per se violate s. 7
  + Public interest shouldn’t be considered in determining whether AL offends principles of FJ
    - Can be considered as possible justification under s. 1

**Held:** s. 94(2) is struck down as unconstitutional

**Ratio:** **Absolute liability & imprisonment can’t be paired.** Confirms Sault Ste. Marie.

Strict vs. Absolute Liability

***R v Raham, 2010*** [ONCA]

* Driver who went 50 km/h over speed limit
* Charged w/ offence of stunt driving (Appeal judge determined it to be AL offence)

**Analysis:**

* Offence doesn’t automatically lead to imprisonment but counsel conceded that if offense was absolute liability the potential of going to jail is enough to make it unconstitutional

**Held:** found to be **strict liability** so it’s constitutional b/c able to raise defences

* When interpreting legislation court will **presume parliamentary intention to comply w/constitution** if legislation can reasonably be interpreted in a manner that preserves its constitutionality

Consider whether **due diligence** is available to determine absolute vs. strict liability

* Due Diligence: did a person take all reasonable steps to avoid committing this particular offence? (NOT that they took all reasonable care to avoid breaking any law)

S. 7 & MR OF MURDER

For high stigma crimes s. 7 requires proof of subjective foresight of the prohibited consequences for conviction

***R v Vaillancourt*** [SCC]

* S. 213(d) – now s. 230(d) = murder that takes place during course of another underlying offence (i.e. robbery) → held to violate s. 7 of Charter since it didn’t require proof of foresight of death, even on an objective standard
  + **Constructive murder provisions violate s. 7, can’t be saved by s. 1**
    - Minimum requirement for this offence = **objective foreseeability of death** in order to be constitutional under s. 7

***R v Martineau, 1991*** [SCC]

**Subjective Foresight of Death – Not Objective**

* Charter challenge of s. 213(a) of CC (now s. 230(a)), which allows a person to be convicted of murder w/o proof of objective foresight of death
* M convicted of 2nd degree murder – he and partner robbed 2 people. Partner shot & killed them afterwards. M was armed w/ a pellet gun.

**Analysis:**

* Subjective vs. Objective
  + ***Vaillancourt***: to be convicted of murder must be **proof BARD of *at least* objective foreseeability of death**. This is extended/clarified in ***Martineau***: now you need **subjective foresight of death**
  + Minimum MR for murder is **intending to cause death or inflicting bodily harm knowing that it is likely to cause death**
* Murder Stigma
  + Murder carries stigma (DUH) – more morally blameworthy the action, harsher the penalty should be → s.230(a) violates this principle
    - B/c of the stigma & punishment attached to murder, should be reserved for those who “intend to cause death or intend bodily harm that they know will likely cause death”
  + Essential role of requiring subjective foresight of death in context of murder is to **maintain a proportionality between stigma & punishment attached to murder conviction & moral blameworthiness of offender**
* Raised Offences: 1st/2nd Degree Murder, Manslaughter
  + Oakes test applied & fails at minimal impairment. Manslaughter already exists to cover those who cause unforeseen death when committing criminal act
  + Section 230(a) raises manslaughter to murder in circumstances where accused meets MR for causing bodily harm
  + Section 231(5) raises 2nd degree murder to 1st degree when A has MR for murder but lacks the planning & deliberation element
  + S. 231 gives list of what can elevate murder to 1st degree murder (ss. 1-7)
  + S. 230 – shows manslaughter raised to 2nd degree murder

**Held:** s. 230(a) unconstitutional, violates ss. 7 & 11(d); conviction quashed, new trial ordered

**Ratio:** Murder requires at least proof BARD of **subjective foresight** (intention to cause, or knew death likely & proceeded recklessly) of death, according to s. 7

Unlawful Object Murder

***R v Shand, 2011*** [ONCA]

* Court reviews history of s. 229( cand notes that is it the only remaining murder provision that doesn’t require **specific intent** to kill or intent to cause serious bodily harm
* S tried to rip off a dealer sealing marijuana; dispute as to whether it was intended for the gun to go off

**Analysis:**

* S. 229(c) interpreted as:
  + Only OBJECT must be unlawful
  + “Act” that causes death doesn’t have to be unlawful BUT must be sufficiently dangerous that a reasonable person would know it was likely to cause death
  + Requires **subjective foresight about likelihood that dangerous act would cause death**

**Ratio: *Martineau* should be interpreted as holding that subjective foresight of death is constitutional minimum MR for murder, not intent to cause death**

S. 7 APPLICATION TO OTHER OFFENCES

***R v DeSousa, 1992*** [SCC]

**Underlying Offenses s. 269: MR requirement is objective when “unlawful”**

* A argued that s. 269, unlawfully causing bodily harm, was unconstitutional
* V was hit by broken glass from bottle allegedly thrown by A

**Analysis:**

* Underlying Offence MR Requirement:
  + Absolute liability offences are excluded b/c you can’t have a defence (***Re: MVA***)
  + Predicate offence must be proven to be charged & constitutionally valid (i.e. have valid subjective MR requirement) → must satisfy MR of underlying offense
* The meaning & impositions of “unlawful” in s. 269:
  + *Mens Rea*
    - When “unlawful” is used, starting point is **objective MR**. This is constitutionally fine as long as its not a high stigma case like murder in ***Martineau***
    - **Objective foresight** implied by “unlawful” – objectively dangerous requires, as a minimum, that a **reasonable person** would realise that A’s action would subject another person to “the risk of some harm” that is “more than trivial or transitory in nature”
      * **Test: Objective foresight of bodily harm**
        + Act must be unlawful (at least objectively dangerous) & one that is likely to subject another person to harm/injury

Bodily harm: must be more than merely trivial or transitory in nature

* + *Actus Reus*
    - “Unlawful” means predicate offense must be contrary to federal or prov. offense creating law that’s not absolute liability
* Constitutional Sufficiency:
  + Sufficed by 2 requirements:
    - Underlying act w/constitutionally sufficient MR
    - Objective foreseeability of bodily harm by unlawful act
* Foresight of Consequences:
  + No constitutional requirement that intention exist in relation to all consequences
  + Consequences & harm go hand in hand
  + Consequences can affect seriousness of offence/level of punishment

**Held:** s. 7 not violated, appeal dismissed

**Ratio: “unlawful” act as used in s. 269 includes only fed & prov. offences;** excludes any offences based on absolute liability & which have constitutionally insufficient mental elements of their own

* Also requires act to be objectively dangerous

***R v Creighton, 1993*** [SCC]

**Asymmetry is Constitutional & Manslaughter**

1. The MR of Manslaughter:
   1. 2 requirements: **Conduct causing death AND fault short of intention to kill**
      1. Fault can consist of committing another unlawful act, or criminal negligence
      2. *DeSousa*: unlawful act must be: constitutional, not AL, objectively dangerous
      3. There must be objective foreseeability of bodily harm that is neither trivial nor transitory (*DeSousa*)
2. Constitutionality of Foreseeability of Bodily Harm Test for Manslaughter:
   1. **MR and consequences don’t have to be symmetrical: asymmetry is constitutionally ok b/c of policy** (b/c of wide variety of circumstances that manslaughter can occur in, penalties must be flexible)
      1. Manslaughter: consequence is death & MR is intention to cause bodily harm
      2. OK b/c of policy:
         1. Deterrence
         2. Hard to draw line between risk of death & risk of bodily harm
         3. Stands test of thin skull rule
         4. Must hold someone responsible for death
         5. Manslaughter has lower stigma
3. Policy Considerations:
   1. Deterrence to those who engage in dangerous behaviour supports view that death need not be objectively foreseeable, only bodily harm
   2. Offence has stood test of time (served interests of society) – accords best w/our sense of justice
   3. A must take their victim as they find them (**thin-skull rule**)
      1. Traditional test is workable – avoids troubling judges w/distinction between foreseeability of risk of bodily injury & foreseeability of risk of death

**Held:** A should have reasonably foreseen risk of harm of injecting cocaine – appeal dismissed

**Ratio:** Objective MR is constitutional, and all that is required for a conviction in manslaughter

* Objective standard: whether a reasonable person in the circumstances would have foreseen the risk of harm from their actions – if satisfied, MR is proved.
  + If an accused lacked capacity to understand risk of their actions, then MR won’t be satisfied

***Wholesale Travel Group v The Queen, 1991***

* Strict liability no MR requirement but you have due diligence defense if it’s proven on BOP
* Argued that strict liability offense aspects of reverse onus & higher burden of proof than BARD attached were unconstitutional
* Reverse burden and BOP deemed fine

Court Findings:

1. Corp charged w/ offence does have standing for constitutional challenge
2. Objective test for MR in strict liability doesn’t typically violate s. 7 (only for special stigma crimes)
3. Reverse burden of proof in strict liability not contrary to Charter either b/c doesn’t violate s. 11(d) or b/c it’s saved as a reasonable limit under s.1

Mistake

MISTAKE OF FACT

**Mistake of Fact:** defence that is open to the accused whenever he holds an **honest belief** in a set of circumstances that, if true, would otherwise entitle him to an acquittal (ex. negating element of AR) – mistake must relate to **essential element of offence**

* Ex. I thought the wallet was mine, but it wasn’t = can use defence
* If I thought the wallet was full of $$ & it wasn’t, can’t use defence b/c doesn’t negate essential element of AR

**John Stewarts** → **2 approaches to mistake of fact:**

1. Materiality
2. Gravamen (essence)

***Beaver***: courts reluctant to absolve accused from any conviction unless accused was totally innocent under facts that accused had imagined (ex. won’t work if someone thinks they’re selling 1 drug but actually selling another)

***R v Kundeus, 1976*** [SCC]

* K offered to sell mescaline to an undercover PO, actually sells LSD
  + TJ erred by treating drugs the same when one is controlled & other is restricted

**Analysis:**

* Majority (Grandpre) – held that b/c no evidence presented by K not possible to find that he had an honest belief amounting to non-existence of MR → accused must rebut presumption of guilt that arises from fact

**Dissent:**

* Laskin thinks majority decision is bullshit – copout
* Questions whether it is enough for Crown to offer proof of trafficking in any drug, regardless of whether they are in the same class or not? → Can evidence that relates to lesser offence (selling mescaline) be adduced to uphold conviction of higher offence (LSD)?
* Laskin argues that where MR is an element of an offence, can’t be satisfied by proof of its existence in relation to another offence if proof is only for less serious offence
  + If Parliament wanted to allow that, should have been specific. Why else would they have separated the drugs into different classes?

**Held:** defence rejected.

**Ratio:** **Belief does not need to be objectively reasonable; only required that it be honestly held.**

***R v Pappajohn, 1980*** [SCC]

* P charged w/ rape. Complainant was a female real estate agent – met for drinks & lunch and then went back to P’s house where they had sex. Complainant said no consent at all; P argues it was consensual.
* TJ refused to put mistake of fact to the jury; P convicted.

**Analysis:** (Majority: McIntyre)

* defence should be used when there is “some evidence which would convey a sense of reality in the submission”

**Dissent:** (Dickson)

* Mistake of fact more accurately seen as negation of guilty intention rather than affirmation of positive defence
* Mistake = defence in sense that it is raised by accused
* In principle, defence should avail when there is an honest belief in consent, or an absence of knowledge that consent has been withheld
* If claim of mistake doesn’t raise a reasonable doubt as to guilt and all other elements of the crime have been proved, then the trier of fact will not give effect to the defence BUT if there is any evidence that there was such an honest belief, regardless of whether it is reasonable, the jury must be entrusted w/task of assessing credibility of the plea

**Held:** Appeal dismissed.

**Ratio:** For a **defence of mistake of fact in consent** to be available to the accused, there **must exist some reasonable evidence that would convey a sense of reality**

**Section 265(4) of Criminal Code** now provides explicit direction on belief of consent (SEE ALSO **s. 273.2**)

* Reasonableness not required but can be considered when determining whether belief was honestly held

***R v Ewanchuk, 1999*** [SCC]

* E persisted in sexual touching, complainant felt afraid, tried to project attitude of relaxed comfort, told accused no, didn’t move or reciprocate

**Analysis:**

* Components of Sexual Assault
  + *Actus Reus* = **unwanted sexual touching**
    - Touching (objective)
    - The sexual nature of the contact (objective)
      * Determined objectively – no need to prove MR re: this aspect
    - Absence of consent (subjective)
      * Determined by reference to complainant’s subjective internal state of mind towards the touching, at the time it occurred
    - For first 2 elements of AR, sufficient for Crown to prove that accused’s actions were voluntary
  + *Mens Rea* = **intention to touch**, knowing of, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched
    - Crime of **general intent** → Crown need only prove that accused intended to touch complainant in order to satisfy the basic MR requirements
    - Accused may challenge Crown’s evidence of MR by asserting honest but mistaken belief in consent
* Implied Consent
  + NOT A THING – no defence of implied consent to sexual assault in Canadian law
* Meaning of “Consent” in Context of Honest but Mistaken Belief of Consent
  + Evidence must show that accused believed that complainant **communicated consent to engage in sexual activity in Q** → accused’s speculation as to what was going on in complainant’s mind provides no defense
  + **s. 273.2** provides limits on honest but mistaken belief in consent
  + Accused can’t rely on mere lapse of time or complainant’s silence to indicate that there has been a change of hear, nor can he try and “test the waters” w/more touching

\*\*L’Heureux also castigates McClung’s opinion severely, arguing it relied on myths & stereotypes about women & sexual assault (he’d basically said victim had asked for it)\*\*

McLachlin:

* Reasonable Steps
  + Assumption that people are not consenting, silence or passivity should not be considered consent
  + It is not a defence to sexual assault where the accused didn’t take reasonable steps to ascertain consent

MISTAKE OF LAW

**Mistake of Law:** in general, person charged w/ offence can’t rely on a mistake of law as a defence – ignorance of the law is no excuse (**CC s. 19**)

* Principle is rule of **policy**, not fairness
* Exception: MAY be able to rely on CL defence of “officially” induced error of law (***Levis***)

**Colvin** → “propositions of law can always be expressed in the language of fact, of what has or has not been done. Thus a mistake of law whether something is an indictable offence is also a mistake of fact about whether or not the legislature has taken the action that would make it an indictable offense”

***R v Campbell and Mlynarchuk, 1973*** [Alta District Court]

* Charged w/committing an immoral/indecent performance (STRIPPING) – **s. 167(2)**
* Manager told her about court decision that decided this was not an immoral/indecent performance, that she won’t be breaking the law
  + Based on decision at trial level that was reversed on appeal
* **Mistake = thinking decision of trial judge was binding**

**Analysis:**

* Mistake of law can negative a malicious intent required for a particular crime – NOT A DEFENSE

***Lévis (City) v Tétrault; Lévis (City) v 2629-4470 Québec inc, 2006*** [SCC]

1. C had car on street that wasn’t registered. C had paid fee and was told renewal would be in mail. C didn’t put apt # on it so it was returned.
2. T driving w/o a license. T was young and said didn’t know what date on license meant.

**Held:** offences in Q are strict liability & respondents haven’t shown that they exercised due diligence

**Ratio: Defence of Officially Induced Error is available. To meet must prove:**

1. That an error of law or of mixed law & fact was made
2. That the person who committed the act considered the legal consequences of his/her actions
3. That the advice obtained came from an appropriate official
4. That the advice was reasonable (objective test)
5. The advice was erroneous, AND
6. That the person relied on the advice in committing the wrongful act (objective test)

Factors to look at for the reasonableness & reliance on the advice:

* Efforts made by accused to obtain info
* Clarity/obscurity of the law
* Position & role of official who gave info/opinion
* Definitiveness & reasonableness of info/opinion

***R v Khanna, 2009*** [ONCJ]

* Charged w/ knowingly concealing material circumstance from Immigrations. Applied for Canadian citizenship & swore she wasn’t subject of any criminal proceedings. She was instructed that if she became involved in a criminal offence in any capacity she was required to report it to an immigration official. Few months later she was involved in car accident in which someone was killed – charged w/ criminal negligence causing death. K testified she described incident to an immigration official who said she didn’t need to report this type of event.

**Held: failure to disclose was an officially induced error of law based on advice she received from immigration officials**.

Defenses

**S.8(3) of CCC** states that Common Law defenses are valid

* Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament

INTOXICATION

**CL rule:** Intoxication is a defence for crimes of **specific intent**; not for general intent

* Possible to be a full defence in this situation. If there is no lesser included general intent offence, then acquitted

***R v Bernard, 1988*** [SCC]

* Complainant forced to have sexual intercourse w/o consent & suffered serious bodily injury. Evidence of bloodstained towel & pillowcase concealed in toilet tank of appellant’s apt. Defence admitted that intercourse had taken place but that he didn’t know what he did it → said drunkenness caused attack on complainant
* Convicted, CA dismissed appeal

**Issue:** is sexual assault causing bodily harm an offence requiring proof of specific or general intent? Is evidence of self-induced drunkenness relevant to the issue of guilt/innocence in an offence of general intent?

**Analysis:** (McIntyre)

* General Intent Offence: only intent involved relates solely to the **performance of the act** in Q
  + Sexual assault causing bodily harm = general intent
* Specific Intent Offence: involves performance of AR + intent/purpose going beyond mere performance of questioned act

**Ratio: where the accused is so intoxicated that he lacks capacity to form specific intent required to commit the crime charged, defense may apply. NO APPLICATION IN GENERAL INTENT OFFENCES.**

* Criticism:
  + Distinction is artificial, illogical, policy decision
  + In Dickson’s view, the ***Leary*** rule imposed form of absolute liability on intoxicated offenders & was contrary to both s. 7 & 11(d)
    - Evidence of intoxication should be admissible for all offences to raise a reasonable doubt as to MR of accused
  + Also difficult to reconcile w/other case law, including ***Pappajohn***
* Defended on basis that it’s sound social policy
* Proof of his **voluntary** drunkenness can be proof of his guilty mind
  + Substitute blameworthiness of getting that drunk for intention to commit the crime

***R v Daviault, 1994*** [SCC]

* D was chronic alcoholic – drank entire bottle of 40oz brandy; sexually assaulted complainant
* Normal person would have been dead if they consumed this much alcohol, instead b/c of alcoholism D was “blackout”

**Issue:** Can a state of drunkenness, which is so extreme that an accused is in a condition that closely resembles automatism/disease of mind as defined in **s. 16 of CC,** constitute a basis for defending a crime that requires only general intent?

**Analysis:**

* Defence justified in limited circumstances:
  + Places burden of proof on accused on BOP – how much accused drank & its impact
  + Need 3rd party evidence – expert to corroborate drunkenness
  + Only situation is something where it would go to voluntariness of action & to MR fault mechanism (akin to automatism that renders accused incapable of performing a *willed* act or minimum mental capacity required to voluntarily decide)

**Held:** There is a defence of extreme intoxication to crimes of general intent ONLY where it is **akin to automatism or insanity** – mandated by ss. 7 & 11(d)

***Section 33.1* – Self-Induced Intoxication**

* Restricts applicability of defense to offenses that don’t involve elements of assault or threat or intent to cause bodily harm (***Drader***)
* This section was added in response to vigorous public disagreement w/ SCC decision in ***Daviault***

***R v Daley, 2007*** [SCC]

* D killed his wife after consuming between 35-50 drinks
* 3 degrees of intoxication:
  + Minimal or mild intoxication: alcohol induced relaxation of both inhibitions & socially acceptable behaviour – does not provide a defence & will not absolve an accused of any criminal liability.
  + Intermediate intoxication: defence to specific intent offences if accused is incapable of forming the specific intent required
  + Extreme intoxication: a state akin to automatism, absolves an accused of all CL criminal liability (subject to s. 33.1). Such a defense is rare & requires expert evidence.

***R v Drader, 2009*** [Alta Prov. Court]

* Charged w/ breaking & entering w/intent to commit theft (indictable offense).
* Testifies that he doesn’t remember anything before he arrives home. Witnesses testify to his behaviour, describe him as drinking from the bottle, stumbling, knocking things over. Many witnesses were intoxicated so recollection is affected.

**Held:** He had consumed alcohol but didn’t have defense b/c no evidence of irrational behaviour

* High threshold even for specific intent crimes

***R v Penno, 1990*** [SCC]

* **Held:** **voluntary intoxication can’t be raised as a defence where Crown must prove intoxication of accused BARD as one of the elements of the offence** 
  + Involuntary intoxication (ex. where someone secretly drugs the accused) may offer a defence even to an offence containing intoxication as an element (***Lefebvre, 2010***)

PROVOCATION

**Provocation:** defence of limited application that applies only to reduce a conviction for murder to one of manslaughter (**s. 232**)

* Applies whenever accused was subjected to “**wrongful act or insult**” that would cause the “**ordinary person**” to **lose “the power of self control**” and where the **accused “acted on the sudden**”
* Defence operates as partial excuse – **does not negate intent to kill** required for conviction for murder

Objective:

* Was there a wrongful act/insult that would cause the ordinary person to lose self control?

Subjective:

* Did the accused actually act on the sudden, before having time for passion to cool?

***R v Hill, 1985*** [SCC]

**Provocation Defense & Ordinary Person**

* A murdered a man that he met through big brother program
* V made sexual advance and A killed him

**Analysis:**

* Test for Provocation:
  + 1. Would an ordinary person be deprived of self-control by the act or insult?
    - Ordinary temperament & self-control, not drunk, not short tempered. Jury ascribe ordinary person characteristics (immutable characteristics) that arise from situation. Different from objective MR
      * Central criterion in determining what should be considered in assessing ordinary person is the **relevance of the particular feature to the provocation in Q**
        + Can include sex, age, race, etc.
  + 2. Did A in fact act in response to these provocative acts? (Causing A to kill V)
    - Subjective
  + 3. Was A’s response sudden & before there was time for passion to cool?

***R v Thibert, 1996*** [SCC]

**Provocation & Air of Reality Test**

* A convicted of murder after shooting his estranged wife’s lover to death. A testified he had gone to wife’s work to talk things over & scare wife w/rifle, but V insulted & demeaned A by holding wife in front of him & daring him to shoot. TJ didn’t tell jury that Crown bears burden of disproving provocation, where raised, BARD.

**Analysis:**

* Just leaving a relationship w/o something can never constitute provocation
* In this case the “something more” is taunting from Ms. Thibert = there is an air of reality

Objective Element:

* Wrongful act/insult must be one that could **in light of the past history of the relationship between the accused & deceased**, deprive an ordinary person **of the same age/sex, and sharing with the accused such other factors as would give the act/insult in Q a special significance** of the power of self-control

**Ratio:**

* Test for Air of Reality: whether there is **some evidence** to establish that an ordinary person would lose self-control, and whether there is some evidence to establish that A was actually deprived of self-control (i.e. some evidence that would allow jury to conclude that an element did not exist BARD)
* Definition of legal right
* Defense was left to jury (in Tran it wasn’t): Thibert victim actively trying to provoke the D

**Dissent:**

* There isn’t something more her
* The court should be more careful in stating how the victim should have acted in such circumstances (V had a loaded rifle pointed at him)

***R v Gill, 2009*** [ONCA]

**Provocation & Fear**

* An air of reality can be raised even if A testifies that he wasn’t angry & that he was scared
* Being scared can be provocation
* Provocation can still have air of reality even if A testifies that he wasn’t angry

***R v Tran, 2010*** [SCC]

**Provocation & Ordinary Person (Subjective & Objective)**

* A enters locked apt of his estranged wife, catches her in bed w/her bf & proceeds to physically attack them, stabbing bf to death & injuring his wife. During course of the attack, he phones his godfather & says “I got him”
* A was Vietnamese – divorce particularly embarrassing, counsel argued that this should modify ordinary person in provocation test

**Analysis:**

* Charron essentially concludes there is no air of reality to the defense, arguing there was no “insult” for purposes of s. 232 for 2 reasons:
  + Victim’s sexual involvement w/another man was insufficient
  + Evidence of accused entering wife’s home & bedroom “belied any notion that this supposed ‘insult’ would have struck “upon a mind unprepared for it” → reaffirms requirements from ***Tripodi*** that “sudden provocation” = conduct that makes an “unexpected impact that takes the understanding by surprise and sets the passion aflame”
* Ordinary Person
  + **Objective Element:** in the context of this defence is more varied than that of offences, though variation is not endless
    - Will share relevant general characteristics w/ A (confirming ***Hill***) but can’t subvert logic of objective test
    - Person will not be given characteristics that are inconsistent w/Charter values, nor will they be “short tempered” or “cranky”
  + **Subjective Element:**
    - Did A act in response to the provocation?
    - Did A act on the sudden before passion had time to cool?
* Air of Reality: determination of air of reality is a legal finding & is **subject to appellate review**

**Held:** Ordinary person wouldn’t have lost control here – plus no air of control b/c no suddenness – went to apt knowing what he would find

**Ratio: Provocation has to be given an air of reality by the A; once it is created, Crown must disprove one or more elements of defence BARD**

***R v Nealy, 1986*** [ONCA]

**Provocation: Accumulation of Defenses**

* A killed V in a fight outside pub after V had repeatedly made crude sexual remarks to A’s girlfriend. A had been drinking & also testified that he was *scared & angry* during the fight. TJ didn’t direct jury on cumulative effect of drunkenness, fear & anger

**Issue:** Did TJ need to instruct the jury as to the cumulative nature of the 3 defences?

**Held:** Appeal allowed – new trial ordered

**Ratio:** TJ must instruct jury to consider all relevant circumstances in combination where these factors accumulate: combine fear, anger & drunkenness for provocation

* Provocation rarely arises on its own; often considered alongside issues of MR

MENTAL DISORDER

**Defence of Mental Disorder:** accused must be found to **(i) have a mental disorder** (defined in s. 2 to mean “disease of the mind”) that (**ii) renders him unable to appreciate the nature & quality of the act he committed OR incapable of knowing that it was wrong** (**s. 16 CC**)

* Source of incapacity may be congenital or acquired, permanent or temporary
* Typically held to exclude states of self-induced intoxication & transitory mental states, such as concussion
* If defence successful, results in special verdict of **not criminally responsible by reason of mental disorder (NCRMD)**
* **S. 16(2)** – everyone is presumed NOT to suffer mental disorder until contrary is proved on BOP
* **Burden of proof lies w/party that raises the issue** (**s. 16(3)**)

**Definitions:**

1. **“Disease of the Mind”:** embraces any illness, disorder or abnormal condition that impairs the human mind & its functioning, excluding, however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion **(*R v Cooper, 1980*)**
2. **Unable to “appreciate” the nature & quality of the act:** “appreciate” imports an additional requirement to mere knowledge of the physical quality of the act – must have an **ability to perceive the consequences, impact & results of physical act (*Cooper*)**

**Alternate Definition: incapacity to know the act was “wrong”** – generated disagreement among members of the court (***R v Schwartz, 1977***) → legally wrong vs. morally wrong

* Did this mean accused could be held responsible if he knew the act was legally wrong (murder against the law), or it is also necessary that he understand actions are morally wrong (i.e. that killing someone is bad)?
  + Majority held that **only** **capacity to know act was legally wrong** required to disentitle accused to special verdict of not criminally responsible by reason of mental disorder
    - Strong dissent of Dickson J. against this finding
* ***Chaulk*** **overrules this decision** – says that “wrong” must mean more than simply “legally wrong” – could know that an act was legally wrong but, by reason of a disease of the mind, believes it would be “right” according to the ordinary morals of his society to commit the crime in a particular context

**Parsing s. 16:**

* Need an act or omission
* Need to be suffering from a mental disorder
* Mental disorder renders A incapable of appreciating nature & quality of act OR of knowing it was wrong
* **While Suffering from a Mental Disorder**
  + This does not include transitory states or self-induced states (covered by automatism, intoxication) – it needs to be shown that neither was the case (*Cooper*)
* **Incapable, generally:** viewed purely subjectively (*Chaulk*)
  + i.e. was the person, in their own mind, incapable
* **Rendered Incapable:** The mental disorder must cause the incapacitation (proven to BoP.) (*Chaulk*)
  + of appreciating the nature and quality of act:
    - this requires perception: an ability to perceive the consequences, impact and results of the physical act (*Cooper*)

**OR**

* + of knowing that it was wrong: (the more difficult one)
    - A. if they know it is legally wrong, they can still have access to the defence if they are incapable of knowing it is morally wrong/would be condemned (*Chaulk*)
      * e.g. A was told to kill someone by the voices in their head, where they knew the consequence would be to go to jail
    - B. Incapacity of knowing it was wrong - according to the ordinary moral standards of reasonable members of society (*Chaulk*)
    - failure to understand must be caused by the mental disorder (*Chaulk*)
      * Don’t worry too much about causation for the connecting the two – need evidence about the mental disorder
* **(*Chaulk*) The defence may act to:**
  + Negate AR (A didn’t act consciously)
  + Negate MR on premise that accused was incapable of forming the requisite MR (i.e. lacking intent)
  + Provide an excuse on basis that A’s mental condition prevented them from knowing act was wrong
* Jury must consider:
  + Has the accused established they’re not criminally responsible for their actions under 1 of 2 limbs of s. 16(1) on BOP?
  + Does the evidence of mental disorder negate MR in whole or part (ex. prevent A from forming specific intent for murder)?

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

***R v Chaulk, 1990*** [SCC]

**s. 16(2)’s Constitutionality**

* B & E, killed occupant. Turned themselves in w/confessions. Insanity defence: incapable of understanding what he did was wrong. Knew laws existed but thought they were about it.

**Analysis:**

* Is s.16(2) constitutional because of onus to prove existence mental disorder to a BoP is on A?
  + Lamer: it does infringe on s.11(d) right but it is justifiable under s. 1 of the Charter
    - Presumption of sanity infringes b/c limits presumption of innocence guaranteed by s. 11(d) b/c allows a factor essential for guilt to be presumed, rather than proven by Crown BARD
  + Putting burden on A is a pragmatic approach. There is no test to discover whether someone was/wasn’t mentally ill at time of crime. W/o burden on A, risk of wrongful claims is too high.
  + Bottom line: Burden of proof rests on the party that raises the defense - deemed constitutional.
  + *Use chopping bread example. Did they know it wasn’t bread?* → NCRMD can work to negate MR in a case where someone chops someone’s head off but thinks they’re chopping bread instead
* **Four options: does s.16 Apply?**
  + 1. A knows act is legally wrong and A knows he should not break the law
    - s.16 does not apply – guilty
  + 2. A does not know legally wrong and A knows more people would condemn action
    - s.16 does not apply – ignorance of the law is no excuse (knowing it is morally wrong is enough) (overrules Schwartz)
  + 3. A does not know act is contrary to law and does not know most people would condemn action
    - s.16 applies
  + 4. A knows legally wrong but doesn't know that people would condemn action and doesn't know that they should follow the law (i.e. they believe they should follow a higher imperative) (Chaulk)
    - s.16 applies
* Expanding defence availability to option 4 (above) will not open floodgates to amoral offenders or to offenders who relieve themselves of all moral considerations for following reasons:
  + Incapacity to make moral judgments must be causally linked to a disease of the mind (if presence of mental disorder not established, criminal responsibility can’t be avoided)
  + “Moral wrong” not to be judged by personal standards of offender but by his awareness that society regards act as wrong → can’t substitute own moral code for that of society

***R v Swain, 1991*** [SCC]

4 possibilities for introducing evidence of mental disorder:

1. A may plead NCR at outset of trial – A must prove on BoP that he had mental disorder at time of offence
2. A may plead “not guilty” and may advance any defences or other arguments against conviction during the trial. If unsuccessful, and Crown proves elements BARD, then A may change plea to NCR (on a BoP) & hearing on matter will be held.
3. Crown may raise evidence of A’s mental disorder during trial if A otherwise puts his mental state in issue (ex. introducing evidence he was seeing a psychiatrist at time of offence)
4. Crown may raise evidence of mental disorder after finding of guilt is made but before conviction is entered (same as option 2). Crown has burden of proving on BOP that accused had mental disorder at time of offence.

Disposition for those found NCRMD

**s. 672.54** – provides for 3 dispositions which can be imposed either by a judge or Criminal Code Review Board:

Where a verdict of NRCMD has been rendered & accused is not a significant threat to the safety of the public the court/Review Board can order that accused be:

1. **Discharged absolutely**
2. Discharged **subject to such conditions** as Court/Review Board considers appropriate
3. Detained in custody in a hospital subject to appropriate conditions

Accused doesn’t bear burden of proof to show that accused isn’t significant threat – court must decide this

* Only way accused can be detained is if an affirmative finding is made that they’re a significant threat to the public

**Bill C-54 (*Not Criminally Responsible Reform Act*)** → introduced by gov’t in response to concerns over release of several individuals designated NCRMD; passed by House of Commons in 2013

* Allows courts to designate persons declared NCRMD as “high-risk accused” where they’ve committed serious personal injury offence & court is satisfied there is “ a substantial likelihood that accused will use violence that could endanger the life or safety of another person” OR the “acts that constitute the offence were of such a brutal nature as to indicate a risk of grave physical or psychological harm to another person”
* Even where “high-risk” isn’t pursued, amendments have placed greater emphasis on public safety & less emphasis on maximizing liberty of the accused
* Also provides victims w/right to make a statement at any disposition hearing or hearing designed to determine whether person should be designated high-risk

AUTOMATISM

**Automatism:** situation in which an accused person doesn’t have mental control of their physical actions (CL defense)

* Factors that can trigger:
  + Consumption of drugs/alcohol
  + Blow to the head
  + Psychological trauma
  + Physical disorder (sleepwalking)
  + Mental disorder that produces state of altered reality

**Three Sources of Accused’s Dissociative State:**

* Voluntary consumption of intoxicants = defence of intoxication (***Daviault; s. 33***)
* Mental disorder (as defined in CC) = mental disorder automatism (**s. 16**)
* Neither the result of voluntary intoxication nor product of mental disorder = **non-mental disorder automatism** (CL defense)

**Mental Disorder vs. Automatism:**

1. If it’s a mental disorder/disease of the mind defense is dealt with under **s.16**. If it’s pure automatism (like in ***Parks***), defense is under the Common Law
2. There is an overlap between Auto and MD; however, you cannot defend with both defenses. The trial judge will charge the jury on MD and Auto.

**Factors of Automatism:**

* **AR**: they **didn’t voluntarily preform their actions**
* **MR**: they were in a **limited state of consciousness at the time that the offense was committed**
  + Can be caused by: acute/extreme stress (Beyond the ordinary emotional blows of life: *Rabey*)
  + Sleepwalking seems to be a special form of automatism that the court will accept in Parks (?)
  + Where there is repeating behaviour, A must show there is no risk of recurrence for it to be covered by automatism (policy consideration) because automatism leads to an acquittal
  + Automatism can also be caused by **external causes**: blow to the head, etc. (possible internal causes as well: severe shock)
* This defence is supposedly tied to current medical science, but there is criticism that it doesn't actually reflect current medical science (it is based in old ideas of automatism)
* **Proving Automatism or Mental Disorder Flow Chart:**

The Presumption is that it’s a mental disorder (***Stone***) and whoever is arguing for automatism has to prove it on a BoP.

1. **For TJ: Could a properly instructed jury decide acting reasonably find on BoP that A dissociated? Did A dissociate? (Stone)**

* To determine this ask if there was sufficient evidence? Factors:
  + Expert evidence stating consciousness was impaired **(required)**
  + Documented history of dissociation
  + Corroborating evidence of a bystander is helpful factor (used in ***Rabey*** unsuccessfully)
  + Motive: relationship between target and trigger. Dissociated people wouldn’t have a motive because they have no control over their actions (used successfully in ***Parks***). cannot be advancing any purposes you may have. no reaction to aggression.
* If no to #1,
  + The jury does not consider automatism
  + The judge has to consider whether other defense should be left to the jury (including s.16)
* If yes to #1, go to #2
  + If it’s a tie, choose yes that it could still be mental disorder/automatism

1. **For TJ: Does dissociation arise from a disease of the mind?**

* Court is asking the Jury to go through a contextualized objective inquiry (Parks)
* Factors to consider:
  + *internal cause:* definition: psychological or emotional makeup and not transient, organic factors, stress of ordinary life (*Rabey:* high threshold)
    - external vs. internal causes are not determinative: it’s a methodological process judges go through in paying attention to the trigger that caused the act
    - the most important thing is what actually caused the dissociation, not the internal or external factors (Parks)
    - if external cause can't be proven, court will presume internal cause (i.e. a mental state caused by external psychological blow) b/c of the starting presumption of mental disorder
    - If the cause was external, i.e. concussion, more likely to find non-insane automatism (Stone)
      * if trigger is sufficient to cause ordinary person to dissociate, then its non-mental automatism
      * if trigger is not sufficient to cause ordinary person to dissociate, its mental disorder automatism
  + *context of dissociation*
  + *continuing danger: history of dissociation*
  + *other policy concerns:* protecting the public – the court wants to push anything that endangers the public in s.16 (Stone)
* If “no” to (2), dissociation is not caused by a mental disorder, then could be common law automatism and the jury is called to ask (a):
  + - a) Jury/Judge is instructed to consider whether A dissociated? (Common law defense that’s successful from Parks)
      * If the jury says yes to (a) A dissociated, A is acquitted on non-insane automatism (like in Parks)
      * If the jury says no to (a) A did not dissociate, look at other defenses (not s.16 or automatism)
* If “yes” to (2), the jury is called to ask (b):
  + - b) The jury/judge is charged with the answer “Is there a disease of the mind”?
      * If yes to (b), the jury is charged with question 3 (go to question 3)
      * If no to (b), its not mental disorder, go to other defenses (not automatism or s.16)

1. **Jury/Judge is charged with answering,** “Is A unable to understand the nature and quality of the act?”
   * If yes, its Not Criminally Responsible Mental Disorder (court prefers s.16 to CL Automatism)
   * If no, go to other defenses (not automatism – **do you go to s.16 now???)**

Exam: Once it is obvious that there is not enough evidence to displace the starting presumption of mental disorder (which comes from *Stone*) and show non-insane automatism, then go back to mental disorder and deal with the statutory language (i.e. nature and quality of act, etc.) - don't bother with automatism anymore (even if it is insane automatism...doesn't matter)

***R v Rabey, 1977*** [ONCA]

**Insane Automatism (Psychological Blow)**

* A hit V on head w/a rock & choked her after reading a letter in which V expressed sexual interest in another man. Conflicting psychiatric opinions regarded whether dissociation is a mental illness or not.

**Analysis:**

* 2 Qs to ask:
  + Are you in an automatist state?
  + Was it from an external source (not disease of the mind)?
    - Ordinary stresses & disappointments of life common to everyone don’t constitute an external cause (in this case judge holds that emotional stress suffered doesn’t = external source
      * Found that it was a result of A’s own internal makeup = disease of the mind
* What mental states constitute “disease of the mind” = Q of law → for the judge to determine whether there’s evidence that accused suffered from abnormal mental condition

**Ratio:**

* **Martin JA:** “Disease of mind” = legal term, not medical – should be broad. TJ must determine whether particular condition fits w/in phrase – Q whether A suffered from condition is for jury. Phrase includes functional disorders w/no known cause, excludes intoxicant-induced disorders.
  + Legal/Policy Component:
    - Scope of the exemption from criminal responsibility to be afforded by mental disorder or disturbance, and
    - Protection of the public by the control & treatment of persons who have caused serious harms while in a mentally disordered/disturbed state
  + Medical Component:
    - Medical opinion as to how mental condition in Q is viewed/characterized medically
* **Internal/External Theory:** Distinction should be drawn between automatism w/an “internal” cause (source in psychological/emotional makeup) and transient automatism that arises from specific “external” factors. Ordinary stresses & disappointments of life common to mankind are NOT external cause constituting explanation amounting to non-insane automatism

***R v Parks, 1992*** [SCC]

**Non-insane Automatism (Sleepwalking)**

* A killed his parents-in-law. Medical evidence suggested that A was sleepwalking at that time & that sleepwalking is not a mental illness. A had family history of sleepwalking & other sleep disorders; experts suggested it was highly improbable that he would be violent again. Sleepwalking had no treatment, but recommended practices to minimize recurrence.

**Analysis:**

* **Lamer:** held that expert evidence showed:
  + A was sleepwalking at time of attack
  + Sleepwalking is not a neurological disorder
  + No medical treatment for sleepwalking aside from good health
* **La Forest:** must look at whether automatism is caused by **internal or external factors**; also consider whether condition is **continuing**/**recurring**
  + Not determinative, but a finding that automatism is internal & continuing suggests disease of the mind
  + Non-insane automatism = complete defence resulting in acquittal
    - Caused by external factors
    - Not continual
    - Not linked to any disease of the mind
* Crown argued sleepwalking as defence would open floodgates to people claiming it – Court disagreed. Said where there is evidence, A should have access to the defence

**Ratio:**

* Automatism = complete defence
* Sleepwalking not necessarily caused by neuro/psych disorder, can be a state of non-insane automatism

***R v Stone, 1999*** [SCC]

* A stabs wife in car after she yells at him for several hours. He testified that when he committed the violent act, he was unaware of what he was doing & only returned to full consciousness w/knife in his hand & wife dead. Drove home w/wife’s body in tool box in truck, then peaced to Mexeico for 6 weeks. Then came back & turned himself in. 2 conflicting psych testimonies: 1 said A’s account was consistent w/dissociation & other testified that it was extremely unlikely that A was dissociated at the time.

**Analysis:**

* Definition Automatism**:** a state of impaired consciousness in which A has no voluntary control over his or her actions.
* Stages for showing non-insane/insane automatism:
  + 1. **Evidence which could prove on BOP that A dissociated**: Evidence required for automatism is:
    - Expert opinion isn’t sufficient (this is just enough for air of reality, which is not enough for automatism)
    - There must be psychiatric evidence in testimony from A (including police reports), but also, they should show there is no history of dissociation, show corroborating evidence (i.e. witness),and absence of motive (which is the most important)
  + 2. **Was the state of automatism founded in a mental disorder**?
    - i.e**.** A must displace the presumption of dissociation as a result of mental disorder
    - If external cause can't be proven, court will presume internal cause (i.e. a mental state caused by external psychological blow) b/c of the starting presumption of mental disorder
    - If the cause was external, i.e. concussion, more likely to find non-insane automatism
  + 3. **Is there a continuing danger**? (Of the same trigger, or generally of the same behaviour)
    - This is not determinative, but the possibility of continuing danger strengthens the presumption of mental disorder
    - This is a policy consideration
      * Automatism and mental disorder CANNOT both be left to the jury
  + Jury determines questions of fact depending on which defence is left to jury. If non-insane automatism, question whether A acted involuntarily on a balance of probabilities. If a disease of the mind, jury considers defence according to s. 16 framework – did A suffer from a disease of the mind which rendered him or her incapable of appreciating the nature and quality of the act.
  + **If automatism = yes**, then acquitted
  + **If automatism = no**, then ask whether there was a mental disorder

**Held:** No evidence of mental disorder (doesn’t matter that TJ didn’t charge jury w/mental disorder defence)

Relationship between Mental Disorder & Intoxication

***R v Bouchard-Lebrun, 2011*** [SCC]

* A brutally assaulted 2 individuals while he was in a psychotic condition caused by chemical drugs he had taken a few hours earlier – took ecstasy. Said to have experienced a “religious delirium”

**Analysis:**

* Accused argues to fall under s. 16; court rejects this
* S. 16 & s. 33.1 are mutually exclusive → for s. 33.1 to apply court must reach conclusion in law that accused lacked general intent or voluntariness required to commit offence *by reason of self-induced intoxication*
  + Absence of intent/voluntariness would preclude finding that incapacity of accused was caused by disease of the mind
  + Fact that accused was intoxicated at material time can’t support finding that s. 33.1 applies if accused establishes that they’re incapable of appreciating the nature & quality of they’re acts *by reason of a mental disorder*
* Court must first consider if s. 16 applies; then s. 33.1

**Ratio:** being on drugs won’t fly for automatism defence

Fitness to Stand Trial

NCRMD plea & disposition is focused on **mental state of accused at time offence was committed**

* If ability of accused to understand proceedings & to instruct counsel is in doubt, there may be a hearing on accused’s fitness to stand trial (defined in s. 2)
  + If found unfit, must go before review board for disposition hearing similar to procedure used after an NCRMD finding
  + S. 672.58 – Crown may apply to bypass this hearing & instead force accused to submit to treatment for period of up to 60 days (different from NCRMD process, which can’t force an accused who is ordered detained to accept treatment)

SELF DEFENSE

**s. 34(1): Defence of person – use of threat/force – a person is not guilty of an offence if:**

1. 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;
2. The act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
3. The act committed is reasonable in the circumstances

**s. 34(2): Factors** (court may consider the following to determine reasonableness of the act)

1. Nature of the force/threat
2. Extent to which use of force was imminent & whether there were other means available to respond to potential use of force
3. Person’s role in the incident
4. Whether any party used or threatened to use a weapon
5. Size, age, gender & physical capabilities of the parties
6. Nature, duration & history of any relationship between the parties
7. Nature & proportionality of person’s response to use/threat of force; and
8. Whether act committed was in response to a use/threat that person knew was lawful

**s. 35**: Defence of property

Self defence is a justification, not an excuse. s.34(2) has multiple elements and is available to initial aggressors (***MacIntosh***)

Self Defense Test

1. *Was A being Assaulted? (subjective and objective, the starting point is A’s perspective: cite* ***Lavallee****)*
   1. *Objective: would the ordinary person in A’s circumstances believe that they were about to be assaulted sometime reasonably soon?* 
      1. threats, expert evidence, no need for imminence
   * ***Petel/Lavallee***
     + It is reasonable to believe you were about to be assaulted sometime relatively soon. It doesn’t have to be an in-progress assault
     + You can be mistaken about whether you’re going to be assaulted and the defense still stands as long as it’s a reasonable belief
   1. *Subjective:*
   * ***Cinous***
     + Find sketchy subjective reasoning reasonable for AoR here (reaching into pockets, changing gloves), thin evidence is reasonable here

*If there is a mistake, ask: did A honestly believe they were being assaulted and was that response reasonable given the circumstances given the circumstances? (****Petel****)*

1. *Did A perceive threat of death or GBH? (subjective and objective: cite* ***Lavallee****)*
   1. *Subjective: the court usually accepts A’s testimony*
   * ***Lavallee***
     + A believed subjectively that she would be hurt very badly that night
     + Court says objectively that you have think about this question with regard to battered women’s syndrome expert evidence. You need expert evidence for Battered Women’s Syndrome. You cannot transfer expert evidence.
     + Overturns Whynot. The threat does not have to be imminent, especially for battered women’s cases
     + She testified that the reasons she shot him was to scare him (above his head) not to kill him but the court still accepts it as SD
   1. *Objective: you need expert evidence for battered women because expert testifies that women know the scale and severity of the attack*
   * ***Cinous***
     + Court had to objectively accept that there was perception of threat here because they accepted evidence for (1)
2. *Did A have a reasonable alternative? (subjective and objective: cite* ***Lavallee****)*

*a. Subjective:*

* + ***Lavallee***
    - A subjectively felt she didn’t have an alternative. She didn’t have anywhere to go.
  + ***Petel***
    - The threat does not have to be imminent
    - Imminence is only one factor in considering other alternatives.

*b. Objective:*

* + ***Lavallee***:
    - Learned Helplessness Theory considered
  + ***Mallot***
    - Learned Helplessness Theory is not required for a reasonable alternative for battered women’s cases. Other considerations may be economic capacity and escalated violence if they try to leave.
    - It can be determined by her material circumstances that she did fear she’d be killed if she tried to escape
  + ***Cinous***
    - Objectively, the court says that A’s subjective reasoning may be true but it’s not on any reasonable basis. Shooting them in the van was not the only reasonable thing to do

Proof and Air of Reality Test (from ***Cinous***)

* To prove self defense, all elements need to be proven to an Air of Reality standard for the court.
* If court is not satisfied by any one of the three elements BRD, A is acquitted
  + A has to raise an air of reality about every one of the elements to be acquitted
* If it passes courts AoR test, then it goes to a Jury
* Jury: the onus is shifted and the Jury will decide if the Crown disproved one elements BRD

TJ has to ask, was there evidence that if believed would lend an air of reality to **every** element of the defense

* To have an **Air of Reality** there must be:

1. Evidence on record (raised by either party)
2. Upon which a properly instructed jury acting reasonably could acquit
   * Is there evidence that could support a reasonable doubt in relation to every element of the defence?

The Reasonable Women from ***Lavallee***:

* + women's perspectives may be different than those of men and must inform the “objective” standard of the reasonable person in relation to self-defence
    - The “reasonable woman” must be considered, not just the “reasonable man” or a person who is reasonable “like a battered woman”
    - [41] The legal inquiry into the moral culpability of a woman who is, for instance, claiming self-defence must **focus on the reasonableness of her actions in the context of her personal experiences**, and her experiences as a woman, not on her status as a battered woman and her entitlement to claim that she is suffering from “battered woman syndrome”

Self Defense Case Law

***R v Lavallee, 1990*** [SCC] \*\*most important SCC case on self defence\*\*

* A killed her partner after he had threatened to kill her “later”. At time A shot V, V had his back to A. Evidence established a pattern of violent physical abuse by V towards A. Expert evidence suggested that A *suffered from the psychological effects of battered woman syndrome*, explained that she was likely well attuned to the nature & severity of V’s impending violence, and suggested why she would have disbelieved that she could leave the premises as a way of escaping violence.

**Analysis:**

* Reasonableness in the context of battered woman cases:
  + Reasonable apprehension must be w/in context of the relationship. Depends on what part of the cycle of abuse the abuser is in – was it a period of violence?
  + Consider reasonableness from **female perspective**
* Test for Reasonableness: whether, given A’s circumstances, A’s perception was reasonable? (modified objective standard)
  + Expert testimony concerning battered wife syndrome is necessary b/c otherwise jury may not know what is reasonable in the circumstances (need to dispel myths about battered woman syndrome) – must have expert for every case
  + History of relationship: in battered woman cases, jury must decide whether violence was typical or life threatening
    - Expert testimony can help jury determine if A had reasonable apprehension
  + A’s circumstances: modified objective standard → takes into issue A’s perception of the attack & response required
    - Mistaken perceptions can still be self defense (so long as it was reasonable – i.e. would have been made by an ordinary man using ordinary care in same circumstances)
* Learned Helplessness Theory:
  + Criticism: makes it seem like its her fault or that one is at fault. Not a medical syndrome, it’s social phenomenon → an individual is harming her, by thinking about it through medical terms its missing the issue of domestic violence
  + Relevant facts: financial issues, no women’s shelters

**Held:** appeal granted, acquittal restored. Overrules *Whynot’s* necessity of imminent threat to avail oneself of self defence

**Ratio:** question the jury must ask is **whether, given the history, circumstances and perceptions of A, her belief that she could not preserve herself from being killed by V that night except by killing him first was reasonable**?

***R v Petel, 1994*** [SCC]

**Self Defense & Mistake**

* A charged w/ 2nd degree murder. Mother of woman being assaulted was actually mistaken – shoots both boyfriend and business partner; bf wounded, biz partner died.

**Ratio:**

* Mistake:
  + Under 34(2) an accused can make a reasonable mistake about whether she was actually being assaulted. It is not necessary that the accused actually be assaulted to trigger s. 34(2) so long as she reasonably believed an assault was taking place.
  + The jury must consider whether A reasonably believed in all circumstances that she was being unlawfully assaulted
* The assault need not be imminent (it is only one factor to consider in determining whether the A had a reasonable apprehension of danger and a reasonable belief that she could not extricate herself from the threat without killing her attacker)

***R v Mallot, 1998*** [SCC]

**Self defense**

* A convicted of 2nd degree murder of former husband & attempted murder of his GF (appealed murder charge)
* Psych described her as having one of the most severe cases of battered woman syndrome that he’d ever seen.

**Analysis:**

* Learned helplessness theory cited in ***Lavallee*** not required for a reasonable alternative for cases where there are battered women (can consider economic capacity, escalated violence if attempt to leave made, etc.)
  + Can be determined on her material circumstances – did she fear she’d be killed if she tried to escape?

**Ratio:** Judge & jury should be made to appreciate that battered woman’s experiences are both individualized (based on own history & relationships) + shared w/other women (w/in context of society & legal system that has historically undervalued women’s experiences). Must seek to understand the evidence being presented in order to overcome myths/stereotypes

* Also: unrealistic for appeal court to review TJ’s charge to a jury based on standard of perfection → CA will show deference
* Battered women syndrome **not a legal defense**

\*\*Cite this case for fact that other defences based on reasonableness (provocation, duress & necessity) may be modified in same way as ***Lavallee***\*\*

***R v Cinous, 2002*** [SCC]

**Self defense and Air of Reality**

* A shot V as they were on their way to steal computers. At the time, their van was in a gas station, V was sitting in the van and A was outside it. A testified that he believed that V and a friend were planning to kill him, and that he could not report his fears to police because they wouldn’t arrive in time. He also thought they would kill him before the day of the crime but decided to do it to see if they would kill him.

**Ratio:**

* In raising self-defence, it must first be determined if there is an air of reality to every element of the defence
* Air of reality test forces the TJ to pretend the evidence is believable. Evidence must be accepted at face value and same with the inferences drawn from it

Air of Reality test:

TJ has to ask, was there evidence that if believed would lend an air of reality to **every** element of the defense

* There must be:

1. Evidence on record (raised by either party)
2. Upon which a properly instructed jury acting reasonably could acquit
   * Is there evidence that could support a reasonable doubt in relation to every element of the defence?

**Held:**

* Air of reality test failed

**Cunliffe:**

* Self-defence must be given an air of reality (put in play by the Judge, or by D's lawyer), it must be left to the jury (i.e. It must be explained), and it must then be disproven by the Crown BRD
* The defendant doesn't have to positively argue the defence because:
  + The judge has a positive obligation to consider whether any defences apply and to instruct the jury if they do
* Any time where there is a defence where the burden of proof is BRD is on the Crown, D must first establish an air of reality

***R v McIntosh, 1995*** [SCC]

**Self defense and Provocation**

* V had agreed to repair sound equipment for A. For eight months, A tried to reclaim the equipment. A went to V’s house with a knife and demanded the equipment. A testified that V pushed A then picked up a dolly, raised it and advanced on A. A stabbed V, dropped the knife, and fled.

**Analysis**

* It was open to jury to find that A provoked the assault – question was whether s. 34(2) could apply in this circumstance.
* Sections 34, 35 and 37 are not reconcilable in any coherent manner and each needs to be interpreted according to principles of stat interp.
* S.34(2)
  + Section 34(2) is not ambiguous re. question of whether it requires an absence of provocation (it is silent on this matter, and finding this requirement would demand that words be read into the section).
  + S.34(2) applies on its face to initial aggressors, this interpretation is more favourable to A and is consistent with clear wording, thereby promoting certainty. No requirement of absence of provocation.
  + Interpretation should be least impairing for the A
  + Dissent (McLachlin)
    - “without having provoked the assault” was clearly a drafting error. These words should be read into s. 34(2)
    - This interpretation is also supported by policy.
* s.37
  + S. 37 adds to the confusion and should not be used if another section applies.

\*\*SECTIONS 36 & 37 WERE REPEALED WHEN NEW SECTIONS CAME INTO EFFECT (March 2013)\*\*

NECESSITY (CL)

**Defence of Necessity:** excuses criminal conduct where accused was acting in response to emergency circumstances in order to prevent a greater evil from occurring (cite **s. 8** – courts can identify CL defences [preserved notwithstanding codification])

* Common law defense recognized by SCC in ***Perka***
  + Defence is justified under s.7 b/c person acting out of necessity is performing **morally involuntary** actions (goes back to idea of only punishing those w/a guilty mind)
* Defense is rarely successful in Canada
* ***Latimer*** doubted whether defense could ever apply to charge in murder
* Excuse/justification
* Must raise an air of reality about every element of defence – if done, Crown must disprove an element BARD (***Cinous***)
* Raised by accused, but Crown always bears burden of proving voluntary act

**Defence Requires 3 Elements:**

1. **Urgent peril**
2. **No legal way out**
3. **Proportionality between harm caused & harm avoided**

Flow Chart for Necessity

Cite s.8(3) for common law defense

Cite s.7 of Charter for justification of Defense because actions are morally involuntary

Defense of Necessity: ***Perka*** lays out the three elements of the test + ***Latimer***says how they are broken down

* There must be:
  + *1. A situation of pressing emergency of great peril*: ***Perka*** (subjective and modified objective: ***Latimer***)
    - A cannot have caused a situation where the clear consequence is the situation of great peril (***Perka***)
    - The peril must be virtually certain/imminent (***Latimer***)
    - You punish the A for how they reacted to the peril, not what they were doing before the peril, so long as illegal activity didn’t have clear consequences that they would have to rely on necessity (***Perka****)*
  + *Subjective*:
    - A’s honest belief (***Latimer***)
  + *Modified Objective:*
    - Taking A's situation and characteristics into account, relying on ***Hibbert****,* can have more regard to the experience of the A than is possible with objective MR, confirmed in ***Hill***and***Lavallee***and***Latimer***
  + 2*. Compliance with the law was “demonstrably impossible” (no legal alternative):* ***Perka*** (subjective and modified objective: ***Latimer***)
    - Oddly, there is no burden on the A: presumption that it was demonstrably impossible
    - The Crown must disprove BARD
  + *Subjective:*
    - A honestly believed there was no legal way out (***Latimer***)
  + *Modified Objective:* 
    - Would an ordinary person in their situation think that there was no reasonable alternative?
    - They could have put her in a home, or kept on going as they were because the peril was not imminent (could have struggled in what was undoubtedly a difficult situation) (***Latimer***)
    - Letting someone die is not a reasonable legal alternative (***Ungar***)
  + *3. There was proportionality between the harm threatened by the situation and the harm inflicted by A's response:* ***Perka*** (purely objective: ***Latimer***)
  + *ONLY PURELY OBJECTIVE:*
    - Could have been 20 dead people, vs. 35 tonnes of weed coming into Canada
      * Policy: From whose perspective is this balance determined? (***Perka***)
    - At a minimum the harms have to be approximately equivalent (purely objective basis) (***Latimer****)*
      * This is mainly a policy question and a moral judgment – what is the social harm vs the social benefit? Does homicide outweigh living with pain?
      * It may be so that killing a person will never be excused because of proportionality (***Latimer***)
      * A greater evil to avoid a lesser evil is never proportionate (***Latimer***)

Necessity Case Law

***R v Perka et al, 1995*** [SCC]

**Necessity Test (first case)**

* A (x4) were on a boat conveying cannabis from one destination in international waters to another (Colombia to Alaska). If successful they wouldn’t have committed any offence in Canada. Boat started to have difficulties so they made an emergency landing in a bay on Vancouver Island. Their evidence was that they landed to repair the boat, reload the drugs, and proceed. They were charged w/importing cannabis. At least prudent & maybe even essential to their safety given weather & mechanical trouble of the boat.
* Argued defense of necessity - **morally involuntary**

**Analysis:**

* A’s justification is what is right to do in the circumstances – avoids greater evil of them dying
* An excuse is something that doesn’t change the wrongness of the act but it will be recognized b/c anyone in the same position would have done the same thing
* Necessity, as a matter of policy, the Court should excuse human frailty (but there need to be clear defined & patrolled limits)
* Recognizes **defence of necessity**: an excuse not a justification. Confined to situations where A’s actions are **normatively involuntary**
* If you are committing a criminal act, you may be guilty of that act, but if you go on to commit a further criminal act out of necessity, you’re not precluded from defence
* Defence of Necessity:
* There must be:
  + A situation of pressing emergency of great peril
    - i.e. unusual circumstances
    - A can’t have caused a situation where the clear consequence is the situation of great peril
    - In this case, they had time to unload the drugs – speaks to lack of urgent peril
  + Compliance w/law is “demonstrably impossible” (no legal way out)
    - No burden on A
    - Crown must **disprove** BARD
    - In this case – could have dumped the drugs before landing (reasonable legal alternative)
  + Proportionality between harm threatened by situation & harm inflicted by A’s response
    - Could have been 20 dead people vs. 35 tonnes of weed coming into Canada
    - Policy: **from whose perspective is this balance determined**?
* Relationship between criminal acts & voluntariness
  + Suggests that people will be punished where their actions are normatively voluntary (principle of fundamental justice s. 7) & excused where it’s normatively involuntary

**Held:** sent back for retrial b/c TJ’s instructions to jury were insufficient

***R v Latimer, 1995*** [SCC]

**Clarification on Test for Necessity**

* A killed his daughter to save her from pain of another surgery; she suffered from severe cerebral palsy & experienced continual pain. He pleaded necessity defence to 2nd degree murder, TJ refused to leave this defense to the jury.
* A had rejected option to have a feeding tube put into her stomach – Crown argued this would have made her life easier – other issues (having to remove a bone in her leg) would have meant things would have gotten more difficult
* Also, crown argued she could have been put into a home

**Analysis:**

* Court picks up on fact that various MR standards not addressed in ***Perka***
* **Modified objective standard:** would a reasonable person in the circumstances of the accused believe that they were in urgent peril w/no legal alternative?
* **Purely objective standard**: would a reasonable person believe that there was proportion?
  + Pressing Emergency of Great Peril: **subjective (A’s honest belief) and modified objective**. Taking A’s situation & characteristics into account, relying on ***Hibbert***, can have more regard to experience of A than is possible w/ objective MR
  + No Legal Way Out: **subjective & modified objective**
  + Proportionate Response: **purely objective** – no modification (homicide may never be proportionate)
* No air of reality in relation to any of the elements of necessity
  + Peril: must be virtually certain/imminent
    - In this case it was persistent ongoing pain, no danger to her life – can’t constitute urgent peril
  + No legal alternative: could have put her in a home, or kept on going as they were b/c peril wasn’t imminent (could have struggled w/ what was undoubtedly a difficult situation)
  + Proportionate response: at minimum harms have to be approximately equivalent (purely objective basis)
    - Mainly a policy Q & moral judgment – what is social harm vs. benefit? Does homicide outweigh living w/pain?
    - It may be that killing a person is never a proportionate response

***R v Ungar, 2002*** [ONCA]

**Successful Necessity Case**

* A charged w/ dangerous operation of a motor vehicle. Drove on wrong side of the street and broke the speed limit w/lights flashing while driving to deliver emergency medical assistance to an injured woman.

**Ratio:** it was not a reasonable legal alternative to fail to respond to the call for assistance. Defence of necessity succeeds and Crown should never have pressed these charged.

* Rare example of necessity working; reasoning not that important

DURESS

**Defence of Duress:** excuses criminal conduct where accused was acting under compulsion of threats from another person in order to prevent a greater evil from occurring (ex. person may be told that if they don’t drive the ‘getaway car’ in a robbery, they’ll be killed)

* CL defense saved by **s. 8(3) of CC** (also saved by s.7 – principle of fundamental justice; don’t punish people acting normatively involuntary)
* Specific criminal conduct need not be directed by the threatener
* Burden of proof = same as necessity: **A must prove air of reality** (***Ruzic***)
  + Needs to be some evidence provided by A (whether testimony from A, or police statements)
  + “Reasonable, but strict standards” for determining whether air of reality raised
* Doesn’t justify A’s action, provides an excuse (***Ruzic***)
* Duress-instigator can’t be the victim, must be 3rd party (***Hibbert***)
* Defence is codified in **s. 17 of CC** – places limits on availability of the defence:
  + Person making the threat must be **present** when criminal act is committed
  + Threat must be of **immediate**, rather than future, death or bodily harm
  + Threats should be to the accused, not to some 3rd person (like spouse or child)
  + Also excludes the following offences:

|  |  |
| --- | --- |
| Threats to a third party or causing bodily harm | Treason/ high treason |
| Forcible abduction | Abduction and detention of young persons |
| Murder | Arson |
| Piracy | Unlawfully causing bodily harm |
| Attempted murder | Aggravated assault |
| Sexual assault | Assault with a weapon r causing Bodily harm |
| Sexual assault with a weapon | Robbery |
| Aggravated sexual assault | Hostage taking |

Choose to argue from CL or s.17 and ask the following questions. Use the other (CL or s.17) to fill in discrepancies

If each element raises an Air of Reality the defense is invoked. Otherwise, the Crown can prove BRD that there was no duress

s.17 and the Charter:

Using s.17: If the offender is a principle offender and committed an offense listed above, argue that it is unconstitutional because of s.7: people who’s actions are normatively involuntary should not be punished because its contrary to fundamental justified. Having a defense is an aspect of fundamental justice. The accused must have a defense available to them. In cases where s.17’s list excludes the A from having a defense, it must be argued that its unconstitutional. ***Ruzic*** left the issue of constitutionality of the excluded offenses to be dealt with “another day”. Argue it now originally. ***Pacquette*** and ***Hibbert*** held CL defense of duress remained, but only for parties and not principles.

If the offender is the principle or party to the offence, argue duress under s.17

Elements of s.17

1. Did A commit an offence other than those excluded by the section?
   1. If its listed in s.17 excluded offenses, argue that its unconstitutional because of s.7 and principles of fundamental justice: can’t punish someone for normative involuntariness
   2. ***Ruzic***: they will leave the constitutionality of the list to another day: so argue it now originally
   3. Common Law Defense only applies to parties after ***Hibbert***
2. Did A act under compulsion by threats of death or bodily harm?
   1. Query whether to which a person of reasonable firmness would respond (***Ruzic***)
   2. Common Law is the same after ***Ruzic***
3. Did the perpetrator make a threat to A or another person (***Ruzic***)?
4. Did A believe the threat would be carried out?
5. Was the threat from a person
   1. This is the trigger… triggers can also lead to self-defense (be aware of two defenses)
6. Did A have no safe avenue of escape, using a modified objective test (***Ruzic***)
   1. This is an implicit element. It’s an element of s.17 because of ***Ruzic***. Court wasn’t clear on this – ***Ruzic*** reads it in implicitly so since its ambiguous try to argue that its not a requirement because of ambiguity making it easier for the A
   2. Common Law defense requires that there be no safe avenue of escape says its from a subjective and modified objective test
   3. Consider the A’s personal characteristics here
7. Was there proportionality? MAYBE: its unclear whether proportionality will be read in (*Ruzic*).
   1. ***Ruzic*** says it most likely it will but argue that it could not be read it that would make it less onerous on A
   2. Common law is superior to s.17 because it explicitly pays regard to the threat vs. the proportionality of the A’s actions
      1. Common Law asks if A’s criminal act is proportionate to the threat made against A (*Ruzic*) measured on subjective-modified objective standard: what would a reasonable person do (compare Latimer where its purely objective standard)
         1. Latimer is a strong case and crown wants a strong objective standard, even though it’s a necessity case
   3. Proportionally replaces the function that the list of excluded offense was supposed to serve (if deemed unconstitutional)
   4. The Harm caused by the A cannot be disproportional to the threat to A
      1. Arises from ***Ruzic*** CL defense, because its not stated in s.17
8. Immediacy/imminence (of threat) and presence (of threatened) requirements are read out of s.17
   1. Query whether imminence requirement is read in (***Ruzic***)
   2. Common Law: there must be a sufficiently close connection in time between the threat and its execution to overbear A’s will (***Ruzic***)
   3. Query whether reasonableness will be read it – there has to be a reasonable amount of time between threat and execution
      1. Presence and immediacy requirements are read out of s.17 in Ruzic; however, they will have to be reasonable.
      2. Ruzic shows that you can wait hours and get on a plane and there can still be a threat
9. Is A not a party to a conspiracy or association
   1. Questions arise under s.17
      1. Do you apply s.17 or common law where both are applicable (gang membership risks)
         1. Common Law: A can’t voluntarily assume risk that leads to duress: ***Ruzic*** suggests this in obiter, which is arguable.
         2. You probably have to apply s.17.
      2. Can be saved under s.7 or s.1 of the Charter. Crown shouldn’t just have to prove association with gang to prove voluntariness: they should also prove assumption of risk
         1. This has not been constitutionally challenged yet
      3. As policy matter, its only in the circumstances that the criminal force of action was foreseeable (***Perka***/Dickson)

|  |  |
| --- | --- |
| * **Section 17** | * **Common law** |
| * A commits an offence other than those excluded by the section. | * A commits an offence as a party to the principal offender. (Hibbert) |
| * A is acting under compulsion by threats of death or bodily harm (query whether to which a person of reasonable firmness would respond) | * A is acting under compulsion by threats of death or serious bodily harm to which a person of reasonable firmness would respond. (Ruzic) |
| * To A or another person (Ruzic). | * To A or another person. |
| * Which A believes will be carried out | * Which A believes will be carried out. |
| * From a person (This is the trigger!) | * From a person (Trigger) |
| * While A has no safe avenue of escape, using a modified objective test. (Ruzic) * This is an implicit element. Its an element of s.17 because of Ruzic. Court wasn’t clear on this | * While A has no safe avenue of escape, using a subjective and modified objective test (Hibbert) |
| Query whether proportionality will be read in (Ruzic). Most likely it will. | * And A’s criminal act is proportionate to the threat made against A (Ruzic) measured on subjective-modified objective standard (compare Latimer). * Common law is superior to s.17 because it explicitly pays regard to the threat vs. the proportionality of the A’s actions * The Harm caused by the A cannot be disproportional to the threat to A * Arises from Ruzic CL defense, because its not stated in S.17 |
| * Immediacy and presence requirements are read out – query whether imminence requirement is read in (Ruzic). | * And there is a sufficiently close connection in time between the threat and its execution to overbear A’s will. (Ruzic) |
| * And A is not a party to a conspiracy or association * This means that questions arise under s.17 – do you apply s.17 or common law where both are applicable (gang membership risks) – you probably have to apply s.17. * Has a shot at being saved under s.7 or s.1 of Charter (Crown shouldn’t just have to prove association with gang to prove voluntariness, they should also prove assumption of risk) | * A acted without voluntarily assuming the risk (?) (Ruzic suggested this reqmt in obiter). * The A must not voluntarily assume the risk that relates to the Duress |

If the offence was committed (other than those excluded by the section) by compulsion under threats of immediate death or bodily harm from a person (T) who is present, A is excused if:

* 1. A believes T's threat will be carried out
  2. A is not involved in a criminal conspiracy or association

Section 17

* 1. Threat of immediate death or bodily harm from Pe (which must be capable of being carried out at the time of the offence - ***Paquette***)
  + Pe must not be in criminal conspiracy or association with A
* 2. A must believe the threat will be carried out
* 3. Threat must compel A to commit and offence as principal (i.e. The A commits the AR – if not, the defence does not apply)
* Offence can't be listed in s. 17
* Pe must be present when offence is committed

***R v Paquette, 1977*** [SCC]

**Ratio:** stat defence of duress applies **only to principal offenders** (person who actually commits the offence)

* Focused on words at beginning of s. 17: “a person who commits an offence”
* Parties to an offence still have access to CL defence of duress
* CL defence traditionally broader – doesn’t require present at time offence is committed
  + Doesn’t require imminence
  + Not limited as to the offences to which it will apply
  + Appears more consonant w/ values of the *Charter*

***R v Hibbert, 1995*** [SCC]

**Common Law Duress**

* Drug dealer/Perpetrator shot the V, A led drug dealer to the house where V was killed. Perpetrator killed the V but A is on the hook because A knew what was going to happen. A argues duress, testifying that Perpetrator was going to shoot A if he didn’t lead the perpetrator to the V.
* A is a principal b/c they commit aiding/abetting

**Analysis**

* Motive is irrelevant. In duress, it does not negate the MR (Al Quida example)
* Duress can negate normative voluntariness
* Moral Voluntariness and MR Standards
  + They knew V would die, they were morally blameworthy; however, their action was morally involuntary in the sense that A reasonably believed their was no alternative to acting as they did
  + Involuntariness + modified objective reasonable belief that there’s no alternative
    - ***Hibbert*** supports situational evidence here, it should be mixed subjective/modified objective standard like Lavallee and battered women’s syndrome
      * Subjective/Modified Objective ***Lavallee***standard is differentiated from Obj MR Standard
    - Contrary to Latimer where the standard was a more limited modified objective
      * What a reasonable person would have done in the this accused persons circumstances and what they would have perceived
* ***Paquette***, pre Charter court held that s.17 replaces the common law defense for principle offenders. So the A could no longer access the defense of duress. Hibbert expands on this reasoning.
* A party to an offence can use Common Law Duress(***Paquette***)

***R v Ruzic, 1995*** [SCC]

**Statutory Duress**

* A was charged with importing heroin and using a fake passport. She testified that she and her mother had been threatened by M, who had also been physically violent to A. Expert evidence supported A’s assertion that she did not trust the Yugoslavian police to protect her from M. A claimed duress under s. 17 CC

**Analysis**

* Presence requirement and the immediacy requirements of **s. 17 duress** were challenged
* Immediacy and Presence are not required (b/c there are situations where an act is **morally involuntary**, but there is either no presence or immediacy) – they contravene s. 7 of the Charter (Life/Lib/Security)
  + Rationale**:** Criminalizing morally involuntary conduct violates a principle of fundamental justice (new principle)

**Held:**

* TJ was correct to leave the CL defence of duress to the jury

**Cunliffe:**

* it is unclear from the decision whether s. 17 is being replaced by the CL, being struck down, or is he reading in to the provision? – LeBel affirmed TJ’s use of CL defence in a case where s. 17 applied
* Unclear whether the list of excluded offences is constitutional
  + Its possible that:
    - 1. list violates s. 7 b/c renders a morally involuntary actor liable to conviction (*Ruzic*)
    - 2. “this section does not apply” + presumption that Parliament doesn’t intend to pass unconstitutional legislation (*Ruzic, Lavallee*) means that A charged under a listed offence in s. 17 should rely on the CL duress defence (relying on *Paquette, Hibbert*)
    - 3. list violates s. 7 but is saved by s. 1 (unlikely – s. 7 violations are almost never saved under s. 1, and given strong language of *Ruzic*, this is unlikely)
* Does LeBel read in the safe avenue of escape? (arguably, there is a requirement that the person could not have had a safe avenue of escape)
* Arguably it is has been read in that the person is required to have acted in proportion to the threat
* The threat must be imminent (though relaxed for immediacy) – still unclear after Ruzic

***Ruzic* strikes out 2 sections from 17 – the presence of the threatened and the immediacy between the threat and the crime**

**Do you add stuff in to s.17 from Ruzic and Hibbert as well and taking things out**

**Ruzic stands to say that you just use the CL test**

**or you can say that s.17 is filled in from CL**

RELATING DURESS, NECESSITY & SELF-DEFENCE

***R v Ryan, 2013*** [SCC]

* Husband threatened many times to cause serious bodily harm/death to A and her daughter. She believed he would. Relationship was violent, abusive & controlling. A paid a man $25,000 who then refused & demanded more $$. She was contacted by an undercover police officer posing as a hit man. Agreed to pay $25,000, $2,000 cash that day, provided a picture & address.
* Charged w/counselling commission of murder. At trial, elements proven. Acquitted on basis of duress. On appeal, acquittal upheld.

**Analysis:**

* Law of duress available when a person commits an offence while under compulsion of a threat mad *for the purpose of compelling* them to commit it
* CL elements of duress can’t be used to fill a vacuum created by clearly defined stat defence of self-defence
* A wanted husband dead b/c he was threatening to kill her & her daughter, not b/c she was being threated *for the purpose of compelling her to have him killed*

**Ratio:** defence of duress not available to her → appeal allowed – stay entered; uncertainty in the law & Crown’s change of position between trial & appeal created unfairness.